Ceylon Law Journal

VOL. IV., 1939-1940.

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REPORTS OF CASES

DECIDED BY

THE SUPREME COURT OF CEYLON,

THE COURT OF CRIMINAL APPEAL,

AND IN APPEAL BY

HIS MAJESTY THE KING IN HIS PRIVY COUNCIL.

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The Mode of Citation of the Cases reported in the Fourth Volume of *The Ceylon Law Journal* will be as follows :—

4 C. L. J. R.

TABLE OF CASES
REPORTED IN THIS VOLUME.

	PAGE
A.	
Amerasekere v. Cannangara	96
Amijie & others v. Lewis & others	190
Aponsu v. Malalsekera	99
Attorney General v. Kunjipalu	30
Attorney General v. James Singho	248
Arumugam v. Lewis & Pope	224
Asst. Government Agent (Mullativu) v. Selvadurai	246
B.	
Baptiste, U.D.C., Kolonnawa v. William	152
Bartleet & Co. v. Commissioner of Stamps	12
Buultjens, Revenue Inspector v. Samitchiappu	274
C.	
Cassim v. Suppiah Pillai	101
Commissioner of Income Tax v. Macan Markar	108
Commissioner of Income Tax v. P.S.M.P.A.	195
D.	
De Mel, Lakdasa v. Sugunasekere	54
Deonis Appu v. Don Johanis Gunewardene	130
De Silva v. Seenath Umma & others	177
De Silva, Charles v. Edirisuriya	250
De Silva, George R. v. Schokman	128
De Silva, Janis v. Kanagaratne	39
Dhanapala v. H. M. Ibrahim	85

	PAGE
Dhanapala v. Ibrahim	85
Dharmaratne, Excise Inspector v. Davith Singho & another	150
Dole, Inspector of Police v. Simon Appu	58
E	
Ebels v. Periannan	119
Edema v. Babun Nona	161
F.	
Fernando, Detective Inspector v. Alwis & another	111
Fernando v. Fernando	114
Fernando, Police Sergeant v. Liyanage	33
Fernando, J. F. A. Re :	117
Forbes, James v. Rengasamy	207
H.	
Herat, Inspector, Crime Police v. Abdul Jabar & another	170
J.	
Jayawardene v. Jayawardene & others [P.C.]	17
John v. Richard Pieris	95
Joonoos v. Kudnoos, [D.B.]	1
Joseph, Inspector of Police v. Francis Fernando & another	262
K.	
King v. Andiris Silva & another	237
King v. De Silva	231
King v. Edwin *alias* Vidane	244
King v. Govinda Pillai	259
King v. Jan Singho & others	242
King v. Perera	185

TABLE OF CASES REPORTED

	PAGE
King v. Silva & others	255
King v. Vijesekere	226
K. G. E. & Co. v. Attorney General	167
Kiri Banda & others v. Dingiri Banda & others	69
Kumaroos v. Joonoos	87
Kulatunga, Police Sergeant v. Mudalihamy & others	263
L.	
Leembruggen v. Pitchaipillai	175
M.	
Mediwake, Inspector of Police v. Gunasekera & another	162
Misso v. Perera [D B.]	4
Mohamed Hassan v. Abdul Wahid & another	47
Muttukaruppan Chettiyar v. Pathirana	144
N.	
Nanditis Silva v. De Soysa & another	74
Nelson v. Nelson	188
P.	
Perera v. Brown & Co., Ltd.	183
Perera v. Sirimana & others	211
Perera v. Wickremanayake	142
Perkins, Inspector of Police, v. Sri Rajah	213
Perumal, Excise Inspector v. Arumugam	37
Pieris, Theresa v. Andachchy Chitty & others	133
Police Sergeant, Hambantota v. Simon Silva	32
Punchi Mahatmaya v. Commissioner of Stamps	160
R.	
Rajapakse, Police Sergeant v. Somapala & others	118
Raman Chettiyar v. Vairavan Chettiyar	153
Ramsait, Sokkalal v. Kumaravel Nadar & others	75
Rex. v. Fernando	125
Rewata Thero v. Horatola	52
S.	
Samarasinghe, Registrar of Lands v. Dalpatadu	266
Selvadurai v. Suntharajah	139
Sellamma Achie v. Palavesan	65
Senanayake & others v. De Croos & another	45
Sinnan Chettiyar v. Mohideen & others	43
Sockalingam Chettiyar v. Samynathan Chettiyar	147
Solicitor General v. Cooke [D.B.]	25
Siriwardene v. James & another	272
Supramaniam Chettiyar v. Senanayake & others	122
T.	
Theobald v. Commissioner of Income Tax	217
Thoradenya v. Ismail	64
Thornhill v. Commissioner of Income Tax	202
Times of Ceylon Co. Ltd. v. Uttumchand	81
U.	
Upasakappu v. Dias & another	49
V.	
Vander Driesen, Sub Inspector of Police v. Peter	173
Van Rooyen, Inspector of Police v. Barbourdeen	270
W.	
Wanigasinha v. Wanigasinha & others	113
Wijesuriya v. Mather	27
William Alwis v. Thiagarajah	260

GENERAL INDEX.

Journal Section.

PAGE

BRANCH, THE LATE SIR ST. JOHN—Tributes

COURT OF CRIMINAL APPEAL—First Sitting of Court xxix

CRIMINAL TRESPASS & INDIAN LABOURERS by Mr. K. Satia Vagiswara Aiyar—

I.—The Case of Periannan vi

II.—Relation of an Indian labourer with his employer xiii

III.—Is an Indian labourer's occupation of the line-room that of a servant or tenant? xvii

GARVIN, THE LATE SIR THOMAS FORREST—Tributes by the Bench & the Bar xli

HANDWRITING EVIDENCE, Some problems of, by Mr Lawrie Muthu Krishna xxxi

HOWARD, THE HON. MR. J. C.—Appointment as Chief Justice x

PAGE

REVIEWS :—

CEYLON LAW OF INDICTMENTS AND CRIMES by R. R. Crossette-Thambiah xxvii

CIVIL PROCEDURE CODE by V. V. Chitaley & K. N. Annaji Rao xliv

CRIME AND CRIMINAL JUSTICE by Abul Hasanat xxvii

DIGEST OF CASES, 1936-40, by V. S. Sivagurunathan l

INDIAN LIMITATION ACT by V. V. Chitaley xii, xxvii

LANDLORD & TENANT IN CEYLON by H. W. Thambiah l

RES NULLIUS : AN ESSAY ON PROPERTY by I. S. Pawati xxviii

SANDARASAGARA, THE LATE MR. H. A. P. xlvii

SAMERAWICKRAME, THE LATE MR. E. J. xlv

The Mode of Citation of the Reports contained in the Fourth Volume of the *Ceylon Law Journal* will be as follows:—

4 C. L. J. R.

SUBJECT INDEX

REPORTS OF CASES

PAGE

Abatement 65

Abetment 248

Accident—meaning of—*see* WORKMEN'S COMPENSATION ORDINANCE 183

Accused—Circumstances requiring him to offer explanation—*King* v. *de Silva* 231

Administrator

—Enforcement by, of debt due to the estate is not barred by default committed by deceased money-lender—*see* under MONEY LENDING ORDINANCE 250

—Grant of letters subsequent to filing of action—Is irregularity curable?—*see* under COURTS ORDINANCE 5. 87

—Order for costs against—*see* CIVIL PROCEDURE CODE

Advocate cannot limit his appearance in Court for a particular purpose 54

Appeal (Civil)—*see* also under CIVIL PROCEDURE CODE

—Discretion of Appellate Court to adjourn hearing of appeal to enable the appellant to take steps to join necessary parties as respondents—When may it be exercised?—*see* under CIVIL PROCEDURE CODE 19. 43

—Non-compliance with provisions of the Code regarding filing petition of appeal—Power of Appellate Court to deal with the matter in revision—*see* under CIVIL PROCEDURE CODE 16. 45

PAGE

—Two defendants separately represented—Petition of appeal by both stamped as one petition—Subsequent withdrawal of petition and filing of fresh petition affixed with stamps to cover deficiency—Appeal not properly constituted—*Hassan* v. *Wahid & another* 47

—Court of Requests—*see* under CIVIL PROCEDURE CODE 20. 74

—Jurisdiction—Extent of—*see* under COURTS ORDINANCE 5. 87

—When will Appellate Court interfere with discretion exercised by trial Judge? 96

—Non-compliance with S. 756 of the Civil Procedure Code—*see* CIVIL PROCEDURE CODE 17. 122

Appeal (Criminal)—*see* under CRIMINAL PROCEDURE CODE

Appeals (Privy Council) Ordinance, Leg. Enact. Vol. II, Cap. 85—Trade Marks—Action for infringement and 'passing off'—Subject matter of action valued in the plaint at Rs. 1,000/.—Is it open to the plaintiff to show the real value?—Costs payable by the appellant may not be regarded as part of the matter in dispute on appeal' to the Privy Council—*Sokkalal Ramsait* v. *Kumaravel Nadar & others* 75

Betel includes the term 'vegetables'—*Baultjens* v. *Samitchiappu* 274

PAGE

Burden of Proof—*see* MONEY LENDING ORDINANCE 4

—*see* MOTOR CAR ORDINANCE 250

—*see* PENAL CODE 270

Business Names, Registration, Ordinance, Leg. Enact. Vol. III. Cap. 120, S. 9—Similarity of language of the section with that of S. 8 (2) of the MONEY LENDING ORDINANCE 250

Car—*see* under MOTOR CAR ORDINANCE

Casus omissus—*see* under EVIDENCE ORDINANCE 259

Circumstantial evidence— 242, 150 & 231

Civil Procedure Code, Ss. 17 & 93—Misjoinder of parties and causes of action—Deletion of name of the 1st plaintiff in consequence of defendant's objection—It is competent to Court to proceed with the trial—*Khudoos & another* v. *Joonoos* 87

2.—Ss. 24, 72 & 85, Appearance of party—Application by defendants' advocate for postponement refused—Advocate's withdrawal from case—Judgment entered for plaintiffs after one plaintiff's evidence was recorded—Judgment is *inter partes*—*De Mel & others* v. *Sugunasekere & others* 54

3.—S. 146, Omission to frame issues will not justify interference by the Appellate Court if substantial justice be done to parties— 54

—Framing of issues—Allegations in the plaint suggesting that defendant was sued in his personal capacity—Issue framed on the basis that he was sued in a representative character—Such issue cannot be allowed without amendment of the plaint—

PAGE

Sockalingam Chettiyar v. *Samynathan Chettiyar* 147

4.—S. 169, Judge should take down evidence in English in narrative form—Evidence taken down in shorthand, transcribed by the writer into English and then signed by Judge is not in compliance with this requirement—*see* also PENAL CODE, S. 190—*King* v. *Wijesekere* 226

5.—S. 175, *see* under S. 833 A. 74

6.—S. 219, *see* under S. 337 144

7.—S. 284, Application by purchaser to set aside sale on the ground that the judgment debtor, lessee under a Crown lease, had no saleable interest—*see* under LEASE BY THE CROWN 39

8.—S. 337, Execution of decree—Subsequent application for writ—Refusal on the ground of want of due diligence by writ-holder—Failure to examine the judgement-debtor under S. 219 of the Civil Procedure Code is not a sufficient ground always for such refusal—What is due deligence depends on the circumstance of each case—*Muthukaruppan Chettiyar* v. *Pathirana* 144

9.—S. 356, Notice of security—Desirable to obtain directions from Court for service of—*see* under S. 756 177

10—S. 402—Failure of plaintiff to prosecute action for a period of more than twelve months—Order of abatement—Death of plaintiff during the period of 12 months—Subsequent application by executor to set aside order—Order not validly made—*Sellamma Achie* v. *Palavasan* 65

11.—S. 416, Security for costs—Plaintiffs residing outside the

PAGE

jurisdiction of the Court—Land in dispute situated within jurisdiction—Order requiring security for costs not proper—*Senanayake & others* v. *de Croos & another* 45

12.—S. 422 *(a)*, Commission—Party and witnesses resident beyond jurisdiction of Court—Court has power to issue a commission to examine them—*Amarasekere* v. *Cannangara* 96

13.—S. 456, Action against the Crown—Appeal against determination by the Commissioner of Stamps—Attorney General should be made a party—*see* also under STAMP ORDINANCE—*Punchi Mahatmaya* v. *Commissioner of Stamps* 160

14.—S. 474,. Order for costs against administrator—Defendant in whose favour the order is made is not entitled to sieze the property of the intestate in execution of his decree for money—*Joonoos* v. *Kudnoos*, [D.B.] 1

15.—Ss. 604 & 606, Matrimonial action—Divorce—Decree *nisi* entered—Allegation of subsequent collusion between the parties—It is competent to Court to entertain such allegation—*Nelson* v. *Nelson* 188

16.—S. 755, Appeal—Non-compliance with provisions of the Code regarding filing petition of appeal—Appellate Court has power to deal with the matter in revision, as the appellants had been granted permission to present the appeal as paupers—*Senanayake & others* v. *de Croos & another* 45

17.—S 756, Appeal—Notice tendering security not given to some of the respondents, though no relief claimed against them—Security for their costs not tendered—Appellant not entitled to relief

PAGE

—*Supramaniam Chettiyar* v. *Senanayake & others* 122

—Appeal—Security for costs—Notice of security tendered with petition of appeal within time—Inability of fiscal to serve notice on one of the respondents before the returnable date of notice—Notice re-issued and made returnable on a date beyond the twenty-day period—Absence of respondent on such date—Notice of appeal ordered by Court—

HELD (i) that notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by Court,

(ii) that a copy of the petition of appeal must be furnished at or before the time the security is accepted and the deposit made,

(iii) that security must be tendered and perfected, and the deposit made, within 20 days of the giving of the notice of security,

(iv) that failure to comply with the requirement in paragraph (i) above and/or the requirement in paragraph (ii) is fatal and sub-section 3 of S. 756 does not permit relief to be granted by the Supreme Court in respect of it and

(v) that omission to tender and perfect security and to make the deposit within 20 days, and other omissions, mistakes and defects occuring in the course of tendering security and perfecting the appeal generally may be condoned by virtue of sub-section (3) in proper cases, if the respondent has not been materially prejudiced by such omission, mistake or defect—

De Silva v. *Seenath Umma & others* (F.B.) 177

18.—S. 758, *see* under S. 833 A. 74

19.—S. 770, Appeal—Some parties to action in the Court against whose decree the appeal is made not made res-

PAGE

pondents to the appeal—Omission attributable to appellant's belief that judgment in appeal did not affect rights of such parties—Court has discretion to adjourn hearing of appeal—*Sinnar Chettiyar* v. *Mohideen & others* 43

20.—S. 832 A. Appeal—Court of Requests—It is not open to appellant to raise a question of law not stated in the petition of appeal—*Nandris Silva* v. *de Soysa & another* 74

21.—S. 839, Inherent powers of Court—Two actions in two Courts between the same parties with regard to identically the same matters in dispute—Court has power to direct one of the cases to be laid by pending the final decision of the other—*Selvadurai* v. *Sunthararajah* 139

—Inherent powers of a Court—Action instituted in Ceylon during the pendency of another action in an Indian Court between the same parties involving substantially identical issues—Application to stay proceedings in action in Ceylon Court—Principles on which a Court will act in granting such application—*Raman Chettiyar* v. *Vairavan Chettiyar* 153

—Revision—*Restitutio in integrum*—Bank in liquidation—Proceedings taken in several Courts—Order of distribution made by one Court, after notice to interested parties, affirmed by Supreme Court—Subsequent application by creditor who had not appeared in the previous proceedings to revise order made therein—The petitioner is not, in the circumstances of the case, entitled to relief either in revision or by way of *restitutio in integrum*—*Arumugam* v. *Lewis & Pope* 224

Colombo Municipal Council (Constitution) Ordinance, Leg. Enact. Vol V, Cap. 194—Ss. 8, 11, 60 & 61—Report of Special Committee of the Colombo Municipal Council—Discussion thereon listed in the 'order' paper—Mayor presides at the meeting of Council—Refusal to allow discussion of Special Committee's report—Mandamus lies—*G. R. de Silva* v. *Schokman* 128

—S. 15 (2) (*c*)—Public office under the Crown—The office of Manager of the State Mortgage Bank is a public office——Though it derives from the Crown, it is not a public office under the Crown—It does not, therefore, disqualify holder from the double qualification mark in the list of Municipal voters—*Alwis* v. *Thiagarajah* 260

Common gaming place—*see* GAMING ORDINANCE 64

Common Intention—liability for act done by several persons in furtherance of—*see* under PENAL CODE 255

Consideration—Meaning, of under the Stamp Ordinance—*see* STAMP ORDINANCE 12

Contract—Agreement between proprietors of a newspaper and advertiser—Stipulation for payment at higher rate in the event of advertiser not using the space reserved for him is enforceable—*The Times of Ceylon Co. Ltd.* v. *Uttamchand* 81

Corroboration—*see* MAINTENANCE ORDINANCE

Costs—Order against administrator—*see* CIVIL PROCEDURE CODE 14 1

PAGE

Court of Criminal Appeal Ordinance, No. 23 of 1938, Ss. 3 & 4.—The principles on which the Court will decide what are questions of fact and law to be based on the decisions and practice of the English Court of Criminal Appeal—When is leave to appeal necessary?—*see* also the CRIMINAL PROCEDURE CODE, S. 234—*King* v. *de Silva* 231

2.—Ss. 4 (*b*), 6 (2) & 18—Application for leave to appeal—Refusal—When will Court exercise its powers to grant relief and substitute verdict?—*see* also CRIMINAL PROCEDURE CODE, S. 185—*King* v. *Edwin* 244

3.—S. 5 (1)—Appeal on grounds of fact—When verdict of Jury may be set aside—Function of Court in an appeal involving questions of fact only is not to re-try case—Court has to decide whether the verdict is unreasonable or whether, having regard to the evidence, it cannot be supported—*King* v. *Silva & another* 237

4.—S. 6 (2)—Substitution of verdict—Circumstances under which the Court will exercise its power—*see* also CRIMINAL PROCEDURE CODE, S. 185—*King* v. *de Silva & others* 255

Court of Criminal Appeal (General)—CIRCUMSTANTIAL EVIDENCE—Facts equally consistent with innocence as with guilt—Verdict of guilt not justfiable—*King* v. *Jan Singho & others* 242

2.—CRIMINAL PROCEDURE—Evidence—Legality of receiving evidence of character of accused person after conviction, without such evidence being tendered on oath—*see* also under EVIDENCE ORDINANCE—*King* v. *Govinda Pillai* 259

3.—MISDIRECTION—It is not a misdirection to tell the Jury that they should not pay the slightest attention to any suggestion put to the witnesses in cross-examination unless those suggestions were supported by proof—*King* v. *Silva & another* 237

4.—NOTICE OF APPEAL—Court may sometimes not confine appellant to grounds stated in the notice—*King* v. *de Silva* 231, (234)

5.—Opinion of Judge on questions of fact—Not objectionable provided the jury are cautioned—*see* also under S. 5 (1) *King* v. *Silva & another* 237

Court of Requests—Appeal from—*see* under CIVIL PROCEDURE CODE **20** 74

Courts and Their Powers Ordinance, Leg. Enact. Vol. I. Cap. 6, S. 17—*see* under LEGAL PRACTITIONER 25

2.—Ss. 2 & 62, Application under S. 51 of the Insolvency Ordinance is an 'action'—*see* under INSOLVENCY ORDINANCE 101

3.—S. 36, Irregularity of procedure in lower Court—Supreme Court will not interfere unless substantial rights of parties prejudiced—*Rewata Thero* v. *Horatola* 52

4.——Supreme Court will not interfere with a judgment on the ground that issues were not framed in the lower Court if substantial justice be done to parties—*ses* also under CIVIL PROCEDURE CODE, Ss. 24, 72, 85 & 116—*De Mel & others* v. *Sugunasekere & others* 54

5.——Administrator—Grant of letters subsequent to the filing of action—Validity of

PAGE

decree—No prejudice to either party—Irregularity not fatal —*Khudoos & another* v. *Junoos* 87

6.—S. 37—*see* under CRIMINAL PROCEDURE CODE 16 27

7.—S. 51—Chief Justice's power to order appeal to be heard by five Judges—*see* under CIVIL PROCEDURE CODE 17 177

8.—S. 62—'Winding up' proceeding is a civil matter within the meaning of the section —*see* under JOINT STOCK COMPANIES ORDINANCE 190 (193)

Criminal Appeal—*see* under the COURT OF CRIMINAL APPEAL ORDINANCE

Criminal Force—What amounts to show of? 95

Criminal Negligence—*see* under PENAL CODE 7 142

Criminal Procedure (General)—Charge—Preaching in the streets within the jurisdiction of U.D.C. after cancellation of permit by Chairman —Failure to mention in the charge the by-law and the Gazette in which the by-law was published—Conviction not valid—*Perkins* v. *Sri Rajah* 213

2.—CRIMINAL TRIAL—Judgment based on admissions is objectionable—*Attorney General* v. *James Singho* 248

3.—IMPRISONMENT—Sentence of—Observations on the undesirability of passing such sentence on young persons who are first offenders—*Darmaratne* v. *Davith Singho & another* 150

4.—JUDICIAL INQUIRY—Conduct of—Observations on the necessity of evidence being considered from a judicial and not an administrative point of view—*A.G.A., Mullaitivu* v. *Selvadurai* 246

5.—PLEA of GUILTY—Conviction—Sentence deferred—Application to withdraw plea —Code is silent on this point —English Law applicable—Competent to Court to allow the withdrawal of plea—*Siriwardene* v. *James & another* 272

—*see* also under CRIMINAL PROCEDURE CODE 7 & 8.

Criminal Procedure Code, S. 6—Application of English law 272

2.—Ss. 122 (1) & (3)—Privilege —Statements made to the police by the person arrested and the person on whose information the arrest was made and recorded in the Information Book are not privileged—Entries in the Information Book of the statement made by the arrested person admissible in an action by such person for malicious arrest — Procedure indicated for proving in a civil action the entry of a statement made to the police —*Pieris* v. *Chitty & others* 133

3.—S. 122 (3)—Charge of mischief—Evidence of incidents in which the accused took no part tendered—Such evidence not admissible — Statement made by witness to police officer in course of investigation under Ch. XII of the Criminal Procedure Code—Accused has a right to cross-examine police officer upon such statement so as to discredit witness—EVIDENCE ORDINANCE, S. 155 (3)—*King* v. *Perera* 185

4.—Ss. 152 (3), 166 & 425—Offences triable by District Court—Decision by the Ma-

PAGE

gistrate at a late stage of the inquiry to try the case summarily—Improper—Prejudice—AMENDING ORDINANCE, No. 15 of 1938, S. 5—Irregularity not curable—Distinction between the procedure under S. 152 (3) and that under S. 166 pointed out—*Mediwake* v. *Gunasekere & another* 162

5.—S. 184—Joinder of charges—Not justified when two accused are charged in respect of two separate and distinct offences—*Joseph, Inspector of Police* v. *Fernando & another* 262

6.—S. 185, Withdrawal of some charges after conviction on one—Effect on S. 6 (2) of the COURT OF CRIMINAL APPEAL ORDINANCE—*King* v. *Silva & others* 255

7.—S. 188.—Admission of offence by accused—Application, before the entering of conviction, to withdraw 'plea of guilty'—When is a plea of guilty 'qualified'? —Accused has a right to withdraw plea of guilty—*Leembruggen* v. *Pitchaipillai* 175

8.—Ss. 188 & 190—Plea of guilt tendered by accused after case fixed for trial—Failure to record verdict and pass sentence—Case put off for another date to enable the accused to abate nuisance complained of—Accused cannot be convicted on such date on the plea made previously by him—*Baptiste* v. *William* 152

9.—S. 234 (1)—Judge's duty to withdraw the case from the jury—When does it arise?—*see* also under COURT OF CRIMINAL APPEAL, Ss. 3 & 4—*King* v. *Silva* 231

10.—S. 288, Procedure to be adopted at the trial of deaf and dumb person—*Joseph, Inspector of Police* v. *Fernando & another* 262

11.—S. 297—Manner of recording evidence—Evidence recorded before the arrest and appearance of one of the accused—The reading of such evidence in the presence of witnesses to the accused, with the opportunity given to him of cross-examining them, is not a sufficient compliance with the law—*Herat* v. *Jabar & another* [D.B.] 170

12.—Ss. 238 & 425—Local inspection—Inspection of *locus in quo* by the Magistrate unattended by the parties after the conclusion of the case—Irregularity cannot be cured—*Perera* v. *Wickremanayake* 142

13.— —Procedure indicated 99

14.—S 325—Conditional release of offender—Principles which should guide Magistrate in exercising his discretionary power—*see* also under S. 356—*Fernando* v. *Alwis* 111

15.—S. 347—Revision—Plea of guilty—Charge of criminal trespass—Accused's statement to the effect, 'I am guilty, I will leave the estate in a week'—Conviction not entered—Order to call case on a subsequent date—Supreme Court has power to revise proceedings—*Leembruggen* v. *Pitchaipillai* 175

16.—Ss. 347 & 348—Jurisdiction of Appellate Court—Power to take further evidence while dealing with appeal—The taking of further evidence by the Appellate Court is a matter of discretion—The only limits to the discretion given by S. 37 of the Courts and Their Powers Ordinance

PAGE

and Ss. 347 & 348 of the Criminal Procedure Code are such as an Appellate Tribunal may impose upon itself in exercising the discretion, paying due regard to the rights and interests of the parties and to general convenience and expediency—*Wijesuriya* v. *Mather* 27

17.—Ss. 336 & 357—Revision—Sanction to appeal from acquittal refused by Attorney General—Supreme Court will not act in revision in criminal cases unless there has been a positive miscarriage of justice—*Aponsu* v. *Malalsekere* 99

18.—Ss. 347 & 357—Revision—Failure to appeal against acquittal—Supreme Court has power to revise proceedings—*Vander Driesen* v. *Peter* 173

19.—S. 356—Revision—Application for enhancement of sentence—Supreme Court will not interfere with Magistrate's discretion unless it was improperly exercised—*Fernando* v. *Alwis & another* 111

20.—S. 418—Dispossession of immovable property by criminal trespass—Evidence of violent threats to complainant's servants—Order of restoration justifiable—*John* v. *Pieris* 95

21.—S 425—Irregularity in procedure—When fatal—*see* under S. 238 & Ss. 152 (3), 142 & 162

Criminal Trespass—*see* under PENAL CODE 9. 119

Deaf and dumb person—Trial of—*see* under CRIMINAL PROCEDURE CODE, S. 288 262

Deed—Recitals in deed may be considered by Court to determine real consideration—*see* STAMP ORDINANCE 12

PAGE

Deega Marriage—*see* under KANDYAN LAW 69

Depreciation of buildings—*see* under INCOME TAX ORDINANCE 108

Distribution of bonus—*Ibid*

Donation of leased property—When voidable?—*see* under LEASE

English Law—Application of—*see* under CRIMINAL PROCEDURE CODE, S. 6 272

Evidence, GENERAL—Circumstantial evidence—Decoy—Denial by him of sale of excisable article—Conviction resting on circumstantial evidence justified—*Dharmaratne* v. *Davith Singho & another* 150

2.—Principles—*see* COURT OF CRIMINAL APPEAL ORDINANCE, 231, 242

3.—When verdict of guilt justifiable—*see* under COURT OF CRIMINAL APPEAL ORDINANCE 242

4.—Evidence of character of accused—Manner of tendering after conviction—*Casus omissus* in Ordinance—English Law applicable—Such evidence may be received by Judge—It need not be on oath—*King* v. *Govinda Pillai* 259

5.—Relevancy—Previous petitions sent by accused having no reference to the subject-matter of the petition which formed the basis of a charge under S. 180 of the PENAL CODE—Not admissible—*A.G.A., Mullaitivu* v. *Selvadurai* 246

Evidence Ordinance, Leg. Enact. Vol. I., Cap. 1—S. 25—Confession—Statement—*Rex* v. *Fernando* 125

2.—S. 73—Finger impression—Comparison of—Close of

PAGE

civil case—Court may, for its own satisfaction, direct a thumb impression to be taken —*Rewata Thero* v. *Horatola* 52

—Ss. 80, 91 & 92—Presumption of genuineness of record of evidence produced does not arise when the record is found not to have been taken in accordance with law, for example, as directed by S. 169 of the CIVIL PROCEDURE CODE—Applicability of Ss. 91 & 92 to such a case considered—*see* also PENAL CODE, S. 190 —*King* v. *Wijesekere* 226

3.—Ss. 91, 123, 124, 125 & 155 (3)—Privilege—Impeaching credit of witness—*see* under CRIMINAL PROCEDURE CODE 133

4.—S. 105—Burden of proof—*see* MOTOR CAR ORDINANCE 4

5.—S 155 (3)—*see* under CRIMINAL PROCEDURE CODE, S. 122 185

Fidei Commissum—When terms of gift constitute a single *fidei commissum*—*see* under *Jus ascrescendi* 49

—When will deed of gift by Muslim constitute a *fidei commissum*?—*see* under MUSLIM LAW 87

Forfieture—*see* under KANDYAN LAW 69

Gaming Ordinance—Leg. Enact. Vol. I. Cap. 38, S. 2 —Search Warrant—No evidence led to show that the warrant was issued on testimony which there was reason to believe—No presumption of guilt arises—*Rajapakse, P.S.* v. *Somapala & others* 118

—Ss. 5 & 22—Unlawful Gaming—Search warrant issued on insufficient material—No presumption arises—*Fernando* v. *Liyanage* 63

PAGE

S. 22.—Certain facts render a game unlawful and a place 'a common gaming place'—*Thoradeniya* v. *Ismail* 64

Ganja—*see* Poisons, Opium and Dangerous Drugs Ordinance 37

Income Tax Ordinance, Leg. Enact. Vol. III, Cap. 188.

—Ss. 2 & 6 (1)—Distribution of bonus to shareholders of Company out of reserve for depreciation of buildings and the permanent reserve—Such distribution effected by the allotment and issue of fully paid up shares—Such shares do not constitute a 'dividend'—They are not liable to tax on their value—*Commissioner of Income Tax* v. *Macan Markar* 108

—S. 6—Profits—Mutual Provident Association—Income from loans made to members is liable to tax—*Commissioner of Income Tax* v. *Public Service Mutual Provident Association.* 195

——Profits or income—Sale of tea and rubber coupons by owner of tea and rubber estates—Receipts from the sale of such coupons are income—*Thornhill* v. *Commissioner of Income Tax* 202

—Ss. 9 & 10—Deduction—Business of making papain—Lease of Crown and private lands for growing papaw trees —Construction of sheds to house drying ovens and labourers' lines on leased lands —Abandonment of structures on expiration of leases—Expenditure incurred in the erection of such structures is not an allowable deduction.

Distinction between 'capital' and 'revenue' expenditure. 'floating' capital asset and 'fixed' capital asset pointed

PAGE

out—*Theobald* v. *Commissioner of Income Tax* 217

—Ss. 46 & 84—Empire Income Tax—Relief in respect of—Claim to be made within three years of the end of the year of assessment—*K. G. E. & Co.* v. *Attorney General* 167

Inheritance under KANDYAN LAW—*see* Kandyan Law 69

Insolvency Ordinance, Leg. Enact. Vol. I, Cap. 82—

—Ss. 36 & 151—Insolvent has right to be protected from arrest till certificate meeting—It is not within the power of District Judge to take away such right, unless he acts under S. 151—*Re: R.F.A. Fernando* 117

—S. 51—Grant of certificate to insolvent—Conveyance of property by insolvent two years prior to his adjudication—Application by assignee to have property sold for benefit of creditors—Such application is a proceeding distinct from the insolvency proceedings—Facts necessary to maintain such application—The application is an 'action' within the meaning of Ss. 2 & 62 of the Courts Ordinance and is governed by S. 10 of the Prescription Ordinance—*Cassim* v. *Suppiah Pillai* 101

Judicial inquiry—Conduct of—*see* under CRIMINAL PROCEDURE (General) **4** 246

Jurisdiction of Appeal Court to take further evidence—*see* under CRIMINAL PROCEDURE CODE **16** 27

Jus accrescendi—*Fidei commissum inter vivos*—Gift of property to six persons—Death of four—Conveyance of her interests to her husband by one of the survivors and her subsequent death without children—Such conveyance does not pass title to her husband—Interests pass to the last survivor and his heirs—*Upasakappu* v. *Dias & another* 49

Joint Stock Companies Ordinance No. 4 of 1861, Ss. 67 & 68—Joint Stock Company incorporated abroad—Winding up—District Court of Ceylon has jurisdiction—Writ of prohibition does not lie—COURTS AND THEIR POWERS ORDINANCE Ss. 42 & 62—*Amijee & others* v. *Lewis* 190

Kandyan Law—Inheritance—Estate of a cousin who died unmarried and issueless—Rights of *deega* married daughters to inherit—The forfeiture to which a daughter becomes liable by marriage in *deega* applies only to her parents' property and cannot be extended to the inheritance in question—*Kiri Banda & others* v. *Dingiri Banda & others* 69

Lease by the Crown—Clause prohibiting sale, sub-lease, donation, mortgage or other disposition of subject matter of lease without the written consent of lessor—Gift of leasehold interest to lessee's sons without such consent—Subsequent devise by last will of lessee's property to one of his sons, executor under the will—Acceptance by the Crown of devisee as substituted lessee—The devise prevails over the gift—*Jayawardene* v. *Jayawardene & others* 17

——Stipulation that land shall revert to the Crown if lessee's interests are sold in execution—Sale of such interests in execution—Lessee has no 'saleable interest' in

PAGE

the land to be sold—Application by purchaser to set aside the sale will succeed—Civil Procedure Code, S. 284—*de Silva* v. *Kanagaratne* 39

Legal Practitioner—A proctor convicted of criminal breach of trust of client's money—Restoration of money to client—Removal from Roll is the appropriate order to make in such a case—COURTS AND THEIR POWERS ORDINANCE, Leg. Enact. Vol. I, Ch. 6, S.17—*The Solicitor General* v. *Cooke* 25

Legium—*see* POISONS, OPIUM & DANGEROUS DRUGS ORDINANCE 37

Local Inspection—Procedure—*see* under CRIMINAL PROCEDURE CODE 13 99

Maintenance Ordinance, Leg. Enact. Vol. II. Cap. 76, S. 6—Corroboration of mothers' evidence in a material particular—Maintenance by the person alleged to be the father of the illegitimate child after the discovery of the applicant's condition and her dismissal by his wife is evidence implicating the man and making it more probable than not that he is the father of the child and is, therefore, a material particular within the meaning of S. 6—*Edema* v. *Babun Nona* 161

Malicious arrest—Conditions necessary for the maintenance of action for damages—When malice may be inferred from circumstances—*Pieris* v. *Chitty & others* 133

Mandamus—When does it lie?—*see* under the COLOMBO MUNICIPAL COUNCIL (CONSTITUTION) ORDINANCE 128

Master and servant—Occupation of premises by servant is not as tenant—*Forbes* v. *Rengasamy* 207

Material particular—*see* MAINTENANCE ORDINANCE 161

Misdirection—*see* under COURT OF CRIMINAL APPEAL (GENERAL) 3 237

Money-lending Ordinance, Leg. Enact. Vol. II. Cap. 67, Ss. 8 (2) & 11—Business of money-lending—Whether one carries on the business or not is a question of fact—System and continuity are tests—Onus is on money-lender to prove compliance with the requirement of S. 8 (2) to keep accounts—Bar imposed by S. 8 (2) does not apply to claims put forward by administrator of the estate of deceased money-lender—Phraseology of S. 8 is similar to that of S. 9 of the REGISTRATION OF BUSINESS NAMES ORDINANCE 250

Motor Car Ordinance, Leg. Enact. Vol. IV. Cap. 156, Ss. 2 & 31—Registered owner is not liable in the absence of proof of use on the high-road—Observations on burden of proof—*Misso* v. *Perera* 4

—Ss. 6, 63, 14 & 84 [Ordinance No. 20 of 1927]—Parking—Omnibus halted at a place other than a public stand or halting place for the purpose of taking up and setting down passengers—This does not constitute parking—*Dole* v. *Simon Appu* 58

—Ss. 11 (1) & 63—Charges of driving a motor car negligently and with defective brakes—Plea that the accused had a licensed driver by his side is not tenable—*Dhanapala* v. *Ibrahim* 85

PAGE

—S. 51—Lorry involved in accident to buggy cart—Driver of lorry not requested by person entitled to do so for particulars regarding his identity—Driver's failure to report accident to Police constitutes an offence—*Attorney General* v. *Kunjipalu* 30

—Ss. 66 (3) & 89—Over-crowding of omnibus—If the driver, with guilty knowledge of the conductor's offence under S. 66 (3) chooses to abet it, he then becomes as liable as the conductor by S. 89—The law of abetment contained in Ch. V of the Penal Code is reflected in S. 89—*Attorney General* v. *James Singho* 248

Muslim Law—Deed of gift—Reservation of life interest in donor's favour, burdened with *fidei commissum*—Absence of donor's intention that the deed should have the character of a deed of gift under the Muslim Law—Roman Dutch Law applies—*Khudoos and another* v. *Joonoos* 87

Notice of termination of employment—May be given in any day of the month—*Ebels* v. *Periannan* 119

—*see* also *Forbes* v. *Rengasamy* 207

Notaries Ordinance, Leg. Enact. Vol. III., Cap. 91, S. 30, Rule 25 and Proviso (*a*)—By virtue of sub-sections 1 & 3 of S. 330 of the CRIMINAL PROCEDURE CODE, a notary who has been prosecuted and convicted for his failure to transmit duly to the Registrar of Lands the duplicates of deeds attested by him in breach of Rule 25 of S. 30 of the NOTARIES ORDINANCE is liable to be charged for his refusal to comply with the terms of a written notice served upon him by the Registrar General in terms of Proviso (*a*) of S. 30 of the ORDINANCE—The act or omission which constitutes an offence under the main provisions of S. 30 of the NOTARIES ORDINANCE is not the same as the omission under Proviso (*a*) of the said section—A prosecution of a notary for a breach of Proviso (*a*) of S. 30 of the NOTARIES ORDINANCE, after his conviction for a violation of any of the main provisions of the said section, is not obnoxious to S. 9 of the INTERPRETATION ORDINANCE—The proviso (*a*) of S. 30 of the NOTARIES ORDINANCE enables the Registrar General to give notice to a notary though he has been convicted for a breach of Rule 25 and then proceed to prosecute him again if he fails to comply with the notice—*Samarasinghe, Registrar of Lands* v. *Dalpatadu* 266

Obstructing public servant—*see* under PENAL CODE 5. 32

Occupation by servant 207

Obligation—Joint and several liability—Payment by one of two debtors of his share of the debt—Subsequent assignment of the whole debt—Assignee's election to recover the balance from the other debtor—Successor in title of assignee has no right of action against the first debtor—*Deonis Appu* v. *Gunawardene* 130

Ordinances—Appeals (Privy Council) Ordinance, Leg. Enact. Vol. II. Cap. 85 75

Business Names (Registration) Ordinance, Leg. Enact. Vol. III. Cap. 120 250

Civil Procedure Code, Leg.

PAGE

Enact., Vol. II., Cap. 86—*see* under CIVIL PROCEDURE CODE.

Court of Criminal Appeal Ordinance—*see* under COURT OF CRIMINAL APPEAL ORDINANCE.

Colombo Municipal Council (Constitution) Ordinance, Leg. Enact. Vol. V, Cap. 194 128, 260

Courts and Their Powers Ordinance, Leg. Enact., Vol. I, Cap. 6—*see* COURTS ORDINANCE.

Estate Labour (Indian) Ordinance, Leg. Enact. Vol. III. Cap. 112 119, 207

Evidence Ordinance Leg. Enact. Vol. I, Cap. 11—*see* under EVIDENCE ORDINANCE

Gaming Ordinance, Leg Enact. Vol. I. Cap. 38 63, 64, 118

Income Tax Ordinance, Leg. Enact. Vol. IV. Cap. 188 167, 195, 202

Insolvency Ordinance, Leg. Enact. Vol. II. Cap. 82 101

Interpretation Ordinance, Vol. 1, Cap. 2 266

Joint Stock Companies Ordinance 190

Local Government Ordinance No. 11 of 1920 [repealed by Urban District Council Ordinance No. 61 of 1939] 274

Maintenance Ordinance, Vol. II. Cap. 76 161

Money-lending Ordinance Leg. Enact. Vol. II., Cap. 67 250

Motor Car Ordinance, Leg. Enact. Vol. IV. Cap. 156. 4, 30, 85

Notaries Ordinance, Leg. Enact. Vol. III. Cap. 91 266

PAGE

Poisons, Opium and Dangerous Drugs Ordinance, Leg. Enact. Vol. IV, Cap. 172 37

Prescription Ordinance, Leg. Enact. Vol. II. Cap. 55 101

Stamp Ordinance, Leg. Enact. Vol. IV, Cap. 189 12, 160

Trade Marks Ordinance, Leg. Enact. Vol. III. Cap. 121 75

Paulian action—Execution of deed of transfer—Subsequent insolvency of transferor—Allegation that deed was made in fraud of creditors—In an action to set aside a deed on the ground that it was made in fraud of creditors, the plaintiff has to prove that the execution of the deed rendered the transferor practically insolvent and unable to pay his debts as they became due and that the transferor had the intention to defraud the creditors—*Perera* v. *Sirimana & others* 211

Penal Code [Leg. Enact. Vol. I. Cap. 15] S. 32, Common intention—Liability for act done by several persons in furtherance of—*see* under Ss. 138, 140, 146, 296 255

2.—Ss. 138, 140, 146, 296 & 32—Unlawful assembly—Common object of causing serious bodily injury—Murder in the prosecution of this common object or in furtherance of a common intention—Proof necessary to sustain charge—*King* v. *Silva & others* 255

3.—Ss. 140 & 144—Unlawful assembly and rioting—What prosecution has to prove—*Kulatunga, Police Sergeant* v. *Mudalihamy & others* 263

4.—S 180—False information with intent to cause a public servant to use his lawful power to the injury of another person—Statements made in petition to Assistant Government Agent

PAGE

—To justify conviction, prosecution must prove that the accused had positive knowledge or belief that the information was false—*A.G.A., Mullaitivu* v. *Selvadurai* 246

5.—S. 183—Obstructing public servant—Verbal refusal to allow a public servant to perform his duty may constitute voluntary obstruction—Some overt act or physical force not necessary—There is voluntary obstruction, whether force is or is not used, when that is done which can reasonably be regarded as hindering or being likely to deter an officer from discharging his duty—*P. S. Pambantota* v. *Silva* 32

190—Perjury — Alleged ment given in evi- l suit—Evidence taken y a shorthand writer and transcribed into English—This is not in compliance with S. 169 of the CIVIL PROCEDURE CODE—No legal evidence before judge to justify conviction—*King* v. *Wijesekere* 226

7.—Ss. 328 & 329—Criminal negligence—Causing hurt while driving a motor car—Facts necessary to establish liability—*Perera* v. *Wickramanayake* 142

8.—S 394—Receiving stolen property—Burden on the prosecution to prove that the explanation offered by the accused is false—If explanation is reasonably true, accused entitled to acquittal—*Van Rooyen* v. *Lardoordeen* 270

9.—Ss. 427 & 433—Criminal trespass—Indian labourer employed on Ceylon estate—Employer's notice terminating contract of service—Labourer's refusal to leave the estate after the expiry of notice—

PAGE

Intention to annoy may be inferred and the offence is, therefore, committed—*Ebels* v. *Periannan* 119

10.——Indian Immigrant labourer employed on Ceylon estate—Termination of contract of service—Occupation of line-room after expiry of period of notice—Circumstances that will justify the finding that the continuance of such occupation is with intent to annoy—Notice of termination of employment can be given on a day other than the last day of the month—THE ESTATE LABOUR (INDIAN) ORDINANCE, S. 5, Leg. Enact, Vol. III, Ch. 112—*Forbes* v. *Rengasamy* 207

Permit—Issued by local authority—When may it be cancelled?—*Perkins* v. *Sri Rajah* 211

Poisons, Opium and Dangerous Drugs Ordinance, Leg. Enact. Vol. IV. Cap. 172, S. 28—*Ganja*—Accused charged with unlicensed possession of a preparation containing *ganja* *Mens rea* is not necessary for constitution of the offence—*Perumal* v. *Arumugam* 37

Policeman as advocate—practice undesirable 263

Prescription Ordinance—Leg. Enact. Vol. II, Cap. 55—S. 10—Application under S. 51 of the Insolvency Ordinance—*see* under INSOLVENCY ORDINANCE 101

Proctor—When removal from roll necessary—*see* LEGAL PRACTITIONER 25

Privy Council—*see* under APPEALS (PRIVY COUNCIL) ORDINANCE 75

Public Office under the Crown—Meaning of—*see* COLOMBO MUNICIPAL COUN-

PAGE

CIL (CONSTITUTION) ORDINANCE 260

Public Servant, obstruction to—*see* under PENAL CODE 5 32

Recitals—*see* STAMP ORDINANCE 12

Res Judicata—Co-defendants—Circumstances under which rule will apply—*Fernando* v. *Fernando* 114

Restitutio in integrum—Party's consent to his action being dismissed obtained by deceit—Application for restitution maintainable—*Wanigasinha* v. *Wanigasinha & others* 113

—*see* also CIVIL PROCEDURE CODE 21 224

Revision—Power of Appellate Court to act in—*see* CIVIL PROCEDURE CODE 16 & 21 45, 224

—*see* also under CRIMINAL PROCEDURE CODE 17 99

Rioting—*see* PENAL CODE 3, 263

Roman Dutch Law—Applicability of 87

Stamp Duty—*see* STAMP ORDINANCE

Stamp Ordinance, Leg. Enact. Vol. IV. Cap. 189—Ss. 22 & 29, Schedule A. Part I—Stamp duty—Where the consideration for a Secretary's conveyance is stated to be the purchase price paid by the secondary mortgagee and where there is evidence of an agreement having been entered into to give the secondary mortgagee credit up to a certain sum of money, this amount forms the real consideration for the deed—*Bartleet & Co.* v. *Commissioner of Stamps* 12

—S. 31—Certificate by Commissioner of Stamps—Appeal against Commissioner's determination—Attorney-General should be made a party—*Punchi Mahatmaya* v. *Commissioner of Stamps* 160

Substitution of verdict—Powers of Court of Criminal Appeal—*see* under THE COURT OF CRIMINAL APPEAL ORDINANCE 255

Unlawful Assembly—*see* und PENAL CODE 2 & 3

Unlawful Gam
GAMING OR [illegible] 63, 64, 1

Ultra Vires—When a by-law may be—*Perkins* v. *Sri Rajah* 211

Workmen's Compensation Ordinance, Leg. Enact. Vol. III, Cap. 117, S. 3—Death resulting from assault by fellow workman following a dishonest claim made by the latter to a screw-driver with which the former worked and which belonged to the employer—Though death is caused by accident, the injury is not caused by accident arising out of or in the course of the workman's employment—*Perera* v. *Brown & Co., Ltd.* 183

THE CEYLON

LAW JOURNAL

VOL.—IV COLOMBO SATURDAY, NOVEMBER, 25, 1939 Part—12

THE LATE SIR ST. JOHN BRANCH

Tributes from the Bench and the Bar

The death occurred at Horsham, Sussex, at the age of 74, of Sir Charles Ernest St. John Branch, who was Chief Justice of Ceylon for two years from 1925. Before the work of the Chief Appellate Court began on the 3rd August, 1939, a large number of lawyers had assembled in the Court when Mr. Justice Hearne, Acting Senior Puisne Judge, accompained by Mr. Justice Keuneman, Mr. Justice de Kretser, Mr. Justice Wijeyewardene and Mr. Justice Cannon, came on the Bench in their full-bottomed wigs.

Mr. E. G. P. Jayatilleke K.C., Solicitor-General, sat at the Inner Bar with Mr. R. L. Pereira K.C., and Mr. M. T. de S. Amarasekera K.C.

Mr. Justice Hearne, addressing the Solicitor-General, said:—

"Mr. Solicitor, we have assembled today as a mark of respect to the memory of a former Chief Justice of Ceylon, Sir St. John Branch, who, as has been reported in the Law Times, died recently at the age of 74. The late Sir St. John Branch came to this Island when he was no longer a young man and brought with him a ripe experience which he had gained during his thirty years of Colonial Service in various parts of the Empire as widely separated as Barbados and Penang. He was called to the Bar by Gray's Inn in 1892. His first appointment was Chief Magistrate of St. Vincent in the West Indies, which position he exchanged for that of Law Officer in the Leeward Islands. After successfully holding the office of Attorney General in various Colonies, he went back to the Bench and was appointed Puisne Justice of Penang, in 1921. He was appointed Judicial Commissioner of the Federated Malay States in 1922. From these he was translated as Chief Justice of Jamaica in 1923 and came to Ceylon in 1925. He retired the following year at the age of 61. His ability had not only marked him for promotion both as a law officer and a Judge but his gifts were employed in spheres other than the sphere of the law. He acted as Colonial Secretary which he combined with the office of Attorney General of the Leewards and was delegated to various conferences including the Agricultural Conference in Jamaica in 1907, the Cotton Conference of Liverpool in 1908, and the Canadian Reciprocity Conference of the same year. He administered the Government of Antigua on several occasions between 1902 and 1909 and he was Acting Governor of Leeward Islands in 1907 and 1909.

Of those who are sitting with me today, my brother Keuneman alone had the privilege of knowing him in Ceylon. His recollection of him is that of a kindly man. I understand, Mr. Solicitor, that his relations with the Bar were extremely cordial. Mr. Justice Maartensz before going to England used to speak of his keen sense of justice and loyalty to his colleagues. In his farewell speech to Sir St. John Branch, the Attorney-General expressed his appreciation of the way in which Sir St. John Branch had detected and pointed to defects and irregularities in procedure in criminal trials and referred to the confidence he inspired in those with whom he came into contact.

From what I have read and the impressions I have gathered, if I were to attempt to describe the late Sir St. John Branch, I would say that he was a sound lawyer and one of nature's gentlemen. Although he retired on the ground of ill-health, I am glad to think that, after thirty years full of the cares and responsibilities of office, he lived for another thirteen years to enjoy the leisure of retirement which he had so fully earned."

Mr. E. G. P. Jayatilleke, K.C., Solicitor General, said in reply:—

"I wish to associate myself on behalf of the Bar with what Your Lordship Mr. Justice Hearne, has said about the late Sir St. John Branch. Sir St. John Branch was Chief Justice of Ceylon for the all too brief a period of one year. Within a short time of his appointment he decided to retire on grounds of ill-health. His tenure of office as Chief Justice was marked by the sturdy independence he displayed in all matters connected with the Supreme Court, and by the maintenance of the friendliest relations between the Bench and the Bar. His work during his short period of service in Ceylon was most valuable, for he brought to bear his wide experience both at the Bar and on the Bench in dealing with the complicated questions which came up before him. His parting words bore eloquent testimony to his strength of character and devotion to duty. When we bade him farewell in this Court, he said: 'I made up my mind many years ago that I should not stay on when I believe that I would not give of my best. Some men have a wide margin between their best and what is sufficient for the adequate discharge of their duties. I have not and I know it. When I cannot give of my best, the time has come for me to go.' My Lords, the memory of a man of such character and determination must always command our respect."

Reference by the Acting Chief Justice

Reference was made on the 3rd August, 1939, by His Lordship, Mr. Justice Soertsz, K.C., Acting Chief Justice, at the Midland Assizes, Kandy, (2nd Midland 1939) to the death of Sir St. John Branch, late Chief Justice.

His Lordship said:—

"Mr. Loos, Members of the Kandy Bar, before we begin the work for the day, it is my sad duty to refer to the death of Sir St. John Branch which occurred in retirement at Horsham in Sussex. As you know, Sir St. John was Chief Justice of this island for some two or three years, I believe, from 1925. His was a long judicial career, and in the course of that career, he served in different parts of the Empire. He came to us in Colombo on the eve of his retirement. It was hardly to be expected that, in the short time available to him, he would be able to gain a

thorough knowledge of our peculiar system of law with its various legal principles and different laws, but the wide experience he had gained in different parts of the Empire and his intimate knowledge of the English law enabled him to bring a trained mind to bear upon such cases as came before him during his period of office here, and he dealt with them, as we all know, with thoroughness and great conscientiousness. It was my privilege to appear very frequently before him in the Appeal Court in Colombo, and I shall always remember him as a great gentleman and a just Judge.

May he rest in peace.'

Mr. F. C. Loos, Crown Counsel, said:—

"It was with great regret My Lord, that I, too, heard of the death of His Lordship. I had not the pleasure nor the honour, My Lord, of appearing before him, because at the time His Lordship was here, I was a very, very junior member of the Bar.

I do sympathize very greatly with his relations, and I would respectfully ask Your Lordship that a copy of the minutes of these proceedings be sent to his relations with our deepest sympathy over their sad bereavement."

LAW EXAMINATION RESULTS

The results of the first, second and third examinations in Law held in July, 1939, are as follows:—

Advocates
(New Rules)

PRELIMINARY EXAMINATION

CLASS I-HONOURS—(In Order of Merit)

Nil.

CLASS II-PASS—(In Alphabetical Order)

De Silva, Edward Anthony Gabriel; Thamotheram, Vincent Thambinayagam; Wijeyeratne, Ceoil Marion Wilfred de Silva, (Referred at December 1338 Examination.)

INTERMEDIATE EXAMINATION

CLASS I-HONOURS—(In Order of Merit)

Jayawardene, Hector Wilfred Henricus; Malalgoda, Piyasena; Jayawardena, Mahabalage Don Henry.

CLASS II-PASS—(In Alphabetical Order)

Ahamadu, Kuppathambi Abdurrahman; Amarasingam, Sarvathaman Ponniah; Canagarayar, Shivananda; Chellappah, Candiah; Fernandopulle, Joseph de Vaz Nihveler; Fernando, Laurie Edmund Joseph; Fernando, Sylvan Emmanuel Joseph; Jayawardene, Edmund Walter Perera Saneviratne; L'Brooy, Harold Victor Theodore; Nagaratnarajah, Sabapathypillai; Nissanga, Don Pedrick; Rajendran, Santhanam Patinade Mariampulle; Silva, Gardige Punchihewage Amaraseela; Somasundaram, Thambipillai; Somatillekam, Ponniah.

FINAL EXAMINATION

CLASS I-HONOURS—(In Order of Merit)

Jayasuriya, Frederick Boyd Perera; Vijayadevendram, Vellupillai; Nadarasa, Nagenthiram; Saravanamuttu, Suppiah.

CLASS II - PASS - (In Alphabetical Order)

De Silva, Percival; Pereira, Ananda.

Proctors
(New Rules)

PRELIMINARY EXAMINATION

CLASS I—HONOURS –(In Order of Merit)

Gunaretnam, Thamotharam.

CLASS II—PASS—(In Alphabetical Order)

Aiyar, Satiavagiswara Harihara; Corea, Emanuel Placidus Eustace Kingston; Edwards, Nallathurai; Kobbekaduwa, Hector Senarath Rajakaruna Banda; Nadarasa, Namasivayam; Perera, Edward Aloysius Sylvester Wilfred; Perera, Jayasinghe Arachige Rochus Victor; Rajapaksa, Jayasekera Samson; Rajaratnam, Velauthan Periatamby; Rustomjee, Noshir Cawasji Jamshedji; Siva Rajah, Sivaguru; Sivasubramaniam, Rasiah; Thambyah, Percy Selvadurai; Wijetunga, Ronald Steuart; Yusoof, Nagoor Mohammed.

INTERMEDIATE EXAMINATION

CLASS I—HONOURS – (In Order of Merit)

Pinto, Felix Reginald; Gomis, Eugene Henry Augustus; Perera, Louis Stephen Valentine.

CLASS II—PASS—(In Alphabetical Order)

Balasingham, Kandappillai Vairamuttu; Chinnaiya, Muttuvelu; de Silva, Ginige Reginald Edmund; Goonesekere, Don Vincent Abeywardene; Jayasinghe, Vincent Alfred; Kanapathipillai, Kanthavanam; Mashoor, Semsami Mohamed Hassen; Namasivayam, Rasapillai; Nambihai, Sivakoluthu Siyanaya; Peiris, Kudatelge Clarence Leslie; Perera, Devamullage Albert Edwin Christie; Ponnudurai, Selliah; Rajaratnam, Kanapathipillai; Sellamuttu, Sangarapully; Sinnathamby, Candiah; Sivagnanasambanthan, Nagalingam; Sivasubramaniam, Vythialingam; Suraweera, George Stanley; Swaris, Joseph Oliver Ignatius; Thanabalasingham, Asaipillai; Thassim, Mohamed Atha; Tisseveresinghe, Joseph Lionel; Udalagama, Jerestra Wijaya Bandara; Visuvalingam, Sittampalam; Wahab, Alim Saibo Abdul; Weerakoon, Egerton Beaumont; Wimalasooriya, Sidney de Silva.

FINAL EXAMINATION

CLASS I—HONOURS—(In Order of Merit)

Jayawickrama, Douglas Sudrikku; Jayasekera, Mahadura Lambert Silva; Samaraweera, Don Morton; Cassim, Sheikh Mohideen Mohamed.

CLASS II—PASS –(In Alphabetical Order)

Arsekularatne, Andrew Thomas de Fonseka, Arulambalam, Ambalawanam; Arulampalam, Chinniah; Chelvanayagam, Subramaniam; Corea, Junius Edward; Devasenapathy, Rajanathan; Dharmalingam, Vallipuram; Ehamparam, Nagamathapillai; Fernando, Miss Lena Charlotte; Fernando, Thomas Victor; Hadgie, Tuan Latiff Mohammath Jainudeen Jammon; Joseph, Miss Anandapathi Victoria Poosbadevi; Kandiah, Ponnampalam; Mathavarajah, Supramaniam; Matugama,

Somaratna; Nadarajah, Kanapathipillai; Ponniah, Saravanamuttu; Ramalingam, Chelliah; Supapathypillai, Joseph Thurairajasingam; Singhawansa, Noor Mohamed Noorun; Thamotharampillai, Candiah; Thurmalingam, Chelliah Mulliyar; Thiraviamayagam, Samuel Kandavanam; Thurairajyagam, James Antony Percy; Vallipuram, Kathiravelu; Van Reyk, Francis Bertram Malcolm; Vincent, Christopher Muthunayagam; Weerakoon, Don Avis, Welikala, Clarence Valentine.

Advocates.

(Old Rules)

FIRST EXAMINATION

(In Alphabetical Order)

Saravanamuttu, M. Sinnatamby.

SECOND EXAMINATION

(In Alphabetical Order)

Balasuriya, D. V.; David, James Nicholas; Hoover, George Gould; Maglon-Ismail, Zain; Perinbanayagam, Saravanamuttu Hanly; Ragupathy, Ponniah.

FINAL EXAMINATION

(In Alphabatical Order)

Cumaraswamy, Visuvalingam Markandapillai; de Zoysa, Eirle Leonard Walter; Kanthasamy, Valuppillai Kandiah; Sithampalam, Vallipuram.

Proctors.

(Old Rules)

FIRST EXAMINATION

(In Alphabetical Order)

Amirthalingam, Arulampalam; Fernando, Joseph Domingo Bertram; Nathiketa, Chelliah; Obeysingho, Pattahandi Edward; Selvadurai, Arthur Joseph Devanayagam Nevins; Storer, Sellathurai; Thassim, Abdulla Marikar Mohamed; Theruganasothy, Arumugam.

SECOND EXAMINATION

(In Alphabetical Order)

Arumugam, Kandar; Fernando, Panambarage Marshal; Issadeen, Sheik Yehya; Patrick, John; Perera, Rajamy Archarige Sedris; Rajaratnam, Paramanather; Thillawasan, Canapathipillai Dharmakirti; Thilliampalam, Kathigasoe Chelliah; Vinasithamby, Kathirgamu.

FINAL EXAMINATION

(In Alphabetical Order)

Balasingam, Thambimuttu; Candiah, Supramaniam; Dissanayake, Francis; Dissanayake, Edward; Devanayagampillai, Kumaravelu Kanapathipillai; Fernando, Vincent Hilary Nicholas; Fonseka, Elias Solomon; Gunawardena, Arumabaduge Don Baron; Moses, Vital Anthony; Rajendran, Sivacolunthu; Ranasinghe, Don Bertram; Richards, Thomas Henry Nesaretnam; Selvarajah, Saravanamuttu; Seneviratne, Edward Walter; Sivagurunathan, V. Subramaniam; Taldene, Frederick William; Vannianathan, Tamotherampillai; Wijesuriya, Hamilton Claude.

SCHOLARSHIPS AND PRIZES AWARDED.

Advocates Examinations.

Intermediate Examination.—Scholarship of Rs. 480: H. W. H. JAYAWARDENE.

Final Examination.—Scholarship of Rs. 600: V. VIJAYADEVENDRAM.

Proctors Examinations.

Intermediate Examination.—First Scholarship of Rs. 360: F. R. PINTO.
Second Scholarship of Rs. 240: E. H. A. GOMIS.
Prize of Rs. 50 in Criminal Law & Procedure: F. R. PINTO.
Prize of Rs. 50 in Law of Trusts, Partnership & Company Law: F. R. PINTO.
Final Examination.—First Scholarship of Rs. 480: D. S. JAYAWICKREME.
Second Scholarship of Rs. 360: M. L. S. JAYASEKERA.
Prize of Rs. 50 in the Law of Persons & Property: D. S. JAYAWICKREME.

CRIMINAL TRESPASS AND INDIAN LABOURERS—I.

BY

K. SATIA VAGISWARA AIYAR

The Case of Periannan

The total population of Ceylon at the end of 1938 is stated to be 5,864,500. Of these, about 800,000 were Indians. The number of Indian labourers and their dependants living on Ceylon estates on the 31st December, 1938, was found to be 682,570 (*a*). A discussion on the law of "criminal trespass." in relation to a class of people who form such a fair percentage of the total population of the Island may not, therefore, be out of place in the columns of this *Journal*, particularly for the reason that the number of criminal trespass cases instituted against Indian labourers of certain districts is reported to be on the increase.

The enactment in the year 1921 of what is now known as the Tundu Prohibition Ordinance (Leg. Enact. Vol. III, Ch. 113) and in 1923 of the Indian Immigrant Labour Ordinance (Vol. III., Ch. 111) was the beginning of a new era for Indian labourers in the Island. The legislature of the time responded in unmistakeable terms to enlightened public opinion and declared by these two laws its view that the Indian labourer was no longer to be regarded as an animal employed in the production of wealth but as a human being with rights and privileges consistent with his contribution to the national economy. The penal clauses which oppressed labourers were done away with (*b*) and from that time, till very recently, they were favourites with their employers. They were "tractable intelligent persons, willing to abide by reasonable directions and not finicky or perverse in their arguments when they considered directions unreasonable ..trouble with them was entirely absent" (*c*).

(*a*) Annual Report of the Agent of the Government of India in Ceylon for 1938, p. 2.

(*b*) Refusing to work, misconduct while in service, quitting service without reasonable cause, desertion and many other acts were offences under the Service Contracts Ordinance No. 11 of 1865. *Vide* text of Ordinance in the Editions published prior to 1921.

(*c*) *per* N. H. M. Bowden, the Ceylon Labour Commissioner, quoted by Mr. Vital Pai, Agent of the Government of India in Ceylon, in his Report for 1933, at p. 4.

But the situation has definitely changed. The forces of progress, political, social and economic, have carried the Indian labourer from the still waters on which he sailed in the past. He has learnt to read and write his mother tongue. He is enfranchised and information setting out the rights which the Ceylon legislature has conferred on him has to be conveyed to him by the employer, who is required to "exhibit in some conspicuous place on the estate, so that they may be easily seen and read by labourers, translations in Tamil of the Service Contracts Ordinance, the Estate Labour (Indian) Ordinance, the Tundu Prohibition Ordinance, the Indian Immigrant Labour Ordinance and the Minimum Wages (Indian Labour) Ordinance" *(d)*. Educative propaganda explaining the scope of labour legislation is being carried on from the platform and through the press by persons who are impelled by a sense of duty to their less fortunate fellow-beings and who are, as is to be expected, characterised as 'agitators' by employers of labour, black, brown or white. Be this as it may, the Indian labourer has begun to pulsate with a new consciousness which the employer naturally views with suspicion. The assertion of a legitimate grievance or a demand for proper treatment is mistaken for insubordination and the bogy of breach of discipline among the labour force disturbs the employer's equilibrium. Prior to the abolition of the penal clauses of the Service Contracts Ordinance, the employer sought the aid of the Criminal Courts to punish labourers for disobedience, insolence, desertion and many other acts of theirs in the course of their employment. The only punishment which an employer can now impose on a labourer who has begun to be assertive of his rights is to discharge him after due notice. The employer has begun of late to use this remedy somewhat frequently. His position appears to be that notice terminating the labourer's employment terminates also the latter's right of occupation of the line room on the estate. The employer's view, further, seems to be that a labourer's refusal to vacate the line room, after the termination of his employment, is a matter properly within the jurisdiction of the Criminal Courts. For whatever reason the labourer chooses to continue in occupation of the line room, the consequence of the labourer's conduct is alleged to have induced in the employer that mental condition termed 'annoyance' in the Penal Code. The employer complains to Court that he is annoyed and the labourer is charged with having committed the offence of "criminal trespass." The language used to define "criminal trespass" in the Ceylon Penal Code is, if we may quote Sir Hari Singh Gour's comment on the nearly identical provision of the Indian Penal Code, "either inapt or defective, and the Courts have consequently been constrained to justify their finding by a reference to reasons which are as varied as they are irreconcilable with one another *(e)*.

The recent decision of the Supreme Court in ***Ebels v. Periannan*** *(f)* necessitates our respectful examination of the law of criminal trespass as it affects Indian labourers on Ceylon estates. In this case, Ebels, Superintendent of a Ceylon estate, told Periannan,

(d) S. 17 of the Minimum Wages (Indian Labour) Ordinance, Leg. Enact. Vol. III., Ch. 114.

(e) Gour's "Penal Law of British India," 5th Edition, Art. 5374, p. 1518.

(f) *Ebels* v. *Periannan* S.C. No. 393—M.C. Hatton No. 9272, decided on the 8th December, 1939 by De Kretser J. and reported at p. 119 of 4 C.L.J.R.

an Indian sub-kangany employed on the estate, on the 7th April, 1939, "I am giving you one month's notice today" and offered Periannan on the 7th May, 1939, his wages and discharge ticket. Periannan refused to accept them and continued to remain in the line room which had been previously occupied by him. Ebels complained to the Magistrate's Court at Hatton that Periannan "continued unlawfully to remain on the estate to his annoyance" and that he thereby committed the offence of criminal trespass as defined by S. 427 of the Ceylon Penal Code (q). He was convicted by the Magistrate and sentenced to undergo one month's rigorous imprisonment. In view of the nature of the sentence, an appeal to the Supreme Court on certain questions of law which appeared to arise from the finding was filed and the Court was also moved to exercise its powers of revision. The Supreme Court dismissed the appeal and refused to interfere by way of revision.

There was a feature of the case which was an insuperable barrier against Periannan. He had denied on oath that notice was given him by Ebels. The evidence of Periannan, as recorded in the lower Court, did not make it clear that his wife, who was expecting to be brought to bed shortly, was a labourer employed on the estate and that she lived in the line room occupied by her husband. There was, however, the following testimony of Periannan which was not challenged: "I have a wife. She is pregnant and she will be brought to bed about this month ..I am prepared to leave the estate at any time after she gives birth to the child."

On the question of annoyance, Ebel's evidence was, in addition to his statement that Periannan continued unlawfully to remain on the estate to the former's annoyance, that he gave notice to Periannan to quit from the estate as he was undermining discipline on the estate and that discipline was undermined as a result of Periannan's refusal to leave it. Ebels admitted, however, that his object was to oust Periannan from the line room which had been in his occupation for some years.

The principles of law which were enunciated by de Kretser J. in dismissing the appeal are, if we may say so with due respect, general in their terms and will apply to any Indian labourer, who, after the expiry of one month from the day on which notice of termination of his service is received by him, refuses to vacate the line room occupied by him while employed on the estate. Firstly, in the words of de Kretser J., "as the labourer is given a free room as part of his contract of service, it follows that when that contract is terminated everything that flows from it also ends." Secondly, "the Superintendent of the estate is by virtue of his office in occupation of the whole estate which is under his control. He may allow different people to occupy different parts of the estate for various purposes, but so long as their right of occupation has been lawfully determined, he has a right to resume possession and if he is prevented from doing so, he has a right to prosecute the

(q) S. 427 of the Ceylon Penal Code enacts: "Whoever enters into or upon property in the occupation of another with intent to commit an offence, or to intimidate, insult, or annoy any person in occupation of such property, or having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass."

person who remains in possession, provided he has one of the intentions provided for in S. 427 (of the Penal Code)." Thirdly, "notice can be given on any day in the month terminating the labourer's contract of service at the expiry of a month from that date," in other words, the month's notice given on the 7th April, 1939, expires on the day with the corresponding number of the next ensuing month. Fourthly, "a man is taken to intend the natural consequences of his act, and when a person is given notice to quit and does not quit and persists in staying, it is idle to contend that he did not intend to annoy" his employer. "There is no way of proving intention except by proving facts and circumstances from which one can infer it," and the labourer's intention to annoy the Superintendent can be inferred from his conduct. Fifthly, as the charge does say that the labourer remained in the line room to the annoyance of the Superintendent, the labourer could not have been misled in his defence. The omission to set out in the charge the particular intention with which Periannan remained in the line room is only a technical defect and does not vitiate on that ground the labourer's conviction.

The first proposition of law enunciated above rests on the view that an Indian labourer who is permitted to occupy a line room on the estate where he is employed does not become a tenant in respect of that room. Is the labourer's occupation of the line room that of a tenant?

We proceed to discuss this question with a sufficient appreciation of the circumstance that the conclusions which will be submitted in these columns may not be in accord with the decision of the Supreme Court in *Ebels* v. *Periannan*. If our conclusions are found to be untenable in law, the further intervention of the legislature will become urgently necessary to safeguard the interests of Indian labourers on Ceylon estates. Bonser C.J., who heard the appeal of an Indian labourer from a conviction for 'wilful disobedience of orders'—an offence punishable by the now repealed section of the Service Contracts Ordinance—expressed the view that the proceedings in that case bore the appearance of oppression. The learned Chief Justice remarked: "I do not wish to say anything which would encourage agricultural labourers to disobey the orders of their Superintendents, but, at the same time, when a man is prosecuted for a criminal offence, it must be shown that he had a criminal intent—in this case that the disobedience was wilful and was not due to an erroneous idea of his rights and duties" *(h)*. It is respectfully submitted that the case of an Indian labourer who refuses to vacate his line room after the termination of his employment on the estate is, very often, on a much better footing than the type of case which Bonser C.J. had in view.

(h) *Maclean* v. *Appan Kangany*, (1896) 2 N.L.R. 51, at p. 59.

THE HON. MR. J. C. HOWARD

Appointment as Chief Justice

The Hon. Mr. J. C. Howard who was appointed as Chief Justice in consequence of the retirement of Sir Sidney Solomon Abrahams sat on the Bench of the Chief Appellate Court on the 4th December, 1939. Mr. Justice Hearne, Mr. Justice De Kretser, Mr. Justice Wijewardene and Mr. Justice Cannon sat on the Bench with the new Chief Justice. The Court was crowded with lawyers and the members of the general public. A number of ladies occupied the Jury Box.

Mr. J. W. R. Hlangakoon K.C., Acting Legal Secretary, sat in the Inner Bar along with Mr. E. G. P. Jayatileke K.C., Acting Attorney-General, Mr. H. V. Perera K.C. and Mr. M. T. de S. Amarasekera K.C. After Mr. Guy O'Grenier, Registrar of the Supreme Court read the Letters Patent, Mr. E. G. P. Jayatileke K.C., Acting Attorney-General, addressing the Judges offered the Chief Justice the congratulations of the Bar. Mr. Jayatileke said :—

"May it please you, My Lord, it gives me genuine pleasure to be here today to offer to Your Lordship the warmest congratulations of the Bar on your appointment to the high and distinguished office of Chief Justice of this Island. I feel that the Bar of Ceylon has been honoured by your appointment for it was not so long ago that Your Lordship was its titular head. Your Lordship brings to the performance of your functions an experience not surpassed by that of any of your distinguished predecessors acquired as a practising barrister of the English Bar, as Law Officer and Judge in various parts of the Empire and above all, as Chief Law Officer and later as Legal Adviser to the Governor and the Ministers of this Island. As Legal Secretary you have by intimate contact with the judiciary gathered first-hand information of the administration of justice in our Courts. As an Officer of State you have by quite close association with all classes of people become familiar with the conditions prevailing in this country. These, My Lord, are advantages which must always stand you in good stead in discharging the duties of your high office.

The systems of law you will have to administer are not a few and some of them are complicated, but the legal problems that will confront you will not be new to you. At any rate, they cannot be as difficult as many a political problem you have been engaged in solving during the last few years.

My Lord, the responsibilities of the office of Chief Justice are great, but in the discharge of those responsibilities you will have the assurance that the support, goodwill and affection of the Bar will always be with you. Those who have come in contact with Your Lordship have not failed to be impressed by your sincerity, your kindliness of nature and disposition and your wide and sympathetic outlook. These, My Lord, are qualities that have won for Your Lordship the affection of the Bar and the public.

On behalf of the Bar I wish Your Lordship a long and happy tenure of office."

The Chief Justice in reply said:—

"Mr. Attorney, today I find myself in a different position from that occupied by my more immediate predecessors, who have been appointed by His Majesty to this high and responsible office. When they assumed office they arrived in Ceylon as strangers. They could, therefore, on receiving the customary welcome from the Bar only expatiate on the beauties of the country and state how fortunate they were to attain to a position which is generally regarded as the Blue Riband of the Colonial Legal Service. I, on the other hand, Mr. Attorney, do not come to this position as a stranger and whether this is a fortunate thing for Ceylon and for you and me I will not speculate. But at any rate on this occasion I am able to strike a more personal note.

It would be idle to pretend, Mr. Attorney, that I merit the encomiums that you have so lavishly bestowed upon me. You and Mr. Illangakoon the permanent Attorney-General and now Acting Legal Secretary, have now been associated with me for some considerable time, both in fair weather and foul and I should like to take this opportunity of thanking you for the loyal and able assistance you have at all times rendered in the elucidation and settlement of those difficulties which I am afraid always beset a Legal Officer of the Crown in Ceylon. In this connection I should like to pay a tribute to you and the members of your department, to the members of my own department and to the Legal Draftsman and the members of his department. Although our problems have been many and complex, no Legal Secretary could have had a more loyal, able and willing band of helpers.

Although I shall have nothing but pleasant recollections and memories of my official life during the last three years, I have no hesitation in saying that I welcome the change that this appointment brings in its train. It may be that temperamentally I am unfitted for a parliamentary life. Be that as it may, I am thankful to escape from the rough and tumble of politics with its eternal compromises to the serene atmosphere of the Supreme Court where the proceedings are conducted in a strain which we who are steeped in the best traditions of the English Bar understand and appreciate. Although I welcome my elevation to the Bench and look forward with pleasure to taking part in judicial life, when I tell you that I have not sat on the Bench since 1924, you will understand that it is not without some feelings of trepidation that I enter upon the arduous and responsible duties of my high office. I have, however, the comforting thought that I am surrounded by friends to whom I can turn for advice and assistance, friends whose friendship during the last three years I have learned to appreciate. Without that assistance from the Bar and from my brother Judges that I know I am to receive, I should enter upon my duties with nothing but gloomy forebodings.

So far as the courts and the administration of justice are concerned, I share and have always shared the views of my distinguished predecessor, Sir Sidney Abrahams. I believe that the sheet anchor on which the social life of a country depends is the impartial and speedy administration of justice by firm and courageous Judges supported by a Bar equally inspired with the same ideal. With this ideal in front of me, I consecrate in that cause what remains of my official life in Ceylon and in doing so I am comforted by the thought that the Judges and the

Bar are equally determined to assist me in attaining that ideal and carrying on the good work to which Sir Sidney Abrahams so ungrudgingly and with such devastating results to his health devoted himself during the past three years. The tenure of his office heralded an epoch of judicial reform. Those labours of his were not complete and it remains for me, with your assistance, to complete the work which he has left undone and in so doing ensure that the judicial administration in Ceylon may be so perfected that it will be a shining example to courts in other parts of the Empire.

Mr. Attorney, I realize that I have been appointed to an office with a great tradition, previously occupied by a most distinguished roll of eminent men. In tendering you my sincerest and most genuine thanks for the congratulations that you have showered upon me, I trust that with the help of the Bar and my brother Judges I shall in no uncertain fashion uphold the dignity of this office and leave untarnished the tradition that is entrusted to my keeping."

REVIEW

The Indian Limitation Act, 1908, by V. V. CHITALEY, B.A., L.L.B., and K. N. ANNAJI RAO, B.A., B.L. [All-India Reporter Ltd., Nagpur, 1939]. Three Volumes—Price Rs. 30/ nett.

We have perused with great interest Vol. III. of *The Indian Limitation Act* by Messrs. Chitaley and Annaji Rao, a copy of which was forwarded to us for review. This Volume contains the text of Articles 141 to 183 of the Act and exhaustive and clear commentaries of the respective sections. As in Vol. II. of the publication, each Article of the present Volume describes the nature of the suit, the period of limitation and the time from which the period begins to run. Articles 142 and 144, which deal with the important topic of possession of of immovable property are dealt with quite fully and this portion of the Volume will be found to be of particular use to the Ceylon lawyer.

The General Index appears to have been very carefully prepared and adds considerably to the usefulness of the publication.

CRIMINAL TRESPASS AND INDIAN LABOURERS—II

BY
K. SATIA VAGISWARA AIYAR
[*Advocate, Supreme Court, Ceylon.*]

Relation of an Indian Labourer with His Employer

The Indian Labourer on a Ceylon estate is a creation of the statute. His recruitment from India, his introduction to Ceylon, the terms and conditions of his employment on the estate and his return to his home are all regulated by Ordinances (*a*) and his occupation of the line room on the estate is an incident of the contract brought into existence between him and his employer by the said Ordinances. A correct view of the nature of his occupation of the line room is not, therefore, possible without a proper appreciation of the nature of his contract with his employer.

An Indian immigrant labourer is defined by the Indian Immigrant Labour Ordinance to mean : (1) "any Indian immigrant who comes to Ceylon on an agreement to perform unskilled work for hire in Ceylon" and (2) "any Indian immigrant who is assisted to come to Ceylon otherwise than by a relative, if he comes for the purpose or with the intention of performing unskilled work for hire in Ceylon" (*b*). An Indian immigrant means "any Indian who emigrates or has emigrated to Ceylon and includes any dependant of an immigrant (*b*). Unskilled work includes "engaging in agriculture whether as a kangany, sub-kangany or labourer" (*b*). Four matters become, therefore, clear. First, the work of an Indian immigrant labourer on an estate is "unskilled work"; secondly, the class of people known as kanganies and sub-kanganies, who by the custom of a century have held a patriarchal position among the labourers for whose recruitment they were generally responsible and who have by their thrift and industry risen considerably in the social and economic life of the community, are 'labourers' in the eyes of the law; thirdly, Indian immigrant labourers in Ceylon fall into two categories, *assisted* and *unassisted* labourers and, fourthly, an Indian immigrant labourer includes his dependant as well, namely, any woman or child who is related to him or any aged or incapacitated relative (*b*). Indian labourers working on Ceylon estates fall into the category of *assisted* immigrants, that is to say, assisted to arrive in Ceylon and get employment on the estate by the machinery provided by the Indian Immigrant Labour Ordinance of 1923.

(*a*) *Vide* Indian Immigrant Labour Ordinance, 1923, Ch. 111; Estate Labour (Indian) Ordinance, 1889, Ch. 112; Minimum Wages (Indian Labour) Ordinance, 1927, Ch. 114; Diseases (Labourers) Ordinance, 1912, Ch. 175; Medical Wants Ordinance, 1912, Ch. 176.
(*b*) Indian Immigrant Labour Ordinance, s. 24.

The Estate Labour (Indian) Ordinance, which was enacted in its present form as early as in 1889, provides Indian labourers with an inexpensive method of recovery of wages due to them from their employers. While specifying the class of people to whom this method is available, the legislature incidentally defined the nature of the Indian labourer's employment on an estate and his relation with his employer. A labourer, for the purposes of this Ordinance, means "any labourer and kangani (commonly known as Indian coolies) whose name is borne on an estate register" (*c*). This definition is strictly construed and persons who do not satisfy its requirements are not Indian labourers (*d*). The register which the employer is required by the Ordinance to maintain must show the names of 'all labourers employed on the estate whether borne on the check-roll or working on any form of contract' (*e*). The names of 'labourers employed under a monthly contract of service with the estate' are entered in the check-roll (*f*). A labourer may enter into a contract with the employer for the performance of work by the day or by the job or by the journey (*ff*). All labourers '*working on contract or other account, whether they work regularly or not*' are deemed in law to be 'in the employ of the estate' (*g*).

The language employed by the legislature in the Estate Labour (Indian) Ordinance is clearly indicative of the fact that the Indian labourer's employment on the estate, though it may, in the majority of cases, be a contract of *service*, may be a contract for *work and labour*. A contract of service is essentially different from a contract for work and labour. The employer, in a contract of service, not only directs the employee during the progress of the work, as to the work to be done, but also controls him as to the manner of doing it; while the employee, under a contract for work and labour, exercises his employment without being subject to such control by his employer (*h*). It will be conceded that Indian labourers employed on estates under contracts for work and labour—and their number is not inconsiderable—are not 'servants' in the legal sense of the term.

(*c*) Estate Labour (Indian) Ordinance, Ch. 112, S. 3.

(*d*) see *Carpen Kangany* v. *Simon Naide*, (1895) 1 Lead. 77; *Stone* v. *Madara Muttu*, (1905) Lem 43; *Festing* v. *Rodrigo*, (1915), 1 C.W.R. 237; *Sopia* v. *Navaratnam*, (1919). 1 Cey. Law Rec. 36.

(*e*) Estate Labour (Indian) Ordinance, S. 22.

(*f*) Ibid, S. 3.

(*ff*) Ibid, S. 5, by implication.

(*g*) *Vide* Proviso to Form 1 of Schedule B of Estate Labour (Indian) Ordinance.

(*h*) 28 Hals. Art. 1520, p. 862; 22 Hals. (Hailsham Edn.) Art. 191, p. 112. See also *Jayaweera* v *Simon*, (1913) 17 N.L.R 9 and other Ceylon cases summarized under the heading *Who are servants?* in Rajaratnam's *Digest* (1820-1914), pp. 1287 *et sequa*.

The majority of Indian labourers, however, are employed on estates on monthly contracts of service and their names are borne on the check-roll. It is significant that the contract is stated by the legislature to be 'a contract of service *with the estate*' (*i*) and not with the employer, which is suggestive of the inference that an Indian labourer's relation with his employer is not much the same as that between master and servant. The Service Contracts Ordinance, which consolidated and amended in 1865 the law relating to 'servants, labourers and journeymen artificers', explains that "the word 'servant' shall, unless otherwise expressly qualified, extend to and include menial, domestic, and other like servants, pioneers, kanganies, and other labourers, whether employed in agriculture, road, railway or other like work." (*j*). In view of this definition, Indian labourers were treated as 'servants' for the purposes of that Ordinance and became liable, till the abolition of the penal clauses of that Ordinance in 1921, to the penalties imposed by the Service Contracts Ordinance of 1865. Special legislation was introduced in 1871 to define the rights and liabilities of domestic servants (The Registration of Domestic Servants Ordinance, Ch. 115) and in 1912, to define the rights and liabilities of chauffeurs (The Chauffeurs Regulation Ordinance, Ch. 60). The Estate Labour (Indian) Ordinance was enacted in 1889 to amend in certain particulars the Service Contracts Ordinance of 1865 and to make more suitable provisions *in lieu of* those contained therein (*k*), for the purpose of consolidating the law relating to Indian labourers employed on Ceylon estates. Except when otherwise expressly provided by the later Ordinance, the provisions of the Service Contracts Ordinance of 1865, so far as they are applicable to monthly servants or their employers, are made applicable to Indian labourers employed on estates (*l*). It is submitted that, inasmuch as the Estate Labour (Indian) Ordinance expressly defines the nature of the labourer's employment on the estate and makes express provisions for the payment of wages due to him and the termination of the contract of employment (*vide* Ss. 5 and 6), the general provisions of the Service Contracts Ordinance in regard to these matters do not apply to an Indian labourer.

To summarize, the Estate Labour (Indian) Ordinance distinctly contemplates contracts other than those of service being entered into between employers and Indian labourers on estates and the relation of a labourer with his employer under such contracts is not that between a servant and a master. This Ordinance and the

(*i*) Estate Labour (Indian) Ordinance, Ss. 3 & 22.
(*j*) Leg. Enact., Vol. I., Ch. 59, S. 2.
(*k*) *Vide* Preamble, as it appears in the Ordinance when it was originally enacted.
(*l*) Ibid, S. 2.

Indian Immigrant Labour Ordinance enact provisions in regard to the formation of a contract of service between an Indian labourer and his employer, the duration of the period of service and the manner of its termination. The Minimum Wages Ordinance provides for a minimum wage for Indian labourers, while the Estate Labour (Indian) Ordinance furnishes the machinery for the recovery of labourers' wages. Though the relation of master and servant may exist in many cases between an employer and an Indian labourer, the latter is not 'a menial, domestic or other like servant' within the meaning of the Service Contract Ordinance.

CRIMINAL TRESPASS AND INDIAN LABOURERS—III

BY
K. SATIA VAGISWARA AIYAR

Is an Indian labourer's occupation of the line-room that of a servant or tenant ?

The Indian Immigrant Labour Ordinance of 1923 enacts that "no contract of service between an employer and an Indian labourer shall be deemed to be for a period longer than one month from the making of such contract" (*a*). This enactment repeals by implication the provision of the earlier Estate Labour (Indian) Ordinance of 1889 which permitted the creation of written contracts of service with Indian labourers for a period of time longer than one month (*b*). The latter Ordinance provides that an Indian labourer who enters into a verbal contract with his employer for the performance of work not usually done by the day, by the job or by the journey, or whose name shall be entered in the check-roll of an estate and who shall have received an advance of rice or money from the employer, shall, unless he has otherwise expressly stipulated, and notwithstanding that his wages shall be payable at a daily rate, be deemed and taken in law to have entered into a contract of hire and service for a period of one month, to be renewable from month to month. It is also provided that every such contract shall be deemed and taken in law to be so renewed unless one month's previous notice be given by either party to the other of his intention to determine the same at the expiry of one month from the day of giving such notice (*c*). The same Ordinance makes also provisions in regard to the payment of wages to Indian labourers and the manner of their recovery, if not paid as directed by the law (*d*). The Minimum Wages (Indian Labour) Ordinance of 1927 requires that Indian labourers shall be paid at the minimum rates of wages prescribed under that Ordinance and that they shall be paid for at over-time rates if they work for more than nine hours per day (*e*). None of these Ordinances, however, requires that Indian labourers should live in line-rooms built by employers within the borders of estates. There is no doubt a Rule made by the Governor under S. 32 (1) of the Medical Wants Ordinance, by which "it shall be the duty of every Superintendent to provide proper dwelling accommodation for his labour force and sufficient clearing around the lines, and proper drainage, to the satisfaction of the Director of Medical and Sanitary Services" (*e*1). But this is far from saying that the occupation of the line-room by the labourer is a *sine qua non* of his employment by the Superintendent.

It is a matter of common knowledge that such line-rooms are coeval with Ceylon estates. In "An Ordinance to provide for the Medical Wants of Coffee Districts" enacted in 1872, there is a reference to "coolie lines" on the estate and the Superintendent

(*a*) Leg Enact. Vol. III, Ch. 111, S. 20.
(*b*) Leg. Enact. Vol. III, Ch. 112, S. 7.
(*c*) Leg. Enact. Vol. III, Ch. 112, S. 5.
(*d*) Leg. Enact. Vol. III, Ch. 112, Ss. 6, 8, 9 *et sequa*
(*e*) Leg. Enact. Vol. III, Ch. 114, S. 3.
(*e*1) Sub. Leg. Vol. III, Rule 48, p. 120.

is required by that Ordinance to allow Medical Officers access to such lines. In 1880 a new Medical Wants Ordinance was introduced, primarily to satisfy the "medical wants of immigrant labourers in certain districts" and the duty was cast by that Ordinance on the Superintendent of the estate to "maintain the lines on the estate in fair sanitary condition." The consolidating Medical Wants Ordinance of 1912, which is in force now, kept intact this provision (*f*). The Diseases (Labourers) Ordinance of 1912 makes a reference to the fact that there are on estates "residential quarters of labourers" and that labourers may be "resident on the estate or otherwise." (*g*). The same Ordinance vests the Governor with power to condemn labourers' lines which are insanitary and order the reconstruction of such lines (*h*); while the Director of Medical and Sanitary Services is empowered to make rules for the proper construction, sanitation and maintenance of lines (*i*). It is to be observed that the present Medical Wants Ordinance and the Diseases (Labourers) Ordinance apply to both classes of labourers, immigrant as well as indigenous, and the Rules framed by the Director of Medical and Sanitary Services, under S. 12 of the latter Ordinance, regulate the construction, sanitation and maintenance of labourers' line-rooms in any part of the Island (*j*).

Many Sinhalese labourers have in recent times accepted employment on Ceylon estates and begun to reside in line-rooms (*k*). The Indian labourer as well as the Ceylonese labourer is permitted to occupy the line-room free of any rent so long as his contract of employment continues. We learn on reliable authority that, in a few estates, persons who are employed outside the estate are permitted to occupy line-rooms on payment of rent to the Superintendent of the estate.

We referred on a previous occasion to the "estate register" required to be maintained under the Estate Labour (Indian) Ordinance. The employer is required "to prepare and keep up to date a complete register of all labourers employed on his estate, whether borne on the check-roll or working on any form of contract." It is immaterial whether a labourer "works regularly or not" on the estate, but his name has to be entered in the register as soon as he is engaged by the employer (*l*).

The Indian Immigrant Labour Ordinance authorizes the cost of reception of labourers by their respective employers to be debited to the Immigration Fund (*m*). The Emigration Commissioner is required to "accept freely as dependents the wife and children of any duly accepted Indian immigrant labourer when such wife or children are not themselves accepted as labourers."

(*f*) Leg Enact. Vol. IV, Ch. 176, S. 12 (1).
(*g*) Leg. Enact. Vol. IV, Ch. 175, Ss. 3 & 10 (1).
(*h*) Leg. Enact. Vol. IV, Ch. 175, S. 9 (1).
(*i*) Leg. Enact. Vol. IV. Ch. 175, S. 12 (1).
(*j*) Sub. Leg. Vol. IV, p. 108.
(*k*) See Report of the Agent of the Government of India in Ceylon for 1938, p. 8.
(*l*) The Estate Labour (Indian) Ordinance, Leg. Enact. Vol. III, Ch. 112, S. 22, and Form I, Schedule B.
(*m*) The Indian Immigrant Labour Ordinance, Leg. Enact. Vol. III, Ch. 111, S. 13 (1) (*c*).

The Commissioner has the discretion to accept "other dependents accompanying duly accepted immigrant labourers and unfit for registration as labourers" (*n*). A dependent means "any woman or child who is related to an Indian immigrant or any aged or incapacitated relative of an immigrant" (*o*). In consequence of these statutory requirements, the line-rooms of estates are found to be occupied by Indian labourers actually employed on the estate or capable of being so employed and a large number of dependents of such labourers. The employer is obliged by law to make half-yearly returns to the Registrar General showing "the number of Indian labourers (whether born in Ceylon or not) on the labour force of the estate on the last working day of the preceding half-year", including "the sick coolies on the *actual labour force*" as well as the "number of *unemployed Indians on the estate* on the last working day of the preceding half-year, e.g. pensioners, old men, and old women unable to work, children below the working age, infants in arms, and other non-workers" (*p*).

Except for references to be found in the manner described above to the circumstance that there are line-rooms available on Ceylon estates to house Indian labourers, there is no provision in any of the relevant Ordinances regulating the terms on which the employer permits the Indian labourer to occupy the line-room during his employment on the estate. A Regulation made under Ss. 14 & 23 of the Indian Immigrant Labour Ordinance requires an applicant for a licence to recruit labourers from India to state in his application whether the wages offered to prospective recruits include *free housing accommodation or not* (*q*). One of the Emigration Rules of 1923 framed by the Government of India authorizes the Emigration Commissioner to supply to Indian labourers information relating to Ceylon and this Officer issues over his signature leaflets containing such information which are printed in English and the vernaculars of South India and distributed among Indian labourers before their recruitment. The offer is made in the said leaflet that "good houses of masonry with tiled or corrugated iron roofs are *generally* available for labourers *free of rent* on Ceylon estates" and that "some estates allow labourers to cultivate for their own use small plots of estate land and also give accommodation for labourers' goats or cattle" (*r*). The leaflet gives the warning, however, that labourers employed in the Government Departments at Colombo and other large towns are not provided with free houses, but that wages paid to such labourers are higher than the wages paid on estates. We may note here that the wages prescribed by the Minimum Wages Ordinance were based on the Ranganathan Budget (*s*) which was prepared on the footing that the employer allowed the labourer to occupy the line-room free of rent. The

(*n*) Regulation 7 under Ss 13 & 23 of Indian Immigrant Labour Ordinance, See p. 585, Sub. Leg. Vol I.

(*o*) Indian Immigrant Labour Ordinance, S. 24

(*p*) Schedule to Order made by Governor under S. 16 of Estate Labour (Indian) Ordinance. *See* p 594, Sub.Leg. Vol I.

(*q*) Regulation 2 of Regulations made under Ss. 14 & 23 of the Indian Immigrant Labour Ordinance *See* p 586, Sub. Leg Vol. I.

(*r*) Rule 17, Indian Emigration Rules, 1923.

(*s*) The Indian labourer's family budget prepared by Mr. S. Ranganathan, I.C.S., the first Agent of the Government of India in Ceylon.

minimum wage would have been higher but for the free line-room.

We shall now proceed to examine whether on the basis of the facts stated above relating to the housing of an Indian labourer on a Ceylon estate, his occupation of the line-room is as a tenant or servant. As TINDAL C.J. observed, "there is no inconsistency in the relation of master and servant with that of landlord and tenant" (*t*). The learned Chief Justice also pointed out that "whether, under a given state of facts, the legal relation of landlord and tenant exists is a question of law" (*u*).

We urged on a previous occasion the view that the relation of an Indian labourer with his employer is not always that between a servant and his master, inasmuch as many labourers are employed on estates under contracts for work and labour (*v*). It may be readily conceded that the occupation of the line-room by an Indian labourer falling within this category—whose contract with his employer is not, in the words of Cozens-Hardy M.R., a contract *of service* but *for services* (*w*)—has to be referred and is referable to a verbal contract impliedly created at the beginning of the labourer's employment, by which the employer agrees to allow the labourer the free and exclusive occupation of the line-room in consideration of the services which the labourer offers to perform for the employer. We have here the necessary ingredients of a contract of tenancy. "The party here", to quote the words of Lord Tenterden C.J., "occupies a house under a contract for a valuable consideration—namely his services—and he has therefore an interest in the premises" (*x*).

It is elementary that rent may be something other than money. Literally, it means a compensation or return made to the owner by the user or occupier of any kind of property (*x*1). In an Indian Tenancy Act, rent is defined as being "money, share of the crops, *service* or any other thing of value to be rendered periodically or on specified occasions by the tenant to the landlord in consideration of the enjoyment of immovable property" (*y*). Profits from employment, for the purpose of the income tax, include the rental value of any place of residence provided rent-free by the employer (*z*). In this view of the matter, the Indian labourer's income is made up of his wages under the Minimum Wages Ordinance and the rental value of the line-room occupied by him.

The majority of Indian labourers on Ceylon estates are employed under *contracts of service* and their names are entered in the check-roll of the estate (*a*). In regard to the occupation of the line-room by a labourer under a contract of service, the principle enunciated by Lord Tenterden applies with equal force. There are a number of other reasons also why the occupation of the line-room

(*t*) *Hughes* v *Overseers of Chatham*, (1843) 5 M. & G. 54 at p. 78.
(*u*) *Ibid*, at p. 63.
(*v*) See p. xiv, *Supra*
(*w*) *Wray* v *Taylor Bros. & Co., Ltd.*, (1913) 109 L.J. 121.
(*x*) *R.* v. *Langriville*, 10 B & C. 899.
(*x*1) Imperial Dictionary.
(*y*) Punjab Tenancy Act, No. 4 of 1882, S. 105
(*z*) Ceylon Income Tax Ordinance, S. 5 (2) (iii).
(*a*) *See* p. xv, *Supra.*

may be regarded in the labourer's capacity as a tenant. One way of putting the matter is to infer, at the time of the creation of the contract of service and its renewal from month to month, the creation simultaneously of a subsidiary contract of tenancy and its renewal in the same manner from month to month.

Even without going to the extent of suggesting the creation in the above manner of a subsidiary contract of tenancy, we may argue the case for tenancy on certain well-known principles of English law. In *Hughes* v. *Overseers of Chatham* (*b*), A, the master rope-maker in a royal dock-yard, had, as such, a house in the dock-yard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. If A had not had it, he would have had an allowance for a house in addition to a salary. It was held that A occupied the house as tenant. The observations of Tindal C.J. are well worth reproduction, in order to elucidate the tests by which the true character of the occupation of a house may be decided. Tindal C.J. said:—

> "A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and if he does so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration.
>
> But it may be, that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but required to occupy in the performance of his contract to serve his master. The settlement cases, cited in argument, established and proceeded on this distinction. We think it applicable to the present question; and as there is nothing, in the facts stated, to show that the claimant was *required* to occupy the house for the performance of his services, or did occupy it *in order* to their performance, or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his services; and, as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong.
>
> The case, indeed, stated that the claimant was master rope-maker, and *as such* had the house as his residence; but that expression is equally applicable, whether he was made tenant of the house in payment of his services as master rope-maker, or occupied it for the purpose of performing them."

The *ratio decidendi* of *Hughes* v. *Overseers of Chatham*, which was decided in 1843, has been consistently followed. Thus in *Smith* v. *Overseers of Seghill* (*c*), the question for decision was whether a collier occupied a house belonging to his employers in his capacity as a tenant or servant. He paid no rent for the house. He was not entitled to any notice to quit and it was contended that the

(b) (1843) 5 M. & G. 54 *Vide* note (*t*) *supra*.
(c) (1875) 10 L.R. (Q.B.) 422.

occupation of the house would cease at the time his service ceased. His employers had several houses and they filled these up with their workmen in their discretion. It was not absolutely necessary for a workman to live in one of the houses to perform his work. The Court held, on the authority of *Hughes* v. *Overseers of Chatham* (supra), that the occupation by the collier was not that of a servant, but that of a tenant.

Similarly, in *Reg.* v. *Spurrel* and *Walker* (*d*), Walker, a farming bailiff to Spurrel, occupied a cottage fifty yards or more from the farm house, but forming a separate and distinct tenement. Walker furnished the cottage with his own furniture and occupied it rent free, in part payment of his services. But for the cottage, his wages would be higher. The question was whether Walker was "a substantial house-holder." COCKBURN C.J., while arriving at the conclusion that Walker was such a householder, said:—

> "If the occupation of the servant be necessary to the service, then I think the occupation is that of the master, although the remuneration which the servant receives is the less on account of his having the advantage of a house of the master for the purpose of his habitation. On the other hand, if the occupation be not necessary to the service, then the fact that the advantage of the occupation is part of the remuneration for the service will not render that occupation less an occupation *qua* tenant, than it would have been if the man had paid rent. It may be that it happens to be convenient both to the master and to the servant, that the servant requiring some place of habitation shall, by agreement with the master, instead of receiving so much for his wages, out of which wages he would have to find himself a separate habitation, inhabit some premises of the master as part of the remuneration for his services; but it is only an equivalent for wages. He would be receiving in the one instance the whole amount of his wages, out of those wages he would have to find himself a habitation for which he would have to pay rent; in the other, he inhabits premises of his master, and instead of paying the master the rent, the master deducts it from the wages.
>
> Although, therefore, the relation of master and servant happens to exist between the parties by a subordinate arrangement, and the servant occupies premises of the master rent free, as part of the wages that he would otherwise receive if he paid the rent, it does not follow, from the relation of master and servant happening to exist between the parties, that the occupation may not be an occupation *qua* tenant, independant of the master. As I said before, the essential element in the determination of the question is, whether or not the servant simply occupies as part remuneration for his services, or whether the occupation is subservient to and necessary to the service."

The same principle was enunciated by BRETT L.J. in *Martin* v. *West Derby Assessment Committee* (*e*) where a superintendent of police for a county police division had as his quarters a house, which was rented for him by the county authorities. His rent was paid out of the police rates and the amount deducted from his

(*d*) (1865) L.R. 1. Q.B. 72.
(*e*) (1883) 11 Q.B.D. 145. C.A.

salary as superintendent. The house was liable to be examined and its fitness reported by one of Her Majesty's inspectors and to be used for purposes connected with the police force as the chief constable may direct. But no room in it was specially set apart for any other purpose than for the use of the superintendent and his family. The house was a quarter of a mile from the police station, within a convenient distance of which it was necessary that the superintendent should reside for the performance of his duty; and he was compelled to live in it as long as it was rented for him by the county authorities but he was liable to be removed from it at any time and from one police station to another. While holding that the superintendent was rateable to the poor rate in respect of such house, the learned Lord Justice stated as follows:—

"One can see plainly what is the nature of his occupation. He is a police man in the public employment of his county; and as a part of his remuneration he has what are called 'quarters,' i.e., he has the use of the whole of his house for the purpose of living in it with his wife and family; and no one else lives in the house, and he furnished it.....the meaning is that as a part of the remuneration he is to have exclusive use of the house for a residence. It is true that if the house is wanted for police purposes, he may be liable (not to have his family outraged by the presence of people at any moment or any hour), but to be removed to another house; but as long as this house is given him, it is his own exclusive house and is in his own exclusive occupation."

In *Marsh* v. *Estcourt* (*f*), certain labourers resided in cottages on the farms of the employers. They were permitted but not required to live in the cottages on the terms that they were to give up possession when the employment ceased. They were charged a a reduced rent or had the rent deducted from their wages. It was held on the above facts that the occupation of the cottages by the labourers was not by virtue of their services but as householders.

In *Dover* v. *Prosser* (*g*), a schoolmaster was permitted, but not required, by his employers to live in a certain house so long as he continued to hold the employment of schoolmaster. The Court had to decide whether the schoolmaster was entitled to have his name inserted in a list of voters for a particular division. LORD ALVERSTONE C.J., holding that the schoolmaster was entitled to do so, said:—

"The governing test in cases of this sort is whether or not the occupier of the premises in respect of which the claim is made, is required to occupy them either by the express terms of his employment or by the nature of his duties. If he is merely permitted but not obliged to occupy the premises so long as he performs certain duties, that is not an occupation by virtue of any office, service or employment."

The case of *Wray* v. *Taylor Bros & Co., Ltd.* (*h*), was that of a workman who was employed as a steel-tester and permitted by his employers to occupy a cottage adjoining their office on the

(*f*) (1889) 24 L.R. (Q.B.) 147.
(*g*) (1904) 1 K.B. 84.
(*h*) (1918) 109 L.T. 121. *Vide* note (*w*) *supra*.

terms of a written memorandum by which he agreed to be responsible for the cleaning of their offices and for other duties, in return for which he could live in the cottage, rent and rates free, with coal and light provided. The cleaning and other duties were performed by the workman's daughters. The Court held that the written memorandum was merely a tenancy agreement embodying a contract for services. Cozens-Hardy M.R. said:—"There was in fact a tenancy, the tenant to render service in exchange for the occupation of the house.....a contract of tenancy in consideration of services to be rendered." Swinfen Eady L.J. said in the same case:—"The motive for allowing (the workman) to occupy the cottage was that he was in the service, but, of course, it was not necessary for him to reside there."

As against the type of cases which we have so far considered, there is another type where the occupation of a house is clearly in the capacity of a servant. *Dobson* v. *Jones* (*i*) is a well-known example. Here a surgeon was required to reside in the hospital so that he might be enabled the more readily to perform the services required of him. It was held that the surgeon's occupation of quarters in the hospital was not that of a tenant. Tindal C.J., who delivered the judgment of the Court in the above case, instanced "the coachman who is placed in rooms of his master over the stables, the gardener who is put into the house in the garden and a porter who occupies a lodge at the park gate" as cases where the occupation was that of "servants merely, whose possession and occupation are strictly and properly that of their masters." In the *Petersfield case* (*j*) Mellor J. gave the example of a game-keeper who was required by the nature of his employment to live in the centre of his employer's preserves, where the occupation is that of the servant. It is so in the case of the shepherd in *Rex* v. *Bardwell (Inhabitants)* (*k*), who was allowed to occupy the house and garden for the more convenient performance of his service as shepherd.

We have thus far relied upon principles of English law for the determination of a question which, it has to be conceded, is governed by Roman Dutch law. The creation of the contract of lease and the relation between a lessor and a lessee in Ceylon are governed by Roman Dutch law. But certain principles of English law have imperceptibly crept into the Ceylon law of leases, eg., the action for use and occupation (*l*). Though the legal incidents of a lease or tenancy in Ceylon have to be decided by a reference to Roman Dutch law, we may very well have recourse to English law for the determination of the question whether the relation of landlord and tenant does exist or not in a particular state of facts. In *Patiraja & another* v. *Don Daniel*, (S.C. 18—C.R. Colombo 49968. S.C. Min. 1-7-1930. Unreported)* the facts were that a watcher was placed on the land to protect a plantation, maintain the wire-fencing and prevent cattle from damaging the plants. The watcher was paid Rs. 10/- a month as salary but he paid no rent for the

(*i*) (1844) 5 Man. & G 112. See also *Mahew* v. *Suttle & another*, (1854) 4 E. & B. 347; *Fox* v. *Dalby*, (1874) L R. 10 C.P. 285; *London & N W. Railway Co.* v. *Buckmaster & others*, (1875) 10 L.R (Q B.) 444; *Bent* v. *Roberts*, (1877) 3 Ex D 66

(*j*) (1974) 2 O'M. & H 94. (*k*) (1823) 2 B & C. 161.

(*l*) See *Perera* v. *Perera*, (1925) 6 Cey. Law Rec. 171.

* The writer is obliged to Mr. H. W Thambiah who cites this case in his treatise on *Landlord and Tenant*.

house which he occupied on the land. It was clear on the facts that the watcher was put into the house *in order that he might effectually perform his services* viz., the protection of the young plantation, as a watcher. E. W. JAYAWARDENE J. decided the case on the footing that the watcher was "a mere licensee." We have here the acceptance of the same principle on which *Dobson* v. *Jones* (supra), was decided. It might be argued that the decision in *Patiraja* v. *Don Daniel* would have been more consistent with the English law on the subject if it merely proceeded on the footing that the watcher occupied the house as a servant and not as a tenant. We shall revert to this matter while we discuss the difference between occupation of immovable property by a tenant, a servant and a licensee.

In *Patiraja* v. *Don Daniel* (supra), we have an acceptance by the Supreme Court of the principle that a servant may be required to occupy his master's house the more effectually to perform his services, while, in another instance, the occupation may not be for such purpose. It is submitted that this is the distinction which English law has evolved in the two types of cases to which we have already referred (*m*).

The principles of law governing the two types of cases may be summarized as follows:—"Where it is necessary for the due performance of his duty that a servant should occupy certain premises, or where he is required to occupy premises for the more satisfactory performance of his duties, although such residence is not necessary for that purpose, such person occupies in the capacity of a servant; but where a person is merely permitted to occupy premises, whether as a privilege or by way of remuneration or part payment for his service he occupies as tenant and not as servant" (*n*).

It is submitted that, on the strength of the authorities we have examined, the conclusion is irresistible that the occupation of the line-room in an estate by the Indian labourer is that of a tenant and not a servant. Firstly, it is not necessary for the due performance of his duties that he should occupy the line-room. Secondly, there is no legal requirement that the Indian labourer should occupy a line-room in the estate. Thirdly, he is not required by his employer to occupy the line-room for the more satisfactory performance of his work, though it may be convenient both to the employer and the labourer that the latter should occupy the line-room. Fourthly, the labourer's occupation of the line-room is not in any way ancillary to the performance of his duties. Fifthly, the labourer is merely permitted to occupy the line-room by way of remuneration or part payment for his services. Sixthly, but for the fact that the labourer is permitted to occupy the line-room free of rent, his wages will be higher.

It may be that the acceptance of the view that an Indian labourer's occupation of the line-room is in his capacity as tenant may lead to some practical difficulties. If the legal relation is nothing more than that of a servant, such difficulties must be recognized. In *R.* v. *Chestnut* (*Inhabitants*) decided in 1818, Lord ELLENBOROUGH C.J. held that the occupation of the labourer in that case

(*m*) *Vide* note (i) at p. xxiv *supra*.
(*n*) 20 Hals. Art. 186, p. 69.

was similar to that of a coachman who frequently occupies a room over the stables and that the labourer was divested of the tenement as soon as his service terminated. His Lordship the Chief Justice said in that case:—"If the Court should hold, in this and similar cases, that the legal relation of landlord and tenant subsisted, it would become necessary to turn such persons out of possession by the regular proceedings in ejectment, and every gentleman having twenty or thirty cottages in which his labourers resided would be compelled on any change of their services to have recourse to such means. This would be productive of the most serious inconvenience. Upon the whole view of this case, I think, it plainly appears that the relation of landlord and tenant never did subsist here." It is clear that, if the relation of the labourer in the above case was found to be that of a tenant, the possibility of serious inconvenience being caused to the employer would not have affected the decision of the Court.

It is submitted that *Ebels* v. *Periannan* (*o*), which is now relied upon freely in prosecutions of Indian labourers for criminal trespass, does not decide the question we have discussed. It was contended on behalf of Periannan that "he is a tenant of a room in the lines and that his tenancy of that room must be separated from his service and must be separately determined." The Court was invited to decide, in other words, whether Periannan's occupation of the line-room was as servant or tenant. His Lordship Mr. Justice DE KRETSER met this contention with the observation: "If the tenant is given a free room as part of his contract of service, it follows that when that contract is terminated everything that flows from it also ends." It is submitted that there is no decision here of the question in dispute. If the Court had decided that Periannan's occupation of the line-room was merely as servant, then on the authority of *R* v. *Chestnut* (*Inhabitants*) (supra) and the other English cases cited already, the termination of Periannan's contract of service terminates also his right to occupy the line-room. In the absence of such a decision by the Court, *Ebels* v. *Periannan* (supra), it is submitted, is no authority for the proposition that, on the termination of an Indian labourer's contract of service, his right of occupation of the line-room also comes to an end.

(*o*) *Vide* p. vi *supra* & p. 119 of the Reports.

REVIEWS

The Indian Limitation Act, 1908, by V. V. CHITALEY B.A., L.L.B. & K. N. ANNAJI RAO, B.A.B.L. [All India Reporter Ltd., Nagpur, 1938, 1939] Three Volumes – Price Rs 30/- nett.

We have pleasure in acknowledging receipt of Volume III of the Commentary on the Indian Limitation Act by Mr. V. V. CHITALEY, Senior Advocate of the Federal Court of India and Editor of the All-India Reporter and Mr. K. N. ANNAJI RAO, Advocate of the High Court of Madras. The learned writers of this Commentary need no introduction to the legal world of Ceylon.

Volume III of the Commentary deals with Articles 141 to 183 of Schedule I of the Act. Each Article describes the nature of the suit, the period of limitation and the time from which the period begins to run. The notes are carefully arranged and embody the principles enunciated by the various High Courts of India. The references to the decisions appear as foot-notes with the names of the cases added. As in the previous volume, there is at the end an enumeration of the various Articles dealt with and synopses of the Commentaries, which are set down in parallel columns, facilitating much the task of reference.

The Volume ends with a General Index which is very carefully prepared and admirably arranged. We hope that this highly useful publication will receive a generous support in Ceylon.

The Ceylon Law of Indictments and Crimes by R. R. CROSSETTE-THAMBIAH, Advocate. [The Associated Newspapers of Ceylon Ltd., Colombo, 1939.] Price Rs. 7/50.

Mr. Crossette-Thambiah modestly describes his attempt as a Note on "The Ceylon Law of Indictments and Charges", but it is easily very much more than a note. It consists of 2 Parts and 4 Schedules. In Part 1, the learned writer sets out the various sections of the Criminal Procedure Code relative to the drafting of criminal charges and, thereafter, enunciates lucidly the rules deducible from such sections. He next proceeds to illustrate by reference to local and English cases the applicability of the rules so enunciated.

Part 2 contains Specimen Charges in respect of the more important sections of the Penal Code, which Mr. Crossette-Thambiah has very skilfully re-arranged "so as to facilitate a clearer understanding of the scheme of the Code." Schedule 1 contains some Specimen Indictments; Schedule 2 contains Draft Charges under the Excise Ordinance, and the Poisons, Opium and Dangerous Drugs Ordinance; Schedule 3 sets out Draft Charges under the Tea and Rubber Control Ordinances; Schedule 4 refers to the question of Limitation of Criminal Prosecutions and Schedule 5 gives a brief note on three recent cases.

Mr. Crossette-Thambiah states that he "intended to assist those laymen who may be called upon, in the course of public duty, to prepare reports and charges for submission before Courts of law." He has certainly succeeded in achieving something more. His admirable book on an important branch of the Criminal Law is bound to be of help to persons other than laymen.

Crime and Criminal Justice by Abul Hasanat I.P. [The Standard Library, Dacca, Bengal, 1939] Pp. 915. Price Rs. 5/50.

Mr. Abul Hasanat, Superintendent of Police, Bengal, has in his CRIME AND CRIMINAL JUSTICE given a very clear outline of criminal sociology, criminology, penology, criminal jurisprudence and criminal investigation. Though the book is written with special reference to Indian conditions, it is of equal interest to Ceylon. Some chapters, for example, the one on "Machinery of Justice", apply as much to Ceylon as to India. Mr. Hasanat's plea for the introduction of public defence is ably made and deserves the serious consideration of those who are responsible for the administration of justice in the Island.

Sir Hari Singh Gour contributes a FOREWORD to the book and characterizes it as "extremely readable." He recommends it to "scholars and students who study problems of criminology in India and elsewhere."

Res Nullius: An essay on Property by I. S. Pawati M.A., L.L.B. [Published by the author at Hubli, India 1938.]

Mr. Pawati's essay on RES NULLIUS is a bold attempt to analyse and understand the legal conception of property. The learned author grapples with the accepted theories of ownership of property "in the hope that it may not be entirely profitless to know how the theories of the compositeness of the right of ownership and of the transferability of rights appear when a layman looks at law." In his analysis of an exceedingly difficult legal concept, Mr. Pawati draws from a broad field extending from the Vedas, on the one hand, and the Roman Jurists on the other.

THE COURT OF CRIMINAL APPEAL

First Sitting of the Court

In the presence of a large gathering of lawyers and members of the public, the Court of Criminal Appeal started functioning on Monday 3rd June, 1940.

The Hon'ble Mr. Justice Howard, Chief Justice, and Messrs. Justices Keuneman K.C. and Nihill K.C, who constituted the Court, mounted the Bench at 11 a.m.

His Lordship the Chief Justice addressing the Attorney General said:

I do not consider that the occasion of the first sitting of the Court of Criminal Appeal in Ceylon should be allowed to pass without a few words from me with regard to its establishment. The realization of the necessity for such a Court is not a matter of recent growth. For some time past the Judiciary, the Law Officers of the Crown, the Bar and those elements of political life who understand the real meaning of justice have appreciated the fact that without such a Court a link was missing in our code of judicial procedure. The matter has year in and year out been the subject of consideration by the Government but in spite of its urgency it had always been shelved on account of financial stringency. It gives me great satisfaction to think of the part played by you and myself, Mr. Attorney, in the political battle that was finally won in the cause of proper judicial administration. I consider myself fortunate that I occupy the position I do at the inception of this reform. I have no doubt, Mr. Attorney, that you also feel proud of the position you occupy on this occasion. It remains, however, for all those concerned in the administration of justice by our actions to ensure that the establishment of this Court is a real measure of reform and not merely an avenue whereby the guilty can escape from punishment duly merited by their crimes.

Mr. Attorney, the age is one of unbridled savagery in which freedom of thought and expression is in danger of being extinguished by a ruthless dictatorship aiming at world domination. Institutions which are a source of pride and beloved by free peoples are being trampled underfoot. In a large portion of the world the due administration of justice is the exception rather than the rule. In these circumstances, it is no small satisfaction to know that, at such a period, another milestone in the history of judicial reform in Ceylon is being passed by the establishment of this Court.

Mr. J. W. R. Illangakoon K.C., Attorney General, in reply said:

On behalf of the Bar, may I say how much we welcome the establishment of this Court which brings the administration of justice in this country into line with the systems of justice existing in the more advanced countries of the world. The procedure which existed hitherto of leaving it to the presiding Judge at an Assize Court trial or the Attorney General to reserve a question of law arising at the trial for the consideration of a Fuller Bench of Your

Lordships' Court could hardly be said to have been satisfactory, however conscientiously that duty may have been performed by those officers. A prisoner whose application to state a case was refused would invariably go away with a feeling that justice had been denied to him and deploring the absence of an Appellate Tribunal to which he could appeal more or less as of right. The establishment of this Court, My Lord, will not only be a welcome relief to those prisoners who have the misfortune to be convicted at a Supreme Court trial but also remove a great weight off the mind of the Presiding Judge and the Attorney General. Your Lordship has made a brief reference to the history attaching to the establishment of this Court. We are aware of the difficulties that had to be surmounted since the first proposal to establish the Court of Criminal Appeal in this Country was made in 1925 in the Legislative Council by the Hon. Mr. S. Rajaratnam. I do not think I should take up Your Lordships' time in dwelling on it. They are recorded in the Hansard in the speech delivered by Your Lordship the Chief Justice on the occasion when you, as Legal Secretary, introduced the Bill to provide for the establishment of this Court. It is very gratifying to us, My Lord, that Your Lordship who was principally responsible for the creation of this Court should be its first President. You were so convinced of the necessity of a Court of this kind in providing, as you stated, more efficient safe-guards for human liberty that you lost no time after your arrival in this country in 1936 to have the necessary legislation enacted for the establishment of this Court, with the co-operation of your predecessor, Sir Sidney Abrahams. My Lords, I had the privilege a couple of years ago to gain some acquaintance of the Court of Criminal Appeal in England. The feature that struck me most was the volume of business it got through at a single day's sitting. That Court sits as a rule every Monday during term time and also during vacations as the occasion demanded. About 20 to 25 different matters including appeals are got through in a day's sitting.

The Judges were able to do that for two reasons: firstly, because the Judges read up the papers before they came to Court and therefore there was no necessity for long addresses by Counsel explaining all the facts and circumstances of the case and, secondly, because Counsel thought it right to restrict themselves to the grounds of appeal of which notice had been given.

We have no doubt, My Lords, that a similar tradition will be built up in connection with our Court of Criminal Appeal here. It only remains for me, My Lords, to assure you that we will give you all such assistance as you may require to make this Court a success.

SOME PROBLEMS OF HANDWRITING EVIDENCE*

BY
LAWRIE MUTHU KRISHNA

"To every individual", wrote Lord Beaconsfield, "Nature has given a distinct sort of handwriting, as she has also given him a peculiar countenance, voice and manner."

Disraeli, it is true, was a statesman, rather than a scientist, but he has summed up in that little sentence the *raison d'etre* for the evolution of the science of handwriting examination and its widespread practice today, namely, the determination of personality immanent in handwriting, so as to classify, identify, or distinguish contested or suspect documents.

Those who suppose that the investigation of handwriting is a sort of pseudo-scientific cult recently developed in the West will be interested in the following quotation from the *Institutio Oratario* of Quintilian, written about A. D. 88:

> "It is, therefore, necessary to examine all the writings relating to a case; it is not sufficient to inspect them; they must be read through; for, very frequently, they are not at all such as they were asserted to be, or they contain less than was stated, or they are mixed with matters that may injure the client's cause, or they say too much and lose all credit from being exaggerated. We may often, too, find a thread broken, or the wax disturbed, or signatures without attestation; all which points, unless we settle them at home, will embarrass us unexpectedly in the forum; and evidence which we are obliged to give up will damage a cause more than it would have suffered from none having been offered."

Almost as old, or much older according to some, are the rules laid down for the scrutiny of documents by Indian law-givers and sages, such as Yagnavalkya, Narada and others, an extract from the writings of one of whom, as quoted by the erudite authors of an Indian treatise on hand-writing, is as follows: –

> "The correctness of a disputed or doubtful writing may be established by comparing it with something written by the party with his own hand, and the like; also by presumption, by confrontation of parties, by marks, by previous connection, by a probability of title and by inference."

do not know if in the ancient literature of this country there is any reference to the examination of disputed writings, but of one thing we may be sure, that, if the craft of forgery was unknown in Ceylon in early times, it is bound to spread in the times ahead with the rapid progress of a purely literary education, and the incidence of unfavourable politico-economic conditions which may possibly follow in its wake.

In a case before the High Court of Madras, when I stated that I had given evidence in a large number of handwriting cases in the Courts of this Island, I was asked whether forgery was something to which the people of Ceylon were specially prone, as comparatively few such cases came before the Madras Courts. I ventured the explanation that forgery

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* *A paper read by Mr. Lawrie Muthu Krishna before the Medico-Legal Society of Ceylon.*

We are indebted to Mr. Muthu Krishna for having supplied us with the text of his highly interesting paper.

was a kind of 'intellectual' crime which apparently tended to increase with the growth of literacy. But Mr. J. C. Adam, the Public Prosecutor of Madras, has a shrewder explanation to offer for the paucity of cases of forgery before the Madras Courts. The fabrication of Promissory Notes, he states, is so common in parts of that Presidency that the person whose signature is forged finds it easier to meet the false Note with a false receipt for payment, than to attempt to demonstrate its spuriousness. The infrequency of forgery cases in the Northern and Eastern Provinces of this Island is sometimes attributed to the same cause, but the authority for this statement seems to be apocryphal.

Reasons for the individualistic character of handwriting may be obvious to most people, but, for the sake of any who are uninitiated, I may venture to trace the cause of this distinctiveness.

It has been pointed out by several writers in the field of handwriting literature that, although a number of children may be seated in a row at a desk and instructed in the rudimentary exercises of copying letters written on the blackboard, probably no two of them will sit relatively to the desk in exactly the same way; no two of them will grasp and wield the pen alike, or place their manuscript books at precisely the same angle to themselves; no two of them will exercise the same pressure of the pen, or dip it in the ink-well the same number of times; and, in brief, no two of them will impart to their work the same measure of attention or the same quality of interest. The muscular organization of the hands of any two of them will not be identical, nor will there be the same degree of co-ordination in the flexure of their thumbs and fingers and in their general writing movements. As a necessary consequence, though attempting to copy standard forms under the same teacher, they will each develop a separate and distinctive style, and this will occur from the same causes which make them talk, walk, laugh, and even think differently. Convenience and comfort in the matter of posture while at work and in holding and moving the pen become important factors in establishing personal habit, and the varying muscular development in each person gradually asserts itself, and, influenced by innate artistic perceptions, the writing progressively assumes an individualistic effect. Thus, there come to be manifested in each person's writing peculiarities which cause it to differ in appearance, not only from copy-book standards, but also from the variations in form which every other person's writing exhibits when compared with these self-same standards. Once these habits are acquired and employed, they persist with the extent and frequency of writing falling to each person to do, and although there may be certain modifications due to any special or unusual conditions under which such writing is executed, the main characteristics will generally survive and be recognizable in a detailed examination of the writing. If the faculty of observation is adequately trained and intelligently directed, therefore, the many-inconspicuous, but nevertheless significant, features associated with one writing will be comparible with the features which mark another writing, and so assist such writings to be readily identified or differentiated.

An English script may, even at some distance, be instantly distinguished from a Sinhalese or a Tamil writing, but several different specimens of English writing may, at first sight, appear to be mere variations of the same hand, if they are the productions of persons of, more or less, the same age and education, schooled in the same style of pen-

manship in early life, and enjoying the same opportunities for developing their art and knowledge in the spheres in which they are subsequently employed. But these specimens whose general pictorial effect was so similar, will, on closer inspection, be found to contain many fundamental differences in the way of the comparative size and slope of the writing, the shape-formations of the letters, their alignment, spacing, angle, pressure, shading, speed, continuity, and embellishment, as well as in other important respects. An analysis of the results of a systematic investigation under these heads will undoubtedly show that the original impression of similarity in appearance of these documents was only illusory, and that, in the details of the construction of the letters and in the mannerisms involved in their production, any theory of their common authorship becomes untenable.

So far, I have very briefly touched upon the basic principles of the science. A word about its recent proliferations and its modern trend may not be without interest.

Psychologists and psychiatrists have developed the evidence of personality in handwriting to a fruitful field of experimental science. A pioneer in this direction who used the microscope and a slow-motion camera to detect minute idiosyncracies in handwriting asserts that a definite relation exists between the written word and the mental state of the writer. Morbid variations in handwriting, considered as prodromal symptoms of impending disease, have been studied now for several years. A new development in the extended application of this knowledge is the use of handwriting as an aid to the treatment of neurotic patients, on the principle that, as a person's handwriting is believed to change with the disintegration of his personality, the reverse hypothesis that, by changing his handwriting his personality can be readjusted, is being tested with encouraging results. Expressive microgestures, such as inordinately large letters, irrational spacing of words, undue pressure of the pen, frequent repetitions or omissions of letters, and other abnormalities of the same kind, are sought to be overcome by a form of re-education through regular handwriting exercise, the theory being that, by trying to write like a normal and sensible human being, the patient eventually tends to become one.

Far be it from me to attempt to diagnose from the hieroglyphics which ordinarily pass muster for their handwriting, any strange maladies to which some interesting folk among us may perhaps be subject, more especially because I am utterly ignorant of these new refinements of the science, and I should not wish to imperil myself by an action at law through trying to determine from such data the engaging deficiencies of their intellectual make-up.

My purpose here is not to undertake an exposition of the subject of handwriting examination, and I desire to leave over, for some future occasion, the discussion of the problems of handwriting investigation itself, as distinguished from the problems essentially connected with the presentation of the evidence relative to it.

According to an oft-repeated gibe, there are liars, damned liars, and expert witnesses. Fortunately for the calling I represent, it has not been suggested that those in the last category consist entirely of handwriting experts. As a matter of fact, in view both of the frequency and the sensational character of their appearances in Courts, I venture

respectfully to suggest that pride of place in the third group of humanity alleged to have no abiding interest in, or morbid passion for, the truth, should be given to medical witnesses. This surrender of privilege somewhat inverts the order suggested by a Greek philosopher who, when asked whether physicians or lawyers should have the precedence, oracularly answered: "Let the thief go ahead, and let the executioner follow!" Thus it has probably come about that, with the view of diverting suspicion from themselves, lawyers have adroitly held up to execration handwriting witnesses whose evidence has not supported the cases of their clients. Where, however, as has sometimes happened, the opinion expressed has been favourable, the eloquence of Counsel has striven to make the expert appear heaven-born, and his science providential, although, shortly afterwards, the same Counsel is ranged against him in a case on all fours with the other.

The vicissitudes of a handwriting expert's life are, therefore, many and moving; and, it is a few distressing problems arising out of them, chosen from a great variety and number relating to the presentation of his evidence, which I venture to place before you for your indulgent attention.

In the first place, this Cinderella of the Sciences is yet without a proper official christening, although its practisers unfailingly receive a baptism of fire! 'Grammapheny', 'Chirography', and 'Bibliotics' were some of the early names bestowed on the subject of comparative handwriting, but they are scracely found in modern lexicons.

'Graphology' has not fared better, as it has often come to be associated with a species of fortune-telling from handwriting by charlatans who have sought thereby to exploit human credulity for their own sordid ends. To the Prophet Muhammad is ascribed the saying, "Astrology may be true, but the astrologer is generally a liar", and, in the view of many, Graphology has the same drab trammels set to it. The claim that it can reveal character is, therefore, regarded sceptically by them, partly because they think some people have possibly no character to be revealed, or they have reason to fear the consequences of a too candid revelation, and partly because they believe Graphology deals more with the forms of writing, which may conceivably be fortuitous, rather than with the processes which are affected by factors susceptible of scientific study, research, and verification.

'Forensic Graphology', 'Psychological Graphology', 'Graphiology', and 'Graphometry' are other expressions which have not achieved popular usage and, consequently, the simple and forthright designation of "Handwriting Science" has been adopted to serve all practical purposes, although it unfortunately appears to exclude those important directions of investigation which have no necessary connection with handwriting as such, and which relate to typescript, paper, inks, pens, pencils, erasers, mucilage, stamps, watermarks, sealing-wax, and the like. For the sake of clearness and convenience, therefore, a handwriting analyst describes himself as an Examiner of Questioned Documents, and this compendious expression has elsewhere acquired fairly wide currency and approval.

Not so long ago, when I described myself as a Document Examiner, in preference to 'Handwriting Expert', I was mildly reproached for my supposed modesty; while, on another occasion, a luckless witness who sought to profit by my experience, and declared himself at once to be a

handwriting expert, was promptly rebuked by the judge on the ground that it was for others, and not for himself, to apply that description to him, if they thought it was deserved. There is thus no general agreement in Ceylon as regards the nomenclature applicable to the practice or to the practitioner of the science of handwriting examination, although, on the negative side, a judgment of the Supreme Court has pronounced against the admissibility of the evidence of one who elects to style himself a 'Graphologist', with or without any sort of artful qualification.

If often happens that a document is not false by reason of any spuriousness of the writing on it, but that there are other grounds on which it discovers itself to be fictitious when subjected to expert examination. In one case, for instance, a particular kind of paper on which a promissory note had been printed was found to have been imported into Ceylon long after the date borne by it. In another case, the old red six-cent stamp was used on a receipt which was dated a few months before the stamp was actually issued to the public. In still another case, a promissory note sued upon had the name of a printing press which was not in existence at the time the note was alleged to have been signed. In an insolvency case where the maker of three Promissory Notes consented to judgment on all of them, it was observed that there was an interval of one year between the first and the second of these Notes, and of eighteen months between the second and the third. It was proved that the stamps on all of them had come out of one block, and the Court held it was unlikely that, out of three stamps bought at one time, one would have been used at once, one kept and used twelve months later, and the third preserved for use thirty months afterwards. Similarly, there have been several cases where receipts bearing different dates and covering a wide period of time, were proved to have been torn out of a single sheet of paper.

The obtaining of helpful comparison standards where any writing itself is in dispute is a problem of some importance. It is doubtful whether an accused person can be compelled to incriminate himself by furnishing examples of his writing. But even where somebody voluntarily provides specimens of his writing, there is the possibility which has to be carefully guarded against that, either through fear or precaution, he will, unconsciously or wilfully, vary his writing.

Suitable standards are particularly necessary in the case of Sinhalese and Tamil writings, in view of the fact that the absence of any distinction between print and script and between small letters and capitals, requires a slight modification of the technique applicable to the examination of English writing.

Handwriting testimony is often looked upon as indirect evidence of a purely circumstantial kind, but it is a mistake to suppose that the evidence in every case of disputed handwriting is of an opinionative character. Possibly, in consequence of this heresy, there prevails the pestilential idea that every handwriting expert is willing to identify himself with the side which engages his services, and that, for a suitable consideration, he will be prepared to uphold or discredit any document, according to the necessities of the client's case. As an actual matter of fact, a recognized and responsible handwriting expert is really not retained, but consulted, and he does not adopt an opinion, but arrives at one through methods which are capable of satisfactory substantiation. For this reason, it is seldom that handwriting evidence partakes of the

character of purely opinionative testimony, as it must be obvious that a handwriting expert cannot, of his own will or caprice, interject into a writing features which are not there. What he undertakes is the analysis and evaluation of the writing in relation to comparison standards with which he is provided, and his processes are always capable of ocular proof. Such assurance as is unfairly imputed to handwriting experts may, perhaps, be occasionally exhibited by other classes of technical witnesses, such as, for example, a chemical examiner who cheerfully opines that a particular confection or medicament contains a tincture of ganja, when there is probably no test known to science which can justify such a finding. One can only suppose that witnesses of this description exercise the faith which St. Paul speaks of as 'the substance of things hoped for and the evidence of things not seen!' Unhappy creatures flung into prison on the ground that they have trafficked in prohibited articles of the kind I have indicated deserve, therefore, to have the broad-arrow on their backs replaced by a very emphatic note of interrogation.

The handwriting expert is able to point to facts which can be tested and criticised by every one present in Court. The inferences from such facts may be correct, or they may be incorrect, but, at all events, the testimony is of a demonstrable character, and does not merely issue forth from the expert's fertile imagination. The expert does not seek to arrogate to himself any pontifical status. Like everybody else, he may make honest mistakes. A readable little book on the "Mental Limitations of Experts" by Dr. Hankin, himself a noted chemical expert in India, induces the feeling that expert witnesses less often misdirect themselves than are misunderstood and misrepresented. On the other side of things, Arnold's *Psychology as Applied to Legal Evidence and other Constructions of Law*, Professor Bose's *Juristic Psychology*, and other well-known authorities contain devastating analyses of lawyers and even judges which suggest that they can be just as much mistaken as handwriting experts. Fallibility is, therefore, the common lot of all of us, however trite it may seem to say so, and any special discrimination against handwriting experts must consequently appear to be gratuitous. In a matter relating to midwifery or to navigation, for instance, or to surgery or ballistics, no Judge can reasonably be expected to come to a conclusion solely on the other evidence in the case, and to accept the opinion of a skilled witness who testifies before him only if his evidence happens to accord with the Judge's own finding Such a suggestion would, in fact, be the virtual negation of the use and purpose of technical testimony, for the employment of which the Evidence Act provides, because, Judges do not claim to be omniscient, and generally desire to avail themselves of the best possible evidence in regard to any matter in dispute, which lies outside the law.

But when it comes to documentary evidence alone, a Judge is invited, from the consideration of exclusively other evidence put forward to support a contested writing, to pronounce an opinion on the accuracy of the expert testimony, and to eliminate the expert if his opinion is anywise in conflict with the other evidence. At any rate, this appears to me to be an unescapable inference from the teaching inculcated by Sir Joseph Wood Hutchinson, at one time Chief Justice of Ceylon, who in a case about the third of a century old, stated as follows:—

"My own opinion—though I am, perhaps, prejudiced as to this by my belief that comparisons of handwriting are a very untrustworthy guide—is that the likeness and differences..... .....are of no value at all..... My own procedure certainly would be to make up my mind first, entirely uninfluenced by the expert's opinion, whether I was quite satisfied that the evidence for the plaintiff was true on the main points in issue. I should then be glad if the opinion of the expert agreed with my conclusion, though I should not be shaken if it did not. I have known too many instances in which experts' opinions as to identity of handwriting have been proved to be mistaken to accept them as anything more than a slight corroboration of a conclusion arrived at independently, never so strong enough as to turn the scale against a person charged with forgery, if the other evidence is not conclusive."

If these words signify anything, they appear to render farcical and unmeaning the calling of expert evidence in any matter where the Judge is resolved to arrive at a decision, not only without any reference whatsoever to such evidence, but also in spite of it. The effect of this pronouncement has been to persuade some judicial officers to go further even than Sir Joseph Hutchinson, and to claim propriety for the practice of deciding cases in which handwriting testimony is involved on the results arrived at by their own unaided discharge of the functions of a handwriting specialist, entirely unaffected by the trend of the expert testimony in the case. The following brief extracts from two judgments of High Courts in India, out of many in which the law journals of that country abound, indicate that this disposition on the part of some judges in Ceylon to undertake technical tasks which fall appropriately within the sphere of the specialist, has not elsewhere met with encouragement or approval. The first of these judments is as follows:—

"There is considerable danger of a miscarriage of justice when a Criminal Court relies on its own comparison of a disputed signature with another signature for purposes of determining its authenticity. It is usually desirable to obtain the opinion of an expert with regard to this."

And the second is like unto it in its explicitness:—

"It is true that the opinions of experts on handwriting meet with their full share of disparagement at times, but, at any rate, there is this use in their employment, that the appearances on which they rely are disclosed, and can thus be supported or criticized, whereas an opinion formed by a Judge in the privacy of his own room is subject to no such check."

In view of the *obiter dicta* of Sir Joseph Wood Hutchinson to which I have referred, the following decisions appear to furnish much food for thought:

In a case in which it was claimed that the rate of interest on a Promissory Note had been fraudulently altered from 8 to 18, the expert pointed out that the disputed numerals were different from the admitted figures in length, width, angle, pressure, alignment, and depth of nib-tracks, and that they also appeared to be in comparatively fresh ink of a colour different from that of the rest of the writing. On all these grounds it was submitted that there was justification for the assertion by the defendant that the disputed numeral had formed no part of the original writing. The Supreme Court, however, held that the material provided was insufficient, and that, therefore, the opinion could not be accepted.

In another case, the comparison standards of a deceased person's writing bore dates about three or four years prior, and subsequent, to that of the disputed document. Co-temporaneous writings are undoubtedly helpful for purposes of comparison, but, in the case under

notice, they were not available. It was remarkable, however, that the admitted writings, notwithstanding the wide interval of time between them had many striking characteristics in common which served definitely to identify them as the productions of one hand, while the impugned writing which, in chronological sequence, came between them, showed a complete absence of, and a departure from, these characteristics. On the ground of these mutually exclusive features which were quantitatively and qualitatively of great importance, the opinion was expressed that it was improbable that the admitted and disputed writings were of common authorship, but the Supreme Court held that the standards examined were not near enough in date to support the view expressed.

In another case, where a Government Officer was sued by a colleague in connection with a libellous communication he was said to have sent, the expert consulted by the defendant was of the opinion that, despite the disguise adopted, the writing was indisputably that of the defendant who though, later, admitting as much, naturally dispensed with the expert's further services. But the Court was so impressed by the superficial differences between the admitted and the suspect writings, that it dismissed the case for the plaintiff, and delivered a homily into the bargain on his attempt to implicate a fellow-officer in a false charge.

In a Last Will case, the opinion privately expressed was decidedly against the propounders of the Will, and the expert, was, therefore, not called. Another expert testified for the objectors, and his opinion was absolutely the same as that of the other expert. Parts of the impugned writing lay over the signatures of the attesting witnesses, instead of under them, and there were other startling defects which showed that a clearer and clumsier case of forgery never came before the Court in Ceylon. The District Judge held against the document, and directed that the record should be sent to the Police after the appealable time, for prosecution of the parties concerned in the fraud. But the Supreme Court admitted the Will to probate, and so paid a well deserved tribute to the skill and eloquence of the eminent Counsel who argued the appeal before that tribunal.

As I recall these cases and a good many others of the same kind, I begin to wonder whether, when the gods beside their nectar smile in secret at mankind, it is by expert witnesses alone the divine mirth is provoked.

As to the terms in which a handwriting expert should express his opinion, varying views prevail in Ceylon. In one case, an expert was not prepared to say anything more than that a certain signature was probably genuine. He was criticized on the ground that an expression of probability did not constitute expert testimony, and it was indicated to him that, if he was unable to swear definitely to the character of the writing, no weight could be attached to his evidence. The expert was unwilling to be positive, because he realized there were necessary limitations to scientific statements, if they had to remain scientific and acceptable. This attitude towards an expert who declined to be dogmatic may be contrasted with that of the presiding Judge in the notorious case of the *Bishop of Lincoln* v. *Archdeacon Wakeford*, in which Dr. Ainsworth Mitchell, a handwriting expert of international repute, was of the opinion that if the disputed writing was not that of the Archdeacon,

it was probably the work of a skilled forger. It was not possible. Dr. Mitchell submitted, to swear that any one had written any given piece of writing. All a conscientious expert could do was to point out the resemblance, and the differences in a case invested with any measure of reasonable doubt and difficulty, and to state what probable conclusions might be drawn from them. The Lord Chancellor, in the course of an interesting judgment, expressed his approval of this method of presenting the evidence, and remarked that that was the manner in which expert evidence ought at all times to be presented to Court.

The time at my disposal does not permit of my dealing with the problems of the literary aspect of a contested writing, and of the employment of a language in which the handwriting expert may not be skilled; of anonymous and pseudonymous communications; of obscene letters addressed by persons to themselves; of guided and assisted writings; of willing and grudging signatures; and of many other allied and incidental matters. But I must not fail to make some passing reference, at least, to the intriguing problem of personality in disputed document cases, not the 'personality' which is inherent in a writing, but which is occasionally associated with an impugned document, rendering it extremely difficult for handwriting evidence to be viewed and assessed in the way in which it is normally assessed and viewed when the questioned writing comes from impeachable custody, or is attested, witnessed, or supported by somebody who is not a well-known figure in society, or whose credentials are somewhat dubious or disputable.

In a Last Will case which aroused considerable interest some short while ago, it was shown that the writing attributed to the alleged testator was unusually firm and vigorous in appearance, although he lay in a, more or less, moribund condition at the time he was supposed to have signed it. Under a lens the impugned writing was found to be discontinuous, each letter having been laboriously built up with several strokes, frequently patched, repaired, and retouched. A bold attempt had been made to stimulate the monogrammatic form of the initials, but the sequence of strokes was hopelessly wrong. The fainter parts of the writing had been gone over a second time with a precision of eye and hand which could hardly have been possible to the dying man. A great many genuine signatures were available for comparison with the disputed signatures, and one of them, admittedly written a few days before death, showed the helpless way in which the deceased's hand had sought to reproduce the accustomed pattern of his signature, without the slenderest executive ability to transmit the mental image to the paper. The pen in that signature was clearly seen to have gone about 'doddering' all over the paper, unable to make a continuous contact with it. Yet, a few days later, on the eve of his death, when the patient had reached a grave and critical stage in his illness, and life was fast ebbing out, the impugned signatures were said to have been set in a manner which must have baffled medical knowledge as much as it flouted reason and commonsense. After a careful examination of the signatures, the District Judge held the Will to be a palpable forgery, both on the handwriting evidence and on the other evidence before him. The Supreme Court, however, reversed that finding, substantially, it would seem, on the ground that a Notary of several years' standing was unlikely to commit an offence of the kind with which he was sought to be charged.

I do not wish to comment on this case, but I may be forgiven for remarking that a handwriting expert, unlike the law sometimes, is not a

respecter of persons, and proof of this may be found in the motley procession of people in the highest and the lowest walks of life who have stood their trial for forgery for momentarily yielding to the temptation of setting with their hands the signatures not their own. Even in this country we cannot fail to notice how there stalks about, all round us, predatory plutocracy as well as predatory poverty, seeking to lay nimble fingers on other people's property, casting about for ways and means to fabricate muniments of title to it, and otherwise devising theftuous expedients for its misappropriation The conscientious handwriting expert inexorably applies the principles of his science to any writing placed before him, no mattar how august or abject the party suspect, and comes to a decision unawed by influence and unbribed by gain. He constantly realizes, what many people, amazingly enough, never do, that every case of forgery, from the dim beginnings of history, is usually bolstered up with rank and impudent perjury. A host of suborned witnesses called to prove a contested document, therefore, leaves the expert unmoved if he is convinced of its falsity. Time and again, in disputed Promissory Note cases, it is found that attesting witnesses hang together for the patent reason that they wish to avoid hanging separately. They must needs, therefore, fetch people from the far ends of the earth to testify to every detail of a picturesquely imaginary transaction. The general policy of the Courts is not to convict on the uncorroborated evidence of a handwriting witness in criminal cases, but Judges have a large discretion in civil matters, and can set at naught a cloud of testimony of an allegedly direct and positive character, if reasonable doubts assail them with regard to the genuineness of any document in dispute. But the human element in Judges is, I suppose, unable always to resist the volume and intensity, no less than the impressiveness, of direct evidence; more especially in view of the injunction received from high quarters that it is mainly on such evidence, and not on expert or technical testimony, that their decisions should be based. One fully recognizes that Judges have to administer justice according to law, and that they are not free to depart a hair's-breadth from the rules of evidence which at all times rigidly bind them. One consequently appreciates their difficulties in coming to any other conclusions than those to which they are constrained to come in certain types of cases. After all, the problems of handwriting testimony, regarded from the point of view of the expert, create for Judges, also, equally delicate problems of a nature and extent which cannot fairly be ignored. One can only confide the hope, therefore, that, with a wider and better understanding of the scientific principles on which handwriting examination is based, and of the data on which, and the care and scruple with which responsible document witnesses seek to present their evidence, judges and lawyers and handwriting experts will, from a mutual recognition of the contribution they must jointly make to the efficient administration of justice, co-operate in an informed and purposeful endeavour to approach Truth through the Gateway of Science.

THE LATE SIR THOMAS FORREST GARVIN

Warm Tributes by the Bench and the Bar

Sir Thomas Garvin, a retired Puisne Justice of Ceylon, died in England on the 19th June, 1940. Every section of the public of Ceylon received the news with profound sorrow. Fitting tributes to the memory of Sir Thomas were paid by the Press, the Bench and the Bar.

A very large gathering was present in the Chief Appeal Court on the 20th June, 1940, when th Chief Justice, the Hon. Mr. J. C. Howard, K.C., came on the Bench along with Mr. Justice Moseley, Mr. Justice Soertsz, Mr. Justice Keuneman and Mr. Justice Cannon.

The Inner Bar was occupied by Mr. J. W. R. Ilangakoon K.C., Attorney General, E. G. P. Jayatilleke K.C., Solicitor General, Mr. R. L. Pereira K.C., Mr. L. M. D. de Silva K.C., Mr. H. V. Perera K.C., Mr. N. E. Weerasooriya K.C. and Mr. A. R. H. Canekaratna K.C.

The Chief Justice addressing the Attorney General said: We are assembled here this morning to express our sorrow at the death announced in this morning's papers of Sir Thomas Garvin. I myself did not have the privilege of personal acquaintance with him and on this account feel that I am unable to do full justice to his unique qualities. I am, of course, familiar with every phase of his brilliant career. He was born in 1882 and was the son of Dr. T. F. Garvin, first Physician of the General Hospital He was educated at Royal College and was called to the Bar in England. In 1907, he started his career in Government Service as Third Crown Counsel, four years after his enrolment as an Advocate. In 1915, at the early age of thirty-four, he was appointed Solicitor General. Five years later he acted as Attorney General, and, after having acted in 1921 as a Puisne Justice, he was confirmed as a Judge of the Supreme Court in 1924. He acted as Chief Justice in 1926, 1930 and 1933. Four months after his retirement in February, 1935, he was knighted.

As a Law Officer of the Crown I believe Sir Thomas Garvin discharged his duties in a manner that reached the high standard set by those who have occupied these offices in the past. When he took his permanent seat on the Bench, he was fully equipped to undertake the duties and responsibilities of the highest tribunal of the land. He was regarded, I believe, as one of the most brilliant Judges to sit on the Supreme Court Bench of Ceylon. The law reports bear eloquent testimony to the manner in which he discharged his judicial duties. His judgments have played their part in the development of law in Ceylon and by their clarity of thought and expression impressed those who have read them with his superb intellect and the fact that he was fully endowed with all those qualities that are required for the responsibilities of high judicial office. In paying this tribute to the memory of Sir Thomas Garvin, I should like to express the sympathy of the Bench with Lady Garvin and his daughter in the loss that they have sustained.

Mr. J. W. R. Ilangakoon, Attorney General, said :—

May I, Your Lordship, on behalf of the Bar associate myself in this last tribute that has been padi to one of the greatest Judges that ever sat in this Court. The glowing tribute paid to Sir Thomas Garvin in this

very hall five years ago by the then Attorney General, Sir Edward Jackson, is still very vivid in our minds Sir Edward spoke of Sir Thomas' excellence in all spheres of life, as a law officer, as a Judge and as a citizen; and that in language which I cannot hope to emulate. He referred to the very high esteem and warm regard in which Sir Thomas was held by the public and by the profession. Your Lordship the Chief Justice has once more recalled to our minds Sir Thomas' meteoric career and his rise to eminence and distinction at a comparatively early age. It was a privilege of some of Your Lordships, as well as some of us at the Bar, to have been friends and colleagues of Sir Thomas from almost the very commencement of his professional career. That career, as Your Lordship has just pointed out, is a unique one indeed. It is unsurpassed in the legal history of this land. Within a few short months of his being called to the Bar, he built up a very large and lucrative practice as a result of his thorough mastery of legal principles, his natural felicity of diction and his charming personality. Before two years had expired after his call to the Bar, I remember that he was briefed to appear in one of the most sensational and intricate commercial cases that came up before our Courts. The stakes involved were high and the legal problems were very complex. He fought that case single-handed against the best talents at the Bar and it was in that case that Sir Thomas may be said to have won his spurs. From that time onward his abilities were universally recognized. The Government, too, My Lords, were not slow in recognizing his merits. For, within four years of his call to the Bar, he was induced to accept one of the senior Crown Counselships and was taken to the Law Officer's Department. As a Law Officer he was a tower of strength both to the Government and to his colleagues. The high traditions which he left behind him we still cherish in our department and we try to maintain them. Your Lordship has referred to the many capacities in which he served the public as well as the Government. As Judge, My Lord, he was full of understanding and sympathy and the quality of his justice was tempered with mercy but not with weakness. We who were in close contact with him marvelled at his unflinching courage when he was stricken by illness from time to time in consequence of his tireless energy and industry and the labours which are enshrined in our law reports and which afford a lasting record of his learning. That courage, My Lord, never deserted him and when I had the privilege of spending a day with him at his home near Brighton two years ago he was full of health and full of high spirits, although on that very day his doctor had once more informed him that his health was precarious and that his life hung by a thread. My Lords, Sir Thomas Garvin's name is sure of a high place in the history of our country. He was not only one of our greatest Judges and Advocates, but he was also a great Ceylonese gentleman. He was trusted, loved and respected by all communities. We sincerely mourn the loss, My Lord, of such a great man and in this sad hour our sympathy goes out to his relations who are mourning his loss and especially to Lady Garvin if not for whose tender care Sir Thomas would not have been spared to us for so long.

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REFERENCE AT THE ASSIZE COURT, KALUTARA

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Mr. Justice E. A. L. Wijeyewardene K.C., made a fitting reference to the death of Sir Thomas Garvin at the Assize Court, Kalutara, before

the work of that Court began on the 20th June, 1940. Addressing Mr. Douglas Jansze, Crown Counsel, His Lordship said:—

Before we commence the work for the day, I wish to make a reference to the sad news received this morning of the death of Sir Forrest Garvin in England yesterday.

Sir Forrest had a distinguished career in the Public Service of this Island. Early in life he was afforded an opportunity of showing his aptitude for official work when he was appointed a Crown Counsel within four years of his being enrolled as an Advocate. His promotion in the Government Service was rapid, and within eight years of his appointment as Crown Counsel, he became the Solicitor General of the Island. During that time he had as his colleagues in the Attorney General's Department two distinguished lawyers, Mr. M. T. Akbar and the late Mr. V. M. Fernando, both of whom subsequently became Judges of this Court.

Sir Forrest was the first Crown Counsel to be appointed as a permanent law officer of the Crown. Later he acted as Attorney General and became a Judge of this Court. He officiated a number of times as Chief Justice of the Island and retired in 1935 when he received the honour of a Knighthood. As a Law Officer of the Crown, he showed unrivalled independence. As a Judge he discharged the duties of his high office with grace, ability and distinction. As a man, he won the affection and regard of all who knew him.

Mr. Jansze, Crown Counsel, said:

May it please Your Lordship, it is my privilege, though a very junior member of the Bar, to associate myself with all that Your Lordship said on this sad occasion on behalf of the members of the Bar, but I think it is we juniors who have the most pleasant memories of the treatment which we received whenever we appeared before the late Sir Thomas Garvin.

It was unfortunate, My Lord, that he was compelled to retire at any early age depriving this country of his ripe experience and sound judgment. His career, My Lord, will always serve as an inspiration to us, members of the Bar, and if I may say so, as an example to his brother Judges.

It is sufficient for me to say, My Lord, that he was always held in the highest esteem, and his memory will always be regarded with the greatest affection.

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REFERENCE AT THE ASSIZE COURT, KANDY

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Mr. Justice Nihill, who presided at the Assize Court, Kandy, made an equally fitting reference to the death of Sir Thomas Garvin, before His Lordship adjourned Court on the 20th June, 1940. Addressing Mr. F. C. Loos, Crown Counsel, His Lordship said:—

I think, Mr. Loos, before I adjourn I should just like to say a word about the very sad news that was in this morning's newspapers about the death of Sir Thomas Garvin. I am sure that this is a matter for very great regret to a great many people in this Court this morning. I never myself had the privilege of knowing Sir Thomas Garvin, but I have had the privilege of reading very many of his very learned and lucid

judgments which appear in the law reports and from those judgments and from what I have heard generally I know that he was a Judge of outstanding ability in this Island, and I am sure that we all very much regret his death at a comparatively early age.

Mr. F. C. Loos, Crown Counsel, on behalf of the members of the Bar addressed the Court in the following words:—

It was indeed with very great regret that I too read of Sir Thomas' death this morning. I knew he had been ill for some time but I did not realize for one moment that his death would occur so soon. I would respectfully ask Your Lordship to direct that a copy of these minutes be forwarded to Lady Garvin with the deepest sympathy of the Bar.

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REVIEW

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The Civil Procedure Code (Act V of 1908) by V. V. CHITALEY, B.A., LL.B., Senior Advocate, Federal Court, and Editor, All India Reporter and K. N. ANNAJI RAO, B.A., B.L., Advocate, High Court, Madras. [All India Reporter Limited, Nagpur, 1940. Three Volumes—3rd Edition—Price Rs. 36/-, postage extra.]

The well-merited support given by the Bench and the Bar to the Commentary on the Indian Civil Procedure Code by Messrs. V. V. Chitaley and K. N. Annaji Rao has made it possible for the learned authors to bring out a 3rd Edition of the Commentary, in the preparation of which they are assisted by Mr. D. V. Chitaley, B.A., LL.B. Explaining the scope of the new Edition, the learned authors state in the Preface: "It is now five years since the last edition of this work was published, and during this period several changes have been introduced into the provisions of the Code by legislation. Further, the case-law has enormously increased, sometimes settling conflicts of judicial opinion which existed before, and sometimes giving rise to new conflicts of opinion. Under the circumstances, no apology is needed for bringing out this edition.

In the preparation of this edition the authors have not confined themselves to merely incorporating the subsequent case-law, but have examined all the old cases once again with a view to remove any defects that might have crept in. The legislative changes in the provisions of the Code and recent case-law have rendered it necessary to re-write many portions of the work, abridging the discussion where the point has been settled by authority, and fully discussing points about which a conflict of opinion has arisen. Beyond this, however, the method of treatment of the subject has not been departed from.

The case-law has been brought up-to-date. References to Official Reports are invariably given in all cases found in the Official Reports."

The usefulness of this popular publication is enhanced by the Appendices which include the text of the Indian High Courts Act of 1861, The Government of India Act, 1935, the Letters Patents establishing the various High Courts of India and the Rules of the Judicial Committee of the Privy Council and the Federal Court.

We have no doubt that the new Edition will find a cordial reception by the Bench and the Bar in Ceylon.

THE LATE MR. E. J. SAMERAWICKRAME K.C.

Tributes by the Bench and the Bar

We record with deep regret the death of Mr. E. J. Samerawickrame K. C. which occurred at his residence in Colombo on the 5th September, 1940, in the 64th year of his life. The news of the death of an eminent lawyer and distinguished citizen, which the late Mr. Samerawickrame undoubtedly was, evoked spontaneous tributes in honour of his memory from the general public, the Press, the Bar and the Bench.

In the Principal Appellate Court, on the 6th September, 1940, the Hon'ble Mr. J. C. Howard, Chief Justice, and Messrs. Justices Moseley, Hearne, de Kretser and Wijeyewardene mounted the Bench. In the presence of a large number of lawyers of both branches of the profession and members of the general public, Mr. J. W. R. Illangakoon K.C., Attorney General, addressed the Court as follows:—

"May it please Your Lordships,

We are assembled here this morning to pay our tribute of respect to Mr. E. J. Samerawickrame, the news of whose death reached us last afternoon.

Of the many distinguished lawyers this country has produced, the name of Edmund Joseph Samerawickrame will have the foremost place; and by his removal from our midst we feel that the country has been rendered immeasurably the poorer.

It was about 15 years ago, about a year after he had taken silk, that Mr. Samerawickrame was stricken down by illness which compelled him to abandon his practice in our Courts and to restrict himself to a chamber practice. That was at a time he was one of the leading and most respected Counsel at the Bar.

It could truly be said, My Lords, that he was consulted in every civil dispute of any importance during the last 30 or 35 years and in almost every important criminal case during that period. Such was the esteem and confidence in which he was held both by the public and members of the profession.

He was possessed, My Lords, in abundant measure of the many supreme qualities which go to make a great lawyer. He had an intellect, logical and well-disciplined. He had a sound grip of the fundamentals of the law and a gift, or a knack, of distinguishing between essentials and non-essentials and of readily reaching the kernel of a question. In addition to these and the other qualities, which have been so ably set out by the writers to the public press, he possessed a thorough and profound knowledge of the Roman Dutch Law of which he was one of the ablest exponents.

The most glittering prizes of the Bar were within his reach, some of which were offered to him, but he could not see his way to accept them owing to the nature of his illness which eventually resulted in the loss of his voice. We cannot help feeling that our law reports would have been richer by his judgments if his decision had been otherwise.

Besides being a distinguished lawyer, Mr. Samerawickrame was one of our foremost citizens. He took a deep interest in the political progress of the country not for any selfish reasons, but purely out of a love for his country. He was one of the pioneers of the great movement which started about 25 years ago led by such eminent men as the late Sir Ponnambalam Arunachalam, Sir James Pieris, H. J. C. Pereira and others in the reform of our constitution.

He was considered an authority on all political questions and his advice was sought and adopted by our leaders. Mr. Samerawickrame's outlook on political problems was very wide and being a man of vision he did his best to harmonize all differences.

By his death this country has lost one of its most precious sons. He did not belong merely to his family or to his friends or to the Bar, but he belonged to the whole country.

Lastly, I may be allowed to allude to the charm and cheerfulness of his manner. He was extraordinarily cheerful without a particle of arrogance and had an overflowing kindness of heart. He was the most unassuming of men, a fine gentleman, a devout Christian, a steadfast friend. No friend of his who needed help or sympathy was disappointed and though he is gone away he yet lives in our hearts and the story of his life will be an example and an inspiration to us.

I wish, My Lords, on behalf of the Bar, to express our condolence with his wife who is widowed, his children and his other relatives."

His Lordship, the Chief Justice, said :

"Mr Attorney,

On behalf of my brother Judges and myself, allow me to say that it is with profound regret that we have heard of the death of Mr. Samerawickrame. We desire to associate ourselves most closely with the well-merited tributes which were paid to his services and to his career. We should also like to tender our sincerest and deepest sympathy to the members of his family in the great loss that they have sustained.

Unfortunately for myself, I did not enjoy the acquaintance of the late Mr. Samerawickrame. I, therefore, thought it fitting and only right and proper that on an occasion like this I should ask one of my fellow Judges who did enjoy that acquaintance to say a few words in his memory. I would, therefore, ask my brother de Kretser to say a few words.

Mr. Justice O. L. de Kretser then said :

"Mr, Attorney,

You have paid a fitting and eloquent tribute to the late Mr. Samarawickreme and you have said most of the things which I would wish to say ; only you have said them very much better than I could say.

When I joined the Royal College, Mr. Samerawickrame was then a senior student. I am sure we old Royalists are very proud of the fact that he belonged to us.

When I joined the Bar, he was about 6 or 7 years in standing. He was a junior, but already a distinguished junior, one to whom the senior members of the Bar did not hesitate to refer for assistance on knotty

points of law. As you know, his reputation grew and grew and there was nobody in later years whose advice was more valued whether by the public or by his fellow members of the Bar or by the Judges than Mr. Samerawickrame.

You have alluded to the loss which this Bench suffered in not being able to avail itself of his services, but I think you will agree that, although he did not write judgments, his learning appears in many of the judgments which this Court has delivered.

He will always be remembered as a distinguished lawyer but he will be remembered for much more; for he was a man of many parts. As you have said, he took an interest in the progress of the country. Not only he wrote to the papers giving his views but his advice was sought and given to our political leaders and, as you have said, they were acted upon. Perhaps one of the best qualities he had was that he was able to advice in a dispassionate way not being influenced by any personal considerations.

He was a loyal member of his Church. He will be remembered in all those lines, but he will be remembered mostly by some of us for his very charming personality. There was something every endearing about him. One did not come into contact with him without feeling drawn to him and, I think, when we learnt of his affliction many of us felt a personal grief and now that he is dead, I think we feel a sense of personal loss. If that is our feeling we can understand what must be the feelings of those who are nearest and dearest to him. It is fitting that we should, therefore, express our sympathy and I count it a privilege that His Lordship the Chief Justice has asked me to speak on this occasion. I associate myself very heartily and really with all that has been said both by you and by His Lordship."

THE LATE MR. H. A. P. SANDARASAGARA K.C.

Tributes by the Bench and the Bar

The death of Mr. H. A. P. Sandarasagara K.C., which occurred at his home in Jaffna on the 12th September, 1940, was regretted deeply by the Bar, the Bench, and the general public of Ceylon.

In the principal Appellate Court, on the 13th September, 1940, the Hon'ble Mr. J. C. Howard, Chief Justice, and Messrs. Justices Moseley, Hearne, De Kretser and Wijeyewardene mounted the Bench to pay their tributes to this distinguished member of the Bar. In the presence of a large number of lawyers of both branches of the profession and members of the general public, the Attorney General, Mr. J. W. R. Illangakoon K.C. addressed the Court as follows:—

" May it please Your Lordships,

Death has been busy amongst us, My Lords; it is only last Friday that we were assembled in this hall to pay our tribute to the memory of the late Mr. E. J. Samerawickrame, and now we have learned with deep regret the passing away at Jaffna of our distinguished King's

Counsel, Mr. H. A. P. Sandarasagara. As lawyers, My Lords, the two belonged, if I may so put it, to two different schools. Mr. Sandarasagara gained distinction at a very early age as a successful criminal lawyer, having won his spurs at Jaffna. He transferred his practice to Colombo, and I believe he did this on the advice of the Judges before whom he practised and who thought that his powers of advocacy should be made available to a larger field.

Though, My Lords, the Bar is the most speculative of all professions, Mr. Sandarasagara soon built up a very large practice throughout the country and won popular affection as a distinguished criminal lawyer. He was possessed of a charming personality and was gifted with a natural eloquence of a high order and a ready wit. These qualities enabled him to gain a considerable number of triumphs before juries and he rightly deserved them. He was, My Lords, very chivalrous towards his opponents and was generous towards the Junior Bar in whom he always took a keen and abiding interest. He presided during a short period in Your Lordships' Court as a Commissioner of Assizes, but his name will best be remembered by us for the gallant and straight fights he used to put up in defence of human liberty.

My Lords, on behalf of the Bar, I should like to express to his widow and children our very deep sympathy."

The Hon'ble the Chief Justice in reply said :—

"Mr. Attorney, as you have pointed out, it is sad to reflect after such a short interval, we are once more assembled here to pay a tribute to a distinguished leader of the Bar. May I say, on behalf of my fellow Judges and myself, we should like to associate ourselves with the well merited tribute that you have paid to the career and services of Mr. H. A. P. Sandarasagara K.C. In that connection, my brother Judges and myself like to tender our deepest sympathy to the relatives of Mr. Sandarasagara over their great loss.

My acquaintance with Mr. Sandarasagara has been very brief and under these circumstances I would like to ask my brother de Kretser who had the benefit of a long acquaintance with Mr. Sandarasagara to say a few words."

Mr. Justice de Kretser said :

"Mr. Attorney, it is once again my privilege to pay a tribute to a departed member of the Bar. As you have remembered, Mr. Samerawickrame whose loss we mourned last Friday was in many respects, not in all respects, different from Mr. Sandarasagara whose death we deeply regret. Mr. Sandarasagara was a brilliant lawyer. He had a happy knack with the Jury. He was not too ponderous and did not indulge in oratory, but his sensible arguments and little jokes appealed very much to the Jury. He had considerable triumphs. I think he will always be remembered as a brilliant criminal lawyer. In other fields too, he arrested attention. Outside the Courts he was always joyous, very good company, always generous and sympathetic. In fact one wonders whether he would not have done better had he taken his work more seriously. Undoubtedly we have lost a very great lawyer. Undoubtedly we shall miss him, but we shall always have happy memories of a person who was very good company and a good friend. I am sure it is with real regret we learnt of his death. I should like to associate

myself with both what you have said and what His Lordship the Chief Justice said to render the widowed lady our sincere regrets."

Reference made at the Jaffna Assize Court.

Before the work of the day commences on the 13th September, 1940, and in the presence of a large gathering of both branches of the profession and the public, Mr. Douglas Jansze, Crown Counsel, addressed the Hon'ble Mr. Justice Nihill, who presided at the Assize Court of Jaffna, and said :

"May I have Your Lordship's permission, My Lord, to make reference to a sad event. I refer, My Lord, to the death of Mr. Sandarasagara, K.C., who retired recently after an extensive and successful practice at the Bar, not only in Your Lordship's Court but in the other Courts of the Island as well.

Mr. Sandarasagara passed out in the year 1898, and practised his profession for about 10 or 12 years in Jaffna where he had a large practice both on the criminal and civil sides. He then proceeded to Colombo where his position at the Bar was recognized by his appointment as Commissioner of Assize but it was unfortunate that owing to ill-health he was unable to continue as such. I cannot speak of Mr. Sandarasagara with the same knowledge as the senior members of my profession, but I can say that his masterly command of the English language, his ready wit, and his fearless advocacy earned for him the admiration of all. His presence was always welcomed in Colombo, and it was not unusual to find him seated in the Law Library with a number of the members of the Bar collected round him.

It is proper, My Lord, that this reference should be made here in Jaffna, today—his land to which he returned in his retirement. The public of Jaffna mourns today the loss of one of her most talented sons.

May I ask Your Lordship to be pleased to direct that a copy of these proceedings be sent to his widow."

The Hon'ble Mr. Justice Nihill, said :—

"Mr. Crown Counsel,

You have brought to my attention this morning the sad news which I knew already of the death of Mr. Sandarasagara K.C. It is probable, I think, that reference will be made to his passing away in the Supreme Court at Colombo this morning but at the same time, I entirely agree with you that it is fitting that reference should be made to his death in the Assize Court at Jaffna.

Mr. Sandarasagra was a very brilliant son of Jaffna, and he has passed away in his native city. It was not my privilege to have met Mr. Sandarasagara, but I have heard of his brilliant advocacy, and I know that he was one of the most brilliant sons of Jaffna, and that he was an ornament to the legal profession. We mourn this morning the passing away of an able King's Counsel.

I direct that a copy of these proceedings be sent to his widow with whom, I know, you and the members of the Bar are in deepest sympathy."

REVIEWS

Landlord and Tenant in Ceylon, by H. W. TAMBIAH, B.Sc., LL.B. (Lond.), Advocate and Lecturer and Examiner to the Council of Legal Education [Ceylon Law Recorder, Colombo, 1940: Price Rs. 7/50.]

The late Mr. Justice Walter Pereira deplored in 1904 the defused state into which the law of Ceylon had drifted and attributed this circumstance to the uncertainty in matters concerning civil rights. Whether the position has changed today or not, the necessity has arisen for the production of suitable treatises on various branches of the civil and criminal law of Ceylon. The law of Landlord and Tenant is a very important branch of the civil law and we heartily congratulate Mr. H. W. Tambiah for having written an excellent monograph on a subject of everday importance. In method of approach, arrangement of subject-matter and exposition of principles, the book has attained a very high standard indeed and we have no doubt that Mr. Tambiah's scholarship and industry will receive due recognition from both the Bench and the Bar.

The Hon. Mr. A. E. Keuneman has written a short Foreword to the book and has thereby enhanced its value.

A Digest of Cases, 1936-1940, by V. S. SIVAGURUNATHAN, Proctor, S.C., Colombo.

This *Digest* is a continuation of Rajaratnam's *Consolidated Digest*, 1914—1936, and includes cases reported up to the 3rd April, 1940. Besides bringing Rajaratnam's *Digest* up-to-date, the Compiler gives numerous cross references to the cases included in that *Digest*, making the volume exceedingly useful to those who already possess Rajaratnam's *Digest*.

The new *Digest* is priced at Rs. 6/75 and may be had from the Compiler at No. 282, Dam Street, Colombo

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END OF VOL IV, JOURNAL.

THE CEYLON LAW JOURNAL REPORTS

VOL. IV—1939-1940.

USOOF JOONOOS *v.* I. L. ABDUL KUDNOOS [D.B.]

[SOERTSZ A.C.J., DE KRETSER AND WIJEYEWARDENE JJ.
S.C. No. 159 (Inty.)—D.C. COLOMBO No. 47499.
JUNE 19, 20 & JULY 3, 1939.]

Order for costs against administrator—Is defendant in whose favour the order was made entitled to seize the property of the intestate in execution of his decree for costs?—Civil Procedure Code, S. 474.

Section 474 enacts: "In every action brought by an executor or administrator in right of his testator or intestate, such executor or administrator shall, unless the Court shall otherwise order, be liable to pay costs to the defendant in case of judgment being entered for the defendant, and in all other cases, in which he would be liable if such plaintiff were suing in his own right upon a cause of action accruing to himself; and the defendant shall have judgment for such costs, and they shall be recovered accordingly."

The defendant executed his decree for costs against the second plaintiff, administrator of the estate of the deceased by siezure and sale of the property of the intestate. The District Judge set aside the sale on the ground that the property of the intestate was not liable to be sold in execution of the decree.

HELD that, under S. 474 of the Civil Procedure Code, an administrator is personally liable for costs and that the property of the intestate is not liable to be seized and sold under a decree for such costs.

Per SOERTSZ A.C.J.—"In our view section 474 enables a Court to exempt an executor or administrator from personal liability for costs and to make an order that costs shall be paid out of the estate, but that, of course, is a power which a Court will exercise in appropriate cases where all the parties interested in the estate are before it. But where a Court does no more than say that a plaintiff executor or administrator shall pay the defendant's costs, the estate of the deceased is not automatically involved in that order. In such a case the administrator or executor is personally liable to pay the costs. He may later in proper proceedings seek to be reimbursed out of the estate."

Followed:	*Edirishamy v. de Silva*, (1896) 2 N.L.R. 242	(2)
Referred to:	*Nugara v. Palaniappa Chetty*, (1911) 14 N.L.R. 327 ...	(3)
	Nanayakkara v. Juan Appu, (1920) 21 N.L.R. 510 ...	(4)
	Fernando v. Fernando, (1916) 3 C.W.R. 328	(5)
Over-ruled:	*Nonnohamy v. Podisingho*, (1922) 23 N.L.R. 319 ...	(1)

A reference by SOERTSZ A.C.J. & MOSELEY J. to a Divisional Bench of an appeal from an order made by R. F. Dias Esq., District Judge of Colombo, setting aside the seizure and sale of the property of an intestate in execution of a decree for costs against the administrator of the estate.

C. Thiyagalingam, with him *E. B. Wickremanayake* and *S. Mahadeva*, for defendant-appellant.

S. J. V. Chelvanayagam, with him *A. Muttucumaru*, for 2nd plaintiff-respondent.

SOERTSZ A.J.C.—The short point referred to us for decision is whether the property of an intestate is liable to be sold on an order for costs made in favour of a defendant against a plaintiff acting in right of the intestate in the capacity of an administrator.

My brother Moseley and I referred this question to a Divisional Bench not because, we ourselves had any doubt in regard to it, but because in view of the conflict between earlier decisions on it, an authoritative ruling seemed desirable.

In *Nonnohamy* v. *Podisingho* (1), ENNIS and PORTER JJ. held that section 474 of the Civil Procedure Code only provides an *additional remedy* against the executor or administrator personally, and that it is open to the defendant to seize the property of the testator or intestate in execution of his decree for costs. ENNIS J. sought to distinguish the case before him from the case of *Edirishamy* v. *de Silva* (2), but so far as I understand the earlier case, it is a direct authority on the point that arose in the case before ENNIS and PORTER JJ., and that arises now in this case. In that case, BONSER C.J. and LAWRIE J. held that on an order for costs made against an executrix, she was personally liable and and the 'Fiscal therefore could not sell or the petitioner buy more than the personal interest of the executrix.' He also said "the English Law does not allow a defendant to recover his costs from the estate of the deceased.....and in my opinion that law should govern this case." The case before BONSER C.J. was one in which the sale occurred prior to the passing of the Civil Procedure Code, and commenting on the fact, the learned Chief Justice said that "since the passing of the Civil Procedure Code," it was clearly the law that an administrator was personally liable for costs "for section 474 expressly provides in the case of an action brought by an executor or administrator in the right of his testator or intestate, the plaintiff is to be liable as though he were suing in his own right upon a cause of action accruing to himself and the costs are to be recovered accordingly." We respectfully agree with that view which, in our opinion, is the correct interpretation of section 474 of the Civil Procedure Code.

Counsel for the appellant was at great pains to emphasize that under the Roman-Dutch Law the estate of a deceased person was liable *qua* estate for costs resulting from litigation undertaken by an executor

or administrator. That, however, is a proposition we were always willing to concede, subject to the qualification that the litigation was undertaken *bona fide*. But we are unable to follow him when he deduces from the liability the further proposition that whenever an order for costs is made against an administrator or executor, the judgment creditor is entitled *ipso facto* to take out writ and sell property belonging to the estate. In our view, section 474 enables a Court to exempt an executor or administrator from personal liability for costs and to make an order that costs shall be paid out of the estate, but that, of course, is a power which a Court will exercise in appropriate cases where all the parties interested in the estate are before it. But where a Court does no more than say that a plaintiff executor or administrator shall pay the defendant's costs, the estate of the deceased is not automatically involved in that order. In such a case the administrator or executor is personally liable to pay the costs. He may later in proper proceedings seek to be reimbursed out of the estate. In the sixth edition of Daniell's *Chancery Practice*, Vol. II. part 1, at page 1175, it is stated on the strength of a number of judicial decisions that "the general rule which gives the costs of the suit to the victorious party and throws them on the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit*, and to those in which they are *sui juris*."

In the case of *Nugara* v. *Palaniappa Chetty* (3), LASCELLES C.J. and MIDDLETON J. held that an executor or administrator who is on the record as plaintiff or defendant is liable personally for costs in the same way as any other person, and "that the question whether he is entitled ultimately to recover the amount of the costs which he is ordered to pay from the estate is a totally different matter." In *Nanayakkara* v. *Juan Appu* (4), BERTRAM C.J. and DE SAMPAYO J. followed the ruling in *Nugara* v. *Palaniappa Chetty* (supra) and added, "the fact that a judgment debtor has a right of indemnity against a third party does not entitle a judgment creditor to sell the property of that third party under a judgment against his debtor. An order of Court is clearly always necessary where it is sought to make the assets of such a third party available." In an earlier case, *Fernando* v. *Fernando* (5), WOOD-RENTON C.J. and DE SAMPAYO J. had taken a similar view adopting the rule laid down in *Nugara* v. *Palaniappa Chetty* (supra). WOOD-RENTON C.J., said "the point is clearly covered both by Statute Law and by Judicial decisions. Section 474 of the Civil Procedure Code provides that, even when an executor brings an action in right of his testator, he is himself personally liable to pay the costs of the defendant should the action be dismissed, unless the Court makes an order to the contrary and that in all other cases the executor is liable for the defendant's costs if the action fails just as if he was suing upon a cause of action accruing to him personally."

We agree with Counsel for the appellant that there is an *in terrorem* element in section 474, but what he fails to appreciate is that that element will disappear if his contention is sound, for in that case it will be open to an executor or administrator to fritter away the estate by wasteful or dishonest and collusive litigation.

We, therefore, hold that on the order for costs made in this case, the land sold by the Fiscal was not liable to be sold. In this view, the appeal fails and must be dismissed with costs.

Appeal dismissed.

DE KRETSER J.—I agree.

WIJEWARDENE J.—I agree.

[Proctor for appellant: *N. M. Zaheed.* Proctor for respondent: *T. Canagarayar.*]

—K. S. A.

MISSO, (REVENUE INSPECTOR) *v.* J. A. PERERA [D.B.]

[SOERTSZ A.C.J., DE KRETSER & WIJEWARDENE JJ. *S.C. No. 16—M.C. Colombo No. 17047.* JULY 19 & JUNE 10, 1939].

Motor Car—Not licensed - When is registered owner liable ?—Motor Car Ordinance, Ss. 2 & 31 (1), Leg. Enact., Vol. IV., Ch. 156.

Burden of Proof—On whom does it lie in cases of this kind ?

S. 2 of the Motor Car Ordinance enacts.: "Unless otherwise provided, this Ordinance applies to a Motor Car only when on a highway." S. 31 (1)states: "No person shall possess or use a motor car for which a motor car licence is not in force....."

HELD that, for the purpose of S. 31 of the Ordinance, the prosecutor must prove not only that the registered owner possessed the motor car during the material period, but also that at sometime during that period it was used on a highway.

Referred to :
Government Agent, Western Province, v. *Bilinda,* (1930) 3 Cr. Appeal R. 38 . (1)
Hodson v. *Madugalle,* (1925) 5 C.L.W. 22 ... ... (2)
Government Agent, Northern Province v. *Sepamalai,* (1936) 1 C.L.J.R. 42 (3)
Hodson v. *Cassim,* (1938) 3 C.L.J.R. 90 ; 40 N.L.R. 83 ... ... (8)
Not followed:
Government Agent, Central Province v. *Beeman,* (1932) 33 N.L.R. 343 ... (4)
de Silva v *Rosen,* (1932) 2 C.L.W. 98 ... ... (5)
Misso v *de Zoysa,* (1935) 4 C.L.W. (81) ... ... (6)
Government Agent, Province of Sabaragamuwa v *Peries,* (1934) 36 N.L.R. 291 (7)

E. B. Wickremanayake, with him *J. A. T. Perera* and *S. de Zoysa,* for accused-appellant.

H. V. Perera K.C., with him *E. F. N. Gratiaen,* for the complainant-respondent.

J. W. R. Illangakoon, K.C., Attorney-General, with him *M. F. S. Pulle,* Crown Counsel, as *amicus curiae.*

SOERTSZ A.J.C.—It is not with any desire to play upon words, but only to state a fact to which our Law Reports bear eloquent witness, that I permit myself the observation that the Motor Car Ordinance is not an enactment that those who run may read. On the very question that now arises for consideration there is a great variety of

judicial opinion, and in view of its not infrequent recurrence in our courts, it seemed desirable to have a definite decision which would afford us "the sure anchorage of a dependable rule." Hence this Divisional Bench.

The question, stated briefly, is this: What is the liability imposed by section 31 (1) of the Ordinance when it requires that "no person shall possess or use a motor car for which a motor car licence is not in force"? That question arises in this case in these circumstances. The name of the accused appears on the register as that of the owner of motor car No. C 7576. In 1937, he took out a licence for it, but he omitted to obtain one for the year 1938, and in consequence, this prosecution was launched against him. The plea he sets up in defence is that in October, 1937, he sold the car to a purchaser who said he was going to dismantle it, and he knows nothing of the car thereafter. These facts the prosecutor is unable to contradict, and for the purpose of this case, they may be regarded as established. But, it is contended, that the accused is bound to provide himself with a licence, year after year, so long as his name continues on the register.

We have had the advantage of a full argument by Counsel appearing on the two sides, and also the assistance of the Attorney-General who appeared as *amicus curiae*, and I have come to a very clear view upon the question, although that view differs from those taken in earlier cases.

I will now refer to those cases in order to indicate how the law stood in regard to this point when I referred it to a Divisional Bench. In *Government Agent, Western Province* v. *Bilinda* (1), GARVIN J. held that for the purpose of a conviction under this section it is not sufficient to prove that the accused man's name appears on the register as the owner of the car and no licence has been taken out by him for the material period, but that "the prosecution must also prove that during that period the motor car was *in the possession* of the accused *or* that he *did use* it. He acquitted the accused, because his evidence to the effect that, although he bought this car, it always lay in the garage in which it was at the time he purchased it, was not opposed. The implication of this ruling is that if it had been shown that the accused was in *actual possession* of the car at any material time, he would be liable whether or not he used it.

In *Hudson* v. *Madugalle* (2), KOCH J. adopted this ruling and said "it is necessary for the prosecution to prove that the accused did *possess or use* the motor car in question during some period in 1935."

In *Government Agent, Northern Province* v. *Sepamalai* (3), DALTON J. too followed the ruling in Bilinda's case and acquitted the accused because although her name appeared as that of the registered owner, there was no evidence that "the accused *either possessed or used* the motor car at the time set out in the charge." Here again, the implication is that in order to sustain a charge under this section it is

necessary to show that the registered owner *either possessed or used* the car.

In *Government Agent, Central Province* v. *Beeman* (4), DRIEBERG J. took a different view. He held that where a registered owner of an omnibus, on being prosecuted under this section, set up the plea that during the period in question the omnibus was in pieces at a garage, he was properly convicted because that plea does not amount to a statement that "he is not in possession of the bus." If the bus was left for repairs or storage at V's. garage, it was still for the purpose of this section in the possession of the appellant. What the appellant says in effect is that he is not in possession of a car which is capable of being used, but if this is so, he should have satisfied the Registrar..... and had the registration of it cancelled. DRIEBERG J. added that "if, as has been proved, the appellant was in possession of the bus, he was liable to take out a licence for it and and *it does not matter whether he used it or not.*"

In *de Silva* v. *Rosen* (5), MACDONELL C.J. adopted this decision and stated that the effect of it was that "the accused, not having divested himself of the possession in law of this car in the manner provided by section 22 or section 24, is still in law in possession of this car, and is liable for the licensing duty." The defence in that case was that the accused had no car for three years. The prosecution was unable to contradict that.

In *Misso* v. *de Zoysa* (6), I followed these rulings that "once a person has been registered owner of a car on his declaration that he is entitled to possession of it, he must be regarded as the person in possession of it unless there has been a transfer of possession in the manner provided by the Ordinance or unless by the cancellation of the registration it ceases to be a car which can be the subject of possession for the purposes of this Ordinance."

In *Government Agent, Province of Sabaragamuwa* v. *Peries* (7), DRIEBERG J. held that in a charge laid under this section *no proof is necessary of its user* during the period when there is no licence in force.

Finally, in *Hodson* v. *Cassim* (8), KEUNEMAN J. followed *Government Agent, Western Province* v. *Bilinda* and *Government Agent, Northern Province* v. *Sepamalai* and held "the mere production of the register and the proof that the accused's name appears there as the registered owner is not sufficient to prove that the accused possessed or used the vehicle in question. But where it has been proved that application has been made for registration.....in the name of the accused by the accused himself or at his instance..... ..it is possible in such circumstances to presume *prima facie* that the accused possessed the vehicle thereafter." KEUNEMAN J. added that he did not agree with the rulings in *Government Agent, Central Province* v. *Beeman*, *de Silva* v. *Rosen* and *Misso* v. *de Zoysa*, and that he thought that "the presump-

tion of possession might be rebutted by the accused *in any way he wishes.*"

After a very careful examination of all these cases and the Ordinance itself, I have, as I said, come to a very definite and clear conclusion that the correct view is that, for the purpose of section 31, the prosecutor must prove not only that the registered owner possessed the motor car at some time during the material period, but also, that at some time during that period, it was used on a highway. Once those elements have been established, it is not open to the accused to rebut possession " in any way he wishes," but only by bringing himself within the exemption expressly given by the Ordinance.

To this view I have been led by a careful examination of section 2 of the Ordinance. In the course of the argument before us, that section was severely commented upon. I believe, I joined in the attack. Mr. H. V. PERERA went to the length of saying that if the draftsman responsible for the Ordinance knew what he was doing when he framed that section, he would, or at least, ought to have hidden it away in some obscure corner. But the compiler of the new edition of the legislative enactments had raised that provision from the humble dependence of a sub-section to the splendid isolation of a section all by itself. By a strange irony, however, it is this very section that, I think, provides the clue to what appeared to be an inextricable maze. It is the "open sesame" to the Ordinance.

Section 2 runs as follows:—'Unless otherwise provided, this Ordinance applies to a motor car *only when on a highway.*" DRIEBERG J. in *Government Agent, Province of Sabaragamuwa* v. *Peries* (7), interpreted this section "in its reference to highways as dealing with so much of the Ordinance as regulates the *use* of cars." Obviously, this is a considerable restriction of the meaning of the words of the section. It can be justified only, if upon any other hypothesis, other provisions in the Ordinance are rendered nugatory. It is a cardinal rule of legal interpretation that every declaration in an enactment must be assumed to mean all that it says, and that every word must be given effect to if it is possible to do so. If the legislature intended to limit the operation of section 2 to that part of the Ordinance that relates to the *use* of a motor car, and not to make it applicable to "*matters unconnected with the use of a car*," it could have made that intention manifest by the employment of an additional word or two. But, as it stands, section 2 is an invariable condition precedent, and to be assumed unless otherwise provided. DRIEBERG J. remarked that "it is not well worded." Perhaps, there is some justification for the remark, and perhaps, the idea meant to be conveyed by the use of the phrase "only when on a highway" might have been expressed better in other words. But the words used seem sufficient for the end in view.

The scheme of the legislature appears to be to regulate the construction and the equipment of motor cars that are to appear on our

highways; to provide for the mode and condition of their use on highways consistently with the safety of traffic and with the preservation of the road; and to enable the authorities to collect licensing and other fees by way of reimbursing themselves for the expenditure incurred on account of the repair and maintenance of highways. In such a scheme, the legislature is not at all concerned with motor cars that do not come on highways at any time, or that do not come on highways during some relevant period. The purpose of section 2 is to make that fact and to declare that when any question of compliance or non-compliance with the requirements of the Ordinance, or of offence or no offence under it arises, that question must be determined with reference to the pre-requisite, whether or not at any material point of time or during any material period the motor car in question was on a highway. I cannot accept the dicta of DRIEBERG J. that "there can be no relevancy to the offence of non-observance of this provision where the car happens to be, whether on the road or in the garage," and that "it is an offence for a person to possess a car for which no licence is in force and this is *not affected by the question of place of user or whether it is used at all.*" Now it is clear that, in the absence of section 2, the use anywhere, in Colombo or outside Colombo, whether on highways *or on private lands*, of cars of certain dimensions, would constitute an offence. But, obviously the legislature could not have so intended. So far as it is concerned, there is no purely ethical or moral *desideratum* in regard to the dimensions of cars, but their size assumes a primary importance when the question is whether they may, or may not be permitted on a highway consistently with other interests. Similarly, the legislature is not concerned with the dimensions and relative position of trailers (section 5), or with the construction and equipment of cars, [Section 10 (1), 11, 12, 13, 14, 15, 16, 17] when they are not on a highway. To my mind, it is an essential ingredient of the offence that the car was on a highway at some material point of time.

A scrutiny of the different chapters of the Ordinance makes this view inevitable. Chapter II deals with the construction and equipment of cars. Section 4 provides for the dimensions of cars for use in Colombo and outside Colombo. Chapter IV, VI, VII, VIII and IX deal with 'identification plates,' 'certificates of competence,' 'driving rules,' 'restriction of use on highways and speed limits,' and 'hiring cars and lorries' respectively and as the very titles suggest, are intended to apply to 'motor cars when on a highway.' Likewise, the supplementary Chapter X contemplates 'motor cars when on a highway.'

But it may be said that the chapters, I have referred to, relate to the *use* of a car and are within the scope of the interpretation given by DRIEBERG J. I will, therefore, examine the two chapters I have so far omitted, namely, Chapters III and V which deal with *possession* of cars and in DRIEBERG J.'s phrase "with matters unconnected with the use of cars." These are the important chapters so far as this case is con-

cerned. Chapter III deals with the registration of motor cars. Section 19 (1) read with section 2 would have made possession and/or use of a motor car even for a limited purpose and by any one at all an offence, if it was shown that it had been on a highway at some material time unless there was a registered owner of that car. That would have resulted in manufacturers and dealers of cars being involved in great hardship, and section 15 (2) is designed to free them from that hardship. It provides for possession and/or use by dealers of cars on a highway although there are no registered owners in respect of those cars. Section 19 lays down the first condition for the possession or use of a motor car on a highway so far as persons other than those indicated in its sub-section 2 are concerned. That condition is that there should be a registered owner. Section 31 in Chapter V supplements section 19 and provides the other condition namely, that there should be a licence in force to cover both possession and use, at every point of time at which a motor car is used on a highway, and here again the dealer is exempted altogether from this requirement, and the owner of a motor car who has notified the licensing authority that the car will not be used for a stated period is exempted during that period from liability to conviction "*by reason only of* a person's possession of the motor car." Emphasis is laid on the fact that possession alone will not inculpate him during that period. If, despite the notification there is user during the period notified, the person using it will, of course, be liable under section 31 (1) and the notifying owner's possession during that period will also become culpable, for the condition for exemption from a licence will have been violated, namely, the condition of non-user. In that event, the owner as the registered owner becomes liable under section 31 (3) to a fine for the offence as well as to a fine to cover the amount payable for the licence; and the party who used the car during that period, if he is other than the owner, will himself be liable to punishment. Now, it is obvious that it is an easy matter to fix liability in the case of an offending "user" of the car. He is the person detected using it. But if the blameable owner is to be the owner, as the common law understands him, it will be necessary to pursue a changing and even elusive person. That of course would be a most unsatisfactory state of things from the point of view of the legislature, and to obviate it, section 26 provides that "for the purpose of any proceeding under this Ordinance, the registered owner shall be deemed to be the owner." The only exceptions to this rule are (a) where the absolute owner registered under section 19 (3) is shown to be in possession and (b) where the person who would have figured as "absolute owner", if he had complied with section 19 (3), seizes the car under section 23 (6) and the registered owner complied with the requirements of section 23 (6) (*a*) and (*b*). Any other change of possession does not result in the exemption of the registered owner from liability

unless section 23 is obeyed. Upon such a change of possession, however, the person entitled to possession by virtue of that change is allowed to use the car for seven days although he has not yet conformed with section 19 (1), but during that period the liability of the registered owner continues despite the change of possession till the new owner is put upon the register and licensed. The result is thus attained that there is no interval during which a car "on the highway" exists without an imputable registered owner.

An examination of Chapter III. and Chapter V. of the Ordinance in this manner leads to the conclusion that it is a motor car on the highway that is in their contemplation, as is clearly the case in the other Chapters. In a word, section 2 is the corner stone of the Ordinance.

It follows that the accused in this case is not liable to conviction under section 31 (1) because the uncontradicted evidence in the case is that this motor car was not on a highway in the year 1938 during which it is charged by the prosecution and admitted by the accused that there was no licence in force. There was no obligation imposed on him to obtain a licence in 1938 for a motor car that was not on a highway during the year. If, however, there was evidence to show that at any time during 1938, this car was on a highway, then, in my opinion, it would not have availed the accused to prove that although he appeared as the registered owner, he was not the true owner because he had sold the car in October, 1937 I cannot agree with the view taken by KEUNEMAN J. in *Hodson* v. *Cassim* (8) that it is open to a registered owner to rebut "the presumption of possession *in any way he wishes.*" It is not, I submit, correct to speak of "a presumption of possession arising from registered ownership. It is much more than a presumption that arises. A statutory possession comes into being and over-rides *de facto* possession and possession, as it is understood in common law. This possession imputed to the registered owner by the Ordinance can, in the view I take, be displaced only in the manner expressly provided by the Ordinance. For these reasons, I set aside the conviction and acquit the accused.

SOERTSZ A.C.J.—In view of the observation made by my brother DE KRETSER on the question of the burden of proof in a case of this kind, I think I ought to add a few words to state as clearly as possible that my view on the point is that it is incumbent on the prosecutor to lead evidence to show that at some time during the material period, the car was on a highway, and that it is only in that event that occasion arises for the accused to enter upon a defence. In this case, I find the accused not guilty, because the prosecutor stated that he was not able to establish that essential fact. It is true that the accused was able to prove and did prove that he had not used the car during the year in question. He apparently attempted and accomplished that task because the prevailing view was that a *prima facie* case against an accused was established once it was shown that he continued to be the registered

owner of an unlicensed motor car and that it was in his possession. But my brothers agree with me that "no charge can be maintained under section 31 in respect of an unlicensed motor car *which has not been used on a highway* at some time during the material period." To my mind, the inescapable result of that finding is that, in order to establish a case against an accused, it is necessary for the prosecutor to show not only that he is the registered owner of an unlicensed motor car, *but also that the motor car was on a highway* at some time during the material period, for the Ordinance applies only to motor cars on a highway. Till such evidence has been adduced, there is no case for the accused to meet. He is entitled to maintain "a sullen silence" and to claim an acquittal. I am quite unable to subscribe to the propositions of my brother DE KRETSER that "in the first result the prosecutor will have to meet a defence of non-user," and that "in case of doubt..... .....the doubt should tell against the owner of the car." If I may say so, with respect those propositions appear to me to be topsy turvy. They are subversive of the fundamental principles of criminal law that the accuser must prove the guilt of the accused, not the accused, his innocence and that the accused is always entitled to the benefit of the doubt.

I am aware that they are a few exceptional criminal cases in which the legislature has imposed upon the prisoner the burden of proving that he is not guilty, but this is not such a case.

DE KRETSER J.—I agree, and wish to add that I reserve my opinion regarding the onus of proof, a matter which was not argued before us nor discussed later.

In the final result the prosecutor will have to be in a position to meet a defence of non-user, but in a case of doubt the question of onus will be a matter of importance, and as at present advised, I incline to the view that the doubt should tell against the owner of the car.

WIJEWARDENE J.—I have had the advantage of reading the judgment of My Lord the Acting Chief Justice, and I agree that no charge can be maintained under Section 31 of the Motor Car Ordinance (*vide* Legislative Enactments Volume 4, Chapter 156), in respect of an unlicensed motor car which had not been used on a highway at some time during the material period.

In this case there is a clear evidence that the car in question was not used on a highway during the year 1938. I would, therefore, set aside the conviction and acquit the accused.

Conviction set aside. Accused acquitted.

[Proctor for accused appellant: *Vivian Jansz.* Proctors for complainant-respondent: *Wilson & Kadirgamar.*

—K. S. A

BARTLEET & CO. *v.* THE COMMISSIONER OF STAMPS

[KEUNEMAN & DE KRETSER JJ. *S.C. No. 107—Special.*
JUNE 30, JULY 3 11, 1939].

Stamp duty—Sale held under decree entered in action brought by secondary mortgagee—Court informed that primary mortgage had meanwhile been satisfied—Confirmation of sale—Conveyance by Secretary of Court—Consideration stated to be purchase price paid by secondary mortgagee—Is it open to the Court to consider all the recitals in the deed to determine the real consideration?—Stamp Ordinance Ss. 22 & 29 (2); Schedule A Part I, item 23 (i) (b).

Meaning of 'consideration' in the Stamp Ordinance.

A half share of S. estate was hypothecated upon a secondary bond to B. & Co. (appellants). In D.C. Colombo 52344 B. & Co. obtained a decree for a sum of money including what was due to them on the secondary bond. The auctioneer appointed to conduct the sale under the decree valued the half share of S. estate at Rs. 42,500. The primary bond was for Rs. 40,000. B. & Co. were allowed to purchase this half share at the sale at any value, on their agreeing to enter satisfaction of the decree for a sum of Rs. 5,000. At the sale B. & Co. made the highest bid, viz., Rs. 1,000 and the premises were knocked down to them. In moving the Court for an order confirming the sale, the proctor for B. & Co., purchasers, informed the Court that their clients were willing to give credit for the amount of the appraised value of the half share of S. estate, viz., Rs. 42,500 as the primary mortgage had been discharged and the sale was confirmed. In the conveyance executed by the Secretary of the Court in favour of B. & Co., purchasers, the operative clause stated that the consideration for the conveyance was Rs. 1 000, the purchase price of the secondary mortgagee, though there were other recitals which set out all the facts leading to the conveyance. A copy of the District Judge's order confirming the sale was annexed to the deed.

Stamp duty was paid upon the footing that the consideration for the purchase of the half share of S. estate was Rs. 1,000. As the Commissioner of Stamps called upon the purchasers (appellants) to pay the deficiency in the duty paid, together with a penalty, the purchasers applied to him for an adjudication as to the proper stamps. The Commissioner expressed the opinion that the deed was liable to duty as a conveyance of land valued at Rs. 42,500. From this decision the purchasers appealed.

HELD that inasmuch as the position taken by the purchasers (plaintiffs in the secondary bond action) on the date on which the order confirming the sale was made is equivalent to the purchasers having entered into an agreement with the defendant to give credit up to the amount of Rs. 42,000, this amount formed the real consideration for the deed and the Commsssioner's adjudication of stamp duty on this basis was correct.

Per KEUNEMAN J.—"I am of opinion that we are entitled to take into account not only the operative clause but also the recitals for this purpose..... Now it is of great importance that the District Judge's order of 21st May, 1934, confirming the sale has been annexed to the deed in question and forms part of the deed.....The Proctor.....expressed his willingness to give credit for the appraised value of Soranawallie Estate, viz., Rs. 42,500. Can this be regarded as merely an act of voluntary generosity on the part of plaintiffs ? I think not."

Followed: *Gunawardene* v. *Gunasekera*, (1922) 1 T.L.R. 90 ... (1)
Croos v. *Attorney-General*, (1930) 32 N.L.R. 78 ... (2)
Referred to: *Waharaka Investment Co. Ltd.* v. *Commissioner of Stamps*, (1932) 34 N.L.R. 266 ... ... (3)

Appeal from an adjudication made by the Commissioner of Stamps under S. 29 of the Stamp Ordinance.

N. Nadarajah, with him *F. C. W. Vangeyzel*, for appellants.

M. T. de S. Amarasekera K.C., Acting Solicitor-General, with him *S. J. C. Schokman*, Crown Counsel, for the Commissioner of Stamps.

KEUNEMAN J.—This is an appeal under section 31 of the Stamp Ordinance from an order of the Commissioner of Stamps under section 30 determining that the duty payable in respect of deed No. 170, dated 12th June, 1934, and attested by D. J. Boniface Gomes, Notary Public, is Rs. 801/-.

The deed in question is a transfer executed by the secretary of the District Court of Colombo in favour of the appellants of (a) an undivided half share of the estate known as "Soranawallie" and (b) an undivided one-fourth of the estate known as "Madulla." The only matter in dispute in this appeal is the duty payable in respect of the half share of "Soranawallie." No question arises about the quarter share of "Madulla."

The facts are as follows:—The appellants in D C. Colombo No. 52344 obtained a decree for Rs. 148,714/82; this sum included Rs. 79,078/38 due upon a secondary mortgage bond hyphothecating the half share of "Soranawallie." No. 1358, dated 23rd July, 1927. The primary mortgage b nd in respect of the same estate was No. 1258 of 14th May, 1926, for the sum of Rs. 40,000/- and interest in favour of some other person. In D.C. Colombo No. 52344 on 19th April, 1934, the appellants applied for an order to bid and an order giving them credit in a sum not exceeding their claim and costs. This was allowed on 25th April, 1934, subject to the condition that they were allowed to purchase at any value. on agreeing to enter satisfaction of the decree for a sum of Rs. 5,000/-. The District Judge took into consideration the fact that the primary bond was for Rs. 40,000/-. Further, the half share of the said estate was valued at Rs. 42,500/- by the auctioneer appointed to conduct the sale (Mr. J. G. Vandersmagt).

Thereafter, the premises in question was sold by the auctioneer on 28th April, 1934. At this sale the appellants made the highest bid, viz., Rs. 1,0 0/- and the premises was knocked down to them.

On 21st May, 1934, the plaintiffs applied to Court for an order confirming the sale. The journal entry of that date reads as follows :—

> "The plaintiffs having purchased the mortgaged property sold in the case, viz., an undivided half part of Soranawallie *alias* Panwila Watte.....for the sum of Rs. 1,000/-.....the Proctor for plaintiffs moves that the plaintiffs may be given credit in the said sum and that the sale be confirmed.
>
> They also move that the Secretary be directed to execute the necessary conveyance in favour of the purchasers. Mr. Rowan for plaintiffs states that the plaintiff is willing to give credit for the amount of the appraised value of Soranawallie Estate, viz., Rs. 42,500/- as it has now been ascertained that the primary mortgage has been discharged, although the discharge has not been registered... The sale will now be confirmed."

It is not in evidence when the primary mortgage was discharged, except that this happened before the application for confirmation of the sale. It is clear, however, that the conditions originally imposed by the Court as regards the order to bid and the order for credit had been based upon the supposed existence of the primary mortgage, and the orders were allowed upon that footing. Either the primary mortgage had no existence at all at that date, or had been extinguished thereafter. Under the circumstances, it may have been open to the Court to refuse to confirm the sale, and it is difficult to think that the Court was not materially influenced in confirming the sale by the offer of the plaintiff's proctor to give credit in the sum of Rs. 42,500/-.

Thereafter, on 12th June, the transfer now in question No. 170 was executed. In its recitals, all the facts which I have mentioned were set out. The recitals stated that the secondary bond No. 1358 was subject to the primary mortgage No. 1258, and that the decree in D.C Colombo No. 52344, as far as the hypothecation of Soranawallie Estate was concerned, was subject to the said bond No. 1258. The order of the District Judge allowing order to bid and order for credit was set out, though not in full. It was also recited that the plaintiffs had made the highest bid at the auction, namely, Rs. 1,000/-, and that the Court had confirmed the sale. A copy of the District Judge's order of 21st May, 1934, was annexed to the deed.

The operative words in deed No. 170 are as follows:—"Now know ye and these presents witness that the...Secretary of the District Court, Colombo....in pursuance of the said authority, and in consideration of the said sum of Rs. 1,000/- credited as aforesaid doth hereby grant...."

In the attestation clause, the notary makes no reference to the consideration. Stamp duty was paid upon the footing that the consideration for the purchase of the half-share of "Soranawallie" was Rs. 1,000/-

Thereafter, on 17th February, 1938, the Commissioner for Stamps called upon the appellants to pay the sum of Rs. 664/-, being the deficiency in the duty paid, together with a penalty of Rs. 25/-, later reduced to Rs. 5/-. After some correspondence, the appellants applied to the Commissioner under chapter 3 of the Stamp Ordinance, (section 29) for an adjudication as to the proper stamp. The present appeal is from the Commissioner's adjudication.

For the appellants it is contended that stamp duty should be calculated on the basis that the consideration on the deed in question was Rs. 1,000/, and that this was "the purchase or consideration money" expressed in the deed [*vide* Schedule A Part I., item 23 (1) (b)], and that no further enquiry could be made by the Commissioner. The Acting Solicitor-General contends on the contrary that under S. 29 (2) the Commissioner was entitled to call for affidavits or other evidence "necessary

to prove all the facts and and circumstances affecting the chargeability of the instrument with duty." He further argued that in any event the terms of the deed in question sufficiently showed that the consideration for the deed was the sum of Rs. 42,500/- for which credit was given, and the fact that this consideration appeared in the recitals and not in the operative words did not affect the question. He further urges that the consideration either wholly or in part was not a pecuniary consideration, and that, accordingly, the basis of assessment should be the value of the property, under the later words of item 23 (1) (b), and that the value of the property is Rs. 42,500/-.

In expanding his argument the Acting Solicitor-General stated that whether we took the original order for credit or the subsequent arrangement made at the confirmation of the sale as operative, the result would be the same. The original order for credit included an agreement to give credit in the sum of Rs. 5,000/-, and even if we regarded the bid of Rs 1,000/- as pecuniary consideration, the credit to be given for the balance of the Rs. 5,000/- was not pecuniary consideration. A similar result would be arrived at if we took into account the arrangement to give credit in Rs. 42,000/-.

For the appellants it was contended that in any event the consideration was pecuniary, whether it consisted in the payment of money or the giving of credit. It was further argued that the giving of credit in Rs. 42,500/- was an act of voluntary generosity, and could not be regarded as forming part of the consideration.

As regards the question whether the Commissioner in arriving at his adjudication was entitled to consider matters not expressed in the deed, the Acting Solicitor General has referred us to two authorities. In *Gunewardene* v. *Ganasekere* (1), BERTRAM C.J., has dealt very fully with this point has considered our own as well as English authorities, and has held that it is competent for the Commissioner of Stamps to insist upon being satisfied that the property, which has been the subject matter of a deed has been correctly valued. He rejected the argument that "duly stamped" means "stamped in accordance with what appears on the face of the instrument." Although this in an *obiter dictum*, it is a valuable one. Again, in *Croos* v. *Attorney-General* (2), this Court held that the Commissioner, if he was not satisfied with the consideration stated, was entitled to call for affidavits, and to utilize the information so obtained for the purpose of making his adjudication.

In this particular case, however, I do not think it is necessary to resort to the affidavits, as in my opinion the recitals in the deed No. 170 sufficiently contain all the facts which are necessary for the determination of this question of consideration. I am of opinion that we are entitled to take into account not only the operative clause, but also the recitals for this purpose. I do not think the affidavits add anything material to what is contained in the deed in question.

Now, it is of great importance that the District Judge's order of May 21st, 1934, confirming the sale has been annexed to the deed in question and forms part of that deed. That order shows that before the confirmation of the sale the proctor for the plaintiffs quite properly pointed out to Court that it had been discovered that the primary mortgage had been discharged; although the discharge had not been registered. The proctor went further and expressed his willingness to give credit for the value of Soranawallie Estate, viz , Rs. 42,500/-. Can this be regarded as merely an act of voluntary generosity on the part of the plaintiffs? I think not As I said before, it was capable of influencing the District Judge in his decision either to confirm the sale or to refuse the confirmation, and I have no doubt that this offer had an important effect in inducing the District Judge to confirm the sale.

Can this offer be regarded as the consideration for the deed in question? Now it has been held in *Waharaka Investment Co., Ltd.* v. *Commissioner of Stamps* (3), that the word "consideration" in the Stamp Ordinance must be given the meaning it has in English Law, where it has been defined thus:—"A valuable consideration in the sense of the law may consist in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other."

The "profit or benefit" accruing to the defendant in D.C. Colombo No. 52344 was that his debt was to be diminished to the extent of Rs. 42,500/. The proctor's statement that the plaintiffs were "willing to give credit" to that amount has had, in my opinion, the important result of influencing the District Judge to confirm the sale, and I do not think it was open to the plaintiffs thereafter to resile from that position and to refuse to give credit to that amount. I think the position is equivalent to the plaintiffs having entered into an agreement with the defendant to give credit up to the amount of Rs 42,500/-. This formed the real consideration for the deed No. 170.

I am of opinion that my finding on this point is in keeping with section 22 of the Stamp Ordinance. I hold that the property was transferred in consideration of the debt due to the plaintiffs to the extent of Rs. 42,500/. I incline to the view that this is not a pecuniary consideration, but it is unnecessary, in view of this finding, to decide this point. If it is a pecuniary consideration, it must be taken as the basis of the assessment. If it is not a pecuniary consideration, the value of the land must be taken as the basis, and that value has been held to be Rs. 42,500/.

Counsel for the appellants asked for an opportunity to lead evidence that the value of the half-share of Soranawallie Estate was not Rs. 42,500/, but I think it is too late to grant his request. The valuation of Mr. Vandersmagt has not been challenged at any time before the

Commissioner, and in fact it was accepted as "the appraised value" by the proctor for the plaintiffs on 21st May, 1934.

I am of opinion that the arrangement on 21st May, 1934, superseded the agreement to give credit to the extent of Rs. 5,000/, which was the footing on which the order for credit was issued. It is unnecessary in this case to consider how the instrument in question had to be stamped, if that was the only arrangement in operation at the date of the deed. It is also unnecessary to consider the further argument addressed to us, namely, that it was necessary in any event for the purposes of the assessment to add to the price the amount of the primary mortgage bond, in view of the explanation to section 22 of the Stamp Ordinance. A number of Indian authorities were quoted to us, which were not all in accord. It is, however, clear that at the date of deed No. 170 the primary mortgage bond had been discharged and nothing was due in respect of it.

The appeal fails and is dismissed with costs.

DE KRETSER J.—I agree.

Appeal dismissed.

[Proctors for appellants: *Julius & Creasy.*]

— K S. A.

JAYAWARDENE *v.* JAYAWARDENE & OTHERS [P.C.]

[LORD ALNESS, LORD ROMER AND LORD PORTER.
Privy Council Appeal No 58 of 1937,
FEBRUARY 24, 1939]

Crown Lease—Clause prohibiting sale, sub-lease, donation, mortgage or other disposition of subject matter of lease without the written consent of lessor—Gift of leasehold interest to lessee's sons without such consent—Subsequent devise by last will of lessee's property to one of his sons, executor under the will—Acceptance by the Crown of devisee as substituted lessee—Does the devise prevail over the gift?

A Crown lease to one J. V G. A W.J contained a clause prohibiting a donation of the leasehold without the written consent of the lessor. The lessee, without the written consent of the Crown, gifted the leasehold to his four sons in equal shares subject to a *fidei commissum*. The lessee, however, endeavoured without success to obtain the Crown's approval of the donation The donor, thereafter, devised by his last will all his property except a certain sum of money to one of his sons whom he appointed executor of the last will. After the death of the testator, the devisee's name was substituted by Government as lessee of the leasehold property and he remained in possession of the property and paid the Government rent till he was dispossessed by his brothers, the other donees under the earlier deeds of donations.

The devisee, thereupon, brought action against his brothers for a declaration of title to the leasehold property.

HELD: (1) that the donation of the leasehold property was voidable by the Crown and that the Crown had avoided the attempted donations,

(ii) that as the donations, being void, did not operate as a valid assignment of the tenant's interest in the lease, there was no breach of the clause prohibiting donations,

(iii) that the passing of property through the executor to the devisee is no breach of the covenant not to assign and

(iv) that, as it was the Crown who gainsaid the donor's act in contravention of the lease, the executor under the will could not be said to hold the lease for those whose title the Crown had refused to recognize and that the donees could not, therefore, claim any right by way of estoppel.

Applied :—
Davenport v. *Reg.*, (1887) 3 App. Cas 115 ... ... (1)
Fernando v. *Fernando*, (1916) 19 N L R. 193 ... ... (2)
Silva v. *Mohamudu*, (1916) I9 N L.R .426 ... ... (3)
Breytenbach v. *Frankel* (1913) S.L R. App. Div. 390 ... ... (4)
Followed :
Doe v. *Powell*, (1826) 5 B. & C. 308 ... ... (5)
Cousoe d'Blencowe v. *Bugby*, 1771) 3 Wils. K B. 234 ... ... (6)
Doe v. *Bevan*, (1815) 3 M. & S. 353 ... ... (7)
Referred to :
Soysa v. *Mohideen*, (1914) 17 N.L R. 279 ... ... (8)

H. I. P. Hallet, K.C., with him *Stephen Chapman*, for the plaintiff-appellant.

L. M D. de Silva, K.C., with *Kenelm Preedy*, for the Attorney-General of Ceylon.

LORD PORTER.—The appellant in this action, who was also the plaintiff, is one of the sons of the late J. V. G A. W. Jayawardene, Gate Mudaliyar. The first three respondents are also his sons.

The deceased man was apparently a considerable landowner in the Island of Ceylon, and amongst his other properties was tenant under the Crown by an indenture No. 29 executed on the 29th October, 1919, and on the 23rd February, 1920, by the respective parties, of a certain allotment of Crown land called Kajugahaudumulleduwa, Kajugahaudumullelanda, and Galagodakele in Maggon Badda, Kalutara Totamune and Eladuwa Village, Iddagoda Pattu, Pasdun Korale West, Kalutara District, Western Province.

The lease was entered into by the Governor of Ceylon on behalf of the Crown as lessor on the one part and by the deceased man as lessee (an expression which was stated to include his heirs, executors, administrators and permitted assigns) of the other part.

The estate was to be held in perpetuity subject to the covenants and general provisions contained in the lease.

The covenants contained provisions for clearing and planting, paying rent, and the non-erection of buildings on the land. The tenth covenant must be set out in full. It read:—

> "The Lessee and his aforewritten shall not sub-let, sell, donate, mortgage, or otherwise dispose of or deal with his interest in this Lease, or any portion thereof, without the written consent of the Lessor, and every such sub-lease, sale, donation, or mortgage, without such consent, shall be absolutely void."

The second general provision was also important, and is as follows:—

> "That if any rent hereby reserved shall remain unpaid and in arrear for the space of more than one year after the time hereby appointed for payment thereof, whether the same shall have been lawfully demanded or not, or if any breach shall be committed by the Lessee of any of the covenants herein on the Lessee's part contained, or if the Lessee shall abandon or cease to cultivate the said land in manner provided in Part IV of this lease, or if the Lessee shall

become bankrupt or compound with his creditors or if the said land or the interests of the Lessee or his aforewritten be sold in execution of a decree against him or his aforewritten, then, and in any of the said cases, this demise and the privileges hereby reserved together with these presents, shall forthwith cease and determine, and the Lessor his agent or his agents, may thereupon enter into and upon the said land and premises, or any part thereof in the name of the whole, and the same have, re-possess and enjoy as in his former estate, and the said land and premises shall forthwith revert to the Crown, without any claim on the part of the Lessee or his aforewritten against the Lessor for compensation on account of any improvements or otherwise howsoever."

The deceased man took possession under the lease and continued in possession until his death on the 19th January, 1930.

Meanwhile, in May, 1927, he was for some reason anxious to make a deed of gift of the whole or at any rate a large portion of his properties to his four sons in equal shares, and amongst those properties he desired to include the Crown lease.

Accordingly he wrote on the 16th May, 1927, to the Assistant Government Agent asking that permission to assign might be granted. Without waiting for the permission to be obtained, however, he executed four deeds of gift between the 27th and 30th May, 1927, giving one quarter of his estates to each of his four sons. Each donation was subject to his own life estate and to each was attached a *fidei commissum*. These deeds included the Government lease amongst the properties given, and were in identical terms save in one matter. That in favour of the second respondent recited that his father had applied for and obtained the written consent of the Governor, whereas the other three recited only that he had applied for such consent.

The Government Agent did not reply until the 27th July, 1927, when he asked to be furnished with a draft of the proposed deed and laid down certain conditions upon which alone permission would be granted. He ended by saying that the donee should understand that the lease was liable to cancellation for any default. The deceased man did not comply with the Government requirements but endeavoured without success to persuade the Government authorities that the deed was in order. When he failed in this attempt, he caused four deeds of cancellation to be prepared and apparently a draft copy was sent to the Government Agent. Finally on the 8th March, 1928, the Agent returned the draft copy and wrote in the following terms:—

"Sir,

I have the honour to return the draft deed of cancellation and to inform you that the deed of gift already executed of your own accord is invalid by reason of Government Consent not having been given thereto. If you are legally advised that cancellation is necessary no question of obtaining Government Consent arises.

I am, Sir,
Your obedient Servant,
(Signed) E. T. DYSON,
Assistant Government Agent."

The deeds were never in fact cancelled, but at the bottom of this letter is to be found the words, "Deed of Gift invalid. Son, heir under the Will," but there is no evidence as to the hand by which these words

were penned, and their Lordships can derive no assistance from them.

On the 23rd October, however, of the same year, the deceased man made his will, leaving all his property, save for a gift of Rs. 3,000/- to his grand-daughter, to the appellant, whom he also appointed his executor.

After the death of his father the appellant's name was entered in the Register of Rents of Government lands leased in perpetuity, as substituted lessee, and he entered into and remained in possession of the property in dispute until November, 1932, when the third defendant dispossessed him. Later on, the first defendant entered into possession. Both the third and first defendants are said by the appellant to have entered into possession on behalf of the three defendants and not on his behalf. It appears from the appellant's evidence that whilst he was in possession he paid the Government rent, but that after he was dispossessed he could not pay the entire rent and the respondents made certain payments, but there is no evidence that the Government accepted them as tenants. Indeed the payments were credited in the Government books to the account of the appellant as substituted lessee.

The respondents did not give evidence. Whether the appellant accepted the deed of gift or not, is not clear—probably he did, as he said in cross-examination, "I got a gift of a one-fourth share of this land. I was present when all the gifts were made. I signed as a witness to deed No. 178." This last-mentioned deed was that giving a one-fourth share to one of his brothers.

The plaintiff having been dispossessed in this way brought the present action against the first three respondents claiming a declaration of title, that the three respondents be ejected and the appellant quieted in possession, damages, and an injunction. Inasmuch as the premises he held on a lease from the Crown, he made the fourth respondent a party to the action, but claimed no relief against him.

His case was that no consent had been given to the disposition of the estate and that the purported gift passed no property either to himself or any of his brothers, because by the terms of clause 10 of the lease any disposition of the property without the consent of the Crown was absolutely void.

In answer, the first three respondents pleaded the four gifts which they said were subject in each case to a *fidei commissum* in favour of their children, or, in default, in favour of the lawful heirs of each of the donees; acknowledged that the appellant was entitled to a one-fourth share; pleaded the covenant in the deeds of gift by the donor that he had full authority to donate the estate thereby given and would warrant and defend the same to the donees; and pleaded that the appellant, as claiming under the deceased testator, was bound by that covenant and was estopped thereby from questioning their title.

Alternatively they said that by reason of clause 10 of the lease the testator had no power to dispose of the property by will.

At the trial of the action both parties agreed to waive damages of all nature (if any) due to them up to the hearing, leaving the substantial issue whether the property passed by the deeds of gift or whether at any rate the appellant was estopped from denying that it had.

The District Judge who heard the case in the first instance gave judgment in favour of the appellant, but was reversed by the Supreme Court by judgment dated the 4th December, 1936.

The appellant has appealed against this decree to His Majesty in Council.

The Crown took no part in either of the Courts in Ceylon, but have attended their Lordships' Board in order to preserve their rights in case it should be held that the appellant was in the wrong and in order to give any assistance which they were able.

These being the facts, the first question to be determined is whether the purported deeds of gift of this land pass any property or not. The answer to this question depends upon the terms and effect of clause 10 of the lease.

It is not necessary in construing the clause to determine precisely the limits of the acts prohibited by each word of the clause. Admittedly the gifts to the sons were donations. No written consent to a donation was obtained and donations are prohibited without the written consent of the lessor. Without such consent the clause declares every donation to be absolutely void.

In a series of cases where a lease has been granted upon the terms that if certain conditions are not fulfilled or are broken it shall be "void" or "utterly void" or "null and void to all intents and purposes," it has been held that upon a failure by the tenant to fulfil the conditions, the leases are not *ipso facto* void but are only voidable at the option of the lessor. The principle is explained in *Davenport* v. *Reg.* (1) and the cases quoted therein in reference to English Law, and a similar principle is to be found in Roman-Dutch Law. See *Fernando* v. *Fernando* (2) and *Silva* v. *Mohamadu* (3) in Ceylon, and *Breytenbach* v. *Frankel* (4) in South Africa. It is to be observed that in those cases it is the lease which is declared to be void, not, as in the present case, the assignment of the lease, but Their Lordships, without expressing any opinion upon the question, will assume that these decisions are applicable to the latter as to the former class of case.

Even if this assumption be made, it is clear that in the present case the lessor never by word or act assented to or acknowledged the donations. On the contrary, as appears by the letter of the 8th March, 1928, the Government claimed that the donations were invalid.

Some misapprehension appears to have arisen in the Supreme Court as to the effect of this letter. That Court seems to have thought that despite the terms of the communication the Government by their subsequent acts affirmed the lease. In this they were mistaken. The Government affirmed the lease because of—not in spite of—their refusal to acknowledge the donations. If the donations were invalid there was no breach of condition because there had been no dealing with the land contrary to the terms of clause 10. If, on the other hand, the donations had been valid, notwithstanding the lessor's refusal to give its written consent, then there would have been a breach of condition such as might entitle the lessor to avoid the lease. Indeed the Government were represented at the hearing before Their Lordships for the express purpose of contending in case the donations were held valid, that the right which they claimed to possess of forfeiting the lease was unaffected.

In Their Lordships' view the lessee had validly contracted that any donation made by him was at least voidable by the Crown, the Crown had avoided the attempted donations, and those donations being void did not operate as a valid assignment of the tenant's interest in the lease and therefore there has been no forfeiture. See *Doe* v. *Powell* (5).

If the lease remained in force and the attempted donations of the lessee were void, the tenant retained his full interest and was capable of disposing of that interest by will to whom he pleased, subject to two questions :—

(1) Did clause 10 prohibit the tenant from disposing of the lease by will?

(2) Whatever the position between the Crown and the lessee, could the appellant as executor of his father repudiate his father's gifts which had never been cancelled?

(1) Had the lease been granted to the testator *simpliciter*, the difficult and doubtful question whether a devise would have been a "disposal of" or "dealing with" his interest in the lease would have arisen. Even if the true view be that a devise is not a breach of a covenant not to *assign*—see *Crusoe d'Blencowe* v. *Bugby* (6)—it does not follow that it may not be a breach of a covenant not to *dispose of* or *deal with* the lease. Their Lordships, however, do not find it necessary to express any opinion on this matter.

The lease was not granted to the testator alone. It was granted to the lessee, and that expression is defined to include his heirs, executors, administrators, and permitted assigns. An executor is therefore in terms one of the lessees, and is just as much entitled to hold the lease as is a permitted assign.

The true view, as Their Lordships think, is expressed by BAYLEY J. in *Doe* v. *Bevan* (7). That was a case in which the lease passed to

the trustee in bankruptcy of the tenant, and it was contended that though the lease might pass to the trustee without a breach of the covenant not to assign, yet there was a breach if they in their turn assigned for the benefit of the estate. To this argument BAYLEY J. replied :—

> "Shall the assignees have capacity to take it and yet not dispose of it? Shall they take it only for their own benefit, or be obliged to retain it in their hands to the prejudice of the creditors for whose benefit the law originally cast it upon them? Undoubtedly that can never be."

So an executor takes not for himself, but for the divisee under the will which appoints him executor, and the passing of the property through the executor to the devisee is no breach of covenant not to assign. If it were not so the naming of an executor as included in the expression "lessee" would be meaningless, since his function is to transfer the lease to some devisee even if that devisee be himself.

Their Lordships would further point out that if, as the respondents contended, "void" in clause 10 means "voidable," then even had a devise of the estate been a breach of the condition, the Crown who have entered the appellant's name as substituted tenant and accepted rent, and who before Their Lordships disclaimed any desire to interfere with his tenancy, have, if they could, waived the alleged forfeiture.

(2) If, as Their Lordships think, the attempted donation was void as against or avoided by the Crown, no estate in the land could pass to the donees. The testator had not at the time of the donation any right to dispose of the land as he purported to do. Indeed permission to do so was expressly refused. Nor has the appellant now any right to dispose of it except with the requisite consent. The only rights, if any, which the donees could claim, would be some right by way of estoppel.

Their Lordships find no evidence in the record on which an estoppel could be based. Save that the first three respondents apparently accepted the donations, they neither acted upon any representation nor altered their position to their prejudice. Nor, indeed, did their father make any representation. All that he did was to purport to make a donation of a lease—a donation which by the terms of that lease he could not make, and in making which he recited the lease itself.

All of the three respondents had express notice from the wording of their respective donations that consent to assign had to be obtained and it appeared from two of the donations that it had not yet been obtained. The third, namely, No. 175, did contain a recital that that consent had been obtained, but the donee Frederick Nicholas Jayawardene was not called as a witness and gave no evidence that he had been misled by the recital.

Nor does the fact that a *fidei commissum* was attached to each of the deeds of gift affect the result. It is true that a *fidei commissum* properly constituted and accepted cannot be revoked—*Soysa* v. *Mohideen* (8)—and it is no doubt also true that a solemnly executed and duly

registered instrument must stand until set aside by a competent Court, see *Breytenbach* v. *Frankel* (u.s.). It was accordingly contended in the Courts in Ceylon on behalf of the respondents that the donations being solemnly executed could not be set aside, or at best could only be set aside by an application to the Court in an action for *vindicatio* or *restitutio in integrum*—in Ceylon the exact form of action would not matter. See *Silva* v. *Mohamudu* (u.s.) *per* ENNIS J. at p. 428.

So far as any of the property included in the donations was at the testator's disposal the argument may have force, but even if the donations are valid gifts, the question, so far as this lease is concerned, is not whether the donations are valid, but what property passes under them. In Their Lordships' opinion, whatever may be the case as regards the other property, the leasehold estate, the subject-matter of the present action, could not, for the reasons given, pass to the donees.

The case differs from those in which a minor purports to grant a lease or to sell land during his minority as in *Silva* v. *Mohamudu* (u.s.) and *Breytenbach* v. *Frankel* (u.s.). In the latter, the lease or sale is not void *ab initio*—it is voidable at the option of the minor or perhaps, as ENNIS J. expresses it, it does not bind the minor unless he ratifies it expressly or impliedly on attaining his majority. But in such cases the affirmance or avoidance of the lease or sale depends on the minor's action after he attains his majority and in such a case he may well be compelled to apply to the Court to have the lease or sale set aside before he can effectively dispose of his interest in the property to someone else if indeed he retains any right to deal with it at all. Where, however, the lease has, as in the present case, been disposed of contrary to the terms contained in it, and that disposition is void or has been avoided by a landlord, there is, in Their Lordships' view, no room for the application of such a doctrine even in the case of a sale or other disposition for value, much less where the disposition is a gift.

In the cases quoted the option to affirm or avoid was the option of the minor himself. Had the right in the present case to avoid or affirm rested with the appellant or even with his father, this case might have had some analogy to those. But in this case the option is with the Crown, the appellant has no choice in the matter, and there seems no reason for holding that he must bring an action in order to make the Crown's election effective.

For the same reason the statement by Voet in Vol. 1. Lib. VI. Tit. 1. section 17 as quoted by the Supreme Court, that "the seller cannot himself vindicate property belonging to another, which has been sold by him, on the ground that he is not the owner even if he subsequently becomes the owner or is heir to the true owner," is not applicable to the present case.

Even though one accepts the view of the Supreme Court that he principle upon which the rule is founded is that no one ought to gainsay

his own act, or (one may add) the act of his predecessor in title, yet the appellant has never gainsaid his father's act. It was the Crown who gainsaid it, and the appellant cannot hold the lease for those whose title the Crown has refused to recognize.

For these reasons Their Lordships will humbly advise His Majesty that the appeal be allowed, the decree and judgment of the Supreme Court set aside and the judgment of the District Judge restored. The first three respondents must pay the appellant's costs of the hearing in the Supreme Court and before Their Lordships' Board.

Appeal allowed.

—K. S. A.

THE SOLICITOR GENERAL *v.* COOKE

IN THE MATTER OF A RULE ISSUED ON J. A. T. COOKE, PROCTOR.

[SOERTSZ A.C.J., KEUNEMAN & DE KRETSER J.J.
JUNE 28, JULY 14, 1939.]

A proctor convicted of criminal breach of trust of client's money—Restoration of money to client—Is suspension from practice or removal from Roll the appropriate order to make in such a case?—Courts and Their Powers Ordinance, Leg. Enact. Vol. I Ch. 6, S. 17.

C., a proctor, was convicted of criminal breach of trust of a sum of Rs 300/- belonging to his client. He had restored the money to the client before his conviction. On an application made for the removal of the name of C. from the roll of Proctors, it was contended on his behalf that it would be sufficient to order his suspension from office for a period.

HELD that, in justice to the public and the profession, that the name of C. must be struck off the roll of Proctors.

Followed: *Re: Narasimhachariar, High Court Vakil, Kumbakonum,* (1925) A.I.R. Mad. 797. ... ... (2)

Referred to: *Solicitor General* v. *Chelvathamby,* (1938) 3 C.L.J.R. 221; 13 C.L.W. 80 ... ... (1)

J. W. R. Illangakoon, K.C., Attorney General, with him *Douglas Jansze*, Crown Counsel, in support.

E. F. N. Gratiaen, with him *S. Nadesan*, for the respondent.

SOERTSZ A.C.J.—This is an application made by the Solicitor General under section 17 of the Courts and Their Powers Ordinance, asking that the name of the respondent be removed from the roll of Proctors, on the ground that in D.C. (Criminal) Jaffna Case No. 4149, he was convicted of the offence of criminal breach of trust of a sum of Rs. 300/- entrusted to him by a client for investment.

The evidence discloses not only a serious offence committed with every circumstance of deliberation, but also measures taken thereafter, involving the fabrication of evidence, in order to make the victim believe that his money had been put out on a mortgage. In point of fact, the money appears to have been used by the respondent for purposes of his own in the financial difficulties in which he found himself at this time.

His story that with the knowledge of his client he gave his money to a money lender has been rightly rejected by the trial Judge.

In this state of things, I was not a little surprised when the respondent appeared in answer to the notice issued on him to show cause, and submitted that he had nothing to say in regard to the conviction, but that, in regard to the application by the Solicitor General, he desired to say that there was no occasion for the removal of his name and that it would be sufficient to order his suspension from office for a period. This submission shows either an entire inability on the part of the respondent to appreciate the gravity of his offence or a too sanguine expectation of such a lack of appreciation on our part. It was said on his behalf that he had made restitution, that he had restored the money to his client. The respondent was relying on certain observations made in similar cases that a Court would take into account the fact that the delinquent has made restitution. No doubt, that is a fact which will be considered, or perhaps I should say will not be ignored, on an occasion like this, but the weight to be attached to it must depend on the circumstances of each case. For my part, I can attach but little weight to a restitution that is nothing more than a last resort when every attempt to defeat and delay his client had failed. I cannot help feeling that when the respondent returned the money he was thinking more of the advantage that might accrue to him from this course when the Judge was considering the question of sentence, than of his obligations to his client.

The case of *Solictor General* v. *Chelvathamby* (1) was cited to us. In that case, a concession was made to the respondent on the ground that the criminal breach of trust of which he was convicted was criminal breach of trust of property entrusted to him in his private and not in his professional capacity. This is a distinction which I am not disposed to make, but I do not think it necessary to say anything more on that point, for in the case before us it is admitted that the respondent was acting in his professional capacity.

It is impossible not to feel sorry for a professional man in a plight like that of the respondent, but it is not open to us to show a forbearance or practise a generosity that ignores the interests of the public and the prestige of the profession to which the respondent belongs. If I may respectfully say so, I share the view of Coutts-Trotter C.J. in *re*: *Narasimhachariar, High Court Vakil, Kumbakonam* (2).

> "We have not only to consider the interests of the Vakil, even should we believe that his repentance is sincere and that his present intention is that he will give no cause for further complaint.....but we have to consider the public in a matter of this kind, and we have also to consider the legal profession generally. How can we say that a man who has been guilty of two such grossly dishonest and improper acts as these, can safely be entrusted with the interests and monies of future clients. We cannot. Were we to suspend him, we should mark our sense of disapproval of such conduct by a suspension so long that it would practically be equivalent to debarring him from ever efficiently practising again and also we would prevent him from doing what we hope he will endeavour to do, namely, to put his affairs in order and earn his livelihood in

some other walk of life. These cases are of such gravity that we feel that, in justice to the public and the profession, we can do no less than order that the Vakil be struck off the rolls."

For exactly these reasons, I would order that the name of the respondent be struck off the roll of proctors.

KEUNEMAN J.—I agree.

DE KRETSER J.—I agree.

Proctor's name ordered to be removed from the roll.

[Proctor for the respondent: *R. R. Nalliah.*]

—K. S. A.

WIJESURIYA, INSPECTOR OF POLICE, C.I.D. v. C A. S. MATHER

[SOERTSZ A.C.J. *S.C. No. 354—M.C. Colombo No. 35947.*
AUGUST 8, 10, 1939.]

Jurisdiction of Appellate Court—Power to take further evidence while dealing with appeal—Is there any limitation on the Court's power?—The Courts and Their Powers Ordinance, S. 37—The Criminal Procedure Code, Ss. 347 & 348.

HELD: (i) that the taking of further evidence by the Appellate Court is a matter of discretion of the Court and

(ii) that the only limits to the discretion given by S. 37 of the Courts and Their Powers Ordinance and Ss. 347 & 348 of the Criminal Procedure Code are such as an Appellate Tribunal may impose upon itself in exercising the discretion, paying due regard to the rights and interests of the parties and to general convenience and expediency.

M., a partner of a firm of proctors, was charged in the Magistrate's Court of Colombo, with aiding and abetting one V.. a peon employed in the District Court of Colombo, to accept an illegal gratification, an offence punishable under Ss. 158 & 102 of the Ceylon Penal Code. M. Maharoof Esq., the Acting Magistrate, acquitted the accused without calling upon him for his defence on the ground that the prosecution had failed to prove:—(a) that the sums of money were paid by the accused himself or at his instance and (b) that they were paid by way of illegal gratification. On appeal against the acquittal, SOERTSZ A.C.J. set aside the order of acquittal and called upon the accused for his defence to the charges laid against him. In the course of his judgment, His Lordship stated:—

"I have come to the conclusion that a *prima facie* case has been established by the complainant against the accused ...As the learned Magistrate acquitted the accused without calling for his defence, he had no opportunity of placing any evidence before the Court on his own behalf.

In the view I take, occasion arises for the accused to enter on his defence in regard to the charges I have mentioned, and, if he desires to do so, to adduce evidence.

In the circumstances of this case, I am of opinion that it will be more convenient and satisfactory if, instead of sending the case back to the Magistrate, so that he may take such evidence as may be tendered and transmit it to me with his opinion on the additional evidence, if any, I act under section 37 of the Courts and Their Powers Ordinance and sections 347 and 348 of the Criminal Procedure Code and make order that I shall take and receive any evidence that the accused may desire to tender."

An application was thereupon made on behalf of the accused that Counsel be heard in regard to the jurisdiction of the Court to make the above order.

H. V. Perera K.C., with him *J. E. M. Obeyesekera*, *E. F. N. Gratiaen* and *H. W. Thambiah* for the accused-respondent.

J. W. R. Illangakoon K.C., Attorney General, with him *D. Jansze*, Crown Counsel, for the complainant-respondent.

SOERTSZ A.C.J.—The order I made on this appeal was made after careful examination of the nature and extent of the jurisdiction conferred on an Appellate Tribunal by section 37 of the Courts Ordinance, and sections 347 and 348 of the Criminal Procedure Code. But, as a matter of grace, and against the possibility of some point in those sections having escaped my attention, I acceded to the request of Counsel for the respondent that he be heard on this question of jurisdiction.

I have now heard him and I have considered the submissions he made, but I see no reason whatever for taking a different view of the scope of the sections I have referred to, or for doubting the validity or the expediency of the order I made.

Sections 347 and 348 of the Criminal Procedure Code provide the various orders that an Appeal Court may make in an appeal from an acquittal or conviction, and give it a wide discretion in regard to the calling for or procuring of any additional or supplementary evidence that it thinks to be necessary for disposing of the case. It may itself take the additional evidence it deems necessary, or it may direct some other judicial officer to take it and transmit it with his opinion on it, or it may remit the case for further inquiry with a view to committing it for trial, or for a re-trial. As WALLACE J. observed in the case of *Narayana Menon* (1), to which the learned Attorney-General referred me "whether the proper course is a re-trial or taking further evidence is a matter of discretion—the discretion of the Court apart from what the appellant or the prosecution may desire." Mr. Perera contended that there is inherent in these sections a limitation of the evidence that may be taken by virtue of them and he submits that it is only such evidence that an Appeal Court is entitled to *require* to be taken, that it may call for and take under these sections, and not such evidence as may be at the option of a party to tender or not. In the Indian case just referred to, ODGERS J. commented on a similar submission made in that case as follows:—"it will be observed that in neither of the cases just mentioned it is stated or even suggested that section 428 (i.e. the Indian equivalent of our section 348) is confined to supplying proof of the prosecution case. On the other hand, the learned Prosecutor draws our attention to several recent cases of this Court in which evidence for the defence has been taken under

(1) Criminal Law Journal Reports, Vol. 25 p. 401.

the provisions of this section apparently without the jurisdiction ever being questioned...I am not prepared...to limit the ambit of section 428." I would add that my order does not imply that I require the respondent to enter upon a defence or that I call upon him to tender evidence. All it implies is that I am prepared to take such evidence as the respondent may desire to tender in exercise of the right given to him by law, before I decide upon the whole case, my view at present being that the prosecution has made out a *prima facie* case. In other words, the position is just the same as it would have been if the Magistrate came to the conclusion that a *prima facie* case had been established against the respondent and had called upon him for his defence. The implication of such a course is that the Magistrate thinks additional evidence necessary—if it is available—for the disposal of the case, consistently with the rights and interests of the prosecution and of the defence. *A priori*, there appears to be no good reason why an Appeal Court should not—once it decides to reverse an order of acquittal entered at the stage at which it was made in this case—be in the position in which the Magistrate would have been if he had taken the view which, in the opinion of the Appeal Court, he should have taken. Nor can I see in the wording of these sections anything to suggest that that antecedent probability has been negatived, and that an Appeal Court may not intimate to an accused-respondent that it is prepared to take such evidence as may be tendered.

So far as I can see, the only limits to the discretion given by these sections are such as an Appellate Tribunal may impose upon itself in exercising the discretion, paying due regard to the rights and interests of the parties and to general convenience and expediency.

The more I examine this case, the more I am convinced that the course I propose to take is the best and most convenient course. The case for the prosecution has been closed, and all its evidence is before me. To order a re-trial by the same Magistrate or by another, will mean an unprofitable expenditure of time, with no conceivable legitimate benefit likely to accrue to the respondent. To send the case back to the Magistrate who tried the case to take any evidence that the defence may wish to tender and to transmit such evidence to me with his opinion on it, would be a roundabout way of doing what I myself can do directly by calling for such evidence as the respondent may desire to adduce. Moreover, there is no point in asking the Magistrate for his opinion. He has already expressed it.

For these reasons, the order made by me will stand and the case will be called on the 25th of August, 1939, at 11 a.m. for the defence to place its case before me.

Cite Proctors Kadirgamar and de Silva to be present on that day, at that time, in case it becomes necessary to examine them further.

Case fixed for defence to be placed before Court.

— K. S. A.

ATTORNEY-GENERAL *v.* V. A. KUNJIPALU.

[HEARNE S.P.J. *S.C. No. 246—M.C. TRINCOMALIE. 5379.*
AUGUST 2, 22, 1939].

Motor car—Lorry involved in accident to buggy cart—Driver not requested by person entitled to do so for particulars regarding his identity—Driver's failure to report accident to Police—Does this constitute an offence?—Motor Car Ordinance No. 20 of 1927, S. 48 (III) B, as amended by S. 6 of Ordinance No. 41 of 1935. [Vol. IV. Leg-Enact. Ch. 156, S. 51].

HELD: (i) that, in the case of bodily injury having been caused owing to the presence of a motor car on a highway, an absolute duty is cast upon the driver of the motor car to report the accident to the police and

(ii) that, in other cases, the driver is absolved from his duty to report to the police, if he has already supplied particulars of himself and the car to the person entitled to ask for such particulars.

D. Jansze, Crown Counsel, for the complainant-appellant.

Colvin R. de Silva, for the accused-respondent.

An appeal by the Attorney-General from an acquittal of the accused by J. Wilmot Perera Esq., Magistrate of Trincomalie.

HEARNE, J.—In this case the Attorney-General is the appellant. The respondent was charged with having failed to report an accident involving damage to a buggy cart in breach of section 48 (III) B of Ordinance No. 20 of 1927 as amended by section 6 of Ordinance No. 41 of 1935. (Vide Vol. 4 of Legislative Enactments of Ceylon, Chap. 156, page 164).

It was admitted that no report was made to the police and it was also conceded that the accused person was not requested by any person for particulars regarding himself, or the lorry he was driving, or the name and address of the owner of the lorry. In these circumstances the Magistrate acquitted the respondent.

The relevant law is this. If, owing to the presence of a motor car on a highway, any accident occurs causing injury to any person, animal or property then —

(a) the driver of the car shall immediately stop the car;

(b) the driver of and every person in the car at the time of the accident shall, if so requested by any person injured, or by the owner of or the person in charge of any animal or property injured, or by any police officer or headman, give his name and address, and also the distinctive number and other identification marks of the motor car and the name and address of the owner of the car;

(c) where the driver of the car has not furnished the particulars mentioned in paragraph (b) to any person entitled to obtain such particulars from him, he shall forthwith proceed to the nearest police station and report the accident to the officer in

charge thereof or to the first police constable or officer whom he meets on his way thereto;

(d) if bodily injury has been caused to any person the driver shall—

(i) if the injured person so requests, or is unconscious, or if he appears to be so injured as to endanger life, take him at once to a hospital or medical practitioner, and then forthwith report the accident to the officer in charge of the nearest police station, and

(ii) in every other case, at once report the accident to the officer in charge of the nearest police station, and every other occupant of the motor car shall within twenty four hours communicate his name and address to the officer in charge of a police station, stating that he was in the car at the time of the accident.

In acquitting the accused the Magistrate held that it was only if the accused had been asked for particulars in (b) and had failed to furnish these particulars that he became liable to make a report under (c).

It is contended on the other hand by the Attorney-General that it was the accused's duty to report the accident under (c) if he had not furnished particulars in (b) whether he had been requested to furnish these particulars or not.

It appears to me that, if the view of the Magistrate was adopted, the clear intention of the legislature, namely, that in the event of an accident the driver of a motor car involved in the accident should not in any circumstances be able to hide his identity would be frustrated in the case of an accident in consequence of which injury was caused to property or an animal but not to a person.

Two illustrations occur to me. Injury is caused to a perambulator but not to the child in it or to the servant propelling it owing to the presence of a motor car on the highway. The servant in charge runs away in fear or, if he does not run away, asks no questions. It is not, I think, intended by the law that the driver of the car may leave the scene of the accident and make no report to the police. On the contrary, I think, that (c) was expressly intended to meet an eventuality such as this.

Or, again, take the case of a driver who damages a culvert, traffic sign, lamp-post or fence. Can it be said that he has complied with the law by stopping his car, inspecting the damage he has done and then speeding on his way again?

The law, as it appears to me, casts on the driver the three-fold duty to stop, to supply information on request, and to report to the police. In the case of bodily injury having been caused the duty of reporting to the police is an absolute one. It is necessary that it should be so as the person injured may not be in a condition to ask for particulars. Where, however, bodily injury has not been caused, the driver is only absolved from his duty to report to the police if he has already

supplied particulars under (b). Should the circumstances be such that the person entitled to particulars has not been placed in possession of those particulars, the driver is under an obligation to make a report to the police so that they may be available if and when required. It is only in this view of the matter that full effect can, in my opinion, be given to the purpose with which the law was framed.

I allow the appeal, convict the accused, and remit the case to the Magistrate for the purpose of passing sentence.

Since writing the above I have seen an article in the *Law Journal* commenting on section 22 of the Road Traffic Act, 1930, subsection (2) of which is similar to though not identical with (c). "On one matter, however, we are certain," the concluding paragraph reads. "If an accident well within the Act takes place, and the only reason why the driver does not give his name and address is that there is nobody there who is willing and able to ask for it, the duty to report arises."

I interpret our own law in the same way.

—K. S. A.

POLICE SERGEANT, HAMBANTOTA *v.* SIMON SILVA.

[SOERTSZ A.C.J. *S.C. No. 338—M.C. HAMBANTOTA, No. 5587.* JULY 16, 24, 1939].

Obstructing public servant—What constitutes voluntary obstruction?—Does a verbal refusal to allow a public servant to perform his duty constitute voluntary obstruction?—Is some overt act or physical force necessary?—Ceylon Penal Code S 183. [*Leg. Enact. Vol. I. Ch 15*].

HELD: (i) that the question whether there is 'voluntary obstruction' within the meaning of S. 183 of the Penal Code is one which depends on the circumstances of each case and

(ii) that there is voluntary obstruction, whether force is or is not used, when that is done which can reasonably be regarded as hindering or being likely to deter an officer from discharging his duty.

Dissented from:
Fernando v. *Alim Marikar* (1912) 1 C.A.C. 173 ... ... (1)
Hendrick v. *Kirihamy*, (1909) 12 N.L.R. 28 ... ... (2)
Lourensz v. *Jayasinghe* S.C. Min. 20-7-1916, 355 P.C. Ratnapura 3948 (3)
Referred to:
Bastable v. *Little* (1907) 1 K.B. 59 ... ... (4)
Betts v. *Stevens* (1910) 1 K.B. 1 ... ... (5)
Followed:
Borrow v. *Howland* (1896) 74 L.T. 787 ... ... (6)
Rasavasagram v. *Siwandi* (1906) 9 N.L.R. 88 ... ... (7)
Davidson v. *Rahiman Lebbe* (1901) 2 Br. 281 ... ... (8)

M. M. K. Subramaniam, with him *C. J. Seneviratne*, for the accused-appellant.

D. Jansze, Crown Counsel, for the plaintiff-respondent.

SOERTSZ A.C.J.—The charge preferred against the accused-appellant was that he 'did...on the 11th April 1939, voluntarily obstruct a public servant to wit...examiner of weights and measures in the discharge of his duties and thereby committed an offence punishable under section

183 of Chapter 15, Vol. I of the Legislative Enactments. This charge was laid in the terms of the section referred to which reads as follows:— "Whoever voluntarily obstructs any public servant or any person acting under the lawful orders of such public servant in the discharge of his public functions shall be punished,..."

The facts on which this charge was based are these: B. T. Jamion, an examiner of weights and measures whom, it is clear, the accused knew as such, visited the Green Market in Hambantota on the 11th of April, 1939, and detected some false measures in the provision stall of one D. C. Jayaweera. The accused came up and claimed one of those measures saying he had lent it to Jayaweera. The examiner took charge of it and sealed it in the presence of the Vidane Aratchi. Later in the day, the examiner went to the accused and intimated to him that he 'wanted to search for the weights and measures,' obviously meaning the weights and measures that accused kept in his boutique. The accused said 'he has no weights and measures in his boutique.' The examiner said he 'did not believe him' and 'must search.' The Vidane Aratchi was with the examiner at the time. The accused threatened the examiner and the Vidane Aratchi saying "he would know what to do if he searched the boutique." The examiner says 'we could not search as the man was *obstructive and boisterous. I anticipated trouble if I used force.*' That is the evidence of the examiner. The Vidane Aratchi's evidence is to the same effect. "The accused said if the premises are searched, you know what will happen." The Vidane Aratchi also says that the accused wanted to see 'the authority,' and would not allow a search until he saw it and that the accused said 'if you want to search the house please bring the police.' Another witness Nikulas corroborates the evidence of Jamion and the Vidane Aratchi. The accused gave no evidence himself. He called a witness, who was, by no means, impressive. The learned Magistrate accepted the version given by the witnesses for the prosecution, and convicted the accused and sentenced him to pay a fine of Rs. 15/-, in default two weeks simple imprisonment.

In view of the punishment imposed, the accused had no right of appeal on the facts, and the appeal is preferred on a question of law. The question submitted is whether assuming the facts to be as stated for the prosecution, there was 'voluntary obstruction' in the meaning of those words in section 183. It was contended that there was no more than a 'verbal refusal to allow the public servant to perform his duty,' and that that 'does not constitute voluntary obstruction within the meaning of the section under which this charge was laid.' The words I have quoted occur in the judgment of LASCELLES C.J. in *Fernando* v. *Alim Marikar* (1). In that case the facts were as follows: A Sanitary Inspector in the course of his perambulations encountered the accused who "had onions in a box on the drain." He told "the accused to remove them. The accused refused." The Inspector "bent to take the box." The accused abused him in indecent language. LASCELLES C.J. commenting upon the

evidence said: "the evidence is that the accused did no more than refuse to allow the complainant to remove the box, and that there was an altercation between the two. A mere verbal refusal to allow a public servant to perform his duty does not constitute voluntarily obstructing within the meaning of section 183. *There must be some overt act done or physical* means used." Now, in my opinion a proposition like that must not be taken at large, but with reference to the facts of the case. I agree with the conclusion to which LASCELLES C.J. came when he acquitted the accused. There was no evidence to show what right the Sanitary Inspector had to demand the removal of the box from where it was. If he had no such right, he was acting beyond the scope of his public functions when 'he bent to take the box,' and the accused was justified in defending his property against an invasion of his right to it. In the circumstances he could not be said to have been resisting a public officer but defending his own property. I should have preferred to base the order for acquittal in that case on that view of the matter. Perhaps, LASCELLES C.J. was saying the same thing in a different way. But if he was not, and if he meant to say that "a mere verbal refusal to allow a public servant to perform his duty does not constitute 'voluntarily obstructing'" and that "there must be some overt act done or physical means used," is a legal proposition that applies universally regardless of the facts, I must say, with great respect, that I cannot agree. LASCELLES C.J. relied on the decision in *Hendrick* v. *Kirihamy* (2), in which HUTCHINSON C.J. held that where a constable went with a search warrant to search the accused's house for fermented toddy and the accused refused to allow such search, and went inside the house and picked up a pot of toddy and spilt it over the hearth, the cunduct of the accused did not amount to obstruction within the meaning of section 183 of the Penal Code. There are two aspects of obstruction in that case, (1) the accused saying he will not allow a search without the village headman being present and (2) his spilling the contents of the pot over the hearth. HUTCHINSON C.J. said 'the mere saying that he would not allow him to search *without doing anything more* is not an obstruction; and the spilling of the toddy *was certainly* not *an obstruction*.' I am not concerned in this case with what HUTCHINSON C.J. said in regard to the second aspect of the obstruction alleged done. But, if I may say so with respect, the acquittal of the accused in respect of the first aspect in that case was right on the facts as established because the accused merely said he would not allow a search and did nothing more than go inside the house. He did nothing to prevent a search. He only took steps to see that the search would prove abortive. That is a different matter and does not concern us in this case. When the accused said he would not allow the police constable to search without the village headman being present, and then went inside the house and spilt the toddy, he was doing nothing to deter the police constable from entering the house, but was really using an expedient for him to go inside the house himself and remove traces of guilty possession by spilling the toddy. So far as the spilling

of the toddy is concerned, whether that amounts to an obstruction or not is another question. But I am not concerned with it in this case On that point HUTCHINSON C.J. and WOOD-RENTON C.J. have taken opposite views. The only question here is whether 'a verbal refusal' to allow a search can never amount to an obstruction. In *Hendrick* v. *Kirihamy*, HUTCHINSON C.J., as I have pointed out, took the view that it did not in the circumstances of that case, and as I have said on the facts of that case the verbal refusal there did not, in my opinion too, amount to an obstruction.

In *Lourensz* v. *Jayasinghe* (3), WOOD-RENTON C.J. said he agreed with that view of HUTCHINSON, C.J. as expressed in that case and acquitted the accused in the case before him because "the obstruction offered by the accused to the Sanitary Inspector was purely verbal." The facts as stated in the report of *Lourensz* v. *Jayasinghe* are too meagre to enable me to say in what circumstances WOOD-RENTON C.J. made the observation I have quoted, but I repeat again that I do not agree with that proposition if it is meant as a general statement of the law. In the very cases cited by WOOD-RENTON C.J. in *Lourensz* v. *Jayasinghe*. namely, *Bastable* v. *Little* (4) and *Betts* v. *Stevens* (5), when RIDLEY J. stated in the former case "I think that in order to constitute an offence under this section (*i.e.* wilful obstruction), *there must be some interference by physical force or threats*," DARLING J. said "I should desire to reserve my opinion whether the respondent had committed an offence under the section, although no physical obstruction of the of the police constables in the execution of their duty had taken place," and ALVERSTONE L.C.J. added as a note to his judgment "I also would wish to guard myself from saying that the only obstruction contemplated by this section is a physical obstruction." In the later case LORD ALVERSTONE, LORD DARLING and BUCKNILL J. acted on the footing that physical obstruction was not necessary.

In the case before me, the facts bring it even within RIDLEY J's view that *threats used to prevent* an officer performing his duty would amount to voluntary obstruction. There is ample proof that the accused in this case used threats. He was clearly threatening when he said 'you know what will happen if you search' and 'that he knew what to do if the examiner searched the boutique.' The evidence also establishes that the accused was 'boisterous' at the time and that the examiner feared that force might be used and refrained from the proposed search. But, as I have pointed out, the other Judges who took part in the two cases took the view that a verbal refusal to allow a person to perform his duty would suffice apart from threats provided it was a refusal conveyed in terms that indicate that the officer would have to use force if he proceeded to put his intention to search into execution. That surely must be so if one regards the plain meaning of the word

obstruct. In the Oxford Dictionary 'obstruct' is stated to mean *inter alia* "to stand in the way of or persistently oppose the progress of or course of (proceedings or a person or thing in a purpose or action), to hinder, impede, retard, delay, withstand, stop," and by way of illustration there is this quotation from Froude, "he had *obstructed* good subjects, who would have done their duty, had he allowed them." On the day in question, those were exactly the relations and reactions between the accused and the examiner of weights and measures. In *Harrow* v. *Howland* (6) a householder who refused to let the scavenger enter into his house to remove refuse—the scavenger acting under the orders of the County Council—was held "wilfully to obstruct" the scavenger. This is the view WOOD-RENTON J. himself took in *Rasavasagram* v. *Siwandi* (7), and I cannot at all follow the distinction he sought to draw in the course of his comment in *Lourensz* v. *Jayasinghe* by pointing out that in the earlier case the words he was interpreting were 'obstruct and impede' and in the case before him, there was only the word 'obstruct.' It seems to me that if the accused in *Rasawasagram* v. *Siwandi* was guilty of 'obstructing and impeding' by doing what she did, she certainly would have been guilty of 'obstructing' if that was the charge against her, for the greater includes the less. But in truth, there seems to be no difference so far as language is concerned between 'obstruct' and 'obstruct and impede' except perhaps that there is greater rhetorical quality in the tautology of the latter. In the quotation I have made from the Oxford Dictionary, Vol. VII., 'obstruct' is stated to mean, 'impede' *inter alia*.

I will refer to one more case *Davidson* v. *Rahiman Lebbe* (8). In that case MONCREIFF J. said. "Mr. Bawa argued that something like force was necessary to meet the words of the section .....and that it was necessary to show something more than passive resistance. The case in 4 N.L.R. 151 is sufficient to show that force was not necessary .....For my part, I think it is not possible to lay down any hard and fast rule upon the subject.....It seems to me that the question is one of circumstances and that there is voluntary obstruction, whether force is or is not used, when that is done which can reasonably be regarded as hindering or being likely to deter an officer from discharging his duty."

If I may respectfully say so, that is my own view on the law; and on the facts of this case, it is abundantly clear that the accused was rightly convicted.

In my opinion, the accused acted very defiantly and the sentence imposed is, I think, out of proportion to his offence. At one stage, I contemplated a sentence of imprisonment, but as there is nothing against the accused, I refrain from sending him to prison. I alter the fine to one

of Rs. 30/- in default one month's rigorous imprisonment.

Conviction affirmed. Sentence enhanced.

[Proctor for accused-appellant : *T. K. Burah.*]

—K. S. A

PERUMAL, EXCISE INSPECTOR *v.* V. ARUMUGAM.

[SOERTSZ A.J.C. *S.C. No 50—M C. Badulla-Haldummulla No. 9990.*
JUNE 29, JULY 25, 1939.]

Ganja—Accused charged with unlicensed possession of a preparation containing ganja—Is mens rea *necessary for the constitution of the offence ?—The Poisons, Opium & Dangerous Drugs Ordinance, S. 28.*

The accused was charged with having had in his possession, without a licence from the Governor, *legium* in which 'ganja' was indentified. The Magistrate, however, acquitted the accused on the ground that he 'never knew that the preparation contained ganja.' On an appeal against the acquittal,

HELD: (i) that there are many branches of social and municipal legislation in which an act is made criminal even without any *mens rea*, the Poisons, Opium & Dangerous Drugs Ordinance being one such and

(ii) that the order of acquittal was, therefore, wrong.

Followed :
Casie Chetty v. *Ahamadu*, (1915) 18 N.L.R. 186 ... ... (2)
Referred to :
Burah v. *Mohamadu Sally*, (1934) 2 C.L.W. 381 ... ... (1)
Applied :
Reg. v *Bishop*, (1879) 5 Q.B.D. 259 ... ... (3)
Hobbs v. *Corporation of Winchester*, (1910) 2 K.B. 472 ... ... (4)
Betts v. *Armstead*, (1888) 20 Q.B.D. 771 ... ... (5)
Goulder v. *Rook*, (1901) 2 K.B. 290 ... ... (6)
Laird v. *Dobell*, 1906) 1 K.B. 131 ... ... (7)
Horton v. *Gwynne*, (1921) 2 K.B. 661 ... ... (8)
Derbyshire v. *Houliston*, (1897) 1 Q B. 772 ... ... (9)

An appeal against an order of acquittal of the accused by R. R. Selvadurai Esq., Magistrate of Badulla.

M. T. de S. Amarasekere, K.C., Solicitor-General, with him *D. Jansze*, Crown Counsel, for the complainant-appellant.

T. K. Curtis, for the accused-respondent.

SOERTSZ A.C.J.—The accused in this case was charged with having had in his possession, without a licence from the Governor, "a preparation of or extract from the hemp plant commonly known as ganga, or a resin obtained from the hemp plant, an offence against section 28" of the Poisons, Opium and Dangerous Drugs Ordinance.

The Magistrate found that the accused was in possession of the impeached preparations. The Analyst's report proves that 'ganga' was identified in all the brands of the legium found in the possession of this accused. But he acquitted the accused because "on the facts it is clear that the *accused never knew that the preparation contained ganga.*"

The Magistrate took the view that *mens rea* is necessary for the constitution of this offence and that on a person being found in possession of such a preparation as this, there is a presumption of *mens rea*, which he must rebut. He relied on the judgment of *Burah* v. *Mohamadu*

Sally (1), in which GARVIN J. concluded his judgment with the observation "upon proof of the fact of possession the onus lay on the appellant to show that his possession was innocent." The learned Magistrate seems to think that this view is in conflict with the view taken by DE SAMPAYO J. in *Casie Chetty* v. *Ahamadu* (2), but, in reality, it is not, for when DE SAMPAYO J. said "I am of opinion that in respect of the acts made punishable by section 43 which involves no qualifying condition, the absence of knowledge is no ground of defence," he was speaking with reference to section 43 alone, and he went on to consider section 50 of the Ordinance in its bearing on section 43 and said 'I think the circumstances give rise to the presumption created by section 50.....I do not think that he as a medical practitioner *ought* to be heard to say, or to be believed when he says, that he did not know the nature of the drug with which he was dosing his *clients*.' Perhaps it was not quite correct to say that 'in the circumstances' of that case the presumption under section 50 arose, the circumstances being the 'suspicious and highly unsatisfactory' conduct of the accused when his house was searched. In my view the presumption arose on the mere fact of possession being established, apart from and independent of the circumstances of that possession The circumstances are something to consider when examining the question whether the presumption has been rebutted or not.

In the present case, the position is quite different from the cases that arose before DE SAMPAYO J. and GARVIN J. The position is what the position would have been in those cases if section 43 of the Excise Ordinance stood without the mitigation offered by section 50. Section 28 states that no person shall have in his possession any such preparation without a licence, and section 76 penalizes such a possession, without qualification or reservation This is one of those statutory crimes in which it is unnecessary to show anything more than that the accused committed the act forbidden by the statute under which he is charged. The Legislature tends to create such offences when in it's view, the damage caused to the public by the offence is great and the offence is such that there would usually be great difficulty in proving *mens rea*, if that degree of guilt was required. *Halsbury* (Vol. IX of the Hailsham Edition at pages 11 and 12) puts the matter thus: "In a limited class of offences, *mens rea* is not an essential element. This class consists, for the most part, of statutory offences of a minor and only quasi-criminal character and, in order to determine whether *mens rea* is an essential element of an offence, it is necessary to look at the object and terms of the statute which creates it." There are many English cases on this point For example, in *Reg.* v. *Bishop* (3), it was held that keeping two lunatics without a licence was an offence although the accused did not know that the two men were lunatics; in *Hobbs* v. *Corporation of Winchester* (4), it was held that possessing unsound meat for sale was an offence despite the fact that the butcher was not aware that it was unsound; in *Betts* v. *Armstead* (5), *Goulder* v. *Rook* (6), *Laird* v. *Dobell*

(7), it was held that selling an adulterated article of food was an offence although the accused did not know it was adulterated. For other instances, see *Horton* v. *Gwynne* (8). As pointed out by DE SAMPAYO J. on the authority of *Derbyshire* v. *Houliston* (9), if the Legislature in legislation of this character does not intend to create an absolute liability, it introduces such words as 'knowingly,' 'intentionally,' etc. The only defence in a case like this appears to be a successful denial of the fact of physical possession on the part of the accused.

As regards Common Law offences, which so far as we are concerned, have been made statutory to the extent that they have been codified in our Penal Code, *mens rea* is necessary as section 72 of the Penal Code indicates. Section 38 makes section 72 applicable to offences punishable under 'any law other than this Code' as well, but in my opinion, this does not mean that it necessarily applies to all offences outside the Penal Code. It is not an inflexible rule. Whether it applies or not must, as I have pointed out on the authority of the cases I have referred to, depend on the particular Legislative Enactment. If I may repeat myself and use the words of DE SAMPAYO J. "there are many branches of social and municipal legislation in which an act is made criminal even without any *mens rea*." The Poisons, Opium and Dangerous Drugs Ordinance is such an Ordinance.

For these reasons, I am of opinion that the order of acquittal was wrong and I set it aside and enter conviction. In regard to the sentence to be imposed, I am of opinion that the absence of *mens rea* can properly be taken into account in that connection, and as the Magistrate took the view in this case that the accused was not aware of the composition of this preparation, I think a nominal sentence will suffice. I sentence the accused to pay a fine of Rs. 5/- in default 5 days' simple imprisonment.

Acquittal set aside. Accused convicted.

—K. S. A.

P. JANIS DE SILVA *v.* A. DE S. KANAGARATNE

[WIJEYEWARDENE J. AND JAYATILAKE A.J. *S.C. No. 66—D.C. Galle No. 35558.* JULY 3, 14, 1939.]

Crown lease—Stipulation that land shall revert to the Crown if lessee's interests are sold in execution—Sale of such interests in execution—Has the lessee a "saleable interest" in the land to be so sold?—Application by purchaser to set aside the sale—Civil Procedure Code, S. 284.

A Crown lease provided *inter alia* that if the lessee's interest be sold in execution of a decree against him, the lease shall cease and that the land shall revert to the Crown.

In execution of a money decree against the lessee, his interest in the leased land was siezed and sold and K. became the purchaser. K. subsequently made an application to Court to have the sale set aside on the ground that he had discovered that the lessee (judgment-debtor) had no saleable interest in the property. The District Judge dismissed the application.

HELD: (i) that the stipulation in question in the lease is valid,

(ii) that upon the sale in execution of the lessee's interest in the lease, the land reverted to the Crown,

(iii) that the penalty of reversion to the Crown takes effect without the necessity on the part of the Crown to obtain a judgment declaring its rights and

(iv) that the lessee had, therefore, no saleable interest in the property sold.

Per JAYATILAKE A.J.—"The first point taken on behalf of the appellant was that the expression 'saleable interest' means an interest which is capable of being sold by the judgment-debtor and not against him. I think this is too narrow a view to take of the meaning of this expression."

Referred to: *Munna Singh* v. *Cajadhar Singh*, (1883) I L R. 5 All. 577 ... (1)
Wijemanne v. *Schokman*, (1910) 13 N L.R. 301 ... ... (2)
Carron v. *Fernando*, (1933) 35 N L R 358 ... ... (4)
Perera v. *Perera*, (1907) 10 N L R. 230 ... ... (5)
Ram Kumar v. *Ram Gour*, (1909) I.L.R 37 Cal. 67 ... ... (9)

Appeal from a judgment of G. Furse Roberts Esq., District Judge of Galle, dismissing an application to set aside a sale in execution of the lessee's interest in a Crown lease.

H. V. Perera K.C., with him *V. F. Gunaratne*, for the purchaser-appellant.

J. E. M. Obeyesekere for the plaintiff-respondent.

N. E. Weerasooriya K.C., with him *L. A Rajapakse* and *Colvin R. De Silva*, for substituted-defendants (respondents).

JAYETILEKE A.J.—By an indenture of Lease bearing No. 155, dated February 23, 1920, the Crown leased to the defendant an allotment of land called Uskekunagodakele containing in extent A. 11 R 3 P. 30 in perpetuity subject to the following conditions:—

(a) The lessee and his heirs, executors, administrators and permitted assigns shall not sub-let, sell, donate, mortgage or otherwise dispose of or deal with his interest in this lease, or any portion thereof, without the written consent of the lessor, and every such sub-lease, sale donation or mortgage without such consent shall be absolutely void.

(b) That if the interest of the lessee or his heirs, executors, administrators and permitted assigns be sold in execution of a decree against him or his aforewritten, then, this demise and the privileges hereby reserved, together with these presents, shall forthwith cease and determine, and the lessor, his agent, or agents, may thereupon enter into and upon the said land and premises, or any part thereof in the name of the whole, and the same have, re-posses, and enjoy as in his former estate, and the said land and premises shall forthwith revert to the Crown, without any claim on the part of the lessees or his aforewritten against the lessor for compensation on account of any improvements or otherwise howsoever.

The plaintiff sued the defendant in this action for the recovery of a sum of Rs. 2,000/- and interest due upon a promissory note, and obtained judgment. A writ was issued to the Fiscal in pursuance of the decree and the right, title and interest of the defendant in the lease was seized. On or about November 4th, 1937, the sale took place, and the

appellant became the purchaser for the sum of Rs. 1,930/-. The appellant as purchaser paid 1/4 of the purchase price on the day of the sale and the balance of 3/4 on November 27th, 1937. On February 26th, 1938, he made an application to Court that the sale be set aside on the ground that he discovered that the defendant had no saleable interest in the property. At the inquiry, he produced three letters, X^2, R^3 and X^6, which indicated that the Crown took up the position that no title passed to him. The District Judge dismissed the appellant's application on the ground that the defendant had a saleable interest in the property; and the appeal is from that order. The appellant bases his application on S. 284 of the Civil Procedure Code. That section enables a purchaser to proceed by an application to set aside a sale on the ground that the person whose property purported to be sold had no saleable interest therein. The first point taken on behalf of the appellant was that the expression 'saleable interest' means an interest which is capable of being sold by the judgment-debtor and not against him. I think this is too narrow a view to take of the meaning of this expression. I agree with the dictum of STRAIGHT J. in *Munna Singh* v. *Gajadhar Singh* (1) that the expression must be interpreted in the widest and most general sense, and as meaning in plain terms 'nothing to sell. In the course of his judgment, STRAIGHT J. said "I cannot suppose it was ever intended that a purchaser at an auction-sale held under the authority of a Court, who buys a property as free from encumbrance, which subsequently turns out to be mortgaged up to its full value, can be said to have purchased what purported to be sold him, because it may be argued that he technically acquired the judgment-debtor's equity of redemption."

The alienation prohibited by condition (*a*) is restricted to voluntary alienations and not to necessary alienations. In *Wijemanne* v. *Schokman* (2) a condition somewhat similar to condition (*a*) was considered and it was held that the purchaser of the land at a sale in execution bought it subject to the condition as to inalienability. It follows from this judgment that if condition (*a*) stood alone, it could not be said that there was "nothing to sell." The next point taken on behalf of the appellant was that under condition (*b*) the property had to revert to the Crown the moment it was sold in execution, and that therefore it could not be said that the defendant had a saleable interest within the meaning of S. 284. A stipulation is attached to the lease providing for the restitution of the property to the Crown if the interest of the defendant is sold in execution. Is that stipulation valid in law? The intention of the Crown in imposing that stipulation can be gathered from the terms of the Indenture. An examination of the terms makes it clear that the Crown granted leases of this nature to persons who were able to clear and plant the land within a certain period and to pay the rent reserved in the indenture on the due dates. The object of the stipulation seems to be to prevent the property from passing into

the hands of people who were not approved by the Crown. A stipulation of this nature must be regarded as one which adheres to the land and gives rise, not to a personal action, but to an *actio in rem*. SANDE (3) says "that there has been considerable controversy on the point whether, if the owner on the sale of his property makes a pact that the purchaser shall not alienate it, such a pact is so far effective as to prevent the dominium from passing if the new owner does alienate the property. The most common view among the Doctors is that it will not have that effect.....They are chiefly influenced by the rule that it is the nature of such agreements that they do not bind the property but the person."

"From the different arguments that have been given in both sides, it appears that the more correct view is held by those who say that the passing of the dominium can be prevented by a pact, if only the owner imposes the pact at the time of the transfer of his property or makes a condition at the time of the alienation of the property, and not subsequently, as by the tradition the right can be acquired by another person....."

It must be noted SANDE was dealing with a case where there was merely an agreement not to alienate. In the present case there is in addition a provision for the transfer of the dominium if in breach of the agreement there is an alienation. The lease under consideration is one which may be termed *in longum tempus*. It is virtually an alienation. See *Carron* v. *Fernando* (4). The stipulation is, in my opinion, a valid one. The result is, that upon the sale in execution of the defendant's interests in the lease, the land reverted to the Crown.

Mr. Obeyesekere contended that the property cannot revert to the Crown until there is a declaration by Court to that effect. He relied on *Perera* v. *Perera* (5) in which it was held that a clause of forfeiture in a lease for non-payment of rent cannot be enforced, except by appropriate judicial proceedings, in the course of which it would be competent for the lessee to set up against the lessor all equitable rights to compensation. WOOD-RENTON J., in the course of his judgment said:

"The Court of Equity in England was from an early period accustomed to grant relief against the payment of the whole penalty on money bonds; and the Statutes 4 and 5 Ann. c. 16, sections 12, 13, 8 and 9 Will. III. c. 11 conferred a similar jurisdiction was extended to forfeiture clauses for non-payment of rent. This extension proceeded on the theory that the forfeiture clause—like the penalty in the bond—was only a security for the recovery of money. The Statue 4 Geo. 2 c. 28 recognized this jurisdiction, but limited (section 3) the time within which the lessee in default might claim relief. An attempt was at one time made to extend the jurisdiction in equity to relieve against forfeiture

(3) Restraints on Alienations pp. 306, 307, 314.

for non-payment of rent to breaches of other conditions in leases, *e.g.*, covenants to insure. But this was effectually checked by the decision of LORD ELDON in *Hill* v. *Barclay* (6), and of *Bowser* v. *Colby* (7), and and *Barrow* v. *Isaacs* (8). Later on, the Legislature interposed, and first the Court of Equity (22 and 23 Vict. c. 35 section 4-9) and afterwards Courts of Law (23 and 24 Vict. c. 126) were enabled to grant relief against breaches of covenants to insure if (*a*) no damage had resulted from the default, (*b*) the default was due to accident or mistake, or in any event not to gross negligence on the part of the lessee, and (*c*) there was an adequate insurance on foot at the time of the application to the Court." The *ratio decidendi* of that case is that the forfeiture clause is only a security for the recovery of money. That case does not help the respondent. It shows that a lessee is not entitled to claim relief against every forfeiture clause in the lease. To my mind there is no analogy between that case and the present case. Condition (*b*) has nothing to do with the performance by the defendant of his duties as a lessee. It provides that on the happening of a certain event, the land shall revert to the Crown. As soon as the interest of the defendant in the lease is sold in execution the property reverts to the Crown as a consequence imposed by condition (*b*). I am, therefore, of opinion that the penalty takes effect at once and there is no necessity for the Crown to obtain a judgment declaring its rights.

Mr. Obeyesekere also contended that the doctrine of *caveat emptor* applies to this case. I cannot see how that doctrine can be applied to an application under section 284 of the Civil Procedure Code. That section furnishes a statutory exception to the doctrine of *caveat emptor*. See *Ram Kumar* v. *Ram Gour* (9). In my opinion, in view of the condition (*b*) the defendant had no saleable interest in the property sold. I would therefore allow the appeal with costs in both Courts against the plaintiff.

WIJEYEWARDENE J.—I agree.

Appeal allowed.

—K. S. A.

SINNAN CHETTIAR *v.* MOHIDEEN & OTHERS.

[HEARNE & DE KRETSER JJ. *S.C. No. 116—D.C. COLOMBO, No. 549.*
AUGUST 24, 30, 1939].

Appeal—Some parties to action in the Court against whose decree the appeal is made not made respondents to the appeal—Omission attributable to appellant's belief that judgment in appeal did not affect rights of such parties—Discretion of Court to adjourn hearing of appeal—Civil Procedure Code, S. 770.

Where some of the parties to the action in the Court against whose decree the appeal was made were not made parties to the appeal and where it appeared that the appellant might have thought that the judgment in appeal did not purport to make any pronouncement upon the rights of the parties not joined,

6 (1811) 18 Ves. 56. 7 (1841) 1 Hare 109. 8 (1891) 1 Q.B. 417.

HELD: that there was, under the circumstances, a valid excuse for the non-joinder of such parties, enabling the Court to give leave to the appellant to take the necessary steps to join such parties as respondents to the appeal.

C. Thiagalingam, with him *Ismail* and *Curtis*, for defendant-appellant.

N. Nadarajah, with him *Kariappar*, for plaintiff-respondent.

HEARNE J.—The plaintiff, in an action filed by him, sought a declaration that he and the 2nd to 4th defendants were entitled to certain land, the subject matter in dispute, by virtue of a *fidei-commissum* contained in the last will of one Lebbe Marikar and that the 1st defendant had no right or title thereto. It was averred that the 1st defendant claimed the land on a deed of transfer which it was stated had been granted in violation of the rights of the plaintiff and 2nd to 4th defendants and was of no avail in law against them.

In his judgment the Judge in answering issue 3 held that the property in question vested in the plaintiff and the 2nd to 4th defendants and in answering issue 4 held that the 1st defendant had been in wrongful possession of the property.

The 1st defendant has appealed from the judgment and decree passed by the Judge, making the plaintiff the sole respondent to the appeal. It is clear to my mind that the 2nd to 4th defendants were necessary parties to the appeal and that, as they have not been made respondents, the appeal is not properly constituted.

The only question is whether relief should be given under section 770 C.P.C.

The decree does not refer to the 2nd to 4th defendants at all. It orders and decrees that the plaintiff is entitled to a 2/5th share of the premises described in the Schedule and to damage in respect of that share. But not only is the decree silent on the question of the rights of the 2nd to 4th defendants. In his judgment the Judge appears to state that he expressly reserves to the 1st defendant the right to establish whatever claims he may be advised he has against the 2nd to 4th defendants. "As the 2nd to 4th defendants were merely added as parties who had interests in the land and as no question has been discussed as between them and the plaintiff in this case, I express no opinion as regards the prescriptive rights of the 1st defendant against them." In another portion of his judgment he says "I can only enter judgment in favour of the plaintiff." Although the Judge had formally answered issue 3 (supra) in favour of the 2nd to 4th defendants, I feel that if the appellant, on reading the judgment as a whole, was left with the impression that it did not purport to make any pronouncement upon the rights vicariously advanced by the plaintiff on behalf of the 2nd to 4th defendants who did not appear, his position is understandable. I am of the opinion that "some good excuse" has been given for the non-joinder of these defendants.

Leave will be given to the appellant to take the necessary steps to join all the other parties in the trial Court as respondents to the appeal (I notice that some of the defendants were minors and a guardian-ad-litem was appointed) subject to this being done within 7 days from the date of the delivery of this order and to the payment of Rs. 105/- costs to the plaintiff-respondent within the same time. If these conditions are not complied with, the appeal will be dismissed with costs.

DE KRETSER J.—I agree.

Leave granted for joinder of necessary parties.

Proctor for appellant: *S. Kandasamy.* Proctor for respondent: *M. N. M. Salahudeen.*

— K. S. A.

C. D. SENANAYAKE & OTHERS v. DE CROOS & ANOTHER

[HEARNE & WIJEWARDENE JJ. *S.C. 63—D.C. NEGOMBO 10531.*
AUGUST 25, 30, 1939.]

Security for costs—Plaintiffs residing outside the jurisdiction of the Court—Land in dispute situated within jurisdiction—Propriety of order requiring security for costs—Civil Procedure Code, S. 416.

Appeal—Non-compliance with provisions of the Code regarding filing petition of appeal—Power of Appellate Court to deal with the matter in revision—Civil Procedure Code, S. 55.

Where it was found that the 1st to 3rd plaintiffs who normally lived outside the jurisdiction of Court had taken up residence within its jurisdiction and the 4th plaintiff lived outside its jurisdiction and the subject matter of the dispute was situated within the jurisdiction of the Court and where the trial Judge had under S. 416 of the Civil Procedure Code ordered the plaintiffs to deposit security for the defendants' costs,

HELD: (i) that the Court should proceed in the exercise of its discretion under S. 416 on definite principles,

(ii) that one of the considerations to which the Court should direct its attention is whether the plaintiff had selected a particular forum to harass the defendant or render the recovery of costs by him difficult,

(iii) that another matter which should carefully be considered is whether the provisions of S. 416 have been oppressively invoked by a defendant and

(iv) that, in the circumstances of the case, the order requiring security was not properly made.

HELD, further, that where the appellants had not complied with the provisions of the Civil Procedure Code regarding the filing of appeals and where the appellants had been given permission to prosecute the appeal as paupers, the Supreme Court had power in appropriate circumstances to make an order in revision at once setting aside the order of the trial Judge.

Per HEARNE J.—"In making his order, the Judge appears to have been influenced by the poverty of the plaintiffs which he stresses. But the poverty of a plaintiff is a misfortune, not a fault; he will not be compelled to give security merely because he is a pauper."

Followed: *Cowell* v. *Taylor*, (1885) 31 Ch. D. 34 ... ... (1)
Cook v. *Whellock*, (1890) 24 Q.B.D. 658 ... ... (2)
Rhodes v. *Dawson* 16 Q.B.D. 548 ... ... (3)
Scott v. *Mohamadu*, (1914) 18 N.L.R. 53 ... ... (4)

1st plaintiff, for himself and on behalf of the others, in person.

Croos Da Brera, with him *C. T. Olegasegeram*, for the defendants-respondents.

HEARNE J.—The 1st, 2nd, 3rd and 4th plaintiffs who are here the appellants filed an action in the District Court of Negombo claiming declaration of title, ejectment and damages in respect of certain landed property situated within the jurisdiction of that Court.

On an application being made by the defendants under section 416 C.P.C., the plaintiffs were ordered to deposit security for costs on the ground that they lived outside the jurisdiction of the Court. Against this order the plaintiffs have appealed and permission has been given to them by this Court to prosecute their appeal as pauper appellants. The Judge found that the plaintiffs were without means, that the 4th plaintiff lived outside the jurisdiction of the Court and that the 1st to 3rd plaintiffs had moved to Negombo "for the purpose of avoiding security in this action or on account of the convenience of residence in Negombo for the purpose of this case."

Section 416 is general in its terms and it is desirable that in applying it, the Court should proceed in the exercise of its discretion on definite principles. Litigants would otherwise be encouraged to make applications of this nature in the great majority of cases.

In making his order the Judge appears to have been influenced by the poverty of the plaintiffs which he stresses. But the poverty of a plaintiff is a misfortune, not a fault; and he will not be compelled to give security merely because he is a pauper. That, at any rate, is a principle on which Courts in England act. *Cowell* v. *Taylor* 31 Ch. D. 34 (1); *Cook* v. *Whellock*, 24 Q.B.D. 658 (2); *Rhodes* v. *Dawson* 16 Q.B.D. 548 (3).

The relevant section has been judicially interpreted by this Court. It has been held that an order for security should not be made as a matter of course and that one of the considerations to which the Court should direct its attention is whether the plaintiff has selected a particular forum in order to harrass the defendant or to render the recovery of costs by him difficult, *Scott* v. *Mohamadu*, (1914) 18 N.L.R. 53 (4). In the present case the plaint was filed in the District Court of Negombo because the subject matter in dispute is situated within the jurisdiction of the Court, and, according to the finding of the Judge, three of the four plaintiffs who normally live outside the jurisdiction of the Court took up residence within its jurisdiction. These are not good reasons for an order requiring security to be given.

Another matter which should be most carefully considered is whether the provisions of section 416 have been oppressively invoked by a defendant. To this the Judge does not appear to have directed his attention at all.

I am satisfied the Judge has wrongly exercised his discretion and that the order he has made cannot stand.

Objection was taken by Counsel for the respondents that as only

one of the appellants appeared before the Court, that as the petition of appeal was signed by the appellants, but was not taken down by the Secretary of the Court in terms of section 755 C.P.C. and as application had not been made for typed copies within 20 days, the appeal should be rejected with costs. We intimated that the matter appeared to be one which would appropriately be dealt with in revision, and although Counsel for the respondents stated he did not ask that notice be given to him, he pressed that the appeal should be dismissed with the right reserved to the appellants to move in revision if so advised.

That is the tenor of the order that has usually been made by this Court in cases where the appellant is not a pauper. In the circumstances of this case, however, I feel that it would be both appropriate and just to make an order in revision at once setting aside the order of the District Judge. The case will be returned to the lower Court for further proceedings to be taken in due course.

WIJEYE WARDENE J.—I agree.

[Proctor for defendants-respondents: *A. E Rosa.*]

Case sent back.

—K. S. A.

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MOHAMED HASSAN *v.* ABDUL WAHID & ANOTHER.

[HEARNE S.P.J. AND KRETSER J. *S.C. Nos. 347 & 348—D.C. COLOMBO No. 1030.* AUGUST 22, 30, 1939].

Appeal—Two defendants separately represented—Petition of appeal by both stamped as one petition—Subsequent withdrawal of petition and filing of fresh petition affixed with stamps to cover deficiency—Is appeal properly constituted?

Two defendants who were separately represented joined in stating their grounds of appeal in one document to which stamps were affixed to cover one petition of appeal. They were subsequently allowed to withdraw this petition and file a fresh petition within the prescribed time to which they affixed stamps to cover the deficiency.

HELD that there is no provision of law whereby the second petition of appeal could be substituted in the place of the first and that the appeal was, therefore, not properly constituted.

Followed:

James v. *Karunaratne*, (1935) 37 N.L.R. 154 ... ... (1)
Attorney-General v. *Karunaratne et al*, (1935) 37 N.L.R. 57 (D.B.) ... (3)
Bandara v. *Baban Appu*, (1892) 1 Matara Cases 203 ... ... (4)
Sinnappu v. *Theivanai et al*, (1937) 39 N.L.R. 121; 1 C.L.J.R. 243 ... (5)

Referred to:

Menika v. *Banda*, (1908) 11 N.L.R. 110 (F.B.) ... ... (2)

L. A. Rajapakse, with him *E. G. Wickramanayake*, for appellants.

N. Nadarajah, with him *H. W. Thambiah*, for respondents.

HEARNE, S.P.J.—After judgment was entered on 18th October, 1938, in favour of the plaintiff and against the 1st and 2nd defendants, the latter who were separately represented by proctors joined in stating their grounds of appeal in one document which was filed on the

day judgment was delivered and to which stamps were affixed sufficient to cover one petition of appeal only. This was obnoxious to the rule in *James* v. *Karunaratna* (1935) 37 N.L.R. (1).

On 19th October, 1938, well within the time limited for appeal, the proctors for the defendants moved to withdraw the petition of appeal. Stamps for Rs. 18/- were tendered and the Court was moved to accept the stamps tendered with the petition on 18th October in order to make up the full amount required for two appeals. The Court allowed the motion and the effect was that on the 19th October the petition of appeal then filed was stamped as for two appeals. In this way the appellants had, as is claimed, brought themselves within the rule laid down in 37 N.L.R.

It is to be noted that while the proctors acting for the defendants gave as their sole reason for applying to withdraw the first petition of appeal and to substitute another in its place the fact that the former was improperly stamped, their application was in fact designed to serve another purpose. The grounds of appeal in the first petition were re-drafted and elaborated and an additional ground of appeal was raised. The second petition of appeal is a very different document from the first.

The ordinary consequence of withdrawing an appeal is an order of Court dismissing the appeal, and I know of no provision in our law which permits an appellant, in the circumstances of this case, to withdraw a petition of appeal and file another in its place. It would appear that in India, by reason of an enactment in the Indian Code, the provisions for the withdrawal of an action apply also to appeals, but there is no corresponding provision in our Code (*re* HUTCHINSON C.J. in 11 N.L.R. 110) (2).

According to the interpretation placed by this Court on the provisions of the Code relating to appeals read with the Stamp Ordinance, the initiation of an appeal must be in strict compliance with the requirements of the law and nothing can be done later to cure non-compliance with the law at the time the petition of appeal is presented.

In *Attorney-General* v. *Karunaratne et al* (1935) 37 N.L.R. 57 (3), a Divisional Bench followed *Bandara* v. *Baban Appu*, 1 Matara Cases 203 (4), which decided that the stamps for the certificate of appeal and for the Supreme Court judgment must be supplied *along with the petition of appeal*: while in *Sinnappoo* v. *Theivanai et al*, (1937) 39 N.L.R. 121 (5), it was held that failure to tender the proper amount of stamps is a fatal irregularity. In this case the correct amount of stamps was tendered after the time limit and it was held that the defect could not be so cured.

It seems to me that following these decisions which bind us the petition of appeal filed on the 18th October must be rejected, and that, as there is no provision whereby the petition of appeal filed on the 19th October could be substituted in its place, the latter must be regarded

merely as a document which has improperly been accepted as a petition of appeal.

In the result the appeal must be rejected with costs.

DE KRETSER J.—I agree.

Appeal rejected.

[Proctors for defendants-appellants: *C. Vethecan & A. C. Mohamadu.* Proctor for plaintiff-respondent: *M. M. A. Raheem.*]

— K. S. A.

K. UPPASAKAPPU *v.* ALLAN ELSIE DIAS & ANOTHER

[SOERTSZ A.C.J. & KEUNEMAN J. *S.C. No. 290—D.C. Galle No. 36634.* JULY 12, 20, 1939.]

Fidei commissum inter vivos—*Gift of property to six persons—Death of four—Conveyance of her interests to her husband by one of the survivors and her subsequent death without children—Does such conveyance pass title to the husband or do her interests pass to the last survivor and his heirs?*—Jus accrescendi.

A deed of gift contained the following declaration: "As I have adopted the late Daniel James Dias.....from his infancy as a beloved child of mine, I do hereby gift of my free will and pleasure unto the girl called Alice, the boy called Richard, the boy called Stewart, the girl called Ellen, the boy called Arthur, the boy called Victor, his six children by his married wife.....to have and to hold in equal rights (*ekka hateeata*) and to inherit by their descendants, children and grand-children (*ohoongeng pevataenne Dharoo munupuro aadeenta*) for ever according to law, enacting that the said.....(i e. Daniel's wife) do live there during her lifetime, and that the said interests shall not be mortgaged, alienated or transferred to any outsider."

Four of the six children died unmarried and without children. The fifth Ellen died without issue, leaving her husband (plaintiff) to whom she had conveyed her interests under the deed of gift. Stewart died shortly after Ellen and his children disputed Ellen's right to convey her interests to her husband.

HELD: (i) that the Roman Dutch law adopted the rule of *jus accrescendi* to the exetnt of saying that in no case had it automatic operation, but that it would be accepted or rejected as would best give effect to the testator's intention,

(ii) that the terms of the deed of gift in the present case created one *fidei commissum* and

(iii) that, therefore, on the death of Ellen, Stewart succeeded to her interests which he passed to his heirs.

Followed: *Tillekeratne* v. *Abeyesekere*, (1897) 2 N.L.R. 313 P.C. ... (1)
Carry v. *Carry*, (1917) 4 C.W.R. 50 ... ... (2)
Ayamperumal v. *Meeyan*, (1917) 4 C.W.R. 182 ... ... (3)
Carlinahamy v. *Juanis*, 26 N L.R. 129 ... ... (4)
Tillekeratne v. *Silva*, (1907) 10 N.L R. 214 ... ... (5)

H. V. Perera K.C., with him *E. B. Wickremanayake* and *H. A. Chandrasena*, for the 2nd and 3rd defendants-appellants.

N. Nadarajah, for the plaintiff-respondent.

SOERTSZ A.C.J.—In the year 1877, Anganetta Tenekoon made a deed of gift in which she declared as follows: "As I have adopted the late Daniel James Dias.....from his infancy as a beloved child of mine, I

do hereby gift of my free will and pleasure unto the girl called Alice, the boy called Richard, the boy called Stewart, the girl called Ellen, the boy called Arthur, the boy called Victor, his six children by his married wife.....to have and to hold in equal rights (*ekka hateeata*) and to inherit by their descendants, children and grand children (*ohoongeng pevataenne dharoo munupuro aadeenta*) for ever according to law, enacting that the said.....(i.e. Daniel's wife) do live there during her lifetime, and that the said interests shall not be mortgaged, alienated or transferred to any outsider." It is not disputed that this deed created a *fidei commissum inter vivos*. The only question is whether four of the six children having died without marriage or issue, and their rights having accrued to the surviving children, Ellen and Stewart, a conveyance by Ellen, who died childless, to the plaintiff, her husband, was a conveyance that passed title to him that enured to him after her death, or whether on her death, Stewart, who survived her, succeeded to her interests and passed them to his children and the 2nd and 3rd defendants, when he himself died a short time after Ellen. The answer to that question depends on whether the deed of gift created six different *fidei commissa*, or only one, for, in the former case, there being no children born to Ellen, her share was unaffected by any substitution, while in the latter case, on her death, her share passed to the other donees and their children, grand-children etc., in whose favour there was substitution.

In the case of *Tillekeratne* v. *Abeyesekere* (1), the Privy Council examined a testamentary bequest couched in similar terms and LORD WATSON who delivered the opinion of the Council said: "the conflicting claims depend not upon any disputed principle of the Roman-Dutch Law (he was referring to the *jus accrescendi*), but upon the construction of that part of the will which regulates the destination" of the property. "If the will constitutes three *fidei commissa*," one result will follow; if "on the other hand, the entire moiety was the subject of one *fidei commissum*," the result would be different. Their Lordships came to the conclusion that the case before them was the case of one single *fidei commissum* because "the bequest is not in the form of a disposition of one-third share of the whole to each of the institutes, *but of a gift of the whole to the three institutes jointly* with benefit of survivorship, and with substitution of their descendants."

When this question again arose in our Courts twenty years later in connection with a *fidei commissum* created by a deed *inter vivos*, BERTRAM C.J. declared that he reserved his opinion "whether so far as relates to the *jus accrescendi*—that is how he expressed himself—there is any substantial difference between testamentary *fidei commissa* and *fidei commissa* constituted by instrument *inter vivos*," and SHAW J. who sat with him said, "In *Carry* v. *Carry* (4 C.W.R. 50) (2) and *Ayamperumal* v. *Meeyan*, (4 C.W.R. 182) (3), this Court held the *jus accrescendi* to apply in cases of *fidei commissa* constituted by gifts *inter vivos* on the ground that the language used by the donor showed an intention to that effect. I was

a party to the latter decision and expressed a doubt whether a similar rule of construction applied in the case of a donation *inter vivos* as applied in the case of a will; but I did not, and do not now, doubt that *a right of accrual* may exist in either case, when the language of the donor or testator expresses such an intention." I should prefer not to express myself quite in that manner. It is not really a question of the *jus accrescendi* applying in these cases, but a similar result being achieved by an express declaration on the part of the testator or donor, or by an intention clearly to be inferred, that he desired the property to devolve in that manner. The *jus accrescendi* was a rule of the Roman Law by which among co-heirs in testamentary succession or among co-legatees there is a right of accretion, so that if one of them cannot or will not take his portion, it falls to other heirs to the exclusion of heirs at law. This rule was evolved in deference to the Roman horror of dying partly testate and partly intestate, but the Roman Dutch Law adopted that rule to the extent of saying that in no case had it automatic operation, but it would be accepted or rejected as would best give effect to the ator's intention. The point, however, is that in that case BERTRAM . and SHAW J. inclined to the view that either a testator or a donor ld provide for such a result.

Finally, in the case of *Carlinahamy* v. *Juanis* (4), the majority of Divisional Bench held that the principle enuciated in *Tillekeratne* v. *Abeyesekere* was not confined to testamentary *fidei commissa* but applied equally to *fidei commissa* created by a deed *inter vivos*. BERTRAM C.J. added that "it is undoubtedly the case that a stricter rule of construction applied to instruments *inter vivos* than to wills." He applied that rule to the deed before him and came to the conclusion that although the instrument was a deed of gift the intention of the donor was clearly to bring it within the scope of the principle of *Tillekeratne* v. *Abeyesekere* and that there was accretion. GARVIN J. agreed with him. The material parts of the deed in that case were as follows;

> "Whereas we do deem it fit and proper to set apart something separate unto our six children for their welfare and advancement, we have gifted unto our six children.....We shall have the right to possess the above property and do our pleasure therewith, and after the death of us both, our aforesaid six children shall be at liberty to own in equal shares, and possess peaceably for ever throughout their generations the property, and the six children and their heirs may by leasing out possess the property and not sell, mortgage, etc."

In my view the terms of the deed of gift in the case before us indicate more strongly the intention of the testator to create one *fidei commissum* by which the property was to devolve on the donees and their children, grandchildren, etc., so long as there were any such in existence. It is quite a different matter that a local law stands in the way and curtails the line of such a devolution. Just as in the Divisional Bench case, so in this case, it was contended that the words by which

the property was given 'in equal *shares*' negatived an intention on the part of the donor to create one *fidei commissum*. That contention was rejected in the earlier case and I have no less hesitation in rejecting it in this. Indeed, in my view, it can be urged with great force in this case that the words *ekka hateeata* are more consistent with an intention to create one *fidei commissum* than the words *ekkakara* in *Tillekeratne* v. *Silva* (5), and *akkakara kotas wasseng* in *Carlinahamy* v. *Juanis*.

We were also pressed to hold that the fact that the deed by necessary implication allowed a mortgage, alienation or transfer to one who was not an outsider indicated a contemplation by the donor of the possibility of the property passing out of the family, for the result, it was said, of a mortgage to one within the family, might well be that an outsider purchased the property at an execution sale. But, in my opinion, the answer to that is the answer suggested by Mr. H. V. Perera during the argument, that at such an execution sale nothing more than the interest of the mortgaging donee could pass to the purchasing outsider namely, his life interest, and that on his death, if he died without iss his share would accrue to the surviving donees and their children, e In other words the permission given to the donees to deal with t property in certain circumstances, operated only within the scope of t prohibition and could not transcend it. The result is that, in my vie the rules in *Tillekeratne* v. *Abeyesekere* and *Carlinahamy* v. *Juanis* app. in this case, and that, therefore, nothing passed to the plaintiff or to the 1st defendant. I set aside the judgment of the District Judge and dismiss the plaintiff's action with costs in both Courts.

KEUNEMAN J.—I agree.

Set aside.

[Proctor for appellants: *A. E. P. Jayatileke.* Proctor for respondent: *M. A. Azeez.*]

—K. S. A.

H. REWATA THERO *v.* H. HORATOLA

[NIHILL J. *S.C. No. 61—C.R. Kandy No. 24456.* JUNE 15, 29, 1939.]

Evidence—Case closed—Thumb impression of one party taken for comparison—Is procedure regular?—When will Supreme Court interfere?—The Evidence Ordinance, S. 73—The Courts Ordinance, S. 36.

At the close of the case and at the request of the defendant, the Commissioner of Requests directed the thumb impression of the defendant to be taken in open Court for the purpose of comparison and after recording further evidence to the effect that the disputed thumb impression was that of the defendant, entered judgment against him. It was contended on appeal that the procedure adopted by the Commissioner was irregular.

HELD: (i) that it is no part of a Judge's duty in a civil action to fill in the deficiencies in the case of one of the disputants by calling evidence on his own,

(ii) that a Judge has, however, a discretion at any period in a case to allow further evidence to be called for his own satisfaction and

(iii) that. whether the procedure adopted by the Judge was irregular or not, the Supreme Court thought that, in the circumstances of this case, it would not interfere with the decision of the Court below.

D. S. L. P. Abeysekere, for defendant-appellant.

Cyril E. S. Perera, for plaintiff-respondent.

NIHILL J.—This is a somewhat remarkable and unusual case. In an action for ejectment in the Kandy Court of Requests the plaintiff-respondent alleged in his plaint that the defendant-appellant was an over-holding lessee of the land in dispute. The defendant denied this and the plaintiff to prove the lease called the notary before whom it was executed. This witness was, however, unable to swear that the defendant was the man who had signed the lease, but he had taken the precaution of taking the lessee's thumb impression on the protocol and this he produced. The defendant in his evidence denied that the thumb impression on the protocol was his and further stated that he was willing to have his thumb impression taken in Court and forwarded along with the protocol to an expert for examination and report. At the close of the case and after counsel on both sides had addressed the Court the learned Commissioner purporting to act under section 75 of the Evidence Ordinance took the defendant's thumb impression in open Court. This was sent to the Registrar of Finger Prints for comparison with the thumb impression on the protocol. Subsequently evidence was taken to the effect that the impressions were the thumb impressions of one and the same person.

Counsel for the appellant has urged that this action on the part of the learned Commissioner was wholly irregular, that after the close of the plaintiff's case, the plaintiff having failed to prove that the defendant had been a lessee of the land, the defendant was entitled to succeed on the first issue, namely, as to whether the defendant had or had not held the land as a lessee. As a general proposition there is force in this contention; it is no part of a Judge's duty in a civil action to fill in the deficiencies in the case of one of the disputants by calling evidence on his own. But in the present case it is clear that the learned Commissioner called the further evidence for his own satisfaction and that he was urged to do so by the defendant's evidence. In the *Alim Will Case*, (20 N.L.R. p. 481), it was held that the Court has a discretion at any period in a case to allow further evidence to be called for its own satisfaction, even though it is doubtful whether it is admissible on the request of the party desiring it as of right. In this instance no formal request appears to have been made by the plaintiff, but the defendant himself had suggested the procedure subsequently adopted. In the light of what transpired this was a brazen suggestion, to say the least of it; but at the time when the learned Commissioner took action under section 73 of the Evidence Ordinance, there was nothing to indicate whether the comparison of the thumb prints would enure to the plaintiff's or the defendant's interest. Indeed, on the defendant's evidence it must have seemed

more probable that the defendant would succeed. However, whether or no the learned Commissioner's action was an irregularity, I do not propose to decide the point; for, in my view, this is a case which, if an irregularity did occur, I should be right to ignore it under the provisions of section 36 of the Courts Ordinance. He who seeks equity should come with clean hands and in this case the hands of the defendant appellant are very dirty indeed. On the other issue which dealt, *inter alia*, with the identity of the land, the learned Commissioner found in the plaintiff's favour and there are no reasons for me to question the correctness of his decision. The appeal is dismissed with costs.

Appeal dismissed.

[Proctors for appellant: *Silva & Karunaratne.* Proctor for respondent: *P. B. Ranaraja.*]

—K. S. A.

REV. LAKDASA DE MEL & OTHERS *v.* H. U. SUGUNASEKERE & OTHERS.

[DE KRETSER & WIJEWARDENE JJ. *S.C. 277—D.C. KALUTARA 20599.* JULY 3, 23, 1939.]

Appearance of party—Application by defendants' Advocate for postponement—Refusal—Advocate's withdrawal—Judgment entered for plaintiffs after the recording of evidence—Regularity—Civil Procedure Code Ss. 24, 72 & 85.

Issues—Omission to frame them—Power of Supreme Court to cure irregularity—Courts Ordinance S. 36.

On the date of trial of an action for recovery of land, one of the defendants attended Court and an Advocate entered an appearance on behalf of all of them. The Advocate made an application for a postponement of the case and, when the postponement was refused, he withdrew intimating that he had only been instructed to apply for a postponement and had no further instructions The trial Judge recorded the evidence of one of the plaintiffs and entered judgment for them.

HELD: (i) When a Proctor appears in Court and applies for a postponement, that is an appearance by his clients for all purposes,

(ii) that, inasmuch as an Advocate represents his proctor, his appearance is the appearance of his proctor and

(iii) that there is no provision of the law by which an Advocate can limit his appearance in Court for a particular purpose.

HELD further (i) that the judgment has, in the circumstances of the case, to be treated *inter partes* and

(ii) that, inasmuch as, in spite of the omission to frame issues, substantial justice had been done in the case, the Supreme Court would not interfere with the judgment in appeal.

Followed:

Andiappa Chettiyar v. *Shanmugam Chettiyar*, (1932) 33 N L.R. 217 [F.B.] (1)
Rampertab Mull and another v. *Jackeeram Angurwalia and others*, I.L.R. 23 Cal 991 ... ... (2)
Woutersz v. *Caruppen Chetty*, 3 Bal. 197 ... ... (3)
Public Trustee v. *Karunaratne*, (1937) 9 C.L.W. 72 ... ... (4)

Appeal from a judgment entered by T. F. C. Roberts Esq., Additional District Judge of Kalutara, after the withdrawal from the case of an Advocate whose application for a postponement was refused.

Colvin R. de Silva, with him *Barr Kumarakulasingam*, for defendants-appellanst.

N. M. de Silva for plaintiffs-respondents.

DE KRETSER J.—This was an action for recovery of land. Certain of the defendants filed answer through a Proctor, and a date was fixed for trial. On that date one of them at least attended Court, and an Advocate entered an appearance on behalf of all of them. He asked for a postponement on the ground that the defendants had been prevented by a Vidhane Aratchy from leaving their homes and so could not get ready for trial, and he called one of the defendants, after which the Court called the Vidhane Aratchy and thereafter refused a postponement. There is nothing on the record to show which of the parties appeared, and whether the respective Proctors appeared or not, but the appeal has been argued on the assumption that only the defendant who was called appeared, and that their Proctor did not appear.

It would seem that upon the postponement being refused the Advocate withdrew, intimating that he had been instructed only to apply for a postponement and had no further instructions. Apparently the Court acquiesced in his withdrawing, but again there is nothing to show that it approved of his doing so. The learned Judge thereupon remarked that the case was really proceeding *ex parte*, and, after recording the evidence of one of the plaintiffs, he entered judgment for the plaintiffs.

It is contended on appeal that there was no appearance on the part of the defaulting defendants, and that the Court should in fact have proceeded *ex parte* and have entered a decree *nisi*; and that even before doing so it should have framed issues. I have only to add that the defendants claimed title by prescriptive possession, and that plaintiffs had a long chain of title and a decree obtained many years previously by a predecessor in title against, it was alleged, defendants' predecessors in title.

The main point argued was that the appearance of Counsel was not an appearance on behalf of the defendants-appellants, and that the decision of this Court applied to a Proctor applying for a postponement and then withdrawing, and not to the circumstances of the present case. If Counsel's appearance amounted to an appearance by them, then the Judge was correct in proceeding as if the trial was *inter partes*.

It is conceded that if a defendant applied for a postponement and then withdrew, the trial would proceed *inter partes*. It is also conceded that if a Proctor acted similarly the proceeding would be *inter partes*, but it is argued that Counsel having appeared for a limited purpose, his appearance was for that purpose and no other; *i.e.*, a party may not limit his appearance, nor may a Proctor, but they may both do so if they appear by an Advocate. This seems a startling proposition, and its only

foundation is that a Proctor holds a proxy from his client and therefore represents him, but a Counsel does not represent him; yet it is conceded that if he did appear for a part of the trial and then withdrew, the trial would be considered one *inter partes*.

In the large majority of cases an application for postponement would be made by the Proctor, and so most of our decided cases deal with such applications by Proctors, and there being a tendency to give relief where the Proctor's appearance happened to be 'casual' a Bench of Four Judges (33 N.L.R. 217) (1) decided that if a Proctor happened to be present when the case was taken up for trial, he should be regarded as appearing for his clients unless he expressly stated that he did not. This case left untouched the decisions which held that when the Proctor did more and applied for a postponement, that was an appearance by his clients for all purposes.

It seems to me that apart from authority to which I shall refer, the argument proceeds on a misconception. It is difficult to get any authority from the Indian Courts for the reason that in that country they use the term 'pleader' and pleader inclues an Advocate, and that a pleader represents his client is made clear by his being expressly referred to in the section corresponding to section 24 of our Code.

In India, howeverr, a pleader is appointed in writing and resembles a Proctor in Ceylon rather than an Advocate. In that country Barristers stand on a different footing.

In *Rampertab Mull & another* v. *Jakeeram Agurwalla & others* (2), the Court held that where Counsel applied for a postponement and on this being refused left the Court not having been further instructed, there was an appearance by the party and the proceedings were *inter partes*. Counsel in this case was not a 'pleader.'

In Section 24 of our Code, a party is allowed to appear by his Proctor, and the section goes or to say that "an Advocate, instructed by a Proctor for this purpose, represents the Proctor in Court." That does no limit his appearance nor do the words "instructed for this purpose" limit it. Those words only mean that a party is not to be bound by some act of an Advocate appearing without instructions or appearing improperly with instructions obtained direct from the party. If then a Proctor represents a party by virtue of his appointment, and especially where his appointment authorizes him to retain an Advocate —as it does in this case, the Advocate represents the Proctor. That means that his appearance is the appearance of the Proctor and we are in exactly the same position as a Proctor who attempts to limit the nature of his appearance.

The question must not be confused with the responsibility of the Advocate, for it may be that his contract is with the Proctor, and having fulfilled his contract he is under no further obligation. The question is whether there has been an appearance by the party, and I

cannot doubt for a moment that there has been. The Advocate's appearance for a limited purpose was the Proctor's appearance for a limited purpose, and that again was the appearance of the party for a limited purpose.

Turning to chapter 12 which deals with default of appearance, we first get section 84 which refers to the defendant appearing in person or by Proctor. It cannot be denied that the Proctor has a right to appear by an Advocate. Section 85 deals with default on the part of the defendant ; it will not be denied that there again he may appear by an Advocate instructed by his Proctor. There is no reference in either section to limited authority, and all that both sections deal with is *appearance* and *no appearance*. If a party appears, even to move for a postponement, he has appeared.

Section 72 has an explanatory note to the effect that "a party appears in Court when he is there present in person to conduct his case or is represented by a Proctor or other duly authorized person." It will be noted that the Proctor *represents* the party, and exactly the same word is used in section 24 in describing the position of an Advocate; he 'represents' the Proctor. An Advocate would also be a duly authorized person. It is a case where the maxim "*Qui facit per alium facit per se*" applies.. If the argument is pressed to its logical conclusion, it would mean that if a trial took more than a day, Counsel may not appear on the second day on the ground of not being obliged to do so, and if Proctor and clients keep away the case will go partly *inter partes* and partly *ex parte*. That is a position which cannot be tolerated, nor would it be conceivable where a proper sense of responsibility exists.

To look at it from another point of view, on a trial proceeding *ex parte* a decree *nisi* is entered and the defendants have an opportunity of curing their default by showing that they had reasonable grounds for not appearing. Now, when a postponement is applied for on specified grounds and is refused, what other reasonable grounds would such a defendant have ? His only ground would have to be that the Court should have granted his application and that would be inviting the Court, perhaps presided over by another Judge, to reconsider its previous order, and this a Court cannot do. And this position is the same whether the application is made by a party or by a Proctor or by an Advocate. There is therefore no reason why any distinction should be drawn between an appearance by a Proctor and one by an Advocate. The truth is that there is no such thing as a limited appearance. There are two local cases dealing with similar applications by Advocates. In *Woutersz* v. *Caruppen Chetty* (2), Counsel applied for a postponement on the ground of his client's illness and "left the matter in the hands of the Court." On the application being refused he withdrew. This Court held that Counsel had no right to withdraw without the consent

of the Judge, but that it was his duty as an Advocate ta go on with the case as far as he could. The Court had given judgment for the defendant and this Court refused to interfere. It does not seem to have been contended that his obligation was limited or that a *decree nisi* should have been entered.

In Volume 23 page 397 of Halsbury's Laws of England will be found this statement:—

> "If Counsel is instructed, he ought to have control over the case and conduct it throughout. His authority may be limited by the client, but only to a certain extent; and it is not becoming for him to accept a brief limiting the ordinary authority of Counsel in this respect, or to take a subordinate position in the conduct of a case, or to share it with the client even if the litigant is himself a barrister; the litigant must elect either to conduct the case entirely in person or to intrust the case entirely to his Counsel. If a litigant instructs Counsel, the litigant cannot himself be heard, unless he revokes his Counsel's authority and himself assumes the conduct of the case and when a case is fairly before the Court and Counsel is seized of it, his authority cannot be revoked."

In the case of *The Public Trustee* v. *Karunatatne* (3), the application was made by an Advocate, and perhaps this appeared in the record, but the judgment of this Court which treated the decree as one entered *inter partes* makes no specific mention of this fact.

There remains the question, whether the Judge should have framed issues. It is not clear whether the first defendant followed his Advocate out of Court or remained. The Judge's note rather suggests he left, for the Judge's note means that though in law the case was proceeding *inter partes* it was in fact *ex parte*. The issues in the case were simple and apparent and could not but have been present to the Judge's mind and I do not think the omission to frame issues affects the case. In any event section 36 of the Courts Ordinance prevents us from interfering on a point like this where substantial justice has been done, and I think it has in this case.

I dismiss the appeal with costs.

WIJEYEWARDENE J.—I agree.

Appeal dismissed.

[Proctor for appellants: *D. R. de Silva.* Proctors for respondents: *Fernando & Fernando*].

— K. S. A.

T. H. DOLE, INSPECTOR OF POLICE *v.* K. K. SIMON APPU

[WIJEYEWARDENE J. *S.C. No. 276—M.C. Chilaw No. 8587.*
AUGUST 29, SEPTEMBER 6, 1939.]

Motor car—Parking—Omnibus halted at a place other than a public stand or halting place for the purpose of taking up and setting down passengers—Does this constitute "parking"?—Motor Car Ordinance, No. 20 of 1927, Ss. 6, 53, 74 and 84. [Leg. Enact. Vol. II, Ss. 6, 56, 61, 74 and 90] and Regulations framed thereunder.

A Regulation framed under the Motor Car Ordinance of 1927 enacted:—

> The driver of a hiring car plying for hire within the limits of the Sanitary Board of Madampe on the roads below mentioned shall not park his hiring car except (a) at a public stand or (b) at a halting place set apart for the purpose by the Chairman and then only for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods.

HELD that the halting of a hiring car on any one of the specified public roads at a place other than a public stand or a halting place for the purpose of taking up and setting down passengers is not "parking" the car within the meaning of the Regulation.

Appeal against the conviction of the accused by C. J. C. Jansz Esq., Magistrate of Chilaw, for a violation of a Regulation framed under the Motor Car Ordinance.

J. R. Jayawardene for the appellant.

D. Jansze, Crown Counsel, for the respondent.

WIJEYEWARDENE J.—This is an appeal by the accused against his conviction by the Magistrate of Chilaw under section 84 of the Motor Ordinance 1927, (vide Legislative Enactments Volume IV, Chapter 156 S. 90), and a regulation made under the provisions of the Ordinance. The charge against the accused as set out in the summons served on him reads:—

> "You did within the limits of the Sanitary Board area of Madampe being the driver of 'bus No. X6493 halt the same on the public road at a place other than a public 'bus stand or 'bus halting place for the purpose of taking up and setting down passengers in breach of regulation No. 10 framed under the Motor Ordinance No. 20 of 1927, appearing in Government Gazette No. 7858 of 4th June, 1931, and you thereby committed an offence punishable under section 84 of Ordinance No. 20 of 1927."

When the accused appeared in Court on the summons served on him the Magistrate read and explained to him the statement of the particulars of the offence contained in the summons in terms of section 187 of the Criminal Procedure Code.

The accused pleaded not guilty and the prosecution called a police constable who stated that the omnibus driven by the accused stopped at a place 50 yards away from the 'bus stand, provided by the Sanitary Board of Madampe and "dropped two passengers and picked up one passenger." He added: "No 'buses are allowed to drop or pick up passengers at Madampe except at the 'bus stand."

The proctor appearing for the accused called no evidence but contended that on the evidence led by the prosecution the accused had not committed a breach of regulation 10 referred to in the charge.

The Magistrate held against the contention of the accused's proctor and found that the accused had "infringed the provisions of section 10 of Gazette No. 7858 of 4.6.1931." He convicted the accused and sentenced him to pay a fine of Rs. 5/-.

The motor regulation for the breach of which the accused has been found guilty is one of the regulations framed under sections 6, 53 and 70 of the Motor Car Ordinance, 1927 (vide corresponding sections 6, 56, 61 and 74 of Chapter 156.)

Regulation 1 defines a "public stand" and regulation 2 empowers the Sanitary Board to establish public stands and halting places. Regulations 4 to 9 set out the conditions governing the parking of hiring cars in public stands.

Regulations 3 and 10 are as follows:—

Regulation 3. "No hiring cars shall be parked within the limits of the Sanitary Board of Madampe except at a public stand so established and notified."

Regulation 10. "The driver of a hiring car plying for hire within the limits of the Sanitary Board of Madampe on the roads below mentioned shall not park his hiring car except (a) at a public stand or (b) at a halting place set apart for the purpose by the Chairman and then only for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods.

Negombo-Chilaw road, Bazaar Street also known as Chetty Street, Kurunegala road including a portion called Jayawardana Crescent, Galahitiyawa road including a portion called Collin Place, and Goods Shed Road."

The question of law that arises for decision is whether on the evidence for the prosecution the accused could be said to have "parked" his hiring car within the meaning of Regulation No. 10. The word "park" is not defined either in the Motor Car Ordinance 1927, or in the Regulation. The Shorter Oxford English Dictionary gives the meaning of the verb "to park" as "to leave in a park" and defines the noun "park" as "a place where motor cars may be left unattended."

Webster's New International Dictionary (1936, 2nd edition) gives a very interesting definition of the word which I reproduce below:

> "To stop and keep (a vehicle, especially a motor vehicle) standing for a time on a public way or to leave temporarily on a public way or in an open space, especially in a space assigned for the occupancy of a number of automobiles. Statutes and ordinances placing restrictions on parking define the terms variously. In some jurisdictions keeping a vehicle standing with a driver in his place is called live parking, without a driver, dead parking. A vehicle halted while awaiting a traffic signal or while allowing an occupant to alight or a waiting passenger to get aboard is not usually regarded as a parked vehicle. A vehicle placed temporarily indoors as in a public garage, is usually said to be stored....."

If the word "park" in the Regulation is given the meaning assigned to it in the Dictionaries the conviction of the accused cannot stand as all that the accused did was to stop the omnibus to "drop two passengers and pick up one passenger." Is the word "park" then used in any other sense in the Regulation under consideration ?

Now the word "parked" in Regulation 3 cannot possibly mean also "halted", for in that case there will be no meaning in Regulation 2 providing for the establishment of halting places. Is there then any reason why the word "park" in Regulation 10 should be given a meaning different from what it has in Regulation 10.? Regulation 3 prohibits the parking of hiring cars in Madampe except at a public stand. Regulation 10 has been framed to make some special provision with regard to the parking of a particular group of hiring cars, namely, cars plying for hire in Madampe on certain public roads. It prohibits the parking of such cars, but creates two exceptions. They may be "parked" at a public stand as under Regulation 3 or they may be "parked" at a halting place but only for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods. According to this view, what the framers of the regulations intended to do by Regulation 10 was to prohibit the parking of hiring cars plying on certain roads except in two groups of places and subject to certain conditions. Regulation 10 which then prohibits the parking of cars cannot be invoked to sustain a charge against a driver for halting a car. The driver of a hiring car charged under Regulation 10 could plead any one of the following defences:

a. That his car did not ply for hire on certain roads.

b. That he did not park his car anywhere.

c. That the place he parked his car was a public stand.

d. That the place he parked his car was a halting place and that he did not keep his car for a period of time longer than was reasonably necessary for the purpose of taking up or setting down passengers or goods.

The accused in this case pleads the defence set out in (b) above.

The question may also be considered in another way. If the word "to park" has the meaning "to halt" in Regulation No. 10, then the regulation prohibits the halting of a hiring car except (a) at a public stand, (b) at a halting place for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods.

But the fourth schedule to the Motor Car Ordinance contains regulations applicable to hiring cars and regulation 3 of these regulations enacts:—

"No omnibus shall be stopped or allowed to stand on a highway in any urban area, except—

(a) In the event of a breakdown and then only for so long as may be necessary to enable reasonable repairs to be effected;

(b) on a public stand provided or allotted for that purpose and indicated as such by a notice exhibited by the licensing authority and then only on payment of such fees, and subject to such regulations for the use thereof as may be prescribed or made under the Motor Car Ordinance and subject to regulation 4 of these regulations; or

(c) at a stopping place indicated as such by a notice exhibited by the licensing authority and then only for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods and subject to regulation 4 of these regulations; or

(d) in a parking place provided or indicated by regulations or notice under section 56 of the Motor Car Ordinance.

These regulations could be altered or added to by regulations under section 71 of the Ordinance, (vide Legislative Enactments Vol. 4, Chapter 156, section 75). Regulation 10 published in the Government Gazette No. 7858 of 5.6.1931 is not a regulation made under section 71 of the Ordinance. Moreover, if the word park in regulation 10 means "halt" the only effect of that regulation would be to replace regulation 3 in the fourth schedule to the Ordinance as otherwise the two regulations will be overlapping. If the effect of regulation 10 is to replace regulation 3 in the fourth schedule, then the framers of regulation 10 must be taken to have intended to refuse the right to the driver of an omnibus to halt his car at any place in the event of a breakdown which right had been specifically given by regulation 3 in the fourth schedule. It is not possible to say that the framers of the regulation No. 10 had such an intention.

In this connection it is interesting to refer to the definition of "parking" given in the new Motor Ordinance No. 45 of 1938, to which my attention has been drawn by the Crown Counsel. "Parking" is defined in that Ordinance as meaning "the bringing of a motor car to a stationary position or causing it to wait for any purpose other than that of immediately taking up or setting down persons or goods."

I am, therefore, of opinion that regulation No. 10 does not enable a charge to be framed against a driver for "halting his hiring car for the purpose of taking up and setting down passengers."

The proctor who appeared for the accused in the lower court contended that the charge could not be sustained under regulation 10 but the prosecution did not move to amend the charge. I do not think that in the circumstances of the case I should alter the charge and send the case back for further proceedings.

I shall therefore quash the conviction and leave it to the proper authorities to take any other proceedings if they think it desirable to do so.

Conviction quashed.

[Proctor for appellant: *H. H. A. Jayawardene.*] — K. S. A.

FERNANDO, POLICE SERGEANT v. D. K. LIYANAGE

[DE KRETSER J. *S.C. Nos. 384-389—P.C. Nuwara Eliya No. 489.* SEPTEMBER 7, 15, 1939.]

Unlawful gaming—Search warrant—Sufficiency of material justifying the issue of—Presumptive proof—Gaming Ordinance, No. 17 of 1889, Ss. 5 & 22 [Leg. Enact. Vol. I Ch. 38.]

The Magistrate recorded, under S. 22 of the Gaming Ordinance, the evidence of M.S., a cooly employed by the Sanitary Board of Nuwara Eliya to collect rubbish, which was as follows:—"I know the boutique of D. K. Liyanage. There is gambling carried on there. People of various races go there to gamble. I have not gambled there. I had seen gambling going on there, when I went there to collect rubbish. D. K. Liyanage collected *thon*. The name of the boutique is 'The Singhala Jatika Hotel.' The gambling is carried on in the upstairs of the hotel."

The Magistrate (H. S Roberts Esq.) stated that on this evidence he was satisfied that unlawful gaming was carried on in the premises and issued a warrant to search the premises. On appeal against the conviction of the accused who were arrested at the place while playing a game of cards,

HELD that the search warrant was issued on insufficient material and that no presumption could be held to arise therefrom.

Referred to:

Police Officer, Beliatta v. *Babunappu*, (1921) 23 N.L.R. 165 ...		(1)
Weerakoon v. *Cumara*, (1922) 24 N.L.R. 29		(2)
Wittensleger v *Appuhamy*, (1937) 39 N.L.R. 93		(3)
Rajendram v. *Perera*, (1934) 2 C.L.W. 474		(4)
S.I. Police, Dandegamuwa v. *Gan Aratchy et al*, (1922) 1 Times (Cey.) 106		(5)
S.I. Police, Bandarawela v. *Kandiah*, (1927) 8 Cey. Law. Rec. 173		(6)

G. P. J. Kurukulasuriya, with him *A. C. Alles*, for accused-appellants.

D. Jansze, Crown Counsel, for complainant-respondent.

DE KRETSER J.—It was urged in appeal that the Magistrate had issued a search warrant on insufficient material, and that consequently the presumption created by the Ordinance would not arise. In support of the appellants' contention I was referred to the following cases:—*Police Officer of Beliatta* v. *Babunappu* (1); *Weerakoon* v. *Cumara* (2); *Wittensleger* v. *Appuhamy* (3); *Rajendram* v. *Perera* (4); *S.I. Police, Dandegamuwa* v. *Gan Aratchy et al* (5) and *S.I. Police, Bandarawela* v. *Kandiah* (6).

Learned Crown Counsel argued that the Magistrate's discretion cannot be questioned, and referred me to the unreported case No. S.C. 348/M.C. Matara No. 23447 decided on the 24th July, 1939, by the Acting Chief Justice.* The material in that case on which the Magistrate issued a search warrant was much fuller than the material in the present case. In view of the serious consequences which may arise from the issue of a search warrant, this court has always insisted on Magistrates having ample material before them before they issue these search warrants. The presumption created under the Ordinance takes the place of evidence which would ordinarily have to be led by the prosecution, and before a search warrant is issued a Magistrate should satisfy himself and have not merely some reason to believe but "*good reason* to believe" (as required by section 5) that the place is kept or used as a common gaming place. "*Common gaming place*" is defined in section 22 of the Ordinance.

In effect more than half the case must be proved before the search

* See *Thoradenya* v. *Ismail*, at p. 64.

warrant issues. The Magistrate himself does not purport to act upon the presumption created by the Ordinance though he may have intended to do so. In this case the search warrant was issued on the evidence of a cooly employed by the Sanitary Board whose duty it was to collect rubbish. He himself had not gambled there but stated that he had seen gambling carried on there upstairs. He has not stated whether he saw the gambling on the day in question, which was the Singhalese New Year's Day, or on more than one occasion. He says that the accused collected *thon* but he was not questioned as to how he saw all that while he was collecting rubbish. He has also stated that people of various races went there to gamble; but the place is a hotel or eating house, and presumably people of various races would go there for other purposes. The police do not seem to have made any attempt to verify this information by keeping any watch on the premises themselves. I hold, therefore, that the search warrant was issued on insufficient material and that no presumption could be held to arise therefrom.

The place was raided on the Singhalese New Year's Day when people of different communities who are friends might well assemble for their own amusement. The evidence as to what took place on the raid is not very satisfactory. According to the Sergeant, they found the hotel closed, indicating presumably that the public had no access there; they stole in through the kitchen and proceeded to arrest four persons who were playing cards downstairs and who seemed to have been quite unperturbed by the entry of the Police; and when they went upstairs they found people there still playing cards in spite of the commotion there must have been downstairs.

I think, the accused are entitled to an acquittal, and I, therefore, set aside the conviction and acquit them.

Conviction set aside. Accused acquitted.

[Proctor for accused-appellants: *P. P. Sumanatilleke.*]

— K S. A.

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S. B. THORADENYA *v.* S. V. M. ISMAIL.

[SOERTSZ A.C.J. *S.C. No. 348.—M.C. MATARA No. 25447.* JULY 20, 24, 1939].

Unlawful gaming—Facts which render a game unlawful and a place "a common gaming place"—Gaming Ordinance No. 17 of 1889, S. 22 [Leg. Enact. Vol. I Ch. 38.]

Colvin R. de Silva, for the 6th accused-appellant.

Douglas Jansze, Crown Counsel, for the complainant-respondent.

SOERTSZ A.C.J.—The conviction in this case was right. The raid was on a search warrant and the presumption arose that the place raided was a common gaming place and that all the persons found engaged in playing, were indulging in unlawful gaming. The accused gave no evidence to rebut that presumption. Mr. de Silva for the

appellant contended that the presumption did not arise because the search warrant was issued on insufficient material. I do not agree with that contention.

The only matter I should wish to refer to is that the learned Magistrate has been at great pains to insist that the game played was 'Baby' or 'Baby Kapanawa,' that is, translated literally, 'cutting the baby.' I do not know that he meant to imply that this game 'Baby' was by itself an unlawful game to play. If that was the implication, he was, of course, wrong. The game 'Baby', despite the blood-curdling suggestion involved in the name, of the cutting of a baby, is no more or less unlawful by itself than the game of bridge. Whether it is unlawful or not must depend on whether it was carried on in the manner set forth in section 22 (2) (a), (b), or (c) of the Gaming Ordinance. As regards (c) it is not necessary to prove that the place is a common gaming place when the raid is on a search warrant unless the defence seeks to rebut the presumption that arises on such a raid. If, however, the raid is not on a search warrant under section 5, or not under section 6, the prosecution must prove that the place was one to which the public had access. The proof of that may be differently adduced in different cases. The facts that 'thon' was collected, that there were people of different communities taking part, are not *per se* sufficient to make a place a common gaming place, but they are facts to be considered along with other facts.

I dismiss the appeal.

Appeal dismissed.

[Proctor for accused-appellant: *W. P. A. Wickramasinghe.*]

—K. S. A.

SELLAMMA ACHIE *v.* PALAVESAN

[WIJEYEWARDENE & NIHILL JJ. *S.C. No. 80 - D.C. Colombo No. 51695.* SEPTEMBER 6, 15, 1939.]

Abatement—Failure of plaintiff to prosecute action for a period of more than twelve months—Order of abatement—Death of plaintiff during the period of twelve months—Subsequent application by executor to set aside order—Was order validly made ?—The Civil Procedure Code Ss. 396, 401, 402 and 403.

HELD that the order of abatement is bad as the plaintiff was not alive during the period of twelve months contemplated by S. 402 of the Civil Procedure Code.

Referred to: *Supramaniam* v. *Symons*, (1915) 18 N.L.R. 229 ... ... (1)
The Associated Newspapers of Ceylon Ltd. v. *Kadirgamar*, (1934) 36 N.L.R. 108 ... ... (2)
Lorensu Appuhamy v *Paaris et al*, (1908) 11 N.L.R. 202 (3)

Appeal from an order made by R. F. Dias Esq., District Judge of Colombo, refusing to set aside an order of abatement.

S. Nadesan for the petitioner-appellant.

E. B. Wickremanayake, with him *M. Thiruchelvam*, for the respondent.

WIJEYEWARDENE J.—This is an appeal against an order of the District Judge refusing to set aside an order of abatement made under section 402 of the Civil Procedure Code.

The plaintiff instituted this action on a promissory note on February 10, 1933. On March 2, 1933, summons was issued returnable on March 25, 1933. The case was called on the latter date when the Court found that the summons had not been served on the defendant and ordered the summons to be reissued for June 5, 1933. On June 5, 1933, the Court made an entry "no order" as the plaintiff had failed to take steps to have the summons reissued. On May 1, 1935, the District Judge made the following order:—

> "A period exceeding twelve months having elapsed since the date of the last order made in this case without the plaintiff taking steps to prosecute this action, it is ordered that this action do abate."

On October 18, 1938, the present appellant filed papers and moved that the order of abatement be set aside and that she be allowed to continue the action as the legal representative of the plaintiff. The affidavit filed by the appellant shows that the plaintiff died in India in March, 1933, and that the probate of the last will of the plaintiff has been issued to the appellant.

The order of abatement appears to have been made under section 402 and the District Judge dealt with the present application on that footing.

The appellant has contended *inter alia* both here and in the District Court that the order of abatement was bad as the plaintiff was not alive during the period of twelve months contemplated by section 402. The learned District Judge held against this contention and stated in the course of his order—

> "Section 402 is a provision of Statute Law and the ordinary language of the Legislature must be given effect to and considering section 402 in the light of section 403 of which it forms a part it is perfectly clear from section 403 that section 402 also contemplated a case where the plaintiff is dead because it says: 'But the plaintiff or the person claiming to be the legal representative of a deceased or insolvent plaintiff, etc.' Therefore, it is perfectly clear that section 403 is sufficiently wide to include a case where the plaintiff dies and the action has abated."

Now section 402 enables a Court to enter an order that an action shall abate if a period of twelve months elapses subsequently to the date of the last entry of an order or proceeding in the record "without the *plaintiff* taking any (necessary) steps to prosecute the action." This section seeks to penalize a plaintiff for his laches. This must necessarily imply that the plaintiff should have been alive during the period of twelve months in question. If the legislature intended to empower a Court under this section to enter an order of abatement even where the absence of any attempt to prosecute the action for twelve months is due to the death of the plaintiff within that period, it appears to me that the legislature may have chosen its language more carefully

to express its intention. The words "without the *plaintiff* taking any step" suggest to my mind that the section regards the plaintiff and not his legal representative as the person who had to take the necessary steps. If the view of the learned District Judge is to be accepted, the word "plaintiff" in "without the plaintiff taking any step" should be construed to mean "the plaintiff or his legal representative." I do not feel justified in giving such an artificial interpretation to the meaning of the word "plaintiff." Moreover, section 396 of the Code enables a Court in certain circumstances to enter an order of abatement when the plaintiff in an action dies. There was, therefore, no necessity for the legislature to seek to make additional provision under section 402 when the action has lain dormant owing to the death of the plaintiff. I do not think that section 403 affords much help in the consideration of this question. It should be noted that section 402 is one of a number of sections grouped together under chapter 25 of the Code dealing with "the continuation of actions" after alteration of a party's status. Section 396 provides for an order of abatement being entered where the legal reresentative of a deceased plaintiff does not make an application to Court to have his name entered of record in place of the deceased plaintiff, while section 401 provides for the dismissal of an action in certain circumstances on the ground of plaintiff's insolvency and section 402 provides for the Court making an order of abatement where the plaintiff fails to take a necessary step to prosecute the action. Section 403 then enacts that "when an action abates or is dismissed *under this chapter* no action shall be brought on the same cause of action" and further proceeds to set out the mode of obtaining relief against such orders of dismissal or abatement. The draftsman had, therefore, to employ in the second paragraph of section 403 appropriate language to make the section applicable to the various earlier sections of the chapter under which orders of dismissal or abatement could be made. This appears to me to be the explanation for the draftsman using the words "or the person claiming to be a legal representative of a deceased" in section 403. In other words, the clause in section 403 referred to by the District Judge has been inserted in order to enable applications to be made by "the plaintiff" against an order under section 402, by the person claiming to be the legal representative of a deceased plaintiff against an order under section 396, and by the legal representative of an insolvent plaintiff against an order under section 401. It is even possible to contemplate a case where the legal representative of a deceased plaintiff may seek relief against an order made under section 402, if the plaintiff died after the expiry of twelve months mentioned in the section.

I am, therefore, of opinion that the appeal should succeed on this ground.

I shall consider briefly two other points raised by the appellant's counsel in support of the appeal. He argues that no order of abatement could be made under section 402 against a plaintiff dead at the time of making such an order as a Court should give notice of its intention to make such an order to all the parties interested and obviously no such notice could be given when the plaintiff is dead. I am unable to assent to this view as the decision of this Court in *Suppramaniam* v. *Symons* (1), which lays down that an order under section 402 could be made without notice to parties, destroys the very foundation of the argument. I wish to add, however, that I think that the Judges of the original Courts who desire to act *ex mero motu* under this section should not ignore the view expressed by the learned Judges who decided *Suppramaniam* v. *Symons* that it was "desirable that a Court before making an order of abatement should notice the parties as far as it conveniently can to give them an opportunity of showing cause against the order."

The last point raised by the appellant's counsel was that as the last order made by the District Judge before entering the order of abatement was "no order", there was no failure on the part of the plaintiff to take any necessary step to prosecute the action. He relied on *The Associated Newspapers of Ceylon Ltd.* v. *Kadirgamar* (2), and *Lorensu Appuhamy* v. *Paaris* (3). I think this argument is based on a misconception of the nature of the order made by the District Judge on June 5, 1933. On March 25, 1933, the District Judge had ordered summons to reissue and when on June 5, 1933, he found that the plaintiff had taken no steps to carry out that order, the Judge wrote "No Order" meaning thereby that he was not making any further order and that the order of March 25, 1933, should be acted upon. There was therefore the order of March 25, 1933, which the plaintiff had to carry out and if the plaintiff failed to carry out such an order within a period of twelve months the District Judge could in an appropriate case order the action to abate under section 402. I hold that the appellant's third contention fails.

In view of the decision I have reached with regard to the first contention raised by the appellant, I would allow the appeal with costs and direct the order of abatement to be set aside. The appellant will also be entitled to the costs of the inquiry in the District Court.

NIHILL J.—I agree.

Appeal allowed. Order of abatement set aside.

[Proctor for Petitioner-appellant: *S. A. Nalliah.* Proctors for respondent: *Perumalpillai & Chelliah*].

—K. S. A.

KIRI BANDA & OTHERS *v.* DINGIRI BANDA & OTHERS

[DE KRETSER AND NIHILL JJ. *S.C. No. 85 (I)—D.C. Kurunegala No. 4167.* SEPTEMBER 19, OCTOBER 2, 1939.]

Kandyan law—Inheritance—Rights of deega *married daughters to inherit estate of a cousin who died unmarried and issueless.*

One U.B. died unmarried and issueless leaving as his next of kin two sons and three daughters of his father's brother. The daughters had married in *deega* and the sons therefore, disputed their sisters' rights to inherit the estate of their deceased cousin.

HELD that the forfeiture to which a daughter becomes liable by marriage in *deega* applies only to her parent's property and cannot be extended to the inheritance in question.

Followed: *Kiriwante* v. *Canetirala*, (1896) 2 N.L.R. 92 ... ... (4)
Dingiri Menika v *Appuhamy*, (1900) 6 N.L.R. 123 ... ... (5)
Referred to: *Dinga* v. *Happuwa*, (1902) 7 N.L.R. 100 ... ... (3)
Saranankara Unnanse v. *Indajoti Unnanse*, (1918) 20 N.L.R. 385 (2)
Menikhamy v. *Suddana*, (1916) 28 N.L.R. 266 ... ... (6)
Dewandra Unnanse v. *Sumangala Terunnanse*, (1927) 29 N.L.R. 415 (1)

C. V. Ranawake for appellants.

E. A. P. Wijeratne for respondents.

DE KRETSER J.—One Ukku Banda died unmarried and issueless leaving as his next of kin the children of his father's brother Kapuruhamy. The children of two brothers or of two sisters are called brothers and sisters although in reality they are cousins, and these five children of Kapuruhamy, two sons and three daughters, made a close approach therefore to the position Ukku Banda's brothers and sisters would have held.

The three females were married in *deega*, and the question is whether they, therefore, had no right to inherit from Ukku Banda. If Ukku Banda had sisters of his own married in *deega* they would not have inherited from him save in exceptional circumstances which need not now be considered. It is urged that his cousins should be similarly disqualified because they ought to be treated as Ukku Banda's sisters.

The strongest emphasis is laid, however, on the argument that a *deega* married female abandons for all time every claim to any property to which is attached the quality of inherited ancestral property, and that the disqualification is not limited to her own parent's property. It is urged that it is not a case of forfeiture, in which case one would hesitate to extend the disqualification, but a case of voluntary abandonment the *deega* married daughter losses her status, her identity as a member of her father's clan, and becomes a member of her husband's clan: and there can be no complaint since she takes her portion with her in the form of dowry.

It seems to me that it is rather a fiction to term the loss she sustains a voluntary abandonment. She usually has no voice in the matter of her marriage and one requires some strong reason before one can accept the position that a person has abandoned something which

would be to her advantage. Besides, abandonment surely depends on intention. If one can assume that a daughter marrying in *deega* abandons her claim to her parents' estates, a portion of which she knows would be hers but for her marriage, why must one assume that she means to abandon even claims to a cousin's estate, which may only come into existence much later? There can be no doubt that it is a case of forfeiture which we are faced with. All the authorities hitherto have gone on that footing.

It is not of much use to seek to know the reason for this customary law. A custom like this merely means a repetition of a large number of cases and the origin of a custom is usually difficult to trace. It is interesting from the point of historical and scientific research to attempt to ascertain the reason for the existence of the custom, but from a legal point of view all we are concerned with is the proof of the custom. That proof is gathered from writers, who may be trusted to know what they are writing about, from the evidence of well-informed witnesses, and, of course, from the trend of judicial decisions. If the custom is not proved, one must fall back on the Common Law, which is the Roman-Dutch Law. I deprecate the attempt to evolve principles; it is a snare the attractions of which one would do well to avoid. What we are asked, is the reason underlying the forfeiture which a *deega* marriage involved? Is it that the female just loses her identity? that "what the husband is, the wife is," that his people become her people? It may be so. It is a theory not without its attraction for the anthropologist, the biologist, the sentimentalist, who may find some evidence of his theory in the fact that, in the days when communication was difficult, when a woman married and left for some distant village, she was really cut off from her people. But on the other hand we find her not only naturally looking back on her old home but custom favouring a marriage between her children and her brothers' children, a custom which, of course, never received judicial recognition.

We find that if she had occasion to come back her family did not regard her as a stranger but were under a natural obligation to maintain her, and they might even go the length of restoring her to her previous position in the family. She might even marry in *deega* and yet keep in touch with her family, so that both parties might indicate that she was not losing any rights by her marriage.

Sawyer, a recognized authority on the subject, says at page 2 of his Digest that, on the failure of issue of the sons and of the daughters married in *binna*, the *deega* married daughters succeed to their father's property; *i.e.*, they are not cut off for ever. But the *deega* married daughters are dead, then the brothers of the father succeed in preference to the children of such daughters, but if the father's brothers are dead

then the children of the *deega* married daughters succeed in preference to their cousins, the children of the father's brothers.

A better reason would be that at her marriage the daughter marrying in *deega* is given her portion in advance by her father, or out of the father's estate by the brothers, if her father be dead. It was not fair therefore for her to expect more, and it was left to them to decide whether she should have more or not. It was a matter of arrangement really.

The provision is always with regard to her parents' property, the property on which she obviously had a natural claim. Nowhere do we find the forfeiture carried any further, and in the absence of authority I am not inclined to extend it. But as a matter of fact there are authorities to the contrary, and they are of such antiquity that they are not only more likely to express the customary rights as they existed at the time when the promise was made by the British Government to preserve the customary rights of the people, but they have never been challenged and must have been acted on quite frequently.

The earliest authority is to be found in Austin's Reports at page 49. Mr. Wijeyeratne's diligence furnished us with a copy of the record, which is annexed hereto. The Supreme Court was assisted by assessors, who were Kandyans and took the evidence of two chieftains on the point. These witnesses presumably were recognised as competent to express an opinion, and there is no indication that their authority was challenged or other evidence offered. The lawyers appearing in the case were themselves well qualified in the subject. In fact the question whether a *deega* married cousin would succeed does not seem to have been considered so much as the question whether she forfeited her rights because her uncle had given her in marriage. The argument rather seems to have been that she succeeds through her uncle and her uncle having given her in marriage, might she not be taken to forfeit her claims to any rights arising indirectly through that uncle. The rights coming to her father, himself an uncle of the deceased, do not seem to have been challenged. The opinion was that she would not forfeit her rights and this Court adopted that view.

The taking of similar evidence has been common, even in recent times; vide *Dewandra Unnanse* v. *Sumangala Terunnanse* (1) and *Saranankara Unnanse* v. *Indajoti Unnanse* (2).

The case reported by Austin was decided as far back as 1851. Then, in 1902, came the decision in *Dinga* v. *Hapuwa* (3), where this Court held that a *deega* married daughter does not forfeit her right to inherit land which had been acquired by her mother or to which her mother had succeeded collaterally *or otherwise than by inheritance from her father*. These last are the important words. This decision followed a

decision by LAWRIE J., in an unreported case. LAWRIE J. had been District Judge of Kandy for many years and his opinion always received the greatest consideration. In *Kiriwante* v. *Ganetirala* (4), he said that in a case where a matter was uncertain a daughter ought not to be deprived of a share of her inheritance; "unless the law be clear, and unless the forfeiture be certain, it should not be decreed." WITHERS J. agreed. It is a statement which commends itself to me. In *Dingiri Menika* v. *Appuhamy* (5), where the question related to acquired property, LAWRIE J. said: "...I doubt whether the forfeiture created by a *deega* marriage extends further than to the father's estate, and even with regard to his estate the tendency ever was to relax the law and to admit the *deega* married daughter."

There is, therefore, authority which covers this point, and I see no reason why the rights of the deceased's female cousins should be affected by their marriages in *deega*. There is no reason to interpret the statement at page 584 of Modder as an authority to the contrary. All he says is that when the direct line of descent is broken inherited property goes over to the next nearest line which issues from the common ancestral roof-tree. That is the rule under a number of systems of law including the Roman-Dutch law. In this case one goes back to Ukku Banda's grandfather, before one begins to come down. That does not mean that Ukku Banda's grandfather is artificially revived, and that the property passes to him and then he dies and it passes to Kapuruhamy who is also artificially revived; and it being Kapuruhamy's inherited property his daughters married in *deega* take nothing. Such a way of looking at the matter is most unnatural.

There was an attempt to suggest that Ukku Banda left acquired property as well, and that in the case of such property the male cousins should be treated as brothers and therefore exclude their sisters. To begin with while there was some suggestion at any early stage of the trial that Ukku Banda owned acquired property, this position seems to have been abandoned during the course of the trial, and the District Judge clearly goes on the footing that the property in question was inherited property. It is too late to go back again. But I do not see how the position would be any better for the respondents were it otherwise. Their strongest arguments are based on the assumption that this property is parental property.

The position that the brothers take all the acquired property of a deceased parent to the exclusion of the sisters is now established, but not without considerable challenge in more recent years. There is no reason to extend the forfeiture. It has been supposed that the reason why the sisters were disqualified was that they contributed no effort to the acquisition, whereas the labourers of the family ought to be rewarded, and the brothers were the toilers and earners. The claim was even greater when, as often happened two brothers took one woman to wife.

No such consideration, if that be the true one, applies to the case of cousins, none of whom contributed to any acquisition by Ukku Banda.

Sawer, at page 13, deals with the rights of inheritance to both ancestral and acquired property. Dealing with the case of *sisters*, he says that they have "only the same degree of interest in their deceased brother's acquired property that they have in their deceased parents' estate." And it has now been settled that the sisters are excluded by the brothers. But the sisters do come in if the brothers and their sons fail.

Proceeding further he at length arrives at the statement that the property goes to cousins (called brothers and sisters) on the mother's side, that is to say, the mother's sisters' children, and then says that, failing them, it goes to the mother's brothers and their children, and failing them to the father's brothers and their children, and failing them to the father's sisters and their children. Where cousins are called to the inheritance, there is no distinction between males and females. He makes this quite plain at page 14 when he says:—"When a person dies intestate, leaving no nearer relations than first cousins called brothers and sisters, his or her acquired property shall go equally to such cousins by the father's and mother's side, that is to say, to the children of the father's brother or brothers, and to the children of the mother's sister or sisters, share and share alike." The last words are most important and can admit of no doubt.

There is nothing in the case of *Menikhamy* v. *Suddana* (6), to the contrary. According to Modder at page 617 of his work, "In regard to acquired property there is no definite system laid down by the jurists, but the tendency is to give preference to the maternal over the paternal line, and to elect males before females in the same degree." He is summarising the law very generally and even then he speaks only of a "tendency." While this statement may be true in general we have the authority of Sawer for the very situation we are now dealing with.

The order made in the lower Court is set aside and the appellants are declared entitled to the rights they claim with costs both in this Court and in the Court below.

NIHILL J.—I agree.

Allowed.

[Proctor for appellants: *E. F. C. Modder.* Proctor for respondents: *H. B. F. Wanduragoda.*]

—K. S. A.

NANDIRIS SILVA *v.* DE ZOYSA AND ANOTHER

[NIHILL J. *S.C. No. 40—C.R. Balapitiya No. 21239.*
SEPTEMBER 29, OCTOBER 6, 1939.]

Appeal—Court of Requests—Is it open to the appellant to raise a question of law not stated in the petition of appeal?—Civil Procedure Code, Ss. 175, 758 (2), 801 and 833 A.

HELD that it is one of the special rules applicable to appeals from Courts of Requests that there shall be no right of appeal from any final judgment unless upon a matter of law and that the Supreme Court will not hear arguments on matters of law not directly and succintly stated in the petition of appeal.

Followed: *Brooke* v. *Peera Veda.* (1905) 9 N.L.R. 302 ... ... (1)
Referred to: *The Tasmania,* (1890) 15 A.C. 223 ... ... (2)

J. E. M. Obeyesekere, with him *P. H. K. Goonetilleke* for defendant-appellant.

M. C. Abeywardene for plaintiff-respondent.

NIHILL J.—I have considered the preliminary objection taken by respondent's counsel that at the hearing of the appeal, appellant's counsel must confine himself to the point of law raised in the appeal petition. This appeal has had a somewhat chequered career, this being the second preliminary objection taken before this Court.

Mr. Obeyesekere for the appellant has now intimated that he wishes to raise also a question concerning an alleged wrongful rejection of evidence which, had it been admitted by the learned Commissioner, would have shown that the debt alleged to be due from the first defendant-appellant had been settled. From the facts quoted to me, it appears that certain account books kept by the second defendant could not be produced at the trial, as objection was taken to his being called on the ground that his name had not been listed as a witness. The learned Commissioner upheld this objection.

Mr. Obeyesekere argued that in doing so, the learned Commissioner must have overlooked the second proviso to section 175 of the Civil Procedure Code where it is stated that any party to an action may be called as a witness without his name having been included in the list of witnesses.

In this case it should be noted that it was the second defendant's counsel, who took the objection to his client being called, nevertheless the point made by Mr. Obeyesekere may be a good one, and it is unfortunate that it was not raised in the appeal petition. The question for my determination now is—that not having been so raised, can it be argued in these proceedings? In *Gordon Brooke* v. *Peera Veda* (1), LAYARD C.J., held that in an appeal from a Court of Requests, the Court could only hear arguments on the matter of law stated in the petition of appeal.

Mr. Obeyesekere asks me to distinguish between that case and this on the grounds that here it is a question which arises from the admission or rejection of evidence and that as all the facts are before

me as completely as they were at the trial, the principle enunciated by LORD HERSCHELL in the House of Lords case of *The Tasmania* (2) tells in his favour.

With regard to the first of these submissions, it is true that the wording of Section 833 A of the Civil Procedure Code suggests that there may be a distinction between "a matter of law" and a question arising upon the admission or rejection of evidence, but, if there is, it is a distinction with very little difference. Questions concerning the admissibility or inadmissibility of evidence are surely questions of law and as such could be raised under Section 833A even if the words "or upon the admission or rejection of evidence" were not there and if that be so, the principle enunciated in *Brooke* v. *Peera Veda* (1) has equal applicability.

With regard to *The Tasmania* (2), it may well be that this is a matter which an Appeal Court might properly consider in deciding an appeal even although it is not stated in the petition of appeal, [Section 758 (2) of the Civil Procedure Code] but Chapter LXVI provides special rules as to procedure in Courts of Requests and section 801 gives precedence to the special rules where there is inconsistency.

It is one of these special rules that there shall be no right of appeal from any final judgment unless upon a matter of law, and judicial decision has determined that this Court cannot hear arguments on matters of law not directly and succinctly stated in the petition of appeal and I am not prepared to go beyond that. I, therefore, uphold the objection.

Let the case be relisted for argument on the point of law raised in the petition.

Preliminary objection upheld.

—K. S. A.

T. P. SOKKALAL RAMSAIT *v.* E. P. KUMARAVEL NADAR & OTHERS

[WIJEYEWARDENE & NIHILL JJ. *Application for conditional leave to appeal to the Privy Council in S.C. No. 116—D.C. Colombo No. 6138.* SEPTEMBER 15, 22, 1939.]

Appeal to Privy Council—Trade Marks—Action for infringement and 'passing off'—Subject matter of action valued in the plaint at Rs. 1,000/-.—Is it open to the plaintiff to show the real value?—Can costs payable by the appellant be regarded as part of the 'matter in dispute on appeal' to the Privy Council?—The Appeals (Privy Council) Ordinance, Leg. Enact. Vol. II, Ch. 85.

The plaintiff, the proprietor of two registered Trade Marks, brought action against the defendants for infringement and 'for passing off' and prayed for an injunction against the defendants and for consequential remedies. He valued the subject matter of the action in the plaint at Rs. 1,000/-. The District Judge gave judgment granting him an injunction and ordering the defendants to deliver to

him the goods in their possession bearing the offending labels. On appeal, the Supreme Court set aside the judgment of the District Court and ordered decree to be entered dismissing the plaintiff's action with costs in both Courts and directing the Registrar of Trade Marks to proceed with the applications made by the defendants for the registration of their Trade Marks in spite of the plaintiff's opposition. The plaintiff applied to the Supreme Court for conditional leave to appeal to the Privy Council against the decree of the Supreme Court and filed his affidavit in which he set out the reason why the subject matter of the action was valued at Rs. 1,000/- in the plaint. He also averred in the affidavit that the matters in dispute on appeal, including his liability to pay costs, were worth over Rs. 5,000.

The Supreme Court held that the valuation in the plaint was intended to be regarded as a correct and *bona fide* valuation of the claim and that, if it were otherwise, the undervaluation was made deliberately for purpose of avoiding payment of heavy stamp duty and thus evading the Revenue laws of the Island. The Court also held that the direction given to the Registrar of Trade Marks was a natural and logical sequel of the plaintiff's claim and that the value placed by the plaintiff on this part of the decree of the Supreme Court was highly exaggerated. The Court further held that, though there might be cases where the order to pay costs may by itself give a right of appeal to the Privy Council, the order in the present case was subsidiary to the order dismissing the plaintiff's claim and that, therefore, it should not be regarded as forming part of a matter in dispute.

Followed: *Appuhamy* v. *Corea*, (1900) 1 Brown's Reports 165 ... (1)
De Alwis v. *Appuhamy*, (1929) 30 N.L.R. 421 ... ... (2)
Dooiga Doss Chowdry v. *Ramanauth Chowdry*, (1860) 8 Moore's Indian Appeals 262 ... ... (3)

An application for conditional leave to appeal to the Privy Council from a judgment of the Supreme Court* dismissing plaintiff's action for an infringement of his registered Trade Marks and for passing off.

N. E. Weerasooriya K.C., with him *N. Nadarajah and K. Satia Vagiswara Aiyar*, for plaintiff-petitioner.

H. V. Perera K.C., with him *N. K. Choksy and C. C. Rasa Ratnam*, for defendants-respondents.

WIJEYEWARDENE J.—This is an application for conditional leave to appeal to the Privy Council and in view of the objections raised by the respondents, it is necessary to give a brief summary of some of the preliminary facts.

The appellant sued the respondents in the District Court of Colombo and asked for judgment against the respondents for

i. an injunction restraining the respondents (a) from infringing his trade marks Nos. 4919 and Nos. 5929 and (b) from passing off goods not of the appellant's manufacture as and for the goods of the appellant,

ii. an account of the profits wrongfully made by the respondents,

iii. delivery to the appellant of all beedies in the respondents' possession marked with certain devices

The appellant valued the subject matter of the action at Rs. 1,000/-.

The appellant also made an application along with the plaint for an interim injunction. This injunction was granted by the District Judge but after a short interval of time the parties agreed to the suspension of the injunction pending the trial.

* The judgment of the Supreme Court (Soertsz A.C.J. & Wijeyewardene J.) was delivered on June 19, 1939.

The respondents filed answer contesting the claim of the appellant and claiming a sum of Rs. 10,000/- as damages sustained by them in consequence of the interim injunction. At a later stage the respondents amended the prayer of their answer by asking that in addition to the relief already asked, they should be declared entitled to have their trade marks No. 6778, No. 6779 and No. 6780 registered in the register of Trade Marks in spite of the opposition of the appellant.

During the pendency of the trial in the District Court, the appellant made an additional claim for Rs. 10,000/- as damages sustained by him by reason of the respondents passing off goods not of his manufacture as his goods, as set out in paragraph 14 of the plaint.

The District Judge gave judgment granting an injunction to the appellant and ordering the respondents to deliver to the appellant beedies in their possession bearing certain labels. The appellant was, however, refused any damages.

The respondents appealed against the judgment of the District Judge while the appellant failed to appeal or file cross objections in appeal against that part of the judgment which dismissed his claim for damages.

In appeal the Supreme Court set aside the judgment of the District Court and ordered decree to be entered:

i. dismissing the appellant's action with costs of the District Court and costs of appeal,

ii. directing the Registrar of Trade Marks to proceed with the application for the registration of trade marks 6778, 6779 and 6780 in spite of the opposition of the appellant,

iii. granting Rs. 300/- as damages to the respondents.

The present application is for conditional leave to appeal against the decree of the Supreme Court. The respondents contend that no appeal lies to the Privy Council as the value of the matter in dispute is less than Rs. 5,000/- and as no question of great, general or public importance is involved in the appeal.

It was not seriously urged on behalf of the appellant that he was entitled to appeal under Rule 1 (b) of the Rules in the Schedule to the Appeals (Privy Council) Ordinance. This is an action between two rival traders of beedi cigars and the points for adjudication depend largely on questions of fact as to the period during which the rival trade marks had been used. No question of general or public importance arises for determination in the case and I hold that the appellant is not entitled to appeal under Rule 1 (b).

The appellant has filed an affidavit in support of his plea that "the matter in dispute on the appeal" to the Privy Council exceeds the value of Rs. 5,000/-. The reasons set out in the affidavit and adopted by Counsel in his argument before us may be briefly summarised as follows:—

1. The action was valued at Rs. 1,000/- in the plaint "as the stamp duty payable in respect of proceedings under the Trade Marks Ordinance is the minimum chargeable in the District Court in Civil Proceedings and fall under Class I up to and including Rs. 1,000/-."

2. The value of the appellant's trade marks and the loss of profit consequential on the refusal of an injunction to the appellant is Rs. 10,000/-.

3. The loss that would accrue to the appellant as a result of the setting aside of the judgment of the District Judge in regard to the delivery to the appellant of the beedies in respondents' possession amounts to Rs. 10,000/-.

4. The loss of profit which would accrue to the appellant in view of the direction given by the Supreme Court decree to the Registrar of Trade Marks to register Trade Marks Nos. 6778, 6779 and 6780 is Rs. 15,000-.

5. The taxable costs payable by the appellant under the decree of the Supreme Court would exceed Rs. 6,000- and should be regarded as a portion of the "matter in dispute on the appeal."

The first contention is clearly untenable. Section 49 of the Trade Marks Ordinance (Legislative Enactments, Volume III, Chapter 121) enacts that "every judgment or order by the District Court under this Ordinance should be subject to an appeal to the Supreme Court... and the minimum duties chargeable in the Supreme Court under the provisions of the Ordinance for the time being in force relating to stamps shall, so far as the same may be applicable, be charged in all proceedings relating to or in connection with such appeal." That section, therefore, refers to stamp duties chargeable in the Supreme Court and the lowest class in the Stamp Ordinance (Vide Legislative Enactments, Volume IV, Chapter 189) with regard to proceedings in the Supreme Court in Class I which includes claims up to and including Rs. 500/-. The appellant should, therefore, have valued his claim at Rs. 500/- and not Rs. 1,000/- if the valuation in the plaint was inserted merely in view of the provisions of section 49 of the Trade Marks Ordinance.* It is difficult to believe that the lawyers who drafted the plaint would have thought that the action was an action to which section 49 of the Trade Marks Ordinance applied. This action was partly a "passing off" action and therefore was not an action under the Ordinance (Vide section 44 of the Trade Marks Ordinance). Moreover, if the lawyers made the mistake of thinking that it was an action to which section 49 was applicable there was no reason why the subject matter of the action should have been valued, as the amount of the stamp duty would have been determined by the nature of the claim. I have no hesitation in rejecting this explanation for the valuation of the subject-matter of the action at Rs. 1,000/-. I hold that the valuation was intended to be regarded as a correct and *bona fide* valuation of the claim.

* The averment in the plaintiff's affidavit has a reference to section 48 of the Trade Marks Ordinance [Leg. Enact Vol. III Ch. 121] which is as follows:— "The minimum stamp duties chargeable in the District Courts in civil proceedings under the provisions of the Ordinance for the time being in force relating to stamps shall, so far as the same may be applicable and except as herein otherwise provided, be charged in all proceedings in the Court under this Ordinance...."

Schedule A, Part II of the Stamp Ordinance [Leg. Enact. Vol. IV Ch. 189] contains "the duties on law proceedings" and, in regard to proceedings in the District Courts, Class I is up to and including Rs. 1,000/-.—*Edd.*

It is convenient to discuss the second and third points together. The appellant valued the subject matter of the action at Rs. 1,000/- in the plaint. The subject matter of the action is indicated clearly in the prayer of the plaint which refers to an injunction, the taking of accounts in respect of profits made by the respondents, and an order for delivery for beedies. This shews that at the time of filing the plaint, the appellant valued at Rs. 1,000/- what he now seeks to value in the aggregate sum of Rs. 20,000/-. As stated by me earlier, the explanation offered by the appellant for valuing the subject matter at Rs. 1,000/- cannot be accepted. The affidavit moreover makes a bare statement that the real value is Rs. 20,000/- and does not give the grounds on which the valuation is made. There is no doubt that it is in the interest of the appellant to state now that the value of the subject matter is Rs. 20,000/- in order to support his application for leave to appeal to the Privy Council.

It has not been suggested by the appellant that the claim had increased in value between the date of the plaint and the date of appeal. If the value given in the plaint is in fact an under-estimate, it appears to me that the undervaluation was made deliberately for the purpose of avoiding payment of heavy stamp duty and thus evading the Revenue laws of the Island. In these circumstances, I am unable to accept and act upon the value now sought to be placed on the matter in dispute (Vide *Appuhamy* v. *Corea* (1), *de Alwis* v. *Appuhamy*, (2).)

I shall now deal with the fourth point raised by the appellant's counsel. The direction given to the Registrar of Trade Marks to proceed with the application of the respondents' trade marks, in spite of the appellant's opposition, cannot, in my opinion, be given a separate and distinct valuation apart from the claim of the appellant. The claim of the appellant, if successful, would have automatically prevented the respondents from obtaining the registration of those particular trade marks. The dismissal of the appellant's action by the Supreme Court was on the ground that the respondents had a prior, or at least an honest concurrent user, of those particular trade marks. This necessarily involved a finding that the plaintiffs could not oppose the application of the respondents for the registration of those trade marks. The order of the Supreme Court did not state that the respondents were entitled to get their trade marks registered against all opposition but only that the respondents' application should be considered by the Registrar ignoring the opposition of the appellant whose claim had been found to be groundless by the Supreme Court. I hold that the direction given to the Registrar was a natural and logical sequel to the order dismissing the plaintiff's claim. Moreover, the value placed on this part of the decree of the Supreme Court in the appellant's affidavit seems to

me to be highly exaggerated in view of the fact that the whole claim of the appellant was valued at Rs. 1,000/-.

The last point urged by the appellant's counsel is that the costs payable by the appellant under the Supreme Court decree should be regarded as a part of the "matter in dispute on the appeal." This argument has certainly the merit of novelty, as a similar argument does not appear to have been addressed to this Court in any previous case. The learned counsel argues that, in appealing to the Privy Council, the appellant is seeking to obtain relief against the decree of the Supreme Court dismissing his claim and ordering him to pay the respondent's costs. The liability to pay costs should therefore be regarded as a part of the matter in dispute. There is no doubt that the appellant is aggrieved in having to pay a large sum of money as costs in addition to having his claim dismissed. But do facts constituting a grievance necessarily constitute a matter in dispute within the meaning of Rule 1 (a). The dismissal of the appellant's claim necessarily resulted in the appellant becoming liable to pay costs to the respondents. If the appellant succeeds in his appeal to the Privy Council and gets the decree of this Court dismissing this action vacated, the appellant will not only be relieved from the necessity of paying the costs of the respondents, but will also be declared entitled to an order for costs against the respondents. If the contention of the appellant's counsel is sound, it may even be argued that in order to ascertain the value of the matter in dispute the value of the plaintiff's claim should be enhanced by double the amount of costs he is now ordered to pay. But I do not think that the language of Rule 1 (a) forces us to such a position. If the amount of costs should be reckoned as forming a part of "the matter is dispute" mentioned in the earlier part of Rule 1 (a), it must also be reckoned in the case of appeals mentioned in the latter part of the Rule as appeals involving "directly or indirectly" some claim or question to or respecting property or some civil right amounting to or of the value of Rs. 5,000/- or upwards. It is difficult to see how an order on an unsuccessful party to pay costs could be regarded as forming part of a "a claim or question to or respecting property of some civil right." If the costs payable by an unsuccessful party cannot be considered in the case of appeals falling under the second portion of Rule 1 (a), it is difficult to hold that such costs should be regarded as forming part of a matter in dispute mentioned in the earlier part of the Rule. There may, no doubt, be cases where the order to pay costs may by itself give a right of appeal to the Privy Council. In the present case, however, the order to pay costs is subsidiary to the order dismissing the appellant's claim and ordering him to pay Rs. 300/- as damages.

In *Doorga Doss Chowdry* v. *Rama Nath Chowdry* (1860) 8 Moore's Indian Appeals, the Privy Council held that costs of suit should not be

added to the principal sum and interest to arrive at the value of the claim for the purpose of an appeal to the Privy Council. That decision was given on an interpretation of the Order in Council of April 10, 1838, which is not available to me. Mulla in his Commentary on the Indian Code of Civil Procedure (Eighth Edition) states at page 294 that the Order in Council referred to "the amount of value of the subject matter in dispute in appeal to Her Majesty in Council." If the statement of Mulla is correct, then the decision of the Privy Council is an authority in support of the view I have expressed.

I would dismiss the appellant's application with costs.

NIHILL J.—I agree.

Application refused.

[Proctor for appellant: *S. Ratnakaram.* Proctor for respondents: *W. D. N. Selvadurai.*]

THE TIMES OF CEYLON CO. LTD. *v.* MESSRS. UTTUMCHAND

[WIJEYEWARDENE J *S.C. No. 87—C.R. Colombo No. 44851.*
SEPTEMBER 1, 7, 1939]

Contract—Agreement between proprietors of a newspaper and advertiser—Stipulation for payment at higher rate in the event of advertiser not using the space reserved for him—Enforceability.

An agreement between the proprietors of a newspaper and an advertiser provided *inter alia* that the space reserved for the advertiser, if not used by him, may be filled with any other matter, that in such case, the proprietors of the newspaper may, at their discretion, charge for the entire space reserved at the contract rate or for the space utilized by the advertiser at the casual rate and that, in the event of advertisement 'copy' not reaching the newspaper office by a stipulated time, the previous 'copy' will be reproduced.

In an action by the proprietors of the newspaper against the advertiser for the recovery of charges calculated at the casual rate, the Supreme Court held, on the facts, that the advertiser was liable to pay for the advertisements which were published in the newspaper and that, under the terms of the contract, the advertiser was liable to pay at the casual rate as he had wrongfully terminated the contract.

Referred to:
Wijeyewardene v. *Noorbhai*, (1927) 28 N L.R. 430 ... ... (1)
Associated Newspapers of Ceylon Ltd. v. *Hendrick*, (1935) 37 N.L.R. 104 (2)

Appeal from a judgment of V. L. St. Clair Swan Esq., Commissioner of Requests of Colombo, holding that a stipulation for payment at a higher rate by an advertiser, who commits a breach of the contract, is enforceable.

J. R. Jayawardene for appellants.

E. F. N. Gratiaen for respondents.

WIJEYEWARDENE J.—This is an action arising out of a contract made by the defendant with the plaintiff company for the insertion of some of his advertisements in an evening newspaper called the Times of Ceylon owned by the plaintiff company. Under the contract it was

agreed that the defendant should pay Rs. 2/50 per single column inch for the reservation of a space of six inches single column for an advertisement to appear in the Wednesday and Friday issues of the newspaper for a period of two months commencing from June 1, 1938. The contract was made subject expressly to a number of conditions three of which were as follows:—

Condition 3. All space contracted for will become due for payment in full in accordance with the terms set out below and will be definitely reserved for the advertiser, whether used or unused, in which latter case the space may, at the discretion of the Times of Ceylon Co. Ltd., be filled with any other matter.

Condition 4. When the advertiser fails to utilize the entire space contracted for within the period specified in the contract, it shall be competent for the Times of Ceylon Co. Ltd. to charge, at their discretion, either for the total space contracted for at the contract rate or for the space utilized at the non-contract rate.

Condition 7. Change of "copy" to be allowed as often as desired but advertisement "copy" must reach this office two clear days before the due date of insertion, failing which the previous copy will be reproduced. If any advertisement cannot be set in the type or style requested, the setting shall be such as, in the opinion of the Times of Ceylon Co. Ltd., most nearly corresponds thereto and the advertisement will be inserted without submission of proof unless a proof is requested on the face of the advertisement "copy."

The plaintiff company published advertisements on account of the defendant in their issues of June 1, 3 and 8 of the Times of Ceylon but discontinued any further publication in view of defendant's letter P8.

Giving credit to the defendant for a sum of Rs. 45/- paid by him, the plaintiff company sued the defendants in this case for a sum of Rs. 135/- alleging liability on the part of the defendant to pay at the casual rate of Rs. 10/- per single column inch for the three advertisements published by them.

The defendant denied his liability (1) to pay for the advertisement published on June 3, and 8 and (2) to pay at casual rates in respect of any of the advertisements. He claimed in reconvention a sum of Rs. 30/- on the footing that he was liable to pay only for the first advertisement and the amount payable was only Rs. 15/- at the contract rate of Rs. 2/50 per column inch.

The defendant sent the plaintiff-company the advertisement D1 which was duly published in the issue of June 1. On the morning of June 3, the defendant sent a new advertisement P3 in place of D1. The plaintiff company, however, published not the new advertisement P3 but the old advertisement D1 in their issues of June 3. The defendant, thereupon, wrote P8, stating that he "cancelled" the contract as the plaintiff company wrongfully failed to publish the advertisement P3 on

June 3. This letter reached the plaintiff company on June 8. The new advertisement P3 appeared in the issue of June 8.

The defendant denied his liability to pay for the advertisements on June 3 and 8 on the grounds

i. that the plaintiff company should have published P3 and not D1 in their issue of June 3.

ii. that the plaintiff company should not have published P3 in their issue of June 8, in view of his letter P8.

The defendant ignores the clear provisions of condition 7 of the contract in putting forward this contention. Moreover, the plaintiff company has led evidence to show why it was not possible for them to substitute P3 for D1 on June 3, and to withdraw P3 from the issue of June 8, at short notice. That evidence stands uncontradicted and has been accepted by the Commissioner of Requests. I hold, therefore, that the defendant fails in his plea that he is not liable to pay for the advertisements on June 3 and June 8.

There remains the further question to be considered whether the defendant is liable to pay at the casual rate as claimed by the plaintiff company. The defendant wrote P8 "cancelling" the contract on the ground that the plaintiff company acted wrongfully in failing to insert the advertisement P3 in their issue of June 3. This is an untenable position as the action of the plaintiff company is justified by condition 7 of the contract and, therefore, the defendant had no right to terminate the contract. The plaintiff company wrote P9 intimating that the contract could stand cancelled but that the defendant would have to pay at the casual rate under condition 4 of the contract.

It will be noted that, if condition 4 is applicable to the present case, it was competent for the plaintiff company to charge the defendant Rs. 270/- on the basis that the defendant had become liable to pay at the contract rate for the whole space contracted for. The plaintiff company has chosen to charge the defendant only Rs. 180/- on the footing that payment should be made at the casual rate for the actual space utilized by the defendant. It will thus be seen that in making the present claim the plaintiff company has exercised the discretion given to them by condition 4 in favour of the defendant. I may add also that the Commissioner of Requests has found that the defendant was well aware of the casual rate at the time he entered into the contract and I am unable to say that the Commissioner's finding is erroneous.

The defendant's counsel urges that the plaintiff's claim is in the nature of a penalty and relies strongly on a decision of this court *Wijewardene* v. *Noorbhai* (1). The plaintiff in that case, a newspaper proprietor, sued the defendant on a contract whereby the plaintiff was to publish advertisements of the theatre owned by the defendant for a period of one year from May 28, 1924, at a rate set out in the contract. The contract provided that in the event of its being terminated before the

expiration of the contract period through any fault of the defendant, the plaintiff should be at liberty to charge for all the advertisements published under the contract at the usual rates which should not exceed Rs. 2/50 per inch. About the end of January, 1925, the defendant transferred his theatre to one Fernando. He discontinued from February 3rd, 1925, the advertisements in the newspaper and paid plaintiff at contract rates for the advertisements sent by him. Fernando himself, however, entered into a contract with the plaintiff to advertise the theatre in the plaintiff's newspaper for a period of three months which, in fact, formed part of the twelve months during which the defendant's contract was to run. The plaintiff sued the defendant charging him at Rs. 2/50 per column inch for the advertisements from May 28. 1924 to February 3, 1925. It was held by this Court that the plaintiffs' claim was in the nature of a penalty, and that the plaintiff was not entitled to get more from the defendant than he would have received had defendant duly completed the contract. The District Judge was directed to assess the plaintiff's claim on the basis—

i. that the defendant was liable to pay at the contract rates for the days during which there were no advertisements from the defendant or Fernando

ii. that the defendant must make good the loss incurred by the plaintiff owing to the fact that Fernando's contract provided for a lower rate of payment than the defendant's contract.

Now in the present case there is evidence to show that right through the contract period of two months the space contracted for remained reserved for the defendant. Therefore even if the defendant's plea is upheld, the plaintiff could claim on the basis of assessment adopted in *Wijewardene* v. *Noorbhai* a sum of Rs. 225/- as that would be the amount the defendant would have had to pay at the contract rate for the period during which no advertisement appeared in the. "Times of Ceylon."

There is, however, a later decision of this court, the *Associated Newspapers of Ceylon Ltd* v. *Hendrick* (2), where MACDONELL C.J. & BOYSER J. took the view that the provisions for the payment of a higher rate in a contract between a newspaper proprietor and an advertiser, in the event of the advertiser failing to utilize the entire space contracted for, should be regarded as an agreement to pay liquidated damages and not as penalty. With reference to the earlier case of *Wijewardene* v. *Noorbhai*. MACDONELL C.J. said "I think, however, that the case can easily be distinguished on the facts. There the contract stated that if advertisements totalling a smaller space were sent in by the defendant within the time given him, then the newspaper was to be entitled to charge for all advertisements published under the contract at the casual rates which should not exceed Rs. 2/50 per column inch. In other words, the amount which the plaintiff newspaper could charge under

that contract was not a fixed and ascertained sum. It was left to it to charge what it pleased provided the sum charged did not exceed Rs. 2/50 per column inch."

In spite of the distinction drawn by the learned Chief Justice between the two cases I find it difficult to say that the principles underlying the two decisions are not somewhat irreconcilable. But it is not necessary for the purposes of this case to decide which of the two decisions should be followed as neither decision will help the defendant to reduce the claim made by the plaintiff in this case.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

[Proctor for appellant. *F. C. D. de Silva.* Proctor for respondent: *J. M. Pereira.*]

—K. S. A.

T. B. DHANAPALA *v.* H. M. IBRAHIM.

[SOERTSZ A.C.J. *S.C. No. 208—M.M.C. Colombo 72529.* JUNE 20, 1939.]

Motor Car—Charges of driving a motor car negligently and with defective brakes—Plea that the accused had a licensed driver by his side—Is it tenable?—Motor Car Ordinance (Leg. Enact. Vol. 4 Ch. 156.) Ss. 11 (1) and 63.

HELD that when a person is charged with having driven a motor car negligently and with defective brakes, it is not open to him to plead that he is not liable because there was a licensed driver by his side.

Appeal from an acquittal of an accused by U. P. Weerasinghe Esq., Municipal Magistrate of Colombo.

D. Jansze, Crown Counsel, for the complainant-appellant.

No appearance *contra.*

SOERTSZ A.C.J.—The accused in this case was charged with certain offences under the Motor Car Ordinance No. 20 of 1927. He was charged with having driven a motor car negligently, punishable under section 57 (3), new section 63 of the Ordinance, secondly, with driving a motor car without a certificate of competence, punishable under section 37 (1), new section (1) of the said Ordinance, and thirdly, with driving a motor car with defective brakes, punishable under section 10 (1), new section 11 (1) of this Ordinance.

It would appear that the accused was driving this motor car while a person licensed to drive it was seated by his side. Notwithstanding the support, moral and other, that this proximity of a duly licensed driver might be assumed to have given this driver who had no license, he succeeded in a short space of time to go on the wrong side of the road, knock down a man called Ramakutty, who was an employee of a hotel and was standing within a foot of the kerb, and then, showing that he was no respector of persons, knocked down a beggar. I am informed

that the driver contributed to this part of the achievement by interfering with the driving wheel himself, and then eventually either one or other or both of them succeeded in knocking over a bicycle, and quite pleased with their performance they brought the car to a stand-still. In these circumstances the charges I have mentioned were laid against the accused. But the learned Magistrate, to whom an extract from some Australian case which is reported in some digest was cited, made up his mind that that case applied and enabled him to acquit the accused, on the ground that while he was on this frolic of his there was seated by him a duly licensed driver.

Now, it is perfectly clear that if this is good law the consequences must be startling. One has only to take the precaution of having a licensed driver by one's side in order to be able to knock down every second man one came across and plead that one was not liable because there was a licensed driver by one's side. The section itself, 57 (3), which is the new section 63, says that anyone who drives a car negligently is liable to be dealt with under that section regardless of how that person was situated at the time he was driving, whether he was driving in splendid isolation or whether he had a licensed driver seated by him at the time. The matter is however different, in regard to the charge preferred against the accused that he drove without a certificate of competence. In that case, the proviso to section 37 (1), new section 39 (1), enables a person to drive without a certificate of competence provided a licensed driver is by his side, so that the accused was rightly acquitted of that charge. In regard to the other charge of driving with defective brakes, it does not make any difference whatever that, at the time the car which the person charged with driving is found with its brakes defective, the licensed driver is also present in the car. In regard to the offence the person actually driving is liable as the driver under that section for that offence.

I, therefore, affirm the acquittal entered by the Magistrate in regard to the charge of driving without a certificate of competence. I set aside the order of acquittal in regard to the other two charges and send the case back for the Magistrate to impose such sentences as he thinks fit after addressing himself to the matter.

Varied.

—K. S. A.

KHUDOOS AND ANOTHER v. JOONOOS

[MOSELEY A.C.J. AND WIJEYEWARDENE J. *S.C. No. 7—D.C. Colombo No. 47499.* OCTOBER 11, 12, 13, 23, 1939.]

Misjoinder of parties and causes of action—Deletion of name of the 1st plaintiff in consequence of defendant's objection—Is it competent to Court to proceed with the trial?—Civil Procedure Code, Ss. 17 & 93.

Administrator—Grant of letters subsequent to the filing of action—Validity of decree—No prejudice to either party—Can irregularity be cured?—The Courts Ordinance, S. 36.

Muslim deed of gift—Reservation of life interest in donor's favour, burdened with fidei commissum*—Absence of donor's intention that the deed should have the character of a deed of gift under the Muslim Law—Applicability of Roman Dutch Law.*

On an objection taken by the defendant, the name of the 1st plaintiff was deleted on the ground of misjoinder of parties and causes of action and the trial of the 2nd plaintiff's action proceeded and decree was entered in his favour. The validity of the decree was attacked on the ground that, in view of S. 17 of the Civil Procedure Code, the action should have been dismissed. The Supreme Court held that this contention was not tenable.

Dissented from: *Abraham Singho* v. *Jayaneris Singho*, (1935) 3 C.L.W. 53 (1)

Referred to: *Jayamaha et al* v. *Singappu et al*, (1910) 13 N.L.R. 318 (2)
London & Lancashire Fire Insurance Co. v. *P. & O. Company et al*, (1914) 18 N.L.R. 15 ... ... (3)
Alagammah v. *Mohamadu*, (1917) 1 C.W.R. 73 ... (4)
Menika v. *Menika*, (1923) 25 N.L.R. 6 ... ... (5)
Kanagasabapathy v. *Kanagasabay*, (1923) 25 N.L.R. 173 (6)
Fernando v. *Fernando*, (1937) 39 N.L.R. 145 ... ... (7)
Beha i Lal and another v. *Kodu Ram*, (1893) 15 All. 381 (8)

A plaintiff instituted an action on the basis that he was both heir to an estate as well as an administrator. The trial Court had found that he was not an heir but gave him judgment in his capacity as administrator, though letters of administration were granted to him after the institution of the action. The Supreme Court held that, in view of S. 36 of the Courts Ordinance, the decree obtained by the plaintiff cannot be attached on the ground that he was not a duly appointed administrator at the time he instituted the action.

Referred to: *Silva* v. *Weerasuriya*, (1906) 10 N.L.R. 73 ... .. (10)
Kanappa Chetty v. *Kanappa Chetty*, (1908) S.C.D. 40 ... (11)
Sethna v. *Hemingway*, (1914) 33 Bomb. 618 ... ... (12)

A Muslim woman gifted a property reserving a life interest in her favour and subject to a *fidei commissum*. There was no clear indication in the deed of the donor's intention that the deed should have the character of a deed of gift under a Muslim Law. The Supreme Court held that the deed was to be construed according to the Roman Dutch Law and by which a *fidei commissum* had been created.

Applied: *Weerasekera* v. *Peiris*, (1932) 34 N.L.R. 281 [P.C.] ... (13)
Kalendaumma v. *Marakar*, (1936) 38 N.L.R. 271 ... (16)
Distinguished: *Sultan* v. *Pieris*, (1933), 35 N.L.R. 57 ... ... (14)
Ponniah v. *Jamal*, (1936) 38 N.L.R. 96 ... ... (15)

The objection that an appellant should not be allowed to urge at the hearing of the appeal a point which was not raised during the trial of the case nor in the petition of appeal considered.

Referred to: *Steward* v. *North Metropolitan Tramways Co.*, (1886) 16 Q.B.D. 556 (9)

C. Thiagalingam, with him *D. K. Curtis*, for defendant-appellant.

S. J. V. Chelvanayagam, for 2nd plaintiff-respondent.

WIJEYEWARDENE J.—This is an action for declaration of title to a property bearing assessment No. 64 at Hulftsdorp Street. By deed P1 of December 8th, 1894, one Ummukuludu Umma gifted the property to Mahamood Natchia, reserving a life interest in her favour and subject to a *fidei commissum*. By deed P2 of September 30th, 1902, Mahamood Natchia conveyed certain interests in the property to the defendant.

Ummukuludu Umma died intestate about 1897 and letters of administration were granted to the first plaintiff Mahamood Natchia died intestate in June, 1924 and letters of administration in respect of her intestate estate were granted to the 2nd plaintiff on April 23rd, 1934.

The present action was instituted in January 1932 asking for judgment declaring the first plaintiff entitled to the property as administrator of the estate of Ummukuludu Umma or "in the alternative declaring the second plaintiff entitled to the property in his own behalf or as belonging to the estate of Mahamood Natchia." The plaint alleged that the second plaintiff was the husband and sole heir of Mahamood Natchia and that he has applied for letters of administration to her estate in D.C. Colombo (Testamentary) 5967. The action was presumably instituted by the plaintiffs claiming an alternative title in either of them owing to the uncertainty which prevailed at least at the time of the institution of the action regarding the validity of Mohamedan deeds of gift subject to certain conditions and limitations.

The defendant filed answer pleading *inter alia* that there was a misjoinder of parties and causes of action and that the plaintiffs could not therefore "maintain this action."

On March 16th, 1934, the case came up for trial before the then District Judge of Colombo, Mr. O. L. de Kretser, when the defendant's counsel suggested the following issue for decision as a preliminary issue—

Is there a misjoinder of plaintiffs and of causes of action ?

The District Judge answered the issue in the affirmative and the plaintiff's counsel moved to delete the name of the first plaintiff and to proceed with the action as at the instance of the second plaintiff. The Judge, thereupon, dismissed the first plaintiff's action and framed a number of issues suggested by the Counsel for the second plaintiff and the defendant. The case was, however, postponed as the second plaintiff had not obtained at that time letters of administration to the estate of Mahamood Natchia.

The case came up for hearing ultimately before another District Judge of Colombo who delivered his judgment in November, 1937, in favour of the second plaintiff. The present appeal is preferred by the defendant against that judgment.

In arguing the appeal before us the appellant's Counsel raised the following points:—

1. The action should have been dismissed as there was a misjoin-

der of parties and of causes of action.

2. As the second plaintiff had not obtained letters of administration at the time he filed the plaint, the action should have been dismissed in view of the District Judge's finding that the second plaintiff was not an heir of the estate of Mahamood Natchia.

3. The deed of gift P1 was invalid and the property did not, therefore, belong to the estate of Mahamood Natchia.

4. The defendant became the absolute owner of the property under P2.

In support of his first contention the appellant's Counsel argued that the order of the District Judge, dated March 16th, 1934, was bad in so far as it allowed the second plaintiff to proceed with the action and there was no provision in the Code which enabled the Judge to strike out the name of one plaintiff and permit the action to proceed in the name of the second plaintiff, as in this case there was not only a misjoinder of parties but also a misjoinder of causes of action. He relied strongly on section 17 of the Civil Procedure Code and a decision of this Court in *Abraham Singho* v. *Jayaneris Singho*, (1).

Now section 17 of the Civil Procedure Code enacts:—

"Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action."

I am unable to agree that this enactment compels a Court to dismiss an action for misjoinder of parties and of causes of action. I do not think we are compelled by any other provision of the Civil Procedure Code to read into this particular enactment anything more than it states. All that the section states is that the plaintiffs should not join in respect of distinct causes of action. I do not see any reason why a Court should not, on an application made to it, exercise its discretion and strike out one or more of the plaintiffs so as to make the plaint conform to the provisions of section 17. In *Jayamaha et al* v. *Singappu et al* (2) HUTCHINSON C.J. said:—"The first plaintiff's cause of action is for trespass on portions of his land A and he has nothing to do with B. The second plaintiff's is for trespass on his land B, and he has nothing to do with A. It is true that all the defendants who filed answer claim ultimately from the *sannas*, but the claims of the plaintiffs are for distinct causes of action, and ought not to have been joined. See section 17 of the Civil Procedure Code. Their Counsel says that he is willing that the second plaintiff and his claim should be struck out. But there was no application by either party to strike him out; and section 18 does not empower the District Court to do so without an application; and I think that we have no power to do it now."

"The order made by HUTCHINSON C.J., with the concurrence of VAN LANGENBURG A.J., was to the effect that the case should be sent back to the District Court for the consideration of an application to strike out one of the plaintiffs and that the District Judge should deal with it on such

terms as to costs, amendment of pleadings, if necessary, and otherwise as he thought fit and if he acceded to it he should proceed with the trial of the other issues.

In *London & Lancashire Fire Insurance Co.* v. *P. & O. Company et al* (3), DE SAMPAYO J. who was of opinion that there was a misjoinder of parties and of causes of action said that he would send the case back for trial of the first cause of action excluding the second cause of action. In *Alagamma* v. *Mohamadu* (4), SHAW J. and SAMPAYO J. held that neither section 17 nor any other provision of the Civil Procedure Code necessitated the dismissal of an action in all cases where there has been a misjoinder of parties and causes of action. DE SAMPAYO J. further observed in the course of his judgment:—"Section 17 of the Code is one of a number of sections concerned with the framing of an action, and it is obvious from the whole set of provisions that the intention of the Code is not to make technical defects wholly to defeat an action but to facilitate the correcting of such defects in order that the Court may once and for all adjudicate on the merits of the case.

Section 93 gives the Court wide powers of amendment, and I think the District Judge should have exercised those powers in this case. It is not as if the plaintiff had not moved him to do so, for it appears that the legal issue on the objection in question was discussed by both sides. Counsel for the plaintiff intimated to the Court that he was prepared to strike off from the record the first, second and third plaintiffs and their particular claims."

In this connection reference may also be made to *Menika* v. *Menika* (5), *Kanagasabapathy* v. *Kanagasabay* (6) and *Fernando* v. *Fernando* (7).

Section 17 of our Code corresponds to section 31 of the Indian Code of Civil Procedure, 1882, and under that section it was held in *Behari Lal and another* v. *Kodu Ram* (8) that, where a suit was bad for misjoinder of plaintiffs and causes of action, it was not proper to dismiss the suit without giving the plaintiff an opportunity of amendment.

I regret, I am unable to assent to the view expressed in 3 Ceylon Law Weekly 53 and I hold that the first point raised by the appellant fails.

The second point urged on behalf of the appellant is that the claim of the second plaintiff is preferred as an heir and as administrator of the estate of Mahamood Natchia and that as the District Judge had found against the second plaintiff's claim as heir there remained only his claim as administrator which should have been dismissed as he obtained the letters of administration about two years after the institution of the action. If the appellant intended to urge this argument in the lower Court, no explanation is forthcoming as to his failure to make his position clear at least on March 16th, 1934, when the District Judge

decided the preliminary issue regarding the misjoinder of plaintiffs and of causes of action. Had he done so, it would have been open to the second plaintiff to withdraw his action and file a fresh action immediately after he obtained the letters of administration on April 23rd, 1934, and before the expiry of ten years from the death of Mahamood Natchia in June, 1924. If the appellant's contention is now upheld and the plaintiff is compelled to file a fresh action, it will be open to the defendant to plead against him that he has obtained title by prescriptive possession. There appears to be some ground for the complaint of the Counsel for the respondent that this point has been taken for the first time at the hearing before us and if the point is now upheld his client will be seriously prejudiced. Though the learned District Judge has dealt with the various matters in dispute argued before him in a very full and well considered judgment he has made no reference whatever to this point. It is, no doubt, just possible that the District Judge may have forgotten to consider this argument though it was urged before him, but in that case I should have expected the appellant to raise this point in the petition of appeal in which he has raised specifically various other points of law. The petition of appeal, in fact, makes no reference whatever to this point. The learned Counsel for the respondent has referred us to *Steward* v. *North Metropolitan Tramways Co.* (9), and pleaded that the appellant should not be allowed to urge this objection at this stage of the proceedings.

There is no direct authority in our Law Reports on the question whether the plaintiff, who was not an administrator at the time of filing the plaint but obtained the letters of administration pending the action, could obtain a decree in his favour. But there are decisions which tend to show that a Court of Law should refuse to dismiss an action in circumstances similar to those which have arisen in this case. In *Silva* v. *Weerasuriya* (10), administrator instituted an action in respect of a property which was not mentioned in the inventory and the values of which had not been included in the sum on which stamp duty had been paid in the Testamentary Proceedings. HUTCHINSON C.J. said that if an application was made even in the Appeal Court, the case would not have been dismissed but remitted to the lower Court to enable the plaintiff to get the letters of administration duly stamped. WENDT J. went further and expressed his view that the Judge of the lower Court should not have dismissed the action in any event but adjourned the trial in order to enable the plaintiff to get his letters duly stamped. In *Kanappa Chetty* v. *Kanappa Chetty* (11), the plaintiff appears to have claimed as an adopted heir of a deceased person whose estate was not administered and this Court sent the case back to the District Court with a direction that further proceedings should be stayed to enable the plaintiff to get the letters of administration within a reasonable time and that on the plaintiff being appointed as administrator he should *in that capacity* be substituted as plaintiff and allowed to proceed with the

action. Section 42 of our Code of Civil Procedure corresponds to section 50 (4) of the Indian Code of Civil Procedure, 1882, and Order 7, Rule 4 of the Indian Code of Civil Procedure 1908, while section 547 of our Code, so far as it is material for the consideration of the present question, is somewhat similar to section 190 of the Succession Act.

In *Sethna* v. *Hemingway* (12), SCOTT C J. while holding that the plaintiff who sued as administratrix before obtaining the letters of administration should be allowed to retain the benefit of a decree entered in her favour after obtaining the letters of administration, said: "The plaint was defective in that it did not show that the plaintiff had obtained letters of administration and it should on that account have been rejected on presentation. The plaintiff, however, obtained letters of administration on the 31st October, 1913, a fortnight before the hearing and the hearing was allow to proceed. A decree was passed for the plaintiff declaring that the Rs. 10,000/- in question formed part of the estate of the deceased and that the plaintiff was entitled to the same. This was not contrary to Section 190 of the Succession Act as remarked by the learned Judge. The only tenable technical objections was to the institution of the suit before the plaintiff had an existing interest in the subject matter. That point, however, if it had been taken and had resulted in the rejection of the suit at the hearing, would have only led to a waste of time and costs without benefiting the defendants, for fresh suit would immediately have been brought by the administratrix."

Moreover, I think that in all the circumstances of this case the respondent is entitled to claim with regard to this contention the benefit of the provisions of Section 36 of the Courts Ordinance which enacts that "no judgment or order pronounced by any Court shall on appeal or revision be reserved, altered or amended on account of any error, defect or irregularity which shall not have prejudiced the substantial rights of either party."

I hold, therefore, that the decree obtained by the plaintiff cannot be attacked on the ground that he was not a duly appointed administrator at the time of institution of the action.

The third point involves a determination of the law which governs Muslim deed of gifts. The ruling authority on this question is *Weerasekera* v. *Peiris* (13) in which the Privy Council considered the validity of a deed of gift executed by one Muslim in favour of another. The deed purported to transfer the property as "a gift *inter vivos* absolute and irrevocable" subject to

(*a*) a reservation to the donor of the right of taking and enjoying the rents and income of the property
(*b*) a burden of *fidei commissum*
(*c*) a right in the donor to revoke the gift.

In view of the elaborate argument addressed to us by the appellant's counsel based on the alleged difficulty of seeing clearly the princi-

ples of law enunciated by the Privy Council, I think it is best to reproduce *in extenso* the relevant passage from that judgment:—

"The conditions and restrictions mentioned in the deed are quite inconsistent with a valid gift, *inter vivos*, according to the Mohammedan Law, for, by the deed, the father reserved to himself the right to cancel and revoke the so-called gift, as if the deed had not been executed and to deal with the premises as he thought fit; he reserved to himself the rents and profits of the premises during his life-time and it was only after his death that the premises were to go to and be possessed by the son.

In Their Lordships' opinion all the terms of the deed must be taken into consideration when construing the deed, and it seems clear to Their Lordships that it was never intended that the father should part with the property in or the possession of the premises during his life-time, or that the son should have any control over or possession of the premises during his father's lifetime. In other words it was not intended that there should be a valid gift as understood in the Mohammedan Law.

The deed further provided (among other things) that after the father's death the son should not sell, mortgage or alienate the premises or any part thereof.....

It was not disputed that the last-mentioned provisions constituted a *fidei commissum* according to Roman Dutch Law but, as already stated, it was contended on behalf of the respondent, that inasmuch as the term of the first part of the deed purported to constitute a gift *inter vivos* between Muslims, the Mohammedan Law must be applied thereto and as possession of the premises was not taken by the son during the father's life the gift was invalid and the *fidei commissum*, which was based on it, also failed.

Their Lordships are not able to adopt this contention of the respondent and upon the true construction of the deed, having regard to all its terms, they are of opinion that the father did not intend to make the son such a gift *inter vivos* as is recognized in Mohammedan Law as necessitating the donee taking possession of the subject matter during the lifetime of the donor, but that the father intended to create and that he did create a valid *fidei commissum*, such as is recognized by the Roman Dutch Law."

If I may say so, I do not see any difficulty in ascertaining the principles of law laid down in that judgment. Nor am I able to hold, in view of that decision, that deed P1, which has to be construed in this case, should not be regarded as governed by the Roman Dutch Law. The deed P1 is a deed of gift between Muslims subject to a reservation to a life interest in favour of the donor and creating a *fidei commissum* in

favour of the children of the donee. I am unable to see any indication on the deed of the donor's intention to make a gift *inter vivos* as known to the Muslim Law and I have no doubt that the (donee) intended to create and did in fact create a valid *fidei commissum* as known to the Roman Dutch Law. The argument of the appellant's counsel appeared to me to be an invitation to us to whittle away the effect of the Privy Council decision by endeavouring to ignore the plain meaning of that judgment and decide the present case according to the view of law expressed in the decision reported in 32 N.L.R. 176 which was the very judgment over-ruled by the Privy Council. There are three reported cases in which this Court had to consider the validity of Muslim deeds of gift subsequent to the Privy Council decision. In *Sultan* v. *Peiris* (14) and *Ponniah* v. *Jamal* (15), this Court held that the validity of deeds of gift in those cases should be decided according to the Muslim Law and not the Roman Dutch Law. It is possible to distinguish these cases from the Privy Council case as the learned Judges who decided those cases pointed out that the deeds themselves gave a clear indication of the donor's intention that the deed should have "the character of a deed of gift under the Muslim Law." It is, however, not possible to reconcile some of the views expressed in the two subsequent decisions of this Court mentioned above with the ruling of the Privy Council, but in spite of these views I am bound to follow the decision of the Privy Council. In *Kalendaunma* v. *Marikkar* (16) this Court followed the Privy Council decision and held that a Muslim deed of gift reserving a life interest in favour of the donor was not governed by the Muslim Law and the deed was valid according to the Roman-Dutch Law.

I hold that the deed P1 is a valid deed of gift and that effect should be given to the *fidei commissum* created by it.

With regard to the fourth point the appellant's counsel argues that by deed P2 Mohamod Natchia purported to convey the entire property and that even if Mohamod Natchia held the property subject to a *fidei commissum* the defendant became the absolute owner of the property on her death without leaving any fiduciary heirs. An examination of P2 shows that there is no foundation whatever for this argument as by that deed Mohamod Natchia conveyed for a sum of Rs. 250/- only her "life rent or possessory interest" in the property.

I would, therefore, dismiss the appeal with costs.

MOSELEY J.—I agree.

Dismissed.

—K. S. A.

T. D. JOHN v. RICHARD PIERIS

[NIHILL J. *S.C. No. 496—M.C. Colombo No. 27253.* SEPTEMBER 25, 1939.]

Dispossession of immovable property by criminal force—Conviction for mischief and criminal trespass—Evidence of violent threats to complainant's servants—Is order of restoration justifiable?—Criminal Procedure Code, S. 418.

The accused arrived on the land with eight others and made violent threats to the complainant's servants which caused them to leave their work and run away, in consequence of which the accused entered into possession of the land. The accused had a club in his hand. After convicting the accused for the offences he had committed, the Magistrate made order putting the complainant into possession of the land.

HELD that the accused's act amounted to a show of criminal force and that the order of restoration was properly made.

Followed:
D. P. S. de Alwis v. *Don Mudiyanse & another*, S.C. Minutes, dated 13.6.34 (1)

Appeal from a conviction of the accused and an order of restoration of immovable property made by E. M. C. Joseph Esq., Magistrate of Colombo.

R. C. Fonseka for appellant.

H. V. Perera K.C., with him *Colvin R. de Silva*, for respondent.

NIHILL J.—In this case, the appellant was convicted of offences under sections 433 and 410 of the Penal Code. He was sentenced to pay a fine of Rs. 30/- and Rs. 50/- respectively. The learned Magistrate also made order under section 418 of the Criminal Procedure Code, putting complainant into possession of a certain land from which he had lost possession by reason of the acts for which the accused was convicted under the above sections.

The only point taken in this appeal which is of any consequence is that the evidence does not disclose that the trespass upon the complainant's land was accompanied by criminal force and that, therefore, the order of the learned Magistrate is wrong. It is true that there is no evidence of any actual blows being exchanged between the accused's party and the complainant's servants, but there is evidence that the accused arrived on the land with 8 others and that violent threats were made to the complainant's servants which caused them to leave their work and run away and in consequence the accused then entered into possession of the land. There was also evidence that the accused himself had a club. The facts in this case are very similar to the unreported case quoted by Mr. Perera for the respondent *D. P. S. de Alvis* v. *Don Mudiyanse and Don Gunasekera* (1). In that case, DALTON J. emphasized that threats of violence and murder which cause people to go away from their lands could rightly be said to amount to a show of criminal force. That is the position in this case and the Magistrate's order restoring to the complainant possession of his property is, therefore, in my opinion, in order and I dismiss the appeal.

Appeal dismissed.
—K. S. A.

AMARASEKERE *v.* CANNANGARA

[MOSELEY A.C.J. AND SOERTSZ S.P.J. *S.C. No. 95—D.C. Colombo No. 4636.* OCTOBER 10, NOVEMBER 2, 1939.]

Commission—Party and witnesses resident beyond jurisdiction of Court—When may Court issue a Commission to examine them?—Civil Procedure Code, S. 422 (a).

Observations as to when a Court of Appeal will interfere with the exercise of discretion by the trial Judge.

HELD (i) that applications such as those for the examination of parties and witnesses on commission are left in the discretion of the Court for it to allow or refuse accordingly as the circumstances of each case seem to require,

(ii) that the language of S. 422 (a) is very wide and makes it possible for the parties themselves to be examined on commission if they are resident beyond the limits of the jurisdiction of the Court,

(iii) that an application to examine on commission a party to an action, when made on his behalf, should not be granted lightly and

(iv) that on a broad view of the case and of the nature of the evidence of the defendant and certain witnesses sought to be procured by means of a commission, the defendant's application was justified.

Per SOERTSZ J.—"There are no hard and fast rules, and where a trial Court has exercised the discretion vested in it substantially in a manner conducive to justice, a Court of Appeal will not interfere merely because, if it had been the original Court, it would have exercised this discretion differently.....after careful consideration I have reached the conclusion that the trial Judge has misdirected himself and has exercised his discretion wrongly."

Referred to: *Mohideen* v. *Mohamadu*, (1893) 1 Br. 234 ... ... (1)
Moorhouse v. *Caffoor*, (1897) 1 Tamb. 10 ... ... (2)

C. Thiagalingam, for defendant-appellant.

N. E. Weerasooriya K.C., with him *D. M. Weerasinghe*, for plaintiff-respondent.

SOERTSZ J.—This is an appeal from an order made by the District Judge of Colombo refusing to issue a commission for the examination of the defendant, and of certain witnesses, all of them resident in England.

The circumstances in which the application for a commission was made, are these. The plaintiff who is the step-son of the defendant sued him, in this case, on several causes of action to recover large sums of money. One of the claims was a sum of Rs. 12,698/- which the plaintiff alleged was the amount of rents collected by the defendant in respect of certain houses and premises belonging to the plaintiff, and not accounted for him. The defendant's defence is that he collected a sum of Rs 12,418/- and not Rs. 12,698/- as stated in the plaint, and that that amount and a sum of Rs. 809/- over and above that amount were expended by him in maintaining, feeding and clothing the plaintiff during his stay in England and the defendant claims in reconvention the additional sum I have referred to. The defendant's attorney has submitted an affidavit in support of the allegations in the answer that a large sum of money was spent "on account of clothing, food, light, heating, house-rent and medical attention to the plaintiff." It is

in regard to these matters that the defendant asked that his evidence, he evidence of Dr. Low and the evidence of Mr. and Mrs. Ramsden be aken on commission. Dr. Low's and Ramsdens, evidence, it is said, vill show that the plaintiff was suffering from a highly contagious disease, and that he had to be segregated and put in charge of attendants.

The learned trial Judge refused the application because he thought that in view of the claim in reconvention the Court should have the defendant and his witnesses before it so that their evidence might be assessed properly with reference to the kind of witnesses they appeared to be and to the manner of their giving evidence. The Judge also thought that the statement made in the affidavit that the defendant's state of health made it inadvisable for him to embark on a voyage to Ceylon was belatedly made and that there was no direct evidence to show that Mr. and Mrs. Ramsden were unwilling to come to Ceylon. There was only the attorney's statement to vouch for that.

Now applications such as this are left in the discretion of the Court for it to allow or refuse accordingly as the facts and circumstances of each case seem to require. There are no hard and fast rules, and where a trial Court has exercised the discretion vested in it substantially in a manner conducive to justice, a Court of appeal will not interfere merely because if it had been the original Court it would have exercised this discretion differently. Mr. Weerasooriya stood on that principle. But after careful consideration I have reached the conclusion that the trial Judge has misdirected himself and has exercised his direction wrongly. One of the reasons given by him is that there is a claim in reconvention and that, therefore, it is necessary that he should have the defendant and his witnesses in front of him. It is, of course, desirable that in every case which has to be tried the parties and their witnesses should, during the pendency of the trial, live and move and have their being, so to speak, in the presence of the Judge who has to adjudicate between them, but obviously there must arise cases in which what is desirable is not attainable conveniently. Hence our Section 422 of the Civil Procedure Code, and kindred provisions in other systems of law. Section 422 provides that "any Court may in any action issue a commission for the examination of any person resident beyond the local limits of its jurisdiction." These are very wide words and make it possible for the parties themselves to be examined on commission. But as Taylor says in his work on evidence "motions for this purpose (*i.e.*, for examination on commission of the parties themselves) ought not to be lightly entertained especially when made on behalf of the party who is sought to be examined. ..... The application should not be granted unless it were supported by affidavits clearly stating that the commission would, under the circumstances, be conducive to the ad-

ministration of justice.....A less stringent rule would inevitabl lead to the pernicious practice of parties going abroad to avoid the ri of cross-examination in open Court."

In the case of *Mohideen* v. *Mohamadu* (1), a commission wa refused where the witnesses sought to be examined in that way were witnesses to nine promissory notes which were being impunged as forgeries. That is quite understandable. In *Moorhouse* v. *Caffoor* (2), a commission issued to examine the plaintiff, where it was apparent that the plaintiff's duties prevented him from returning to Ceylon except at a large sacrifice of time and money, and he was not wilfully avoiding the Ceylon Courts.

In the case before us, so far as the defendant is concerned, he has been resident in England continuously from 1926. He says it is his intention to continue to reside there, and that seems probable. The claim with which we are concerned is a claim brought against the defendant not by him and it cannot be said that he desires to remain abroad to avoid the risk of cross-examination in open Court. What is more, there is material before us to show that the defendant has been advised medically that it will be prejudicial to his health to voyage to Ceylon and back. I cannot help feeling that the trial Judge took too technical a view of the matter when he remarked that this fact had not been brought properly to his notice and that it was so brought belatedly. In cases where a Court is exercising a discretion vested in it, it may well, I think, take a more liberal view. It seems to me that the affidavit of the attorney who is the local representative of the defendant, and the medical certificate show that the defendant's health is as it is said to be. In my opinion, therefore, it cannot be said that, if we entertain this application for the defendant's evidence to be taken on commission, we shall be entertaining an application for a commission lightly.

The position in regard to Dr. Low and Mr. and Mrs. Ramsden is even stronger. One is a professional gentleman, and the others are working people, and it is unlikely that they will agree to come to Ceylon to give evidence in this case. I cannot pay serious attention to the objection made that these witnesses have not themselves said that they will not come to Ceylon for the purpose of this case. The attorney says they are unwilling, and he must be understood to be speaking on instructions he has received from the defendant. On the probabilities of the matter too, one may assume that they have refused to come to Ceylon. But even if they should be willing to come, the expenditure that would be incurred in getting them out is such that it is out of proportion to the nature and amount of the claim. The sole question involved is whether the defendant has incurred all the expenditure he says he has. It seems clear that he must have incurred some expenditure. My view in a case like this is that the interests of justice will not suffer by

the evidence referred to being taken on Commission. The Judge will no doubt, in adjudicating upon the claims, bear in mind that the evidence for the defence was placed before him in this manner, and that the plaintiff has not had the advantage of subjecting those witnesses to cross-examination in open Court in the presence of the trial Judge. We were referred to certain English and local cases in support of the contention put forward on the two sides, but case law is not of much assistance in a matter of this kind where the exercise of a discretion vested in a Court must depend on the peculiar facts and circumstances of each case. On a broad view of the circumstances of this case, and of the nature of the evidence sought to be procured by means of a Commission, I am of opinion that the defendant's application should be allowed.

I would, therefore, set aside the order dismissing the application and send the case back with the direction that a commission do issue at the expense of the defendant to such a Court or person as the trial Judge may deem fit for this evidence to be taken on commission. The appellant will have the costs of this appeal and of the argument on the point in the Court below, but whatever the ultimate result of this case, the defendant must bear the cost of the commission including such additional costs as the plaintiff will have to incur in procuring representation for himself before the commission appointed to take the evidence the defendant desires to adduce.

MOSELEY A.C.J.—I agree.

Allowed.

—K. S. A.

APONSU v. MALALSEKERA

[NIHILL J. *In Rev. M.C. Panadure 789.* OCTOBER 2, 5, 1939.]

Revision—Sanction to appeal from acquittal refused by Attorney General—Power of Supreme Court to act in revision in criminal cases.

Local Inspection—Procedure.

HELD (i) that, although the Supreme Court has full powers of revision in all criminal cases, in such a case a heavy *onus* rests upon the applicant to satisfy the Court that there has been a positive miscarriage of justice and

(ii) that an inspection of the *locus* if undertaken at all by the judge must be done with due care and caution.

Referred to:

Jayawickreme v. Siriwardene & others, (1939) 3 C.L.J.R. 316; 18 C.L.Rec. 182 (1)

An application to revise an order of acquittal made by D. A. Leanage Esq., Magistrate of Panadure.

Stanley de Soyza, for petitioner.

D. D. Athulathmudali, for respondent.

NIHILL J.—This is an application for revision in a case of acquittal under sections 433 and 346 of the Ceylon Penal Code. Sanction was sought for an appeal from the Attorney General and was refused. Although this Court has full powers of revision in all criminal cases, in such a case a heavy *onus* rests upon the appellant to satisfy this Court that there has been a positive miscarriage of justice.

I am far from being satisfied that that position has been reached in this case. Although the respondent was charged with high sounding offences, namely, criminal trespass and assault with intent to dishonour, the evidence shows that the incident that led to the charges was in fact a trivial one. Bad feeling existed between the parties, two school masters, and it was alleged that the respondent slapped the appellant at the gate of his premises one morning.

It looks as if the applicant might have been successful in establishing a case of simple assault against the respondent in the Village Tribunal but, no doubt with a view of rehabilitating his injured pride, he chose to bring heavier artillery to bear and his attack has failed.

In my opinion, I should be performing no service either to justice or to the parties themselves were I to send this case back for further investigation on the matter of the assault.

Both the parties are members of a profession that demands a high standard of behaviour as an example to their pupils, and I trust that they will both realize that the time has now come for them to shake hands and to agree to let bygones be bygones.

Although, I think, the learned Magistrate was justified on the evidence led in Court in dismissing the charges, it is unfortunate that he made an inspection of the scene under conditions which so far as the record shows, were not satisfactory, for there is nothing to show that the parties were present or as to how the Magistrate found the scene of the offence or as to how the inspection proceeded.

An inspection of the *locus* if undertaken at all by a Magistrate must be done with due care and caution, otherwise, this practice, however helpful it may seem to the Magistrate who has doubts as to his decision, is open to grave objection.

I would invite the learned Magistrate's attention to the recent case of *Jayawickreme* v. *Siriwardene* (1), in which the matter is more fully discussed.

I dismiss the application.

Dismissed.

[Proctor for complainant: *Jacob Fernando*. Proctor for accused: *M. H.* —K. S. A.

CASSIM v. SUPPIAH PILLAI

[MOSELEY A.C.J & NIHILL J *S.C. No. 11—D.C. Colombo (Inty.) No. 4669.* OCTOBER 4, 23, 1939.]

Insolvency—Grant of certificate to insolvent—Conveyance of property by insolvent two years prior to his adjudication—Application by assignee to have property sold for benefit of creditors—Is such application a proceeding distinct from the insolvency proceedings?—Facts necessary to maintain such application—Insolvency Ordinance, S. 51.

Is such application an 'action'?—Limitation—Courts Ordinance, Ss. 2 & 62—Prescription Ordinance, S. 10.

The insolvent was so adjudged on 19th June, 1933. He had sold on the 7th August, 1937, certain properties to his father-in-law and the consideration of Rs. 10,000/- was stated in the deed of sale to have been paid to the insolvent at the time of execution of the deed. After the insolvent was granted a certificate, the assignee, on the 9th December, 1937, initiated proceedings by way of petition, under S. 51 of the Insolvency Ordinance, for the sale of the said properties for the benefit of creditors. In the absence of the insolvent and the purchaser, the inquiry into the application proceeded and, in spite of objection raised by Counsel for the purchaser, the Judge allowed the evidence of the insolvent and the purchaser in the insolvency proceedings and the finding of the Judge thereon to be read in support of the application. The application was allowed and order made for the sale of the property for the benefit of the creditors. The purchaser appealed.

HELD (i) that the motion by way of petition, under S. 51 of the Insolvency Ordinance, is a proceeding independent of the insolvency proceedings and

(ii) that, in such an application, it must be proved that the insolvent was in fact insolvent at the time he sold the properties.

HELD, further (i) (MOSELEY A.C.J.) that the evidence of the insolvent and the purchaser (appellant) and the judgment in the insolvency proceedings were improperly admitted in the present proceeding and

(ii) (NIHILL J.) that an application under S. 51 of the Insolvency Ordinance is an 'action' within the meaning of the Courts Ordinance and, therefore, came within the ambit of S. 10 of the Prescription Ordinance.

Per MOSELEY A.C.J.—"Here we are faced with a difficulty which arises from the statute under which the proceedings are brought—an antiquated and unsatisfactory piece of legislation. The difficulty is in no way lessened by the fact that no rules have been framed to regulate the practice and the forms of proceedings under the Ordinance."

Per NIHILL J.—"The archaic character of the law relating to the Insolvency has often been the subject for comment of this Court and the difficulty is increased by the absence of rules. Without rules it is impossible to say with certainty how a proceeding under section 51 should be started."

Followed:	*Kandapper* v. *Moses*, (1930) 8 C.T.L.R. 69		(1)
	Kandappa v. *Ramasamy Chetty*, (1924) 6 C.L.Rec. 37 ...		(2)
Referred to:	*Silinda* v. *Akura*, (1907) 10 N.L.R. 193		(3)
	In re: Mansel, 9 Mor. 198		(4)
	Fernando v. *Peiris*, (1931) 33 N.L.R. 1		(5)

Appeal from an order allowing the sale for the benefit of creditors of properties previously sold by the insolvent.

H. V. Perera K.C., with him *S. J. V. Chelvanayagam*, for the appellant.

N. E. Weerasooriya K.C., with him *C. Ranganathan*, for the respondent.

MOSELEY A.C.J.—This appeal arises out of a proceeding under section 51 of the Insolvency Ordinance (Cap. 82 of the Laws.) The insolvent was so adjudged on June 19, 1933. The certificate sitting closed on August 31st, 1937, when a certificate of the third class was granted, but suspended for four years. On December 9, 1937, the assignee initiated proceedings under the above-mentioned section for the sale of certain property for the benefit of the creditors.

The appellant, together with the insolvent, was made respondent to those proceedings and was served with notice to show cause why the property should not be sold, since it appeared that the appellant, who was the father-in-law of the insolvent, had purchased the property from the latter on August 7, 1931. The deed of sale C.7, set out that the consideration of Rs. 10,000/- had been paid at the time of execution.

The insolvent did not appear at the hearing and there was evidence that he was in hiding. The appellant was represented by Counsel who applied for an adjournment on the ground of the illness of his client. The request appears to have been refused and the inquiry proceeded. In the absence of the insolvent and the appellant, Counsel for the assignee moved that their evidence given in the course of the certificate proceedings should be read. Counsel for the appellant objected to this course and further pointed out that it would be improper for the Court to take notice of the finding of the Judge on those proceedings in which he had expressed the opinion that the transaction in question was of a fraudulent nature. The District Judge appears to have overruled the objection as the evidence of both the insolvent and the appellant was referred to, as was the finding of the Judge on the certificate proceedings.

The application, which was by way of petition, was allowed and it was ordered that the property be sold for the benefit of the creditors.

The grounds of appeal are in short that the petitioner, that is the assignee, has failed to prove the facts necessary to support an order for sale under section 51 of the Insolvency Ordinance, and further that the claim is prescribed by section 10 of the Prescription Ordinance.

Section 51 of Cap. 82 applies only to the case of a person who has been adjudged insolvent and is aimed at transactions effected at a time when such person is insolvent. Obviously that is not to say that the person must have been, at the time of the transaction, adjudged insolvent, but that he must have been in fact insolvent. That he was so in fact appears to be the first fact which must be proved, that he was subsequently adjudged so being a matter of record.

As to the onus of proof we were referred to the case of *Kandapper* v. *Moses* (1) in which an insolvent prior to his adjudication assigned certain mortgage bonds. It was open to the assignee to claim

the proceeds either under section 51 or section 56. "If", said MACDONELL C.J., "he makes it under section 51 he must prove that the assignor, that is the insolvent, was actually insolvent at the time of making this assignment, and that the assignment was voluntary, or not for valuable consideration."

In the present case the onus of proof of these facts being upon the petitioner, was it open to him to invite the Court to read the evidence of the insolvent and the appellant, and to rely very largely upon that evidence in support of his application? Counsel for the appellant objected to such evidence being read. There is no ruling by the District Judge apparent from the record, beyond a note that Counsel for the assignee referred to the evidence of the insolvent and the admissions of the 1st respondent, that is the present appellant.

In my view the propriety of admitting this evidence in the way in which it was admitted depends in the first place upon the character of the proceeding. Is an application for an order of sale under section 51 merely an incident in the insolvency proceedings, or is it a proceeding arising out of the insolvency proceedings but independent thereof? It must be borne in mind that the certificate sittings began in March, 1936, and closed, as far as the taking of evidence is concerned, in June, 1937. The insolvent was, of course, examined and the appellant also gave evidence. His character at that time was merely that of a witness. He no doubt was aware that the genuineness of the transaction of 7th August, 1931, was being attacked but he was not represented by counsel and could hardly know that the financial position of the insolvent at that date, some two years before the petition in insolvency was filed, was a matter which could in any way affect him personally. Some months later he is served with the petition in the present proceedings and for the first time becomes a party. The learned District Judge appears to have held the view that this application is merely a step in the insolvency proceedings as a whole for he says: "When the Court made its order (*i.e.*, suspending the certificate) in August, 1937, it was perhaps open to the Court under section 51 of the Insolvency Ordinance to order that this property should be sold for the benefit of the creditors."

Here we are faced with a difficulty which arises from the statute under which the proceedings are brought—an antiquated and unsatisfactory piece of legislation. The difficulty is in no way lessened by the fact that no rules have been framed to regulate the practice and the forms of proceedings under the Ordinance. There is something to be said, therefore, for the view taken by the District Judge, since the wording of section 51 does not suggest that any particular procedure is a condition precedent to the making of the order for sale. But there can be no doubt that to make such an order in the manner suggested by the

District Judge, that is at the certificate sitting, would in many cases inflict an injustice upon third, and in some cases no doubt, innocent parties. In cases such as this, it is the rights of third parties that are being attacked and it is inconceivable that the law should permit an absolute order prejudicial to their interests to be made without giving them an opportunity of being heard. Such an opportunity was given to the insolvent in this case, and I hold the view that the motion by way of petition is a proceeding arising out of the insolvency but independent thereof.

In *Kandappa* v. *Ramasamy Chetty* (2), it was held that where, in an enquiry under section 56 of this Ordinance, no evidence was offered and the District Judge relied on the judgment in earlier proceedings between the insolvent and other parties and held the transactions in question to be a fraudulent assignment, the earlier judgment should not have been admitted.

In the order now appealed from, the following passage occurs: "At the certificate meeting, after a good deal of evidence was gone into, the Court held there was no consideration for the transfer to the father-in-law and practically the transfer itself was fictitious." There is some indication that the District Judge had in mind the earlier proceedings and the evidence upon which the certificate of conformity was suspended.

Now, holding the view that these proceedings are distinct from the certificate proceedings, I know of no authority for the admission in the former of the evidence of the insolvent. In the District Court, Counsel for the assignee referred to section 33 of the Evidence Ordinance (Cap. 11) but the first condition, viz., that the proceeding was between the same parties or their representative in interest, appears to me to be absent and I cannot see how the section is in any way useful in these circumstances. At a later stage, Counsel for the assignee sought to have the evidence of the appellant treated as admissions by him and, therefore, admissible. But if his evidence is to be so treated, it should have been proved in proper manner, such as formal production by an officer of the Court of the record in the previous proceedings, or the evidence of a witness who was in a position to testify that certain admissions had been made. But all that the record shows is that Counsel "refers to the evidence of the insolvent and the admissions of the first respondent (*i.e.*, the appellant)."

Now, although in my view the evidence was improperly admitted, I do not know that it was of any great use to the case for the assignee. Counsel for the respondent before us contended that the District Judge did not act on the previous evidence or judgment, but that he had before him ample evidence of insolvency. He relied largely upon a balance sheet which purported to show the position of the insolvent's affairs at May, 1932, on the ground that it was prepared from the insolvent's books

which were closed in 1931. But the assignee in the course of his evidence said:—"I do not know what his (the insolvent's) liabilities were at the time of the execution of the transfer...I found that the liabilities were about one lakh of rupees...Insolvent said that he had *stock* to the extent of Rs. 10,000/- at the time ..I cannot find out from the books what the debts due to the insolvent were and *vice versa* at the time of transfer...I have not prepared a balance sheet of the insolvent's state of affairs at the time of the transfer of the property for the purpose of this enquiry... *I cannot say what his state of affairs were at the time of the transfer.*"

The extracts which I have just quoted are a fair sample of the evidence upon which, in my view, the District Judge should have considered the application. To me the evidence falls considerably short of the standard of proof desirable in such proceedings. The case no doubt is full of suspicious circumstances in regard not only to the financial position of the insolvent at the relevant date but to the genuineness of the alleged consideration for the transaction, but suspicion is not a ground upon which to base an order such as this. I have already said that, in my opinion, the evidence which I have held to have been improperly admitted does not help the assignee's case. I would merely refer to one extract from his evidence, which is as follows:—"At the time I sold my share in the properties I had creditors to the extent of Rs. 100,000/-. I had book debts and stock in trade worth more than Rs. 100,000/-...Most of the book debts are irrecoverable." There is nothing to show that the debts were irrecoverable at the time of the impugned transaction. The insolvent's statement was not contradicted and, if believed, is an answer to the allegation of insolvency.

In my view, the assignee has failed to prove the necessary fact of insolvency, and on this ground the appeal must be allowed with costs, here and in the Court below.

NIHILL J. —This is an appeal from an order of the District Judge directing a sale of certain properties in favour of an insolvent's estate. The properties were purchased by the appellant from the insolvent in August, 1931. The adjudication of the insolvent took place in June, 1933. On August 31, 1937, the insolvent was granted a certificate of the third class which was suspended for a period of four years. The grant of a certificate was opposed by the largest creditor on the grounds, *inter alia*, that the sale above referred to was fraudulent and had been executed to defraud the creditors. The sale was to the insolvent's father-in-law who is the present appellant.

The District Judge in the course of his certificate order stated that he was "inclined to think that no consideration in fact was paid for the transfer of these immovable properties" and reached the conclusion that the transfer was merely intended to put the property beyond the reach of the creditors of the insolvent.

I have detailed these facts in order to assist in determining the exact nature of the proceedings which led to the order which is now appealed against. The order was on an application made by way of petition by the assignee of the insolvent and the learned District Judge in dismissing the plea of prescription did so on the grounds that the application was "more in the nature of execution proceedings" by which I take him to mean that the Court could have ordered the sale of the properties at any time under section 51 of the Insolvency Ordinance once it was satisfied that the transfer was fraudulent, which was the view of the Court when the certificate order was made.

But before an order can be made under section 51, it must be proved that at the time of the transfer the insolvent was insolvent, and that the exceptions named in the section were not present. If there has been a *bona fide* purchase for valuable consideration by an innocent purchaser, he must be given his chance to demonstrate this to the Court and he cannot do this until he is brought in as a party to the proceedings.

In the present matter the appellant was no party to the proceedings which led to the certificate order being made; he comes in for the first time when the attempt is made to sell his properties.

Was not, therefore, the real nature of the proceedings now appealed against, however different in form they may have been, more in the nature of an action in which the appellant was an interested party than a mere inevitable, almost routine, step in the insolvency proceedings?

It is hardly likely that this preliminary difficulty would arise but for the absence of Insolvency Rules. The archaic character of the Law relating to the Insolvency has often been the subject for comment of this Court, and the difficulty is increased by the absence of rules. Without rules it is impossible to say with certainty how a proceeding under section 51 should be started. In the English Bankruptcy Rules, 1915, as given in Williams' on *Bankruptcy*, (15th Edition), it is provided for that every application to the Court (unless otherwise provided for) shall be made by motion supported by affidavit, and it has been held that a motion made under section 105 of the Bankruptcy Acts, 1914 and 1926, which is a section dealing with the general powers of Bankruptcy Courts, is equivalent to an action, and that, accordingly, the Statute of Limitations would be an answer to a motion by the trustee if it would have been an answer to an action by the bankrupt. *In re: Mansel*, 9 Mor. 198 (3); Williams', 15th Edition, page 438.

Now, if the application upon which the order appealed against was in truth "an action", would section 10 of the Prescription Ordinance (Cap. 55) apply? In *Silindu* v. *Akura* (4), an application for *restitutio in integrum* was held to be an action within the meaning of this section of the Prescription Ordinance. In his judgment, GRENIER J. commented on the section's comprehensive and far-reaching character. WOOD RENTON

J. in the same case concluded that "action" in the terms of the section must be construed as embracing any proceedings by which a legal right to redress is asserted.

According to section 2 of the Courts Ordinance (Cap. 6) an "action" is a proceeding for the prevention or redress of a wrong, and the jurisdiction of a District Court by section 62 of the same Ordinance includes insolvency matters. It cannot be said, therefore, that the definition of an "action" in the Courts Ordinance can have no applicability to a matter which comes before a District Court under the Insolvency Ordinance in the exercise of the Court's insolvency jurisdiction.

Now, the essence of the application by the assignee in this matter was that he was seeking to redress a wrong alleged to have been committed against the creditors, but to succeed he had to bring in and defeat a party who was not a party in any way to the insolvency. How then can this be said to be a mere step in the insolvency proceedings? There are certain steps in insolvency in which the persons who make up an insolvency each plays his part—insolvent, assignee, creditors, but when it becomes necessary, consequential on something that comes to light during the course of the insolvency, to go outside and attack the rights of a third party to retain property which he has acquired, it seems to me that such proceedings must take on the character of an action, whatever they may be called in fact, for if they do not the third party is prejudiced.

It is significant that in this case the difficulties with regard to the admissibility of evidence arose because there was no clear distinction made by the learned District Judge between the insolvency proceedings as a whole and the application before him in which a stranger to these proceedings was a party.

It should also be remembered that it would seem that the assignee could have pursued the same remedy in this case by instituting a Paulian action which is what was done in the well-known case of *Fernando* v. *Pairis* (5). Although that case was decided on the facts, GARVIN J. was prepared to hold that a Paulian action was prescribed in three years from the time when the cause of action arose which, in the absence of concealed fraud, he placed at the time when the alienation sought to be impeached took place.

If that be so, it seems to me illogical that the position of the purchaser-defendant should be worsened because the assignee moved the Court by way of petition to which the purchaser had to be made respondent.

I would, therefore, hold that the application was an "action" and as such came within the ambit of section 10 of Cap. 55.

If that view is correct, the application is prescribed because it was not taken by the assignee within three years of the adjudication,

for there is no question here of concealed fraud. I agree, however, with my Lord the acting Chief Justice, that apart from all other considerations, this appeal should be entitled to succeed because the assignee failed to prove that the insolvent was in fact insolvent at the time he conveyed these properties.

Appeal allowed.

[Proctor for appellant: *T. Canagarayer.* Proctor for respondent: *K. T. Chittampalam.*]

—K S. A.

THE COMMISSIONER OF INCOME TAX *v.* MACAN MARKAR

[HEARNE & DE KRETSER J.J. *S.C. No. 12—Special (Income Tax).* NOVEMBER 7, 8, 20, 1939.]

Income Tax—Distribution of bonus to shareholders of company out of reserve for depreciation of buildings and the permanent reserve—Such distribution effected by the allotment and issue of fully paid-up shares—Do such shares constitute a 'dividend' ?—Are they liable to tax on their value ?—Income Tax Ordinance, Ss. 2 & 6 (1).

A 'dividend', under S. 2 of the Income Tax Ordinance, includes "any distribution of profit by a company to its shareholders in the form of.....shares....."

Under S. 6 (1) of the Ordinance 'profits and income' means *inter alia* dividends.

In February, 1933, a Company resolved that "the sum of Rs. 235,929/96 forming part of the existing reserve for depreciation of buildings and further the sum of Rs. 14,070/04 lying to the credit of Permanent Reserve shall be applied towards payment of a bonus to shareholders as nearly as may be in proportion to the amounts paid up on the shares held by them and that the Directors be authorized to allot and issue to the shareholders entitled thereto in like proportions 2,500 shares of Rs. 100/- each credited as fully paid up in satisfaction of such bonus." The resolution was carried into effect and Sir Mohamed Macan Markar, one of the shareholders of the Company, received 793 shares. The assessor treated this distribution as a 'dividend' within the meaning of S. 2 of the Ordinance and, therefore, income of the recepient within the meaning of S. 6 (1) The assessee was, accordingly, assessed to pay a tax on the value of the shares except as to so many of the shares as represented profits arising in the relevant accounting periods. An appeal to the Commissioner of Income Tax was referred by him to the Board of Review who annulled the assessment. The Commissioner of Income Tax, thereupon, required the Board to state a case to the Supreme Court for its opinion on the question of law, viz., whether the shares received by the assessee constituted a 'dividend' within the definition of that term in S. 2 of the Ordinance, so as to render the assessee liable to be taxed on their value.

HELD (i) that the issue of shares in the circumstances of the case is not a distribution of profit and

(ii) that the value of such shares is not assessable for Income Tax.

Referred to:

Commissioners of Inland Revenue v. *Blott*, (1921) 2 A.C. 171; 8 T.C. 101 (1)
Pool, Inspector of Taxes v. *Guardian Investment Trust Co., Ltd.* (1921) 38 T.L.R. 177; 8 T.C. 167 ... ... (2)

Case stated by the Board of Review under S. 74 of the Income Tax Ordinance.

J. W. R. Ilangakoon K.C., Attorney General, with him *S. J. C. Scholman*, Crown Counsel, for the Commissioner of Income Tax (appellant.)

H. V. Perera K.C., with him *E. F. N. Gratiaen*, for the assessee (respondent.)

HEARNE J.—This is an appeal by the Commissioner of Income Tax on a case stated by the Board of Review under section 74 of the Income Tax Ordinance.

The assessee-respondent, who is a shareholder of the Galle Face Land and Building Co., Ltd., was called upon to pay a tax of Rs. 3,280/05 on an additional assessment in respect of certain shares he had received from the Company in the following circumstances.

In February, 1936, the Company resolved that "the sum of Rs. 235, 929/96 forming part of the existing reserve for depreciation of buildings and further the sum of Rs. 14,070/01, lying to the credit of permanent reserve shall be applied towards payment of a bonus to shareholders as nearly as may be in proportion to the amounts paid up on the shares held by them and that the Directors be authorized to allot and issue to the shareholders entitled thereto in like proportions 2,500 shares of Rs 100 each credited as fully paid up in satisfaction of such bonus."

The resolution was carried into effect and the respondent received 793 shares. The question for determination is whether the shares received by him constituted a dividend within the meaning of section 2 of the Income Tax Ordinance, so as to render him liable to be taxed on their value. The Board of Review held that he was not.

In the past difficult questions have arisen as to whether distributions purporting to be by way of bonus shares constituted distributions of income or of capital.

The leading case is *Commissioners of Inland Revenue* v. *Blott* (1). It decided that where shares credited as fully paid up were issued in satisfaction of a bonus the distribution was a distribution of capital and not of income, for the reason that the profits were not paid away to the shareholders. On the contrary they were retained by the company and applied in paying up capital sums which shareholders would otherwise have had to contribute.

In England income is quite simply "total income from all sources," and if the question in this appeal was whether the shares were income in the ordinary sense, and independently of any statutory extension of the definition of income, it would have unhesitatingly to be answered in favour of the respondent.

In Ceylon income includes dividends and a dividend is defined "as including any distribution of profit by a Company to its shareholders in the form of money or an order to pay money, or in the form of shares....."

Dealing with the term "dividend" as it has been defined in the Income Tax Ordinance, the Attorney-General thought it probable that the draftsman had Blott's case in mind and had sought, by including the

words "in the form of shares" in the definition, to provide against the implications of the decision in that case.

It is, on the other hand, possible that he fell into the error of thinking, as was thought by the Commissioners of Inland Revenue in *Pool's case* (2), that "where a bonus is paid in the shares of another Company the value of those shares, following Blott's case, is not assessible for the purposes of tax" and, if he so thought, it is probable that he used the word "shares" in the sense of "shares of another company."

Apart, however, from mere speculation, the point at issue is shortly this—is the definition of dividend wide enough to enable the Commissioner of Income Tax to insist upon the inclusion by a taxpayer, in his return of income, of an amount equal to the value of shares that may have been received by such tax-payer by way of capitalising the profits of a company of which he is a shareholder ?

If it is wide enough, then the controversy of whether he is being taxed on income or capital becomes merely academic.

It has, for instance, become academic in Australia (Victoria) where the Income Tax Act, 1935, defines income as including "profits or bonuses paid *credited* or distributed from the profits of a Company." The courts there held that by the world "credited" the legislature had reached cases where, though a shareholder has not been "paid" the dividend or bonus, there has been *credit* in the Company's books imputed to the shares issued to him.

All difficulty as it appears to me, would have been avoided if what are profits in the ordinary acceptation of that word and what is in essence capital had been dealt with separately, if, for instance, dividend had been defined as meaning any distribution of profit made by a company in money or other property *and* as including "the paid up value of shares distributed by a Company to its shareholders to the extent to which the paid up value represents the capitalisation of the whole or any part of the profits of the Company." (Income Tax Assessment Act, Australia, 1922-1933.)

In our Ordinance, however, this has not been done. On the contrary, the definition clause so far from not saying that shares issued in consequence of capitalisation of profits which would ordinarily be regarded as receipts of a capital nature are, for the purposes of the Ordinance, to be regarded as income, expressly states that a dividend is a distribution not of capital but of profit.

The definition deals with two matters—the essential character of a dividend, namely, distribution of profit and the form it might take, for

instance, shares. Looking then at what may be called both limbs of the clause, that is to say to substance on the one hand and to form on the other, shares issued to a tax-payer could be a dividend but only if they come to his hands as profit, and this was clearly not so in the present case. The Company had decided to do no more than to increase its paid up capital and to this end to capitalise its depreciation reserves and to distribute the relative shares as a bonus among shareholders. The issue of shares in these circumstances could never be a distribution of profit.

Sub-section (*b*) following the definition of dividend is a pointer perhaps to what the draftsman *intended* but what, in my opinion, he succeeded in doing by drawing no distinction between profit and capital (as in the Australian Act to which I have referred), by making "a distribution of profit" govern the whole conception of what is a divinend, and by including in the Ordinance (section 52) provisions similar to section 21 of the Finance Act, 1922, as amended by the Finance Act, 1927, was to have brought our law into line with the law of England.

I think the Board of Review was right and I would dismiss the appeal with costs.

DE KRETSER J.—I agree.

Appeal dismissed.

[Proctors for the Commissioner of Income Tax-appellant: *Gratiaen & de Rooy.* Proctors for assessee-respondent: *F. J. & G. de Saram.*]

—K. S. A.

FERNANDO, DETECTIVE INSPECTOR, *v.* ALWIS & ANOTHER

[HEARNE J. *Application to revise sentence in M.C. Colombo No. 38390.*
NOVEMBER 17, 22, 1939.]

Enhancement of sentence—Application in revision—Accused conditionally released on recognizance—Exercise of discretion by Magistrate—When will the Supreme Court interfere?—Criminal Procedure Code, Ss. 325 & 356.

HELD (i) that S. 325 of the Criminal Procedure Code is to be applied to an accused on considerations personal to him, relating to the circumstances and nature of his crime and

(ii) that the Supreme Court will not interfere with the exercise of the discretion vested in the Magistrate by law unless it appears that it was improperly exercised.

Douglas Jansze, Crown Counsel, for the Solicitor General.

Colvin R. de Silva, with him *M. M. Kumarakulasingham*, for the accused-respondent.

HEARNE J.—The 1st accused and the 2nd accused, the former of whom is here the respondent, were convicted of cheating Mr. A. A. Raymond by dishonestly inducing him to deliver property valued at Rs. 216/84 and of using as genuine a document known to be forged.

The 1st accused was dealt with under section 325 of the Criminal Procedure Code. He was bound over in a sum of Rs. 250/- to be of good behaviour for a period of one year and to come up for judgment when called upon.

The Solicitor-General has moved this Court to pass a sentence of imprisonment on the respondent. The Magistrate acted under section 325 (2) of the Code, instead of section 325 (1), but this technicality would not lead me to accede to the application if it otherwise appears to be an inappropriate one.

No cases have been brought to my notice indicating the principle upon which this Court has acted in dealing with similar applications. It has, however, been held that on an application for enhancement of sentence, a revisional Court will interfere only when the sentence passed was manifestly inadequate and not merely on the ground that it would itself have passed a heavier sentence. Analogously, this Court would not interfere with the discretion vested in a Magistrate by law if it would itself not have exercised the discretion but only if it appears that it was improperly exercised.

The only argument addressed to me was that the order of the Magistrate was not sufficently deterrent, not of further, similar, criminal activities on the part of the respondent but on the part of other members of the public.

If this argument were sound it could be urged in almost every case in which a Magistrate decides to use his discretion, certainly in every case where, but for the provisions of section 325, a Magistrate would be obliged to pass a sentence of imprisonment.

I have consulted Indian decisions on the corresponding section of the Criminal Code of India, and the principle I extract from these decisions is that the Magistrate is required to look at the matter primarily in the interests of the accused.

Having regard to the object of the section, this appears to be only common sense. The benefit of the section should not be indiscriminately applied, but when it is proposed to be applied regard must be had to considerations, if it may put it in this way, personal to the accused. As I read the section, it does not mean that it is essential that the accused must be young or the offence must be trivial, it merely indicates the lines on which the discretion of a Court is to be exercised, and those lines, it is important to note, relate to the accused and the circumstances and nature of his crime.

In the present case, the Magistrate addressed his mind to the youth of the respondent, to the fact that he is a first offender, and he took the view that his partner in crime, a reconvicted criminal much older than he, had probably persuaded him to participate in an undertaking which the former had planned.

I am not prepared to say the exercise by the Magistrate of his discretion was so improper that interference by this Court is desirable.

I dismiss the application.

Refused.

—K. S. A.

S. WANIGASINHA *v.* M. WANIGASINHA & OTHERS

[HEARNE & DE KRETSER JJ *Application for restitutio in integrum in D.C. Tangalle No. 3446.* NOVEMBER 27, DECEMBER 1, 1939.]

Restitutio in integrum—*Dismissal of action obtained by deceit—When will application for restitution be allowed?*

HELD that, if materials are placed before the Court which *prima facie* indicate that the petitioner's consent to his action being dismissed was obtained by deceit, his application for *restitutio in integrum* will be allowed.

H. V. Perera K.C., with him *C. V. Ranawake*, for the plaintiff-petitioner.

N. E. Weerasooriya K.C., with him *O. L. de Kretser* (Jr.) for defendants-respondents.

HEARNE J.—This is an application for *restitutio in integrum*. The plaintiff petitioner averred in a plaint filed by him that for certain domestic reasons he had transferred all his properties to the defendant, his sister, to be held in trust for him, that the defendant was now fraudulently claiming title to the properties so transferred and that in pursuance of her fraud, she and her husband the 1st added defendant, had sold some of his properties subsequent to the action to the 2nd added defendant. He prayed, *inter alia*, that the defendant be ordered to reconvey to him the lands that had been conveyed to her, as he had alleged, "on trust."

In another case, No. 3379 of the District Court of Tangalle, one of the properties referred to was the subject of a partition action, the petitioner raised in that case the same pleas on which he founded his present action; and it was arranged that the latter should be laid by pending the decision of No. 3379 by the result of which the parties agreed to be bound. This was on 12th December, 1938.

On 9th January, 1939, the plaintiff and the defendants being present, a motion was filed which stated that the parties had come to terms and the plaintiff withdrew his suit. The Judge accordingly made an order that his action be dismissed.

The petitioner alleges that he had agreed to withdraw his action in consequence of a settlement by which the defendant agreed to execute a re-transfer of the lands conveyed to her which she now refuses to do. Another term of the settlement was that the claim of the petitioner in case 3379 be allowed without costs.

Counsel for the respondent has urged that the petitioner before submitting to his action being dismissed could have and should have insisted, at the least, upon an agreement being executed by the defendant to re-transfer, that the full terms of the alleged settlement had not been communicated to the Court, and that in consequence the extraordinary remedy claimed by the petitioner should not be granted.

If the facts, as alleged by the petitioner, are true it cannot be said that the step he took was in any way an attempt to deceive the Court. He merely withdrew his action, as he says, on the strength of a promise given to him which has not materialised, while the first argument amounts to no more than that the petitioner is disentitled to relief as he believed in the respondent's good faith. "Machiavelian as I might have been," so runs the respondent's contention, "the petitioner took no action to defeat my Machiavelianism and so must pay the forfeit." Could anything be more cynical ?

In my opinion the petitioner has placed before the Court affidavits which if true—and the respondent denies that they are true—*prima facie* indicate that the petitioner's consent to his action being dismissed was obtained by deceit. I would allow the application, and direct the Court which passed the decree to hear all parties and determine whether the petitioner's allegations are true and, if he finds they are, to restore him to the position in which he was before the settlement. The costs of the application will abide the result of the inquiry.

DE KRETSER J.—I agree.

[Proctor for petitioner: *D. P. Atapattu*. Proctors for 1st and 2nd respondents: *Wickremanayake* and *Edirisuriya*. Proctor for 3rd respondent: *C. A. Wickremasuriya*.]

—K. S. A.

FERNANDO *v.* FERNANDO.

[MOSELEY A.J.C. & SOERTSZ J. *S C. No. 12.—D.C. Avissawella.* OCTOBER 9, 19, 1939.]

Res judicata —*When does the rule apply as between co-defendants ?*

HELD that the rule of *res judicata* applies as between co-defendants only when (1) there is conflict of interest between the defendants concerned; (2) it is necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants are finally decided.

Followed :
Senaratne v. *Perera* (1924) 26 N.L.R 225 (1)
Mt. Munni Bibi and another v. *Tirloki Nath and others* (1931) A.I.R. [P.C.] 114 (2)

H. V. Perera, K.C., with him *C. V. Ranawake*, for plaintiff-appellant.

Cassius Jansz for defendant-respondent.

MOSELEY A.C.J.—This was an action in which the plaintiff asked for the cancellation of a lease which she had granted to the defendant of certain property in which she had a life interest. The defendant pleaded in his answer, *inter alia*, that the plaintiff was estopped from bringing this action by reason of a consent decree in another case, namely, D.C. Avisawella No. 2360, to which she was a party. A number of issues were framed, all of which were answed in the plaintiff's favour with the exception of that dealing with the question of estoppel. That issue was answered in the defendant's favour and the plaintiff's action was dismissed. The appeal is confined to the question whether or not the consent decree in D.C. Avisawella No. 2360 amounted to *res judicata*.

The land in question had belonged to the plaintiff's deceased husband and was half of an entire block, the other half of which belonged to some people named Wickremaratne. In his last will the late husband devised his share, subject to a life interest in favour of the plaintiff. After the death of the deceased the executor and the devisee sold the deceased's share to the Wickremeratnes who thus became the owners of the whole property subject to the plaintiff's life interest in half. The Wickremeratnes then brought the action No. 2360 to which the reference has been made. They sued the defendant and the plaintiff in this action together with the executor and the devisee of the plaintiff's husband's estate. The defendants in case No. 2360 filed a joint answer. The case was settled and it is this settlement which the defendant pleaded as a bar to the present action. The learned District Judge held that all the rights as between the parties to the lease and arising out of it were merged in the consent order, and that the parties ought not to be allowed to re-agitate the same matter. The plaintiff's action was accordingly dismissed and she now appeals.

In the replication of the plaintiff she alleged that the defendant had appropriated to himself certain rubber coupons which he had obtained in respect of the property and she prayed that he should be directed to render an account in respect thereof. This matter, I may say at once, is not one covered by the terms of the consent order.

It must be conceded that a judgment which would amount to *res judicata* between the plaintiff and defendant is not necessarily so between defendants *inter se*. In *Samaratne* v. *Perera* (1), JAYAWARDENE A.J., expressed himself as follows :—

"In my opinion, formed after careful examination of the authorities on the subject, the principle that a decision is not *res judicata* between co-defendants is subject to two exceptions :

(a) When a plaintiff cannot obtain the relief he claims without an adjudication between the defendants, and such an adjudication is

made, the adjudication so made is *res judicata* not only between the plaintiff and the defendants but also between the defendants.

(*b*) When adverse claims are set up by the defendants to an action, the Court may adjudicate upon the claims of such defendants among themselves, and such adjudication will be *res judicata* between the adversary defendants as well as between the plaintiff and the defendants.

Provided that in either case the real rights and obligations of the defenants *inter se* have been defined in the judgment."

Mr. Perera referred me to several Indian cases which affirm the principle as set out by JAYAWARDENE A.J. All are decisions of the Privy Council and it is only useful to refer to one, since in the others the same principle was adopted. In *Mt. Munni Bibi and another* v. *Tirloki Nath and others* (2), SIR GEORGE LOWNDES set out the three conditions which the Board adopted as the correct criterion in cases where it is sought to apply the rule of *res judicata* as between co-defendants. They are set out concisely in terms similar to those used by JAYAWARDENE A.J. and are as follows:—

(1) There must be a conflict of interest between the defendants concerned;

(2) It must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and

(3) the question between the defendants must have been finally decided.

It would seem that in the present case the learned District Judge overlooked the plaintiff's claim for an accounting in respect of the coupons, a matter which, as I have observed, was not touched upon by the consent order. In my opinion, therefore, he erred in holding that the defendant's plea of *res judicata* was entitled to prevail.

I would allow the appeal with costs and direct that the case be returned to the District Court in order that an account may be rendered by the defendant of the rubber coupons obtained by him in respect of the property. The defendant must be credited with expenses incurred by him in obtaining the coupons and with any other expenses which he has been authorized by the plaintiff to incur. The costs in the District will depend upon the result of the account.

SOERTSZ J.—I agree.

Allowed.

—K. S. A.

Re: J. F. A. FERNANDO.

[HEARNE & DE KRETSER JJ.—*S.C. No. 59. D.C. Chilaw No. 46 (Ins.)*
NOVEMBER 14, 21, 1939.]

Insolvency—Absence of insolvent on the date of examination—Withdrawal of protection—Arrest.—Has the insolvent the right to be protected from arrest till the certificate meeting?—Insolvency Ordinance Ss. 36 & 151.

On the adjourned date for the examination of an insolvent he was absent, but forwarded a telegram to Court that he was ill and that a medical certificate was sent. The District Judge withdrew the protection granted to the insolvent.

HELD that an insolvent has the right to be protected from arrest till the certificate meeting.

Per DE KRETSER J.—"The District Judge perhaps intended to act under section 151, but if so the offences which he thought the insolvent had committed must have appeared on the previous day when the insolvent was partly examined, and that was the proper occasion for him to exercise the powers granted to him by section 151."

Followed:

In the matter of the Insolvency of Don Juanis (1888) 1 C.L. Rep. 23 (1)
Ex parte Leigh (1823) 1 Glyn & Jameson's Rep. 264 ... (2)
Price's Case (1814) 3 Vesey & Beames' Rep. 23 ... ... (3)

N. E. Weerasooriya, with him *A. E. R. Corea*, for the insolvent-appellant.

DE KRETZER J.—The insolvent in this case was duly granted protection, and he had been partly examined and the examination adjourned for a certain date. On the adjourned date the insolvent was absent, but forwarded a telegram to the Court intimating that he was ill and that a medical certificate was being sent. The District Judge then withdrew the protection granted to the insolvent, and in his order stated that the insolvent's conduct had been unsatisfactory in certain respects which he specified.

Thereupon, two of the creditors moved to have a certificate in Form R. issued, and after some postponements their applications were allowed. On the insolvent being arrested, an application was made for his release but was refused. He, therefore, appealed to this Court and was granted protection pending the appeal. In spite of an order that the certificate meeting should be duly held notwithstanding the appeal, the certificate meeting has not in fact been held as yet.

We decided that, whatever view we may take of a submission on the law made by Counsel, we would direct the District Judge to grant the insolvent protection until the certificate meeting.

The point of law taken by Mr. Weerasooriya was that the Court had no option in the matter, and that the insolvent was entitled to protection as of right. He quoted the case *In the matter of the Insolvency of Punchihewage Don Juanis* (1), in which LAWRIE J. held that the protection granted by the 36th section of the Ordinance was a positive enactment of a privilege which it is not within the power of a District Court to take away, and that the mere announcement that the insolvent was not protected was unavailing and *ultra vires* of the District Judge.

Our Insolvency Ordinance copies the provisions of 12 & 13 Victoria Chap. 106 S. 112, and that in turn is almost indentical with the terms of 6 George IV. Chap. 16 S. 117 under which section it was held—in the case of *Ex parte Leigh* (2)—by the Lord Chancellor, after consultation with the Lord Chief Justice, that a bankrupt derived his right to protection from arrest from the terms of the Statute and independently of the Commissioners' certificate. And in *Price's Case* (3), it was held that a bankrupt was protected through the whole period of his examination enlarged by the Commissioners, though they had omitted to endorse the adjournment on his summons. In both cases it was indicated that the endorsement was only necessary in order that the bankrupt might show on arrest that he was entitled to release, and also to fix the liability of the arresting officer in the penalty provided by the Ordinance.

It would seem, therefore, that there is authority both in the English Reports and in our reports to support the position taken up by Mr. Weerasooriya. The insolvent is accordingly entitled to be protected. The District Judge perhaps intended to act under section 151, but if so, the offences which he thought the insolvent had committed must have appeared on the previous day when the insolvent had been partly examined; and that was the proper occasion for him to exercise the powers granted to him by section 151. He would then have been acting in the presence of the insolvent and his Proctors, and would, no doubt, have given them an opportunity of showing cause. But he did not act on that occasion, and on the adjourned date nothing more appeared than that the insolvent was absent. The medical certificate did arrive in the course of that day and showed that the insolvent was ill with dysentry.

I think, therefore, the insolvent is entitled to protection from arrest until the certificate meeting. The protection will issue accordingly. There is nothing to indicate that the respondents were responsible for the action taken by the Judge and, therefore, no order for costs will be made.

HEARNE J.—I agree.

Appeal allowed.

—K. S. A.

RAJAPAKSE, POLICE SERGEANT *v.* SOMAPALA & OTHERS

[HEARNE J. *S.C. No. 843—M.C. Hatton No. 9973.*
DECEMBER 1, 15, 1939.]

Unlawful gaming—Search warrant—Evidence on which warrant was issued not produced—Does any presumption of guilt arise?—Gaming Ordinance of 1889, S. 2. [Leg. Enact. Vol. I, Ch. 38.]

Where the accused was convicted on the presumption created by the Gaming Ordinance and where no evidence was led that the search warrant had been issued on testimony which there was reason to believe,

HELD that the conviction is bad.

Followed:

Sub-Inspector of Police, Panadure v. *Charles & others*, (1916) 2 C.W.R. 98 (1)

S. P. Wijewickreme for appellant and petitioners.

No appearance *contra*.

HEARNE J.—The appellant was convicted, under S. 2 of Cap. 38 Vol. I, of unlawful gaming. He was not convicted on the strength of the evidence adduced. Indeed an analysis of that evidence, in particular the divergence between the testimony of prosecution witnesses as to where the gaming took place, might easily have led the Magistrate to conclude that the offence charged had not been proved. He was convicted because "the raid was carried out on a search warrant, the presumptions created by the Gaming Ordinance arose and the appellant had not discharged the burden cast upon him."

It was held in *The Sub-Inspector of Police, Panadure* v. *Charles et al* (1), that where the conviction of an accused rested upon the presumption raised by the issue of a warrant and the warrant was not produced at the trial and no evidence was led as to the information on which the warrant was issued, the conviction was bad.

In this case, no evidence was led that the warrant had been issued on testimony which there was reason to believe; the accused could not challenge such testimony and I, therefore, allow the appeal.

In the exercise of the revisional powers of this Court, I also quash the convictions of the two applicants in the proceedings numbered 526.

Appeal allowed: Convictions of petitioners quashed.

[Proctor for appellant: *Antony J. M. de Silva.*]

—K. S. A.

G. L. EBELS *v.* M. PERIANNAN.

[DE KRETSER J.—*S.C. No. 393.—M.C. Hatton No. 9272.*
DECEMBER 8, 1939.]

Criminal trespass—Indian labourer employed on Ceylon estate—Employer's notice terminating contract of service—Labourer's refusal to leave the estate after the expiry of notice—Is labourer guilty of criminal trespass?—Penal Code Ss. 427 & 433.

E., Superintendent of an estate told P., an Indian labourer employed on the estate, on the 7th April, 1939, "I am giving you one month's notice today," and offered P., on the 7th May, his wages and his discharge ticket. P refused to accept them and continued to remain in the line room which had been previously occupied by him. E. complained to Court that the accused "continued unlawfully to remain on the estate to E.'s annoyance." The summons from which P. was charged stated that he did "refuse and neglect to receive his discharge ticket and wages.....and continued unlawfully to remain on the estate to the annoyance of E., the Superintendent, though a month's notice to quit the estate was given on the 7th April, 1939." P. was convicted of criminal trespass and sentenced to undergo one month's rigorous imprisonment.

On appeal, the following questions of law were raised, viz.:—(1) that the charge is defective, inasmuch as it does not mention specifically the intention with which the accused remained on the premises; (ii) that the intention was not proved and cannot be inferred; (iii) that the notice terminating the contract of service must begin with the beginning of the month previous to which the notice was given; (iv) that the tenancy of the line room occupied by the accused must be severed from his service and separately determined; (v) that the complainant, not being the occupier of the line room, cannot initiate these proceedings and (vi) that the evidence does not prove that the accused intended to annoy the Superintendent.

HELD that the points of law failed and that the conviction was rightly entered.

Per DE KRETSER J.:—"A man is taken to intend the natural consequences of his act, and when a person is given notice to quit and does not quit and persists in staying in spite of being advised by a person who attends to his interests, I think it is idle to contend that he did not intend to annoy."

Followed: *Burne* v. *Munisamy*, (1919) 21 N.L.R. 193 ... ... (1)

Appeal on questions of law from a conviction for criminal trespass, together with an application for revision.

K. Satia Vagiswara Aiyar, with him *M. Balasundaram*, for the appellant.

H. V. Perera K.C., with him *V. F. Gunaratne*, for the respondent.

DE KRETSER J.—This is an appeal on points of law which have been elaborated in view of the concession given by my brother Wijeyewardene. Mr. Perera objected to the points of law now raised as not complying with my brother's order, but I think most of them do and the only one to which exception may be taken is the third, which states in very general terms that the notice to quit is not valid in law. I think a point of law when certified should state for what reason it is alleged that a notice is not valid. However, the whole matter has been argued. I have not called upon the respondent because it seems to me that the points of law do not require very serious consideration. The first is that the charge is defective inasmuch as it does not mention specifically the intention with which the accused remained on the premises. It is true the charge does not use the words "with intent to cause annoyance," but it does more. It sets out all the facts from which the inference would be that the intention was to cause annoyance. One ordinarily judges of a person's intention from the facts and circumstances proved and I do not think the accused could have been prejudiced merely because the charge, instead of saying that he remained on the estate with intent to cause annoyance, proceeded to state the facts from which that annoyance might be inferred. As a matter of fact the charge does say that he remained there to the annoyance of the Superintendent; so that the fact that annoyance to the Superintendent and not insult or intimidation was the ingredient in the charge would have been known to his lawyers, and I do not think the technical defect in the charge either misled the accused in his defence or entitles him to claim an acquittal on that ground.

The second point taken is that the intention has not been proved and cannot be inferred, but I am afraid there is no way of proving

intention except by proving facts and circumstances from which one can infer it. I believe the contention is that the Superintendent ought to have stated that the accused did what he did with intention to cause annoyance. But it was not for the Superintendent to state what the accused's intention was. It was within his province to state the facts and it was within the province of the Magistrate to find whether there was the intention or not, otherwise the Magistrate would merely be surrendering his judgment to the Superintendent.

The third point taken is that the notice which was given was insufficient inasmuch as it was given and was expected to begin on the 7th day of April, and not from the 1st day of May. The argument is that because section 5 of Chapter 112 of the Ordinances states that a labourer's contract shall be taken in law to have been entered into as a contract of service for a period of one month to be renewed from month to month, and as he is paid at the end of each month and is given food sufficient for the month, therefore, the notice must also begin with the month: But the provision regarding notice which is contained in the latter part of the same section expressly states that it is sufficient to give notice to determine the contract at the expiry of one month from the day of giving such notice. This clearly means that notice can be given on any day in the month and that contract will be terminated at the expiry of a month from that date. It is a provision as much in the interests of the labourer as of the employer. In the case of *Burns* v. *Munisamy* (1), a similar decision was given on a corresponding provision in Ordinance No. 11 of 1865 by a Bench of two Judges, to whom the matter had been referred. The reasoning in that judgment is binding upon me and, if I may say so, I am in complete agreement with it.

The fourth point taken is that the labourer is entitled to have free quarters and that, therefore, he is a tenant of a room in the lines and that his tenancy of that room must be separated from his service and must be separately determined. If the tenant is given a free room as part of his contract of service, it follows that when that contract is terminated everything that flows from it also ends. The accused was under no illusion as to the nature of his obligations for all he could do was to deny that he ever received notice, and I should be very surprised if a sub-kangany on an estate did not know the law affecting himself and the coolies he employs.

The next argument is that the complainant is not the occupier of the room and, therefore, cannot initiate these proceedings. The complainant is the Superintendent of the estate and is by virtue of his office in occupation of the whole estate which is under his control. He may allow different people to occupy different parts of the estate for various purposes, but so long as their right of occupation has been

lawfully determined he has a right to resume possession and, if he is prevented from doing so, he has a right to prosecute the person who remains in possession provided he has one of the intentions provided for in section 427.

The last point taken is that the evidence does not prove that the accused intended to annoy the Superintendent. A man is taken to intend the natural consequences of his act, and when a person is given notice to quit and does not quit and persists in staying in spite of being advised by a person who attends in his interests, I think it is idle to contend that he did not intend to annoy.

In my view, therefore, every one of the points of law taken fails.

Another point which was not taken but was merely touched upon was that his wife had a right to remain on the estate. That is a matter which does not arise on this appeal and if his wife had a right to remain on the estate no one has sought to interfere with that right. Besides the accused was signally silent on the point in the lower court and in the papers which he has filed for revision. In the lower court he states that his wife was expecting to be confined within the course of the month and that he was willing to leave after that event. There is nothing to indicate at what time he did leave, and his affidavit which he has filed indicates that he waited until he was able to find other employment. In other words, he remained on the estate as long as he pleased to remain, notwithstanding the notice which was given to him. I see no reason, therefore, to interfere by way of revision.

The appeal is dismissed.

Appeal dismissed.

[Proctor for appellant: *S. Sellathurai.* Proctor for respondent: *F. V. H. Labrooy.*]

SUPRAMANIAM CHETTIYAR *v.* D. D. SENANAYAKE & 2 OTHERS

[DE KRETSER J. *S.C. 173—C.R. Colombo 45706.* DEC. 1, 1939.]

Appeal—Notice tendering security not given to some of the respondents—Nor security for their costs tendered—Is appellant entitled to relief?—Civil Procedure Code, S. 756.

Where two defendants to an action were made respondents to the appeal and no notice was given them of the tendering of security for their costs,

HELD (1) that there was a non-compliance by the appellant with the 1st sub-section of S. 756 of the Civil Procedure Code and (ii) that he is not entitled in such circumstances to the relief contemplated by the 3rd sub-section of the said section.

Followed:
Zahira Umma v. *Abeysinghe*, (1937) 39 N.L.R. 84 (D.B.) ... (1)
Katonis Appu v. *Charles*, (1938) 12 C.L.W. 162 (6)
Siyadoris Appu v. *Abeyenayake*, (1938) 18 Cey. Law Rec. 120; 3 C.L.J.R. 193 (7)

* *Punchimahatmaya* v. *Jotihamy & others*, S.C. No. 218—D.C. Ratnapura No. 6363 S.C. Min. 20.2.39 ... ... (8)
S.C. No. 93—D.C. Kalutara 16775, S.C. Minutes 14.2.39 ... ... (9)

Referred to:
Nadarajah v. *Don Carolis & Sons*, (1936) 38 N.L.R. 162; 1 C.L.J.R. ... (2)
Mendis v. *Jinadasa*, (1934) 24 N.L.R. 188 ... ... (3)
Martin Singho v. *Paulis Singho*, (1934) 13 C.L.R. 237 ... ... (4)
S.C. No. 31—D.C. Kandy No. 70, S.C. Minutes 18-9-39 ... ... (5)

L. A. Rajapakse with him, *M. M. I. Kariapper* & *J. E. A. Alles*, for plaintiff-appellant.

J. R. Jayawardene for defendant-respondent.

DE KRETSER J.—The appellant sued three persons on a promissory note. A proxy was filed which purported to come from the 1st and 2nd defendants but was in fact signed by the 2nd defendant alone. The Court required a proxy to be filed from the 1st defendant and several dates were given, but before the proxy was filed a minute of consent was placed before the Court by which the 1st and 2nd defendants consented to judgment and asked to be allowed to pay by instalments. The Court was then only concerned, apparently, with the recovery of the stamp duty on the proxy which should have been filed, and that was duly recovered. The proxy remained unsigned by the 1st defendant. At a later stage the 1st defendant took objection to the issue of writ against him on the ground that he was a public servant at the time when the note was made and decree entered against him. This objection was upheld. The plaintiff then appealed, making all three defendants respondents to his appeal, and he stated that though the 2nd and 3rd defendants were made respondents no relief was claimed against them. He then purported to deposit in Court, by a motion dated 31st July, a sum of Rs. 26/- as security for costs of appeal of the 1st defendant respondent, which seems to have been received in Court on the 2nd August and to have been minuted against the date 3rd August. The Proctor, who still had no proxy from the 1st defendant, received notice and had no cause to show.

**Punchimahatmaya* v. *Jotihamy & others*. [S.C. No. 218—D.C. Ratnapura 6263, February 20. 1939] :—

"SOERTSZ J.—Counsel for the respondent on this appeal takes the preliminary objection that the appeal has not been properly constituted in that the 4th to the 7th defendants, who were made respondents by the appellant to his appeal, have not been given security for their costs of appeal. I think this objection is entitled to succeed. The requirements of section 756 are imperative. That section lays down that once a petition of appeal has been filed, notice should issue forthwith to the respondent that on a day to be specified in such notice the appellant will tender security for the respondent's costs of appeal. That requirement has not been complied with. Mr. Manickavasagar for the appellant contends that these parties were really not necessary parties to the appeal. But I do not think it lies in his mouth to make this submission, because, when he filed the petition of appeal, he advisedly made the 4th to the 7th defendants-respondents to the appeal.

We have no alternative but to uphold the objection and dismiss this appeal with costs.

HEARNE J.—I agree."

The order appealed from had been made on the 31st July and notice had been given not to the respondent but to a person who purported to be his proctor.

No objection to the constitution of the appeal has been taken on this ground, but it is argued that no notice of the tendering of security and no security had been given to the 2nd and 3rd defendants although they had been made respondents.

Now, in terms of section 756, every person made a respondent is entitled to notice and to such security as the Court orders. In this case the appellant, probably thinking that no security was required for those against whom no relief was claimed, did not serve any notice on them nor tender security, but he has made them respondents, apparently feeling for some reason that their presence was necessary to constitute a proper appeal, and it is impossible to say at this juncture whether the mere fact that he claimed no relief against them on his appeal necessarily meant that they might not be prejudiced by the appeal or by their absence at the hearing of the appeal. It is contended that their liability remained the same, whether the appeal succeeded or not, and in fact their position might conceivably be better if the appeal succeeded since it is conceivable that the plaintiff might levy against the 1st defendant alone, and in any case each of the other parties would have a right of contribution from the 1st defendant. This may or may not be so. It may be the respondents desired to be present in Court so as to give whatever support they could to the appellant's case; or it may be, as suggested by the respondent's counsel, that one of them is a public servant himself and therefore interested in the result. It is impossible to canvass these questions at this stage. It is enough that they were made respondents and that having been made respondents they should have been given notice of whatever security was being tendered. It is quite conceivable that eventually the Court might not have ordered any security in their case. There is, therefore, a non-compliance with the provisions of the first sub-section of section 756, and the only question is whether relief should be given under sub-section 3.

A number of authorities have been cited, some prior to the Divisional Bench judgment in *Zahira Umma* v. *Abeysinghe* (1), and some subsequent thereto. Those prior to that case are necessarily not of much assistance now, but I might state that the decisions in *Nadarajah* v. *H. Don Carolis & Sons* (2), *Mendis* v. *Jinadasa* (3), and *Martin Singho* v. *Paulis Singho* (4), are very like the unreported case decided by my brother NIHILL and myself (24 D.C. Kandy 70—S.C. Minutes of 18th September, 1939) (5). In all those cases as a matter of fact security had been deposited with due notice but there was only the formal

defect that the sum of money deposited had not been hypothecated. Such a defect would be covered probably by the second condition imposed in the Divisional Bench judgment.

In *Katonis Appu* v. *Charles* (6), a case which was very similar to the present one, ABRAHAMS C.J. rejected the appeal because security had been given only for one of many respondents although it was not clear that the other respondents would in any way be affected by the appeal.

In *Siyadoris Appu* v. *Abeyenayake* (7), an appeal was rejected because security was not given for one of the respondents. That case, however, was a partition case and the party for whom no security had been given seems to have made common cause with the respondents, but that does not appear to be the ground upon which relief was refused. It was refused on the ground stated in the Divisional Bench judgment, namely, that there had been a non-compliance with the terms of the section without any excuse.

In the unreported case (S.C 218 D.C. Ratnapura No. 6263) (8), decided by my brothers SOERTSZ and HEARNE on the 20th February, 1939, an appeal was rejected for the same reason in very emphatic language. There is also the case (92 D.C. Kalutara 16775) (9), decided on the 14th February, 1939. There is, therefore, quite an abundance of authority that, in circumstances such as the present, the appeal must be rejected. It is, therefore, rejected with costs.

Rejected.

—K. S. A.

REX *v.* FERNANDO

[SOERTSZ J. *S.C. No. 22—M.C. Panadure No. 1937.*
Western Circuit, Kalutara. NOVEMBER 29, 1939.]

Evidence—Confession—Statement made by accused to the Police—Accused's evidence different from the previous statement—Has the Crown the right to cross-examine the accused on his previous statement?—Evidence Ordinance, (Leg. Enact. Vol. I, Ch. I.) S. 25.

The accused who was charged with murder gave evidence to the effect that he shot in the direction of Peduru, the witness, taking care not to hurt him when he was on a *suriya* tree, with a katty in his hand, and about to leap on to the land of the accused. In the course of a statement made previously by the accused to the Police, the accused had admitted having fired a shot. He had said:—"I do not know where it went. I had proceeded about 4 or 5 yards from the latrine towards my house when I fired. I fired as I was running into my house. After firing I got into my house and slept. Later, a Police constable came and told me that I had killed a man. Till then I did not know that I had shot anyone."

Crown Counsel sought to cross-examine the accused on his statement to the Police in order to show that in that statement the accused had given a different version as to how he came to fire the gun. Counsel for the defence objected on the ground that the statement was in the nature of a confession and, therefore, inadmissible under S. 25 of the Evidence Ordinance.

HELD that, as it is possible to regard the statement as a confession, Crown Counsel was not entitled to question the accused in the manner proposed by him.

Followed: *King* v. *Kalu Banda*, [D.B.] (1912) 15 N.L.R. 422 .. (4)
Distinguished: *King* v. *Attygalle*. (1935) 37 N.L.R. 60 ... ... (1)
Dal Singh v. *King Emperor*, (1917) 86 L.J. 140 ... ... (2)
King v. *Cooray*, (1926) 28 N.L.R. 74 [D.B.] ... ... (3)

E. H. T. Gunasekera, Crown Counsel, for the Attorney-General.

R. L. Pereira K.C., with him *D. D. Athulathmudali* and *A. C. Gunaratne*, for the accused.

SOERTSZ J.—Crown Counsel proposes to question the accused on a statement he is said to have made to the Police and in which he does not appear to have said what he now says in the witness-box, namely, that he shot in the direction of Peduru, the witness, taking care not to hurt him when he was on a *suriya* tree, with a katty in his hand, and about to leap on to the land of the accused. Crown Counsel has shown me the statement said to have been made by the accused, and there can be no doubt but that in that statement the accused has given a different version of how he came to fire the gun.

Counsel for the accused objects to his client being questioned on the statement made or said to have been made by him, on the ground that questioning him in the manner proposed is obnoxious, if not to the letter, certainly to the spirit of section 25 of the Evidence Act.

Crown Counsel, however, submits that section 25 of the Evidence Act applies to a confession made by an accused person to a Police Officer, and he contends that the statement he proposed to question the accused upon is not a confession but an exculpatory statement. He relies on the ruling of AKBAR J. in the case of *The King* v. *Attygalle* (1). In that case, AKBAR J. ruled that the statement relied upon in that case was not a confession within the meaning of section 25 of the Evidence Ordinance as it was exculpatory in effect. I have read the statement made by the accused Attygalle in that case and, if I may say so with respect, AKBAR J. rightly described it as an exculpatory statement. As such it falls within the Privy Council ruling in *Dal Singh* v. *King Emperor* (2), that a statement which "is in no sense a confession" is admissible against the accused who made it to the Police. Similarly in *The King* v. *Cooray* (3), a Divisional Bench admitted a statement made by an accused to the effect, "there your Inspector is killed." That statement does not imply that the accused was present at the killing nor does it suggest the complicity of the accused in any way at all. It is certainly not a confession.

Now, I have carefully examined and considered the statement said to have been made by the accused in this instance and I cannot agree that it is an exculpatory statement, because in the course of the statement the accused admits having fired a shot. He says "I do not know where it went. I had proceeded about 4 or 5 yards from the latrine towards my house when I fired. I fired as I was running into my house. After firing I got into my house and slept. Later, a Police constable came and told me that I had killed a man. Till then I did not know that I had

shot anyone." This, as far as I can make out, is an admission by the accused that as a result of his firing the gun a man was shot and that he died in consequence. Such a statement is capable of being construed as establishing a *prima facie* case against the accused, because the offence of murder is constituted *inter alia* by a man doing an act which is so imminently dangerous that it must in all probability cause death. I must regard the statement from that point of view and looking at it in that way, to say the least, I am doubtful that it can be properly described as an exculpatory statement.

There is also the Divisional Bench case of *The King* v. *Kalu Banda* (4), which I think has a bearing on the point involved in this matter. In that case it was sought to prove that the accused who, at his trial, set up the plea of self-defence, had not set up such a defence in the statement he had made to the Police, and LASCELLES C.J. in the course of his judgment said, "after hearing the arguments of counsel and referring to the cases which were cited in argument, I am of opinion that, when the headmen were allowed to prove the facts that the accused had made statements to them and that he had not in those statements set up the plea of self-defence, the headmen were allowed to give evidence of what was in substance a confession by the accused. They were allowed indirectly to disclose a part at least of the substance of the accused's statement, the effect of this disclosure being such as to suggest the inference that the defence on which the accused relied was not set up by him at the time when, if true, it would naturally have been set up, and that it was, therefore, false.

"If regard be had to the intention and object of the Legislature in enacting section 25 of the Evidence Ordinance, I think the conclusion must be the same."

In this instance too, Crown Counsel declares that his object in eliciting the statement said to have been made by the accused to the Police is to show that the accused did not set up his present defence. The case of *The King* v. *Kalu Banda* rules that that may not be done where an inference of guilt is likely to be drawn from this divergence of pleas. In the case before us now the position is worse, in that, as I have pointed out, it is possible to regard the statement as a confession.

Although, it is possible for a different view to be taken of the question that arose in *The King* v. *Kalu Banda* from that taken by the Divisional Bench that decided it, we are, at present, bound by that decision. In India, there is a great divergence of judicial opinion on the point and to say the least, if the question, whether a statement made by an accused to a Police Officer should or should not be admitted cannot be answered clearly against the accused, it is safer and proper to reject it. I, therefore, refuse to allow the accused to be questioned in the manner proposed.

[Proctor for the accused: *E. C. S. Karunaratna.*]

—K. S. A.

GEORGE R. DE SILVA *v.* V. R. SCHOKMAN.

[HEARNE J.—*S.C. Appln. No. 512.* DECEMBER 15, 20 1939.]

Mandamus—*Report of Special Committee of the Colombo Municipal Council—Discussion thereon listed in the 'order' paper—Mayor presides at the meeting of Council—Chairman's refusal to allow discussion of Special Committee's report—Does* mandamus *lie?—The Colombo Municipal (Constitution) Ordinance, Ch. 194, Ss. 8, 11, 60 & 61.*

The Mayor presided at a meeting of the Municipal Council. The Report of a Special Committee appointed under S. 11 of the Colombo Municipal Council (Constitution) Ordinance to inquire into the circumstances which led to the transfer of a Municipal officer was listed in the 'orders of the day' for discussion by the Council. The Chairman refused to allow the discussion of the Report. On an application made by a member of the Council for a writ of mandamus,

HELD (i) that in his capacity as Mayor of the Council, he is entitled, subject to the provisions of Ss. 60 & 61 of the Ordinance, to preside over all meetings of the Council at which he is present,

(ii) that, apart from statute, he derived his authority from the meeting itself and

(iii) that, as the Report of the Special Committee appointed under S. 11 of the Ordinance was properly before the meeting, the Chairman had no discretionary power to prevent discussion of the Report.

An application by Mr. George R. De Silva, a member of the Municipal Council of Colombo, for a writ of mandamus on Dr. V. R. Schokman, the Mayor of the Council.

H. V. Perera, K.C., with him *Colvin R. de Silva* & *S. Alles*, for the petitioner.

N. E. Weerasooriya, K.C., with him *E. B. Wickramanayake* & *V. F. Gunaratne*, for the respondent.

HEARNE J.—This is an application for a writ of mandamus on Dr. V. R. Schokman directing him to place for consideration by the Municipal Council of Colombo, the report of a Special Committee appointed under section 11 of the Colombo Municipal Council Ordinance to enquire into "the circumstances which led to the transfer of the Municipal Workshop Foreman." The respondent was described in the caption as the Mayor of Colombo and Chairman of the Municipal Council; but it appears from an examination of the relevant Ordinance, that this is a misdescription. He is the Mayor of the Municipal Council and as such is entitled, subject to the provisions of sections 60 and 61, to preside over all meetings of the Council at which he is present.

The report of the Special Committee was set down for consideration at a meeting of the council on the 1st November, 1939, and when that item of the agenda was reached the respondent stated that he had decided to reject the report as it was not in conformity with the terms of reference. After certain members had expressed their views he made it clear that he refused to allow it to be discussed.

The signatories of the majority report purported to deal with the circumstances which preceded the transfer of the Workshop Foreman

but they went much further. They dealt with the conduct of certain officers concerned in the transfer and also with their "unsuitability" for their respective posts. Further, adverse comment was made on the qualifications of another officer who does not appear to have had anything to do with the subject matter of the enquiry. (paragraph 14).

In the argument before this Court, it was, no doubt, correctly assumed that the respondent did not seek to exercise powers he knew he did not possess, but that, on the contrary, he thought he was entitled, by reason of the extraneous matter in the report, to forbid any discussion of it. It is clear that the legal advice he has since taken has confirmed him in this view.

In my opinion, however, he has been wrongly advised: As Chairman he undoubtedly had control over the conduct of business at the meeting and to his ruling on points of procedure members would be bound to bow. But he had no right to prevent discussion of a matter that was properly before the meeting. On the contrary it was his duty to see that due and sufficient opportunity to express their views on any such matter was given to those who wished to do so.

The report of the Special Committee was properly before the meeting. It had been authorized by and made to the Council, it had been listed in the "orders of the day" for discussion by the Council, and it was not within the authority of the respondent to deprive the Council of the right to consider it. If the report went beyond the terms of reference, it would be for the Council to decide upon the steps it would be advisable to take. If, in the course of a discussion on the report, it was considered desirable to do so, the provisions of bye-law 2 (cap. 2) relative to the exclusion of strangers could be invoked. But all these are matters within the competence of the Council and not an individual member of it.

In his affidavit the respondent said that "in the exercise of the discretion I had as Chairman of the meeting.....I did not permit the report to be discussed." The fact is that he had no discretion. It is not vested in him by the Colombo Municipal Council Ordinance and his counsel could not say whence he had derived it. Apart from statute he could only have derived it from the meeting itself. "Public meetings" as JERVIS C.J. said in *Taylor* v. *Nesfield* must be regulated somehow; and where a number of persons assemble and put a man in the chair they devolve on him, by agreement, the conduct of that body. They attorn to him, as it were, and give him the whole power of regulating themselves individually. This is within reasonable bounds. The Chairman collects, as it were, his authority from the meeting." The meeting of the Municipal Council certainly did not vest in the Chairman the right to decide which items of the agenda should and which should not be taken up. So far from doing so, those who spoke protested against the assumption of any such right.

Counsel for the respondent argued that there was nothing to show that the action taken by the applicant meets with the approval of a majority of the Council, and that, therefore, the writ must be refused. I know of no authority for this proposition.

It is suggested by the respondent that the application is not *bona fide*, that the applicant is a candidate for the office of Mayor in 1940, and that the object of the application is to throw doubt on the propriety of the respondent's conduct as Mayor. I would stress that no suggestion has been made that he acted with any improper motive. On the other hand, it would, I think, be generally conceded that had the Special Committee not taken such a liberal view of the task entrusted to them, the respondent in the ordinary way would have submitted their report for discussion. It is not the propriety but the legality of his conduct that is at issue. The applicant in his counter affidavit states that his application was made *bona fide*. He also says that the respondent is mistaken in thinking that he is a candidate for the office of Mayor. This must be taken to be conclusive of the matter.

The rule will be made absolute with costs.

[Proctor for applicant: *N. Saravanamuttu.* Proctors for respondent: *Wilson and Kadirgamar.*]

—K. S. A.

DEONIS APPU *v.* DON JOHANIS GUNEWARDENE.

[DE KRETSER J. *S C. No. 25—C.R. Galle No. 18753.*
NOVEMBER 9, 15, 1939.]

Obligation—Joint and several liability—Payment by one of two debtors of his share of the debt—Subsequent assignment of the whole debt—Assignee's election to recover the balance from the other debtor—Has successor in title of assignee a right of action against the first debtor?

HELD (i) that when A and B bind themselves jointly and severally with C to pay him a sum of money, C may enforce his claim against A and B jointly or severally but not jointly as well as severally,

(ii) that if C accepts payment from A in full satisfaction of A's liability, D an assignee of C's rights on the bond, can only sue B and that for the balance due.

HELD further (i) that at the best D has a choice as to whether he would sue A and B together or one of them and having elected to sue B he has no cause of action against A until he has failed to recover from B,

(ii) that as D had filed an action against B to recover B's share of the debt, he had thereby divided the debt into shares and renounced his right to proceed against one of the debtors *in solidum* and

(iii) that, though the rule with regard to mortgagors will apply to the present case, D's successor in title cannot make liable the property of B whom he has not sued.

S. W. Jayasuriya for plaintiff-appellant.

C. V. Ranawake, with him *Kottegoda* for defendant-respondent.

DE KRETSER J.—The facts of this case are these:—Don Johanis Gunawardene and Don Andris Gunawardene, on the 8th July, 1929, bound themselves jointly and severally with one Wilmon to pay him the sum of Rs. 75/- with interest thereon at the rate of 18 per cent per annum. They hypothecated property.

Don Johanis Gunawardene on the 1st July, 1935, paid Wilmon half of the debt (viz. Rs. 75/-) and transferred the property he had hypothecated to one Nikulas Gunawardene for Rs. 100/- the same day

There was still due and recoverable on the bond Rs. 75/-. On the 18th of August, 1935, Wilmon assigned to one Karnelis *alias* Podiappuhamy Gunawardene "the bond and the sum of Rs. 150/- now due upon the said bond"—though the recitals state that he had arranged to assign his rights on the said bond. All he could assign were his rights on the said bond, viz., the right to recover Rs. 75/-. It will be noted that all the parties except Wilmon bear the same family name: Karnelis was the brother of Nikulas, who had brought Don Johanis's rights.

Karnelis next sued Don Andris in C.R. Galle No. 17128, and it would appear that he obtained a decree, the date of which is stated in P4 to be 28-10-36.

Meanwhile, the present plaintiff bought in execution the rights of Don Andris in the property hypothecated. He then moved the Court in C.R. 17128 stating that the plaintiff in that case had sued only one mortgagor and had thereby waived the other, thereby releasing the entire debt, and that at best he could recover only half. He asked for an inquiry,

The plaintiff had not at that date obtained a Fiscal's transfer.

On 27-1-37 the Court ordered Karnelis to execute a conveyance of the decree and of all his rights on the bond, and accordingly a conveyance was executed. The present plaintiff then moved to be substituted as plaintiff and his application was allowed, the Court expressly limiting his rights on the decree to the terms in which the decree had been executed. He, therefore, now had a decree against Andris for Rs. 150/- with a hypothecation over the property he had purchased. Quite clearly the hypothecation was extinguished by merger. He had by his own act converted the mortgage decree into a money decree against Andris.

He then brought the present action against Don Johanis Gunawardene for Rs. 150/- and sought a hypothecary decree for that amount over the share Don Johanis had owned. The defendant denied that any money was due on the bond and claimed that plaintiff was barred from bringing this action. He also questioned the validity of the Court's order and of the assignment.

The only issue was whether plaintiff was entitled to enforce his claim on the conveyance in his favour. The learned Commissioner held against the plaintiff.

At the hearing in this Court Counsel were unable to refer to any precedent in point and argued the case rather on general lines. The case of a joint contract is quite different; so is the case of joint tort feasors. The writers on Roman Dutch Law do not seem to have contemplated joint and several liability: with them liability was joint or it was several, i e. *in solidum*. In the present case, the liability was both joint and several. What did that mean? It meant that the creditor might enforce his claim against the debtors either jointly or severally, not jointly as well as severally. He did not sue on the joint liability. There remained the several liability, and he could enforce his claim against either debtor; he had a sufficient cause of action against each. But he could not sue both of them at the same time in separate actions for the full sum; he had to elect. As Nathan puts it (Vol. II p. 563)—"Two persons are said to bind themselves or become joint-debtors (or co-principal debtors) on a contract or agreement when they promise *singuli in solidum* at one and the same time, the same thing, as principals, with the intention that they shall be separately liable for the whole of the same, but that they shall not be liable jointly for more than the same thing..... But, as one thing is the subject of the contract, payment by one co-principal debtor puts an end to the obligation.....A creditor may elect whom of several co-principal debtors for the same thing he shall call upon for payment of the same amount.....If one co-principal debtor has been called upon for payment of the whole amount, and fails to satisfy the claim, the other co-principal debtors may be proceeded against for that which the first co-principal debtor is unable to pay. If there are several joint principal debtors and the creditor accepts from one of them, who offers it, a certain portion of the debt in satisfaction of his liability, the creditor is not bound to divide his claim against the others, but may proceed against any one of them for the balance. But if the creditor has already called upon one or more of the co-principal debtors for his or their proportionate share of the debt, he cannot call upon the remaining co-principal debtors for a larger portion .....for in this case the creditor by dividing the debt into shares has renounced his right to proceed against one *in solidum*.....There is, however, one case where a renunciation of the benefit *ae duobus vel pluribus reis debendi* will not absolve the creditor from suing all the principal co-debtors together,—that is, where it is sought to make mortgaged property executable, in which case the joint owners of the property must all be summoned."

Applying these principles, what have we got in this case? Don Johanis paid his half of the debt and the creditor, Wilmon, accepted it. He did not expressly say he accepted it in full satisfaction of Johanis' liability, and he later assigned the whole debt. He gave evidence, which was accepted, that he received the payment in full satisfaction of Johanis' liability. The position was that he could not sue for more than the balance nor assign greater rights than he owned, and he could sue only Don Andris. The assignee sued Don Andris for the

full amount but he had no right to do so, and he certainly could not recover more than half from Don Johanis. At the best he had a choice as to whether he would sue both Don Johanis and Don Andris together or one of them. He elected to sue Don Andris. Once he elected to sue Don Andris he had no cause of action against Don Johanis until he had failed to recover from Don Andris. That he cannot recover from Don Andris has not been established, and the circumstance that the present plaintiff had himself substituted as plaintiff and almost simultaneously brought this action indicates the contrary.

There is then no cause of action against Don Johanis, and this action fails. But the case for the respondent can be put much higher In the first place Wilmon had discharged Don Johanis; in the next place, Karnelis sought to have declared bound and executable only Andris' rights in the mortgaged property. The present plaintiff in his application to Court stated that Karnelis had waived his rights against Don Johanis, but whether he waived his claim against Don Johanis or not he clearly divided the claim. The present plaintiff cannot go back to the original position.

Again, the rule with regard to mortgagors applied. Both mortgagors' property was liable even if each was liable to be sued, but you cannot make liable the property of a person whom you have not sued. Therefore, both should have been sued together or each for his share only, and once the separation had been made you cannot go back to the original position.

The appeal fails and is dismissed with costs.

Appeal dismissed.

— K. S. A.

THERESA PIERIS v. ANDACHCHY CHITTY & 3 OTHERS

[HOWARD C.J. & DE KRETSER J. *S.C. No. 360—D.C. Colombo No. 6390.* DECEMBER 18, 19, 1939, JANUARY 17, 1940.]

Malicious arrest—Conditions necessary for the maintenance of action for damages.

Privilege—Statements made to the police by the person arrested and the persons on whose information the arrest was made—Statements recorded in the Information Book—Are the entries in the Information Book privileged?—Is the entry in the Information Book of the statement made by the arrested person inadmissible in an action by such person for malicious arrest—Criminal Procedure Code, Ss. 122 (3); Evidence Ordinance, Ss. 91, 123, 124, 125 & 155 (c).

Malice—May it be inferred from circumstances?

Procedure indicated for proving in a civil action the entry of a statement made to the police.

The plaintiff instituted an action for damages for malicious arrest. The police had arrested her on the complaint of one of the defendants which was supported by the statements made to the police by the other defendants. The police had also

recorded the statement made by the plaintiff after her arrest. On appeal from a judgment for damages in favour of the plaintiff,

HELD (i) that, in an action for malicious criminal arrest, the plaintiff must show (a) that her arrest was instigated, authorized or effected by the defendants, (b) that the defendants acted maliciously and (c) that the defendants acted without reasonable and probable cause and

(ii) that, as far as the first three defendants were concerned, the evidence disclosed the ingredients necessary for the successful institution of an action for damages for malicious arrest.

HELD, further, that, in an action for malicious arrest, malice need not be express, but may be inferred from the circumstances. A defendant will be regarded as having acted maliciously if he has acted negligently or without the care which a person might reasonably be expected to exercise or without such definite information as would justify him in making a criminal charge.

HELD also (i) that privilege can be claimed in respect of official communications under S. 124 of the Evidence Ordinance. In order to sustain such a claim it is necessary that there should be some evidence that the public officer who is being compelled to disclose the communication considers that the public interest would suffer by the disclosure. As there is no such evidence in this case, the entry in the Information Book of the statement made by the plaintiff to the police is not excluded by virtue of S. 124 of the Evidence Ordinance or Ss. 123 & 125 of the said Ordinance

(ii) that S. 122 (3) of the Criminal Procedure Code does not apply to the entry made in the Information Book of the plaintiff's statement to the police, and her credit can be impeached under S. 155 (c) of the Evidence Ordinance by proving her former statement to the police and

(iii) that if, on the other hand, S. 122 (1) of the Criminal Procedure Code applies to such a statement, there is nothing in sub-section (3) of the said section to exclude the said statement from being given in evidence under the provisions of S. 155 (c) of the Evidence Ordinance.

Distinguished:

Wijegunatileke v. *Joni Appu*, (1920) 22 N.L R. 231; 3 Cey. Law Rec. 11 (1)
Kotalawela v. *Perera*, (1937) 2 C L.J.R. 58; 39 N.L.R. 10 ... (2)

Appeal from a judgment of R. F. Dias Esq., District Judge of Colombo.

J. E. M. Obeyseker a, with him *S. Nadesan* and *N. Kumarasingam*, for the defendants-appellants.

L. A. Rajapakse, with him *F. A. Tisseverasinghe* and *H. W. Thambyah*, for the plaintiff-respondent.

HOWARD C.J. - The plaintiff-respondent in her plaint alleged that on or about the 14th April, 1938, the defendants wrongfully, maliciously and without reasonable or probable cause caused the Police of Colombo to arrest her on a charge of alleged theft or criminal breach of trust and misappropriation and thereby caused her much pain of body and mind and loss of reputation and honour amounting to damages which for the purposes of this action she restricted to Rs. 1,000/-.

The first issue framed at the trial was, "did the defendants on 14th April, 1939, falsely and maliciously without reasonable or probable cause, cause the arrest of the plaintiff?" This issue was answered by the learned District Judge in the affirmative The facts with regard to the arrest of the plaintiff so far as relevant to this appeal are as follows: On the 14th April, a complaint was made to Police Sergeant No. 1628 P. J. Fernando by the 3rd defendant against the plaintiff. The charge was

one of criminal breach of trust of two pairs of ear-studs and a saree. As a result of this complaint Sergeant Fernando visited the house of the four defendants and recorded the statements of all four defendants. The police then visited the plaintiff's house at Armour Street and whilst recording her statement she ran away. She was overtaken by the Sergeant, placed in a car and taken to Kotahena Police Station about 4 p.m., where, after being searched by a female officer, she was locked up until released on bail about 9 p.m. the same day.

The law with regard to actions for malicious arrest has been laid down in Nathan (1906 Edition, paragraph 1650 on page 1695) as follows: "In an action for malicious criminal arrest, then, the plaintiff must show (1) that his arrest on a criminal charge was instigated, authorized or effected by the defendant, (2) that the defendant acted maliciously and (3) that the defendant acted without reasonable and probable cause." The cases of *Wijegunatileke* v. *Joni Appu* (1), and *Kotalawala* v. *Perera* (2), were cited by counsel in support of the argument that no action would lie against the appellants in the circumstances of this case. Although those cases related to actions for malicious prosecution and not for malicious arrest, I am of opinion that they provide useful analogies with regard to the law that should be applied in this case.

So far as the application of the principle laid down by Nathan in the passage I have cited is concerned, the learned District Judge has held that the arrest of the plaintiff was the direct result of the false complaint made by the 3rd defendant and supported by the other defendants. It is contended by counsel that there is not a shred of evidence on the record that any of the defendants either requested or directed the police to arrest the plaintiff and in the absence of such evidence the defendants cannot be held liable in damages. The learned Judge distinguished the case from that of *Wijegunatileke* v. *Joni Appu* in which the statement to the police by the defendant on which the action for malicious prosecution was based was made in answer to an inquiry by the police under the provisions of Chapter XII of the Criminal Procedure Code. I do not think that there is any doubt on the evidence that the arrest of the plaintiff was the direct result of the complaint made by the 3rd defendant and that the learned Judge was right in distinguishing the case from that of *Wijegunatileke* v. *Joni Appu*. Similarly, this case can be distinguished from that of *Kotalawala* v. *Perera*. In the latter case the judgment of FERNANDO J. makes it clear that the defendant merely gave some information when questioned by the Muhandiram and by the Inspector of Police and that he did not either direct or request the prosecution of the plaintiff or any one else. In the present case, the 3rd defendant made a definite charge against the plaintiff to the police. It was not merely as a result of information furnished by the 3rd defendant to the police that the arrest of the

plaintiff was effected. By making a criminal charge against her, the 3rd defendant must be held to have instigated her arrest and hence so far as he is concerned the first condition formulated by Nathan as necessary for the maintenance of an action for malicious arrest has been satisfied.

I am also of opinion that the learned District Judge has come to a proper conclusion in holding on the evidence that the 1st and 2nd defendants were parties to the making of the charge against the plaintiff. The defendants are all related to each other and live in the same house. They were represented at the trial by the same counsel. The complaint was made by the 3rd defendant with regard to articles borrowed from the 1st and 2nd defendants. In his evidence, the 3rd defendant states that the 1st defendant asked him to see about it, on which he went to the Police Station and made a complaint. He further states that his complaint was substantiated by the 1st and 2nd defendants. Sergeant Fernando also states that, on the statements of the 1st, 2nd and 4th defendants, he decided to arrest the plaintiff. The 3rd defendant states moreover that he wrote on behalf of the 1st and 2nd defendants asking that the charge be withdrawn. The 1st defendant admits that it was on something she told the 3rd defendant that he went to the police. The 2nd defendant failed to give evidence rebutting the suggestion that he was a party to the making of the charge. In my opinion, there is an overwhelming inference to be deduced from the evidence that the 1st and 2nd defendants were parties to the making of this charge. In view of the nebulous character of the evidence, particularly that of Sergeant Fernando against the 4th defendant, I am of opinion, that the case against him has not been established and should be dismissed.

In addition to proving that her arrest on a criminal charge was instigated, authorized or effected by the three defendants, the plaintiff in order to succeed in this action must also prove that they acted (1) maliciously and (2) without reasonable and probable cause. The learned Judge after a review of the evidence has held that the charge was a false one in the making of which the defendants were actuated by an improper motive and was made without reasonable and proper cause. Therefore, in the view of the Judge, the other ingredients necessary for the successful institution of an action for malicious arrest are present. On page 1687, Nathan expresses the opinion that malice need not be express, but may be inferred from the circumstances. A defendant will be regarded as having acted maliciously if he has acted negligently or without the care which a person might reasonably be expected to exercise or without such definite information as would justify him in making a criminal charge. Whether the defendants made a false charge against the plaintiff and were actuated by improper motives are questions of fact, the answers to which must depend to a large extent on the manner in which the

witnesses tendered their evidence. As pointed out by the Judge, there was a conflict of evidence. After carefully considering this evidence he has come to the conclusion that the case put forward by the defendants was a false one. It is not for this court to disturb the trial Judge's finding of fact unless it is unsupported by the evidence. I am of opinion, that the finding of the Judge derives ample support from the evidence and that malice may not only be implied but has been proved to be express.

With regard to the second issue there is no dispute. This issue is material only as to the amount of damages.

There is, however, one further matter requiring consideration. The appellants contend that they have been materially prejudiced by the order of the learned Judge during the trial that, information given to the police by the defendants and the plaintiff on the day of her arrest could not be admitted in evidence on the ground that such information was privileged. The appellants contend that such evidence is material to test the veracity of witnesses and the statement of the plaintiff made to the police on the day of her arrest would contradict the case set up by her in support of her claim. The facts with regard to this ruling as they appear from the record of the proceedings are as follows: Whilst the plaintiff was tendering her evidence a representative of the Superintendent of Police, Crimes, in reply to an inquiry by the Judge stated that he was claiming privilege for the Information Book. No order was made by the Judge at this stage. At the close of the plaintiff's evidence Counsel for the defence pressed his request for the production of the plaintiff's statement recorded in the Information Book. On the following day, Crown Counsel appeared on behalf of the Attorney General and objected to the production of the Information Book entry on the ground that it is privileged and that the law refuses inspection except in accordance with S. 122 (3) of the Criminal Procedure Code. The learned Judge held that this evidence was inadmissible on the ground of privilege. In my opinion, there has been considerable confusion of thought both in the mind of the Judge and Counsel appearing for the parties in dealing with this matter. Privilege can be claimed in respect of official communications under S. 124 of the Evidence Ordinance. In order to sustain such a claim it is necessary that there should be some evidence that the public officer who is being compelled to disclose the communication considers that the public interests would suffer by the disclosure. There is no such evidence in this case. Nor is it conceivable that a public officer could in respect of this particular evidence go into the witness-box and tender such evidence. For obvious reasons the claim of privilege could not be sustained under S. 123 and 125 of the Evidence Ordinance. In my opinion, therefore, the decision of the learned Judge in excluding this evidence on the ground of privilege was wrong.

In addition to the contention that the entry in the Information

Book was inadmissible on the ground of privilege, it was also sought to exclude it as a statement made under S. 122 of the Criminal Procedure Code. It was argued that such a statement was admissible only in the circumstances mentioned in S. 122 (3) and in a Criminal Court. It may be argued, and *Sohoni's Commentary* on the corresponding provision of the Indian Criminal Procedure Code is authority for the proposition, that this section applies only to witnesses in criminal proceedings and not to persons in the position of the plaintiff who was accused of committing the crime. If the section did not apply to the plaintiff, it was, in my opinion, open to the defendants in civil proceedings under section 155 (c) of the Evidence Ordinance to impeach her credit by proving former statements made by her to the police. If on the other hand, the section does apply to the plaintiff as a person examined by a police officer under sub-section (1), there is, in my opinion, nothing in sub-section (3) to exclude a statement made by her in such circumstances from being given in evidence under the provisions of section 155 (c) of the Evidence Ordinance. I am, therefore, of opinion that the entry of the plaintiff's statement in the Information Book was not rendered inadmissible on either of the grounds put forward by Crown Counsel. In view of the fact that Counsel for the plaintiff and not Counsel for the defendants pleaded for the admission of the first complaint in evidence and that the verdict was in favour of the plaintiff the question of its rejection by the Judge does not arise.

Although the Information Book entry was improperly excluded as evidence in the case, I am of opinion, that this in itself is not a sufficient reason for setting aside the verdict of the learned Judge or in the alternative sending the case back for re-trial. Objection was taken to the production of the Information Book and such objection was upheld by the Judge. Counsel for the defendants was, however, in possession of a copy of the statement made by the plaintiff to the police officer and was in a position to cross-examine her on its contents. Moreover he could have called such police officer as a witness and asked him in the witness-box what the plaintiff had told him. In this connection I would refer to *Sohoni's Commentary* on S. 162 of the Indian Criminal Procedure Code. This section corresponds with S. 122 (3) of the Ceylon Code. Defendants' Counsel did not adopt such procedure which is not, in my opinion, precluded by the provisions of S. 91 of the Evidence Ordinance. In these circumstances I do not think that it can now be contended that the defendants have been prejudiced by the exclusion in evidence of the entry in the Information Book.

The question of the amount of damages being excessive was not seriously contested by Counsel for the defendants. In these circumstances I consider that their amount should stand.

Except as regards the 4th defendant the judgment and order of the learned District Judge is, therefore, confirmed and the appeal is dismissed with costs.

The case against the 4th defendant is dismissed with costs both in this Court and the Court below.

DE KRETSER J.—I agree.

Case against 4th defendant dismissed. Judgment and order of the lower court as regards the other defendants confirmed.

[Proctor for plaintiff-respondent: *S. Ratnaswamy.* Proctor for defendants-appellants: *T. F. Paulickpulle.*]

—K. S. A

KANDAR SELVADURAI *v.* AMPALAVANAR SUNTHARARAJAH AND ANOTHER.

[HOWARD C.J. & WIJEWARDENE J. *S.C. No. 139—D.C. Jaffna 11503 (Inty.)* JANUARY 18, 24, 1940].

Civil Procedure – Inherent powers of a Court—Two actions in two Courts between the same parties with regard to identically the same matters in dispute—Power of Court to direct one of the cases to be laid by pending the final decision of the other—Civil Procedure Code, S. 839.

Where it appeared that there were two District Courts of the Island, each trying simultaneously a case between the same parties with regard to matters in dispute which are identically the same, and where the trial Judge refused an application to have one of the cases laid by pending the final decision of the other case, the trial of which had commenced,

HELD: (i) That the Civil Procedure Code is not exhaustive,

(ii) That in matters with which it does not deal, the Court will exercise an inherent jurisdiction to do justice between the parties, which is warranted under the circumstances and which the necessities of the case require and

(iii) That this was an appropriate case for the Court to exercise the inherent power vested in it by S 839 of the Civil Procedure Code to make order that the case which has not come up for trial should be laid by pending the final decision of the other case.

Per WIJEWARDENE J: "I do not think that the powers of a Court are strictly confined within the narrow limits of the express provisions of the Code. A Court has, and it is necessary that it should have, inherent powers to make orders which are absolutely essential in the interests of Justice. A Court, no doubt, should guard against the exercise of such powers in an arbitrary and capricious manner and should involve such powers only in matters for which no express provision is made by the Code. Even where a Court has recourse to such inherent powers it must be careful to see that its decision is in harmony with sound legal principles and it is not inconsistent with the intentions of the legislature."

Followed: *Hukam Chand Boid v. Kamala Nand Singh, (1905)* 33 Calcutta 927 (1)

N. Nadarajah, with him *H. W. Thambiah*, for plaintiff-appellant.

No appearance for defendants-respondents.

Appeal from an order made by C. Coomaraswamy Esq., District Judge of Jaffna refusing an application to lay by a case pending the decision of another case in the District Court of Kandy between the same parties and in respect of the same subject-matter.

WIJEYEWARDENE J.—The plaintiff appellant filed this action in July, 1937, in order to obtain a declaration of title to a property in Kandy and to have a deed No. 78 of 27th April 1927, executed by the second defendant in favour of the first defendant set aside as having been executed in collusion, with intend to defraud the plaintiff and other creditors of the second defendant.

The plaintiff did not take out summons on the defendants for some time and ultimately the summons was served on the defendants in October, 1938. The defendants filed answer in January 1939, and the case was fixed for trial before the District Judge of Jaffna.

The first defendant in the meantime filed action L. 141 in the District Court of Kandy, in September, 1938, against the plaintiff and a tenant under the plaintiff in order to obtain a declaration of title in respect of the same property. The present plaintiff filed answer in that case and claimed that the deed on which the first defendant (the plaintiff in the Kandy case) based his title should be set aside. The second defendant in the present action has been made a party to that action. The issues in that case were framed in February, 1939, and the trial commenced in August, 1939. An examination of the record of the Kandy case shows that the plaintiff in that action (1st defendant in this case) and two witnesses have given evidence and that the trial has been adjourned for 30th January, 1940 for further hearing.

In July, 1939, the plaintiff in this action filed a petition and an affidavit and moved in the District Court of Jaffna that the present action be laid over pending the final decision of the Kandy case. The defendants opposed the application and the District Judge made order dismissing the application of the plaintiff as he thought he had no power under the Civil Procedure Code to grant the application of the plaintiff except with the consent of the defendants. The present appeal is preferred against that order.

The trial of this action has not commenced as yet in the District Court of Jaffna in view of the present appeal.

The question of law that arises on this appeal is whether a Court has no powers in matters of procedure other than those expressly provided for by the Code. There can be no doubt as to the answer to that question especially in view of section 839 of the Civil Procedure Code which corresponds to section 151 of the Indian Code of Procedure. Section 839 provides:—

> "Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Courts."

I do not think that the powers of a Court are strictly confined within the narrow limits of the express provisions of the Code. A Court has, and it is necessary that it should have, inherent powers to make orders which are absolutely essential in the interests of justice. A Court, no doubt, should guard against the exercise of such powers in an arbitrary and capricious manner and should invoke such powers only in matters for which no express provision is made by the Code. Even where a Court has recourse to such inherent powers it must be careful to see that its decision is in harmony with sound legal principles and it is not inconsistent with the intentions of the legislature.

In *Hukam Chand Boid* v. *Kamala Nand Singh* (1), WOODROFFE J. said:—

> "The Court has in many cases where the circumstances require it acted upon the assumption of the possession of an inherent power to act *ex debito justitiae* and to do real and substantial justice for the administration of which it alone exists. It has been held that, although the Code contains no express provision on the matters herein after mentioned, the Court has an inherent power *ex debito justitiae* to consolidate; postpone pending the decision of a selected action; to advance the hearing of suits; to stay on the ground of convenience cross suits;.....to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorise a Judge to do what in this matter was justice and for the advantage of the parties. These instances (and there are others) are sufficient to show, firstly, that the Code is not exhaustive, and, secondly, that in matters which it does not deal, the Court will exercise an inherent jurisdiction to do justice between the parties, which is warranted under the circumstances and which the necessities of the case require."

It appears to me that the present appeal is one in which the Court should exercise its inherent powers. If the plaintiff's application is refused, there will be two District Courts of the Island, each trying simultaneously a case between the same parties with regard to matters in dispute which are identically the same. The trial in the Kandy case has now reached its final stages and I think it necessary in the interests of justice that the case in the District Court of Jaffna, which has not come up for trial, should be laid by pending the final decision in the Kandy case.

I would allow the appeal with costs and order that the trial in this action be not taken up pending the final decision in D.C. Kandy L. 141.

HOWARD C.J. —I agree.

Appeal allowed.

[Proctor for plaintiff-appellant: *K. V. Rasiah.* Proctors for defendants-respondents: *Aboobucker & Sultan.*]

—K. S. A.

K. A. SIMON PERERA v. H. D. WICKREMANAYAKE

[HOWARD C.J. *S.C. No. 316—M.C. Colombo 33258.* FEBRUARY 1, 5, 1940.]

Criminal negligence—Causing hurt while driving a motor car—Facts necessary to establish liability—Penal Code, Ss. 328 & 329.

Local inspection—Inspection of locus in quo *by the Magistrate unattended by the parties after the conclusion of the case—Irregularity—Can such irregularity be cured?—Criminal Procedure Code, Ss. 238 & 425.*

HELD, on a charge of causing grievous and simple hurt while driving a motor car, (i) that, in order to establish criminal liability, the facts must be such that in the opinion of the jury the negligence went beyond a matter of mere compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment and (ii) that the facts of this case, as elucidated by the prosecution, did not indicate that the appellant had been guilty of criminal negligence.

HELD, further, (1) that it was irregular for the Magistrate to visit the *locus in quo* unattended by the parties after the conclusion of the case,

(ii) that, as the decision of the Magistrate had to a certain extent been influenced by an impression formed during his inspection, the irregularity resulting from such inspection had occasioned a failure of justice and

(iii) that the irregularity cannot under such circumstances be cured by S. 425 of the Criminal Procedure Code.

Followed:

Rex v. *Bateman*, (1925) 94 L.J.K.B. 791; 19 Cr. A.R. 8,	(4)
Wickremesinghe v. *Obeysekere*, (1935) 37 N.L.R. 327	(5)
Andrews v. *Director of Public Prosecutions*, 26 Cr. A.R. 34	(6)
Jayawickreme v. *Siriwardene & others*, (1939) 14 C.L.W. 83; 3 C.L.J.R. 316	(1)
Perumal (Excise Inspector) v. *Fonseka & another*, (1937) 9 C.L.W. 131	(2)
Aponsu v. *Malalsekera*, (1939) 4 C.L.J.R. 99; 15 C.L.W. 106	(3)

Appeal from a conviction by the Magistrate of Colombo on charges of causing grievous hurt and simple hurt while driving a motor car.

Colvin R. de Silva, with him *A. A. Ranasinghe* for the accused-appellant.

Nihal Gunasekera, Crown Counsel, for the complainant-respondent.

HOWARD C.J.—This is an appeal by the accused from a conviction by the Magistrate of Colombo on the 6th July, 1939, on charges of causing grievious hurt and simple hurt framed respectively under Ss. 329 and 328 of the Ceylon Penal Code. Various points have been taken by Counsel for the appellant. He contends first of all that the conviction is bad in law, inasmuch as the Magistrate, after the evidence both for the prosecution and the defence had been tendered, inspected the *locus in quo* unattended by any of the parties in the case. Mr. de Silva has in this connection referred me to a certain judgment of the Magistrate which indicates that in coming to a decision the latter had to a certain extent been influenced by impressions formed on his inspection. The passage in question is worded as follows:—

> "I have inspected the scene and I am definitely of opinion that when the accident occurred the complainant was not actually turning into his highway. The distance between the spot of accident and

the gateway is too far for that to have been the case. It is true that the Police Constable who saw the accident stated in cross-examination that the complainant was turning when the cars met but that is not borne out either by the position of his car after the impact or by the other evidence in the case."

The legality of visits by Magistrate to scenes of offences has been considered by the Courts on various occasions. In *Jayawickreme* v. *Siriwardene and others* (1), it was held by SOERTSZ A.C.J. that although the Criminal Procedure Code makes no provision for inspection of scenes of offences by District Judges and Magistrates there can be no objection to such an inspection, provided it was held with due care and caution. In that case there was nothing on the record to show whether the inspection took place in the presence of the parties, or how the inspection proceeded or whether the Magistrate went to the actual scene of the offences. The learned Acting Chief Justice in these circumstances set aside the conviction and sent the case back for trial before another Magistrate. In *Perumal, (Excise Inspector)* v. *Fonseka and another* (2), it was held by MOSELEY J. that the inspection of the scene of an offence after the conclusion of the trial is irregular and that if an inspection is considered desirable, it should be made during the course of the trial.

In *Aponsu* v. *Malalsekere* (3), it was held by NIHILL J. that an inspection of the *locus*, if undertaken at all by a Magistrate, must be done with due care and caution; otherwise, this practice, however helpful it may seem to the Magistrate who has doubts as to his decision, is open to grave objection. In that case, there was nothing on the record to show that the parties were present, as to how the Magistrate found the scene of the offence or as to how the inspection proceeded.

The principles laid down in the cases I have cited apply with equal force to this case when the Magistrate unattended by the parties visited the *locus* after the conclusion of the case. Crown Counsel admits that this was an irregularity, but maintains that it is cured by the provisions of S. 425 of the Criminal Procedure Code. Inasmuch as the decision of the Magistrate has to a certain extent been influenced by an impression formed during his inspection, I am unable to say that the regularity resulting from such inspection has not occassioned a failure stice. In these circumstances, such irregularity cannot be cured by . The conviction must therefore be set aside and there remains sideration the question as to whether the case should be remitted l by another Magistrate. I have given careful consideration to ts of the case and have come to the conclusion that apart from estion of any irregularity, the Magistrate was not justified in g the appellant guilty on the charges as framed. The onus was on rosecution to establish criminal negligence against the accused. The

rule with regard to criminal negligence has been laid down by the Court of Criminal Appeal in *Bateman's Case* (4) as follows:—

> "In order to establish criminal liability the facts must be such that in the opinion of the jury the negligence of the accused went beyond a matter of mere compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

This rule was followed by MACDONELL C.J. in *Wickremasinghe v. Obeyesekere* (5).

The rule in *Bateman's Case* has also been approved in the more recent decision of the House of Lords in *Andrews v. Director of Public Prosecutions* (6).

In my opinion, the facts as elucidated by the prosecution in this case do not indicate that the appellant has been guilty of criminal negligence. It would, therefore, manifestly be unjust to send the case back for retrial before another Magistrate. The conviction is in the circumstances quashed and the appellant discharged.

Conviction quashed. Appellant discharged.

—K. S. A.

MUTTUKARUPPAN CHETTIAR *v.* PATHIRANA

[HOWARD C.J. & WIJEYEWARDENE J. *S.C. No. 47—D.C. (Inty.) Colombo No. 52352.* JANUARY 22, 29, 1940.]

Execution of decree—Subsequent application for writ—Refusal on the ground of want of due diligence by writ-holder—Is failure to examine the judgment-debtor under S. 219 of the Civil Procedure Code a sufficient ground for such refusal?—Civil Procedure Code, S. 337.

A decree payable by monthly instalments was entered in 1934 and, in terms of the decree, specified properties were hypothecated to meet the judgment-debt. On the 15th March, 1937, the Court allowed writ to issue against the defendant, the returnable date of the writ being 13th June, 1938. On the 9th August, 1937, the hypothecated properties were sold, but the sale was by consent set aside on the 12th November, 1937. The properties were again sold on the 12th January, 1938, and the sale was confirmed by order of Court on the 25th March, 1938. The writ-holder applied on the 28th March, 1938, to draw the proceeds of sale and his application was allowed by Court on the 31st May, 1938. He applied on the 1st October, 1938, for the re-issue of the writ. The application was refused by the trial Judge on the ground that the writ-holder had failed to show due diligence in procuring complete satisfaction of the decree as prescribed by S. 337 of the Civil Procedure Code.

HELD (i) that, as specified properties had been hypothecated to meet the judgr debt, it was reasonable for the writ-holder to have awaited the result arising the sale of those properties before proceeding to attach other property judgment-debtor, which result the writ-holder could not have known till t firmation of the sale by Court on the 25th March, 1938,

(ii) that his failure to take further action between the 25th Marc and the 13th June, 1938, the returnable date of the writ, cannot be rega indicative of lack of diligence in the circumstances of this case and

(iii) that the failure on the part of the writ-holder to have examin debtor under S. 219 of the Civil Procedure Code, did not, on the facts of this show lack of diligence.

Referred to:

Sinnatamby v. *Patumah*, 5 A.C.R. 143 ... . (1)
Eliyapillai v *Murukesu*, (1907) 10 N L R 249 ... ... (2)
P L.K.N M K Chetty v *Perera*, (1916) 19 N L R 140 ... ... (3)
Raman Chetty v *Jayawardene*, (1915) 18 N L R 392 ... ... (4)
G.H. Raymond v. *K.A.A.P. Wijewardene & another*, (1937) 1 C.L.J.R. 246 (5)

Appeal from an order made by the District Judge of Colombo refusing an application for the re-issue of writ.

C. Thiagalingam, for the appellant.

H. V. Perera K.C., with him *W. W. Mutturajah*, for the respondent.

HOWARD C.J.—This is an appeal from an order made by the District Judge of Colombo on the 22nd February, 1939, refusing an application made on the 1st October, 1938, for the re-issue of a writ issued on the 15th February, 1935, for the recovery of a sum of Rs. 1,750/-, interest and costs less a sum of Rs. 900/- being an amount due on a decree entered by consent on the 31st January, 1934. The facts so far as material are as follows. On the 31st January, 1934, judgment was by consent entered for the plaintiff for the above-mentioned sum and it was further ordered that the 1st defendant should pay the decreed amount by monthly instalments of Rs. 100/- commencing from the 10th February, 1934, on his giving security in immovable properties. In pursuance of the decree the 1st defendant hypothecated his undivided shares in five lands in the Kurunegala district and paid a sum of Rs. 900/- as instalments due up to the 10th October, 1934. Thereafter, the 1st defendant defaulted on the 15th February, 1935, writ was issued for the recovery of the amount of the decree less Rs. 900/- and the said properties were seized. Before the sale could be carried out, the plaintiff died. On the 9th December, 1936, the appellant who was appointed administrator of the plaintiff's estate was substituted in this action for the original plaintiff and the claim against the 2nd to 4th defendants was waived. On the 15th March, 1937, the Court allowed the writ to issue against the 1st defendant, the returnable date being the 13th June, 1938. On the 9th August, 1937, the hypothecated properties were sold, but the sale was by consent set aside on the 12th November, 1937. The properties were again sold on the 12th January, 1938, such sale being confirmed by order of Court on the 25th March, 1938. The application to draw the proceeds sale amounting to Rs. 404/61 made by the appellant on the 28th ch, 1938, was allowed by the Court on the 31st May, 1938. The ation of the appellant of the 1st October, 1938, for the re-issue writ was refused by the Judge on the ground that the appellant led to show due diligence in procuring complete satisfaction of ree as prescribed by S. 337 of the Civil Procedure Code.

It is not contended that there was any lack of diligence on the f the appellant up to the 15th March, 1937. In these circum- es the lack of diligence occurred between that date and the

returnable date of the writ, that is to say, the 13th June, 1938. Following the decision in *Sinnatamby* v. *Patumah* (1), the learned Judge has held that the onus is on the appellant affirmatively to show that he exercised due diligence. In coming to the conclusion that such onus has not been discharged by the appellant, the learned Judge does not specify what steps might have been taken by the appellant beyond stating that no application to examine the debtor appears to have been made under S. 219 of the Civil Procedure Code. It is true that it was held in *Eliyapillai et al* v. *Murukesu* (2) that failure to apply for the examination of the debtor under section 219 created a presumption of the want of due diligence, a presumption, however, that may be rebutted by other evidence. On the other hand, in this connection, the following passage from the judgment of SHAW J. in *P. L. K. N. M. K. Chetty* v. *Perera* (3) is very much in point:—

> "The provision contained in S. 337 of the Civil Procedure Code, that where an application to execute a decree has been granted no subsequent application to execute the same decree shall be granted, unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, is a highly penal one against the judgment-creditor, and one which prevents him altogether from thereafter recovering a sum of money that the Court has decided to be his due, should he be found not to have exercised due diligence on his former application. I think the Court should, therefore, not construe it unnecessarily strictly against the judgment-creditor, or search about for possible steps that he might possibly have taken, had he exercised great diligence in enforcing his first decree. I agree entirely with the decision in *Ramen Chetty* v. *Jayawardene* (4) that it is not in all cases necessary that the creditor should have taken proceedings for the examination of the debtor under the provisions of section 219, and that it is a question of fact in each particular case whether, under the circumstances, due diligence was exercised."

The question, therefore, as to whether failure to have the debtor examined under section 219 amounts to showing lack of diligence is one depending on the facts of each particular case. I have been referred to *G. H. Reymond* v. *K. A. A. P. Wijewardene and another* (5). In that case the writ-holder allowed five years to ela before he made application for a notice on the 2nd defendant to cause why a writ should not issue for the seizure of his properties explanation of this long delay was that the writ-holder ha recently become aware of the fact that the 2nd defendant was p of property. As pointed out by SOERTSZ J., this informatio have been obtained if the writ-holder had chosen to have t defendant examined under section 219. The facts as disclosed case indicated clearly a lack of diligence on the part of the writ-hol

In this case it is not suggested that apart from action under section 219 of the Civil Procedure Code any action was open to the appellant. I do not think it can be contended that failure to take such action in this particular case amounted to showing lack of diligence. Specified properties had been hypothecated to meet the judgment debt. It was, therefore, reasonable for the appellant to have awaited the result arising from the sale of those properties before proceeding to attach other property of the judgment-creditor. The sale was not confirmed by the Court until the 25th March, 1938. The returnable date of the writ was the 13th June, 1938. Hence it was the failure to take further action between these two dates, that is to say, during a period of two-and-a-half months, that is regarded by the District Judge as indicative of lack of diligence. I am unable to agree with this view, particularly having regard to the incidence of the Easter vacation during this period and the speed at which legal business normally proceeds in this country. It has been urged by Counsel for the respondent that we should bear in mind that we are not acting in this matter as a Court of original jurisdiction and should not, therefore, interfere with the discretion of the learned Judge, unless such discretion has been wrongfully exercised. I am not unmindful of our duty in this respect, but am of opinion that on the facts of this particular case the discretion of the learned Judge depriving the appellant of the fruits of his judgment has been wrongly exercised. In these circumstances the order dismissing the application for re-issue of the writ is set aside, and the appellant's application for re-issue of writ against the property of the respondent is allowed with costs in this court and the court below.

WIJEYEWARDENE J.—I agree.

Appeal allowed.

[Proctor for plaintiff-appellant: *S. Somasundaram.* Proctor for 1st defendant-respondent: *K. T. Chittampalam.*]

—K. S. A.

SOCKALINGAM CHETTIAR *v.* SAMYNATHAN CHETTIAR & ANOTHER

[HOWARD C.J. & WIJEYEWARDENE J. *S.C. No. 125—D.C. Colombo No. 1361* JANUARY 18, 31, 1940.]

Framing of issues—Allegations in the plaint suggesting that defendant was sued in his personal capacity—Issue framed on the is that he was sued in a representative character—Could such issue llowed without amendment of the plaint?—Civil Procedure Code, 46.

he caption of the plaint did not describe the defendant as administrator, was no averment therein that he had become liable as administrator and elief claimed in the prayer clearly excluded a claim against him as adminis-r. An issue was, however, allowed to be framed suggesting that he was in a representative capacity.

HELD that such an issue could be allowed only after an appropriate amend-nt of the plaint is made.

Per WIJEYEWARDENE J.—"No doubt it is very often possible to frame issues not arising on the pleadings but such a procedure is adopted where it could be done without injustice to any of the parties. The proposed attempt to claim relief against the second defendant as administrator may result in questions of prescription arising between the parties. It is, therefore, necessary that there should be no doubt as to the point of time when such additional claim was made."

N. Nadarajah, with him *H. W. Thambiah*, for the 2nd defendant-appellant.

H. V. Perera K.C., with him *C. Thiagalingam*, for the plaintiff-respondent.

WIJEYEWARDENE J.—The plaintiff-respondent instituted this action on September 30, 1936, for the recovery of money due on a promissory-note made in his favour on October 7, 1930. He alleged that the first defendant and one Supramanian Chettiar were members of an undivided Joint Hindu Family and were carrying on business in partnership under the vilasam of S.P.A.R.A.R. at the time the first defendant made the note as a member of the Hindu Joint Family and as a partner. He then proceeded to make the following allegations in paragraphs 3, 4 and 6 of the plaint:—

Paragraph 3.

"The said Supramanian Chettiar, partner of the said Firm of S.P.A.R.A.R. died in India in or about the year 1932 leaving an only son, the second defendant above-named, who as a member of an undivided Hindu Joint Family became vested with all the rights of the said Supramanian Chettiar in the said firm of S.P.A.R.A.R. The said second defendant further applied for letters of administration to the estate of his deceased father and was duly appointed administrator of his estate....."

Paragraph 4.

"Neither the said first defendant nor the deceased Supramanian Chettiar nor his heir, the second defendant above-named, paid the plaintiff....."

Paragraph 6.

"The second defendant is liable in the said amount as a member of the Hindu Joint Family."

The prayer in the plaint is for judgment against "the defendants jointly and severally," and the caption of the plaint describes the defendants as follows:—

1. S.P.A.R.A.R. Samynathan Chettiar
2. S.P.A.R.A.R. Arunachalam Chettiar both of Madampe carrying on business under the name, style, and firm of S.P.A.R.A.R.

When the case came up for trial, the counsel for the plaint stated in answer to the Court that he sought in this action to make second defendant liable both "as administrator of his father's estate as a member of the undivided estate of his father." He then sugg the following issue which was objected to by the counsel for th defendant.

Is the second defendant duly appointed administrator estate of Supramanian Chettiar?

This issue, no doubt, arises on the averment in paragrap the plaint, though in view of the admission made by the plain

counsel that the second defendant had not obtained letters of administration at the time of the institution of the action, a question might arise whether the second defendant could be considered as a duly appointed administrator. But a Court would not allow an issue to be framed merely because the plaintiff has chosen to make an averment in the plaint on which such an issue could be based, unless the Court is satisfied that a decision has to be given on that issue in order to adjudicate upon the rights of the parties in the action. This issue becomes relevant only if the plaintiff seeks to make the second defendant liable an administrator of the estate of his father. The various allegations in the plaint which I have reproduced *in extenso*, the caption of the plaint and the prayer of the plaint show that the claim is not, and could not have been understood by any one as a claim against the second defendant in a representative capacity. A plaint filed in a civil court should set out plainly and concisely the circumstances constituting each cause of action and show that the defendant is liable to be called upon to answer the plaintiff's demand. It is not possible for the plaintiff to refer to the statement in paragraph 3 of the plaint and say that the second defendant has been sued as administrator. The caption of the plaint does not describe him as administrator nor is there any averment in the plaint that he has become liable as administrator. The relief claimed in the prayer excludes clearly a claim against him as administrator.

If the plaintiff seeks to make the second defendant liable as administrator of the estate of Supramanian Chettiar he should move to amend the plaint. If such amendment is allowed and after the consequential amendments of the answer, if any, the plaintiff could suggest such further issues as may arise on the pleadings and are necessary for the proper determination of the rights of the parties. No doubt it is very often possible to frame issues not arising on the pleadings but such a procedure is adopted where it could be done without injustice to any of the parties. The proposed attempt to claim relief against the second defendant as administrator may result in questions of prescription arising between the parties. It is therefore necessary that there should be no doubt as to the point of time when such additional claim was made. The permission to frame issue 6 without a proper amendment of the plaint may create a situation prejudicial to the defendant, there is no reason why the defendant should be made to suffer. plaint as filed in the Court does not obviously include a claim t an administrator of the estate of Supramanian Chettiar. If aintiff desired to make such a claim in the present action, the f's lawyers should have adopted the normal course of amending aint and then framed the issues instead of framing an issue which levant as between the present parties to the action and then ng to argue at a later stage on the basis of that issue that the

plaintiff has on the plaint as filed made a claim against the administrator of the estate of Supramanian Chettiar.

I would allow the appeal with costs and set aside *pro forma* the order of the learned District Judge allowing issue 6 and all proceedings in the District Court subsequent to such order. I reserve to the plaintiff-respondent the right to amend his plaint as stated above and raise any further issues that may arise as a result of such amendment. The appellant will also be entitled to the costs of the trial on 28th June, 1939.

HOWARD C.J.— I agree.

Appeal allowed.

[Proctor for plaintiff-respondent: *H. T. Ramachandra.* Proctor for 2nd defendant-appellant: *K. T. Chittampalam.*]

—K. S. A

DHARMARATNE, EXCISE INSPECTOR, *v.* DAVITH SINGHO AND ANOTHER

[NIHILL J. *S.C. No. 677—M.C. Tangalle No. 9251.*
JANUARY 24, FEBRUARY 7, 1940.]

Decoy—Denial by him of sale of exciseable article—Is conviction resting on circumstantial evidence justified ?

Sentence of imprisonment—Observations on the undesirability of imposing such sentence on young persons who are first offenders.

The decoy denied that there was a sale of arrack, but circumstances were proved which pointed strongly to the conclusion that a sale did in fact take place.

HELD that the conviction was, under the circumstances, rightly entered.

Followed: *Dharmaratne* v. *Kandasamy*, (1933) 35 N.L.R. 206 ... (1)
Jayatilake v. *Don Ana*, (1934) 36 N.L.R. 27 ... (2)

J. E. M. Obeyesekere, for accused-appellant.

Nihal Gunasekera, Crown Counsel, for the complainant-respondent.

NIHILL J.—The appellant who was the first accused was convicted for selling an excisable article, to wit, arrack. He is a boy of seventeen and a servant of the second accused who was acquitted.

The decoy in his evidence denied that there ever was a sale and the point for my consideration is whether the other evidence sufficiently establishes beyond all reasonable doubt that a sale in fact took place, *Dharmaratne* v. *Kandasamy* (1).

The evidence of the Excise Inspectors which was believed by Magistrate amounts to this. The decoy was handed a one-rupee bearing the number P/46 68815 and told to go to the boutiqu buy arrack. At that time he had nothing on him and was not se of liquor. He was not kept under observation whilst he was way but the Inspectors followed him in a car five minutes later was found standing in the boutique near the first accused with a in his hand which was wet and smelt of arrack. In a drawer of a t

that was by the first accused, there was found the one-rupee note in a tin receptacle. Nothing was found on the decoy. His mouth smelt of arrack. On the table there was found an open bottle of arrack.

The second accused, the owner of the boutique, was not present when the Inspectors arrived. The decoy said he never bought the arrack because he found the boutique shut and that he waited about outside until the Inspectors came.

His evidence does not explain how he came to part with the one-rupee note. He said he was drunk at the time.

The first accused gave evidence in which he admitted taking the rupee note from the decoy which he says was tendered to him to pay for the purchase of two cigarettes and that he returned the change. No change or cigarettes were found on the person of the decoy.

It is apparent on the above facts that whilst there is no direct evidence of the sale, circumstances have been proved which point strongly to the conclusion that a sale did in fact take place.

In *Jayatileke* v. *Dona Ana* (2), DRIEBERG J. discussed the value of circumstantial evidence in a like case where the decoy failed to support the charge. The facts in that case were somewhat similar to this. Here too, "pretty stringent proof has been given of circumstances tending to support the charge" and the explanation of the accused has not relieved the suspicion, because no change and no cigarettes were found on the decoy. Further-more, the evidence of the decoy is patently false unless both the Inspectors and the accused have committed perjury.

I cannot, therefore, conclude that the Magistrate was not justified in making the inference that the sale did take place and that the first accused who was the salesman in charge of the boutique at the time was the man who effected it.

With regard to the sentence, I feel in some difficulty. The appellant has no previous convictions. He is a seventeen year old shop assistant, lucky, I suppose, to have employment at three rupees a month and his food. Now the Magistrate in refusing the option of a fine has given reasons which are entitled to consideration. He has appreciated that the real culprit is the employer but he hopes by sharp sentences of imprisonment to discourage recruits from entering the trade, so that employers bereft of salesmen will have to take risks themselves and so increase the chances of catching the real offenders.

This strikes me as an ingenious but somewhat devious method of approach to the problem and I doubt if it justifies the adoption of a principle akin to vicarious punishment. I think it might, if there was evidence that the trade held out alluring conditions of service to young men prepared to take risks. In the present case the appellant is clearly nothing but a drudge and I do not imagine that such part of his duties

as has involved him in unlawful acts has added anything to his emoluments.

It is a good principle to keep the young first offender out of prison unless circumstances make it evident that it is better both for himself and society that he should go there. I doubt if this class of offence falls into that stern category.

In confirming this conviction, therefore, I vary the sentence of four months' rigorous imprisonment to one of a fine of seventy-five rupees or in default two months' rigorous imprisonment.

Conviction confirmed; sentence varied.

—K S. A

L. BAPTISTE, U.D.C. KOLONNAWA *v.* J. D. WILLIAM

[HOWARD C.J. *S.C. No. 776—M.C. Colombo No. 39330.* FEB. 9, 1940.]

Plea of guilt tendered by accused after case was fixed for trial—Failure to record verdict and pass sentence—Case put off for another date to enable the accused to abate nuisance complained of—Accused convicted on such date on the plea made previously by him—Regularity—Criminal Procedure Code, Ss. 188 & 190.

The accused was charged with having kept his premises in an insanitary condition and thereby caused a nuisance in contravention of S. 6 of Ordinance No. 15 of 1862 and S 97 (5) of Ordinance No. 11 of 1920 and punishable under S. 2 of Ordinance No. 15 of 1862 and S. 97 of Ordinance No. 11 of 1920. On the 3rd June, 1939, the accused appeared in Court in obedience to the summons and, on being charged from the summons, he stated: "I am not guilty," whereupon the trial of the case was adjourned for the 1st of July, 1939. On this date the accused was present and, on his undertaking to abate the nuisance, the Magistrate made order that the case be called on the 15th of July, "to see whether the nuisance is temporarily abated" and that the case "be called thereafter on the 2nd of September, for the accused to build permanent drain."

As it appeared subsequently that the accused had not abided by his undertaking, the case was fixed for trial on the 2nd September, 1939, on which date the accused stated "I am guilty." The record of the case showed that he also made an application to Court for time to abate the nuisance. The Magistrate did not record a verdict of guilty on the accused's plea and pass sentence, but made order that the case be called on the 30th of September, 1939. On the 30th of September, 1939, the Magistrate convicted the accused and passed sentence upon him. The position taken up by the accused on that date appears from the following passage in the judgment: "The accused has pleaded guilty to the charge and I, therefore, cannot listen to his version as it tends to exculpate him. He now desires to say the footpath belongs to him; if so, he should not have pleaded guilty.....This Court has tried apparently to make him see sense and I have no doubt he would have merely been warned and discharged if he had abated the nuisance, but he seems to have acted perversely in this matter." On appeal.

HELD that the conviction cannot stand.

Appeal from a conviction recorded by Aelian W. Pereira Esq., Magistrate of Colombo.

L. A. Rajapakse, for accused-appellant.

No appearance *contra*.

[Appellant's Counsel referred to *Fernando* v. *Costa*, (1918) 5 C.W.R. 224 and *Roosemalacocq* v. *Sally*, (1935) 37 N.L.R. 139 and argued that as the learned Magistrate had not on the 2nd September, 1939, recorded a verdict of guilty against the accused, the latter was

entitled in law to withdraw his plea of guilt at any time before the recording of such verdict.]

HOWARD C.J. allowed the appeal, set aside the conviction and sentence and made order that the case be sent back to be tried by another Magistrate.

[Proctor for appellant: *A Clive Abeywardene.*]

—K. S. A.

RAMAN CHETTIAR *v.* VAIRAVAN CHETTIAR

[HOWARD C.J. & WIJEYEWARDENE J. *S.C. No. 37 (1)—D.C. Ratnapura No. 6472.* JANUARY 24, 25, FEBRUARY 1, 1940]

Civil Procedure—Action instituted in Ceylon during the pendency of another action in an Indian Court between the same parties involving substantially identical issues—Application to stay proceedings in action in Ceylon Court—Principles on which a Court will act in granting such application—Inherent powers of Court—Civil Procedure Code, S. 839.

HELD (i) that the Court has the power under S 839 of the Civil Procedure Code to make an order staying an action pending the final decision in another action between the parties where the matters in dispute in the first case are directly and substantially in issue in the second case, and

(ii) that, as such inherent powers of a Court are very wide and indefinable, a Court has to guard against an arbitrary exercise of such powers.

Per WIJEYEWARDENE J.—"In the absence however of any definite authority on the question of the court's jurisdiction in respect of an application to stay proceedings pending an action in a court outside Ceylon, I think it desirable to be guided to some extent by the principles that may be deduced from the English cases to which I have referred. The principles deducible from the authorities cited in the course of the argument before us may be summarized as follows :

1. The burden is on the party asking for the interference of court to prove that he is doubly vexed by reason of two actions being brought against him.
2. Where the two actions are brought in the same country there is a *prima facie* presumption of an intent to cause vexation.
3. Where the party is sued in one country and also in a foreign country or where a party is sued in two countries subject to the same paramount power a court will not presume an intent to cause vexation:

(*a*) in the absence of evidence that the plaintiff cannot obtain an additional advantage in continuing both his actions or

(*b*) from the mere fact of inconvenience or additional expense caused to a party or,

(*c*) from the fact that by staying one action less evidence would have to be ultimately led in the first action."

Referred to: *Mc Henry* v. *Lewis*, (1882) 52 L J. (Chancery) 325 ... (1)
Peruvian Guano Co. v. *Bockwoldt*, (1883) 23 Ch. Div. 225 (2)
Cohen v. *Rothfield*, (1918) 120 Law Times 434 ... ... (3)
Hyman v. *Helm*, (1883) 49 Law Times 376 ... ... (4)
Carter v. *Hungerford*, (1915) 59 Solicitor's Journal 428 ... (5)

N. E. Weerasooriya, K.C., with him *J. A. T. Perera*, for plaintiff-appellant.

H. V. Perera K.C., with him *N. Nataraja*h and *C. Ranganathan*, for defendant-respondent.

WIJEYEWARDENE J.—This is an appeal against the order of the District Judge directing the proceedings in the present action to be stayed pending the final decisions in cases bearing Nos. O.S. 1624 of 1933 and O.S. 547 of 1937 in the Chief Court of Pudukottai State. The plaintiff instituted the present action on July 10, 1937, against the defendant to have it declared that the defendant held three-eighth shares of an estate called "Morning Site" in trust for the plaintiff and for an order against the defendant to render an account of the profits and income of the estate from January 11, 1931, until the execution of a conveyance in favour of the plaintiff in respect of the three-eighth shares. It is stated in the plaint that the defendant entered into a notarial agreement No. 1633 of January 15, 1931, with the then owner of the property and that in pursuance of the agreement the defendant purchased the property by deed No. 1091 of December 22, 1938. The plaintiff pleads that the defendant held the deed of agreement in respect of the three-eighth shares in trust for the plaintiff and that it was intended that the deed of conveyance should operate in favour of and for the benefit of the plaintiff with regard to those shares which the plaintiff says are held and possessed by the defendant in trust for him.

The defendant filed his answer on December 13, 1937, stating

(a) that it was agreed to purchase the property "in the proportions of one-fourth share each to the plaintiff and one Muttiah Chettiar and the remaining half share to the defendant."

(b) that the deed of conveyance "was taken in the name of the defendant pending the payment by the plaintiff and Muttiah Chettiar of their shares and on payment of their shares of the purchase price the defendant had to convey to the plaintiff and Muttiah Chettiar their shares in the said estate."

(c) that in March, 1933, the plaintiff wanted to be released from his liability to pay his share of the purchase price and agreed to Muttiah Chettiar taking over his share.

(d) that the plaintiff thereafter executed the deed of release of March 18, 1933 "renouncing *inter alia* his rights in and to the said estate."

It is somewhat difficult to understand the plea in paragraph (b) above if by the deed of release the plaintiff intended to renounce his rights to the estate. The deed of release was executed in March, 1933, and the defendant has not made it clear in his pleadings why in December, 1933, the conveyance was taken "pending the payment by the plaintiff and Muttiah Chettiar of their shares of the purchase price."

The plaintiff instituted action O.S. No 1624 in the Chief Court of Pudukottai State on October 5, 1933, against the present defendant and Muttiah Chettiar asking for a "cancellation" of the deed of release

of March 18, 1933, on the following grounds as set out in the issues framed in that action—

a. "Is the release deed void because it was bought in fraud of plaintiff's right when he was not of sound mind and body by the exercise of undue influence?"

b. "Is the release deed void because it was subject to the condition that it was not to be enforced if the plaintiff recovered?"

The defendants filed answer in that action referring to a partnership V.E.R.M. of which the plaintiff and the defendants were partners, denying the allegations of the plaintiff with regard to the deed of release and pleading that the "plaintiff can only bring an action for the dissolution of the partnership and the action brought only to cancel the release deed is not proper." In this answer too there is an averment to the following effect:—"The estate called 'Morning Site' was purchased from the partnership business V.E.R.M. In that, too, 1st defendant (Muttiah Chettiar) is entitled to 1/4 share. The other partners, too, are entitled to shares in that according to their respective shares." It is again difficult to reconcile this allegation with the statement made in the present action that before the execution of the deed of conveyance, it was agreed about March, 1933, that the property should be held in equal shares by the plaintiff and Muttiah Chettiar.

The issues were framed in the Pudukottai action No. 1624 on December 11, 1933, and judgment was delivered on January 3, 1937, dismissing the plaintiff's action with costs. It appears from an affidavit filed by the plaintiff that he has appealed against the judgment of the Chief Court of Pudukottai State, that the appeal has not been heard, and that a party dissatisfied with the decision of that appellate court has a right of appeal to another court of appeal. During the pendency of that action the defendant appears to have given to the plaintiff a writing dated August 22, 1938, agreeing to render an account to the plaintiff of the income derived from the 3/8 shares claimed by the plaintiff and to execute a transfer of of those shares of the estate in favour of the plaintiff. There is a dispute between the plaintiff and the defendant on the question whether that writing was given subject to certain conditions on the occurrence of which alone the writing was to have legal effect.

I shall now proceed to consider the action No. 547 instituted by the plaintiff against the defendant and Muttiah Chettiar in the Chief Court of Pudukottai State in April 13, 1937. The action has been brought to establish the right of the plaintiff as based on the agreement of August 22nd, 1928, referred to by me earlier in the judgment. The plaintiff asks for judgment, declaring him entitled to a 1/4 share in the business carried under the vilasam of V.E.R.M. and R.M.V.E. and three-eighth shares of "Morning Site."

According to an affidavit filed by the defendant in the present action answers have been filed in action No. 547 and that case has now been set down for trial. There is no evidence on record to show whether the trial of that action has commenced.

The application on which the learned District Judge made the order appealed against was filed in the District Court of Ratnapura in October, 1938. The grounds on which the application is made are set out in the defendant's petition as follows:—

a. The plaintiff has instituted the action in the District Court of Ratnapura to harass and oppress the defendant.

b. It is convenient and necessary to have all the issues raised by the plaintiff tried in the High Court of Pudukottai as all parties are permanent residents of Pudukottai State.

c. The defendant will be put to unnecessary expense and a great deal of hardship in getting ready for two trials on the same subject matter in Pudukottai and in Ceylon.

The plaintiff has filed a counter affidavit stating that in filing the present action he acted *bona fide* in the exercise of his legal rights and without any intention of harassing the defendant.

At the inquiry before the District Judge the Counsel for the defendant tendered in evidence certified copies of (a) the plaint in case No. 547 of the Chief Court of Pudukottai (b) the plaint, answer and issues in case No. 1624 of the Chief Court of Pudukottai and (c) the judgment in case No. 1624 of the Chief Court of Pudukottai "for the limited purpose of showing what the findings were on the issues framed." No other evidence was led before the District Judge.

I have no doubt that this Court has the power to make an order staying an action in a Court in Ceylon pending the final decision in another action between the parties where the matters in dispute in the first case are directly and substantially in issue in the second case (*vide* Civil Procedure Code Section 839). But as these inherent powers are very wide and indefinable a court has to guard against an arbitrary exercise of such powers. While conceding the existence of such powers the learned Counsel for the appellant cited certain authorities as indicating the limits within which such powers should be exercised. He referred us to *McHenry* v *Lewis* (1), *Peruvian Guano Co.* v. *Bockwoldt* (2), *Cohen* v. *Rothfield* (3). and *Hyman* v. *Helm* (4). in which the courts had to consider applications for restraining parties from proceeding in connected actions. In *McHenry* v. *Lewis*, the Court dealt with the application of a defendant sued in the English Court to stay the proceedings in view of an action pending in the United States of America. JESSEL M.R. pointed out that very different considerations arose where both the actions were brought in England and where one of them was brought in a foreign country. He said :—

"In this country where the actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do .....It is by no means to be assumed, in the absence of evidence, that the mere fact of suing in a foreign country as well as in this country is vexatious."

In *Peruvian Guano Co.* v. *Bockwoldt* an English company sued a firm of French merchants in the English Courts for the delivery of cargoes of seven ships or in the alternative for damages. Shortly after the institution of the action the ships which were in British waters were removed by the direction of the defendants to ports in France and the cargoes were taken possession of by the defendants. The plaintiffs thereupon commenced proceedings in France for the recovery of the cargoes of six of the ships. Refusing an application by the defendant that the plaintiff should be ordered to elect between the two actions, JESSEL M.R. gave as one of the reasons the fact that the matters in dispute were not identically the same. He said: –

"Supposing the plaintiff elected to go on with his French action for the six (ships) and in England for one.....What good would that be to anybody? The two actions would go on, and all that is suggested is that a witness or two less would be required possibly, not necessarily, in carrying on the litigation. That is not a ground for putting a man to his election.....It is no sufficient reason to stop a plaintiff to say that you can have a little less evidence in one action or try it in a less expensive mode."

In the same case LINDLEY L.J. said :—

"The Court here is not and cannot be alive to all the advantages which a person may expect to derive from suing in a foreign Court. The Court does not know with accuracy, unless the matter is brought to its attention, what reasons there may be for preferring one Court to another."

BOWEN L.J. expressed his view as follows :—

"We have no sort of right, moral or legal, to take away from the plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries, why should this Court interfere and deprive him of it.?"

In *Cohen* v. *Rothfield* there were cross suits between the parties in England and Scotland and the Court laid down the principle that the burden was on the party making the application for stay of proceedings to satisfy the Court of the existence of a state of things justifying the Court's exercise of its powers. In the course of his judgment SCRUTTON L.J. said—

"It is obvious, for instance, that an action in South Africa where the Dutch procedure prevails, Mauritius or Quebec, where the French procedure exists, Malta with its peculiar law, or Scotland with its Roman procedure, may produce quite different results from an English action. It appears to me that, unless the applicant satisfies the court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's Dominions, the Court should not stop him from proceeding with the only proceedings which he as plaintiff can control."

In *Hyman* v. *Helm*, BOWEN L J. said:—

"A man may wish to sue abroad as well as in England both because he has superior facility of execution abroad and also because of superior facility of procedure before execution and before judgment.....I think it lies on the persons who wish to put an end to concurrent litigation here and abroad to make out a case of opression. It does not do simply to say, "why should the action go on in two places at the same time ?."

There remains also the case of *Carter* v. *Hungerford* (5), to which the attention of Counsel was drawn by My Lord the Chief Justice. A full report of the case is not available to me, but, from a brief note given in the Annual Practice, I find that it decided that a Court should not ordinarily stay an action where there is an action in a foreign Court dealing with the same subject matter in which the English plaintiff is defendant.

No doubt the application in the present action is not for an absolute but conditional stay of the proceedings and to that extent the present application differs from the applications made in the cases considered by me. In the absence, however, of any definite authority on the question of the Court's jurisdiction in respect of an application to stay proceedings pending an action in a Court outside Ceylon, I think it desirable to be guided to some extent by the principles that may be deduced from the English cases to which I have referred. The principles deducible from the authorities cited in the course of the argument before us may be summarized as follows:—

1. The burden is on the party seeking for the interference of Court to prove that he is doubly vexed by reason of two actions being brought against him.
2. Where the two actions are brought in the same country there is a *prima facie* presumption of an intent to cause vexation.
3. Where the party is sued in one country and also in a foreign country or where a party is sued in two countries subject to the same Paramount Power, a Court will not presume an intent to cause vexation—

a. in the absence of evidence that the plaintiff cannot obtain an additional advantage in continuing both his actions or

b. from the mere fact of inconvenience or additional expense caused to a party or

c. from the fact that by staying one action less evidence would have to be ultimately led in the first action.

The present application is made by the defendant in view of two cases pending in the High Court of Pudukottai. Now Pudukottai is a Native State outside British India. It is not clear whether the whole Code (Indian) of Civil Procedure, 1908, is in force in that state. Section 1 of the Code shows that some of the sections do not extend even to what are known as Scheduled Districts in British India. The pleadings filed in the High Court of Pudukottai certainly differ so largely from the pleadings that are normally filed in our courts that one is left in doubt whether there are any provisions there similar to sections 46 (a) and 77 of our Code of Civil Procedure. Moreover, there is the fact that the Indian Code of Procedure differs in may particulars from our Code. I may also add that the Reciprocal Enforcement of Judgments Ordinance (Chapter 79 of Volume 2 of the Legislative Enactments) has not been extended to the State of Pudukottai. The defendant has failed not only to lead definite evidence of the procedure obtainable in the State of Pudukottai but also to furnish any material on which the Court could form an opinion as to the law and the legal remedies in that State.

It is clear from a perusal of the pleadings in the various cases that the decisions in the Pudukottai cases will not do away with the necessity of continuing the proceedings in the present action. Assuming that the finding of the High Court of Pudukottai with regard to the validity of the deed of release may be pleaded as *res judicata*, it will still be open to the plaintiff to prove a trust relying on circumstances arising after the deed of release. It is not conceded by the plaintiff that the High Court of Pudukottai had jurisdiction in case No. 1624 to give a decision as to the scope of that deed and the plaintiff may contend that the deed of release has no bearing on the matters in dispute in the present action. In this connection, I may refer to what I observed earlier that some of the allegations in the defendant's answer do not appear to be reconcilable with the plea that by the deed of release the plaintiff renounced his rights to "Morning Site."

We do not know anything about the state of the cause lists in Pudukottai, but we know that the action 1624 which was instituted in 1933 was decided by the Chief Court in 1937 and that before finality could be reached the proceedings would have to go before two appeal courts. In these circumstances there is no material before us to justify our holding that by proceeding with the present action the plaintiff will not get a decision more expeditiously.

The defendant has stated that if his application is not granted, it would cause him inconvenience and expense. That is hardly a ground to justify a court in exercising its inherent powers where the two actions are not both in Ceylon. Besides making a mere statement that the intention of the plaintiff in instituting the present action was to harass him, the defendant has made no effort to satisfy the court that the plaintiff cannot obtain any advantage from the present action which he would not obtain in the Pudukottai cases.

I do not think in the present action it is desirable that we should exercise the powers vested in this court and support an order staying the proceedings pending the final decision of the cases in the Pudukottai court.

I would, therefore, allow the appeal and set aside the order of the learned District Judge. The appellant is entitled to the cost of the appeal and the costs of the inquiry in the lower court.

Appeal allowed.

HOWARD C.J.—I agree.

[Proctor for plaintiff-appellant: *J. A. Perera*. Proctor for defendant-respondent: *Fred Wiresekera*.]

—K. S. A.

PUNCHI MAHATMAYA *v.* THE COMMISSIONER OF STAMPS

[HOWARD C.J. & WIJEYEWARDENE J. *S.C. No. 35 (I)*—STAMPS—JANUARY 17, 1940].

Certificate by Commissioner of Stamps—Appeal against Commissioner's determination—Need Attorney-General be made a party?—The Stamp Ordinance, Ch. 189, S. 31—Civil Procedure Code, S. 456.

Held that an appeal under S. 31 of the Stamp Ordinance to which the Attorney-General is not made a party is not properly constituted.

J. E. M. Obeyesekere, with him *Gilbert Perera*, for the appellant.

S. J. C. Schokman, Crown Counsel, for the respondent.

HOWARD C.J.

The practice in the past has been that in appeals of this nature the Attorney General should be made respondent so that he may appear on behalf of the Crown. We think that this practice follows as a matter of course from section 456 of the Civil Procedure Code read in conjuction with section 31 of the Stamp Ordinance, Chapter 189. We, therefore, think that the appeal is not properly constituted but in view of the fact that section 31 of the Stamp Ordinance is not altogether clear we grant the appellant this indulgence that we will allow the appeal to continue on the Attorney General being made a party within 10 days from today and on proper notice being given to him in accordance with section 31 within a further 7 days and on the appellant paying the costs of today's hearing.

WIJEYEWARDENE J.—I agree.

Appeal allowed.

—K. S. A.

EDEMA *v.* BABUN NONA

[NIHILL J. *S.C. 495—M.C. Colombo 16287.* JAN. 24, 31, 1940.]

Maintenance—Corroboration of mother's evidence in a material particular—Maintenance Ordinance, S. 6.

In an application by a mother for the maintenance of her illegitimate child,

HELD that the fact of maintenance by the person alleged to be the father of the illegitimate child after the discovery of the applicant's condition and her dismissal by his wife is evidence implicating the man and making it more probable than not that he is the father of the child and is, therefore, a material particular within the meaning of S. 6 of the Maintenance Ordinance.

Followed: *Ponnammah* v. *Seenitamby*, (1921) 22 N.L.R. 395 ... ... (1)
Bandara Menika v. *Dingiri Banda*, (1926) 27 N.L.R. 284 ... (2)

J. E. M. Obeysekera for the defendant-appellant.

Stanley de Zoysa, with him *M. Kumarakulasingam*, for the applicant-respondent.

NIHILL J.—This is an appeal from a maintenance order in respect of an illegitimate child. Paternity is denied by the appellant. The main ground of the appeal is that the evidence of the mother has not been corroborated in some material particular. (See S. 6 of the Maintenance Ordinance). In order to determine the point it is not necessary for me to relate all the facts. It will be sufficient to note that the respondent was employed as a domestic servant in the household of the appellant who is a married man living with his wife and children in Colombo.

According to the respondent's story, which was believed by the Magistrate, intimacy occurred between her and the appellant when the appellant's wife and children were away on a visit to Galle. The respondent conceived and subsequently, her condition having become known to the wife, she was turned out of the house.

The evidence in regard to dates is somewhat vague and unsatisfactory, but it would appear that the dismissal from service took place in June or July, 1938, when the respondent was four or five months advanced in pregnancy. The child was born on the 22nd of November, 1938. Subsequently, statements were made by the respondent to third parties involving the appellant, but these were not relied upon by the Magistrate as corroboration since they were made some time after intimacy had ceased.

For the purposes of this appeal they can be disregarded, *Ponnammah* v. *Seenitamby* (1).

The evidence on which the Magistrate relied for corroboration are the documents A1 and A2 and the evidence of the witness Arthur. A1 and A2 are Post Office Savings Bank withdrawal forms upon which the appellant has certified that the holder of the Pass Book is the respondent. The dates of these withdrawals were in June and July, 1938, respectively at the time when the Magistrate has found that the respondent was still in the appellant's service. These documents of themselves could not possibly supply corroboration.

An innocent employer might naturally perform this service for his employee if asked to do so, even although she was pregnant at the time. A fact, which on the face of it is capable of an innocent inter-

pretation and which could not even to the most suspicious mind suggest guilt, cannot be said to point to probable paternity.

When the evidence of Arthur is reached, however, converse considerations apply. Not all the evidence of Arthur was accepted by the Magistrate, but he does find as a fact that Arthur was used as an intermediary between the appellant and the respondent after her dismissal and that on two occasions he was given money by the appellant to give to her.

Now, Mr. Obeyesekere has urged that this fact is also capable of an innocet interpretation. That is true, the payments might have been arrears of wages, they might even have been charitable donations from a soft hearted employer saddened by the plight of an unfortunate girl. But the appellant takes up neither position and offers no explanation of these payments. Indeed, he denies that he has ever employed Arthur or that he even knows him. That being so, if the fact of these payments is accepted, they are suggestive of something quite other than innocence, for they establish that after the respondent has been turned out of the house by a no doubt righteously indignant wife, the appellant continued, surreptitiously, to supply her with money.

The respondent in her evidence stated that she was maintained by the appellant right up to the birth of the child and the maintenance ceased only when she refused to surrender her child. Now Arthur's evidence corroborates this part of the respondent's evidence in what I hold to be a material particular because the fact of maintenance by the appellant after the discovery of the respondent's condition and dismissal by the wife is, in my opinion, to quote once more the words of ATKIN L.J. in *Thomas* v. *Jones** so often cited in these Courts (*Bandira Menike v. Dingiri Banda*) (2), "evidence implicating the man and making it more probable than not that he is the father of the child."

I dismiss the appeal.

Appeal dismissed.

—K. S. A

R. MEDIWAKE, INSPECTOR OF POLICE, *v.* D. A. S. GUNASEKERE AND ANOTHER

[NIHILL J. *S.C. 656—M.C. Matara 23649.* JAN. 25, FEB. 21, 1940.]

Criminal procedure—Offences triable by District Court—Decision by the Magistrate at a late stage of the inquiry to try the case summarily—Regularity—Prejudice—Criminal Procedure Code, Ss. 152 (3) & 425—Amending Ordinance, No. 13 of 1938, S. 5.

Distinction between the procedure under S. 152 (3) and that under S. 166 pointed out.

The accused was charged with having committed the offences of cheating and criminal breach of trust while being a public servant, punishable under Ss. 403 and 392 of the Penal Code. The Magistrate began non-summary proceedings and after the lapse of four months from the appearance of the accused to the summons, and after the bulk of the evidence for the prosecution had been led, he assumed jurisdiction as a District Judge and tried the case summarily in that capacity under S. 152 (3) of the Criminal Procedure Code. He did not record any reasons for so doing. On appeal from a conviction of the accused, it was contended that

* (1921) 1 K.B. 22.

the Magistrate assumed jurisdiction so late in the case that his action was highly prejudicial to the accused and that the conviction cannot, therefore, stand.

HELD: (i) that, the amendments to Ch. 15 of the Criminal Procedure Code introduced by Ordinance No. 13 of 1938 do not alter the law in regard to the assumption of jurisdiction by a Magistrate under S. 152 (3) of the Criminal Procedure Code,

(ii) that, when a person appears before a Magistrate charged with offences triable by a District Court and not summarily by him, the Magistrate must address his mind at the outset of the inquiry to the question whether the offence may properly be tried by him summarily and quickly form his opinion thereon,

(iii) that it is necessary for the Magistrate to give his reasons for the exercise of this power and,

(iv) that as the Magistrate had not complied with the requirements indicated above, he exercised his discretion improperly.

HELD, further, (i) that as the Magistrate in this case was till a late stage of the inquiry, to put it at its lowest, acting as a quasi-prosecutor, the evidence upon which he ultimately convicted the accused as a trial Judge being evidence which had been extracted from the witnesses by his diligence as an inquiring Magistrate, there was a possibility of prejudice having been caused to the accused and

(ii) that this is not a defect which can be cured by invoking the aid of S. 425 of the Criminal Procedure Code.

Followed: *Queen* v. *Uduman*, (1900) 4 N.L.R. 1 ... ... (1)
Silva v. *Silva*, (1904) 7 N.L.R. 182 ... ... (2)
Punchirala v. *Don Cornelis*, (1904) 8 N.L.R. 58 ... ... (3)

Appeal from a conviction of the accused by V. H. Wijeyeratne Esq., Magistrate of Matara, who decided to try the case summarily under S. 152 (3) of the Criminal Procedure Code at a very late stage of the non-summary inquiry, without giving any reasons for assuming this jurisdiction.

R. L. Pereira K.C., with him *C. V. Ranawake* and *S. W. Jayasuriya*, for accused-appellant.

Nihal Gunesekera, Crown Counsel, for complainant-respondent.

NIHILL J.—This is an appeal from a conviction for cheating offences under section 403 of the Penal Code. The value of the property in respect of which it was alleged the offence had been committed did not exceed Rs. 200/00 and the offences could therefore have been tried summarily by the Magistrate in the first instance except for the fact that counts were also included embodying charges under section 392 relating to the same transaction.

He therefore started non-summary proceedings and then, after the bulk of the evidence for the prosecution had been led, assumed jurisdiction as a District Judge and proceeded to try the case summarily in that capacity, under section 152 (3) of the Criminal Procedure Code. He did not record any reasons for so doing.

It has been argued before me that the Magistrate assumed jurisdiction so late in the case that his action was highly prejudicial to the accused and that on this ground alone the conviction cannot stand.

I have not considered the merits of this appeal apart from this preliminary point. Mr. Nihal Gunesekera, for the Crown, was content to take up the position that if an irregularity had occurred it was curable by the application of section 425 of the Criminal Procedure Code. Before considering that aspect of the matter, however, I must first consider whether the Magistrate did in fact go outside the proper

ambit of section 152 (3) in assuming the jurisdiction of a District Judge when he did.

It will perhaps be convenient to state the facts in some detail. On the 24th of January, 1939, report was made to the Magistrate under section 148 (1) (b) alleging that the appellant and one other (since acquitted) had dishonestly drawn certain sums from the Assistant Government Agent at Matara for the purpose of paying for the lighting of a lamp at Hakmana Market during the period March-August, 1937. The report alleged that in fact no lamp was lit during the period. The appellant was named as the Chairman of the Village Committee. Summons was issued and the accused appeared before the Magistrate on the 10th of February, when the charges were read over to them in accordance with the provisions of section 156. A remand on bail was granted until the 27th of February and the evidence for the prosecution was started. The preliminary inquiry had begun. It continued with various adjournments until the 30th of May when the Magistrate decided to try the case summarily as a District Judge and the trial was fixed for the 15th of June. Up to this date nine witnesses had been called, their cross-examination having been reserved. On the 15th of June these witnesses were recalled for cross-examination. Their evidence-in-chief was not taken *de novo*, although further evidence-in-chief was elicited from some of them. After two further witnesses had been called, the prosecution was closed.

After hearing evidence for the defence, the Magistrate convicted the appellant on the 13th of July on two counts relative to section 403 and sentenced him to two terms of six months' rigorous imprisonment to run concurrently. It should be noted here that the conviction was in respect to the offences which the Magistrate could have tried summarily in the first instance.

Now is there a stage in a preliminary enquiry beyond which the Magistrate cannot retrace his steps and elect to try the case himself as a District Judge? In *Queen* v. *Uduman* (1), BONSER C.J. quashed a conviction on the ground that the serious offence of housebreaking by night was not one which a Magistrate should try summarily. In that case the Magistrate had heard all the evidence for the prosecution and the Chief Justice in the course of his judgment at page 3 said:—

> "Even if the offence was one which he could try summarily, which it was not, it seems to me that it was too late for him to exercise the power given him by section 152. It is quite clear from the whole of Chapter 15, in which that section occurs, that the Magistrate is to make up his mind whether he will try summarily as District Judge or not after hearing evidence under section 149. It is not competent for him to take all the evidence for the prosecution as a committing Magistrate, and then, after various remands, say suddenly, 'all this time I have not been acting as a committing Magistrate, but trying the case as District Judge.' That is what it comes to."

In 1904 the scope and effect of section 152 (3) came before a Bench of three Judges but the question as at what stage of the proceedings the Magistrate should act or beyond what stage he could not act was not considered, see *Silva* v. *Silva* (2). Their Lordships in that case held against the view that the jurisdiction was confined to Magistrates who were also the District Judges of the District and they

held also that the exercise of the discretionary power of Magistrates was not conclusive and could be reviewed by the Supreme Court on appeal. As a corollary to that they indicated that Magistrates should give reasons for their opinion that the offence might properly be tried summarily.

The question as to the stage at which the Magistrate's decision should be taken did not arise probably because in the case which formed the basis of the submission to the full Bench it had been taken at a very early stage, that is to say when the Magistrate had partly heard the evidence of the complainant.

In the same year, however, LAYARD C.J. sitting alone held in *Punchirala* v. *Don Cornelis* (3), that it was too late for the Magistrate to change his mind after he had taken the evidence of the complainant in full but he stated that it might be different "if he had recalled the complainant after he had made up his mind to try the case as District Judge."

This case, together with *Queen* v. *Udunan* (supra), is authority for the view that the assumption of the jurisdiction should take place at an early stage. I would mention, however, that in the present case, as the accused appeared before the Magistrate on summons, it was not imperative in view of amendment to section 149 (now section 151) effected by section 5 of Ordinance No. 13 of 1938 that he should take the evidence of the complainant or some material witness or witnesses before issue of the summons.

Under section 149 of the Code as before amendment the Magistrate would have had to have heard evidence forthwith before issuing his warrant as the report had disclosed a non-summary offence. Now, under the Code as amended, the Magistrate has a discretion in such cases either to issue a warrant, in which case he must examine the complainant or some material witness or witnesses on oath, or to issue a summons. If he decides on the latter course it is again in his discretion whether he shall or shall not forthwith take evidence on oath. The question I think arises whether this amendment in procedure has not to some extent altered the position as it stood when BONSER C.J. and LAYARD C.J. gave the judgments I have cited. It seems to me that the view expressed in these judgments amounts to this—that the Magistrate must make up his mind very early, in fact before the real enquiry in the presence of the accused begins. Once the enquiry is under-weigh it should not be turned into a trial.

Now in cases such as the one we are considering I think it can reasonably be urged that the Magistrate must take some evidence after the accused has answered the summons before he can be in a position to exercise his discretion. If that be so, it is doubtless difficult to draw a line and say thus far and no further. Nevertheless I consider it important that the principle should be maintained that proceedings which have continued for some time on one basis cannot in fairness to the accused be suddenly turned into proceedings of a different nature.

It must be remembered that the assumption of a Judge's power by a Magistrate is not one that the accused can resist. In that sense it differs from what might be termed the converse procedure provided for by section 166. Under that section the Magistrate assumes no additional jurisdiction, he remains a Magistrate and tries a non-summary case summarily because, having regard to the character and antecedents of the accused, the nature of the offence and all the circumstances of the

case, he thinks it expedient to do so. In sub section (3) of that section it is expressly provided that he may make up his mind to try the case summarily during the hearing of the case and after he has become satisfied by the evidence that it is a proper one for the application of the section. But the accused cannot possibly be prejudiced because the Magistrate cannot move without his consent.

In section 152 the Magistrate can so move and it is important therefore that Magistrates should not apply the section in a way under which even an appearance of prejudice to an accused person may be manifested. I do not consider, therefore, that the amendments to Chapter XV introduced in 1938 warrant any substantial change in the view hitherto held with regard to section 152. A Magistrate must address his mind to the matter at the outset of the inquiry and quickly form his opinion thereon, because that is the only way in which an appearance of prejudice can be avoided. It will not do for him to meander through the evidence as an enquiry Magistrate until at a late stage it is driven into his consciousness that it is a case which he might have tried himself from the start.

In the present instance nearly four months elapsed between the appearance to the summons and the assumption of the jurisdiction and by that time the bulk of the evidence for the prosecution had been recorded, and when he did exercise his power he gave no reasons.

I have no hesitation therefore under all these circumstances in holding that on this occasion he exercised his discretion improperly.

Now there remains the question whether this irregularity is curable under section 425. If prejudice has in fact been caused to the accused, then clearly it is not. On the face of it such prejudice may be difficult to detect. The accused who was represented made no objection at the time and he has been convicted only of those offences which the Magistrate could have tried summarily as a Magistrate and he has not received a sentence greater than the Magistrate as a Magistrate could have imposed.

It has been urged for the appellant, however, that a Magistrate when conducting a preliminary investigation has a character different from that of a trial Judge and my attention was drawn to section 392 (2). I must confess I find it difficult myself to reconcile the provisions of that section with the amendments introduced by Ordinance No. 13 of 1938. How a Magistrate can conveniently "conduct the prosecution" and at the same time address himself judicially to the question as to whether the case warrants committal is not easy to see. The position was, of course, formerly quite otherwise as committal then lay only on the instructions of the Attorney-General. Whilst I do not believe for a moment that this provision of the law did in fact affect the Magistrate's attitude of judicial impartiality, I cannot overlook that it is open for the appellant to say that up till the 30th of May, the Magistrate was, to put it at its lowest, acting as a quasi-prosecutor. After that date the evidence-in-chief of the prosecution witnesses was not taken afresh, so we are left with the position that the evidence upon which the Magistrate ultimately convicted as a trial Judge was evidence which had been extracted from the witnesses by his diligence as an enquiring Magistrate. That being so, I cannot overlook the possibility of prejudice having been caused and I decline therefore in this instance to invoke the aid of section 425.

The case must go back for re-hearing before another Magistrate. If the charges are confined to those counts which can be tried summarily, the Magistrate can, of course, dispose of the matter himself.

With regard to the other accused who was acquitted, my order will not affect him. He was acquitted for reasons which would have been equally good as against his committal for trial and it would not be fair that he should be placed in jeopardy again.

Set aside and sent back.

[Proctor for accused-appellant: *W P. A. Wickremesinghe.*]

—K. S. A.

K. G. E & CO. *v.* ATTORNEY-GENERAL

[KEUNEMAN J. *S.C. 143—C.R. COLOMBO 51483.* FEBRUARY, 16, 21, 1940.]

Income Tax—Relief in respect of Empire Income Tax—Has claim to be made within three years of the end of year of assessment?—Income Tax Ordinance, Ss. 46 & 84.

S. 84 (1) of the Income Tax Ordinance enacts: "If it is proved to the satisfaction of the Commissioner by claim duly made in writing within three years of the end of a year of assessment that any person has paid tax, by deduction or otherwise, in excess of the amount with which he was properly chargeable for that year, such person shall be entitled to have refunded the amount so paid in excess....."

The plaintiffs paid the Commissioner of Income Tax the sums of Rs. 297/40 and Rs. 342/10 as income tax for the years ending 31st March, 1934 and 31st March, 1935, respectively. Being residents of India, they had paid income tax in India in respect of the corresponding period on the same source and they claimed, therefore, that they were entitled, under S 46 of the Income Tax Ordinance, to relief from Ceylon tax to the extent of Rs. 136/01. They instituted action on the 23rd of February, 1939, for the recovery of this amount. Their action was dismissed with costs and they appealed.

HELD: (i) that, where a person has paid the full amount of Ceylon tax without any deduction being made by reason of his statutory right to relief in respect of Empire Income Tax, he is deemed to have paid tax 'in excess of the amount with which he is properly chargeable' and

(ii) that a claim for a refund of the amount so paid in excess has to be made within three years of the end of the year of assessment.

Per KEUNEMAN J: I do not think that the word "chargeable" is used in section 84 in any other sense than "liable." No technical significance should be attached to the word "chargeable" so as to restrict the term only to "charges" mentioned in section 20.

Referred to:

King v. *The Kensington Income Tax Commissioner*, (1914) 6 Tax Cases 622 (1)

Appeal from a judgment of V. L. St. Clair Swan, Commissioner of Requests, Colombo.

N. Nadarajah, with him *K. Satia Vagiswara Aiyar* and *D. H. A. Koattegoda*, for the plaintiffs-appellants.

H. H. Basnayake, Crown Counsel, for the defendant-respondent.

KEUNEMAN J.— The plaintiffs, who were partners of the firm of Kana Gnavenna Ena & Co, brought this action alleging that they had paid to the Commissioner of Income Tax the sums of Rs. 297/40 and Rs. 342/10 as income tax for the years ending 31st March, 1934, and 31st March, 1935 respectively, and that they were entitled to a refund

of a sum of Rs. 154/80 under section 46 of the Income Tax Ordinance. The action was instituted on the 23rd of February, 1939. At the trial, it was agreed that if the plaintiffs were entitled to a refund, the sum to be refunded was Rs. 136/01. The only issue framed ran as follows:—

"Is the plaintiffs' claim for a refund barred by section 84 of the Income Tax Ordinance ?"

The plaintiffs' action was dismissed with costs, and the plaintiffs appeal.

It is clear that, if section 84 applies, the plaintiffs' claim is out of time, as it was not made within three years of the end of the years of assessment.

It was argued that section 84 did not apply. Under that section, where any person has paid, by deduction or otherwise, in excess of the amount with which he is properly chargeable for any year, he is entitled to a refund of the amount so paid in excess. In this case, the plaintiffs who were non-resident partners, have undoubtedly paid the sum mentioned in the plaint as income tax. They claim that they are entitled to relief from Ceylon tax to the extent of Rs. 136/01, in virtue of the fact that they have paid income tax in India in respect of the corresponding period.

It was argued that section 84 only applied to claims for refunds made in respect of assessments made under section 20 of the Income Tax Ordinance, and did not apply to a refund claimed under section 46. In other words, it was contended that the plaintiffs were "properly chargeable" for the full sums paid by them, but the claim for refund was made in consequence of the special case created by section 46.

Great stress was laid by counsel for the appellants on the words "charge" and "chargeable" which occur in section 20 of the Ordinance. If we look at the Ordinance, we find, under section 5, that income tax, subject to the provisions of this Ordinance, shall be charged at specified rates in respect of the income of every person. Under section 6, "profits" and "income" are defined, and sections 7 and 8 contain certain exemptions.

Chapter III deals with the "Ascertainment of Profits and Income." Section 9 deals with certain deductions which are allowed and section 10 with deductions which are not allowed.

Chapter IV deals with the "Ascertainment of Statutory Income." Section 11 sets out what the "statutory income" of a person from each source of his profits and income in respect of which tax is charged shall be.

Chapter V sets out in section 13 that the "assessable income" of a person shall be "the statutory income" subject to certain deductions which are set out.

Chapter VI, in section 14, sets out that the "taxable income" of the person shall be his assessable income, except as provided by the subsequent sections, 15 to 19. These latter sections deal with certain exemptions, allowances, etc.

Chapter VII deals with the charge and rates of tax. Section 20 provides that the tax shall be charged upon taxable income at certain

rates for resident and non-resident persons. This section contains several phrases such as, "an individual is chargeable", "no tax is chargeable under sub-section (1)", "tax charged", "tax payable", etc.

Chapter VIII refers to special cases, and Items A to L—sections 21 to 53—related to such special cases. The section with which we are concerned, namely, section 46, relates to relief in respect of Empire Income Tax, and falls within Item K, namely, relief in cases of double taxation.

A later Chapter, XII, deals with payment of tax. Chapter XIV deals with repayment and contains section 84.

The argument addressed to me on behalf of the appellants amounted to this, namely, that the words in section 84, "in excess of the amount with which he was properly chargeable for that year", referred only to the charges made under section 20 and had no relation to the special case under section 46.

In the first place, I find it difficult to understand how the special cases in Chapter VIII can be regarded otherwise than as supplementary to section 20, and as amplifying the terms of that section.

Further, where this Ordinance has gone out of its way to provide machinery for repayment, I do not think I am justified in placing any unduly restrictive construction on the words of the section so as to make it apply only to certain classes of repayment.

Again, taking account of the scheme of the Ordinance and the position in which section 84 appears in that Ordinance, I am of opinion that the words, "amount...properly chargeable", cover the circumstances of this case. It may be remembered that the word "chargeable" is used in several senses even in section 20. As pointed out by Lord WRENBURY with regard to a similar case relating to the Income Tax Acts in England, 'In these Acts it is not possible to rest any conclusion upon a particular word. The same word is in one section used in one sense and in another in a different sense"—*King* v. *The Kensington Income Tax Commissioners* (6 Tax Cases 613 at 622.)

On examination of section 46 itself, it will be found that where the person establishes to the satisfaction of the Commissioner that he has paid or is liable to pay both Ceylon tax and Empire tax in respect of the same period of time, he "shall be entitled to relief" from Ceylon tax for one half of the Ceylon tax or Empire tax which ever is less, subject to certain provisions. It follows that when the person has established his claim to the satisfaction of the Commissioner, he has a statutory right to relief and that the amount of the tax payable by him must be diminished to that extent Where he has paid the full amount without the diminution, I think it follows that he has paid "in excess of the amount with which he was properly chargeable." I do not think the word "chargeable" is used in section 84 in any other sense than "liable." No technical significance should be attached to the word "chargeable" so as to restrict the term only to "charges" mentioned in section 20.

Counsel for the appellant conceded that in at any rate one of the "special cases", namely, section 43 relating to dividends (Item J), where the tax had been deducted at the source in regard to the dividend, and tax has by inadvertence been paid on the dividend by the individual, a claim for a refund would fall under section 84. This is a typical case.

of "payment by deduction" mentioned in section 84. Now, under section 43, where the tax has been deducted at the source, what the person is entitled to is a "set-off against the tax"—*Vide* section 43 (3) and (4).

If a person who is entitled to a "set-off" and has failed to claim it can be regarded as having made a payment "in excess of the amount with which he is properly chargeable", I fail to understand how a person who has a statutory right to relief and has failed to claim it can be regarded as falling into any other category.

I think the argument for the appellant fails, and that section 84 applies to the present case and that the time limit mentioned therein is operative.

Counsel for the respondent further argued that if section 84 did not apply, the subject was devoid of any remedy. I do not think it is necessary for me to consider this argument, nor is it possible for me to do so in view of the single issue which was framed in this case.

The appeal is dismissed with costs.

Appeal dismissed.

[Proctor for plaintiff-appellants: *A. P. de Zilva*]

— H. W. T.

T. B. HERAT, INSPECTOR, CRIME POLICE *v.* ABDUL JABBAR AND ANOTHER

[SOERTSZ, HEARNE AND KEUNEMAN J J. *S.C. 472—M.C. Kandy 62200.* FEBRUARY 29, MARCH 7, 1940].

Criminal Procedure—Evidence recorded before the arrest and appearance of one of the accused—Is the reading of such evidence in the presence of the witnesses to the accused, with the opportunity given to him of cross-examining them, a sufficient compliance with the law ?—Criminal Procedure Code, Ss. 150, 151, 188, 297 & 407.

On the 27th May, 1939, the police instituted criminal proceedings against both the accused under S. 148 (*b*) of the Criminal Procedure Code and on that date the Magistrate recorded, in the presence of the 2nd accused alone, the evidence of two witnesses, K. & J. The 2nd accused was charged from the charge sheet and the Magistrate ordered a warrant to issue against the 1st accused. He stated he was trying the case as A.D.J. On the 14th June (the first accused not having been arrested) the Magistrate, in his absence and in the presence of the second accused, recorded the evidence of four other witnesses, P, R1, R2 and C. On the 4th July, both the accused were present and the witnesses who gave evidence on the 8th May and 14th June were recalled. Their previous evidence was read over, additional questions were asked and they were cross-examined by Counsel for both the accused. Further witnesses were also called, the accused entered on their defence and were eventually convicted. On appeal, it was contended on behalf of the first accused appellant that the evidence recorded on 14th June was, as far as it affected that appellant, improperly recorded and that the conviction was, for that reason, illegal.

HELD (i) that, by virtue of the first paragraph of 297 of the Criminal Procedure Code, 'all evidence taken at inquiries and trials shall be taken in the presence the accused,' unless his personal attendance has been dispensed with or unless one of the specific exceptions of the Code is applicable,

(ii) that the 2nd paragraph of section 297 clearly refers to evidence which has been properly recorded against an accused in his absence,

(iii) that such evidence, of which the accused would otherwise have no notice, shall be read over to him,

(iv) that, as the attendance of the appellant had not been dispensed with and none of the specific exceptions of the Code applied to him, the evidence given by the witnesses on the 14th June was improperly recorded and the witnesses should, therefore, have been required to give their evidence afresh in his presence and

(v) that the use made at a trial of an accused person of evidence improperly recorded against him is an illegality and a conviction founded upon such evidence cannot be sustained.

Over-ruled: *Mudiyanse* v. *Appuhamy*, (1920) 22 N.L.R. 169

HEARNE J., before whom the appeal was argued, referred the question for consideration by a full Court by the following judgment:—

It should be noted that the 1st accused was not treated as having absconded, there was no evidence before the Court to the effect that there was no immediate prospect of arresting him, and the evidence taken on 14th June was not taken under the provisions of section 407 of the Criminal Procedure Code.

Section 297 of the Criminal Procedure Code is as follows:—

"Except as otherwise expressly provided all evidence taken at inquiries or trials under this Ordinance shall be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader:

"Provided that if the evidence of any witness shall have been taken in the absence of the accused whose attendance has not been dispensed with, such evidence shall be read over to the accused in the presence of such witness and the accused shall have a full opportunity allowed him of cross-examining such witness thereon."

The section enacts that all evidence recorded at trials shall normally be recorded in the presence of the accused except for instance (*a*) when the accused has absconded or (*b*) when evidence has of necessity been taken in his absence (section 150) unless (*c*) the presence of the accused has been dispensed with and evidence has been recorded in the presence of his pleader, *e.g.*, under sections 86, 154, etc.

The circumstances mentioned in (*c*) are not further dealt with in section 297. The law applicable to those circumstances is that when personal attendance of the accused has been dispensed with, proceedings may be carried on in the presence of the pleader of the accused. But if no pleader appears for the accused the Court is bound to suspend proceedings until the accused is before the Court.

Nor does section 297 deal further with the matter of evidence recorded in the absence of an absconding accused.

Section 297, however, further enacts that if evidence has been taken in the absence of an accused whose attendance has not been dispensed with, such evidence shall be read over to the accused, etc.

It is argued by Crown Counsel that by virtue of this *proviso*, the evidence of Piyadasa, Ramen, Ratnasekere and Cornelis, could have been read over to the accused, as the attendance of the accused had not been dispensed with.

But he has forgotten that the evidence of these witnesses could not have been *recorded*, in the absence of the accused, unless one of the exceptions applied, and the facts do not fall within any exception of the Code of which I am aware or which has been brought to my notice.

It follows from what I have said that the witnesses who gave evidence on 14th June in the absence of the 1st accused should on 4th July have given their evidence in his presence *de novo*.

It is to be noted that on the 14th June, the 2nd accused did not cross-examine Piyadasa, Ramen, Ratnasekere and Cornelis, and it may be said that *he* thought their evidence had been recorded under section 150, but in point of fact this was not the case. The only evidence recorded under section 150 was that of Kulugammana and Jayawardene on the 30th May.

The principle involved is an important one. A person charged with a criminal offence is, in my opinion, entitled to be confronted with his accusers.

A different view, however, appears to have been taken by this Court in *Mudiyanse* v. *Appuhamy* (1), which I have urged to follow. I think the matter should be referred to a Bench of three Judges.

I have not considered the question whether there has been an irregularity which is curable for there are other aspects of the case which incline me to the view that a fresh trial is desirable before another Magistrate.

I dismiss the appeal of the 2nd accused.

L. A. Rajapakse, with him *H. A. Wijemanne* and *Jayamanne* for 1st accused-appellant.

R. R. Crossette Thambiah, Crown Counsel, for complainant-respondent.

HEARNE J.—In this case which has been referred to us the Magistrate took cognizance on 30th May, 1939, of Criminal proceedings against two named accused persons on a report made to him under section 148 (b) of the Criminal Procedure Code. The 2nd accused was before the Court and after recording certain evidence in his presence he directed a warrant to issue against the 1st accused (appellant).

A fortnight later, on the 14th June, he recorded further evidence, which affected the 1st accused, in his absence but in the presence of the 2nd accused. It could not be argued that this evidence, *in so far as it affected the 1st accused*, could have been recorded in his absence by virtue of any of the exceptions to the general rule that "all evidence taken at inquiries and trials shall be taken in the presence of the accused." In particular the exception referred to in section 151 has no application. That section permits the examination on oath of a complainant or any other person who can speak to the facts of the complaint to enable a Magistrate to decide whether process should issue against an accused person who is not in custody. In this case, however, a warrant had already been issued on the 30th May. It is to be noted that the 1st accused was not regarded as having absconded. In that event different considerations would apply (section 407).

Counsel for the Crown did not, in fact, seek to bring the facts of the case within section 151. It was tentatively submitted by him that the evidence recorded on 14th June might properly have been recorded against the 1st accused under the provisions contained in the last paragraph of section 188, but as this section unambiguously refers to an accused who is present the argument was abandoned.

The question of law which has been referred to us is, in effect, whether the witnesses, whose depositions were taken on the 14th June in the circumstances I have mentioned should have given their evidence *de novo* in the presence of the 1st accused after his arrest, or whether the reading of the recorded depositions in the presence of the witnesses to the accused with the opportunity given to him of cross-examining them is a sufficient compliance with the law ?

The answer is to be found in the provisions of section 297. The section lays down in the first paragraph that "all evidence taken at inquiries or trials shall be taken in the presence of the accused" unless his personal attendance has been dispensed with or unless one of the specific exceptions of the Code is applicable; and in the second paragraph, that in the latter case "the evidence" of which the accused would otherwise have no notice "shall be read over to him."

The second paragraph of section 297 clearly refers to evidence which has been properly recorded against an accused in his absence. The evidence to which I have referred was improperly recorded as against him in his absence and there was, therefore, no compliance with the law in merely reading it to him. The witnesses should have been required to give their evidence afresh in his presence.

In my view the use made at a trial of an accused person of evidence improperly recorded against him is an illegality and a conviction founded upon such evidence cannot be sustained.

I would allow the appeal and remit the case for trial of the appellant before another Magistrate.

SOERTSZ J.—I agree.

KEUNEMAN.—I agree.

Appeal allowed. Case sent back.

[Proctor for accused appellant: *T. N. R. Misso.*]

—K. S. A.

E. A. VANDER DRIESEN, SUB-INSPECTOR, POLICE *v.* K. PETER

[HOWARD C.J. *Rev.—M.C. Ratnapura No. 25209.* FEB. 29, MARCH 5, 1940.]

Revision—Failure to appeal against acquittal—Power of the Supreme Court to revise proceedings—Criminal Procedure Code, Ss. 347 & 357.

HELD (i) that the Supreme Court has full powers of revision in all criminal cases,

(ii) that the power is not limited to those cases in which either no appeal lies or for some reason or other an appeal has not been taken and

(iii) that the powers granted to the Supreme Court on appeal by S. 347 (*a*) of the Criminal Procedure Code, made exercisable on revision by S. 357 (1), allow the Court, when interfering with an acquittal, to order that non-summary proceedings be taken.

Followed:

King v. *Noordeen*, (1910) 13 N.L.R. 115. ... ... (2)
Revision Application No. 114—M.C. Badulla 29123. S.C. Min. of 4-4-39 (3)
Revision Application—P.C. Matale No. 863. S.C. Min. of 15-7-38. .. (4)

Referred to:

Inspector of Police, Avissawella v. *Fernando*, (1929) 30 N.L.R. 482. (1)

Application by the Solicitor General to revise proceedings in a criminal case in which the accused was acquitted by the Magistrate.

Nihal Gunasekera, Crown Counsel, for the Solicitor General.

R. C. Fonseka for the accused-respondent.

HOWARD C.J.—This is an application by the Solicitor-General asking me to deal with the proceedings in M.C. Ratnapura No. 25209 by way of revision under the powers vested in the Supreme Court by section 357 of the Criminal Procedure Code. Counsel for the accused-respondent has taken the preliminary objection that the revisionary powers of the Supreme Court cannot be employed in a case such as this where the Solicitor-General could have appealed under section 338 of the Code. In connection with this contention, I was referred to the case of *Inspector of Police, Avisawella* v. *Fernando* (1). In that case the accused person had been warned and discharged and the Solicitor-General made an application to revise the sentence. It was held by Mr. JUSTICE AKBAR that where the proper remedy is by way of appeal, an application for revision will not be entertained save in exceptional circumstances. On the other hand, it was held by WOOD RENTON J in *King* v. *Noordeen* (2) that the Supreme Court has full powers of revision in all criminal cases and that power is not limited to those cases in which either no appeal lies, or for some reason or other an appeal has not been taken. The present case, unlike that of *Inspector of Police, Avisawella* v. *Fernando* which was an application for enhancement of sentence, involves the quashing of all proceedings before the Magistrate and an order that non-summary proceedings be taken on a charge of an offence punishable under section 300 of the Penal Code. The Supreme Court has been accustomed in such cases to make use of its revisionary powers. Thus on an application by the Solicitor-General in M.C. Badulla case No. 29123 (114) decided on the 4th April, 1939 (3), SOERTSZ J. set aside an order of the Magistrate made after a summary trial and imposing a fine of Rs. 20/- on the accused and sent the case back with a direction that non-summary proceedings be taken. Similarly in P.C. Matale No. 863, decided on the 15th July, 1938 (4), ABRAHAMS C.J. set aside a sentence of four months rigorous imprisonment passsed by the Magistrate on the accused after a summary trial and directed the case to be remitted to the Magistrate to proceed to take evidence under section 155 of the Criminal Procedure Code. In that case the Court brought its revisionary powers into operation on its own motion. There is no doubt that the powers granted by section 347 (*a*), made exercisable on revision by section 357 (1), allow me when interfering with the acquittal in this case to order that non-summary proceedings be taken There are, moreover, exceptional circumstances in this case rendering the exercise of such powers desirable. I, therefore, quash all proceedings had by the Magistrate and direct that the case be remitted to another Magistrate to take evidence under section 155 of the Criminal Procedure Code.

Proceedings quashed. Case remitted.

[Proctor for accused-respondent: *M. A. W. Gunesekere*]

—K. S. A.

W. A. R. LEEMBRUGGEN, A.S.P. N'ELIYA v. PITCHAIPILLAI

[HOWARD C.J. *Rev. Appln.—M C Hatton* 97, 98 & 99. *S.C. No.* 147—*M C, Hatton* 100. *S.C.* 148 *to* 156 —*M C. Hatton* 101, 102, 103, 104, 107, 108, 110, 111 & 112 *with Rev. Applns.* MARCH 11, 14, 1940.]

Plea of guilty—Charge of criminal trespass—Accused's statement to the effect 'I am guilty. I will leave the estate in a week'—Conviction not entered—Order to call case on a subsequent date—Power of Supreme Court to revise proceedings—Criminal Procedure Code, S. 347.

Application by accused to withdraw plea of guilty before the entering of conviction—When is a plea of guilty 'qualified'?—Right of accused to withdraw plea of guilty—Criminal Procedure Code, S. 188.

Thirteen Indian labourers of Elgin Estate, Lindula, were charged with having committed the offence of criminal trespass under S. 433 of the Penal Code. It was alleged that they unlawfully continued to remain on the estate with intent to annoy the Superintendent, though their services had been lawfully terminated. The accused appeared in Court on the 22nd January, 1940, and each of them pleaded not guilty, whereupon the cases were adjourned for 30th January, 1940. On this date, each of the accused, who were undefended, stated: 'I am guilty. I will leave the estate in a week.' The Magistrate made order as follows: 'Call case on the 7th February at Nuwara Eliya.' In some cases, he added: 'Sentence deferred until then.'

Before the Magistrate could make any further orders in cases Nos. 97, 98 and 99, the accused moved the Supreme Court in revision and prayed that the proceedings had against them on the 30th January, 1940, be quashed and that directions be given for the continuation of the trials in accordance with the law.

The accused in cases Nos 100, 101, etc., appeared in Court on 7th Feb., 1940, and an application was made on behalf of each of them that they be allowed to withdraw their pleas of guilty. The Magistrate refused this application and convicted each of the accused and sentenced them to undergo one month's rigorous imprisonment.

The accused in case No. 100 appealed on the ground that he had the right to withdraw his plea of guilty before a conviction was entered against him. The accused in the other cases moved the Supreme Court in revision and also appealed on questions of law.

HELD (i) that the pleas in the cases are so phrased that it is a matter of inference as to whether they are unqualified admissions of guilt,

(ii) that the doubt as to whether the pleas are unqualified must, in the circumstances of the cases, be resolved in favour of the accused,

(iii) that, as the Magistrate had not recorded a formal conviction of the accused in any of these cases, the pleas could at the option of the accused be withdrawn and treated as never having been made and

(iv) that the accused in cases Nos. 97, 98, 99, were entitled to an order quashing the proceedings had against them on 30th January, 1940, and remitting the cases for trial by a different Magistrate.

Followed:

Fernando v. *Costa*, (1918) 5 C.W.R. 225 (1)
Roosemalacocg v. *Sally*, (1935) 37 N.L.R. 139 (2)

Applications to revise proceedings held by H. S. Roberts Esq., Magistrate of Hatton, and appeals against convictions entered by him after refusing to allow the accused to withdraw their pleas of guilty.

L. A. Rajapakse, with him *K. Satia Vagiswara Aiyar* and *M. Balasunderam*, for the petitioners and appellants.

M. T. De S. Amarasekera K.C., Actg. Solicitor General, with him *Nihal Gunasekere*, Crown Counsel, for the complainant respondent.

HOWARD C.J.—The points that arise for decision in these cases are the same and in these circumstances Counsel on both sides have

asked that they should be taken together. In Applications for Revision in M.C. Hatton Nos. 97, 98 and 99 the petitioners pray that the Court may be pleased to quash the proceedings had against them on the 30th January, 1940, and thereafter make order directing the continuation of the trial in accordance with the law. In Applications for Revision in M.C. Hatton Nos. 101, 102, 103, 104, 107, 108, 110, 111 and 112, and in Appeals M.C Hatton Nos. 100, 101, 102, 103, 104, 107 and 108, the petitioners pray that the Court may set aside the convictions and sentences entered against them and make order allowing the appellants to withdraw their pleas of guilt and make such other orders as may seem meet and proper to the Court. In cases Nos. 97 and 98 each of the petitioners on the 30th January, 1940, who on the 22nd January, 1940, had pleaded "not guilty," stated: "I am guilty. I will leave the estate in a week." The Magistrate thereupon made order as follows: "Call case on the 7th February at Nuwara Eliya." In case No. 99 the accused made the same statement and the Magistrate thereupon made order as follows: "Call case at Nuwara Eliya on the 7th February. Sentence deferred until then." No further orders have been made by the Magistrate in these three cases.

In the other cases the Magistrate on the 30th January, 1940, made the same order as in cases Nos. 97 and 98. On the 7th February, 1940, Counsel for each of the accused applied to withdraw the latter's plea of guilty. This application was refused and the Magistrate then found each of the accused guilty on his own plea and convicted them and sentenced them to a term of one month's rigorous imprisonment. On behalf of the various accused, Mr. Rajapakse has contended that the Magistrate was wrong in law in refusing to allow the accused to withdraw their pleas of guilty. The Acting Solicitor-General admits that, if the pleas of guilty were qualified, they could be withdrawn. He also admits that the wording of those pleas and the affidavits of the accused in support of their petitions permit of some doubt as to whether the pleas in law amounted to unqualified admissions of guilt. In these circumstances, he suggests that the matter should be referred to the Magistrate for report. I am of opinion that the pleas are so phrased that it is a matter of inference as to whether they are unqualified admissions of guilt. It is conceivable that they amount to a plea of guilty on the condition that a week is allowed for the accused to leave the estate. If this inference is correct, the plea of guilty was not unqualified. In these circumstances the doubt as to whether the pleas are unqualified must be resolved in favour of the accused. I, therefore, hold that the accused should in these cases have been permitted to withdraw their pleas and substitute pleas of "not guilty."

Even if the pleas were unqualified, it is maintained by Mr. Rajapakse that they could be withdrawn. The Magistrate has not recorded a formal conviction of the accused in any of these cases. In these circumstances, the judgment of BERTRAM A.C.J., in *Fernando* v. *Costa* (1), is authority for the proposition that such pleas could at the option of the accused be withdrawn and treated as never having been made. *Roosemalaccoq* v. *Sally* (2) is a further authority for the same proposition. In cases Nos. 100, 101, 102, 103, 104, 107, 108, 110, 111 and 112 the convictions and sentences must be set aside and the cases remitted to be tried by a different Magistrate.

In cases Nos. 97, 98 and 99 the proceedings are also quashed and the cases remitted for trial by a different Magistrate.

Proceedings in cases No. 97, 98 & 99 quashed. Convictions in the others set aside and cases remitted for trial.

[Proctor for petitioners and appellants: *S. Sellathurai.*]

—H. W. T.

G. H. M. K. DE SILVA v. S. D. SEENATH UMMA & 3 OTHERS

[HOWARD C.J., SOERTSZ, HEARNE, KEUNEMAN & WIJEYEWARDENE JJ.
S.C. No. 1 (Final)—D.C Tangalle No. 4226. MARCH 7, 19, 1940.]

Appeal—Security for costs—Notice of security tendered with petition of appeal within time—Inability of fiscal to serve notice on one of the respondents before the returnable date of notice—Acceptance of security by court on the returnable date of the notice—Notice re-issued and made returnable on a date beyond the twenty-day period—Absence of respondent on such date—Notice of appeal ordered by Court—Is appeal properly constituted?—Civil Procedure Code, S. 756.

Observations on the necessity of obtaining directions from Court for service of notice of security—Civil Procedure Code, S. 356.

HELD (i) that notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by Court,

(ii) that a copy of the petition of appeal must be furnished at or before the time the security is accepted and the deposit made,

(iii) that security must be tendered and perfected, and the deposit made, within 20 days of the giving of the notice of security,

(iv) that failure to comply with the requirement in paragraph (i) above and/or the requirement in paragraph (ii) is fatal and sub-section 3 of S. 756 does not permit relief to be granted by the Supreme Court in respect of it and

(v) that omission to tender and perfect security and to make the deposit within 20 days, and other omissions, mistakes and defects occuring in the course of tendering security and perfecting the appeal generally may be condoned by virtue of sub-section (3) in proper cases, if the respondent has not been materially prejudiced by such omission, mistake or defect.

Followed: *Zahira Umma* v. *Enid V A Abeysinghe & others*, (1937) 8 C.L.W. 26 (2)
Fernando v. *Nikulan Appu*, (1920) 22 N.L.R. 1 ... ... (4)
Kangany v. *Ramasamy Rajah*, (1918) 21 N.L.R. 106 ... (5)
Referred: *Katonis Appu* v. *Charles & another*, (1938) 12 C.L.W. 162 ... (1)
Freeman v. *Tranch*, (1852) 21 L.J.C.P. 215 ... ... (3)

H. V. Perera K.C., with him *S. W. Jayasuriya* and *Ranatunga* for 1-4 defendants-appellants.

E. B. Wickremanayake, with him *C. C. Rasa Ratnam*, for plaintiff-respondent.

SOERTSZ J.—A preliminary objection has been taken to the hearing of this appeal on the ground that it is not properly before this court, inasmuch as, it is contended, it must be held to have abated in the court below, for want of conformity with an essential requirement of section 756 of the Civil Procedure Code.

It is deplorable that despite the fact that this section of the Code has functioned in the Civil courts of this Island almost daily for over sixty years, there should be so much misapprehension and uncertainty as to its meaning. In the case of *Katonis Appu* v. *Charles and others* (1), ABRAHAMS C.J. felt compelled to observe in the year 1938 that "it is certainly about time that it was fully understood what the provisions of section 756 entail. There have been sufficient decisions over a number of years to make it perfectly clear; but these cases still go on and litigants pay." Today, the position is no better. If anything it is worse. Preliminary objections to the manner in which appeals have been constituted are of such frequent occurrence that they may be said to form a part of the order of the day in our courts of appeal. They

have become a "positive nuisance" and they occupy so much of the time of this court with matters of trivial routine that my Lord the Chief Justice has thought fit to exercise the power vested in him by section 51 of the Courts and Their Powers Ordinance and give directions for five Judges to assemble and consider this matter, in the hope that the parties concerned will take occasion to co-operate in order to put an end to a state of things that may well be described as scandalous. The facts upon which the objection taken here is based are as follows:—On the 18th of August, 1938, the appellants tendered their petition of appeal together with a notice of security calling upon the plaintiff-respondent and the defendant-respondent to take notice that they (the appellants) would on the 1st of September, 1938, move to tender security for the cost of the appeal by offering one A. L. M. M. Sahib as surety, and that they would, on the same day, deposit a sufficient sum of money to cover the expense of serving the notice of appeal. Thereupon, the Court ordered notices to issue on the repondents to the appeal, returnable on the 1st of September, 1938, which was the date specified in the notice as the date on which security would be tendered and this date, although it fell within the twenty-day period mentioned in section 756, was perilously near the end of it. However, the defendant respondent was served before that date, but the Fiscal reported on the 31st of August, 1938, that his officer had made search for the plaintiff-respondent but could not find him and that it was said that he had gone to Ambalangoda in the District of Galle for medical treatment. On this, the Court made order "security will be tendered today...Re-issue on plaintiff-respondent for 3/10", a date far beyond the twenty-day period within which security for costs had to be accepted. When the case was called on that day, the Fiscal's report showed that the notice was served on the plaintiff-respondent on the 12th September, 1938. But he was absent, and the Court ordered notice of appeal to issue for the 3rd November, 1938. That order, of course, implied that the Court regarded the security that was, in point of fact, tendered and perfected on the 1st of September, 1938, eleven days before the notice of security had been served on the plaintiff-respondent, as a compliance with the requirement of section 756 that there must be procurement of the acceptance of the security *within twenty days* of the giving of the notice of the security. It was, obviously, in that view of the matter that the court issued notice of appeal and directed the subsequent steps to be taken for the appeal to reach this court. It is now contended on behalf of the respondents that there was no proper acceptance of the security on the 1st of September, 1938, because by that date the plaintiff-respondent had not received notice of security and had not had an opportunity to be heard in regard to it, and that, therefore, the proper course for the District Judge to have taken was to hold the petition of appeal to have abated and to have abstained from taking the further steps that he took.

Counsel for the appellants concede that there is technical force in this objection but they ask for relief under sub-section (3) of section 756 on the ground that the plaintiff respondent has not been materially prejudiced by what has occurred in this case. The question that then arises for our consideration and decision is in what instances of failure to observe the provision of section 756, relief may be granted under this sub-section. For the appellants, the submission is made that sub-section 3 empowers this court to grant relief in all cases of failure, whether *substantial* or *incidental*, provided the respondent to the appeal has not been materially prejudiced.

This question was considered by a Divisional Bench of Three Judges of this Court—*Zahira Umma* v. *Abeysinghe & others* (2), and ABRAHAMS C.J., who delivered the judgment of that Bench said: "It seems to me that there are two forms of a breach of section 756 in respect of which this court *ought not* to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made *without an excuse*, and the other is when, though *non-compliance with an essential term may be trivial*, a material prejudice has been occasioned."

This is an authoritative decision of this Court and, if we may say so, contains a correct statement of the meaning of section 756 read as a whole; but, in view of the fact that that decision does not appear to have been fully appreciated in the succinct form in which it has been expressed, it seems desirable to elucidate its meaning. The first part of that statement is intended to lay down that, where there has been a *total failure* to comply with one of the terms of section 756, relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such a failure, for peremptory requirements of the law must be given full effect. Such requirements must be put before the interests of individuals and courts have no power to absolve from them. If I may quote the words of MAULE J. in *Freeman* v. *Tranch* (3), "although instances are constantly occuring where courts might profitably be employed in doing simple justice between the parties, unrestrained by precedent or by any technical rule..., the proceedings of all courts must take a defined course, and be administered according to a uniform system...and it is probably more advantageous that it should be so, though at the expense of some occasional injustice."

Now, section 756 speaks in imperative terms when it enacts that the petitioner "shall forthwith give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days...tender security...and will deposit a sufficient sum of money to cover the expenses of serving notice." In the case before that Divisional Bench, the appellant gave no notice at all of security to be tendered, but within the period of twenty days she produced what she claimed to be adequate security, and the first part of the statement I have cited from the judgment of ABRAHAMS C.J. dealt with the actual case before the Bench, and held that the failure on the part of the appellant to give notice of security was fatal. But in coming to that conclusion ABRAHAMS C.J. appears to have taken notice of the fact that the failure was one for which no excuse was given, for in the preceding sentence he said. "the petitioner says she did everything she could, but she has not given any *excuse* for not doing what she should." The argument in the course of the case before us indicated that this qualification has created some doubt. The qualification seems to imply that a complete non-compliance with one of the terms of section 756 may be condoned if a good excuse is forthcoming, but I think I am in a position to say—and the context supports the view—that when ABRAHAMS C.J. used the words "without an excuse," he had in mind the practice that obtained in some courts for proctors to waive security for costs by arrangement among themselves, and he intended to say that in a case where no notice of security was given in pursuance of that practice, an objection taken in this court that the letter of the law had not been complied with would be over-ruled and the failure excused, for a party may waive a rule of Civil Procedure intended for his benefit, and such a waiver would estop

him from thereafter insisting upon the requirement he had waived. I can imagine no other excuse that could avail a party who has failed to comply with the peremptory requirement to give notice of security. In the case ABRAHAMS C.J. was considering, it is not quite correct to say that the appellant 'has not given any excuse for not doing what she should.' She did, in fact, put forward an excuse. She said, "She was unable at the time when she ought to have given notice of security to say what form the security was going to take", and so she waited till she could ascertain that. Logically, this appears to be a valid and cogent excuse, but it was rejected, just as any other excuse than the one I have referred to would have had to be rejected, in view of the peremptory terms of the requirements.

Again, in the course of the argument in this case, there was indication that difficulty had arisen from the use of the words 'ought not to give relief', when in the course of the judgment ABRAHAMS C.J. stated: "It seems to me that there are two forms of a breach of section 756 in respect of which this court *ought not to give relief*." It was submitted to us that those words imply that, in regard to both forms of breach, this court could give relief, if it would, but that ABRAHAMS C.J. took the view that this court ought not to exercise its discretion to do so, and upon that submission it was contended that such a judicial dictum was no more than pious opinion." I am unable to accept that suggestion. It seems to me that here too, in the context, 'ought not' must be taken to mean 'ought not for the reason that the law does not permit', for, after saying that, ABRAHAMS C.J. went on to say that the other breach that this court '*ought not to*' relieve from 'is when, though non-compliance with an essential term may be trivial, a material prejudice has been occasioned.' It is obvious that in that context '*ought not*' must mean 'cannot' for sub-section 3 implies, beyond any manner of doubt, that relief may not be granted when the respondent has been materially prejudiced by the failure.

The result thus reached is that this court is not empowered by sub-section 3 to grant relief where there has been a failure to comply with an essential requirement of section 756 regardless of the question of prejudice, but may do so in cases in which there has been 'mistake, omission or defect *in complying* with the provisions of section 756' provided the respondent has not been materially prejudiced.

I cannot read sub-section 3 in the manner proposed by the appellants' counsel as covering 'all failures'; for, to read it in that way, that sub-section will have to be recast, for instance, as follows: "*in the case of failure to comply with, or* of any mistake, omission or defect *in complying with*."

The next question is what are the requirements of section 756 that *must* be complied with unless they have been *expressly* waived. Section 756 (1) sets them forth explicitly. They are (1) that the appellant, once the petition of appeal has been received, shall give notice *forthwith* that he will *on a* date within twenty days of the giving of the notice (a) tender and perfect his security (b) that he will deposit a sum of money sufficient to cover the expenses of serving the notice of appeal; (2) that he shall furnish a copy of the petition of appeal for service on the respondent or his proctor. Two of these matters are immediately in his power, namely, the giving of notice forthwith and the furnishing of the copy of the petition of appeal. The two other matters, namely, the tendering of the security and of the deposit to cover expenses of the

service of notice of appeal are not immediately in his power, for they can be effectually done only with notice to the respondent. Section 756, therefore, gives him twenty days' time for that purpose, and of course, requires him to contrive things so as to discharge those obligations within twenty days. The effect of section 756 is that the failure on the part of the appellant to comply with the matters immediately and completely in his power may not be excused, the other matters may be excused if there has been a 'reasonable' omission, mistake or defect and the respondent has not been materially prejudiced.

The question then arises as to how the present case stands. There can be no question that these appellants duly furnished a copy of the petition of appeal and give notice of security forthwith for they tendered this notice with their petition of appeal. In my opinion, it is clear from the words used in section 756 that when it was provided that notice should be *given* forthwith, what was intended was that notice should be tendered or filed forthwith, not that it should be served forthwith, for there is made available by the section itself an interval within the period of twenty days within which to serve notice. It is in this sense that the words '*give* notice forthwith' were interpreted in *Fernando* v. *Nikulan Appu* (4), and our ruling is that that is "the meaning of the words 'give notice' in this section." There has, therefore, been a compliance by the appellants with the requirements of section 756 that were immediately and completely at their disposal, but in consequence of the mode employed by them to have this notice served on the respondent, it came to pass that service on the plaintiff-respondent could not be effected in time to afford him an opportunity to be heard in regard to the security if he had any objection to offer to its acceptance before the twenty days elapsed. If I may say so with respect, the view taken in the case of *Kangany* v. *Ramasamy Raja* (4) is correct, namely, that the notice that should be given to a party respondent is an effective notice, that is to say, a notice that is served on him in time to enable him to be heard in regard to the security before it is accepted within the twenty days allowed by section 756. In that case, a notice that reached the respondent 'a day after the date on which security was tendered and perfected' was held to be an insufficient compliance with the section and the appeal was rejected for that reason. That case, however, was decided in 1918, when sub-section 3 was not in existence. Today, the position is different.

When the appellants in this case tendered the notice of security for costs, they followed the course usually taken in regard to service of processes or notices, for section 356 of the Code says that 'all notices and orders required by this Ordinance to be given to or served upon any person, shall, *unless the Court otherwise directs*, be issued for service to the Fiscal.' Evidently the appellants hoped that it would be possible to serve the notices on the respondent through the Fiscal within time, but in view of the peremptory direction in section 756 that the security should be accepted within twenty days, they ought to have considered the desirability of asking for special directions to be given by the Court for the service of this notice. They could, for instance, have asked to be allowed to serve the notices on the proctors for the respondents. But their failure to do that was not a failure to comply with any special requirement of section 756, for there is no requirement in that section in regard to the manner in which notice of security shall be served, it was only an omission to take a more effective course in complying with an imperative requirement of section 756, namely, the requirement of giving notice of security. As an omission, it falls within the words of

sub-section 3 and this Court has the power to grant relief from the consequences of the omission, if no material prejudice has resulted to the respondent. Now, it seems clear that in this case there is sufficient security given for the respondents' costs of appeal. The defendant-respondent who was served with notice in time had nothing to say against it, and the plaintiff-respondent himself has not up to now urged anything against it, and I can imagine no prejudice that will result to the respondents from this omission, mistake or defect. The next question is ought we to grant relief. In regard to that matter, I think we must not overlook the fact that the appellants took the course that has been usually followed for giving notice of security. They were able by those means to have notice served in time on the defendant-respondent. It was the extraordinary fact that the other respondent had just at this time left the district temporarily that prevented service being effected on him within the period of twenty days.

For these reasons, I am of opinion that relief may properly be granted in this case, a direction given that the appeal be listed in the usual course. But I think we should state quite clearly that our decision in this case does not mean that in future cases we shall, necessarily, give relief in similar circumstances. The experience of these appellants in this case must serve to teach other appellants the hazards to which they expose themselves when, in too sanguine expectation, they resort to the usual mode prescribed for the service of processes and notices, oblivious of the fact that while in nearly every other instance there is no time limit imposed by the Ordinance for the service, in the instance of section 756 a definite and somewhat exiguous period is fixed. That is a fact to which appellants should pay careful attention, and they should not omit to ask for special directions from the Court whenever it appears likely that the usual mode of service may not serve their purpose.

To sum up, the conclusions reached are that (a) notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the Court, *Fernando* v. *Nikulan Appu*, supra; (b) a copy of the petition of appeal must be furnished at or before the time the security is accepted and the deposit made; (c) security must be tendered and perfected, and the deposit made within twenty days of the giving of the notice of security; (d) failure to comply with (a) and/or (b) is fatal and sub-section (3) of section 756 does not permit relief to be granted by this Court in respect of it; (e) omission to tender and perfect security and to make the deposit within twenty days, and other omissions, mistakes and defects occuring in the course of tendering security and in the course of perfecting the appeal generally, may be condoned by virtue of sub-section 3 in proper cases, if the respondent has not been materially prejudiced by such omission, mistake or defect.

In view of these conclusions, the case before us appears to be typical of the cases in which relief may be granted and for that reason I have already expressed my opinion that it should be listed in the ordinary course for consideration on the merits of the appeal.

In all circumstances, I think that no order for the costs of this preliminary discussion need be made.

HOWARD C.J. and HEARNE, KRUNEMAN & WIJEYEWARDENE JJ. agreed.

Relief granted: appeal listed.

[Proctor for defendants-appellants: *L. G. Poulier.* Proctor for plaintiff-respondent: *A. D. de Silva.*]

—K. S. A.

VIOLET CATHERINE PERERA v. BROWN & CO. LTD.

[WIJEYEWARDENE J. *S C. No. 859 (1939).* MARCH 13, APRIL 15, 1940.]

Workmen's Compensation—Death resulting from assault by fellow workman following a dishonest claim made by the latter to a screw-driver with which the former worked and which belonged to the employer—Was death caused by accident ?—Was injury caused by accident arising out of or in the course of the workman's employment ?—Workmen's Compensation Ordinance, S. 3—Leg. Enact. Vol. III, Ch. 117.

P. was a workman employed under the firm of B. P. was paid on an hourly basis, the hours of work being 8 a.m. to 5 p.m. He was allowed to stay at the premises, where a dynamo was being installed by the firm of B , with the permission of the authorities in charge of the premises. It was alleged that one S. had previously made a dishonest claim to a screw-driver with which P. worked and which belonged to the firm of B. While P. got out of the line room where he had his meal after the day's work, he was assaulted fatally by S. and he died the next day.

HELD (i) that the death of P. was caused by 'accident' within the meaning of S. 3 of the Workmen's Compensation Ordinance but

(ii) that the accident did not arise out of or in the course of P.'s employment within the meaning of the said section.

Referred to:

Board of Management of Trim Joint District School v. *Kelly*, (1914) A.C. 667 (1)
St. Helens Colliery Co Ltd. v. *Hewilson*, (1924) A.C. 59 ... ... (2)
Lee v. *Breckman*, (1928) 21 B.W.C.C. 32 ... ... (3)
Smith v. *Stepheny*, (1929) 22 B W.C C. 451 ... ... (4)

J. R. Jayawardene, with him *M. M. Kumarakulasingham*, for the applicant-appellant.

F. C. W. Vangeyzel for the respondent.

WIJEYEWARDENE J.—The applicant-appellant is the widow of one Edwin Perera, a workman employed under the respondent firm.

The respondent firm, which has its head office in Colombo, entered into a contract to instal a dynamo at the Borstal Institute at Watupitiwela. The firm sent a number of workmen including Perera to Watupitiwela. Perera was paid on an hourly basis, the hours of work being 8 a.m. to 5 p.m. When working at Watupitiwela, Perera received in addition a daily allowance of 50 cts. to cover any extra expenditure he had to incur in living out of Colombo. The firm did not provide accommodation for the workmen at Watupitiwela but informed them that they could make use of any accommodation available at the premises with the permission of the authorities in charge of the premises.

On April 1st, 1939, while Perera was attending to some work, one of his fellow workmen asked for his screw-driver. Perera searched for it and found it missing. Shortly afterwards a small screw-driver was found by a fellow workman of Perera in the possession of Soysa, himself a workman employed at the premises It is not clear from the evidence whether Soysa was also a workman employed under the respondent firm. The screw-driver was identified by several workmen as the property of the respondent firm and claimed by Perera as the one with which he worked. Soysa, on the other hand, claimed the screw-driver as his own, but gave it to Perera and abused Perera and his fellow workmen, who said it was the property of the respondent firm. Nothing further happened till April 4th. By noon that day, Perera finished his work and was arranging to return to Colombo when his superior asked him to stay back until the machine was tested. At 6 p.m. that day,

Perera and some other workmen went to bathe. On their way back to their lines they went to a tea-boutique, where they met Soysa who threatened them again and attempted to hit Perera. They went back to their lines at about 6.50 p.m., and had their meals. Some time afterwards Perera got out when he was assaulted fatally by Soysa. He died the next day.

The questions of law to be considered in this appeal are:—

1. Whether Perera's death was caused "by accident" within the meaning of section 3 of the Workmen's Compensation Ordinance;

2. Whether the injury was caused by accident, (a) arising out of Perera's employment and (b) in the course of Perera's employment.

There is no difficulty in answering question (1) in the affirmative in view of the decision of the House of Lords in *Board of Management of Trim Joint District School* v. *Kelly* (1), where Viscount HALDANE L.C. held that "accident" is a mishap unexpected by the workman irrespective of whether or not it was brought about by the wilful act of someone else.

There are numerous English decisions, which seek to elucidate the words "arising out of employment" and "in the course of employment" but it is almost hopeless to try and reconcile them. It may, however, be taken as an accepted principle that these words in the section should be given an extensive interpretation. But even with such an interpretation, could it be said that Perera received his injury in the course of his employment? His work for the day was over at 5 p.m. He was under no obligation to live on the premises. It was merely a privilege conferred upon Perera of which he could have availed himself of or not as he pleased. In remaining on the premises after the hours of work Perera was not doing something in discharge of a duty to the respondent firm directly or indirectly imposed upon him by his contract of service, vide *St. Helens Colliery Co. Ltd.* v. *Hewilson* (2). Nor do I think that it could be stated that the accident arose out of the employment. There is no evidence whatever as to the immediate circumstances, which resulted in the assault on Perera. It was admitted at the argument before me that Soysa was indicted for murder but was found guilty of culpable homicide not amounting to murder. This could only be accounted for by the fact that Soysa pleaded successfully (a) that he acted under grave and sudden provocation or (b) that acting in the exercise of the right of private defence he exceeded the power given to him by the law or (c) that he committed the act without premeditation in a sudden fight. I shall, however, deal with this part of the case on the assumption that the assault was in some way connected with the suggestion that Soysa made a dishonest claim to the screw-driver. It cannot be said that employment under the respondent firm involved a special risk to be assaulted by a person against whom a workman may make such a suggestion. It is a risk that any one may run. Perera by his employment did not expose himself to a risk not incurred by an ordinary member of the public, vide *Lee* v. *Breckman* (3) and *Smith* v. *Stepney* (4). I think that *Board of Management of Trim Joint District School* v. *Kelly*, supra, could be distinguished as in that case there was some evidence of the unruly character of the pupils with whom the deceased person had to deal and there was a finding by the County Court Judge to that effect. It may, perhaps, be added that in cases under the corresponding Statute in England, the County Court Judge acts as an arbitrator and "his award

can, therefore, be set aside only if it is apparent that there was no evidence to support it or if an error in the law appears on the face of it."

I dismiss the appeal but I make no order as to the costs of appeal.

Appeal dismissed.

[Proctor for applicant-appellant: *Valentine S. Perera.* Proctors for respondent: *Julius & Creasy.*]

—K. S. A.

KING *v.* W. S. PERERA

[HOWARD C.J. & SOERTSZ J. *S C No. 99—D.C. (Crim.) Col. No. 12550.* FEBRUARY 21, 22 & 28, 1940.]

Evidence—Charge of mischief—Evidence of incidents in which the accused took no part tendered—Admissibility of such evidence—Statement made by witness to police officer in course of investigation under Ch. XII of the Criminal Procedure Code—Right to cross-examine police officer upon such statement so as to discredit witness—Criminal Procedure Code, S. 122 (3)—Evidence Ordinance, S. 155 (3).

The driver of an omnibus belonging to A was charged with committing mischief by wilfully and intentionally backing it and making it collide with an omnibus belonging to B The prosecution alleged that there was rivalry between A and B, that there was an organized conspiracy on the part of employees of A to harass B's omnibuses and this conspiracy culminated in the wilful damage inflicted on B's 'bus Evidence was tendered of a number of incidents showing such conspiracy but there was no proof that the accused had any connection with these incidents except for the fact that he was the employee of A. The trial Judge disallowed the cross-examination of a witness for the prosecution on a statement alleged to have been made by him to a police officer. When this police officer was tendering evidence for the defence, a question with regard to something which the above witness had told the police officer was dissallowed. On appeal against the conviction of the accused,

HELD: (i) that evidence of incidents unconnected with the charge is inadmissible and the conviction, therefore, cannot be allowed to stand,

(ii) that statements made to police officers conducting inquiries under Chapter XII of the Criminal Procedure Code can be used to prove that a witness made a different statement at a different time and

(iii) that such statements may legitimately be used for the purpose of discrediting a witness under S. 155 (3) of the Evidence Ordinance.

Referred to: *Dias v. Kiriwanthia,* (1918) 5 C.W.R. 187 ... ... (1)

R. L. Pereira K.C., with him *J. E. M. Obeysekera,* for the accused-appellant.

Nihal Gunasekera, Crown Counsel, for the Crown-respondent.

HOWARD C.J.—The appellant was convicted on the 15th September, 1939, in the District Court of Colombo of committing mischief on the 16th July, 1938, at Peliyagoda by wilfully and intentionally backing his omnibus No. X 4524 and making it collide with omnibus No. Z 3695, property of one G. D. E. Malwana, and thereby caused loss or damage to the omnibus No. Z 3695 to the amount of Rs. 571/60 and thereby committing an offence punishable under section 410 of the Ceylon Penal Code. The appellant was acquitted of a further charge of committing an offence punishable under section 426 of the Ceylon Penal Code. The two omnibuses concerned in this collision belonged to rival owners, Z 3695 being the property of Malawana whose buses are called "Siyarata"

and X 4524 the property of another owner whose buses are known as "M.J.". The story told by Peter the driver of bus Z 3695 and the other eye-witnesses called by the Crown was as follows: Z 3695 left Kurunegala about 8.30 a.m. on the day in question *en route* for Colombo. As Z 3695 approached the Socony Petrol Service Station at Peliyagoda on the new main road to Kandy, Peter saw ahead of him an M.J. bus halted on its left facing the direction of Colombo. As he approached closer he saw another bus belonging to the M.J. Company coming from the direction of Colombo. The oncoming M.J. bus as it neared the halted M.J. bus began to decrease its speed and came so close to the halted M.J. bus that there was no room for Z 3695 to pass in between although there was ample room for the oncoming bus to have kept to its left and permitted Z 3695 to pass between it and the halted M.J. bus In these circumstances, Peter says, he brought his bus to a halt about 30 feet behind the halted M.J. bus to permit of the oncoming bus keeping to the course it had set itself. About a minute or half a minute after he had halted his vehicle and, as the oncoming M J. bus was passing away, the M.J. bus No. X 4524 that was halted in front of him was reversed by the accused who was driving and dashed into him. Peter further says that, after the first impact, bus X 4524 was driven forward about two or three fathoms and reversed a second time into his bus. At this stage he got down from his bus and saw the operation repeated by the M J. bus once more. Peter also says that after the first impact he heard someone near the bus say, "Michael, knock it till it is reduced to matchwood."

The case for the prosecution is based on the ground that as the result of inter bus rivalry, there was an organized conspiracy on the part of the employees of the M.J. firm to harass the Sivarata buses and this conspiracy culminated in the wilful damage inflicted on bus Z 3695 as the result of the deliberate backing of X 4524 by the accused. It is suggested by the prosecution that the shunting in of Z 3695 between the oncoming M.J. bus from Colombo and the stationary X 4524 was deliberately planned. As additional proof of such a conspiracy a whole mass of evidence has been tendered by the prosecution of events which are alleged to have happened on the Kurunegala – Colombo road not only on the day in question but also on the two previous days, the 14th and 15th. This evidence seeks to establish that M.J. buses were continually harassing Peter the driver of bus Z 3695 in the course of his journeys to Colombo on these particular days. Not only has evidence of the facts of these harassings been tendered, but also complaints made by Peter to the police and to his master with regard to what happened. I am unable to understand the relevancy of this evidence in relation to the charge against the accused. It has not been established that the accused was a party to such a conspiracy on the part of M.J. employees. There is no proof that he participated in the harassings that are alleged to have taken place earlier in the day and on the two previous days on the Kurunegala—Colombo road. The only connection between the accused and these happenings is the fact that he, like the persons who are alleged to have been responsible for them, is an employee of the M.J. firm. That fact in itself is in my opinion insufficient to permit the admission of such evidence in a criminal charge against the accused. All this evidence was clearly inadmissible. Perusal of the judgment of the learned District Judge indicates only too clearly the extent to which he has been influenced by this evidence in coming to a decision. Thus he refers to a few facts with regard to the bus rivalry which he regards as furnishing the background to the incidents that form the subject matter of the charge.

He also states that the motive behind the commission of the offence would seem to be to wreck the newly started bus service by Malawana and to force him to keep off the road The whole judgment of the learned District Judge is coloured with the idea of a planned attempt on the part of the M.J. firm to harass and injure their rivals. In these circumstances it is obvious that for no reason other than the improper admission of this evidence the conviction cannot be allowed to stand.

Apart from the improper admission of evidence to which I have referred, there are other grounds for allowing this appeal. Counsel for the appellant sought in the District Court to cross-examine the witness Appuhamy on an alleged statement made by him to P.C. Wambeck. This cross-examination was disallowed by the District Judge under section 122 (3) of the Criminal Procedure Code. P.C. Wambeck when tendering evidence for the defence was asked a question with regard to something Appuhamy had told him. On objection by Crown Counsel the question was disallowed. It seems to me that these questions were disallowed as the result of an erroneous interpretation of section 122 of the Criminal Procedure Code. Statements made to officers conducting inquiries under chapter XII of the Criminal Procedure Code can be used to prove that a witness made a different statement at a different time. Such statements may be legitimately used for the purpose of discrediting a witness under section 155 (3) of the Evidence Ordinance. In this connection I would refer to *Dias* v. *Kiriwanthia* (1). In my opinion the questions to Appuhamy and P.C. Wambeck which Counsel desired to put with the express purpose of discrediting the former should have been allowed.

As distinct from legal questions affecting the admissibility of of evidence I am of opinion that the evidence taken as a whole falls far short of the standard required for the conviction of the appellant on a criminal charge. The story put forward by the prosecution was of a most improbable character. It presupposes that those engaged in the conspiracy had selected this particular spot for their nefarious design. If such a design was planned, it is highly improbable that this particular locality would have been selected. The road was wide, the traffic was voluminous and moreover it was contiguous to a police station. Foot passengers must have been numerous. The locality does not seem to lend itself for such an object particularly as, according to the case put forward by the prosecution, ample opportunities were available earlier in the morning when Z 3695 was being hemmed in by M.J. buses all the way from Kurunegala. For its success the plan required that the stationary bus X 4524 and the oncoming bus from Colombo should conduct their manoeuvres at this spot at the very moment when Z 3695 arrived at the locality. It is impossible to imagine that such accurate timing of the movements of the three buses could have been planned. If the probability of the story of the prosecution is to be judged by ordinary standards of common sense, it is highly improbable even allowing for intensive bus rivalry that the owners of M J. buses would risk the injury to X 4524 by an operation of this nature.

I have not only to consider the probability of the story put forward by the prosecution, but also the weight of evidence. It seems to me that the learned Judge has not fully appreciated the evidence of the Motor Engineer Mr. Beven. His evidence is to the effect that the tyre marks are indicative of the brakes of Z 3695 having been applied whilst this bus was in motion. This and the position of the two buses suggest that Z 3695 ran into X 4524, and thus the whole fabric of the

case for the prosecution as built up falls to the ground. This theory is also supported by the fact that Z 3695 was not found pulled up paralled to the road, but was straddled across the road at an angle.

The learned District Judge has not only failed to distinguish between the inherent probabilities of the two stories and to give due weight to the technical evidence, but has also failed to take into consideration the fact that only two out of the twenty-four passengers in the bus have testified on behalf of the prosecution. I think the verdict was clearly contrary to the weight of evidence and, in the circumstances, the appeal must be allowed and the conviction set aside and the appellant discharged.

SOERTSZ J.—I agree.

Appeal allowed: conviction set aside.

—K. S. A.

R. L. NELSON *v.* C. M. NELSON

[SOERTSZ & KEUNEMAN JJ. *S.C. (Inty.) Nos. 150-151—D.C. Colombo No. 1120.* MARCH 18, 19, APRIL 15, 1940.]

Divorce—Decree nisi *entered—Allegation of subsequent collusion between the parties—Is it competent to Court to entertain such allegation ?—Civil Procedure Code, Ss. 604 & 606.*

Held that any person is entitled to intervene in a matrimonial action after the entering of decree *nisi* and prove that collusion has taken place after the decree *nisi* was entered.

Per SOERTSZ J.—"Section 606 of the Civil Procedure Code.....authorizes a person who suspects collusion between the parties for the purpose of obtaining a divorce, to apply to the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make decree in accordance with the justice of the case, and he is permitted to make the application at any stage of the progress of the action on the ground that there is 'present' collusion or that there has been collusion at any relevant point of time. 'Progress of the action' in the context, clearly covers the period from the institution of the action to the entering of the decree absolute."

Referred to: *Hulse* v. *Hulse*, (1871) 24 L.T. 847 ... ... (1)
Rogers v. *Rogers* (1894) 70 L T. 699 ... ... (2)
Fender v. *Mildmay*, (1937) 3 A.E.R. 402 ... ... (3)

N. Nadarajah, with him, *M. Tiruchelvam*, for the plaintiff-appellant in 150, and for the plaintiff-respondent in 151.

R. L. Pereira K.C., with him, *C. X. Martyn*, for the defendant-respondent in 150 and for defendant appellant in 151.

E. G. Wickremanayake for the petitioner-respondent in both appeals.

SOERTSZ J.—In this case submissions were made to us, both on the law and on the facts. In the first place, counsel for the appellants sought to construe sections 604 and 606 of the Civil Procedure Code so as to make *both* sections applicable only to cases in which collusion or suppression of material facts has occurred *before* decree *nisi*. But, in my opinion, the plain meaning of the words of section 606 does not, at all, justify such a limitation.

Courts exercising matrimonial jurisdiction have always been gravely concerned to ensure that the marriage state which, according to

the earlier law, was permanent and indissoluable, should not, even in the less stringent modern view of that status, be terminable at the option of the parties, and elaborate precautions have been taken to make divorce as collusion-proof as possible. To that end, section 604 of our Code of Civil Procedure enacts that a decree dissolving the marriage bond shall, in the first instance, be entered in the form of decree *nisi*, not to be made absolute till, at least, three months have elapsed. During this interval, opportunity is given for *any person* to show that the decree *nisi* has been obtained by collusion or by suppression of material facts. Necessarily, the collusion or suppression contemplated in this section must have reference to something done or omitted before the date of that decree. But it is obvious that there may be collusion or suppression of material facts even during the period between the two decrees, and that there may be cases in which collusion becomes apparent or is suspected before the decree *nisi* stage is reached, or in which pre-decree *nisi* collusion or suppression of facts is suspected, or made apparent only after decree *nisi* has been entered.

Section 606 of the Civil Procedure Code is designed to provide for those contingencies It authorizes a person who suspects collusion between the parties for the purpose of obtaining a divorce, to apply to the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make decree in accordance with the justice of the case, and he is permitted to make his application at any stage of the progress of the action on the ground that there is 'present' collusion or that there has been collusion at any relevant point of time. "Progress of the action", in the context, clearly covers the period from the institution of the action to the entering of the decree absolute. This view is, I find, supported by some of the observations made in the course of the judgments delivered in the cases of *Hulse* v. *Hulse* (1), *Roger* v. *Roger* (2), and *Fender* v. *Mildmay* (3).

I am, therefore, of opinion that the petitioner was entitled to intervene in this action as he did, and to rely on the collusion that, he alleges, has taken place after decree *nisi* was entered.

All that remains is the question of fact whether the plaintiff and the defendant have resumed cohabitation. If they have, it follows that the decree *nisi* that has *been entered must be rescinded*, for to make it absolute, despite that fact, would, in the words of the trial Judge, 'be a travesty of judicial proceeding.' It would be tantamount to dissolving a marriage on the ground that there has been desertion by one spouse or the other when, as a matter of fact, both of them are living together. Such intriguing situations belong to comic opera.

In regard to this question of fact, the trial Judge has reached a very definite conclusion. He was in ever so much a better position than we are on a question of this kind, for he saw and heard the witnesses whose evidence, he says, he believes, and an appeal court would interfere with such a finding only in exceptional circumstances. In this case, the direct evidence is strongly supported by the circumstantial evidence, particularly by the fact that this so called reconciliation appears to have taken place at a time when the plaintiff was confronted with an application for writ made on behalf of the defendant, to enable her to recover a sum of Rs. 260/- due to her on account of accumulated alimony, and an application for an order on him to pay her a sum of Rs. 150/- to enable her to prosecute her appeal.

The learned trial Judge inclines to the opinion that the reconciliation, so far as the plaintiff is concerned, is pure stratagem to which he has resorted in order to escape from these applications made on behalf of the defendant, and to secure her inactivity till the decree is made absolute.

As for the defendant, she appears to have been floundering in a sea of trouble about this time, and she was only too ready to clutch at any straw in a desparate attempt to save herself.

I cannot help sharing that view.

The appeals fail and must be dismissed. The plaintiff-appellant will pay the petitioner-respondent's costs in both courts. I make no order for costs in regard to the defendants' appeal.

I wish to add that it will, perhaps, be as well if the District Judge gives directions to the Secretary that this case be brought to his notice in the event of either the plaintiff or the defendant suing for a divorce in the future.

KEUNEMAN J.—I agree.

Appeal dismissed.

—K. S. A.

AMIJEE AND OTHERS *v.* LEWIS AND OTHERS

[SOERTSZ & NIHILL J. *Application for writ of prohibition No. 417.*
FEBRUARY 6, MARCH 6, 1940.]

Joint Stock Company—Incorporated abroad—Winding up—Has District Court of Ceylon jurisdiction?—Does writ of prohibition lie?—Courts and Their Powers Ordinance, Ss. 42 & 62—Joint Stock Companies Ordinance, No. 4 of 1861, Ss. 67 & 68.

Held that a District Court has jurisdiction by virtue of section 62 of the Courts Ordinance to order the winding up of a Banking Company not registered in Ceylon. Sections 67 and 68 of Ordinance No. 4 of 1861 do no more than provide the test for ascertaining what particular District Court has jurisdiction to order winding up proceedings in any given case.

Per SOERTSZ J.—"If we are satisfied that District Courts as constituted by our laws have no jurisdiction to wind up companies other than those incorporated by registration in Ceylon.....we are at once face to face with a case of a patent lack of jurisdiction, and we are bound *ex debito justitiae* to grant the writ applied for regardless of the motives of the petitioners and of their delay in preferring their petition."

Referred to: *Worthington* v. *Jeffries*, (1874) L R C.P. 379 ... ... (1)
Farquhassen v. *Morgan*, (1894) L.R 1 Q B D 552 ... ... (2)
Mercantile Bank of Australia, (1892) 2 Ch. 204 ... ... (3)
North Australia Co. v. *Goldsborough Co.* 61 L.T. 716 ... (4)
In the matter of the application of John Ferguson for a Prohibition against the District Judge of Colombo, (1874) 1 N.L.R. 181 (5)

N. E. Weerasooriya K.C, with him *E. B. Wikramanayake* and *J. A. T. Perera*, for the petitioners.

H. V. Perera, K.C., with him *T. K. Curtis* and *C. C. Rasaratnam*, for 1st respondent.

N. Nadarajah for 2nd, 3rd and 4th respondents.

SOERTSZ J. The three petitioners, whose petition has been submitted to us for consideration, are decree holders against the

Travancore National and Quillon Bank, Limited. They make their petition to ask us to exercise the jurisdiction conferred on us by section 42 of the Courts Ordinance, and issue a writ against the District Judge of Jaffna prohibiting him from proceeding further with the compulsory winding up of that Bank on which he has been engaged in case No. L/2 of his Court, initiated at the instance of the 2nd, 3rd and 4th respondents. The 1st respondent is the official liquidator.

The petitioners' case is that the District Court of Jaffna usurped a jurisdiction that was never given to District Courts in this Island, when it addressed itself to the winding up of a Bank that has not obtained incorporation by registration under the provisions of Ordinance No. 4 of 1861 and Ordinance No. 2 of 1897, but is a Bank incorporated by registration in Quillon in the Native State of Travancore, in South India.

If we are satisfied that District Courts as constituted by our laws have no jurisdiction to wind up companies other than those incorporated by registration in Ceylon, for the winding up of which provision is made by the Joint Stock Companies Ordinance, we are at once face to face with a case of a patent lack of jurisdiction, and we are bound *ex debito justitiae* to grant the writ applied for regardless of the motives of the petitioners and of their delay in preferring their petition. Questions of motive and delay may have an important bearing in cases in which there has been encroachment by one Court on the jurisdiction apportioned to another Court of the same class, and not in cases in which there has been a manifest usurpation of jurisdiction. This fact emerges clearly in the judgment of BRETT J., in the case of *Worthington* v. *Jeffries* (1) and in the judgments of LORD HALSBURY and LOPES L.J., in *Farquhassen* v. *Morjan*, (2). I indulge in these observations only because Counsel for the respondents commented strongly on the motives and the delay imputable to the petitioners.

The sole question, then, that we have to answer is whether the petitioners have made out their case that in the matter of the winding up of companies, District Courts have jurisdiction only by virtue of the Joint Stock Companies Ordinance and only so far as companies falling within the provisions of the Ordinance are concerned. In regard to this question, the submission made to us by petitioners' Counsel in the course of the able and learned argument he addressed to us may be summarized as follows:- Ordinance No. 4 of 1861 provides in Part IV for the winding up of companies registered under that Ordinance *and of no other companies*, by the District Court having jurisdiction in the District in which the registered office of the Company in question is situate. (See sections 67 and 68). Banking and Insurance Companies were not within that Ordinance (see section 3) till it came about that the passing of Ordinance No 2 of 1897 brought Banks registered under that Ordinance within the purview of Ordinance No. 4 of 1861 in so far as the provisions of that Ordinance were not inconsistent with its own provisions (see section 2 of Ordinance 2 of 1897).

The Bank with which we are here concerned is not a Bank registered by virtue of Ordinance No. 2 of 1897, and, therefore, the provisions of Part IV. of Ordinance No. 4 of 1861 do not apply to it, and such jurisdiction as was conferred by sections 67 and 68 on District Courts in regard to winding up proceedings, does not extend to a case such as this, that is to say, to a case of the winding up of a bank registered abroad The conclusion reached by this line of reasoning is

that a company or bank registered abroad cannot be wound up in Ceylon. It will be observed that this submission of the petitioners is based on the major premise that jurisdiction is conferred on District Courts in regard to the winding up of companies by sections 67 and 68 of Ordinance No. 4 of 1861 and that apart from those sections District Courts have no jurisdiction. The validity of this submission must, therefore, necessarily depend upon the validity of that premise. Is the premise valid? To answer that question, we must examine the Ordinance that provides for the establishment of our courts and defines their powers, that is to say, "The Courts and Their Powers Ordinance." (Vol. 1 Cap. VI. Legislative Enactments of Ceylon). Section 3 of that enactment says that "the Courts for the *ordinary* administration of justice, *civil* and *criminal*, within this Island shall continue as heretofore to be as follows:—

(a) The Supreme Court
(b) District Courts
(c) Court of Requests
(d) Magistrates' Courts.

The proviso appended to this section leaves unaffected certain jurisdictions created by Imperial Statute or by certain local Ordinances, but with them we are not at all concerned in this case.

The matter of the winding up of companies is undoubtedly a matter arising in the course of the ordinary administration of justice in a country, and, I think, it must be assumed that it is, at least antecedently, probable that provision will be made in such an Ordinance as the Courts and their Powers Ordinance for some court or other to have jurisdiction over such a matter. The question, then, is whether the words used in the Ordinance in conferring and apportioning jurisdiction on and among various courts have or have not resulted in the realization of that *a priori* probability.

It is conceded that a winding up proceeding is not within any original Civil Jurisdiction of the Supreme Court. It, obviously, is not within the jurisdiction of Courts of Requests or of Magistrates' Courts. It, therefore, follows that it must be within the jurisdiction of District Courts or must be regarded as an unfortunate *casus omissus*, unfortunate, because it is deplorable that local Courts should have no jurisdiction to wind up companies which, though not registered here, have largely lived and moved and had their being here. In other countries, in England for instance, certain Courts are empowered to wind up foreign and colonial companies having assets and liabilities there. *Mercantile Bank of Australia* (3); *North Australia Co.* v. *Goldsborough Co.* (4). The new local Companies Ordinance No. 51 of 1938 makes provisions in Part X for the compulsory winding up of unregistered companies. Have we, then, heretofore occupied an exceptional position? I think the answer to that question must be found in Chapter VI of the Courts and their Powers Ordinance, and does not depend upon whether District Courts are superior or inferior Courts of Record. I refer to this because there was a great deal of argument on the point, and if it were necessary to find whether a District Court is a superior or inferior Court of Record, I should have no difficulty in holding that it is not a superior Court in the sense in which that term is understood in English jurisprudence. That was the view taken in *In the matter of the application of John Ferguson for a Prohibition against the District Judge of Colombo* (5), a ruling by a Collective Court.

Section 62 of Part VI of the Courts and their Powers Ordinance is in these terms: "Every District Court shall be a Court of record and shall have original jurisdiction in all *civil, criminal, revenue, matrimonial, insolvency and testamentary* matters, save and except such of the aforesaid matters as are herein, or by virtue of the said Criminal Procedure Code or any other enactment for the time being in force, exclusively assigned by way of original jurisdiction to the Supreme Court, and shall also have jurisdiction over the persons and estates of lunatics, minors and wards, over the estates of *cestuis que trust*, and over guardians and trustees, and in any other matter in which jurisdiction has heretofore been, is now or may hereafter be given to District Courts by law." I read these words as meaning that, when all the powers given to the Supreme Court are put on one side, the entire residuary original jurisdiction in regard to all *civil, criminal, revenue*.....matters is vested in District Courts. Now, in my opinion, a 'winding up' proceeding is a civil matter and falls within that jurisdiction. This view is, I think, supported and not controverted by sections 67 and 68 of Ordinance 4 of 1861 on which reliance was placed. Section 68 says, "the expression 'the Court' as used in this Ordinance shall mean the District Court *having jurisdiction in the place* in which the registered office of the company is situate; and any Court to which jurisdiction is given by this Ordinance shall, in addition to its ordinary powers, have the same power of enforcing any orders made by it in pursuance of this Ordinance as it has in relation to other matters within the jurisdiction of such Court, respectively." It will be observed that in the first part of this section it is said the word 'Court' shall be taken to mean the District Court *having jurisdiction* in the place in which the registered *office of the company* is situate. The words 'having jurisdiction' must mean, in the context, *already* possessed of a jurisdiction that comprises the relevant jurisdiction, namely, the jurisdiction to wind up, for on the occasion on which the draftsman is using his words, it is not at all to the point that the Court he envisages has every other kind of jurisdiction, if it has no jurisdiction to take steps to wind up a company. He is concerned, at that point of time, with winding up proceedings, and with nothing else, and when he used the words *'having jurisdiction'* he must be understood to mean jurisdiction to wind up. The words *having jurisdiction* are, by no means, apt if the intention of the draftsman is to confer a new jurisdiction. The later words, 'and any Court to which jurisdiction is given by this Ordinance', create no difficulty, for when he uses those words, the draftsman is clearly referring to the exclusive jurisdiction given by the Ordinance to that District Court within the limits of which the registered office is situate. In other words, the draftsman when confronted with a number of Courts that may be said to have jurisdiction on the usual grounds on which jurisdiction is conferred, namely, residence of the parties, situation of property, the arising of the cause of action, etc., ignores them all and selects the Court within the limits of which the registered office is situate as the Court that shall function in winding up proceedings. In the concluding part of section 68, the draftsman goes on to say that the Court singled out, because it is the Court within whose limits the registered office is situate shall, in addition to its ordinary powers, have the power to enforce any orders made in the course of the winding up. The contention of the petitioners' Counsel might have appeared to be stronger if section 68 of Ordinance No. 4 of 1861 had been worded in the manner of section 161 of the new Companies Ordinance No. 51 of of 1938. That Section reads: "The District Court of the District in which the registered office of a company

is situate *shall have jurisdiction.*" The words "*shall have jurisdiction*" as contrasted with the words "the District Court *having jurisdiction*" might have afforded more plausible support to the submission that the conferment of a new jurisdiction is in contemplation. But even so, the support obtained would have been plausible, and no more, for it seems clear that the words of Section 161 in the new Ordinance are not meant to confer a new jurisdiction on District Courts, but only to provide a new test as the sole test by which to ascertain the particular District Court which shall function in any particular winding up proceeding.

The question then arises in regard to the position of a company not registered under the provisions of Ordinance 4 of 1861 and not governed by the new Ordinance. Is there no way of winding up such a company? The answer seems to be provided by section 3 of the "Introduction of the Law of England" Ordinance (Cap. 66 Vol. 2 Legislative Enactments) which provides that "in all questions or issues which may hereafter arise or which may have to be decided in this Island with respect to the law of Partnership, Joint Stock Companies, Corporations, Banks and Banking.....the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, with such formal alterations as to names, localities, Courts, offices, persons, moneys, penalties and otherwise as may be necessary to make the same applicable in the circumstances of this Island."

For these reasons, I come to the conclusion that jurisdiction to wind up companies is conferred on District Courts by section 62 of the Courts and their Powers Ordinance and that sections 67 and 68 of the Ordinance No. 4 of 1861 do no more than provide the test for ascertaining the particular District Court for any given winding up proceeding.

In this view of the matter, the major premise, as I described it, on which petitioners' Counsel based his submission, proves to be invalid and invalidates his submission that District Courts have no jurisdiction to wind up companies not registered locally. Consequently the petitioners' application in the way it was presented to us fails. The petitioners made no request that the District Court of Jaffna be prohibited for some particular reason, as for instance, for the reason that Jaffna was not the principal place of business of this Bank in this Island and I wish to state quite clearly that this order does not consider or deal with that aspect of the matter or with the propriety of several District Courts in the Island being engaged simultaneously on the winding up of this Bank, as was said, in the course of the argument, to be the case.

The application fails and must be dismissed with costs.

NIHILL J.—I agree.

Application dismissed.

[Proctor for petitioners: *J. A. Perera.* Proctor for respondents: *F. Arumainayagam.*]

—K. S. A.

THE COMMISSIONER OF INCOME TAX *v.* THE PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION

[KEUNEMAN & CANNON J.J. *S. C. No. 128 (1939)—Special.*
APRIL 15, 16, 25, 1940]

Income Tax—Mutual Provident Association—Loans made to members—Is income from such loans liable to tax?

The material facts were set forth in the case stated as follows:—

The Public Service Mutual Provident Association, which is a body corporate constituted by Ordinance No. 15 of 1891, Chapter 207, was assessed under the Income Tax Ordinance, 1932, for the year of assessment 1937-1938 as being liable to pay Income Tax on a total investment income of Rs. 139,585/- which included a sum of Rs. 126, 718/- being the amount of interest derived by the Association from loans to members, in the year preceding the year of assessment. The tax payable on this amount of interest (if the Association is liable to pay tax on it) is Rs. 2,745/80, The tax payable on the total investment income of Rs. 189,585/- is Rs. 3,025/80. The amount of the tax in dispute on this appeal is the said sum of Rs. 2,745/80.

The Association was constituted for the general objects of promoting thrift, of giving relief to members in times of sickness or distress, of aiding them when in pecuniary difficulties and of making provision for their widows and orphans—section 3. Rules have been framed by the Association under the powers given by S. 16. Under the rules the Committee of Management may grant loans to a member to the extent of one-half of the nett amount standing to the credit of such member in the books of the Association. The Association can also make loans to members on the security of landed property to an amount not exceeding one-half of the appraised value of the property. Interest is payable by members on both types of loans made to them by the Association at 6% per annum.

The accounts of the Association, for the relevant period, showed that Rs. 2,114,850/- had been lent to members and Rs. 633,026/- had been invested in Government Securities and Fixed Deposits in various Banks Of the total loans to members, Rs. 822,054/- had been lent to members against mortgages of landed property. Of the total sum of Rs. 126,718/- received as interest from members Rs. 51,764/- was the interest from secured loans.

No question as to the liability of the Association to pay Income Tax on the income derived from the investments in Government Securities and Fixed Deposits had been raised; it admits its liability to pay tax on that income.

The Association, however, disputed its liability to pay tax on the sum of Rs. 126,718/-.

Held that the interest from loans made to members of the Association is liable to tax.

Referred to: *The New York Life Insurance Co.* v. *Styles*, 2 Tax Cases 460 ... (1)
Board of Revenue, Madras v. *The Mylapore Hindu Permanent Fund Ltd*, 1 Indian Tax Cases 217 ... ... (2)
The English & Scottish Joint Co-operative Wholesale Society Ltd. v. *The Commissioner of Income Tax, Madras*, 3 Indian Tax Cases 385 ... ... (3)
Madura Hindu Permanent Fund Ltd. v. *The Commissioner of Income Tax, Madras*, 6 Indian Tax Cases 326 at 332 ... (4)
Municipal Mutual Insurance Ltd. v. *Hills*, 16 Tax Cases 430 (5)
Jones v. *The South-West Lancashire Coal Owners' Association Ltd.* 11 Tax Cases 814 at 822 ... ... (6)
The Liverpool Corn Trade Association Ltd v. *Monks*, 10 Tax Cases 442 ... ... (7)

Case stated by the Board of Review under the Income Tax Ordinance.

E. G. P. Jayatilleke, K.C., Acting Solicitor-General, with him *H. H. Basnayake*, Crown Counsel, for the Commissioner of Income Tax-appellant.

H. V. Perera, K.C., with him *F. C. de Saram*, for the assessee-respondent.

KEUNEMAN J.—This is a case stated by the Board of Review. The Commissioner assessed the respondent, The Public Service Mutual Provident Association, for the year 1937-1938 in respect of three items of interest, namely, (1) on Rs. 74,954/-, unsecured loans to members, (2) on Rs. 51,764/-, secured loans to members, and (3) on Rs. 12,867/-, loans to Government and to Banks. The total tax payable was assessed at Rs. 3,025/-. Respondent admitted liability on item (3) but disputed his liability under items (1) and (2) and appealed to the Board of Review. That body upheld the contention of the respondent and ordered that the assessment should be corrected by the deletion of items (1) and (2). The tax payable was thus reduced by the sum of Rs. 2,745/80. The matter now comes before this Court.

The respondent is a body incorporated under Chapter 207 of the Legislative Enactments (Ordinance No. 5 of 1891 and subsequent enactments). The general objects of the corporation appear in the Preamble and in section 3, namely, "to promote thrift, to give relief to the members in times of sickness or distress, to aid them when in pecuniary difficulties, and to make provision for their widows and orphans". Section 22 provides for the vesting of property in the corporation; section 27 provides that the corporation may hold property movable or immovable; section 24 makes it lawful for the Committee of Management to place the whole or any part of the surplus funds belonging to the corporation and not required for loans, advances and other current expenses, in fixed deposit in the local banks or to invest the same in certain Government or Municipal securities; and section 16 provides for the making of rules at any general meeting of the Association.

The rules of the Association have been put in—document A. These provide, *inter alia*.

(a) for the grant of loans to members up to one-half of the amount standing to their credit in the books of the Association (Chapter I, Rule 12);

(b) for the grant of loans for the purpose of relieving members at a time of sickness or distress, or of aiding them in pecuniary difficulties to the extent of either one month's or two months' salary or pension according to the standing of the member (Chapter 1, Rule 13);

(c) for the grant of loans to members on the security of landed property up to one-half of the appraised value of the lands (Chapter II, Rules 1 and 4)

Each of these classes of loans carries interest at six *per centum per annum*.

The Board of Review, by a majority decision, held that the respondent Association was a body of individuals banded together for mutual help, that the loans to members were in furtherance of the objects of the Association and advanced out of the common fund formed by the contributions of all the members, that the interest from loans to members was earned by the mutual fund and that this sum (less expenses) was divided between the members in their capacity of members or contributors to the mutual fund, (from which the loans were made), and not in any capacity analogous to that of shareholders of a limited liability trading company. The Board depended mainly on the decisions in three cases, namely:—

(1) *The New York Life Insurance Co.* v. *Styles* (1)

(2) *Board of Revenue, Madras* v. *The Mylapore Hindu Permanent Fund Ltd.* (2), and

(3) *The English and Scottish Joint Co-operative Wholesale Society Ltd.* v. *The Commissioner of Income Tax, Madras* (3).

The case most nearly related to the present one is the Mylapore case, where a mutual benefit society registered under the Companies' Acts had its share capital subscribed entirely by its members by way of periodical payments, and the income of the fund was derived chiefly from interest earned on overdue subscriptions or on loans given exclusively to its members, who were entitled under the rules to take loans and also from interest from outside investments with banks. The principle enunciated in this case is that income to be taxable must come from outside and not from within, and that the fact that the Fund is a legal entity for certain purposes does not matter and that a person cannot make a profit or loss out of himself It was held, therefore, that interest obtained from members was not taxable, although interest derived from investments in Banks was taxable.

RAMESAM J. who delivered the judgment of the Court, held that this case was governed by the case of *The New York Life Insurance Co.* v. *Styles* (supra).

The Mylapore case would be of some authority but for one infirmity inherent in it. In a later case, namely, *The Madura Hindu Permanent Fund Ltd.* v. *The Commissioner of Income Tax, Madras* (4), it was held, in considering the Mylapore case, that *Styles'* case had no application to it, and that the Mylapore case could not be based upon it. RAMESAM J. himself admitted that the actual decision in *Styles'* case did not apply to the Mylapore case, but he added that the Mylapore case was not wrongly decided, apparently on the ground that the observations made by their Lordships in *Styles'* case supported the result arrived at. In the circumstances, I think it is necessary for us to consider *Styles'* case, and to see whether the reasoning in that case causes us to arrive at the same conclusion. I may add that the same criticism applies to the other Indian case relied upon by the Board of Review, namely, *The English and Scottish Co-operative Society* case.

I shall next consider *Styles'* case. A mutual life insurance company had no members other than the holders of participating policies, to whom all the assets of the company belonged. At the close of each year an actuarial valuation was made, and if the aggregate receipts of the company were more than the expenses and the estimated liabilities, the surplus was divided between the policy-holders who received a premium in the shape of either a cash reduction from future premiums or a reversionary addition to the amount of their policies. It was held that so much of the surplus as arose from excess contributions of the participating policy-holders was not profit assessable to income tax.

I am opinion that the principle decided in *Styles'* case is, as stated in the judgment of Lord WATSON, "when a number of individuals agree to contribute funds for a common purpose, such as the payment of annuities or of capital sums to some or all of them, on the occurrence of events certain or uncertain, and stipulate that their contributions, so far as not required for that purpose, shall be repaid to them, I cannot conceive why they should be regarded as traders, or why contributions

returned to them should be regarded as profits". Similarly, Lord HERSCHELL says: "The members contribute for a common object to a fund which is their common property; it turns out that they have contributed more than is needed, and therefore more than ought to have been contributed by them for this purpose, and, accordingly, the next contribution is reduced by an amount equal to their proportion of the excess. I am at a loss to see how this can be regarded as a *profit* arising or accruing to them from a trade or vocation which they carry on."

In the later case of *Municipal Mutual Insurance Ltd.* v. *Hills* (5) Lord MACMILLAN laid down the principle of *Styles'* case as follows:—

> The principle on which the surpluses arising in the conduct of a mutual insurance scheme are not taxable as profits is now well understood. The essence of the matter is that a number of persons who are exposed to some contingencies as fire, employees' claims, marine casualties or the like, associate themselves together as contributors to a common fund on the footing that if the contemplated contingency befalls any contributor he or his representatives shall receive a compensatory payment out of the common fund proportional to his contribution. The scale of contributions or premiums is fixed on experience and estimate. If it is found to yield more than enough to satisfy the claims that emerge, the contributors receive the entire benefit in the shape of bonuses, reduction of future contributions or otherwise. As the common fund is composed of sums provided by the contributors out of their own moneys, any surplus arising after satisfying claims obviously remains their own money. Such a surplus resulting merely from miscalculation or unexpected immunity cannot in any sense be regarded as taxable profit."

In my opinion, the present case has features which are not possible to reconcile with the *Styles'* case, as so interpreted. The present appeal does not deal with the question of any surplus remaining over as the result of miscalculating or unexpected immunity. What takes place in the case of our Society is that money is lent to members at six per cent interest. It is clear that the volume of these transaction is large, and for the year in question in this case a sum of more than two million rupees has been so loaned to members. It is difficult to resist the conclusion that the Society carries on a business with its members in respect of these loans, in point of fact, a bigger business than with the Government and the Banks. Can the return received by the Society from this business by way of interest be regarded as otherwise than a taxable profit ?

In this connection, I may cite a *dictum* of ROWLATT J. in *Jones* v. *The South-West Lancashire Coal Owners' Association Ltd.* (6).

> The principle laid down in the *New York Insurance Company* case is that no one can make a profit out of himself....It is true to say that a person cannot make a profit out of himself, if what is meant is that he may provide himself with something at a lesser cost than that at which he could buy it, or if he does something for himself instead of employing somebody to do it. He saves money in those circumstances, but he does not make a profit. But a company can make a profit out of its members as customers, *although its range of customers is limited to its shareholders.* If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with its shareholders—even if it is limited to trading with them—makes a profit, that profit belongs to the shareholders,

in a sense, but it belongs to them *qua* shareholders. It does not come back to them as purchasers or customers."

Vide also *The Liverpool Corn Trade Association Ltd.* v. *Monks* (7), where a similar point was decided.

With respect, I do not think that in the case of a Society doing business with its own members in the way of loans and earning interest on such loans to members, there is present the mutuality which existed in *Styles'* case. I cannot distinguish between the present case and that of a railway company carrying its own members, or a trading company selling to its own members, and making a profit thereby; and with all deference, I cannot see any decision in *Styles'* case or in the subsequent case decided in England, which makes me come to a different conclusion. I think that the amount earned by the Society as interest from loans to its members is a taxable profit obtained from a business.

It was strenuously argued by counsel for the respondent that because the object of the Society was to give loans to members, and because the loans were obtained by virtue of their membership, therefore, all interest received was to be regarded as an internal accretion, and that the element of mutuality was established. I do not think this argument can be sustained. In my opinion, the interest was paid by the member *qua* borrower, and the interest paid helped to swell the resources of the whole body of members, *qua* members. There was not that mutuality which exists between members who pay contributions for a common purpose and receive back the excess after the deduction of necessary expenditure. In the latter case, the money is paid and received back in only one capacity, namely, that of members. In other words, the members are receiving back what has always been their own, and that cannot be regarded as a profit.

Counsel for the respondent also relied on *Jones'* case, and in particular on the dictum of ROWLATT J.

> "The broad principle was there (i.e. in *Styles'* case) laid down that, if the interest in the money does not go beyond the people *or the class of people* who subscribed it, then, just as there is no profit earned by the people subscribing, if they do the thing for themselves, so there is none if they get a company to do it for them."

It was argued that the interest earned here was earned from members and enured to the benefit of members of the same class. I do not think that is the true interpretation of the words. ROWLATT J. was dealing with the possible distinction between the body of members and the corporation. What this case established was that where surpluses were available after deduction of expenditure from the contributions of the members it did not matter whether these surpluses were paid back immediately or carried to a fund, the benefits of which would be available to members who joined subsequently and who had not made the original contributions. But the fundamental facts of that case were that the contributions were originally made by the members *qua* members, and the benefits of the fund were available to them subsequently in the same capacity, and the principle in *Styles'* case was held to be applicable. No doubt the principle enunciated in *Styles'* case may be regarded, as the respondent says, as carried one step further, but I do not think that step has been taken in the direction which the respondent contends for.

I am accordingly of opinion that the interest obtained both in

the case of the secured loans and of the unsecured loans is a taxable profit. I allow the appeal, set aside the order of the Board of Review, and restore the items which have been deleted by the Board.

The appellant is entitled to the costs of appeal.

CANNON J.—This is a case stated by the Board of Review under the Income Tax Ordinance No. 2 of 1932 (S. 74) for the opinion of this Court as to whether the Public Service Mutual Provident Association is liable to pay income tax on interest received from the members of the Association on the loans advanced to them by the Association. The Association appealed to the Board of Review against the decision of the Income Tax authorities to assess this interest for taxation. The Association contended that the Association is not a business concern and that the loan transactions were between the members of the Association themselves in pursuance of the provident objects of the Association on a mutual basis, in that the interest paid by the members who took loans was returned to the members by being distributed as a dividend to the account of every member; and that therefore the interest derived from the loans did not come within the statutory definition of profits—S. 188 (6).

The Board by a majority upheld the objection of the Association and upon the application of the Commissioner stated a case for the opinion of this Court, the question for decision being whether interest derived from loans to members constitutes taxable profits or income under the Income Tax Ordinance.

The material facts set forth in the case stated are as follows:—

The Public Service Mutual Provident Association, which is a body corporate constituted by Ordinance No. 15 of 1891, Chapter 207, was assessed under the Income Tax Ordinance, 1932, for the year of assessment 1937-1938 as being liable to pay Income Tax on a total investment income of Rs. 139,585/- which included a sum of Rs. 126,718/- being the amount of interest derived by the Association from loans to members, in the year preceding the year of assessment. The tax payable on this amount of interest (if the Association is liable to pay tax on it) is Rs. 2,745/80. The tax payable on the total investment income of Rs. 139,585/- is Rs 3,025/80. The amount of the tax in dispute on this appeal is the said sum of Rs. 2,745/80.

The Association was constituted for the general objects of promoting thrift, of giving relief to members in times of sickness or distress, of aiding them when in pecuniary difficulties and of making provision for their widows and orphans—section 3. Rules have been framed by the Association under the powers given by S. 16. Under the rules the Committee of Management may grant loans to a member to the extent of one-half of the nett amount standing to the credit of such member in the books of the Association. The Association can also make loans to members on the security of landed property to an amount not exceeding one-half of the appraised value of the property. Interest is payable by members on both types of loans made to them by the Association at 6% per annum.

The accounts of the Association, for the relevant period, show that Rs. 2,114,850/- had been lent to members and Rs. 633,026/- had been invested in Government Securities and Fixed Deposits in various Banks. Of the total loans to members, Rs. 822,054/- had been lent to members

against mortgages of landed property. Of the total sum of Rs. 126,718/- received as interest from members Rs. 51,764/- was the interest from secured loans.

No question as to the liability of the Association to pay Income Tax on the income derived from the investments in Government Securities and Fixed Deposits had been raised; it admits its liability to pay tax on that income.

The Association, however, disputed its liability to pay tax on the sum of Rs. 126,718/-.

For the Income Tax authorities, Mr. E. G. P. Jayatileke, K. C., the Solicitor-General, pointed out that under the Rules made by the Association requiring interest at 6 per cent, to be paid by members for loans, such of the Rules as deal with the lending of money to members on mortgage do not stipulate that the mortgagor shall be in pecuniary difficulties. The lending of money on interest forms a material part of the activities of the Association, the loans totalling Rs. 2,114,850/- for the year in question, those secured bringing in interest in a sum of Rs. 74,954/-. Counsel contended that as the interest earned was distributed not only to those who paid it but also to the other members, there was no mutuality as between those members who paid and those who received. Members were not compelled by the Rules to borrow, and as only some of them took up loans, those who did not do so nevertheless shared in the income derived from the interest to which they were not contributors. Such income, therefore, became profit liable to taxation. He relied upon *Municipal Mutual Insurance Ltd.* v. *Hills* (5) and *Liverpool Corn Trade Association Ltd.* v. *Monks* (6).

Mr. H. V. Perera, K. C., for the Association took the point that the Association was a body of persons as distinct from a trading company and submitted that S 48 of the Income Tax Ordinance had in that case no application to the Association. Section 48 reads:—

> "The profits of a company from transactions with its shareholders which would be assessable if such transactions were with persons other than shareholders shall be profits within the meaning of this Ordinance".

Counsel next argued that the purpose of the loans was not the making of a profit but the carrying out of one of the objects for which the Association was formed, namely, to aid its members when in pecuniary difficulties; and that since any income which resulted from such money-lending transactions was derived from members and distributed to members only, it was a mutual matter and not a business transaction, as it would have been, had the transactions been with non-members. The fact that some members participated in the income derived from interest but did not contribute to that income did not, he submitted, make it a profit for the reason that the income did not come from an outside source. It was, he argued, a mere receipt of money which was an accretion derived from the internal operations of the Association in carrying out one of the objects of its existence, namely, lending money to members in need, to aid them and not to gain profit. It was "the body of persons' who were taxed, but the enrichment of that body by internal functioning of its operations, according to its objects, was not income derived from a transaction with the outside world and therefore was a matter of mutuality and not business. The borrowing member took the loan in

his capacity as a member, not *qua* borrower or debtor. Though all members did not avail themselves of the right to borrow, they were entitled to exercise that right or privilege and, consequently, there was mutuality between those who did and those who did not borrow. The income need not go back to the identical members who contributed it; it was sufficient if it went to the class of people who did so, namely, all those who were members of the Association at the time of the distribution. He relied upon *New York Life Insurance* v. *Styles* (1), *Board of Revenue, Madras* v. *Mylapore Hindu Permanent Fund Ltd.* (2) and *Jones* v. *South West Lanchashire Coal Owners Association Ltd.* (6). My brother KEUNEMAN has in his judgment analysed the *ratio decidendi* of these and the other cases cited.

The cases support Mr. Perera's contentions generally – that a transaction which is restricted to the members of the Association has the character of a mutual transaction and that there is no necessity for the "income" to be returned to the identical people who contributed it. The point, however, remains that while the loans made by this Association are taken from the common fund, the interest is not paid out of a common fund, and, in my view, this fact negatives mutuality—see *Municipal Mutual Insurance Ltd.* v. *Hills* (supra)—and this independently of any distinction that may be drawn between the Association as a trading company and as a body of persons incorporated for provident purposes. Whether or not the lending of money at 6 per cent interest to members (as distinct from investments of surplus money) can properly be said to be carrying out the object of the Association of aiding its members when in pecuniary difficulties is, in my opinion, arguable, but the legality of the Rules, which were made by the Association permitting this is not raised by the Case Stated. The lending of money is obviously not a minor part of the Association's activities and the rate of interest charged can hardly be characterized as a non-commercial rate. By receiving income from interest which they do not contribute, though they contribute to the common fund from which loans are made, non-borrowing members make a benefit at the expense of the other contributors who do borrow, and I would say that all income derived from such interest constitutes taxable income of the Association under the Ordinance.

I agree that this appeal should be allowed with costs.

Appeal allowed.

[Proctors for Public Service Mutual Provident Association: *D. L. & F. de Saram.*]

—K. S. A.

B. A. THORNHILL *v.* THE COMMISSIONER OF INCOME TAX

[SOERTSZ & KEUNEMAN JJ. *S.C No. 131 (1939)—Income Tax.*
MARCH 11, 12, & 13, APRIL 29, 1940.]

Income Tax—Profits or income—Sale of tea and rubber coupons by owner of tea and rubber estates—Are receipts from the sale of such coupons income?—Income Tax Ordinance, S. 6, Leg. Enact. Vol. IV, Ch. 188.

The assessee (appellant) was the owner of both tea and rubber estates. He was assessed under the Income Tax Ordinance, for the year of assessment 1938-1939, as having an assessable income of Rs. 93,353/-, which included a sum of Rs. 19,622/19 being the proceeds of the sale by the appellant of tea and rubber coupons issued to him under the Tea and Rubber Control Ordinances. The assessee claimed that this sum was not liable to income tax.

HELD that the amount in question is "profits or income" within the meaning of the Income Tax Ordinance and is, therefore, liable to tax.

Per SOERTSZ J.—"...the amount in question appears to me to be 'profits or income' derived from a business, namely, an agricultural undertaking, and assessable to Income Tax under section 6 (1) (*a*) of the Income Tax Ordinance.... I agree with the Board that if it is assumed that this amount does not fall within the scope of section 6 (1) (*a*), it is caught by the 'residuary' sub-section 1 (*h*), for this amount is not something casual or something in the nature of a windfall. It is something that will recur, or, at least, that can be made to recur as long as the Tea and the Rubber Control Ordinances continue in operation."

Referred to:

Tennant v. *Smith*, (1892) A C. 150, ... (1)
The Attorney General of British Columbia v. *Ostrum*, (1904) A C. 147 (2)
Pool v. *The Guardian Investment Trust Co. Ltd.*, (1921) 8 T.C. 178 (3)

Case stated under S. 74 of the Income Tax Ordinance of 1932.

H. V. Perera K.C., with him *S. Nadesan* and *C. Ranganathan*, for the assessee (appellant).

H. H. Basnayake, Crown Counsel, for the Commissioner of Income Tax (respondent).

SOERTSZ J.—This is a case stated under the provisions of the Income Tax Ordinance, but the questions which arise for consideration are so closely connected with the Tea and Rubber Control Ordinances that brief reference to them is necessary. Both these Ordinances restrict owners of tea and rubber lands to a certain exportable maximum of their potential produce, and provide for the issue of coupons which are exchangeable for licenses to cover the export of that maximum, and no more. The owners are not, however, involved in any obligation to produce the maximum allotted to them, or any part of it, in order to obtain these coupons The coupons, when issued, are transferable and saleable. The resulting position is that it lies at the option of tea and rubber land-owners whether they will harvest their produce and use their coupons to obtain export licenses and export their maximum, and so obtain their income, or whether they will obtain their income by transferring or selling their coupons, or by using part of the coupons themselves and selling the remainder. These Ordinances leave the owners free to produce more than their allotted maximum, but that excess will be sterile unless these owners are able, by means of coupons, to provide themselves with export licenses to cover it. Put in a few words, the scheme of the two Ordinances is to establish a co-operative agricultural undertaking, that is to say, a co-operative business in which all tea and rubber land owners work together in order to put on the world's market the quota, or as near it as possible, of tea and rubber allotted to this Island. But they need not all work in the same way or with the same intensity. Indeed, some hardly work their lands at all and yet they contribute to the end in view, for it may be truly said that "they also serve who only stand and wait", inasmuch as they enable others to produce usefully more than they would otherwise, in view of the restriction imposed. Ultimately, these tea and rubber land-owners acting thus together produce the quota, and, in view of their active or inactive collaboration, it may, with justification, be said that each has disposed his land to produce the individual quotas of tea and rubber that go to make up the Island's quota.

To come now to the facts of this case. The appellant before us is the owner of tea and rubber estates. In the Income Tax year with which this appeal is concerned, he received the tea and rubber coupons to which

he was entitled. He made use of some of these coupons to obtain export licenses for himself, and sold others in the market to the value of Rs. 19,622/19. In the return of income which he made to the Commissioner he showed these proceeds from the sale of coupons in the class "Income from Agriculture", but when the Assessor taxed this amount as "Profits from Agriculture" he was dissatisfied and appealed against the assessment to the Commissioner of Income Tax on the ground that "proceeds of sale of coupons are not agricultural income as described in section 31 (2), nor any income liable to tax under the Ordinance". The Commissioner rejected his appeal and confirmed the assessment. The appellant then appealed to the Board of Review, and, as is to be gathered from the terms of the decision of that Board, he pressed his appeal before them on the grounds:—

(a) That the amount in question is not assessable income inasmuch as, he contended, it does not fall within the range of section 6 (1) of the Ordinance;

(b) That the Assessor "has wrongly indicated that the amount is assessable as agricultural income;"

(c) That "the proceeds of sale of the coupons constituted capital and were therefore free from liability to tax."

The Board refused to entertain any of these submissions and ruled that "the value realised by the sale of coupons.....comes within the range of section 6 (1) (*a*). If it does not come under section 6 (1) (*a*), it falls within section 6 (1) (*h*)."

Dissatisfied with this decision, the appellant asked the Board to state a case for the opinion of this Court, and the case stated to us is "whether the said sum of Rs. 19,622/19 constitutes profits or income within the definition of '*profits*' or '*income*' under section 6 (1) (*a*), or alternatively under section 6 (1) (*h*); or whether the said sum represents a realization of capital and is, therefore, not liable to tax; and also, whether the assessor was wrong in describing and assessing the amount in question as agricultural income, and, if so, whether the assessment is.....null and void, or whether the irregularity or mistake, if any, is covered by section 68 of the Ordinance."

In my opinion, there is no substance in the appellant's contention that inasmuch as the assessor has described this amount as agricultural profits he must either stand or fall by that description, and that if, in point of fact, this is not 'agricultural income', the assessment is null and void notwithstanding the fact that the assessment of tax might properly have been made under some other category of section 6 (1). This, I think, is a mere battle of words.

The real question involved is whether this amount is assessable to tax under any of the classifications set forth in section 6 (1) of the Income Tax Ordinance, for, if I may permit myself the observation, to the Income Tax Commissioner it is the thing and not the name that matters. To him the thing that is "income" is like the fragrant rose: it smells as sweet by any name.

Similarly, I am opinion that the appellant's contention that the proceeds of the sale of the coupons constitutes a receipt of capital and not of income is wholly untenable as is sufficiently shown by the observations made on that contention by the Commissioner and by the Board of Review. I should state here that these submissions were not adopted by

the appellant's counsel in the course of his very able argument before us, and I have made this brief allusion to them only because they have been raised by the case stated to us for decision.

The one question that was debated with great vigour before us was whether this amount could be assessed as 'income' either under section 6 (1) (*a*) or under section 6 (1) (*h*). Counsel for the Commissioner of Income Tax rightly conceded that it did not fall within any of the other classes of '*profits and income*' or '*profits*' or '*income*' enumerated in section 6 (1).

Now, this word 'income', although it is on everybody's lips and runs like a tune - sometimes, a bad one—in everybody's head, is a baffling sort of word when it comes to defining it for the purpose of the Income Tax Ordinance. The Ordinance itself, after a feeble attempt to define it synonymously with '*profits*' resorts in section 6 (1) to the less ambitious method of enumeration, and sets forth the sources of profits and income in contemplation as sources from which assessable income is derivable. We are, therefore, compelled to search for the meaning of this word '*income*' in the pages of case law.

We are told, for instance, in *Tennant* v. *Smith* (1) that, for income tax purposes, '*income*' "must be money or something capable of being turned into money." But obviously this statement needs qualification. All money and all things capable of being turned into money are not necessarily '*income*' for tax purposes, for, as explained in the case of *The Attorney General of British Columbia* v. *Ostrum* (2), "the word '*income*' is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of these receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the Statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as 'income' and, I would venture to add, except in so far as the Statute states that receipts which, in ordinary parlance, appear to be income are not to be treated as income.

Again, SANKEY J. in the course of his judgment in *Pool* v. *The Guardian Investment Trust Co. Ltd.* (3), observed that "as Mr. Justice PITNEY points out in giving the judgment of the Supreme Court of the United States of America. ..the fundamental relation of capital to income has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream to be measured by its flow during a period of time". He cites various definitions, one of which was that "income may be defined as the gain derived from capital, from labour, or from both combined", and points out that "the essential matter is that income is not a gain accruing to capital but a gain derived from capital".

Cunningham and Dowland in their treatise on *Land and Income Tax Law and Practice* examine a number of cases in which the meaning of the word 'income' has been considered, and they sum up the essentials of 'income' as follows at page 128:—

"The essential characteristics appear to be the following:

(a) It must be a gain,

(b) It must actually *come in*, severed from capital in cash or its equivalent,

(c) It must be either the produce of property or/and the reward of labour or effort.

(d) It must not be a mere change in the form of, or accretion to, the value of articles in which it is not the business of the taxpayer to deal.

(e) It must not be a sum returned as a reduction of a private expense".

This statement, if I may say so, provides adequate tests by which to ascertain whether a particular receipt is '*income*' or not, and all that now remains to be done is to examine the amount involved in this case by these tests, or at least by as many of them as are applicable. To take them one by one, there can be no question but that:

(a) this amount represents a gain; in fact, in his Return, the appellant showed it as income:

(b) it has actually come in, in the sense that it has reached the hands of the appellant, ultimately in the form of cash and as cash severed from capital;

(c) in a sense, it is the produce of property, for it has been produced from the sale of coupons which were issued to him under these Ordinances to cover his produce, real or hypothetical.

Counsel for the appellant, however, strongly contended that these coupons were not the 'produce' of the appellant's property, and that 'produce' in the context meant natural produce, such as fruit, leaves, latex, etc. This contention raises a question of some difficulty, and that difficulty arises from the fact that the "*quotaisation*" of tea and rubber has created an artificial state of things, which could hardly have been in contemplation when the Income Tax Ordinance was enacted. In consequence, the normal modes of assessment and the phraseology of some of the provisions of that Ordinance seem somewhat inappropriate in a case like this.

But, as I have indicated in the preliminary observations I made, if attention is paid to the substance and not only to words and to the mere form of things, it seems to me that under the scheme of, and in the conditions created by, the Tea and Rubber Control Ordinances, these coupons may fairly be described at least as the equivalents of the produce of property. Assuming, however, but not conceding, that this line of reasoning is fallacious, these coupons fall to be treated as the reward of labour or effort, for in order to obtain these coupons, tea and rubber land-owners have maintained, or had at some relevant point of time to maintain, their lands in a certain condition in conformity with the provisions of the Ordinance and the Rules made under them, and this maintenance involves or involved labour and effort however small or meagre.

Examined in this way, the amount in question appears to me to be 'profits and income' derived from a business, namely, an agricultural undertaking, and assessable to Income Tax under section 6 (1) (*a*) of the Income Tax Ordinance.

If, however, this view is incorrect and the amount is not assessable under that sub-section, I am clearly of opinion that it is not a receipt which escapes altogether from the Ordinance. I find it impossible to resist the conclusion that this is a taxable receipt for, as very pertinently observed by the Board, "if the appellant's contention is accepted, the owner of a

five-hundred acre estate may get it registered, refrain from harvesting its produce, receive coupons, derive large sums of money thereby, and escape taxation altogether in respect of the money he receives in connection with his owning and maintaining an estate". I agree with the Board that if it is assumed that this amount does not fall within the scope of section 6 (1) (*a*), it is caught up by the 'residuary' sub-section (1) (*h*), for this amount is not something casual or something in the nature of a windfall. It is something that will recur, or at least, that can be made to recur as long as the Tea and Rubber Control Ordinances continue in operation.

For these reasons, I am opinion that this amount was rightly assessed to tax and I would confirm the assessment.

The appellant will pay the costs incurred by the Commissioner of Income Tax in this Court. He will, however, be credited in the course of taxation of costs with the sum of Rs. 50/- paid by him under section 74 (I) of the Ordinance.

KEUNEMAN J.—I agree.

Assessment confirmed.

[Proctors for the assessee-appellant: *Perera and Perera*]

—K. S. A.

JAMES FORBES *v.* K. RENGASAMY

[KEUNEMAN J. *S.C. No. 336—M.C. Hatton No 210.* MAY 17, 23, 1940.]

Criminal trespass—Indian Immigrant labourer employed on Ceylon estate—Termination of contract of service—Occupation of line-room after expiry of period of notice—Circumstances that will justify finding that the continuance of such occupation is with the intent to annoy—Can notice of termination of employment be given on a day other than the last day of the month ?—The Estate Labour (Indian) Ordinance, S. 5, Leg. Enact. Vol. 3, Ch. 112—Penal Code, Ss. 427 & 433.

T. estate falls within the class of estates paying acreage fees. It is also one of the estates which provide free housing accommodation included in the wages. R., an Indian Immigrant labourer, was employed on T. estate. He, his father, his mother and other members of his family occupied two line-rooms allotted to them in the estate.

In practice all Indian Immigrant labourers reside on the estate, but there are stray cases where such labourers reside in villages and go to the estates for work.

R. was given notice by F., Superintendent of the estate, on the 2nd December, 1939, terminating R.'s services on the 2nd January, 1940. The evidence showed that R was warned that he must leave the estate on the expiration of the term of notice and that about the middle or end of December, 1939, R. went to F. and said that he had not been able to get employment elsewhere and that he could not go on the 2nd January, 1940. He was informed that he must leave on that date. R. did not leave the estate nor did he accept his discharge ticket. The evidence of F. was that R.'s attitude was one of defiance.

R. was charged with having committed criminal trespass by unlawfully continuing to remain on the estate with intent to annoy F. and was found guilty and sentenced to one month's rigorous imprisonment. On appeal, on matters of law,

HELD: (i) that the Magistrate was justified, in the circumstances, in arriving at the finding that R. continued to remain on the premises with the intention of annoying F.,

(ii) that R. was not a tenant of the line rooms, but that his residence in the rooms was in his capacity as a servant and

(iii) that notice given on December 2, 1939, to terminate R.'s service on January 2, 1940, is a good notice.

Per KEUNEMAN J.—"I think it is clear that (the labourer's) residence on the estate is in the interest of the estate, and that such residence is conducive to that purpose and the more effectual performance of the service. The labourer's position is more akin to that of the coachman, the gardener or the porter....Even if he was a tenant, his tenancy terminated when his contract of service ended, and his subsequent residence was a trespass."

"I do not think there is any substance in the further point that the superintendent was not 'in occupation of the lines'. I hold that, as representative of the owners in full charge of the estate, he was in such occupation."

Followed:	*Burne* v. *Munisamy*, (1919) 21 N.L.R. 193	(2)
	Ebels v. *Periannan*, (1939) 4 C.L.J.R. 119; 16 C.L.W. 15 ...	(1)
	Smith v. *Overseers of Seghill*, (1874) 10 Q.B.D. 422 ...	(5)
	Dobson v. *Jones*, (1843) 5 M. & G. 112	(6)
Distinguished:	*Hughes* v. *Overseers of Chatham*, (1843) 5 M. & G. 54 ...	(3)
	Marsh v. *Estcourt*, (1889) 24 Q.B.D. 147	(4)

Appeal, on questions of law, from a conviction and sentence entered by H. S. Roberts Esq., Magistrate of Hatton.

L. A. Rajapakse, with him, *K. Satia Vagiswara Aiyar* and *H. W. Thambiah*, for accused-appellant.

H. V. Perera K.C., with him *E. F. N. Gratiaen*, for complainant-respondent.

KEUNEMAN J.—The accused was charged and convicted under section 433 of the Penal Code for committing criminal trespass on 3rd January, 1940, by unlawfully continuing to remain on Thornfield Estate with intent to annoy the complainant, who is the Superintendent of the estate. He was sentenced to one month's rigorous imprisonment. He now appeals.

Several points of law were argued by his counsel. Most of those points have been raised in a previous case, *Ebels* v. *Periannan* (1) and have been decided by DE KRETSER J. But as the matter has been fully argued before me again, I shall myself deal with the arguments.

One point raised may be disposed of shortly. It is contended that the month's notice terminating the accused's service was illegal in that the notice was given on the 2nd December, 1939, terminating on the 2nd January, 1940. It was contended that notice must be given before the commencement of a month and terminate at the end of that month. But Section 5 of Chapter 112—The Estate Labour (Indian) Ordinance - reserves the right to both labourer and employer to determine the contract of service "at the expiry of one month from the day of giving such notice." Similar words in Ordinance No. 11 of 1865 have been interpreted by a Bench of two Judges in *Burne* v. *Munisamy* (2). I hold that the notice in this case was a good notice, and that the contract of service terminated on the 2nd January, 1940.

The further argument addressed to me is that the accused was a monthly tenant of the room in which he lived, and that he was entitled to notice to quit the room given before the commencement of a month, and terminating at the end of that month.

Two English cases have been cited to me on this point by the appellant's counsel, namely, *Hughes* v. *The Overseers of the Parish of Chatham* (3) and *Marsh* v. *Estcourt* (4). In the former case TINDAL C.J. stated: "There is no inconsistency in the relation of master and servant

with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest.....As there is nothing in the facts stated to show that the claimant was required to occupy the house for the performance of his services, or did occupy it *in order to* their performance, or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his services;....., we cannot say that the conclusion at which the revising barrister has arrived is wrong" The revising barrister had held that the servant occupied the house in the capacity of tenant, and was entitled to be on the list of voters.

The latter case was decided under the County Electors Act, 1888. The claimants were labourers residing in cottages on the farms of their employers. They were permitted but not required to live in the cottages on the terms that they were to give up the possession when their employment ceased, and were either charged a reduced rent or had the rent deducted from their wages. The rates were paid by the employers and the names of the claimants appeared in the rate-book as occupiers. It was held that the facts showed an occupation by the claimants not by virtue of services, but as householders. WILLS J. stated: "The labourers were not required to reside in the cottages, but were allowed to reside in them as a privilege. It would be an abuse of language to call residence under such conditions occupation by virtue of service."

Appellant's counsel also referred me to Halsbury's Laws of England (Hailsham Edition) Vol. 22 page 117, paragaraph 196, which runs as follows:

"Where it is necessary for the due performance of his duties that a person should occupy certain premises, or where he is required to occupy premises for the more satisfactory performance of his duties, although such residence is not necessary for that purpose, such person occupies in the capacity of servant; but where a person is merely permitted to occupy premises, whether as a privilege or by way of remuneration or part payment for his services, he occupies as tenant and not as servant....." It continues:

"Occupation by the servant is occupation by the master, and a servant has neither estate nor interest in the premises he occupies in that capacity."

In the case cited by respondent's counsel—*Smith* v. *The Overseers of Seghill* (5), MELLOR J. stated: "It appears that the appellants and the other workmen are entitled to occupy the houses during the time of their services at the colliery; the occupation terminates at the time the service terminates. Still the appellants are tenants though not tenants for any fixed time." LUSH J also said: "It is true that the holding is not for any fixed term; the tenure is co-existent with the service; but it may still be that during the period of the service the colliers occupy in the character of tenants."

Another aspect of this matter is to be found in *Dobson* v. *Jones* (6). There TINDAL C.J., said that "the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service

required from such officer or servant" and he instanced the case of a coachman, a gardener or a porter.

In the present case, it is in evidence that Thornfield Estate falls within the class of estates paying acreage fees. It is also one of the estates which provide "free housing accommodation" (to use the words of Schedule C of the Rules, Vide Subsidiary Legislation Vol. 1 p.59) included in the wages. The evidence for the defence itself establishes that "in practice all Indian labourers (the accused is one) reside on the estate, but there are stray cases where Tamil labourers reside in villages and go to the estates for work". I think it is clear that residence on the estate is in the interest of the estate, and that such residence is conducive to that purpose and the more effectual performance of the service. The labourer's position is more akin to that of the coachman, the gardener or the porter.

Further, there is no evidence that any particular room is appropriated to the accused. It is in evidence here that the accused, as well as his father, his mother and other members of the family, have been allotted two rooms. Though housing accommodation is provided, if the exigencies of the service require it, there seems to be nothing to prevent the Superintendent from removing labourers to different rooms or even to different lines. I hold that the accused was not a tenant of the premises, but that his residence in the room was in his capacity as servant. Even if he was a tenant, his tenancy terminated when his contract of service was legally ended, and his subsequent residence was a trespass.

I do not think that there is any substance in the further point that the Superintendent was not "in occupation of the lines". I hold that as representative of the owners in full charge of the estate he was in such occupation.

The last matter urged was that the intention to annoy the Superintendent has not been proved. In this case there is evidence to show that the accused was warned that he must leave the estate on the expiration of the term of the notice and that about the middle or end of December, 1939, the accused came to the Superintendent and said he had not been able to get employment elsewhere and that he could not go on the 2nd January. He was informed that he must leave on that date. He has on several occasions been warned to leave the estate, but he refused to accept his discharge ticket, and refused to leave the estate. The refusal to accept the discharge ticket is significant, as without it the accused cannot obtain employment elsewhere. This tends to show that the excuse made by the accused was not a genuine one. The accused has not given evidence in this case as to his intention in remaining on the estate. His conduct was calculated to cause annoyance, and, in fact, has done so. The Superintendent said that the accused's attitude was one of defiance. In the circumstances, the Magistrate has come to the conclusion that the accused continued to remain on the premises with the intention of annoying the Superintendent, and I think the finding is justified.

The application for revision has not been persisted in and is dismissed.

As regards sentence, I see no reason to alter the sentence, but I order that the period of detention pending appeal should be taken into account in calculating the month, and if the whole period spent in prison by the accused, whether subject to rigorous imprisonment or not, is equal

to, or more than, one month, he is entitled to be released. Subject to this, the appeal is dismissed.

Appeal dismissed.

[Proctors for the accused-appellant: *V. Ponnusamy* and *S. Sellathurai*. Proctors for the complainant-respondent: *F. J. and G. de Saram.*]

—K. S. A.

PERERA *v.* SIRIMANA AND OTHERS

[HEARNE & KEUNEMAN JJ. *S C. No. 84—D.C. (F) Kandy 48372.* May 8, 14, 1940.]

Paulian action—Execution of deed of transfer—Subsequent insolvency of transferor—Allegation that deed was made in fraud of creditors—What has to be proved to set aside deed?

HELD: (i) that, in an action to set aside a deed on the ground that it was made in fraud of creditors, the plaintiff has to prove that the execution of the deed rendered the transferor practically insolvent and unable to pay his debts as they became due and

(ii) that the transferor had the intention to defraud the creditors.

Followed: *Louis* v. *Dingiri*, (1915) 18 N.L.R. 161 ... ... (1)
Fernando v. *Peiris*, (1931) 33 N.L.R. 1 ... ... (2)
Baba Etana v. *Dassi Terunnanse*, (1896) 2 Browne 355 ... (3)

N. E. Weerasooriya, K.C., with him *E. B. Wickramanayake*, for the 2nd and 3rd defendants-appellants.

H. V. Perera, K.C., with him *C. E. S. Perera*, for the plaintiff-respondent.

N. Nadarajah, with him *L. A. Rajapakse* and *E. G. Wickramanayake*, for the substituted defendants-respondents.

KEUNEMAN J.—In this case, the plaintiff, who is the administrator of the estate of Aslin Perera, deceased, brought action against the 1st defendant, the brother of Aslin, and the 2nd and 3rd defendants to have deed P3 of the 2nd March, 1935, set aside on the ground that it was made in fraud of creditors. P3 was a deed of gift by the 1st defendant in favour of his son, the 2nd defendant subject to a life interest in favour of the 3rd defendant, the wife of the 1st defendant. Before trial, the 1st defendant died and his heirs were substituted in his place.

The plaintiff established that Aslin was a creditor of the 1st defendant by virtue of a promissory note for Rs. 6,500 dated the 14th January, 1934. Action was brought by her administrator in D.C. Kandy Case No. 47173 against the present 1st defendant, and decree was obtained on the 20th March, 1936, for Rs. 6,982/45 with further interest.

Plaintiff also established that the 1st defendant executed a number of deeds of gift in favour of his children between July, 1934, and April, 1935. Of these deeds, P4 of the 3rd July, 1934, and P6 of the 8th October, 1934, were gifts to two daughters on the occasion of their marriages. P7 of the 9th January, 1935, was another gift in favour of another daughter. P3 and P8, both of the 2nd March, 1935, were in favour of the 2nd defendant and another minor daughter, respectively. P9 of the 4th April, 1935, was a further gift to the 2nd defendant. The plaintiff has now brought action to set aside deeds P3, P8 and P9, the present action relating to P3.

The two gifts to the 2nd defendant were valued according to the deeds P3 and P9 at Rs. 10,000 and Rs. 4,000 respectively.

The evidence discloses that even after April, 1935, the 1st defendant continued to have another asset, namely, a land on which stood a big house, a tea factory, cooly lines, tea-maker's house, etc. At the time of the execution of P3, this property was under mortgage to Messrs. Bartleet and Co., under a bond to secure future advances. The 1st defendant carried on a business here, buying green tea leaf and making tea. At one time it appears to have been a profitable business, namely, up to the end of March, 1934, but there is no definite evidence as to the condition of the business in March, 1935. It is, however, clear that the business continued for some time after that date, and at least two consignments of made tea, each of the value of over Rs. 5,000 (vide D1 and D2 of May and October, 1935) were sent to Messrs. Bartleet and Co. The business, however, ceased some time after October, 1935. Up to the 30th June, 1935, the total debt to Messrs. Bartleet and Co. on the mortgage bond was Rs. 12,600.

The crucial date in this case, as the District Judge rightly says, was the 2nd March, 1935, the date of P3. It is clear that at the date the asset I have mentioned still remained to the plaintiff. We have evidence of the value of the asset. The plaintiff admitted that the house alone was worth Rs. 10,000. Besides that, there was a fully equipped factory and other buildings. On the 25th November, 1936, the whole of the asset was transferred by the 1st defendant to Messrs. Bartleet and Co. for the sum of Rs. 26,255, (the 1st defendant's debt having by this time amounted to this sum). I think that we may take this figure as a fair value of the asset on that date, and even in March, 1935.

The learned District Judge held that P3 was executed in fraud of creditors. As against this, it is contended for the appellants that there is no proof that by the execution of P3 the first defendant rendered himself insolvent, or that P3 was executed with the intention of defrauding creditors.

The Divisional Court held in *Louis* v. *Dingiri* (1) that in a case of this nature the burden of establishing fraud is on the plaintiff and that the *facta probanda* in such cases were well settled. "It must be shown affirmatively that the alienor intended to defeat the claims of creditors, that the alienation left him with practically no property out of which such claims could be met, and that particular creditors, including the creditor impeaching the alienation, had in fact been prevented by it from recovering what was their due," (per WOOD RENTON C.J.).

The case of *Fernando* v. *Peiris* (2) also emphasizes the necessity of proof that the transferor made himself insolvent by depriving himself of the assets conveyed by the impugned deed.

In *Baba Etana* v. *Dassi Terunnanse* (3) it appears that the *facta probanda* mentioned are based on a passage in Voet (42–8–14) which is applied as follows:—

"It is not proved that Juanis (the debtor) was in fact insolvent, i.e., unable to pay his debts as they became due at the date of the conveyance, or that the conveyance so diminished his assets as to render him insolvent, much less is there proof of knowledge of insolvency on the part of Juanis."

The District Judge has not dealt with this aspect of the case.

Prima facie on the 2nd March, 1935, the first defendant, after he executed P3, had an asset worth Rs. 26,255. Besides the debt of Rs. 6,500 to Aslin, he owed about Rs. 12,600 to Messrs. Bartleet and Co. There is no evidence that he had any other debts at that time. In addition, on that date the first defendant was still carrying on his business of tea manufacture. There is no evidence that that business had become unprofitable by March, 1935. I think this evidence negatives two of the essential elements of proof required, namely, (1) that the execution of P3 rendered the first defendant practically insolvent and unable to pay his debts as they became due, and (2) that the first defendant had an intention to defraud his creditors. The insolvency of the first defendant was in fact caused by subsequent events namely, the large increase of his debt to Messrs. Bartleet and Co , after June, 1935. We do not know how this debt was increased from Rs. 12,600 to Rs. 26,255. Mr. Parsons, of Messrs. Bartleet and Co., was a witness, but no question was put to him by either side to elicit either the dates of the items which constituted that increase, and I am unable to accept the contention of the plaintiff's counsel that on the 2nd March, 1935, the first defendant had in contemplation such an increase in his debt to Messrs. Bartleet and Co. It is unnecessary, therefore, to express an opinion whether such a fact if proved would have been sufficient to constitute fraud of creditors.

I am of opinion that the plaintiff has failed to establish his case, and I accordingly allow the appeal with costs and dismiss plaintiff's action with costs.

HEARNE J. — I agree.

Appeal allowed.

—K. S. A.

PERKINS, INSPECTOR OF POLICE *v.* SRI RAJAH

[WIJEWARDENE J. *S.C. No. 898—M.C. Badulla 1577.* March 11, 20, 1940.]

Charge—Preaching in the streets within the jurisdiction of U.D.C. after cancellation of permit by Chairman—Failure to mention in the charge the by-law and the Gazette in which it was published—Validity of conviction—On what grounds can a local authority cancel a permit?

Observations as to when a by-law may be ultra vires.

On a charge of preaching in the streets within the jurisdiction of an Urban District Council subsequent to the cancellation of the permit issued by the Chairman of the U.D.C,

HELD: (i) that a conviction is bad unless the charge mentions the particular by-law in respect of which the accused is alleged to have committed an offence and the Gazette wherein the said by-law is published and

(ii) that it is not open to a local authority to revoke a permit, unless there be a breach of the conditions subject to which the permit was issued.

Distinguished: *Inspector, Sanitary Board, Wadduwa* v. *Podinona* (1926) 28 N.L.R. 415 ... ... (1)

Referred to: *Cassell* v. *Jones*, (1913) 108 Law Times 806 ... ... (2)

No appearance for accused-appellant.

R. R. Crossette Thambiah, Crown Counsel, for complainant-respondent

WIJEWARDENE J.—The accused-appellant has been convicted of the offence of preaching to an assembly within the limits of the Urban District Council, Badulla, without a valid permit from the Chairman, Urban District Council, and sentenced to pay a fine of Rs. 20 and in default undergo simple imprisonment for three weeks.

On a written report made by an Inspector of Police under section 148 (*b*) of the Criminal Procedure Code, the Magistrate ordered summons to issue on the accused. When the accused appeared in Court on receiving the summons, the Magistrate read the charge to him from the summons and the accused pleaded not guilty.

The summons sets out the charge as follows:—

"You did on the 1st day of August, 1939, at.....preach or address an assembly or crowd within the limits of the Urban District Council, Badulla, without a valid permit from the Chairman, Urban District Council, and you thereby committed an offence punishable under sections 164, 168 (8) (d) of the Penal Code."

Now section 164 of the Penal Code refers to a fraudulent or malicious infraction of duty by a Public Servant employed in the Government Telegraph Department and section 168 of the Penal Code refers to the offence of personating a public servant. There is no section in the Penal Code numbered as 168 (8) (d). Mr Crosette-Thambiah, who appeared for the complainant, showed me a by-law published in the Government Gazette 7973 of March 24, 1933, which enacts that:—

"No person shall preach or address any assembly or crowd or hold any meeting on any through-fare within the limits of Badulla Urban District Council area except in pursuance of a permit from the Chairman of the Urban District Council and within the times and limits specified on such permit. Any person who shall commit a breach of this by-law shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Rs. 50."

This by-law is purported to have been made by the U.D.C. in the exercise of its powers under sections 164, 168 (8) (d) of the Local Government Ordinance No. 11 of 1920. The reference in the summons to the Penal Code is clearly a mistake for the Local Government Ordinance No. 11 of 1920 due to the carelessness on the part of an officer of the Magistrate's Court. More-over, the summons was defective as it did not refer to the particular by-law and the Gazette in which it was published. These defects in the summons show serious carelessness on the part of some responsible officer and it is somewhat disconcerting to find that the learned Magistrate did not detect them when according to the record he explained the charge to the accused from the summons. The conviction of the accused cannot be sustained in view of these defects.

The facts of the case are briefly as follows:—The Chairman issued a permit P2 of May 24, 1939, granting the accused permission to "preach in the street between the hours of 6 a.m. to 6 p.m. in the Town of Badulla. For a period of 24.5.39 to 23.11.39". The permit stated that it was liable to be revoked.

1. When the meeting was attended by any obstruction to traffic or pedestrains.

2. When the preaching caused annoyance to the public.

3. If the holder failed to produce the permit when requested to do so by any Police Officer.

On July 22, 1939, the Chairman addressed a letter to the accused and sent it by Registered Post to the accused informing him that the permit was cancelled and requested him to return it to the office. This letter was in fact delivered by the Postal authorities to the keeper of a boutique where the accused took his meals often. The boutique-keeper handed the letter to one Perera who says he gave the letter to the accused on the 1st or 2nd August. Both the boutique-keeper and Perera are witnesses for the prosecution. On August 1, 1939, the Assistant Superintendent of Police, Uva, found the accused preaching at 8-30 a.m. on a public road. The Assistant Superintendent of Police says that he was aware at the time that the accused's permit had been cancelled by the Chairman of the Urban District Council. He went to the accused and got the permit from the accused. He adds:

"When the accused took this permit out he also handed to me with it an envelope containing a letter from the Chairman, Urban District Council, addressed to him. P3 dated 22-7-39 is a copy of the letter that was in the envelope handed to me by the accused. The letter came out from the accused's pocket accidentally. I read it and handed it back to the accused immediately. I made a note of the number of the letter and the date.....".

The Police Officer appears to deserve commendation for efficiency for observing the letter which came out by accident from the accused's pocket and for having thought it useful to read the letter and note its date and number in spite of the fact that he was then aware that the permit had been cancelled by the Chairman and he had no reason to believe that there would be any question as to the letter having reached the accused without delay. The learned Magistrate accepts "unhesitatingly" the evidence of the Assistant Superintendent of Police on this point and states that he has not the "slightest doubt" in holding that the Chairman's letter must have reached the accused before August 1, in spite of some difficulty created by the evidence of two other witnesses for the prosecution, the boutique-keeper and Perera. I add that the accused appears to have charged the Superintendent in M.C. Badulla No. 1514 with assault, wrongful confinement in respect of certain acts alleged to have been committed by him at the time of the arrest. The Magistrate acquitted the Assistant Superintendent of Police on August 21, 1939.

There is a conflict of evidence with regard to the reasons for the cancellation of the permit. The evidence of the Assistant Superintendent of Police on this point is:—

"I wrote to the Chairman on 22-7-39, asking him to withdraw the permit issued to the accused as I found that the accused had published a pamphlet inciting communal feellings and he was also distributing similar pamphlets. I did not hear what the accused preached. I thought the accused was a dangerous man to be allowed to preach.

The Chairman, Urban District Council, states in his evidence.

"On 22-7-39 on representations made to me by the A.S.P., Uva, I wrote to the accused a letter.....informing him that the street preaching licence issued to him him is cancelled. I thought that if I could issue the permit I could also withdraw it. I thought the object of the by-law was to control preaching. I went through the file of the

accused and found that he was on the Black List of the D.I.G. of Police. The accused had refused to give the permit to the Police and I was satisfied with it. When I withdrew the permit I did not look into the by-law specially."

The Chairman whose attention was drawn to the permit and the by-law in the course of his cross-examination appears to justify the revocation of the permit on the ground that the accused had committed a breach of condition (3) appearing on the permit requiring the production of the permit when requested to do so by a Police Officer. Besides the Chairman the prosecution has called seven witnesses, including two members of the Police Force. But none of these witnesses have stated that the accused at any time committed a breach of condition (3) given in the permit. In one part of his evidence the Chairman seems to suggest that the "cancellation" was induced by some discovery which he made in the Black List of the Deputy I.G. of Police. In the absence of any evidence as to the character and contents of this Black List to which the Chairman makes a cryptic reference, I am unable to understand the exact nature of the reason which the Chairman suggests as one of the possible reasons.

I wish to add moreover that if it became necessary for me for the purpose of this appeal to consider the soundness of the reasons given by the Assistant Superintendent of Police for the action taken by him in asking the Chairman to revoke the permit I would have had no material before me on which I could have reached a decision as to the adequacy of the reasons given by him. The A.S.P. has merely stated that in his opinion the pamphlet issued by the accused incited communal feelings. A Court cannot be expected to surrender its judgment to a Police Officer and hold that the tendency of the pamphlet was to incite "communal feeling" and the person publishing the pamphlet was therefore a "dangerous man" merely because the Police Officer states so in his evidence.

I am not satisfied on the evidence that the accused has committed a breach of the conditions subject to which the permit was issued to him. Nor do I think that the Chairman of the Urban District Council could arbitrarily revoke the permit. The authority cited by the learned Magistrate—*Inspector, Sanitary Board, Wadduwa* v. *Podinona* (1) deals with building regulations and has no application to the present case.

The accused was not represented at the hearing of the appeal and I did not have, therefore, the advantage of hearing Counsel on the question whether the by-law referred to is *ultra vires*. Section 164 of the Local Government Ordinance No. 11 of 1920 empowers a District Council subject to the approval of the Local Government Board to make only such by-laws as may appear to the council necessary for the purpose of the exercise of its powers and duties under the Ordinance. Now the particular by-law discussed in this case is purported to have been made under section 168 (8) of the Ordinance which sets out the purpose as follows:—

"The regulation of processions and assemblages and of the performance of music in thoroughfares."

It is to say the least open to serious doubt whether the framing of this particular by-law could be justified under section 168 (8) of the Ordinance. On the other hand, section 166 of the Ordinance declares that by-laws purporting to be made under the Ordinance shall, when published in the Government Gazette, become as legal, valid and effectual

as if they had been enacted in the Ordinance and the modern tendency of the Courts has been not to scrutinize too strictly the by-laws made by a Public Body on the ground of unreasonableness but to support them if possible by a benevolent interpretation unless it is quite clear that the Public Body has exceeded its powers, and credit those who are to administer them with an intention to do so in a reasonable manner—*Cassell* v. *Jones* (2). I do not think it however desirable that I should express a definite opinion on the validity of the particular by-law as the matter was not argued before me.

I allow the appeal and acquit the accused.

Appeal allowed.

—K. S. A.

F. C. THEOBALD *v.* COMMISSIONER OF INCOME TAX

[KEUNEMAN & NIHILL JJ. *S.C. No 157 (1939)—Income Tax.*
May 27, 28, June 6, 1940.]

Income Tax—Business of making papain—Lease of Crown and te lands for growing papaw trees—Construction of sheds to house ovens and labourers' lines on leased lands—Abandonment of res on expiration of leases—Is expenditure incurred in the erection structures an allowable deduction?—Income Tax Ordinance, Ss. 9 eg. Enact. Vol. III. Ch. 188).

Distinction between 'capital' and 'revenue' expenditure and between capital asset and 'fixed' capital asset pointed out.

One T. carried on in partnership with another the business of making from the papaw fruit. For the purposes of this business, he took leases of lands periods from two to four years generally, which is the period which is profitable for the exploitation of the land for the purposes of the business. The leases were free of money rent, but T. and his partner had to carry out an afforestation scheme in the case of lease of Crown lands or carry out the planting of permanent plantations in the case of lease of private lands. The partners put up sheds to protect the drying ovens necessary for the making of papain and they put up temporary labourers' lines. As the exploitation of each land continued for a limited period, the partners did not put up any structure of a permanent nature. At the end of each lease, these structures were generally left standing on the land when it was surrendered to the lessor. Occasionally the lessor paid compensation in respect of such structures, but ordinarily no compensation was obtainable. It was rarely worth the while of T. and his partner to dismantle the structures and to re-erect them on fresh blocks of land taken on lease. The partners had, therefore, for the most part, to utilize fresh materials to erect sheds and labourers' lines on the land to which they moved.

T. contended that a sum of Rs. 6,512/- had been incurred by his firm in the year in question, viz., Rs. 4,270/- on the erection of papian drying sheds and Rs. 2,242/- on labourers' lines. He claimed a deduction of a half of this expenditure, viz., Rs. 3,256/- from his assessable income for the year of assessment 1938-1939 on the ground that it was an expense or outgoing necessarily incurred in the production of the income, within the meaning of S. 9 (1) of the Income Tax Ordinance. The Assessor disallowed the claim as being expenditure of a capital nature or loss of capital, not allowable under S. 10 (*c*) of the Ordinance. On appeal to the Commissioner of Income Tax and the Board of Review, the claim was disallowed and the assessment was affirmed.

The Board of Review, at the request of the assessee, stated a case for the opinion of the Supreme Court on the question of law, namely, whether the said sum of Rs. 3,256/- could be allowed as a deduction under S. 9 (1) of the Income Tax Ordinance or whether it was a deduction not allowable under S. 10 (*c*) of the Ordinance.

HELD: (i) that the expenditure in question is incurred for the enduring benefit of the business, not only in relation to the particular land, but also in relation to the business generally, and is made once and for all and

(ii) that it is, therefore, of a capital nature within the meaning of S. 10 (c) of the Income Tax Ordinance.

Applied: *The Vallambrosa Rubber Co. Ltd.* v. *Farmer*, (1910) 5 T.C. 529... (1)
Atherton v. *The British Insulated and Helsby Cables Ltd*, (1926) A C. 205; 10 T C. 155 C A. ... ... (2)
The Anglo-Persian Oil Co. Ltd. v. *Dale*, (1932) 1 K B. 124; 16 T.C. 253 (3)
Eastmans Ltd. v. *Shaw*, (1928) 45 T.L.R 12, 14 T C. 218 ... (4)
The Granite Supply Association Ltd. v *Kitton*, (1905) 5 T.C. 168 (5)
Smith v. *The Westinghouse Brake Co.*, (1888) 4 T.L.R 649; 2 T.C. 357 (6)
Hyam v. *The Commissioners of Inland Revenue*, (1929) 14 T.C. 479 (7)
Mallett v. *The Staveley Coal and Iron Co. Ltd.*, (1928) 13 T.C. 772 (8)
John Smith & Son v. *Moore*, (1921) 37 T.L.R. 613; 12 T.C. 266 ... (9)

H. V. Perera K.C., with him *K. Satia Vagiswara Aiyar* and *C. Renganathan*, for the assessee-appellant.

H. H. Basnayake, Crown Counsel, for Commissioner of Income Tax-respondent.

KEUNEMAN J. – The appellant claimed to be entitled to dedu sum of Rs. 3,256/- from his assessable income for the year of asses 1938-1939 in the following circumstances which are set out in the Stated:—

"The appellant has been carrying on for some years the b of making papain from the papaw fruit, in partnership with a The partnership take on lease from the Crown and from private various blocks of jungle lands and grow papaw trees on them for ing the milk, for the making of papian, from the fruits of these t

The leases were stated to be generally of a period from four years during which time the lessees clear the land and carr either re-afforestation, in the case of Crown lands, or the planting permanent agricultural plantation, such as coconut, on private lands, in lieu of rent, as the lands are leased out free of rent, because of the permanent afforestation or plantation which the lessees have to effect whilst they carry out the planting of papaw trees and extract the papian therefrom in the course of their business. The papaw trees yield almost the whole milk that can be got from them in about two years, and on the expiration of the leases, the properties are handed back with the permanent plantation which has been established whilst the papian was being tapped from the papaw trees which have been grown.

For the purpose of converting the milk into papain for export, the firm used a special kind of drying oven. The ovens and the sheds in which they are housed, covered with zinc sheets all round, are set up on each block of land on which the growing of papaw trees is done. In addition to that, temporary cooly lines to house the labourers employed in the business are also erected on these blocks of land. There are invariably a number of different blocks of such lands, in various places, on which the firm is carrying on its business operations.

On expiration of a lease, it is frequently found not worth while dismantling these structures and re-erecting them elsewhere, so, they are generally left on the land when it is surrendered to the lessor, who sometimes pays compensation for them and sometimes does not. So that, on the opening of a new block for planting trees and tapping of papian, fresh drying sheds and lines have to be erected more often than not."

The sum of Rs. 6,512 was claimed by the firm as having been incurred in the year in question, namely, Rs. 4,270/- on the erection of papain-drying sheds, and Rs. 2,242 on cooly lines. The appellant claimed a deduction of Rs. 3,256/-, namely, half of the total expenditure. The amount of tax payable in respect of this sum is Rs. 586/08.

The appellant's claim was disallowed by the assessor, and on appeal, by the Commissioner of Income Tax. On the 26th July 1939, the matter was argued before the Board of Review. The Board upheld that the expenditure was of the nature of capital expenditure under section 10 (c), which cannot be allowed as a deduction under section 9 of the Income Tax Ordinance (Chapter 188). The assessment was accordingly affirmed.

The matter now comes before this Court on a case stated by the Board of Review, under section 74 of the Income Tax Ordinance.

Counsel for the appellant referred us in the first instance to the case of the *Vallambrosa Rubber Co. Ltd.* v. *Farmer* (1). In this case, a rubber company had an estate, of which, in the year under review, one-seventh only produced rubber, the other six-sevenths being in process of cultivation for the production of rubber. Expenditure for the superintendence, weeding, etc., was incurred by the company in respect of the whole estate. It was held that in arriving at the assessable profits, the company was entitled to deduct the expenditure for superintendence, weeding, etc., on the whole estate and not one-seventh of such expenditure only. After considering and rejecting the proposition that nothing could ever be deducted as an expense unless the expense was purely and solely referable to a profit which was reaped within the year, the Lord President proceeded to give a rough definition of 'capital expenditure':

"I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing which is going to be spent once and for all, and income expenditure is a thing that is going to recur every year."

This definition of capital expenditure was carried a stage further in the case of *Atherton* v. *The British Insulated and Helsby Cables Ltd.* (2). There, the respondent company claimed as a deduction in computing its profits for Income Tax purposes a lump sum of £31,784 which it had contributed irrevocably as a nucleus of a Pension Fund established by trust deed for the benefit of its clerical and technical salaried staff, that being the sum actuarially ascertained to be necessary to enable past years of service of the then existing staff to rank for pension. It was held by a majority of the House of Lords that the sum in question was not an admissible deduction. In the course of his judgment, Viscount CAVE, Lord Chancellor, discusses the distinction between revenue expenditure and capital expenditure, and criticizes the rough criterion set up in the *Vallambrosa Case* (supra). He says:

"The criterion is not, and was obviously not intended by Lord Dunedin to be, a decisive one in every case; for it is easy to imagine many cases in which a payment, though made 'once and for all', would be properly chargeable against the receipts."

His Lordship then goes on to give instances from decided cases, and proceeds to lay down a general principle:

"But when an expenditure is made not only once and for all, but with a view to bringing into existence an asset or advantage for the enduring benefit of a trade, I think that there is very good reason, (in the absence of special circumstances leading to an opposite conclusion), for treating such an expenditure as properly attributable, not to revenue, but to capital."

His Lordship was satisfied that the payment in that case was 'in the nature of capital expenditure.'

One other case cited by the appellant must be mentioned, namely, *The Anglo-Persian Oil Co. Ltd.* v. *Dale* (3). There, by agreements made in 1910 and 1914, the appellant company appointed another company as its agents in Persia and the East for a period of years, upon the terms (*inter alia*) that the agents should be remunerated by commission at specified rates. In course of time, the amounts payable to the agents increased far beyond the amounts originally contemplated by the company, and, after negotiating between the parties, the agreements were cancelled in 1922, the agent company agreeing to go into voluntary liquidation, and the company agreeing to pay to the agents £300,000 in cash. This sum was in fact paid and it was held that this payment was an allowable deduction for the purpose of Income Tax and Corporations Profits Tax. This case was ultimately decided in the Court of Appeal.

Counsel for the appellant laid great stress on the language of ROMER L J. where he deals with the passage from Viscount CAVE'S judgment in the *Atherton Case* (supra):

"It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made 'with a view, to bringing an asset or advantage into existence. It is also to be observed that the asset or advantage is to be for the 'enduring' benefit of the trade. I agree with Mr. Justice ROWLATT that by 'enduring' is meant 'enduring in the way that fixed capital endures'. An expenditure on acquiring floating capital is not made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date."

Counsel for the appellant argued that the proper test to apply in this case is that laid down by Viscount CAVE and explained by Lord Justice ROMER. He argued, further, that, if that test was applied, the expenditure in the present case would be clearly not of a capital nature. I shall deal more fully with this argument later.

Counsel for the respondent has also referred us to several cases, and I shall refer to some of them. One of these is *Eastmans Ltd.* v. *Shaw* (4), where the appellant company carried on business as butchers and meat retailers. It was the policy of the company to close or to open shops in accordance with the needs of their business as a whole, and it was advantageous to dispose of fixtures and fittings in the shop given up rather than to transfer them to a newly acquired shop. It was held that the company could not deduct the difference between the cost of new fixtures and the price obtained for old fixtures in computing the company's profits for the purpose of Income Tax and Corporations Profits Tax. This was decided finally in the House of Lords on the ground that the expenses were of a capital nature.

In this case, ROWLAIT J. dealt with an interesting question which may have a bearing on the present case:—

"Then Mr. Needham says, and this is the point: Their business was really that of travelling butchers. He said, for instance, like a circus ...Let us take a travelling butcher who has his stall in one town today, and his stall in another town tomorrow, and whose business it is to sell here today, and there tomorrow. He may very well, I should think, charge his moving expenses ..as an expense of his travelling business. But this is not a travelling business. It is, if I may borrow the expression from the *Granite Case* (5), a 'flitting' business.....They substitute one shop, which, for however short a time it lasts, is permanent in its nature, for another shop, which, for however short a time it has lasted, has also been in its nature of a permanent character. They are substituting shops for shops, and are not, I think, in any reasonable sense of the word travelling their business from place to place."

So also, in the case of *The Granite Supply Association Ltd.* v. *Kitton* (5), where a granite company moved their business to larger premises, the expense of carting the granite from the old to the new premises and of taking down and re-erecting two cranes were held not to be allowable deductions. *Vide* also *Smith* v. *The Westinghouse Brake Co.* (6) and *Hyam* v. *The Commissioners of Inland Revenue* (7), in which an interesting comment on *Eastmans' Case* (supra), is to be found. The Lord President says:—

"That was the case of a multiple-shop business, in which the policy was not to carry on business in a number of permanently established premises, but to carry on...a mobile trade here, there, and everywhere, so long as there was a prospect in any particular locality, however temporary, of doing profitable business.....It might be argued that, having regard to the mobile character of the trade and the constant change of premises which was necessarily incident to it, the cost of supplying these temporary premises with fittings was a proper revenue charge. But it was not so regarded either by the Judge of first instance or by the Court of Appeal or by the House of Lords."

Another case has also to be considered, namely, *Mallet* v. *The Staveley Coal and Iron Co. Ltd.* (8). Here, a colliery company held the right to work certain beds of coal under mining leases for terms of sixty-three and twenty-one years respectively. The company agreed in 1923 for the surrender of a part of the seams demised. It was held that the payment for the surrender of the seams was an expenditure of capital, and not an admissible deduction from profits for Income Tax purposes. In this case, Lord HANWORTH, Master of the Rolls, accepted the test applied by ROWLATT J.:—

"The company do not make these payments to get rid of any annual charge against revenue in the future. They make these payments to get rid of the loss in the business or apprehended loss in the business—an entirely different matter....." Another case of interest is *John Smith & Son* v. *Moore* (9), which, although relating to Excess Profits Duty, has also an application to the present question. The matter that concerns us is the payment of £30,000 for the acquisition of certain unexpired contracts for the supply of coal at fixed prices. All these contracts expired at the end of the year in which they were purchased. The majority of their Lordships in the House of Lords held that this was a capital expenditure. Viscount HALDANE said in this connection:

"In the case before us, the appellant, of course, made profit with circulating capital, by buying coal under the contracts....., but he was

able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other masters, but by retaining them, that he was able to employ his circulating capital in buying under them. I am accordingly of opinion that, *although they may have been of short duration*, they were none the less part of his fixed capital."

I have stated the law so far as it appears to be relevant to the present case. It remains now to apply the law to the facts.

The business of the appellant is the making of papain from the papaw fruit. For the purposes of this business, he takes leases for periods of two to four years generally, which is the period which is profitable for the exploitation of the land for the appellant's purposes. The leases are free of money rent, but the appellant carries out an afforestation scheme in the case of Crown lands, or carries out the planting of a permanent plantation in the case of private lands. To protect the drying ovens, the appeallant puts up sheds, and, to house the labourers employed in the business, he puts up temporary cooly lines. As the exploitation of each land continues for a limited period, the appellant does not put up any structure of a permanent character. At the end of each lease, these structures are generally left standing on the land when it is surrendered to the lessor. Occasionally the lessor pays compensation to the appellant, but ordinarily no compensation is obtainable. It is rarely worth the while of the appellant to dismantle the structures and to re-erect them on fresh blocks of land taken on lease. So, for the most part, the appellant has to utilize fresh materials to erect his sheds and cooly lines on the lands to which he moves.

Does the expenditure in respect of these structures fall within the definition of Viscount CAVE in *Atherton's Case*, as explained by ROMER L.J. in the *Anglo-Persian Oil Case* ?

To begin with, is it made "once and for all" ? There is no doubt that the expenditure is incurred "once and for all" in respect of each land leased, but counsel for the appellant argues that, as far as the business is concerned, it is a constantly recurring item. I think the matter will be best argued in connection with the third element in Viscount CAVE'S definition.

Secondly, was the expenditure incurred "with a view to bringing into existence an asset or advantage" for the benefit of the business? I think this element is clearly satisfied in the present case.

Thirdly, is that asset or advantage "for the enduring benefit" of the business ?

Now, I may point out, with all respect, that, although in other cases the words "permanent" and "relatively permanent" have been used, Viscount CAVE adopted the word "enduring". How does fixed capital endure? Their Lordships of the House of Lords held in *John Smith's Case* (supra) that the fact that it is of short duration does not prevent an asset from being regarded as fixed capital. In the case in question, it was a wasting asset Fixed capital, I take it, may be wasting; it may also be subject to depreciation, and it may be that, in the course of time, its value may be practically nil. Further, I think it may be fixed capital, although it is in the contemplation of the owners that it will have to be superseded in the process of time. The asset must, however, be for the enduring

benefit of the business to be regarded as fixed capital. ROMER L.J. in the *Anglo-Persian Oil Case* (supra) appears to have had in mind this distinction between fixed capital and what has been referred to in other cases as circulating capital, and which he refers to as "floating capital", namely, "an asset which may be turned over at a comparatively early date."

It has not been argued by counsel for the appellant, nor can I myself see, that the expenditure in question in this case can be regarded in any way as circulating or floating capital. Counsel for the appellant in effect sought to compare his case to that of the travelling circus or travelling butcher mentioned by ROWLATT J. in *Eastmans' case* (supra.) He argued that this is in its nature a travelling business. He instanced the case of a building contractor who puts up his sheds for the purpose of his operations, and keeps moving from one site to another as his business requires, and on each site erects the necessary sheds. *Eastmans' Case*, counsel argued, is to be distinguished because it was the intention of the company in that case to maintain each shop it opened as a permanent shop, if the nature of the business in the locality was favourable.

In the present business, it must be admitted, there is a certain degree of mobility, and there is no intention of remaining on any land leased for a longer period than the two to four years necessary for the exploitation of the land. But can this business really be regarded as a travelling business? I think the position is not in any reasonable sense comparable with that contemplated by ROWLATT J., where the butcher has his stall in one place today and in another place tomorrow. In the present case, the appellant obtains the benefit of the structures for the full period for which the land can be regarded as economically exploitable for the making of papain; and that period of time is, in my opinion, a substantial period, or, to adopt the language of ROMER L.J., the appellant has no intention of removing or abandoning the structures "at a comparatively early date." For the purpose of his exploitation of the land, expenditure on sheds and cooly lines is necessary, and he takes care to adapt his expenditure to the economic conditions.

No doubt the appellant realizes that, at the end of his exploitation, there may be no value whatever attaching to the structures. But I think the expenditure is incurred for the enduring benefit of the business, not only in relation to the particular land, but also in relation to his business generally, and is made once and for all.

It is not an easy matter to say whether a particular set of facts falls on one side of the line of division or of the other. But in this case, I am of opinion that the expenditure in question is of "a capital nature" within the meaning of section 10 (c) of the Income Tax Ordinance, and that it satisfies the conditions laid down by Viscount CAVE as set out earlier.

The assessment is confirmed and the appeal is dismissed with costs, but any deposit made by the appellant under section 74 (1) of the Income Tax Ordinance will be reckoned as part of the costs.

NIHILL J.—I agree.

Appeal dismissed.

[Proctors for the assessee-appellant: *Percra & Perera.*]

—K. S. A.

S. ARUMUGAM *v.* J. S. LEWIS & H. L. POPE

[KEUNEMAN & NIHILL JJ. *Rev. Appln. No. 20—D.C. Jaffna No. 12.*
JUNE 7, 12, 1940.]

Revision—Restitutio in integrum—*Bank in liquidation—Proceedings taken in several Courts—Order of distribution made by one Court after notice to interested parties, affirmed by Supreme Court—Subsequent application by creditor who had not appeared in the previous proceedings to revise order made therein—Exercise of revisionary powers of the Supreme Court.*

HELD that the petitioner was not, in the circumstances of the case, entitled to relief either in revision or by way of *restitutio in integrum.*

Referred to: *Perera* v. *Simeon Appuhamy*, 2 T.L.R Cey. 136 ... (1)
Velupillai v. *Ponnambalam*, 2 T.L R. Cey. 136 ... (2)
Appuhamy v. *Weeratunga*, (1921) 23 N.L.R. 467 ... (3)
Samynathan v. *The Registrar-General*, (1937) 37 N.L.R. 289 (4)

N. K. Choksy, with him *Miss A. Metha*, for petitioner.

H. V. Perera K.C., with him *N. Nadarajah*, for 1st respondent.

E. B. Wickremanayake for 2nd respondent.

KEUNEMAN J.—This is an application by a creditor of the Kandy Branch of the Travancore National and Quilon Bank. The 1st respondent is the official liquidator of the Bank appointed by the District Court of Jaffna. The 2nd respondent is the official liquidator appointed by the District Court of Colombo, Kandy, and Galle.

The application is made in respect of the order of the District Judge of Jaffna dated the 19th December, 1938. A preliminary objection has been taken to this application under the following circumstances.

The Jaffna Liquidator, on the 17th November, 1938, moved that the rateable distribution of 60 *per centum* of the deposit in the hands of the Jaffna Court be paid to certain persons, namely, the creditors of the Jaffna Branch. Thereupon, on the 18th November, 1938, the Court ordered a notice to be published in several Ceylon and Indian newspapers that a distribution would be made, unless cause was shown to the contrary by any person or persons interested on or before the 12th December, 1938. Notice was duly given. On the date mentioned, the present petitioner did not appear or file proxy. But the liquidators in Madras appeared and showed cause. They were supported by the liquidator in Travancore. The liquidator in Colombo, Kandy and Galle, (the present 2nd respondent), was not represented in Court on that occasion, but he had previously filed a proxy in the Jaffna Court. After argument, the Judge reserved order, and later delivered his order on the 19th December, 1938. Thereafter, the Madras Liquidators appealed to this Court, making the liquidators in Jaffna, Travancore, Colombo, Kandy and Galle, respondents. The liquidator in Colombo, Kandy and Galle, the present 2nd respondent, also moved this Court to revise the order of the 19th December, 1938. The appeal and the application for revision came up before this Court on the 26th October, 1939. On that day, by consent, the appeal was dismissed without costs, and the application was withdrawn and dismissed without costs, without liberty to make a fresh application. The present petitioner made his application to this Court on the 8th January, 1940.

The 1st objection taken by counsel for the 1st respondent is that the present petitioner was no party to the proceedings, and has no

status to make the application. *Perera* v. *Simeon Appuhamy* (1), and *Velupillai* v. *Ponnambalam* (2), were cited in this connection. As against these cases, counsel for the petitioner cited *Appuhamy* v. *Weeratunga* (3). This last case, however, is not on all fours with the present case. There, in a partition action, by a clerical error, the decree was so drawn up as to include the petitioner's land. The petitioner was not interested in the partition action at all, and had no right to intervene until the error in the decree came into being, and all he asked for was that the decree should be brought into conformity with the judgment.

In the present case, the petitioner was interested in the question of the distribution of the deposit. As a creditor of the Bank, he was entitled even at an earlier stage to become a party to the proceedings in the Jaffna Court. He did not even avail himself of the opportunity of appearing and showing cause on the 12th December, 1938, and up to date he has not appeared before the Jaffna Court.

Further, the present petitioner has delayed to make this application till the 8th of January, 1940, more than a year after the Judge made his order. No explanation of this delay appears in the petitioner's affidavit. Counsel suggests on his behalf that he was awaiting the result of the appeal and the application in revision, which were pending before this Court. I think, this is not a satisfactory excuse. There is no explanation of the further delay of about two-and-a half months after the appeal and the application for revision were dismissed.

Counsel for the petitioner contends that the order of the District Judge results in an injustice to him. In this connection I have to remember that the liquidators in Madras did not persist in their appeal, and that the liquidator in Colombo, Kandy, and Galle, withdrew his application for revision without liberty to renew his application. This latter liquidator particularly may well be regarded as having the interests of the petitioner among others in his mind, and he decided not to go on with his application for revision. It is not suggested that there was anything improper in the withdrawal of the appeal or of the application for revision.

There is no doubt that the powers of this Court to act in revision are very wide, but we must bear in mind the fact that "a proceeding in revision is invoking an extraordinary remedy, which the Court is required to exercise with great care, otherwise there would be not an end to litigation once commenced"—(per DALTON J. in *Samynathan* v. *The Registrar-General* (4).

I do not think it would be fair to allow the petitioner, who has preferred to let others bear the brunt of the opposition, to apply in revision now, when the efforts of these others have failed, and a considerable period of time has elapsed. It is intolerable that this matter should be allowed to drag on so long.

The application for revision or *restitutio in integrum* is dismissed with costs to be paid by the petitioner to the respondent.

NIHILL J.—I agree.

Application dismissed.

[Proctor for petitioner: *G. R. Motha.* Proctor for 1st respondent: *T. Arumainayagam.*]

—K. S. A.

KING *v.* L. N. WIJESEKERE

[KEUNEMAN & NIHILL JJ. *S C. No. 9 (1940.—D.C. Colombo Crm. No 87* JUNE 11, 12, 25, 1940.]

Perjury—Alleged false statement given in evidence in a civil suit—Evidence taken down by a shorthand writer who subsequently transcribed it into English—Is the taking down of evidence in such manner in accordance with law ?—Penal Code, S. 190 —Civil Procedure Code, S. 169.

Applicability of Ss. 80, 91 & 92 of the Evidence Ordinance to the production of a record of evidence not taken down in accordance with law.

In a matrimonial suit brought by W. against his wife for divorce on the grounds of malicious desertion, he was recorded as having said that 'about 1937 she (his wife) left me altogether'. His evidence was taken down at that time by a shorthand writer who subsequently transcribed it into English. In a prosecution of W. for having given false evidence in this respect in the matrimonial suit, the prosecution, in order to prove W.'s statement, relied on the record of the matrimonial suit and on the presumptions set out in S. 80 of the Evidence Ordinance.

S. 169 of the Civil Procedure Code enacts:—"The evidence of each witness shall be taken down in writing in the English language by the Judge, not ordinarily in the form of question and answer but in the form of a narrative."

HELD: (i) that there was no compliance in the present case with S. 169 of the Civil Procedure Code and

(ii) that the evidence given by W. in the matrimonial suit was not therefore taken down in accordance with law.

Considered: *Emperor* v. *Nabab Ali Sarkar*, (1924) A I.R. Cal. p. 705 ... (1)
Nath Sinha Roy & others v. *Harishee Bagdhi*, (1929) A.I R. Cal 79 (2)
Riel v. *The Queen*, (1884-1885) 10 Appeal Cases 675 ... (3)

H. V. Perera K.C., with him *Cyril E. S. Perera*, *P. H. K. Goonetilleke*, *Dodwell Goonewardene* and *T. D. L. Aponso*, for accused-appellant.

Nihal Gunasekera for Crown respondent.

NIHILL J.—The appellant who is an Inspector of Police was convicted in the District Court of Colombo for intentionally giving false evidence in a judicial proceeding contrary to section 190 of the Penal Code. The alleged false statement which formed the basis of the indictment was given by the appellant in evidence in a matrimonial suit brought by him against his wife for divorce on the grounds of malicious desertion His petition for divorce was heard *ex parte* and in the course of his evidence he is recorded as having said that "about 1937 she (his wife) left me altogether." His evidence was taken down at the time by a short-hand writer who subsequently transcribed it into English.

At the trial the prosecution called evidence which clearly demonstrated that the statement taken in its ordinary meaning was not true. Indeed it was proved that up to the time of the hearing of the petition the parties had been living together, outwardly at least, as man and wife; that on the very morning of the hearing he had driven her in a car to a hair-dresser in the Colombo Fort and that he had rejoined her in a restaurant when the hearing was over.

The appellant in his defence denied that he used the words complained of but agreed that he might have said that 'about 1937 she left me in September." He explained that on the 10th of September, 1937, when he was in Kandy he received a letter (not produced) from his wife who was then in Moratuwa indicating that she wished to return to her

parents in England and that it was useless for them to continue to live together under false pretences. In November his wife did return to his house but they occupied separate rooms and thereafter there was never any true consortium.

The appellant, it appears, as a keen Police officer, is a student of law and he stated that he had formed the idea in his mind that he was entitled to a divorce on account of the constructive desertion of his wife, so that when he used the word "left" in his evidence he used it in the sense of constructive desertion and not with the intention to convey the false idea of physical desertion.

His proctor who was called by the prosecution to some extent bore out this contention but it becomes difficult to attach much importance to it when one looks at the plaint filed in the matrimonial suit and at the document, P1 c which contains the appellant's evidence given at the hearing of the petition.

In the plaint not a word was said about constructive desertion and the parties were given different addresses, nor in his evidence in the matrimonial suit did the appellant give any indication that he was attaching some special legal meaning to the ordinary meaning of common English words.

I feel constrained to say that, did this appeal rest on questions of fact alone, I would have no hesitation in dismissing it and affirming the conviction.

A point of law, however, of some difficulty does arise on this appeal which merits close consideration. It is contended for the accused that his conviction cannot stand because there was at his trial no legal proof that the accused did in fact state what he was charged with stating.

What happened at the trial was this. The asssistant record-keeper of the Colombo District Court put in the record of the matrimonial suit, P1, and the short-hand writer who had taken down the accused's evidence spoke to having done so. He had no independent recollection of what the accused had said and no other evidence was called, so that the prosecution in order to prove the statement relied on the record and on the presumptions set out in section 80 of the Evidence Ordinance.

The question that arises is, was this statement of the accused "taken in accordance with law" so that the presumptions can apply? The matter is governed by section 169 of the Civil Procedure Code which runs as follows:—"The evidence of each witness shall be taken down in writing in the English language by the Judge, not ordinarily in the form of question and answer, but in that of a narrative."

On the face of it there was not compliance with section 169. The evidence of the accused was not taken down in the English language by the Judge but by someone else who by the use of certain symbols was able to record what he heard on to paper so that later he could transcribe those symbols into the English language. Later again this transcript was signed by the Judge. The learned District Judge before whom this point was also argued felt able to hold that there had been a sufficient compliance with the section.

I should be happy if I could reach the same conclusion but I confess I find great difficulty in doing so. The introduction into our

Courts of the short-hand writer has been a considerable aid to the speedy and efficient administration of justice. Given skill and intergrity on the part of the shorthand writer, this method of recording evidence has obvious advantages and I should regret if any judgment of mine should retard its development.

Nevertheless, our duty is to look at the law as it is and in the interpretation of a statue we cannot add to the ordinary meaning of words something which is not there.

No local case was cited to us which is directly in point but we have been given extensive references to Indian and English cases. The corresponding rule in the Indian Civil Procedure is Order xviii, Rules 5, 8 and 147 but this Order is more flexible than section 169 since it allows evidence to be taken down in writing "in the language of the Court by or in the presence and under the personal direction and superintendence of the Judge"—but if not taken down by the Judge himself, Rule 8 requires the Judge to make a memorandum of the substance of what each witness deposes.

If our section 169 was in similar terms some of the difficulties in the present case would disappear although there would still remain the question whether a taking down in shorthand was a taking down in the language of the Court. Gour in paragraph 2059 of the 1936 edition of his *Penal Law of British India* in discussing proof of perjury writes as follows :—"The deposition if reduced to writing must have been taken in accordance with law. That is to say, it, must comply with the requirements of the law under which it was taken. If, for instance, it was taken under the Code of Civil Procedure, it must comply with the provisions of that Code relating to the reading over and signing of it by the Judge, in the absence of which there can be no prosecution for perjury."

It may also be noted that under the Indian Civil Procedure Code, a number of safeguards are provided to ensure the accuracy of the record. For instance, it must be taken under the personal direction and superintendence of the Judge, and where the Judge does not himself take down the evidence, he has to make a memorandum of the substance of what each witness deposes. Further, the record has to be read over in the presence of the Judge and the witness, and if necessary corrected. Under the Ceylon Civil Procedure Code the only safeguard is the taking down by the Judge, and where the record has to be proved in a charge of perjury, special emphasis must therefore be placed on that requirement of the law.

A study of the Indian cases fully bears out the principle stated above. Thus in *Emperor* v. *Nabab Ali Sarkar* (1), two Judges held that where the provisions of O.18.R.5 had not been fully complied with it was not permissible to prosecute the witness on his statement informally recorded. In that case the deposition has not been read over to the witness. In *Nath Sinha Roy and others* v. *Harishee Bagdhi* (2), the evidence was not taken down by the Judge himself nor did he make a memorandum under Rule 8. He dictated the evidence to a typist. It was held by PAGE J. that this was not sufficient compliance with Order xviii but that it was a curable irregularity. It should be noted that in this case no question of a prosecution arose. The appellant there sought to set aside a decree on the grounds that no legal evidence had been taken. The matter was heard in revision and the Court refused to

treat the whole proceedings as a nullity on the grounds that it would not promote the ends of justice but would work hardship and injustice to the opposite parties.

I think the following passage from the judgment of PAGE J. is worth quoting because it may have some application to the present case :—" The fallacy, I think, that underlies the construction which the opposite parties urge upon the Court is that the short-hand writer or the typist who takes down the evidence at the dictation of the Judge is not a mere instrument like the pen or the typing machine, that needs must react to the touch of the Judge, but a human being with a will and intelligence of his own, and fallible as all men are."

With that I agree, as it is for this reason that I find it difficult to agree with the learned District Judge in this case who seems to have regarded the shorthand writer as the Judge's "*alter ejo.*" How can he be ? The evidence in the matter before us was taken down in narrative form; that was the first intellectual process to which the shorthand writer had to address himself, he then had to write down the appropriate symbols and later transcribe those symbols into English words. There are three stages herein which error might occur, and at no stage in the process can the Judge have exercised any effective control.

Mr. Goonesekere, for the Crown-respondent, has cited to us an English case in which Their Lords of the Privy Council as early as 1885 dealt with the question of the taking of evidence in shorthand. This is the case of *Riel v. The Queen* (3). Not much help, however, can be got from this case because there the corresponding section in Canadian Procedure required the Magistrate to take or *cause to be taken* in writing full notes of the evidence, and their Lordsdips held that the taking of full notes of the evidence in shorthand was a *causing* to be taken in writing of full notes of the evidence and therefore a literal compliance with the statute.

I would say at once that on the authority of that decision I would be prepared to hold in the present instance that there had been compliance with section 169, if the Judge himself had taken down the evidence in shorthand. It is the absence of the words "cause to be taken" in section 169 which creates the difficulty.

These words do occur in section 170. Mr. Goonesekere attempted to argue and did argue with skill that the words "cause to be taken" act as an expansion of section 169 and show the intention of the draftsman who drafted sections 169-172. I wish I could agree but I cannot. The clear meaning of section 170, coming after section 169, is that for a particular purpose, that is for the recording of a particular question and answer, the Judge can stop his own taking down of evidence which will ordinarily be in narrative form and direct someone else to take the question and answer down. That is what the two sections say and I can read nothing further into them.

Again under section 172 where on objection the Judge refuses to allow a question to be put, on the request of the questioner, the burden is placed on the Judge himself to take down the question, the objection, and the decision of the Court.

In my opinion, therefore, there has not been a compliance with section 169 and I would hold therefore that the evidence of the accused in the matrimonial suit was not taken in accordance with law. I would

concede that section 169 is directory in the sense that an irregularity in its application would not necessarily vitiate the entire proceedings. It would not in my view in the present instance have entitled the respondent to vacate the *decree nisi* on the grounds that no evidence had been tendered at all. But when it comes to the application of section 80 of the Evidence Ordinance I think the matter is different. That section lightens the burden of proof on the party producing the document but the document itself must be free from all taint, for then and then only can the party producing the document obtain the benefit of the presumptions.

Even apart from section 80, we are here dealing with the proof of the record. The law requires that the evidence should be taken down by the Judge. It is not possible to say here that, in any real sense, there was any taking down by the Judge. The record which should have supported the charge of perjury is not available and another record taken down by the shorthand writer is offered as proof. This cannot be allowed.

The application of section 91 of the Evidence Ordinance was also argued before us. For the accused it was urged that this section prevented the Crown from adding parol evidence in support of the document or giving any proof except the document itself containing the record of evidence.

Mr. Goonesekere, on the other hand, has contended that the section is not intended to cover records of evidence at all, that read with section 92 it seems that the section is contemplating only documents *inter partes* such as contracts, partnership, agreements and wills. I found this argument attractive but it is against the trend of the Indian decisions and it is difficult to reconcile it with words used in the section — "and in all cases in which any matter is required by law to be reduced to the form of a document."

However, for the purposes of this appeal, it is not necessary to decide this point, for if the record of what the accused is alleged to have said is put aside, as I consider it must be, the prosecution did not prove by parol evidence that the accused did make the statement set out in the indictment.

For the above reasons, I have reached the conclusion, with reluctance, that there was no legal evidence before the District Judge on which he could have convicted and accordingly the appeal should succeed and the accused be acquitted.

KEUNEMAN J.—I agree.

Appeal allowed: accused acquitted.

[Proctor for accused-appellant: *P. E. S. Wijesekere.*]

—K. S. A.

IN THE COURT OF CRIMINAL APPEAL

KING v. DE SILVA

Present: HOWARD C.J. (President), KEUNEMAN & NIHILL JJ.

[Appeal No. I of 1940. S.C. No. 5 –M.C. Kalutara No. 44026. 2nd Western Circuit, 1940. JUNE 3, 4, 12, 1940.]

Criminal Appeal—When is the duty cast on the Judge to withdraw the case from the Jury?—Distinction between English law and Ceylon law—Circumstances which require an accused person to offer an explanation—Duty of Judge to explain to the Jury the principles to be followed in appreciating circumstantial evidence—Criminal Procedure Code, S. 234 (1).

Observations as to what constitute questions of law and of fact.

The appellant was found guilty of the charge of murder and sentenced to death. He appealed on the following grounds:—

1. As a matter of law there was no case to go to the jury.

2. In dealing with a possible theory involving the guilt of the accused the learned Judge addressed these words to the Jury: "I cannot refer to anything that he may have said to the Police because the law prevents any reference being made to that." It is submitted that this is a misdirection in that the words used by the Judge, having regard to the context in which they are used, suggest or tend to suggest to the Jury that the accused had made a confession to the Police.

3. In the course of his charge the learned Judge said: "the murderer, whoever he may be, or others acting with the murderer, had stabbed the woman, laid out her body, placed it on a mat and pillow in a decent manner, covered it with a cloth, arranged her hands, placed flowers, placed a candle, locked the door and gone.....was it the accused, or was it anyone else who did all this?" It is submitted that this was a misdirection in that it identifies the person who locked the door with the person who stabbed the woman. Having regard to the fact that it was the accused who unlocked the door for the Police to enter, it is submitted that this misdirection was calculated to cause grave prejudice to the accused.

4. In dealing with the admittedly abnormal behaviour of the accused in general, the Judge directed the Jury to consider whether such behaviour would be sufficient to bring the accused within the exception created by section 77 of the Penal Code, but failed to direct the attention of the Jury to the bearing of such abnormality on the question of inferences to be drawn, with reference to the alleged guilt of the accused, from the conduct of the accused in relation to the incidents of the day in question. Referring to the possibility of the accused having dressed and laid out the body of the deceased, the learned Judge directed the Jury to consider whether the master of a house, finding his servant stabbed, would act in that way, without immediately informing the Police, implying thereby that the Jury had to consider whether a man would normally act in that way, if the deceased had been killed by someone else. It is submitted that the failure to draw the attention of the Jury to the fact that the accused was abnormal in his general behaviour is a non-direction amounting in the circumstances to a misdirection.

5. In the absence of proof that the blood found on exhibits P2 and P3 was human blood, or a tittle of evidence indicating it to be such, the Judge was wrong in directing the Jury to regard it as an item of real evidence, which may be taken into account by them.

In connection with Ground No. 1, Counsel for the appellant asked the Court to consider an alternative ground, not mentioned in the Notice of Appeal, namely, that the learned Judge omitted to explain to the Jury the main principles to be followed in appreciating circumstantial evidence and, in particular, to point out to them that, before they could convict, they must be satisfied that the incriminating facts be incompatible with the innocence of the accused and be incapable of explanation upon any other reasonable hypothesis than that of his guilt.

HELD: (i) that Ground 3 is an alleged mis-statement of the evidence; Ground 2 is an omission to refer to some point in favour of the appellant; Ground 5 is a

complaint with regard to a misdirection as to a fact and these Grounds cannot, therefore, be regarded as involving questions of law,

(ii) that Ground 2 must be regarded as involving a question of law, inasmuch as the phraseology employed by the Judge, if construed as contended for in the Ground of Appeal, had the effect of bringing to the notice of the Jury the fact that the appellant had made a confession,

(iii) that it does not follow that the phraseology of the Judge in this case suggested to the minds of the Jury that the appellant had made a confession,

(iv) that in view of the evidence that incriminated the appellant and definitely associated him with the crime, the trial Judge would not have been justified in withdrawing the case from the Jury,

(v) that, as a strong *prima facie* case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime, the Jury, in the absence of an explanation from the appellant, were justified in coming to the conclusion that he was guilty and

(vi) that, even if the charge failed to explain, as it should have done, the principle to be followed by the Jury in dealing with circumstantial evidence, they would have had, on a right direction in this case, come to the same conclusion.

Per HOWARD C.J:—"The line of demarcation between questions of law and fact is a somewhat narrow one and it is advisable that the principles on which this Court is to be guided in matters such as this should be clearly stated at the earliest opportunity after its establishment. Ordinance No. 23 of 1938 follows almost word for word the Imperial Criminal Appeal Act, 1907, and hence it is expedient that our procedure in Ceylon should model itself on the decisions and practice of the English Court of Criminal Appeal. In England leave to appeal is considered to be necessary unless the misdirection alleged is clearly misdirection as to the law. Where the misdirection consists of a wrong direction as to the law in general which obtains in the class of cases to which the particular case belongs, or as to the law which is applicable to the special facts of the case, the complaint clearly involves a question of law. A mistake of the Judge as to fact, or an omission to refer to some point in favour of the accused, is not, however, a wrong decision of a point of law, but merely comes within the very wide words "any other ground" in section 3 (*b*)."

"This alternative Ground of Appeal is intimately connected with Ground 1 and, in these circumstances, we have given it consideration although it is not raised in the Notice of Appeal. Generally speaking, this Court will refuse to give effect to grounds not stated in the notice, but when the appellant is without means to procure legal aid and has drawn his own notice, the Court will not as a rule confine him to the grounds stated in his notice."

Referred to: *Rex* v. *Cohen and Batemen*, (1909) 2 Cr App. Rep. 207 ... (1)
Rex v. *Abraham George*, (1908) 1 Cr. App. Rep. 168 ... (2)
Rex v. *Lord Cochrane and others*, Gurney's Rep. 479 ... (3)

Appeal from a verdict and sentence passed on the appellant at the Criminal Sessions of the Supreme Court held at Kalutara and presided over by WIJEYEWARDENE J.

H. V. Perera K.C., with him *M. T. De S. Amarasekere*, *S. Alles* and *N. M. De Silva*, for the accused-appellant.

J. W. R. Illangakoon K.C., with him *E. H. T. Gunasekere*, Crown Counsel, for the Crown.

HOWARD C.J.—Several points have arisen for consideration in the hearing of this appeal which is the first to be heard under the Court of Criminal Appeal Ordinance, No. 23 of 1938. In his notice of appeal the appellant relies on five grounds of appeal. The Attorney-General has taken the preliminary objection that the last four grounds, three of which complain of misdirection and one of non-direction by the Judge, do not involve questions of law and hence cannot be considered by this Court without the prior leave of the Court or upon the certificate of the

Judge who tried the appellant granted under section 4 (*b*) of the Ordinance. The line of demarcation between questions of law and fact is a somewhat narrow one and it is advisable that the principles on which this Court is to be guided in matters such as this should be clearly stated at the earliest opportunity after its establishment. Ordinance No. 23 of 1938 follows almost word for word the Imperial Criminal Appeal Act, 1907, and hence it is expedient that our procedure in Ceylon should model itself on the decisions and practice of the English Court of Criminal Appeal. In England leave to appeal is considered to be necessary unless the misdirection alleged is clearly misdirection as to the law. Where the misdirection consists of a wrong direction as to the law in general which obtains in the class of cases to which the particular case belongs, or as to the law which is applicable to the special facts of the case, the complaint clearly involves a question of law. A mistake of the Judge as to fact, or an omission to refer to some point in favour of the accused, is not, however, a wrong decision of a point of law, but merely comes within the very wide words "any other ground" in section 3 (*b*). In this connection, I would refer to the judgment of CHANNELL J. in *Rex* v. *Cohen and Bateman* (1). Applying the principles I have formulated we are of opinion that Grounds 3, 4 and 5 cannot be regarded as involving questions of law. The suggestion in Ground 5 that the learned Judge was wrong in directing the Jury to regard the finding of the blood as real evidence is a complaint with regard to a misdirection as to a fact. Ground 4 is an alleged omission to refer to some point in favour of the appellant. Ground 3 is an alleged mis-statement of the evidence. We are of opinion that Ground 2 must be regarded as involving a question of law inasmuch as the phraseology employed by the Judge, if construed as contended for in the Grounds of Appeal, had the effect of bringing to the notice of the Jury the fact that the appellant had made a confession. Applying therefore the strict letter of the law, Grounds 3, 4 and 5 were not properly before the Court. In view, however, of the uncertainty with regard to what is a question involving a point of law, we have decided in making our decision on the appeal to take these grounds into consideration.

We do not consider that Ground 3 bears the construction placed upon it by counsel for the appellant. Read with the rest of the context it cannot be said that the learned Judge told the Jury that one person must have done all of these acts. He is putting before the Jury various hypotheses. The words that follow the passage of which complaint is made indicate that the person who locked the door, that is to say, the appellant, may not have been the murderer.

Ground 4 raises a matter of small importance. It is true that with regard to the laying out of the body the learned Judge did not particularly refer to the abnormality of the appellant. On the other hand, a large part of the summing-up is devoted to a consideration as to whether he was of sound mind. It cannot be contended, therefore, that such abnormality would not be present in the minds of the Jury when they were considering this and every aspect of the case.

With regard to Ground 5, it might have been better if the learned Judge had informed the Jury that there was no evidence that the blood was human blood. On the other hand they were warned that it might be any other kind of blood and the matter was left for them to decide. We do not consider the appellant was prejudiced by this passage.

The point made with regard to Ground 2 is that the reference

to the statement made by the appellant to the police would inevitably lead the jury to think that the appellant had made a confession. The policeman to whom the statement had been made by his omission to relate in his evidence what the appellant said to him might with equal force be said to have brought to the notice of the Jury that the appellant had made a confession. Moreover, Jurymen are not so well versed in legal procedure as to infer from the words used by the learned Judge that a confession had been made. Jurymen know that the law formulates various rules with regard to the admission of evidence. They are not, however, fully acquainted with such rules and in these circumstances it does not follow that the phraseology of the Judge suggested to their minds a confession.

To sum up, we are of opinion, for the reasons I have stated, that there is no real substance in Grounds 2, 3, 4 and 5.

The main case for the appellant was based on the ground that, as a matter of law, there was no case to go to the jury. In connection with this ground, Mr. Perera asked us to give consideration to an alternative ground not mentioned in the notice of appeal, namely, that the learned Judge omitted to explain to the Jury the main principles to be followed in appreciating circumstantial evidence, and, in particular, to point out to them that before they could convict they must be satisfied that the incriminating facts be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt This alternative ground of appeal is intimately connected with Ground 1 and, in these circumstances, we have given it consideration although it is not raised in the notice of appeal. Generally speaking, this Court will refuse to give effect to grounds not stated in the notice, but when the appellant is without means to procure legal aid and has drawn his own notice, the Court will not as a rule confine him to the grounds stated in his notice.

Counsel for the appellant contends that although no submission was made by Counsel for the accused at the close of the case for the prosecution, the Judge should at this stage have directed the Jury to return a verdict of "Not Guilty." It was argued that section 234 (1) of the Criminal Procedure Code imposes this duty on the Judge if he considers that there is no evidence to go to the jury that the accused committed the offence. The English Law is somewhat different. In *Rex* v. *Abraham George* (2), it was held that at the close of the case for the prosecution a Judge is not, in law, bound to withdraw the case from the Jury if the point is not submitted to him. If the prisoner elects to go on, the Court will look at the case as a whole. It is, therefore, material at this stage to consider whether there was any evidence that the appellant committed the offence. In this connection the following facts have been established. The deceased was a young girl introduced into his house by the appellant ostensibly as a cook. There was at that time another girl called Pody Nona who also lived in the house and assisted in the cooking. About three weeks before the death of the deceased, the girl Pody Nona left the appellant's house. There was evidence that the appellant regarded the deceased from another aspect than that of a servant. The witness Bastian Senanayake has testified that the appellant informed him that the deceased had bolted because he held her breasts. There is evidence that the appellant was jealous of the attentions that he thought the deceased was receiving from other men. It was established that at the time when the deceased met with her death she

was living alone with the appellant in the latter's house. She was last seen alive by Charles, the carter, at the appellant's house at 7 a.m. on the morning of the 23rd June, the day before the murder. On this occasion the appellant told Charles, apparently in the presence of the deceased, that the latter was a woman of bad character and asked her to leave the house. He also asked Charles to advise the deceased and Charles told her to live well according to the instructions of her master. Charles on that day took the accused to Alutgama in his cart and brought him back to his home about 5-30 p.m. He did not see the deceased on his return. On the following day about 6-30 p.m. Charles was driving his cart about ¼ mile from the appellant's house when he met the appellant. The latter got into the cart and was driven to Alutgama Police Station. During the drive the appellant made no mention to Charles of the death of the deceased. At the Police Station the appellant made a statement in consequence of which Sub-Inspector Ratnarajah went with the appellant to his house. The appellant opened the door with a key which he had in his pocket. All the doors and windows were closed. In a room the Inspector saw the body of the deceased covered with a cloth laid on a mat with the head resting on a pillow. She was dressed in a white jacket and a white cloth which were soaked with blood. Her hands were placed on her chest clapsed together with a bunch of orchids placed in her hand. A candle fixed in a bottle was burning at the time. A knife covered with blood stains and identified as having previously been in the possession of the appellant was on the pillow. The deceased's hair was cropped short. The appellant told the Inspector that the hair cut from the woman's head would be in the shed. The Inspector went to the shed and found the hair there. The appellant also took from the bed some clothes -- exhibits P2 and P3—which were identified by the dhoby as belonging to the appellant. These clothes had blood stains on them. It was not, however, established that it was human blood. The Inspector then took the appellant to the Police Station, searched him and found a diary in in one of his pockets. Inside the diary was a Galle Gymkhana Club Sweep ticket, the *non-de-plume* being "Lily," one of the names of the deceased. The diary also contained certain entries. The hand-writing that made these entries was not proved to be that of the appellant. In these circumstances we are of opinion that such entries cannot be taken into consideration.

Mr. Perera maintains that there was no case to go to the Jury inasmuch as there was no evidence of previously expressed intention or preparation or motive and such evidence as there was only indicated opportunity and did not exclude opportunity by other persons. He also contended that there were no circumstances incriminating the appellant. The circumstances in which the appellant found himself were not incompatible with his innocence. Though there was suspicion, that suspicion did not amount to proof. We have given careful consideration to the submission of Mr. Perera and have come to the conclusion that the Judge was right in not withdrawing the case from the Jury. It seems to us that the following facts incriminate the appellant and definitely associate him with the crime. The deceased was living alone in the house with the appellant and was last seen alive in his house at 7 a.m. on the previous day. The appellant left the house after locking the door and taking the key with him about 6-15 p.m. on the 24th June, 1939, which, according to the medical evidence, was about the time that the deceased might have met with her death. The appellant

omitted to tell Charles, the driver of the cart, anything about the death of the deceased although on the day before he had made complaint to Charles about her conduct and asked the latter to give her advice as to her behaviour. The position in which the body of the deceased was found and its surroundings indicated the improbability of its having been so arranged by an intruder or stranger to the house The hair of the deceased had been cropped and the appellant had pointed out to the Police where it would be found. The Sweepstake ticket in the diary indicated that the appellant did not regard the deceased in the light of a servant only and, in this respect, reinforces the evidence of Charles and Bastian. The interest thus evinced by the appellant in the deceased indicates that he was actuated by feelings of jealousy which supply a possible motive for the crime. We are of opinion that, in view of the evidence to which I have referred, the learned Judge would not have been justified in withdrawing the case from the Jury. In considering whether the Jury were entitled to convict on such evidence, it must also be borne in mind that the appellant gave no evidence and offered no explanation of the various parts of the evidence that incriminated him. On the assumption that he was innocent of this crime, he alone was in a position to tell the Jury the circumstances in which he found the body of the deceased. He could, moreover, have offered his explanation of the body being found lying in his house draped in white, with the hands clasped and holding orchids, a candle burning in a bottle and his blood-stained knife on the pillow. He could also have explained how he knew that the hair of the deceased was in the shed. In this connection I would refer to the following dictum of Lord ELLENBOROUGH in the case of *Rex* v. *Lord Cochrane and others* (2).

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so where a strong *prima facie* case has been made out, and when it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

This dictum applies in the present case. A strong *prima facie* case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of some one else having committed the crime. Without an explanation from the appellant, the Jury were justified in coming to the conclusion that he was guilty.

I now come to the final point made by Mr. Perera, namely, that the learned Judge in his charge to the Jury has omitted to explain the main principles to be followed in appreciating circumstantial evidence. It is true that, when the Judge deals with the evidence generally, he has not explained fully those principles. On the other hand, the charge has to be considered as a whole. If it is found that the Jury have been warned in judging each circumstance that incriminates the appellant to look for an innocent as well as a guilty explanation, the charge cannot be said to be unfair or prejudicial to the defence. Perusal of the charge indicates that the passages with regard to the arrangement of the body, the lighting of the candle, and closing of the door and the supplying of information to the Police without a word to anyone invite the Jury to

find an innocent as well as a guilty explanation of such circumstances. The charge, so it seems to us, recognized that there might be an innocent interpretation in regard to those circumstances that incriminated the appellant.

Even if the charge failed to explain, as it should have done, the principle to be followed by the Jury in dealing with circumstantial evidence, we are of opinion that on a right direction the Jury would have come to the same conclusion.

The appeal is therefore dismissed.

Appeal dismissed.

—K. S. A.

IN THE COURT OF CRIMINAL APPEAL

THE KING *v.* M. H. ANDIRIS SILVA & ANOTHER

Present: MOSELEY J. (President), DE KRETSER & WIJEYEWARDENE JJ.

[Appeals Nos. 2 & 3 of 1940, with Applns. Nos. 8-9. S C. No. 9—M C. Balapitiya No. 35956. 1st Southern Circuit, 1940. July 1, 2, 3, 4, 16, 1940.]

Criminal Appeal—Function of Court of Criminal Appeal in an appeal upon grounds involving questions of fact only—Misdirection—Expressions of opinion by trial Judge on questions of fact—Court of Criminal Appeal Ordinance, S. 5 (1).

Observations on the attitude which the Court should adopt as regards misdirection.

HELD: (i) that in an appeal involving questions of fact only it is not the function of the Court of Criminal Appeal to re-try a case which has already been tried by a Jury and

(ii) that all that the Court is required to say in such a case is whether the verdict is unreasonable or whether, having regard to the evidence, it cannot be supported.

HELD, further, (i) that it is not a misdirection to tell the Jury that they should not pay the slightest attention to any suggestion put to the witnesses in cross-examination unless those suggestions were supported by proof and

(ii) that there is no objection to expressions by the Judge of his own opinion on questions of fact, provided he cautions the Jury that such matters are entirely within their own province and that they should reject his views unless they happen to coincide with their own.

Referred to:
Rex v. *Martin*, (1903) 1 Cr. A.R. 52 ... ... (1)
Rex v. *Jenkins*, (1909) 2 Cr. A.R. 247 ... ... (2)
Rex v. *Matthews*, (1917) 12 Cr. A.R. 247 ... ... (3)
Rex v. *Smith*, (1915) 11 Cr. A.R. 81 ... ... (4)
Rex v. *Scranton*, (1920) 15 Cr. A.R. 104 ... ... (5)
Rex v. *Armstrong*, (1922) 16 Cr. A.R. 147 ... ... (6)
Rex v. *Margulas*, (1922) 17 Cr. A.R. 3 ... . (7)
Rex v. *Shefsky*, (1922) 17 Cr. A.R. 28 ... ... (8)
Rex v. *Rice*, (1927) 20 Cr. A.R. 21 ... ... (9)
Rex v. *McLocklin*, (1930) 22 Cr. A.R. 138 ... ... (10)
Rex v. *Wallace*, (1931) 23 Cr. A.R. 32 ... ... (11)
Rex v. *Hancox*, (1913) 8 Cr. A.R 193 ... ... (12)
Rex v. *Wyman*, (1918) 13 Cr. A.R. 163 ... ... (13)

R. L. Pereira K.C., with him *M. T. De S. Amarasekera* K.C., *S. Alles* and *N. M. De Silva*, for the accused-appellant.

E. G. P. Jayatilleke K.C., Solicitor-General, with him *E. H. T. Gunasekera*, Crown Counsel, for the Crown.

MOSELEY J.—These are appeals against conviction on grounds involving questions of law, and applications for leave to appeal on grounds of fact. The appellants were convicted of murder at Galle Assizes on 19th May, 1940, and sentenced to death by SOERTSZ J. There were two counts in the indictment. The first alleged that the appellants committed murder by causing the death of one William Silva; the second that in the course of the same transaction they committed murder by causing the death of Chalo Nona, who was the wife of William Silva. The appellants had been originally charged in the Magistrate's Court together with a third accused, one David. All three were discharged by the Magistrate and it was at the instance of the Attorney General that proceedings were re-opened against the two appellants. The fact of their previous discharge is mentioned since one of the grounds of appeal is in connection therewith.

After hearing some of the submissions of counsel for the appellants, we granted leave to appeal on the facts and that aspect of the appeal was first argued.

Now section 5 (1) of the Court of Criminal Appeal Ordinance sets out specific grounds upon which the Court may allow an appeal against a conviction. The relevant part of the section, which particularly applies to the present case, in so far as the appeal is on grounds of fact, is as follows :—

> "The Court of Criminal Appeal on any such appeal.....shall allow the appeal if they think that the verdict of the Jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence."

Since the section further provides for the determination of appeals on the ground of a wrong decision of any question law, it must be assumed that the words above quoted presuppose that the verdict of the Jury has been arrived at upon evidence properly admitted and after a proper direction by the Judge.

The section follows precisely section 4 (1) of the Imperial Criminal Act, 1907, and confers upon the Court a power which is capable of wide application; but from its inception, in 1908, the English Court has shown in a series of desicions its disinclination to question a verdict given by a Jury on questions of fact. In *Rex* v. *Martin* (1), an appeal heard and determined within two months of the first sitting of the Court, CHANNELL J. prefaced the judgment of the Court with these words :—" The case has been argued as if this Court was to re-try the case, but that is not its function." A year later in *Rex* v. *Jenkins* (2), the Lord Chief Justice observed :—" We have had to point out from time to time that this Court does not sit to try cases again." The Solicitor General brought to our notice a number of cases in which verdicts have been set aside by the Court of Criminal Appeal and counsel for the appellants asked us to infer from these decisions that the point of view originally expressed by the Court has been modified. Since the present case is the first to come before this Court in which it has been sought to reverse the verdict of a Jury on a question of fact, it may be convenient to refer briefly to these cases, for it appears to us that in each there exists a feature which enabled the Court to distinguish it from those in which they had first enunciated the principles which they deemed to govern their procedure in the determination of such appeals. In *Rex* v. *Matthews* (3), identification, which alone connected the accused with the

offence charged, had been obtained by unsatisfactory means. In *Rex* v. *Smith* (4), the evidence of the prosecutrix on a charge of rape was uncorroborated and, according to the argument of counsel as reported, the Jury had not been warned of the danger of acting on her evidence alone. It would seem therefore that the conviction was quashed not on a question of fact alone. In *Rex* v. *Scranton* (5), the appeal was brought on the certificate of the trial Judge who indicated that the verdict was unsatisfactory, a fact which the Court held to be an element to be taken into consideration. In *Rex* v. *Armstrong* (6), the Court, by a majority decision, held that it was not safe to convict upon the slight evidence before the Jury. In *Rex* v. *Margulas* (7) and *Rex* v. *Shefsky* (8), there had been three co-accused, of whom one had been acquitted by the Jury upon precisely the same evidence as that upon which the other two were convicted. The appeals of the latter were, therefore, allowed. In *Rex* v. *Rice* (9), which was a case of unlawful carnal knowledge, the Court held that the story of the prosecutrix was an impossible one. Moreover, the defence had proved an *alibi* by two unimpeachable witnesses. In *Rex* v. *McLocklin* (10), the conviction rested on the identification given by one witness only, who had in the first place expressed doubt and only became positive of the identity of the accused under pressure from the police. Lastly, in the case of *Rex.* v. *Walles* (11), in which the evidence was purely circumstantial, the Court expressed themselves as "not concerned with suspicion, however grave" and held that the case was not proved with that certainty which is necessary to justify a verdict of guilty.

It does not seem to us that these decisions, or any one of them, indicate any material departure from the view that it is not the function of a Court of Criminal Appeal to re-try a case which has already been decided by a Jury.

In the case now before us the prosecution relied mainly upon the evidence of three persons, each of whom claimed to be an eye-witness of part or the whole of the incident. Two of these are children of the deceased, namely, Anulawathie, a girl of 15, and Upasiri, a boy of 11; the third is Simon, who appears to have accompanied the male deceased on his way home on the evening in question. Each one of these three persons was in a position, if his or her evidence is to be believed, to see what happened in the course of the incident. In the case of each, however, there are unsatisfactory features which might very well cause a Jury to entertain serious doubts as to the value of their evidence. Simon, for instance, in his first statement to the police implicated the accused rather by inference than by claiming to have seen them play the parts, which he subsequently allotted to them. His claim to have actually seen what transpired was, however, corroborated by other witnesses to whom, unless their evidence and that of a police sergeant is rejected, he made statements implicating the appellants very shortly after the incident. Anulawathie, who, in the Magistrate's Court had implicated the man David as well as the two appellants at the trial, eliminated him until her previous evidence was put to her in cross-examination. She then denied that she had made in the Magistrate's Court innumerable statements which she is recorded as having made. The boy Upasiri professed at the trial to have no recollection of what he had said in the Magistrate's Court, and the Jury were practically invited by the Judge to reject his evidence.

Now we are asked to say that the verdict is unreasonable or that

it cannot be supported having regard to the evidence, that is to say, in this case, the evidence of these three witnesses who gave direct evidence supported by the corroborative evidence of the persons to whom statements are said to have been made by them shortly after the incident. So far as this particular aspect of the appeal is concerned, we must assume, and indeed we have no difficulty in so doing, a proper direction by the Judge. We have carefully considered all the points put to us by counsel for the appellants, notably, that the evidence of Anulawathie, as to the range at which the shots were fired, is inconsistent with the medical evidence; that Simon's evidence is not only contradictory of Anulawathie's but of his own previous statement; that Anulawathie's evidence at the trial indicated a desire on her part to come into line with Simon.

The Solicitor-General cited the case of *Rex* v. *Hancox* (12), in which PICKFORD J. observed as follows:—

> "This case turned on the manner in which the witnesses gave their evidence; there was a proper direction to the Jury, and the Court does not see that it can interfere with the verdict without substituting itself for the Jury, which was the proper tribunal to decide the matter. It is not necessary to say whether we would have given the same verdict."

So here, it is not necessary for us to say whether we would have given the same verdict. We do not expect Jurymen to be endowed with legal training nor can we say that our impressions gathered by a perusal of recorded evidence are as valuable as those of persons who have heard witnesses give evidence. We might say that the arguments for the appellants created a strong impression on our minds, and if the Jury had seen fit to acquit the accused we should not have been able to take exception to the verdict. All that we are required to say is that it has not been shown to our satisfaction that the verdict is unreasonable or that it cannot be supported, having regard to the evidence. The appeal on grounds of fact fail.

The notice of appeal on questions of law sets out ten grounds of appeal.

Ground 1 is, in effect, that the Jury were directed that, unless a motive were proved for the giving of false evidence by witnesses for the prosecution, this evidence should be believed. The passage quoted from the charge to the Jury, taken away from its context, may appear to be somewhat strongly put, but if it is read in its context and if for the word "motive" the word "reason" is substituted, the passage seems to us entirely unobjectionable and we do not think that the Jury can have been under any mis-apprehension in this respect.

Grounds 2 and 3 deal with the question of the existence of common intention on the part of the two appellants. As far as Count I of the indictment is concerned, it does not appear to us that any direction on this point was necessary, since the medical evidence showed that necessarily fatal injuries were caused both by a firearm and a cutting instrument which are the weapons which the eye-witnesses placed, respectively, in the hands of the first and second appellants. In any case, in our view, the charge on this point was adequate. In regard to Count 2, since it is alleged that the two acts of killing took place in the course of the same transaction it can fairly be presumed that the

common intention which clearly existed in the beginning continued throughout the transaction.

Ground 4 alleges that the Judge found as facts several matters which should have been left to the Jury, notably in regard to the state of the light which existed at the time of the incident. This is a matter upon which there was no evidence to contradict that given by the witnesses for the prosecution. Moreover, particularly where the extracts, to which the objection is taken, are read in their context, they appear entirely unobjectionable. This ground further included an objection, which is reiterated in Ground 9, to the direction of the Judge that the Jury should not pay the slightest attention to any suggestion put to the witnesses in cross-examination unless those suggestions were supported by proof. We need say no more than that in our view that is a proper direction.

Ground 5 refers to the discrepancies in the evidence of the witnesses for the prosecution and alleges that the Judge did not warn the Jury of the danger of acting upon such evidence. It is obvious that in the course of a very careful and exhaustive summing-up these discrepancies and contradictions were put in great detail to the Jury. The question of credibility of the witnesses, in the light of the unsatisfactory features in their evidence, could not have been dealt with more adequately.

Grounds 6 and 7 contain an objection to expressions by the Judge of his own opinion on questions of fact. It is sufficient to say that the Judge repeatedly cautioned the Jury that such matters were entirely within their own province and that they should reject his views unless they happened to coincide with their own.

Ground 8 alleges that the Judge failed to put the case for the defence to the Jury. The defence relied upon the weakness of the case for the prosecution and in particular upon the discrepancies and contradictions in the evidence. Since these, as we have already observed, were brought adequately to the notice of the Jury, we do not think it can fairly be said that the case for the prosecution was favoured in this respect.

Finally, Ground 10 is in connection with the discharge of the accused at the close of the preliminary proceedings before the Magistrate. At the trial, counsel for the accused in cross-examination asked a police witness if the Magistrate has discharged the accused. The Judge interposed that the matter was irrelevant. Counsel for the accused appears to have agreed that the Judge should direct the Jury to put the matter out their minds. Counsel for the appellants has urged that the fact that the accused had been discharged in the Magistrate's Court was relevant as bearing upon the alteration by Anulawathie of her evidence. It seems to us that it is quite unnecessary to go beyond that alteration. The alteration was patent; the reasons underlying it, immaterial. The objection to evidence of the discharge going to the Jury is obvious.

The Judge's charge to the Jury was, as we have already observed, exhaustive and extremely careful. Taken as a whole, it can only be described as unexceptionable.

It is almost unnecessary, in these circumstances, to refer to the authorities cited by the Solicitor-General in regard to the attitude which this Court should adopt in regard to misdirection. It may, however, not

be out of place to quote the following observations of Lord COLERIDGE J. in the case of *Rex* v. *Wyman* (13):—

> "Voluminous particulars illustrative of the original grounds of appeal were furnished to the Court at a late stage. They were evidently the creation or conception of some learned person, who, having the transcript of the shorthand notes of the evidence and of the summing up, directed much ingenuity and industry to picking out from a long and careful summing up a number of small points, most of which are frivolous. On these we are asked to upset the conviction if we can find any possible slight oversight or error of statement or some inference to be possibly drawn from a chance phrase or possible immaterial misconstruction of evidence. The Court does not deal with matters of this kind. We are here to deal with substantial points of misdirection. We strongly object to this practice which is growing, and we hope that in the future it may be more honoured in the breach than in the observance. It is not fair to learned Judges and others who have to sum up in elaborate cases for their remarks to be subjected to the minute scrutiny which has been applied in this case."

The appeal fails on all grounds. The conviction and sentence are affirmed.

Affirmed.

—K. S A.

IN THE COURT OF CRIMINAL APPEAL

KING *v.* T. JAN SINGHO AND TWO OTHERS

Present: MOSELEY J. (President), SOERTSZ & DE KRETSER JJ.

[Appeals Nos. 4-6 of 1940 with Applications Nos 11-13. S C. No. 24—M.C. Gampaha No. 1333 July 29, 1940.]

Criminal Appeal—Circumstantial evidence—Facts equally consistent with innocence as with guilt—Is verdict of guilt justifiable?

The case for the prosecution, briefly, was that the deceased was shot by the 1st appellant ; that the 2nd and 3rd appellants were seen in his company with the 1st appellant at the time of or immediately after the incident and that they ran away from the scene of the incident and were not subsequently found at their respective homes. From these circumstances the Jury were invited by the prosecution to draw the inference that the 2nd and 3rd appellants were acting in concert with the 1st appellant and that the common intention of all was to bring about the death of the deceased. The Court held that the verdict of guilt against the 1st appellant was justified by the evidence, but in regard to the 2nd and 3rd appellants the facts were equally consistent with their innocence as with their guilt, and that for that reason the verdict cannot be supported.

H. V. Perera K.C. with him *S. P. C. Fernando* for the 1st accused-appellant.

H. V. Perera, K.C. with him *A. H. C. de Silva*, for the 2nd accused-appellant.

H. V. Perera K.C., with him *S. N. Rajaratnam* and *Cherubim* for the 3rd accused-appellant.

J. W. R. Ilangakoon K.C., Attorney-General, with him *E. H. T. Gunasekera*, Crown Counsel, for the Crown.

MOSELEY J.— The three appellants were charged with the murder of one Charles Peter Subasinghe. They were convicted and sentenced to death on the 27th of June 1940 by Mr. Justice CANNON.

Each of the three appellants has appealed on grounds of law and each has filed an application for leave to appeal on questions of fact. The case for the prosecution, briefly, was that the deceased was shot by the 1st appellant and the 2nd and 3rd appellants were in his company and were acting in furtherance of a common intention.

In regard to the 1st appellant, we do not think that any of the questions of law upon which the application is based has any substance. Moreover, we are satisfied that the verdict in this respect is justified by the evidence. His appeal therefore fails.

The cases of the 2nd and 3rd appellants have a different complexion. The evidence against them was that they were seen in company with the 1st appellant at the time of or immediately after the incident; that they were running away from the scene of the incident and they subsequently were not to be found at their respective homes. From these circumstances the Jury were invited by the prosecution to draw the inference that they were acting in concert with the 1st appellant and that the common intention of all was to bring about the death of the deceased.

It does not seem to us that these facts lead one irresistibly to the inference that such a common intention existed on the part of the 2nd and 3rd appellants. Their actions are capable of innocent explanations even though no such explanations was given by either of them. There was no evidence of ill-feeling between the 2nd appellant and the deceased and evidence only of a very slight motive on the part of the 3rd appellant. There was evidence that the 2nd appellant had on previous occasions been in the company of the 1st appellant who at the time was armed with a gun. There was, therefore, nothing extraordinary in the fact that the two were in company at the time of the incident, nor was there any reason why the 3rd appellant who was a first cousin of each of them should not be with them.

On the hypothesis that the 1st appellant was acting independently of the others when he fired the fatal shot at the deceased, it would be quite natural for the 2nd and 3rd appellants to take to their heels. Similarly, if they were aware that they had been seen in the company of the 1st appellant it would not be unnatural, though perhaps unwise, that they should deem it advisable to absent themselves from their homes.

To put it shortly, it seems to us that the facts are equally consistent with the innocence as with the guilt of the 2nd and 3rd appellants, and that for that reason the verdict cannot be supported having regard to the evidence.

In these circumstances, their appeals are allowed and the convictions and sentences are set aside and a judgment of acquittal is entered.

Appeals of 2nd and 3rd appellants allowed.

—K. S. A.

IN THE COURT OF CRIMINAL APPEAL

THE KING *v.* K. EDWIN *alias* VIDANE

Present: MOSELEY S.P.J. (President), DE KRETSER and WIJEYEWARDENE JJ.

[Appln. No. 4 of 1940. S C. No. 21—M.C. Galle No. 23342. July 4, 5, 1940.]

Criminal Appeal—Application for leave to appeal—Refusal—Power of Court to grant relief and substitute verdict found by the Jury—Court of Criminal Appeal Ordinance, Ss. 4 (b), 6 (2) & 18.

On a charge of murder, the evidence for the prosecution rested mainly upon the evidence of a person who claimed to be an eye-witness to the incident. The Jury brought a verdict of guilt. As it appeared to the Court of Criminal Appeal that the evidence of this witness was of an unsatisfactory nature, that it lacked corroboration and that it would be unsafe to accept this witness's version as to the circumstances which surrounded the incident leading to the death of the deceased, the Court granted leave to appeal and, exercising the powers conferred upon it by S 6 (2) of the Court of Criminal Appeal Ordinance, found that the accused person acted in the exercise of the right of private defence but in so doing exceeded that right and was, therefore, guilty of culpable homicide not amounting to murder. The Court, therefore, set aside the conviction and sentence and substituted for the former a conviction under S. 297 of the Penal Code and passed a sentence of five years rigorous imprisonment.

A. H. C. de Silva for the appellant.

E. H. T. Gunasekera, Crown Counsel, for the Crown.

MOSELEY J.—This is an application under section 4 (*b*) of the Court of Criminal Appeal Ordinance for leave to appeal against a conviction. The application first came before Mr. Justice KEUNEMAN who refused leave. The application then comes before this Court under the provisions of section 18 of the Ordinance. After hearing the observations of Mr. de Silva, Counsel for appellant, we decided to grant leave to appeal. We then considered the appeal generally.

The appellant was convicted at the Galle Assizes on the 22nd May last of the murder of one Kuragodage Romanis and he was sentenced to death by Mr Justice SOERTSZ. While this appeal was lodged on grounds of facts only, it was brought to our notice that at the date of the application for leave to appeal, the appellant was not represented by Counsel and we have therefore allowed the appeal to take a wider range and considered the matter as a whole.

Now the evidence for the prosecution rests mainly upon the evidence of a girl named Seelawathie, aged 15 years, who claims to be an eye-witness to the incident. Hers indeed was the only direct evidence. There is other evidence of a circumstantial nature connecting the accused with the commission of the offence and indeed, in his own version, the accused does not deny that his action, which was described as "waving the knife", was responsible for the injuries which caused the death of the deceased. In view of the nature of the injuries, there can be little doubt that it was the intention of the accused to cause the death of the deceased or to cause such injuries as are sufficient in the ordinary course of nature to cause death. The point for consideration then is in what circumstances were those injuries inflicted ? Is there evidence of any facts which would bring the case within one of the exceptions to section 294 of the Penal Code ?.

Now, as I have said, the girl, Seelawathie, claimed to be an

eye-witness of, at least, part of the incident. She did not claim to have seen how it began. Her attention, she says, was first attracted by the report of the gun. It has not been definitely established that a gun was discharged at that time, but the girl Seelawathie says that when she first came within view of the scene she saw the accused sitting on top of the deceased and stabbing him. The report which she made shortly afterwards to the Village Headman was to the effect that her father was shot by the accused and she went on to say that her mother, Karlinahamy, saw the shooting. But between the time of the incident and the time of her making that report, according to her story, she had met two persons, Amaradasa and Thawneris, to whom she had given the information that her father had been stabbed by the accused. In the course of a very careful summing-up, the learned Judge referred to the discrepancy between her two statements, namely, her evidence at the trial that she saw the accused stabbing the deceased and her statement to the Village Headman that her father had been shot, but he omitted to mention that in the meantime she had met the two witnesses to whom I have referred, and described the case as one of stabbing. This girl was the only eye-witness, but the learned Judge does not appear to have thought it necessary to warn the Jury to that effect and that her evidence would therefore require careful consideration at their hands. Moreover, in considering the point as to whether the accused was responsible for the death of the deceased, the learned Judge referred to the corroboration of her story by certain productions in the case. While these productions may have corroborated her story in that particular respect, it does not seem to us to go any further, but it is more than probable that the Jury, in considering the case generally, were influenced by the Judge's observations as to the corroboration of the girl's story. On the whole it seems to us that the evidence of the girl Seelawathie is of an unsatisfactory nature, that it lacks corroboration, and that it would be unsafe to accept her version as to the circumstances which surround this incident.

The accused gave evidence on his own behalf and set the defence that he was acting in the exercise of the right of private defence. His story may or may not be true, but it seems to us that if the story of the witness Seelawathie is to be rejected, one is thrown back on the version of the accused, exaggerated though it may be, as to the circumstances in which the deceased met his death. That being so, we think that we should exercise the powers conferred upon us by section 6 (2) of the Ordinance and find that the accused was acting in the exercise of the right of private defence, but in so doing he exceeded that right and is, therefore, guilty of culpable homicide not amounting to murder. We, therefore, set aside the conviction and sentence and substitute for the former a conviction under section 297 of the Penal Code, and we think, in view of all the circumstances and the fact that the deceased was armed with a tapping knife with which certain of the accused's injuries may have been inflicted, that a sentence of five (5) years rigorous imprisonment will meet the case.

Verdict substituted.

—K. S. A.

ASSISTANT GOVERNMENT AGENT (Mullaitivu) *v.* SELVADURAI

[HOWARD C.J. S.C. No. 274/1940—M.C. Mullaitivu No. 16130.
July 8, 10, 1940.]

False information with intent to cause a public servant to use his lawful power to the injury of another person—Statements made in petition to Assistant Government Agent—What prosecution has to prove to justify conviction—Penal Code, S. 180.

Previous petitions sent by accused having no reference to the subject-matter of the petition which formed the basis of the charge—Admissibility—Evidence Ordinance, S. 146.

Conduct of a judicial inquiry—Observations on the necessity of evidence being considered from a judicial and not an administrative point of view.

HELD. that, to constitute the offence punishable under S. 180 of the Penal Code, it is necessary that the information by the accused person should be information which he knows or believes to be false; it is not sufficient that he had reason to believe it to be false or that he did not believe it to be true; there must have been positive knowledge or belief that it was false.

Followed: *Murad* v. *Empress*, 29 P.R. 1894 Cr. ... ... (1)
Goonstilleke v. *Elisa*, (1917) 20 N.L.R. 140 ... ... (2)

Appeal from a conviction entered by Kohoban Wickreme Esq., Magistrate of Mullaitivu, for an offence under S. 180 of the Penal Code.

S. Nadesan for the accused-appellant.

E. H. T. Gunasekera, Crown Counsel, for the complainant-respondent.

HOWARD C.J.—The conviction in this case cannot be maintained. To constitute the offence punishable under section 180 of the Penal Code it is necessary that the information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false or that he did not believe it to be true. There must have been positive knowledge or belief that it was false. In *Murad* v. *Empress* (1), PLOWDEN J. stated as follows:

> "It is not enough to find that he has acted in bad faith, that is, without due care or enquiry or that he has acted maliciously or that he had not sufficient reason to believe or did not believe the charge to be true. The actual falsity of the charge, recklessness in acting upon information without testing it or scrutinizing its sources—actual malice towards the persons charged—they are relevant evidence more or less cogent; but the ultimate conclusion must be in order to satisfy the definition of the offence that the accused knew that there was no just or lawful ground for proceeding. It may be difficult to prove thia knowledge but, however difficult it may be, it must be proved and unless it be proved the informer must be acquitted."

The accused cannot be convicted if he shows that he had reasonable grounds for believing the information to be true. He is not bound to show that it was in fact true.

The prosecution have not proved that the accused knew or believed the information which he gave to be false. In fact the evidence indicates that he had real grounds for thinking that it was true. The first

false statement charged against the accused is that he stated that the District Mudaliyar, Vavuniya South, came to Rasenthirankulam on the 11th instant and included in the list for relief work all people who had large quantities of paddy. The Assistant Government Agent in his evidence stated that work had been given to S. Velupillai although he had 18 bags of paddy and to S. Kaddaiyar who had 4 or 5 bags of paddy. Also that some were given relief work in spite of their having seed paddy. The Udaiyar —Karthigesu Nagamany—in his evidence also admits that there was paddy in some of the houses where relief was given. In view of this evidence it is clear that the falsity of the statement has not been established. There may have been some exaggeration, but on the other hand it would appear that the accused had reasonable grounds for thinking that it was true.

The second false statement alleged is that the accused stated in his petition that the District Mudaliyar had given relief work to those who can live comfortably even if Government does not give one cent. If the petition is scrutinized it is clear that this was not a charge made by the accused against the Mudaliyar in his petition. The passage in the petition on which this charge against the accused is based is merely a repetition by the latter of what he said to the Mudaliyar. Moreover the falsity of the accused's statement has not been established.

The third false statement alleged is that the District Mudaliyar has included for relief work 2 from a family of 4, 2 from a family of 3 and 3 from a family of 7. The evidence of Karthigesu Nagamany indicates that this statement was approximately correct. Knowledge of its falsity has moreover not been brought home to the accused.

The fourth false statement alleged is set out in the charge as follows :—

"(4). For all these the District Mudaliyar did not act according to the Regulation."

The Magistrate states that (4) is a general summing-up of (1), (2) and (3). If (1), (2) and (3) are accepted against the accused, suffice it to say that (4) has to be accepted against him. The accused's knowledge of the falsity of (1), (2) and (3) has not been established. In these circumstances, (4) stands in the same category.

In allowing this appeal, I feel it incumbent on me to say something with regard to the judgment and the whole atmosphere pervading the trial of this case. The learned Magistrate seems to have regarded the weight to be attached to the evidence of various witnesses from an administrative rather than from a judicial point of view. As an instance of this attitude, he accepts the evidence of the Udaiyar of Naducheddikulam apparently on the grounds that the latter could count three generations of his ancestors as having held influential and trusted offices in Government, that he holds a medal for good work and has no censures in his record of service. The evidence for the defence is rejected because it is given by witnesses taken at random from the village where the incidents connected with the 11th June, 1939, are said to have taken place. This is not the method that a Judicial Officer should employ to test the credibility of witnesses.

The Magistrate's strictures on a statement in the accused's petition begging the Assistant Government Agent to do away with the injustice

of the subordinate headman and grant them his help can only be described as lamentable. These strictures are couched in flowery language in which are drawn inferences unwarranted and unjustifiable. It is ludicrous for the Magistrate to infer from the words "do away with the injustice" a request for the Assistant Government Agent to use his lawful power to dismiss the acting Mudaliyar or, if that is not possible, to recommend him for dismissal or censure or fine him.

The Magistrate, in addition to misdirecting himself both on the law and the evidence, has allowed evidence of previous charges against the accused to be given in evidence. It does even appear that convictions in these cases were recorded against the accused. Not content with this, the Magistrate allowed evidence to be tendered of previous petitions sent by the accused but not referring to the subject matter of the petition which formed the subject of the charge in this case. In spite of objections by Counsel for the accused, this evidence was admitted under section 146 of the Evidence Ordinance. Needless to say this section has no relevance in the matter.

The record of the case offers a good example of how a judicial enquiry should not be conducted.

I would also refer to the concluding paragraph of SHAW'S judgment in *Goonetilleke* v. *Elisa* (2). The present case is also one in which, in my opinion, the provisions of S. 180 of the Penal Code should not have been exercised.

The appeal is allowed and the conviction set aside.

Appeal allowed. Conviction set aside.

—K. S A

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ATTORNEY GENERAL *v.* E. H. JAMES SINGO

[NIHILL J. S.C. No. 627—M.C. Anuradhapura No. 328.
January 30, February 2, 1940.]

Motor car—Overcrowding of omnibus—Can driver of omnibus be made liable?—Abetment—Motor Car Ordinance, S. 66 (3) [*Cap. 156*]—*Penal Code, Ch. V.*

Criminal trial—Judgment based on admissions—Regularity.

S 66 (3) of the Motor Car Ordinance makes the conductor of an omnibus liable for the offence of overcrowding. On an appeal against the acquittal of the driver of the omnibus for overcrowding,

HELD that if the driver, with guilty knowledge of the conductor's offence chooses to abet it, he then becomes as liable as the conductor by the provisions of S. 89 of the Ordinance.

HELD, further, that in a criminal case nothing can be taken as admitted and that a judgment entered by a Judge who did not hear the evidence but relied on admissions is open to objection.

Followed: *Gough* v. *Rees*, (1929) 142 Law Times Rep. p. 424 ... ... (1)

Nihal Gunasekere, Crown Counsel, for complainant-appellant.

No appearance for respondent.

NIHILL J.—In this case the Attorney General is the appellant and the appeal is against the acquittal of the accused respondent, a motor

omnibus driver, who was charged with aiding and abetting the commission of an offence under section 66 (3) of the Motor Car Ordinance (Cap. 156).

The learned Magistrate without hearing any evidence, acquitted the respondent on the grounds that, since by the terms of section 66 (3) he was not liable as the driver of the omnibus for the overcrowding, he could not be held liable for abetting an offence which he himself as a driver could not commit.

I do not know on what authority the Magistrate founds this proposition. Section 66 (3) makes the conductor of an omnibus, not the driver, liable as a principal for the offence of overcrowding for the good reason that the conductor is the person who is there in the omnibus for the express purpose of regulating the seating of the passengers and the collection of their fares, but if the driver with guilty knowledge of the conductor's offence chooses to abet it, he then becomes as liable as the conductor by the provisions of section 89.

The essence of section 89 is not the offence of overcrowding but the abetment of that offence and the section reflects the general principles of the law of abetment as set out in Chapter V of the Penal Code.

It is easy to think of instances where an abettor could not himself be guilty of the offence abetted. For an example, could not a minister of religion or registrar of marriages who intentionally and with guilty knowledge performed a bigamous marriage be held accountable for abetting the bigamy or a person other than a public servant who abets a public servant to receive a bribe ?

I am indebted to Mr. Nihal Gunesekere for citing to me the English case of *Gough* v. *Rees* (1), which is very much in point. There it was held that the fact that section 15 of the Railway Passenger Duty Act, 1842, imposes a penalty only on the "driver, conductor, or guard" of an omnibus which is overloaded did not preclude the conviction of the owner for aiding and abetting under section 5 of the Summary Jurisdiction Act, 1848. That section provides that:—

> "Every person who shall aid, abet, counsel, or procure the commission of any offence which is or hereafter shall be punishable on summary conviction shall be liable to be proceeded against and convicted for the same, either together with the principal offender, either before or after his conviction, and shall be liable on conviction to the same forfeiture and punishment as such principal offender."

Now sections 89 and 90 of Cap. 156 together provide similar means for the conviction and punishment of one who abets an offence under section 66 (3). It is clear therefore that this case must be re-heard since the Magistrate founded his acquittal on a wrong view of the law. His judgment is also open to objection in that he did not hear the evidence but relied on admissions. In a criminal case nothing can be taken as admitted.

I set aside the order of acquittal and remit the case back for trial on the charge framed against the respondent.

Set aside and sent back.

—K. S. A.

W. K. CHARLES DE SILVA *v.* D. D. EDIRISURIYA

[HOWARD C.J. & SOERTSZ J. *S.C. No. 65—D.C. (F) Tangalle No. 3898.*
July 25, 26, August 2, 1940.]

Money-lending—What constitutes the business of money-lending ?—Default made by money-lender in keeping accounts—Is such default a bar to the enforcement of claim by the administrator of the estate of the deceased money-lender ?—The Money Lending Ordinance, Ss. 8 (2) & 11 [Leg. Enact. Vol. II, Ch. 67].

The similarity of the phraseology of S. 9 of the Registration of Business Names Ordinance [Leg. Enact. Vol. III, Ch. 120] with that of S. 8 of the Money Lending Ordinance pointed out.

The original plaintiff, a fisherman, sued the defendant on a promissory note. The original plaintiff died and his son, as administrator of the estate of the deceased, was substituted as plaintiff and the action proceeded to trial.

HELD: (i) that the question as to whether a person carries on the business of money-lending is one of fact,

(ii) that where there is evidence that the money-lending transactions of a person are not limited to occasional loans, but his operations are conducted systematically and continuously, a finding that such person carries on the business of money-lending is justifiable,

(iii) that, if it is proved that a person carries on the business of money-lending, the onus rests on that person to prove that he complied with the provisions of S. 8 of the Money Lending Ordinance and

(iv) that the bar imposed by S. 8 (2) of the Money Lending Ordinance does not apply to claims put forward by the administrator of the estate of a deceased money-lender.

Followed:	*Fagot* v. *Fine*, (1911) 105 L.T. 583	(1)
	Edgelow v. *Mac Elwee*, (1918 118 L.T. 177	(2)
	Pathmanathan v. *Chawla*, (1933) 13 Cey. Law Rec. 89 ...	(3)
Referred to:	*Newton* v. *Pyke*, (1908) 25 T.L.R. 127	(4)
Applied:	*Daniel* v. *Rogers*, (1918) 2 K.B. 229	(5)
	Hawkins & another v. *Duche'*, (1921) 3 K.B. 227	(6)
	Fernando v. *Jayasinghe*, (1933) 35 N.L.R 231	(7)
Distinguished	*Silva* v. *Fernando*, (1912) 15 N.L.R 499	(8)

H. V. Perera K.C., with him *O. L. de Kretser* (Jr.), for the substituted plaintiff-appellant.

N. E. Weerasooriya K.C., with him *Cyril E. S. Perera*, for the defendant-respondent.

HOWARD C.J.—This is an appeal from a judgment of the District Judge of Tangalle dismissing the plaintiff's action with costs. The original plaintiff who was the father of the appellant sued the defendant on a promissory note dated the 27th February, 1931, for the recovery of a sum of Rs. 877/50 and interest. The original plaintiff having died, the appellant, after taking out letters of administration, was substituted plaintiff as administrator of his estate. After two witnesses had been called for the plaintiff the following issues were added to those already framed.

"5. Did the original plaintiff carry on the business of money-lending ?

6. If so, can this action be maintained without account books ?"

Issues 3 and 4 were answered in favour of the plaintiff, the learned District Judge finding that at the execution of the note Rs. 500/-

was paid in cash by the original plaintiff to the defendant. Issues 5 and 6 were answered by the learned Judge in favour of the defendant and in consequence of those answers judgment was entered dismissing the action instituted by the plaintiff. Counsel for the plaintiff has argued that the District Judge was wrong in his findings with regard to both these issues. It is maintained that the original plaintiff was not a money-lender. This contention was not argued with great force. In fact Counsel could only contend that it was doubtful whether the original plaintiff was a money-lender. There was evidence that though he was a fisherman the original plaintiff lent money on notes to persons who were not his relations and filed actions to recover on such notes. It was in evidence, moreover, that sometime before his death he had given up fishing. The note in this case was also on a printed form. In the course of his judgment in *Fago* v. *Fino* (1), in which it was held that a jeweller who lent money to customers was carrying on the business of money-lending., BANKES J. said :—

> "It is absolutely essential that the tribunal should consider not only the nature but the number of the money-lending transactions. It is from these transactions and from them alone that the inference can be drawn whether or not the person is carrying on the business of money-lending."

In *Edgelow* v. *MacElwee* (2), a solicitor who habitually lent money on loan transactions in no way confined to clients was held unable to recover as he was not registered. In commenting on the essential attributes of a money-lender McCARDIE J. said :—

> "A man does not become a money-lender by reason of occasional loans to relations, friends or acquaintances, whether interest be charged or not. Charity and kindliness are not the basis of usury. Nor does a man become a money-lender because he may upon one or several isolated occasions lend money to a stranger. There must be more than occasional and disconnected loans. There must be a business of money-lending, and the word business imports the notion of system, repitition and continuity. The line of demarcation cannot be defined with closeness or indicated by any special formula. Each case must depend on its own peculiar features."

The question as to whether the original plaintiff was carrying on a money-lending business is one of fact. There was evidence that the money-lending transactions of the original plaintiff were not limited to occasional loans, but his operations were conducted systematically and continuously. In these circumstances, it is impossible to say that the District Judge was wrong in holding on Issue 5 that the original plaintiff carried on the business of money-lending.

The correctness of the District Judge's answer to Issue 6 depends on the question raised by this Issue and the interpretation to be given to Section 8 of the Money Lending Ordinance (Cap. 67). Counsel for the plaintiff has contended that the point raised by this Issue is whether the debt can be proved without the production in Court of account books. The wording of the Issue is not felicitous and if it had this limited meaning, I am of opinion that the Judge's finding would be incorrect. The Issue must, however, be held to raise the question as to whether, having regard to the provisions of section 8 of the Ordinance, the plaintiff can enforce this claim if the original plaintiff did not keep or cause to be kept a regular account of this loan, clearly stating in plain words and

numerals the items and transactions incidental to the account and entered in a book paged and bound in such a manner as not to facilitate the elimination of pages or the interpolation or substitution of new pages. There should have been an Issue as to whether in fact the original plaintiff did keep books as provided by the section. The District Judge has, however, found that no books were kept. In coming to this finding he has in effect placed on the plaintiff the burden of proving that books were kept. Counsel for the plaintiff has contended that this burden of proof rested on the defendant. In support of the District Judge's finding Counsel for the defendant relied on *Pathmanathan* v. *Chawla* (3). In his judgment in that case DALTON A.C.J. stated as follows:—

> "It is conceded that, if plaintiffs are held to be carrying on the business of money-lending, the onus is on them to show they have complied with the provisions of section 8 of the Ordinance. They have failed to do so and therefore they are not entitled, in the words of the Ordinance, to enforce any claim in respect of any transaction in relation to which the default shall have been made."

Mr. Perera has contended that inasmuch as the plaintiff has not "conceded" that the original plaintiff carried on the business of money-lending, this case is not an authority for placing the burden of proof with regard to the books on the plaintiff. I do not consider that this is the meaning of the passage cited from DALTON J 's judgment. As I read his dictum, I understand it to mean that, if it is proved that a person carries on the business of money-lending the onus rests on that person to prove that he complied with the provisions of section 8. This is the position in the present case. *Pathmanathan* v. *Chawla* is a decision binding on the Court. In this connection, I would also refer to the following passage in the judgment of LUSH L.J. in *Fajot* v. *Fine* (supra):—

> "It seems to me clear that in cases brought under the Money Lenders Act or cases which involve questions raised under the Money Lenders Act the defendant has to prove that the plaintiff is a money-lender, in other words that he carries on the business of lending money. But when the defendant has given *prima facie* evidence of what WALTON J. in *Newton* v. *Pyke* (4) referred to as a certain degree of system and continuity about the plaintiff's transactions, then, if the plaintiff seeks to avail himself of any of the exceptions under section 6 of the Act, the burden is upon him to show that he comes within them."

On the authority of these two cases, therefore, the District Judge was correct in placing the burden of proof in this matter on the plaintiff.

There now remains for consideration the interpretation of section 8 of the Money Lending Ordinance. It has been contended by Mr. Perera that the bar to enforcing a claim provided by sub-section (2) is a personal bar and only applies to the person subject to the obligations of the section. We are without a decision, on the interpretation of this section, of the Supreme Court of Ceylon to assist us in coming to a conclusion on the matter. A similar provision is not to be found in the English law. We have, however, been referred to two decisions of the English Courts on section 8 (1) of the Registration of Business Names Act. These two decisions are *Daniel* v. *Rogers* (5) and *Hawkins and another* v. *Duche'* (6). Section 8 (1) of the above-mentioned Act is worded

as follows:—

"Where any firm or person by this Act required to furnish a statement of particulars.....shall have made default in so doing, then the rights of that defaulter under or arising out of any contract made or entered into by or on behalf of such defaulter in relation to the business in respect to the carrying on of which particulars were required to be furnished at any time while he is in default shall not be enforceable by action or other legal proceeding either in the business name or otherwise: provided always as follows:—

(a) The defaulter may apply to the Court for relief against the disability imposed by this section, and the Court.....may grant such relief on certain conditions.

(b) Nothing herein contained shall prejudice the rights of any other parties as against the defaulter in respect of such contract as aforesaid....."

It will be observed that the wording of this sub-section is similar to that of section 8 (2) of the Ceylon Money Lending Ordinance. In *Daniel* v. *Rogers* (supra), PICKFORD L.J. stated as follows:—

"I entertain considerable doubt whether the Act of 1916 was ever intended to apply to the enforcement of a contract except as between the parties to it. The provisoes to S. 8, sub-section 1, seem to me to point in this direction, certainly provisoes (a) and (c) do so; but it is unnecessary to decide this point, and I do not propose to do so."

The judgments of the other Judges, BANKES and SCRUTTON L.JJ., were couched in similar language. In *Hawkins and another* v. *Duche'* (supra), MC CARDIE J. stated as follows:—

"The contention of Mr. Carr is largely founded on the observation of the Court of Appeal in *Daniel* v. *Rogers*. The facts in that interpleader issue were somewhat different to the present facts. Several *dicta* however are relied on by Mr. Comyns Carr. PICKFORD L.J. said: 'I entertain considerable doubt whether the Act of 1916 was ever intended to apply to the enforcement of a contract except as between the parties to it'. BANKES L.J. expressed a similar view and pointed to the distinction between the Money Lenders Act, 1900, as compared with the Registration of Business Names Act, 1916. And SCRUTTON L.J.: 'I desire to say, although it is not necessary finally to decide the point, that in my view the application of S. 8 is limited to proceedings between the parties to the contract'. I respectfully think that the above weighty *dicta* represent the true interpretation of the Act of 1916. That Act, I think, was meant to punish a defaulter (unless he procured relief) rather than innocent third parties. Unless the dicta I have cited be good law, the most serious consequences would follow. Innocent holders for value of negotiable instruments might under S. 8 be unable to enforce the rights of a defaulter. The position of innocent assignees of a defaulter's book debts would be equally imperilled. Even purchasers of goods from a trader who was in default under the Act of 1916 might (if the goods were warehoused or held by third persons) be met by a plea of the Act if action was begun against those persons for detention. The position would be still further aggravated if the assignor defaulter in the cases above put either absconded from the country or refused to make any application for relief. Take

moreover the case of a defaulter who executes a deed of assignment for the benefit of his creditors and then leaves the country. Is the trustee of the deed of assignment stricken with inability to collect the assets or enforce the claims of the debtors ? I cannot think so. I shall hold that the plaintiff trustees in bankruptcy in the present action are not effected by the disability (if any) of M. and B. Taper. I respectfully adopt and apply the views of PICKFORD, BANKES and SCRUTTON L.JJ. in *Daniel* v. *Rogers*. I merely add that it is still more necessary to take the view I have ventured to express when it is remembered that an argument has arisen before me as to whether a trustee in bankruptcy can as such apply for relief under S. 8 in respect of a bankrupt who was a defaulter under the Act of 1916. The Bankruptcy Act, 1914, does not appear to expressly contemplate such circumstances."

With regard to these two cases it will be observed that, whereas the observations of the learned Judges in *Daniel* v. *Rodgers* were obiter, in *Hawkins* v. *Duchs'* MCCARDIE J. adopted those observations and applied them in reaching a conclusion. The reasoning and observations of the Judges in these two cases were also applied in the case of *Fernando v. Jayasinghe* (7), where the interpretation to be placed on section 9 of the Business Names Registration Ordinance was considered. It seems to me that, if the phraseology employed in section 8 (1) of the Registration of Business Names Act indicates that it was only intended to impose a bar on the actual person who was in default in complying with the requirements of the section, the language employed in section 8 (2) of the Money Lending Ordinance would *a fortiori* lead to a similar conclusion. It has been argued by Mr. Weerasooriya that the limitation on the operation of the bar would apply only to assignees for value of promissory notes given in respect of any loans. In this connection he has referred us to section 11 of the Money Lending Ordinance which limits the protection thereby granted to such persons. Although this is a special provision inserted to protect *bona fide* holders for value, I cannot think that it can in any way modify the ordinary interpretation to be placed on the language employed in section 8 (2). In *Hawkins* v. *Duchs'*, MCCARDIE J. held that the bar did not extend to a trustee in bankruptcy. The same reasoning and consideration would apply to the administrator of the estate of a deceased person. I am of opinion that such reasoning applied in this case leads inevitably to the conclusion that the bar imposed on section 8 (2) of the Money Lending Ordinance does not apply to claims put forward by the administrator of the estate of a deceased money-lender.

In conclusion, I must refer to the final argument of Mr. Weerasooriya who contended that even if the bar imposed by S. 8 (2) of the Ordinance applied only to the actual person who made the loan, the rights of the parties must be regulated by their position at the time when the action was instituted. In this case the plaint was filed by the deceased money-lender himself and it was only subsequently that the plaintiff was substituted as the administrator of the estate. In support of this decision, we have been referred to the decision of the Privy Council in *Silva* v. *Fernando* (8). In that case it was decided that no retrospective effect can be given to a letter written by the Crown waiving its rights to plumbago so as to vest in the plaintiff a title at the commencement of the action. In that case the plaintiff when he filed his claim had no cause of action. The decision has no application to the facts of the present case.

For the reasons given in this judgment, I am of opinion that the appeal must be allowed and judgment entered for the plaintiff as claimed together with costs in this Court and the Court below.

SOERTSZ J.— I agree.

Appeal allowed.

—K. S. A

IN THE COURT OF CRIMINAL APPEAL

THE KING *v.* E. L. SILVA & 4 OTHERS

Present: HOWARD C.J. (President), MOSELEY S.P.J. and WIJEYEWARDENE J.

[Appeals Nos. 15-19 of 1940. *S.C No. 23—M C. Gampaha No. 3463, 2nd Western Circuit, 1940.* August 26, 27, 30, 1940.]

Unlawful assembly—Common object of causing serious bodily injury—Murder in the prosecution of this common object or in furtherance of a common intention—Proof necessary to sustain charge—Penal Code, Ss. 32, 138, 140, 146 & 296.

Withdrawal of one count by the prosecution after conviction on other counts—Substitution of verdict by Court of Criminal Appeal—Criminal Procedure Code, S. 185—Court of Criminal Appeal Ordinance, S. 6 (2)—Penal Code, Ss. 294 (4) and 343.

The verdict of the Jury was that the five accused were guilty of: (1) being members of an unlawful assembly the common object of which was to cause serious bodily injury to one F. and thereby committed an offence under S. 140 of the Penal Code and (2), being members of the said unlawful assembly did in prosecution of the said common object, commit, murder by causing the death of the said F. and thereby committed an offence under Ss. 146 & 296 of the Penal Code. After the Jury had returned this verdict, Crown Counsel withdrew a third count in the indictment which charged the accused that they, acting in furtherance of a common intention, did commit murder by causing the death of the said F. and that they thereby committed an offence under S. 296 of the Penal Code read with S. 32 of the said Code.

HELD (i) that, before the Jury could find the accused guilty on counts (1) and (2), it was incumbent on the prosecution to prove that each accused was a member of the unlawful assembly at the time the offence for which he is held liable was committed.

(ii) that the evidence led to connect the 2nd accused with the common object was not sufficient to prove that he was a member of an unlawful assembly,

(iii) that the conviction of the remaining four accused on the two counts dependent on the existence of an unlawful assembly cannot, therefore, be upheld,

(iv) that as the presence of the accused at the scene of the assault must be deemed to have been fortuitous and not in pursuance of a pre-concerted plan, a conviction of the accused or any of them under S. 296 of the Penal Code read with S. 32 is not possible and

(v) that, in view of the oral and medical evidence in the case, the offence committed by the 1st accused comes within exception 4 to S. 294 of the Penal Code and he is guilty of culpable homicide not amounting to murder and, as the medical evidence did not bring home with sufficient certainty to any of the other four accused the responsibility for the infliction of any injuries on the body of the deceased, the only offence established against them is one of assault under S. 343 of the Penal Code.

Referred to: *Rama Boyan* v. *Emperor*, (1934) A I.R. Madras 565 ... (1)
King v. *Sayaneris*, (1937) 39 N.L.R. 148 ... ... (2)

Francis de Zoysa K.C., with him *Siri Perera*, *S. de Zoysa* and *E. L. V. de Zoysa*, for appellants.

E. H. T. Gunasekera, Crown Counsel, for the Crown.

HOWARD C.J. —This is an appeal by all five accused on grounds of appeal involving questions of law. The verdict of the Jury was that they were guilty of (1) being members of an unlawful assembly the common object of which was to cause serious bodily injury to one Welisarage Rogus Fernando and thereby committed an offence under section 140 of the Penal Code and (2) being members of the said unlawful assembly did in prosecution of the said common object commit murder by causing the death of the said Welisarage Rogus Fernando and thereby committed an offence under sections 146 and 296 of the Penal Code. After the Jury had returned this verdict, Crown Counsel withdrew a third count in the indictment which charged the accused that they, acting in furtherance of a common intention, did commit murder by causing the death of the said Welisarage Rougus Fernando and that they thereby committed an offence under section 296 of the Penal Code read with section 32 of the Penal Code.

The main ground of appeal was based on the contention that there was no legal proof of the charge of unlawful assembly. An "unlawful assembly" is defined in section 138 of the Penal Code. For the purpose of this case, it was necessary for the Crown to establish that each of the five accused had gathered together with the common object of causing serious bodily injury to the deceased. The evidence adduced by the Crown in support of this proposition was as follows:—

(1) That on the day in question about 2 p.m. gambling was going on close to the house of the deceased who went there to stop it. That 10 minutes after deceased had come away from the place all five accused and two other men were seen coming towards the boutique of the witness Miguel Fernando. That the 3rd accused was heard to say "I am Hitler of Welisara. I was asked to get up from the place where we were gambling by Rogus. I will do something nice to him before night-fall." That the 2nd and 5th accused amongst others also made some remarks.

(2) That about 6 or 6-30 p.m. Miguel returned to his boutique and found the 5th accused lying down in the verandah. Subsequently the 3rd accused came there followed by the 1st and 4th accused arriving from different directions. The third accused had a walking stick with a brass knob, and, after hearing something that sounded like the report of a gun, he left the boutique saying: "I asked that fellow not to fire. In spite of that he has done it. I must do something to him."

(3) That whilst the 1st, 4th and 5th accused, the first two of whom were armed with clubs, were in the botique, Rosalin, the 12 year old child of the deceased, came to the boutique to get some betel. That the 1st accused asked her if her father was at home. When she told him that he was, he said. "Tell your father that we are gambling, ask him to come if he could." After the girl had left, the 5th accused who was said by Miguel to be drunk, said: "Kill that fellow, no harm one of us going to the gallows". Then the 1st accused said: "From 6 p.m. I was behind that fellow's house but he did not come out."

(4) That a little later deceased and his wife came towards Miguel's boutique with a chulu light. Miguel tried to prevent the deceased coming to his boutique. Then the 1st, 4th and 5th accused came out of the boutique saying, "Stop, we were waiting here to meet you" and ran towards the deceased. The deceased turned and hurried towards his house. Then the 1st accused gave him a blow with his club. The 3rd accused who had also appeared on the scene then gave him a blow with his walking stick. The 2nd accused also dealt him a blow with a club. Miguel is not able to say from which direction the 2nd and 3rd accused appeared. The deceased then fell down and the 4th and 5th accused struck him with clubs. According to the evidence of Miguel, the deceased was carrying an umbrella and nothing else.

No complaint has been made with regard to the learned Judge's charge to the Jury. In fact, perusal of the charge indicates, that the law with regard to the ingredients of the offence of "unlawful assembly" was most meticulously explained with reference to the evidence in the case. But before the Jury could find the accused guilty on counts (1) and (2) it was incumbent on the prosecution to prove that each accused was a member of the unlawful assembly at the time the offence for which he is held liable was committed. The common object of the unlawful assembly was the infliction of serious bodily injury on the deceased. The only evidence to connect the 2nd accused with this common object was the fact that he was with the other accused in the early part of the afternoon when they were proceeding from the place of gambling towards the boutique of Miguel and was present when the 3rd accused made the alleged threat against the deceased and also that he arrived on the scene of the assault after the deceased had been struck by the 1st and 3rd accused with clubs and struck the deceased with a club. This evidence is not, in our opinion, sufficient to prove that the 2nd accused was a member of an unlawful assembly. Even if there was sufficient evidence to show that the common object of the remainder of the accused was the causing of serious bodily injury to the deceased, this evidence does not establish an unlawful assembly inasmuch as the participators in the assembly would be reduced to four. The conviction of the accused on the two counts dependent on the existence of an "unlawful assembly" cannot, therefore, be upheld.

It has been contended by Mr. Gunasekera that, if the convictions on counts (1) and (2) cannot be sustained, the withdrawal of count (3) does not preclude this Court from finding the accused or some of them guilty under this count, or in the alternative ordering a new trial thereon. In this connection he relies on section 185 of the Criminal Procedure Code read in conjunction with section 6 (2) of the Court of Criminal Appeal Ordinance No. 23 of 1938. Moreover, Crown Counsel contends that apart from count (3), it was on this indictment possible for the Jury to have found on count (2) a verdict of murder without "unlawful assembly." As authority for this proposition, he has referred us to the *Rami Boyam* v. *Emperor* (1) and the *King* v. *Sayaneris* (2). We are in agreement with these contentions. We do not, however, consider that the ends of Justice will be served by directing a new trial. We, therefore, propose to have recourse to the powers vested in us by section 6 (2) of the Court of Criminal Appeal Ordinance.

In deciding whether the evidence justifies a conviction under count (3) we have given careful consideration to the question as to

whether it was proved that the accused or any of them were acting in furtherance of a common intention to cause the death of the deceased. The evidence tendered by the Crown in support of such a common intention is summarized in paragraphs (1) to (4) of the second paragraph of this judgment. That evidence which is mainly the testimony of the witness Miguel is, however, considerably weakened by the evidence of Rosalin, the deceased's daughter, who states that of the accused she saw only the 1st accused in the boutique when she went there to get betel. The 4th and 5th accused, although alleged by Miguel to have come out of the boutique with the 1st accused, dealt their blows on the deceased at a late stage in the assault and only after he had fallen down. The 2nd and 3rd accused, moreover, appeared on the scene of the assault from different directions. There was no evidence to indicate that those in the boutique warned the other conspirators of the expected arrival of the deceased at the scene of the assault. In these circumstances we are of opinion that the presence of the accused at the scene of the assault must be deemed to have been fortuitous and not in pursuance of a pre-concerted plan. There is, therefore, no evidence that the death of the deceased was caused by the accused in furtherance of a common intention. A conviction of the accused or any of them under section 296 of the Penal Code read with section 32 is not therefore possible.

The fact that a conviction under count (5) as framed is not warranted by the evidence does not preclude us from finding the accused guilty of offences arising out of individual acts committed by them in the course of this affray. We have, therefore, dealt with the accused on this basis. The 1st accused has in giving evidence admitted that he struck the deceased two blows with his club The medical evidence established that these blows alighted on the head of the deceased and caused his death. The 1st accused maintains, however, that these blows were struck in self-defence through fear that he would be killed after he had himself been struck by the deceased on the head with an iron rod or wooden club. We are of opinion that the evidence tends to show that the deceased came towards the boutique spoiling for a fight and that the 1st accused was only too ready to gratify this wish. We take into consideration also the bodily injuries found on the various accused. In other words, the evidence indicates that the act of the 1st accused was committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without his having taken undue advantage or acted in a cruel or unusual manner. Moreover, the fact that the 1st accused used a club and not a weapon that was necessarily lethal raises a doubt, having regard to the circumstances in which the blows were struck, as to whether the necessary proof of intention is present to constitute the offence of murder. The offence committed by the 1st accused, therefore, comes within exception 4 to section 294, and he is guilty of culpable homicide not amounting to murder.

There is no doubt that the remaining accused were present at and participated in the assault on the deceased. The medical evidence does not, however, bring home with sufficient certainty to any of these accused the reponsibility for the infliction of any injuries on the body of the deceased. In these circumstances, the only offence established against them is one of assault under section 343 of the Penal Code.

The order of the Court, therefore, is as follows: The convictions of the five accused under counts (1) and (2) of the indictment are set aside. The 1st accused is convicted of culpable homicide not amounting to

murder under section 297 of the Penal Code and sentenced to 10 years rigorous imprisonment. The 2nd, 3rd, 4th and 5th accused are convicted of assault under section 343 of the Penal Code and sentenced to 3 months rigorous imprisonment.

Convictions substituted.

—K. S. A.

IN THE COURT OF CRIMINAL APPEAL

THE KING *v.* GOVINDA PILLAI

Present: HOWARD C.J. (President), MOSELEY S.P.J. and WIJEYEWARDENE J.

[Appeal No. 10 *S.C. No. 45 -M.C. Colombo No. 45900.* August 28, 1940.]

Criminal procedure—Sentence—Evidence of character of accused person after conviction—Need such evidence be tendered on oath?—Evidence Ordinance—Casus omissus.

HELD: (i) the question of whether evidence of the character of an accused person can be allowed to be given after his conviction and whether such evidence should be given on oath is a *casus omissus* in the Evidence Ordinance and regard should be had, therefore, to the law of England on this point and

(ii) that, in view of the practice of the Judges of the High Court of England, after the verdict has been given by the Jury, to receive unsworn evidence as to the character of the person who has been convicted, it is competent to a trial Judge in Ceylon to receive evidence, without such evidence being tendered on oath, of the character of an accused person who is convicted.

Followed: *Henry Weaver*, (1908) 1 Cr. A.R 13 ... ... (2)
Not Followed: *Nikapota* v. *Gunasekere*, (1911) 14 N L.R. 213 ... ... (1)

P. S. W. Abeywardene, for the accused-appellant.

E. H. T. Gunasekere, Crown Counsel, for the Crown-respondent.

HOWARD C.J.—This is an appeal against a sentence of ten years rigorous imprisonment passed by Mr. Justice CANNON on the accused for the offence of culpable homicide not amounting to murder.

Counsel for the appellant has argued that this sentence is harsh and excessive and that in passing it the Judge has been influenced by certain evidence with regard to the character of the accused given by Inspector Sheddon. He also objects to that evidence on the ground that it was not given on oath.

The question of whether such evidence should be given and whether it should be given on oath was considered by MIDDLETON J. and WOOD RENTON J. in the case of *Nikapota* v. *Gunasekere* reported in 14 N L.R. 213 (1). The Judges in that case held that there was a *casus omissus* in the Evidence Ordinance and that they were entitled to have regard to the law of England with regard to the evidence of character of an accused person tendered after he has been convicted. The law of England on this point was laid down by the Lord Chief Justice of England in *Weaver's Case* (2). The principle was laid down by the Lord Chief Justice as follows:—

> "In considering sentences, it has been the invariable practice to enquire into the prisoner's history, in his own interest, and if in the course of that inquiry facts come out which damage him, the Judge ought to take notice of them."

In adopting this practice, WOOD RENTON J. said that he need scarcely add that any investigation conducted by a court of trial, after conviction, into the character and antecedents of an accused should be an investigation according to the rules of evidence. MIDDLETON J. stated that in his opinion no evidence to prove the antecedents and bad character of an accused person should be accepted by the Police Court except from persons of undeniable position and respectability and then also under the sanction of an oath or affirmation.

Our attention has been invited by Mr. Gunasekera to certain English cases which formulate the practice adopted in this connection by English Courts. It would appear from those cases that it is the practice of Judges of the High Court in England after the verdict has been given by the Jury to receive unsworn evidence as to the character of the person who has been convicted.

In these circumstances, we do not feel that we can go so far as to adopt in whole the dicta of the Judges in the case of *Nikapeta v. Gunasekere* (supra), with regard to the necessity for the evidence of character of an accused person to be on oath. At the same time we feel that it is very desirable that such evidence should be tendered and tendered only on oath.

Quite apart from the evidence given by the Inspector with regard to the previous character of the accused, we have given consideration to the facts of this case. It has been pointed out by counsel for the appellant that the Jury have not registered their opinion as to whether the offence was committed with intention or merely with knowledge. Having regard to the fact that the accused used a knife which he thrust into a vital part of the body of the deceased, we are of opinion that this question is not of material interest.

Having regard to the facts of this case, which was one of extreme gravity, we do not feel disposed to interfere with the sentence which was fully merited. In these circumstances, the appeal against the sentence is dismissed.

Appeal against sentence dismissed.

—K. S. A.

G. WILLIAM ALWIS *v.* J. THIAGARAJAH

[HEARNE J. *S.C. No 588—Mun. M.C. Colombo, Objection No. 59.* August 27, September 3, 1940.]

Public office under the Crown—Municipal franchise—Is the office of Manager of the State Mortgage Bank a public office?—The Colombo Municipal Council (Constitution) Ordinance, S. 15 (2) (c) [*Leg. Enact. Vol. V, Ch. 194.*]

Objection was taken to T. being credited with a double qualification mark in the list prepared under the provisions of the Colombo Municipal Council (Constitution) Ordinance, on the ground that T., being the Manager of the State Mortgage Bank, holds "a public office under the Crown" within the meaning of S. 15 (2) (c) of the said Ordinance and is, therefore, not entitled to the double qualification mark.

HELD: (i) that, inasmuch as T undoubtedly performs functions of a public nature, he holds a public office which, as indeed do all public offices, derives from the Crown and

(ii) that, as T. is paid by the Bank out of its own revenue and not the public revenue, he does not hold 'a public office under the Crown' within the meaning of S. 15 (2) (c) of the Ordinance

Referred to: *In re Miram*, (1891) 1 Q B. 594 ... ... (1)
Bowers v. *Harding*, (1891) 1 Q.B. 561 ... ... (2)

Appeal against an order made by M. Krishnadasan Esq., Municipal Magistrate of Colombo, disallowing an objection to a municipal voter being credited with the double qualification mark.

H. V. Perera K.C., with him *J. L. M. Fernando*, for the appellant.

N. E. Weerasooriya K.C., with him *E. B. Wickremanayake*, for the respondent.

HEARNE J.—The respondent to this appeal was credited with a double qualification mark in the list prepared under the provisions of the Colombo Municipal Council (Constitution) Ordinance. To this G. William Alwis, a registered voter, objected on the ground that the respondent, who is the Manager of the State Mortgage Bank, holds a public office under the Crown and is, therefore, not entitled to the double qualification mark.

The Municipal Magistrate of Colombo took the view that the respondent holds a public office, but not under the Crown, and disallowed the objection. The objector has now appealed.

In the law of England "public office" has been given a very wide meaning for certain purposes, for instance in *Quo Warranto* proceedings. The rule, as originally understood, was that *Quo Warranto* was not the remedy "unless there was an usurpation actually upon the Crown." But the procedure was later employed to determine disputed questions of right to Municipal offices and franchises. The sole test then became whether the office involved the discharge of functions of a public nature. Further, in certain statutes, which dealt in part at least with grounds of disqualification from public office, the latter, *e.g.*, in the Corrupt and Illegal Practices Prevention Act, was expressly defined as "an office under the Crown".....*or* "under any Acts relating to local government." (Section 64).

For other purposes, especially in the construction of financial Acts, "public office" has been interpreted in a much more narrow sense. A charge on the stipend of a workhouse chaplain, who was paid by the guardians out of the rates, was held not to be against public policy, as being on the emoluments of a public officer, *In re Mirams* (1). "For," as CAVE J. said, "to make the office a public office, the pay must come out of national and not local funds." On the other hand, in *Bowers* v. *Harding* (2), the post of a schoolmaster was held to be a public office, because his salary was paid "by persons, whose position and duty to manage the school was recognized by Act of Parliament, and out of sums principally contributed from the taxes for the purpose of making such payments....."

In my opinion, the words of limitation "under the Crown" in the relevant Ordinance point to an intention, on the part of the legislature, that the expression "public office under the Crown" should be given a restricted, rather than a wide interpretation.

The respondent undoubtedly performs functions of a public nature. In that sense, he holds a public office and his office, as indeed

do all public offices, derives from the Crown. But, as he is paid by the Bank out of its own revenue and not the public revenue, he does not hold, in my view, within the meaning of section 15 (2)(*c*) of the Colombo Municipal Council (Constitution) Ordinance, "a public office under the Crown."

The appeal is dismissed with costs.

Appeal dismissed.

[Proctor for objector-appellant. *V. A. Jayasekera.*]

—K. S. A.

JOSEPH, INSPECTOR OF POLICE *v.* FRANCIS FERNANDO AND ANOTHER.

[WIJEYEWARDENE J. *S.C. No. 569—M.C. Dandegamuwa No. 7582.*
SEPTEMBER 7, 10, 1940.]

Criminal procedure—Joinder of charges—Deaf and dumb person who cannot be made to understand proceedings charged—Procedure to be adopted at the trial of such person—Legality of trial and conviction—Criminal Procedure Code, Ss. 184 & 288 & Ch. 33.

HELD: (i) that where the 1st accused was charged with having committed theft at P on July 18, 1940, and the 2nd accused was charged with having received some of the stolen articles at D. on July 20, 1940, section 184 of Criminal Procedure Code does not justify the joinder of the two accused in respect of such distinct and separate offences and

(ii) that S. 288 of the Criminal Procedure Code enables a Court to try a deaf and dumb person who cannot be made to understand the proceedings against him.

Per WIJEYEWARDENE J.—A Magistrate trying a deaf and dumb accused should make all reasonable efforts to ascertain if there is any reliable person who is able to communicate with the accused by signs and make him understand the nature of the proceedings, in order to avail himself of the assistance of such a person. It is also desirable that there should be some medical evidence as to the state of mind of a deaf and dumb accused so that the court may consider the propriety of taking action under Chapter 33 of the Criminal Procedure Code.

Followed: *Fernando v. Fernando*, (1913) 17 N.L.R. 249 ... (1)
The Queen v. Bowka Hari, (1874) 22 Sutherland's Weekly Reporter (Criminal) 35 ... (3)
Dissented from: *Aiya v Peniya*, (1918) 21 N.L.R. 72 ... ... (2)

No appearance for accused.

Nihal Gunasekera, Crown Counsel, as *amicus curiae*.

WIJEYEWARDENE J.—There are two accused in this case. The first accused Francis, a lad of 16 years, was charged with the theft of some jewellery and clothes of the value of Rs. 18/85. The second accused, an elder brother of Francis, was charged with retaining some of the stolen articles knowing or having reason to believe that the articles were stolen property.

At the commencement of the trial the Magistrate recorded the fact that the first accused was deaf and dumb, and that there was no one "who could make him understand the proceedings."

At the close of the case for the prosecution, the second accused made a statement in the course of which he stated: "He (the 1st accused) handed me the string of amulets (one of the alleged stolen articles). He told me that he picked it up. He can make me understand him by signs."

The Magistrate found the first accused guilty under section 369 of the Penal Code and the second accused guilty under section 394 of the Penal Code. He sentenced the second accused to one week's rigorous imprisonment and forwarded the proceedings to this Court for the consideration of the case against the first accused under section 288 of the Criminal Procedure Code.

I think there has been a misjoinder of accused in this case. The first accused is alleged to have committed theft at Pannala on July 18, 1940, while the charge against the second accused is that he received some of the stolen articles at Dalupotha on July 20, 1940. Section 184 of the Criminal Procedure Code would not justify the joinder of the two accused in respect of two such distinct and separate offences, *vide Fernando* v. *Fernando* (1). I quash the conviction of the first accused for this reason. In the event of fresh proceedings being taken against the first accused, I think it fair that the trial should take place before another Magistrate. A Magistrate trying a deaf and dumb accused should make all reasonable efforts to ascertain if there is any reliable person who is able to communicate with the accused by signs and make him understand the nature of the proceedings, in order to avail himself of the assistance of such a person. It is also desirable that there should be some medical evidence as to the state of mind of a deaf and dumb accused so that the court may consider the propriety of taking action under Chapter 33 of the Criminal Procedure Code.

I wish to add that as at present advised I am unable to subscribe to the view expressed in *Aiya* v. *Peniya* (2) against the trial and conviction of a deaf and dumb person who cannot be made to understand the proceedings against him. Section 288 of the Criminal Procedure Code contemplates clearly the trial and conviction of such persons. It was held in *The Queen* v. *Bowka Hari* (3), that section 186 of the Indian Code of 1872 corresponding to section 288 of our Code enabled a Court to try a person though he was unable to understand the proceedings.

Conviction of the first accused quashed.

—K. S. A.

KULATUNGA, POLICE SERGEANT v. MUDALIHAMY & 7 OTHERS

[HOWARD C.J. *S.C. Nos. 477-484—M.C. Gampola No. 19271.*
September 3, 6, 1940.]

Unlawful assembly and rioting—What prosecution has to prove—Penal Code, Ss. 140 & 144.

Observations on the practice of policemen conducting the case for the prosecution.

Held: that, in cases of unlawful assembly, a rioter is made liable for the act of his confederate; but before that liability can be imposed it must be proved that the person was a member of the assembly and the offence was committed in the prosecution of the common object of the assembly or must be such as the members knew to be likely.

Referred to: *Webb* v. *Catchlove*, (1836-1887) 3 T.L.R 159 ... ... (1)
Duncan v. *Toms*, (1887) 16 Cox 267 ... ... (2)

L. A. Rajapakse, with him *Percy de Silva*, for the accused-appellants.

S. J. C. Schokman, Crown Counsel, for the complainant-respondent.

HOWARD C.J.—This is an appeal from the conviction of the appellant by the Magistrate of Gampola of the following charges :—

(*a*) Forming members of an unlawful assembly with the common object of causing hurt to one P.G. Gunasekera and Mallinahamy and causing damage to their house and thereby committing an offence punishable under section 140 of the Penal Code.

(*b*) Being members of an unlawful assembly with the common object of causing hurt to the said P. G. Gunasekera and Mallinahamy and causing damage to their house, did cause hurt to the said P. G. Gunasekera by assaulting him with hands and Mallinahamy with flail and damage to the house of P. G. Gunasekera and Mallinahamy by pelting stones in prosecution of their common object and thereby committing an offence punishable under section 144 of the Penal Code.

The case for the prosecution was based on the evidence of the complainants P. G. Gunasekera and Mallinahamy with the corroborating testimony of R. G. Somapala, Kiri Banda and Dingiri Banda, the Arachchi of Dunukeulla. At 7 p.m. on the day in question the 2nd accused made a complaint to the Arachchi that P. G. Gunasekera and one Mudiyanse had committed robbery of Rs. 4/- due to him. He proceeded to the house of Gunasekera and asked him to come to the Police Station. He saw there, in addition to Gunasekera, Mallinahamy, Somapala and Kiri Banda. He states that whilst he was in the compound, twenty-five people came there, four of whom, namely, the 1st, 2nd, 4th and 6th accused entered the house. The 1st accused had a flail and the 2nd a katty. The evidence of Gunasekera and Mallinahamy was to the effect that about 2 p.m. the 2nd accused came to his house and abused them. This abuse was returned by Gunasekera and continued between 2 p.m. and 6 p.m. About 7-15 p.m. the Arachchi arrived and wanted Gunasekera to go to the Police Station on a complaint by the 2nd accused. Later Gunasekera saw the 1st accused in the hall with a flail and according to Mallinahamy the 1st accused struck her a blow on the hip. Then 1st, 2nd, 3rd, 4th, 6th, 7th and 8th accused entered the house. The 2nd accused had a katty, whilst the 3rd accused had a club. Gunasekera says he was assaulted with hands and dragged outside about 30 yards after a a struggle. Mallinahamy testifies as to this and states that she saw the 2nd accused deal a blow at Gunasekera; whilst the 4th, 6th and 8th accused struck him with their hands. Gunasekera says he got free and ran back and locked the door of the house. The 3rd, 5th, 6th and 7th accused then pelted the house with stones, the 1st, 2nd, 4th and 8th accused being also there with others who took no part. The doors windows and flower pots were damaged. After accused left, a katty, flail, club, a sarong belonging to the 4th accused and towel belonging to the 1st accused were found in the house. Somapala corroborates the evidence of Gunasekera and Mallinahamy. Kiri Banda was also there but is only able to testify to the entry of the 1st accused into the house and to his striking Mallinahamy with a flail.

In his judgment the learned Magistrate seems to have applied his mind first of all to an examination of the main feature of the defence that the case was a false one engineered by the Arachchi and the Sergeant. Having rejected this part of the defence, the Magistrate accepts the evidence led for the prosecution and their version of the incident.

Nowhere in the judgment are the charges against the accused examined in the light of the evidence with the view of discovering whether the ingredients of those charges have been established beyond all reasonable doubt. Both charges involved the proof of an unlawful assembly. It had, therefore, to be proved by the prosecution that there was an unlawful assembly with a common object as stated in the charges. So far as each individual accused was concerned it had to be proved that he was a member of the unlawful assembly which he intentionally joined. Also that he knew of the common object of the assembly. The Magistrate does not in his judgment seem to have applied his mind to the elucidation of these aspects of the case which were vital so far as the conviction of the accused on such charges was concerned. If these features of the case had been analysed, I am of opinion that the Magistrate would have arrived at a different conclusion. In cases of unlawful assembly a rioter is made liable for the act of his confederate. But before that liability can be imposed it must be proved that the person was a member of the assembly, that the offence was committed in prosecution of the common object or must be such as the members knew to be likely. In this case the evidence established that Gunasekera and the 2nd accused spent the afternoon abusing each other, that subsequently the Arachchi arrived to assist the former, that the 1st accused came into Gunasekera's house and hit Mallinahamy with a flail, and that some of the other accused also came into the house and assaulted Gunasekera. It has also been proved that the 1st accused was in hospital for 22 days suffering from four stab wounds and one caused by a blunt instrument. Two of these injuries were grievous. Although Gunasekera alleges that he was assaulted and dragged along the ground by several of the accused, there is no evidence of his having received any injuries. The story of the prosecution witnesses regarded from its most favourable aspect does not to my mind establish an unlawful assembly with that degree of certainty required by the law. Viewing the case as a whole the verdict can only be regarded as unreasonable and against the weight of evidence. In these circumstances the appeal must be allowed and the convictions of all the appellants on both counts set aside.

There is another aspect of the case to which my attention has been directed in the course of the hearing of this appeal. The case for the prosecution in the Magistrate's Court was conducted by Sergeant Kulatunga. At an early stage in the proceedings, Mr. G. E. de Silva who appeared for the accused stated that his position is that this case is a conspiracy by the prosecuting Sergeant Kulatunga and the Arachchi against these accused and the Sergeant should not conduct the trial. Mr. de Silva also stated that his client had submitted a petition against the Sergeant. The Sergeant challenged this statement. The learned Magistate made the following order:—

> "It is not uncommon for the prosecuting Sergeant or Inspector to give evidence. The Sergeant will proceed to conduct the trial."

The Sergeant subsequently gave evidence for the prosecution. He was not merely a formal witness. His examination in chief occupies two-and-a-half pages of the record and his cross-examination another two-and-a-half pages. In cross-examination he admitted that the 2nd accused had sent a petition against him. The question of allowing a policeman to act as an advocate before a tribunal has been considered in several English cases. In *Webb* v. *Catchlove* (1), Mr. Justice HAWKINS said that he thought it a very bad practice to allow a policeman to act as an

advocate before any tribunal, so that he would have to bring forward only such evidence as he might think fit and keep back any that he might think likely to tell in favour of any person placed upon his trial. *Webb* v. *Catchlove* was referred in the judgment of Lord COLERIDGE C.J., in *Duncan* v. *Toms* (2) in the following terms :—

> " In the general observations made in *Webb* v. *Catchlove* I should entirely concur. I agree that it is a bad practice for a policeman, being a general officer of the law and one who ought to stand indifferent between the parties, to appear and act as an advocate in Courts of Justice. I entirely agree and I entirely concur in the observations made in that case against such a practice."

The objection taken by the Judges in these two cases to policemen conducting the case for the prosecution was based on the ground that their position would not allow them to act impartially. The remarks of the Judges apply with even greater force in this case where the prosecuting Sergeant gave evidence that was not of a purely formal character and against whom allegations of bias and partiality were made that went so far as to accuse him of having taken part in fabricating the case against the accused. How could such a person be expected to hold the scales evenly and to stand indifferent between the rival parties ? The conduct of the prosecution by Sergeant Kulatunga indicated that the maxim that " Justice should not only be done but be manifestly and undoubtedly seen to be done" had been completely ignored in regard to this aspect of the case.

Appeal allowed : Convictions set aside.

—K. S A

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SAMARASINGHE, REGISTRAR OF LANDS *v.* DALPATADU

[WIJEYEWARDENE J. *S.C. No. 385—M.C. Panadura No. 6029.*
JULY 18, 24, 1940.]

Notary—Failure to transmit to Registrar of Lands duplicate of deeds—Prosecution and conviction of notary for breach—Notary's failure to comply with the terms of notice served by Registrar General—Prosecution and conviction of notary for such failure—Legality—Notaries Ordinance, S. 30, Rule 25 & Proviso (a). [Leg. Enact. Vol. III. Ch. 91] —Criminal Procedure Code, S. 330—Interpretation Ordinance, S. 9, [Leg. Enact. Vol. I. Ch. 2.]

HELD: (i) that, by virtue of sub-sections 1 & 3 of S. 330 of the Criminal Procedure Code, a notary who has been prosecuted and convicted for his failure to transmit duly to the Registrar of Lands the duplicates of deeds attested by him in breach of Rule 25 of S. 30 of the Notaries Ordinance is liable to be charged for his refusal to comply with the terms of a written notice served upon him by the Registrar General in terms of Proviso (a) of S. 30 of the Ordinance,

(ii) that the act or omission which constitutes an offence under the main provisions of S. 30 of the Notaries Ordinance is not the same as the omission under Proviso (a) of the said section,

(iii) that a prosecution of a notary for a breach of Proviso (a) of S. 30 of the Notaries Ordinance after his conviction for a violation of any of the main provisions of the said section is not obnoxious to S. 9 of the Interpretation Ordinance and

(iv) that the Proviso (a) of S. 30 of the Notaries Ordinance enables the Registrar General to give a notice to a notary though he has been convicted for a breach of Rule 25 and then proceed to prosecute him again if he fails to comply with the notice.

Referred to: *The King* v. *Haramanis et al*, (1916) 19 N.L.R. 142 ... (1)
Wijesuriya, (Registrar of Lands) v. *Dalpatadu (Notary Public)*, (1937) 2 C.L.J.R. 157; 9 C.L.W. 73 ... ... (2)

D. Goonewardene for appellant.

Nihal Gunasekere, Crown Counsel, for respondent.

WIJEYEWARDENE J. —The accused-appellant, a notary public, was charged in M.C. Panadura 3826 for failing to transmit to the Registrar of Lands on or before April 15, 1939, the duplicates of deeds attested by him in March, 1939, in breach of rule 25 of section 30 of the Notaries Ordinance (Legislative Enactments Vol. 3 Chap. 91). He pleaded guilty and was fined Rs 50/- on November 25, 1939. Thereafter, the Registrar General served a written notice on him in terms of proviso (*a*) of section 30 of the Ordinance calling upon him to comply with the requirements of rule 25 of section 30 on or before December 18, 1939. On the failure of the notary to comply with the terms of the notice, the present proceedings were instituted against him. The Magistrate found the accused guilty and fined him Rs. 100/-.

The counsel for the accused-appellant contended that the conviction was bad on the following grounds :—

1. The appellant was entitled to the benefit of the plea of *autre fois convict*.

2. The conviction was obnoxious to the provisions of section 9 of the Interpretation Ordinance (Legislative Enactments Vol. 1 Chap 2).

3. The offence constituted under proviso (*a*) of section 30 of the Notaries Ordinance is alternative to the offence under the main provisions of section 30.

The first point raised by the appellant's counsel ignores the clear provisions of sub-sections (1) and (3) of section 330 of the Criminal Procedure Code. The accused was charged in M.C. Panadura 3826 for the failure to deliver the duplicates before April 15, 1939. As a consequence of his failure and after the termination of the proceedings in the earlier case, the Registrar General sent him the notice referred to by me. He is now charged for refusing to comply with the terms of that notice. Section 330 of the Criminal Procedure Code states clearly that a person could be charged a second time in such circumstances. [*See* illustration (*c*)].

The second argument urged on behalf of the appellant is based on section 9 of the Interpretation Ordinance which enacts :—

"When any act or omission constitutes an offence under two or more laws..... .....the offender shall, unless the contrary intention appears, be liable to be prosecuted and punished under either or any of these laws, but shall not be liable to be punished twice for the same offence."

As pointed out by me earlier it is not the same act or omission which constitutes the offences under the main provisions of section 30 of the Notaries Ordinance and under proviso (*a*) of section 30. Moreover, there is clear indication of an intention that a notary should become liable to be punished for both offences as will be seen when I deal with the third point raised by the appellant's counsel. I hold that section 9 of the Interpretation Ordinance is no bar to the present proceedings. [*Vide* 19 N.L.R. 142 (1).]

The argument of the appellant's counsel on the third point may be summarized as follows : When a notary commits a breach of rule 25, the Registrar General should decide whether he would prosecute the peccant notary or would give him further time for the transmission of

the duplicates. If the Registrar General does not prosecute the notary in the first instance, he could give the notary notice under section 30 proviso (*a*) and then enter a prosecution under that proviso if the notary fails to comply with the notice. If he chooses to prosecute the notary in the first instance, he cannot subsequently give the notary a notice under section 30 proviso (*a*) and then enter a prosecution under that proviso if the notary fails to comply with the notice If he chooses to prosecute the notary in the first instance, he cannot subsequently give the notary a notice under section 30 proviso (*a*) and then initiate further proceedings against the notary for non-compliance with the terms of the notice. Otherwise proviso (*a*) would have the effect of making rule 25 more stringent. But it has been held in *Wijesuriya (Registrar of Lands)* v. *Dalpatadu (Notary Public)* (2), that the legislature amended the Notaries Ordinance by the addition of proviso (*a*) in order to give the power to the Registar General to grant an indulgence to notaries deserving of such indulgence.

For a proper consideration of this argument, it is necessary to examine fully the legislation on the subject.

Section 29 the Notaries Ordinance No. 1 of 1907, as originally passed, reads :—

> "It is and shall be the duty of every notary strictly to observe and act in conformity with the following rules and regulations : that is to say.—
>
> (1) to (23).....
> (24) He shall deliver or transmit to the Registrar of Lands ....the following documents, so that they shall reach the Registrar on or before the fifteenth day of every month, viz , the duplicate of every deed or instrument..... ...attested by him during the preceding month.
>
> (25) to (35)..... ....
>
> And if any notary shall act in violation of any of the rules.....he shall be guilty of an offence and shall be liable on conviction thereof to a fine not exceeding two hundred rupees, in addition to any civil liability he may incur thereby."

It will be noted that the corresponding provisions in chapter 91 of the Legislative Enactments are section 30 and rule 25.

The Ordinance as originally passed enacted further by section 20 (corresponding to section 20 of chapter 91 of the Enactments):

> "It shall be the duty of the District Judge within whose jurisdiction a notary resides, upon being satisfied after due inquiry, that such notary
>
> (*a*) ....
>
> (*b*) .....
>
> (*c*) has so conducted himself by any repeated breaches of any of the rules made by or under this Ordinance that he ought not to be any longer entrusted with the performances of the said duties, or
>
> (*d*) .....
> to report the same in writing to the Governor with the evidence taken at the enquiry."

It appears to have been felt shortly after the passing of the Ordinance that the Registrar General should be given a discretion not to prosecute for breaches of rules in such cases where he thought fit not to enter a prosecution. Accordingly the Legislature passed Ordinance No. 27 of 1909 which by section 2 enacted :

"When the Registrar-General has reasonable grounds for believing that any notary has committed a breach of any of the rules the Registrar-General may, if he thinks fit, instead of instituting criminal proceedings against such notary accept from him such sum of money as he may consider proper in composition of the offence. When the Registrar-General has accepted any sum of money from any notary in composition of any alleged offence, criminal proceedings shall not be taken, or if already taken shall not be continued in respect of such offence. . . . ."

This enactment appears in Chapter 91 of the Legislative Enactments as section 30 proviso *(d)*.

The Notaries Ordinance was further amended by Ordinance No. 10 of 1934. A study of its provisions makes it abundantly clear that the object of that amending Ordinance was—as stated in the objects and reasons annexed to the draft Bill (*vide* Government Gazette No. 7995 August 4, 1933 page 637)—to make more effective provision for checking slackness and dishonesty on the part of notaries and for a more expeditious and summary way of dealing with notaries who do not forward their duplicates. This Ordinance amended *inter alia*:

"(*a*) Section 20 (1) (*c*) of the Notaries Ordinance by the addition at the end, of the words: 'has been convicted three times or oftener for a violation or disregard or neglect to observe the provisions of Rule No. 24 in section 29'; or

(*b*) By the insertion at the end, but immediately before the first proviso of section 29 of the Notaries Ordinance, of the words:

'Provided that where any notary shall act in violation of or shall disregard or neglect to observe the provisions of rule 24, the Registrar-General may by a written notice served on him personally or sent by registered post, call upon such notary to comply with the requirements of the said rule within such further time as he may specify for such purpose, and any notary who fails to comply with the terms of such notice shall be guilty of an offence and shall be liable on summary conviction to a fine not exceeding five hundred rupees.'"

These amendments appear in Chapter 91 of the Legislative Enactments as section 20 (1) (*d*) and section 30 proviso (*a*).

A study of the main Ordinance and the two amending Ordinances mentioned by me leads me to the following conclusions: The Legislature regarded a breach of rule 26 prescribed by section 30 chapter 91 as a more serious offence than the breaches of most of the other rules. Ordinance 10 of 1934 amended section 20 of the Notaries Ordinance so as to make three convictions for a breach of rule 25 a sufficient ground for an inquiry by the District Judge while in the case of other rules the District Judge had to be satisfied that by repeated breaches the notary has shown himself to be a person who should no longer be entrusted with the performance of his duties. There is, if I may say so, good reason for taking such a view of the importance of rule 25. In a large number of cases a breach of rule 25 is occasioned by the notary misappropriating the money paid to him for stamps and thus experiencing a difficulty in sending on the due date the duplicates which have to be stamped.

The Legislature did not amend section 30 of Chapter 91 by the addition of proviso *(a)* because it wanted to give relief to some deserving notaries against the hardship that may be caused to them by a prosecution for breach of rule 25 and, therefore, empowered the Registrar-General to grant an indulgence to the notaries deserving that indulgence. The Registrar-General had that power given to him by Ordinance No. 27 of 1909 which gave him the right to exercise his discretion in the case of

the breach of any rule and decide to accept a money payment in composition of any offence instead of prosecuting the notary in the Magistrates' Court (*vide* proviso (*d*) of section 30 of Chapter 91). There was no need, therefore, to give the Registrar-General any authority in 1934 to relax the stringency of the rule. Proviso (*a*) to section 30 was introduced in 1934 to enable the Registrar-General to bring pressure to bear on the notary to deliver to him the deeds which he has failed to deliver on the due date according to rule 25. Moreover, it would hardly be an indulgence to give a deserving notary a short extension of time and then prosecute him for non compliance when he would be liable to a fine of Rs. 500/- whereas, if he had been prosecuted without being favoured with such an indulgence, the maximum fine that could have been imposed on him would have been Rs. 200/-.

I think, therefore, that section 30 proviso (*a*) enables the Registrar-General to give a notice to a notary though he has been convicted for a breach of rule 25 and then proceed to prosecute him again if he fails to comply with the terms of the notice. It is, of course, a power, which the Registrar-General may or may not exercise according to his discretion.

I hold, therefore, against the appellant and dismiss the appeal.

Appeal dismissed.

—K. S. A.

C. E. VAN ROOYEN, INSPECTOR OF POLICE *v.* BARDOORDEEN

[MOSELEY J. *S.C. No. 265—M.C. Gampola No. 18943.* SEPTEMBER 13, 1940.]

Receiving stolen property—Burden of proof—Penal Code, S. 394.

The question for decision was whether the accused (appellant) knew or had reason to believe that a buffalo which was found in his possession had in fact been stolen from its owner. The accused explained that he purchased four cow buffaloes, including the one which was alleged to have been stolen, through two brokers named J. and I and that he received through them two receipts purporting to be signed by the vendors of the animals. There was a descrepancy in the receipts and the accused failed to call as a witness J. whom he had summoned and who was in attendance in Court.

HELD : (i) That it is not proper to draw any inference adverse to an accused person charged with the offence of receiving stolen property from his failure to call a person who is certain to be directly connected with the offence,

(ii) That the burden of proving that the explanation of an accused as to how he came to possess stolen property is false is on the prosecution,

(iii) That if the accused offers an explanation which may reasonably be true, although the Court is not convinced that it is true, he is entitled to be acquitted and

(iv) That if there is any circumstance which entitles the Court or the jury to say that the accused's explanation is false, and the Court or jury so finds, then such explanation cannot be considred reasonable.

Followed : *Attorney General* v. *Rawther*, (1924) 25 N.L.R. 385 (F.B.) ... (1)
Fernando v. *William Singho*, (1935) 37 N.L.R. 278 ... ... (2)
Kandiah v. *Podi Singho*, (1921) 23 N.L.R. 337 ... ... (3)
Rex v. *Ambramovitch*, (1915) 84 L.J.K.B. 398 ... ... (4)

Appeal from a conviction of the accused by Ivor S. de Saram Esq., Magistrate of Gampola.

Cyril E. S. Perera with *S. C. E. Rodrigo* for accused-appellant.

G. E. Chitty, Crown Counsel, for respondent.

MOSELEY J.—The appellant was convicted of receiving a buffalo having reason to believe the same to be stolen property, an act punishable under section 394 of the Penal Code. It is not disputed that the buffalo which was found in the possession of the appellant had been stolen from its owner. The only question for decision was whether the appellant knew or had reason to believe that the animal had in fact been stolen.

The animal had been tethered at the owner's place on the 11th February and was missing on the morning of the 12th. A lorry driver gave evidence to the effect that on the night of the 11th at 11 p.m. the appellant engaged his lorry to drive four buffaloes, of which the stolen animal was one, to Colombo. According to the lorry driver the appellant told him that he had a permit to move the cattle. When, however, the lorry came to Kelaniya it was reported that the Police were inspecting lorries and the appellant then admitted that he had no permit.

According to the appellant he purchased four cow buffaloes through two brokers named Jotiya and Ismail and received through them two receipts, each purporting to be signed by the vendor in each case, for two head of cattle. In neither of the receipts is the amount paid for the cattle mentioned. Each of the receipts moreover purported to be in respect of two cow buffaloes, whereas the four animals taken to Colombo, and to which the appellant said the receipts referred, were three cows and one bull. The suggestion made by the prosecution was that for this reason the receipts were not genuine and this view seems to have been taken by the learned Magistrate. The discrepancy, however, is one which would not probably occur if the documents had been manufactured in order to support a false case. The learned Magistrate also commented upon the failure of the accused to call as a witness the broker Jotiya whom they summoned and who apparently was in attendance. The obligation of an accused person in such circumstances was discussed in the case of *The Attorney-General* v. *Rawther* (1). BERTRAM C.J. observed that

> "in all these cases it should be borne in mind that if the property really was stolen, the witness referred to as the person from whom the prisoner received it is almost certain to be directly or indirectly connected with the crime. It is not likely that such a witness will give a frank account of the circumstances, and allowance must be made for any reluctance on the part of the accused to call him."

With respect I might say that it seems to be the proper way to view the matter and I do not think that any inference adverse to the appellant should be drawn from his failure to call the man Jotiya.

In *Fernando* v. *William Singho* (2). KOCH J. made the following observations:

> "In this state of the law my opinion is that if the explanation of the accused taken as a whole is reasonable, the fact that in the course of that explanation there may happen to be one or two statements that may not be strictly true will not prevent the explanation from prevailing, unless the prosecution satisfies the Court that the explanation *qua* explanation is false."

As DE SAMPAYO J. said in *Kandiah* v. *Podisingho* (3):—

> "With regard to the law it has been pointed out in many recent judgments that when a man, in whose possession stolen property

is found, gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecution to show that account is false."

In the present case it seems to me that the appellant gave a reasonable explanation as to how the buffalo came into his possession. One might go a little further and say that he gave an explanation which might reasonably be true. In such a case, to employ the words of Lord READING C.J. in *Rex* v. *Ambramovitch* (4),

"If the jury think that the explanation given may reasonably be true, although they are not convinced that it is true, the prisoner is entitled to be acquitted."

In the case of *The Attorney General* v. *Rawther* (supra), BERTRAM C.J., in considering *Rex* v. *Ambramovitch* (supra) said :

"But if there is any circumstances which entitles the Court or the jury to say that the explanation is false, and the Court or jury so finds, then such explanation cannot be considered reasonable."

I cannot find in the present case any circumstance which would justify the Court in finding that the explanation of the appellant was false.

I would, therefore, allow the appeal and set aside the conviction and sentence.

Accused acquitted.

[Proctor for appellant : *A. V. VanLangenberg.*]

—K. S. A.

SIRIWARDENE *v.* JAMES AND ANOTHER.

[MOSELEY J, *In Rev.—M.C. Ratnapura 27408* SEPTEMBER 11, 1940.]

Criminal procedure—Plea of guilty—Conviction—Sentence deferred—Application to withdraw plea—What is an unqualified plea of guilty—Is it competent to a Magistrate to allow the withdrawal of a plea of guilty before the entering of sentence ? —English Law—Criminal Procedure Code, S. 6.

The accused severally pleaded on the 25th April, 1940, 'I am guilty' to the charge of criminal trespass on a land and were convicted upon their own pleas. They then asked for six weeks' time in which to leave the land and sentence was deferred till the 5th June, 1940. In the interval between conviction and sentence, the accused moved to withdraw their pleas of guilty on the ground that they acted under a misapprehension of the facts when they tendered their pleas of guilty.

HELD: (i) that the pleas were unqualified and the request for time during which to leave the land appeared to be rather in the nature of a concession which the accused asked for than a qualification of their pleas,

(ii) that as the Criminal Procedure Code is silent on the question whether a Magistrate has power to entertain an application by the accused to withdraw his plea of guilty, it is open to the Court by virtue of S. 6 of the Criminal Procedure Code, to look to the provisions of the English Law for guidance and

(iii) that applying the English Law it is competent to a Magistrate, in the circumstances of this case, to allow the accused persons to withdraw their pleas of guilty.

Followed : *Reg. v. Clouter and Heath*, (1859) 8 Cox Criminal Cases 237 ... (1)
King v. *Plummer*, (1902) 2 K.B.D. 339 ... ... (2)

G. P. J. Kurukulasuriya, with him *S. R. Wijeyatilake*, for the accused-petitioners.

U. A. Jayasundere for the complainant-respondent.

MOSELEY J.—The petitioners in this case were charged with criminal trespass, an offence punishable under section 433 of the Penal Code. They pleaded not guilty and the case went to trial on the 25th April, 1940. After two witnesses had given evidence, the following note is made by the Magistrate :—

> "At this stage the accused severally withdraw their former pleas and now they severally plead 'I am guilty' to charge against them."

They were convicted upon their own pleas and they then asked for six weeks' time in which to leave the land as their house was not complete. Sentence was deferred till the 5th June on which date each of the accused was sentenced to pay a fine of Rs. 25/, in default three weeks' imprisonment.

In the interval between conviction and sentence, the accused moved to withdraw their pleas of guilty, and filed an affidavit which was sworn on the 30th May in which they deposed that they were acting under a misapprehension as to the facts when they tendered their pleas of guilty. The Magistrate in making his order on the 26th June expressed doubt as to whether he had the right to set aside the verdict of guilty which he had recorded on the 25th April and to allow them to plead to the charge again and to proceed with the trial. He considered one authority which appears to have been brought to his notice, but held the view that it did not apply to the case before him and that he had no jurisdiction to set aside his own verdict.

The petitioners now ask that the convictions and sentences shall be revised. In the first place they claim that their pleas of guilty were not unqualified and that they were tantamount to a plea that if they were allowed time during which to vacate the premises they would plead guilty. With that contention I am unable to agree. It appears the Magistrate has correctly recorded the words of each of the accused, namely, "I am not guilty," and the request for time during which to leave the land would appear to be rather in the nature of a concession which they asked for than of a qualification of their pleas.

It is then urged on their behalf that the convictions should be set aside inasmuch as the pleas were tendered under a misapprehension as to the facts and the question arises whether the Magistrate had power to entertain their request to withdraw their pleas. The Criminal Procedure Code is silent upon this point, and Counsel for the petitioners submits that in such a case, by virtue of the provisions of section 6 of the Code, it is open to this Court to look to the provisions of the English Law for guidance.

There has been brought to my notice a case reported in 8 Cox Criminal Cases 237 (1), in which a plea of guilty was allowed to be with drawn although it would appear to have been confirmed by a verdict of a Jury. Again, in the case of *King* v. *Plummer* (2), it was held that a plea of guilty might be withdrawn at any time before judgment. It seems to me that the term "judgment" used in that case is synonymous with the word "sentence," and if that law may be applied, as I conceive

that it may, in the circumstances of this case, it would appear that the learned Magistrate was mistaken in the view that he had no power to set aside his finding of guilty.

In these circumstances, I think that the convictions and sentences should be set aside and the case should go back for trial before another Magistrate.

Conviction set aside.

[Proctor for accused-petitioners: *Arthur S. Fernando.* Proctor for complainant-respondent: *M. A. W. Gunasekera.*]

—K. S. A.

BUULTJENS, REVENUE INSPECTOR *v.* SAMITCHIAPPU

[WIJEYEWARDENE J. *S C. No. 228—M.C. Matara No. 29,900.*
JULY 9. 1940.]

Public market—Betel—Sale at a place other than a public market—Does the term "vegetables" include betel?—Local Government Ordinance No. 11 of 1920, Ss. 164 & 168—By-law 16 (1).*

A by-law made under Ss. 164 & 168 of the Local Government Ordinance prohibited *inter alia* the sale of vegetables at a place other than a public market. On appeal against the conviction of a person for having sold betel in breach of the above by-law,

HELD: That the term "vegetables" in the above by-law does not include betel.

Followed: *Sanitary Board Inspector of Ambalangoda* v. *Sawneris* (1913), 17 N.L.R. 275 ... (1)

Barr Kumarakulasingham for accused-appellant.

S. W. Jayasooriya for complainant-respondent.

WIJEYEWARDENE J.—The accused-appellant in this case has been charged with having exposed for sale betel at a place other than a public market in breach of by-law section 16 (1) of the by-laws made by the Urban Council under sections 164 and 168 of the Local Government Ordinance. The by-law in question reads as follows: "Within any market area no person should sell or expose for sale any meat, poultry, fresh fish, fresh goods or vegetables except at a public market." The question that has to be decided is whether betel is included in the term "vegetables" used in the by-law. A similar question arose in 17 N.L.R. 275 and was answered in the negative. I see no reason to differ from that decision.

I allow the appeal and acquit the accused.

Appeal allowed.

[Proctor for accused-appellant: *Stanley F. Periera.* Proctor for complainant-respondent: *R. A Bastiansz.*]

K. S. A.

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*Repealed by the Urban District Council Ordinance No. 61 of 1939.

END OF VOL. IV.