The Ceylon Law Weekly

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

VOLUME LII

WITH A DIGEST

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Held : (1) That there is nothing in the Vinaya or the decisions of the Supreme Court which forbids a *bhikku* from renouncing his right to the management of a vihare.

(2) That under the settlement J had renounced his rights to the management of the other vihare.

(3) That upon J's renunciation, S, as the original Viharadhipathi's senior pupil, became *viharadhipati* of the other vihare (J having no pupils at the time) ; and that the respondent, as pupil of S, is entitled to be Viharadhipathi.

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(2) That the cases *Sumana Therunnanse vs. Somaratena Therunnanse* (1936) 5. C. L. W. 37 and *Chandrawimala Therunnanse vs. Siyadoris* (1947) 47 N. L. R. 304 must be regarded as having been pronounced *per incuriam.*

Per SANSONI, J.—" At no time in the history of Buddhist temples in this Island has a priest who has no right to the incumbency of a temple been invested with the title to or the power to manage, the temporalities of the temple, I am unable to accept the suggestion that the Ordinance of 1931, Cap. 222 had the far-reaching effect of conferring an important legal status on one who may not even claim to be, and who is not in law, the chief priest of a temple. Instead of the words " the chief " in the earlier definitions of " incumbent " the definition of " Viharadhipati " contains the words " the principal " and the only other change is that a Bhikkhu could be a Viharadhipati whether he was resident in the temple or not—a change which was probably made because a priest can be an incumbent of more than one temple. In effect, therefore, a Viharadhipati after 1931 is the presiding priest who was known as an incumbent before 1931. With the difference that he need not be resident in the temple of which he claims to be the Viharadhipati."

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Per SANSONI, J.—"On the contrary, the basis of the decision in *Shaw & Sons vs. Sulaiman* (*supra*) is that a judgment-creditor who applies for execution is not shut out from claiming concurrence so long as the money lying in the custody Court has not been appropriated to a particular decree holder or holders by an order of that Court."

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Held: That the Matara Court had jurisdiction to entertain an action by the plaintiff to recover the *kaikuli* from the defendant as the obligation to pay the *kaikuli* to the plaintiff was undertaken by the defendant at Matara when he married her.

Per GRATIAEN, J.—If the obligation be equated to an obligation in the nature of a trust, the English Law applies and the trustee debtor must seek out the beneficiary in order to discharge the trust. Alternatively (if *kaikuli* is regarded as an implied contractual obligation to pay upon marriage to the wife whenever she demands it or if she dies, to her heirs) there was a breach of a contractual obligation undertaken at Matara.

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(2) That it is undesirable to order incurred costs unless the Judge is in a position to form a fairly accurate estimate of such costs.

(3) That a Judge should not enhance the amount of costs merely for the reason that a party is in affluent circumstances.

Per DE SILVA, J.—Although I would not go so far as to say that a Judge in no circumstances should order a party to pay "incurred costs" I would however venture to observe that such an order is an undesirable one and should be made only in cases where the Judge is in a position to form a fairly accurate estimate of the "incurred costs". Where he makes such an order the record also should show that he had material before him to arrive at the estimate of "incurred costs". Otherwise it would not be possible for this Court to ascertain whether or not the Judge had exercised his discretion judicially. In this case it is not possible to gather from the Judge's record even a very rough idea of the amount of costs incurred by the plaintiff and which the defendant was ordered to pay. If the Judge had no means of knowing what the plaintiff had spent, it cannot be said that he used his discretion judicially in ordering the defendant to pay the "incurred cost". The learned District Judge should have stated in his order his estimate of the "incurred costs" and the grounds on which he based that estimate before he made the order.

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Where at the hearing of an appeal before the Supreme Court, the respondent was not represented and the appeal was allowed, and the respondent thereafter applied to the Supreme Court by way of *restitutio-in-integrum* or revision to have the judgment and decree set aside and satisfactorily explained his failure to be represented at the hearing of the appeal, the Supreme Court ordered a rehearing of the appeal under the provisions of Section 771 of the Civil Procedure Code.

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The plaintiff-appellants brought this action in the Court of Requests, Vavuniya, for the redemption of an otty mortgage and the release of the mortgaged lands from the mortgage. The lands in respect of which the action was brought lay within the limits of the jurisdiction of the Court; but the Commissioner had held that the action was not brought " in respect " of the lands within the meaning of Section 9 (*b*) of the Civil Procedure Code and that no " interest or right to the possession " of the lands in question was in dispute within the meaning of Section 75 of the Courts Ordinance.

Held: (1) That the question, whether this particular usufructuary mortgage should be redeemed and the lands released from the encumbrance, is a dispute affecting an interest in the lands in question within Section 9 (*b*) of the Civil Procedure Code.

(2) That moreover, as the defendant has a right to possess the land as long as the mortgage is in existence the dispute may be said to be one relating to the possession of the mortgaged lands. The action was therefore instituted in the proper Court.

Per ROSE, C.J.—" It seems to me that it would be wrong to hold that a mortgage—usufructuary or otherwise—cannot be said to be an interest in land".

Contempt of Court

Contempt of Court—Conviction under section 53 of Partition Act No. 16 of 1951—Right of appeal under section, 798 Civil Procedure Code—Is it limited by section 335 of Criminal Procedure Code?—Proper procedure for contempt of Court under chapter 65 of Civil Procedure Code—Section 797—Meaning of " explanation."

The accused was convicted on a charge of contempt of court under section 53 of the Partition Act. The learned judge who tried the case did not ask the accused whether or not he admitted the truth of the charge in terms of section 796 of the Civil Procedure Code and the evidence of the accused was mainly in the form of answers to questions put by the learned judge.

A preliminary objection to the appeal was taken that, having regard to the sentence, leave of court was necessary under section 335 of the Criminal Procedure Code.

Held: (1) That section 335 of the Criminal Procedure Code did not apply to an appeal under Section 798 of the Civil Procedure Code.

(2) That the conviction must be set aside as Section 797 of the Civil Procedure Code had been infringed by the failure of the learned judge to hear the explanation of the accused, which under the section must be voluntary.

(3) That the procedure to be adopted in cases of contempt under section 53 of the Partition Act is the procedure laid down in Chapter 65 of the Civil Procedure Code.

Contract

Contract—Breach of—Village Committee calling for tenders for construction of abutment of bridge—Condition of notice that successful tenderer should enter into contract with Government Agent and furnish security—Plaintiff signing contract in printed form supplied at Kachcheri before Superintendent of Works (employed by Assistant Local Government Commissioner who replaced Government Agent) and furnishing security—Commencement of work—Subsequent request to plaintiff to stop work till receipt of copy of agreement signed by Commissioner—Action for damages against Crown—Liability of Crown.

The Chairman of a Village Committee called for tenders for the construction of two abutments for a bridge. The notice stated that the successful tenderer should enter into an agreement with the Government Agent and furnish cash security. The Village Committee recommended to the Assistant Commissioner appointed in place of the Government Agent that the plaintiff's tender should be accepted and the plaintiff was in due course notified of it.

The plaintiff thereupon deposited at the Kachcheri the required security and signed in triplicate a printed agreement form before the Superintendent of Village Works. By this agreement the plaintiff bound himself (1) to execute the work, (2) to hypothecate in favour of the Assistant Commissioner the security money, and (3) to complete the work within six months or in default pay liquidated damages.

After the agreement was signed the Superintendent of Works showed the plaintiff where the work had to be done and he accordingly commenced work on the 16th May, 1947.

On 10th July, 1947, the plaintiff received from the Assistant Commissioner a letter dated 30th June 1947, directing him not to commence work until he received a signed copy of the agreement form.

The plaintiff sued the Crown for the recovery of (*a*) the cost of work already performed under the contract, (*b*) the deposit of security, and (*c*) the profit which the plaintiff would have been entitled to if the work was allowed to be completed.

The learned District Judge dismissed the plaintiff's action on the grounds (*a*) that there was no concluded contract as the Assistant Commissioner had not yet signed the agreement, and (*b*) even if the contract was concluded it was entered into by the Assistant Commissioner as agent of the Village Committee and not of the Crown.

In appeal—**Held**: (*a*) that when the plaintiff signed the agreement, the contract was concluded and left the Crown no *locus poenitentiae* to withdraw as the plaintiff has already complied with the condition of providing security. The clause that the plaintiff should complete the work within six months from the date of the agreement strongly supported the argument.

(*b*) In the circumstances it was clear that the Assistant Commissioner had acted on behalf of the Crown.

Contract—Breach of, sale of land—Agreement under deed between plaintiff and defendant for transfer of land to plaintiff if certain sum of money was tendered before an agreed date—Money undertaken to be paid on plaintiff's behalf by Industrial Credit Corporation provided land is transferred to plaintiff and mortgaged to the Corporation—Transfer

and mortgage to be effected contemporaneously—Guarantee of Corporation adequate—Is it sufficient tender?—Roman Dutch Law.

Under a deed the defendant agreed to convey land to the plaintiff if a certain sum of money was tendered before a given date. The deed did not provide expressly the time for payment of the consideration, apart from the stipulated period. The Industrial Credit Corporation, from whom the plaintiff raised a loan, undertook to pay the money at any time within the agreed period provided that the land was transferred to the plaintiff by the defendant and mortgaged in favour of the Corporation, and that both deeds were registered. It was arranged that both the deeds of transfer and of mortgage were to be notarially attested and forwarded for registration at the same time. The plaintiff alternatively offered to deposit the money (pending registration) in Court or with the defendant's lawyer, who were to attest and register the documents. The adequacy of the security or the guarantee of the Corporation was not disputed by the defendant. The defendant refused to transfer the land on the ground that under the deed of agreement, he was entitled to receive the purchase price at or before the time when he actually signed the transfer.

In an action by the plaintiff to have the land conveyed to him by the defendant on the ground that he had made a good and sufficient tender of the consideration in terms of the agreement.

Held : (1) That under the agreement, the time fixed for the delivery of the deed of transfer by the defendant was also the proper time for the receipt of the purchase price.

(2) That the plaintiff's offer amounted to a valid tender and that the defendant was not justified in refusing to sign the deed of transfer in favour of the plaintiff.

Contract—Agreement between owner of business, P and his employees S and W—Payments made to S in terms of agreement—Business taken over by Company subsequently formed with P as managing director—Oral undertaking by company to make the payments to S—Refusal of company to continue payments after death of P—Action by S to enforce agreement—Novation—Delegation—Estoppel—Roman-Dutch Law—English Law.

S was employed in a business known as ' Hirdaramani ' owned by P. W was also an employee of the business. An agreement was entered into between P, S and W by which S was to retire from the business and W was to succeed him as leading jeweller. S after retirement was to receive during his lifetime monthly payments of Rs. 150/- from P and towards these payments W was to contribute Rs. 75/- per month. In the event of W's employment ceasing by death, dismissal or otherwise the monthly payments to S were to cease. In terms of the agreement S received the payments of Rs. 150/- monthly.

Later a private limited company (Hirdaramani Ltd.) was formed with P as Managing Director, which took over the business owned by P. W then ceased to be in P's employment and became an employee of the company. Soon after the company was formed P as Managing Director of the company, undertook to make the payments to S under the agreement, and in fact continued to make the monthly payment with the Company's cheques.

Some time afterwards P died. The company thereupon denied liability to continue payments to S under the agreement. S then instituted an action to enforce payment against the company.

The learned District Judge entered judgment in favour of S holding (1) that there had been a novation of the original contract by which the defendant-company undertook the liability of P to make payments in terms of the contract.

(2) that the defendant company was, by reason of its having made payments to S until the death of P, estopped from denying its liability to continue the payments.

On appeal the Supreme Court reversed the judgment of the learned trial judge holding :

(1) that in the absence of an express declaration a novation cannot be inferred unless it is a necessary inference from all the circumstances of the case and that there had been no novation as the correspondence ruled out the inference that the company had unequivocally undertaken the obligation to pay S.

(2) that the company was not estopped from denying its liability to pay as it could not be said that the plaintiff was misled into the belief that the company would continue the payments throughout his lifetime.

S appealed against the judgment of the Supreme Court to the Privy Council.

Held : (1) That the obligation to make the payments to S was binding on the Company either because a completely new form of contract which might be regarded as a mixture of novation proper and delegation was made between the Company and S irrespective of any condition with regard to W's employment, or because there was a novation of the original agreement by which the Company was substituted for P at all points of the agreement.

(2) That W's obligation to pay half the monthly payment to P was a separate obligation from P's obligation to make the monthly payments to S and that there was no interdependence between the two obligations. W's failure to pay his share would not have excused P from paying the full sum to S.

Per LORD KIETH OF AVONHOLM.—" The names given to different kinds of novation in Roman-Dutch Law and in other systems of law drawing on the civil law are a convenient means of classifying different kinds of transactions, but introduce no principle which would not equally operate in similar circumstances under the law of contract in England."

Contract—Insurance—Proposal and personal statement in company's form in English—Assured illiterate in English—Assured's answers translated into English by defendant company's canvasser—Assured's health certified by company's doctor to be good—Death of assured—Repudiation of liability by company on the ground of withholding material information regarding state of health and inaccurate or untrue statements in the proposal—Principles governing construction of insurance policy—Meaning of " consult."

Civil Procedure—Defective pleadings—Judge's powers under section 77 of the Civil Procedure Code.

The plaintiff's husband entered into a contract of insurance of life with the defendant company on the company's proposal form, which was in English, and containing a number of questions, which he had to answer together with questions under " personal

statement ", also in English. As the assured did not know English the questions were translated into Malayalam and the answers into English by the company's inspector S, and likewise the answers in the personal statement were recorded by the company's doctor, who after examination certified him to be of good health. The assured agreed that the statements should be the " basis of the contract."

In an action by the plaintiff as administratrix to recover the money under the contract after the assured's death, the company repudiated liability on the ground that the deceased had withheld material information regarding his health and ailments and that he had given inaccurate and untrue answers to the questions in the proposal and the personal statement, namely, (*a*) whether he had consulted any medical man for any ailment within the past five years ; (*b*) whether he had ever suffered from any other illness, accident or injury.

The burden of proving nullity of contract was on the defendant company.

The trial Judge rejected the evidence of one Dr. Shenoy the defendant's witness and that of Dr. Narayan, the plaintiff's witness regarding the state of deceased's health at the time of the contract, and acting on the evidence of Nair, the company's canvasser, and the medical report of the company's doctor found in plaintiff's favour that the deceased was perfectly healthy at the time of effecting the assurance.

The trial Judge relying on the admission of Dr. Narayan that the deceased had a mild attack of " influenza " in 1945 also held that the assured had given an untrue or incorrect answer to the questions in the proposal and the personal statement.

Held : (1) That there was sufficient evidence to justify the trial Judge's finding that the deceased was in good health at the time of effecting the policy.

(2) That the answers given by the assured to the questions in the proposal and the personal statement have not been proved by the defendant to be untrue or incorrect as—

(*a*) the defendant had failed to establish that the relevant questions were correctly interpreted and explained by the company's inspector and that the answers thereto were correctly inserted by him ;

(*b*) the answers given by the assured, on a fair construction of the questions, cannot in the context be said to be untrue, and that the defendant should not be permitted to plead that the question was put in a sense different from or more comprehensive than the assured's answer.

Observations regarding the duty of a trial Judge under sections 77 and 146 of the Civil Procedure Code to clarify the issues between the parties before evidence is recorded and to prevent parties being taken by surprise.

Co-operative Societies Ordinance

Co-operative Society—Dispute between Society and Manager—Reference to arbitration—Appeal from award to Registrar—Dismissal of appeal, later award held to be ultra vires*—Second reference to arbitration—Validity—Section* 37, *Co-operative Societies Ordinance No.* 34 *of* 1921.

A dispute having arisen between a Co-operative Society and its Manager over the value of goods entrusted to the appellant and not accounted for, the matter was referred to arbitration under Rule 29 made under Section 37 of the Co-operative Societies Ordinance No. 34 of 1921. On an award being made directing appellant to pay Rs. 737/40 to the Society the appellant appealed to the Registrar who dismissed the appeal but thereafter declared the award to be *ultra vires* on the ground that on the date of the award the appellant had ceased to be an employee of the Society.

On a second reference being made for arbitration an award was made directing the appellant to pay the Society Rs. 808/98. The Society then applied for a writ and the appellant objected on the ground (*a*) that the Assistant Registrar had no authority to refer the matter for arbitration for the second time and (*b*) that the first award was valid.

Held : (1) That the first award was valid since on the date of the reference to arbitration the appellant had not ceased to be the Manager.

(2) That no authority except a court of law could declare an award to be *ultra vires* or invalid.

Co-owners

Rights to land co-owned—Co-owner building on common land—Opposition by another co-owner—Order for demolition in partition action—Can such order be made.

Where a co-owner put up buildings on the common land contrary to and in spite of the protests of another co-owner,

Held : That an order for demolition of such building can properly be made in a partition action.

Per NAGALINGAM, J.—" It is obvious that such a question as whether the co-owner who has put up the buildings without the consent of his co-owners should be permitted to retain it or not in appropriate circumstances cannot be as conveniently determined in a proceeding which has for its object the grant either of a prohibitory injunction or a mandatory order as in a partition action."

" I think it is settled law that where a co-owner puts up or becomes solely entitled to a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation to him for it."

Costs

Bill of—Proctor resident within four miles from Courts summoned as witness—Payment made to compensate for loss of professional income while attending Court—Is the amount of such payment recoverable as part of costs incurred by successful litigant.

Payment made to a Proctor, who was summoned as a witness and who resided within 4 miles of the precincts of the Court, to compensate him for the loss of his professional income while attending the Court in obedience to the summons, is not an expense which the unsuccessful party to a litigation can be compelled to meet.

Court of Criminal Appeal Decisions

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Penal Code, Section 294, first proviso to Exception I—Party on whom burden lies to prove matters contained in such proviso—Extent of such burden.

The appellant, who was charged with committing murder by inflicting on the deceased several stab wounds with a pointed knife gave evidence to the effect that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter.

While cross-examining him the prosecuting counsel questioned him as follows :—

Q. Did you tell a single Police Officer that the deceased had insulted you in this way ?

A. Yes, to Mr. Nathan. I told him that this girl had insulted me very badly at the well and also that she spat at me at the well.

Q. I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness.

A. I told him.

At the end of the re-examination, prosecuting counsel, in the presence of the jury, moved to call Mr. Nathan to give evidence in rebuttal and in reply to a question by the learned trial Judge as to what part of the accused's evidence he proposed to rebut, stated that it was with regard to the statement that he told the Inspector that the deceased girl insulted him and spat at him when near the well.

At this stage the jury was asked to retire and after further argument the application to call this witness was disallowed. After trial the jury convicted the accused of murder and sentence of death was passed on him. On an appeal from the conviction and sentence it was contended on his behalf (*a*) that the cross-examination of the appellant on, what were in effect, the contents of a confessional statement to the Police, was contrary to Section 25 of the Evidence Ordinance ; (*b*) that the failure on the part of the learned trial Judge to direct the jury as to the party on whom lay the burden of proving the matters contained in the first proviso to Exception 1 to Section 294 of the Penal Code and the extent of that burden amounted to a non-direction which vitiated the conviction.

Held : (i) That the above questions put to the accused in cross-examination coupled with what was said by the prosecuting counsel when he moved in the presence of the jury to lead evidence in rebuttal, amounted to a contravention of Section 25 of the Evidence Ordinance.

(ii) That as the accused had adduced evidence to avail himself of Exception I to Section 294 of the Penal Code, the burden of proving positive averments which would justify the application of the first proviso to Exception I was on the Crown, and the extent of that burden was the same as and no higher than that rested on the accused who claimed the benefit of the Exception to which Section 105 of the Evidence Ordinance applies.

(iii) That the failure to give a direction on such burden of proof amounted to a misdirection.

The Court set aside the conviction and sentence and upon a consideration of the entirety of the admissible evidence ordered a re-trial.

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Court of Requests

Absence of defendant on summons returnable day—Ex-parte trial fixed—Application to file answer—Explanation that absence due to forgetfulness—Validity of excuse—Civil Procedure Code Section 823 (3).

Held : That forgetfulness on the part of a defendant to appear in Court on a date fixed for his appearance does not amount to an excuse within the meaning of section 823 (3) of the Civil Procedure Code.

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Court of Requests—Right of footpath—Plaintiff absent on trial date—Action dismissed—Motion to file fresh action allowed on terms—Defendant's right to appeal—Section 78 of Courts Ordinance and Section 823 (6) of Civil Procedure Code.

Where plaintiff filed action in the Court of Requests for a declaration that defendant was not entitled to a right of foot-path over plaintiff's land and at the trial the plaintiff being absent the action was dismissed, and the plaintiff thereafter moved for permission to institute fresh action, and the Court allowed it on terms and the defendant appealed from that order :

Held : That the order appealed from is not an order having the effect of a " Final Judgment " and therefore no appeal lay.

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Held : (1) That where a person is charged with the offence of selling bread in excess of the price prescribed by a Price Order, which prohibited absolutely such sale, he is entitled to an acquittal, if he can prove on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not prohibited by law.

(2) That the defence available under Section 72 of the Penal Code is applicable not only to offences punishable under the Penal Code but also to offences punishable under all other criminal statutes enacted in Ceylon, even if the definition of the offence does not contain a particular state of mind or knowledge as one of its elements.

Per GRATIAEN, J.—" Even if the decision of a Collective Bench properly constituted under Section 51 of the Courts Ordinance is wrong, it cannot subsequently be over-ruled by even a subsequent Collective Bench, far less by a Bench to which an appeal has been referred under Section 48A (of the Courts Ordinance)."

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Criminal Procedure—Charge under section 457 of Penal Code—Magistrate assuming jurisdiction under section 152 (3) of Criminal Procedure Code—Appeal from conviction—Crown not supporting conviction—Application to remit case for non-summary proceedings—When it should not be granted.

Where on a charge under section 457 of the Penal Code, the Magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code, and after summary trial convicted the accused and on appeal the Crown did not support the conviction on the merits, but urged that a charge of so grave an offence should not have been tried summarily.

Held : That as both parties had acquiesced in the procedure adopted by the Magistrate in the exercise of his discretion, the gravity of the offence is by itself not a sufficient ground for making an order in the exercise of the powers of revision vested in the Supreme Court, to remit the case for non-summary investigation.

H. G. THEDIAS INSPECTOR OF POLICE *vs.* S. SIRISENA PERERA 93

Criminal Procedure Code

Section 32—Arrest without warrant—Failure of police officer arresting to inform person arrested the reason for arrest—Legality of arrest.

Held : That a police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere " unexpressed suspicion " that a particular cognizable offence has been committed, unless of course " the circumstances are such that the man must know the general nature of the offence for which he is detained," or unless the man "himself produces the situation which makes it practically impossible to inform him."

Per GRATIAEN, J.—" Police officers must also realise that before they arrest without a warrant, ' *they must be persuaded of the guilt of the accused.* They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile, or taking him to some spot where they can or may find further evidence ' —*per* Lord Porter in *John Lewis & Co. Ltd. vs. Tims* (1952) A. CW 676 at 691."

COREA AND TWO OTHERS *vs.* THE QUEEN ... 17

Section 148—Proceedings instituted by Range Forest Officer under Land Development Ordinance —Is he empowered to do so.

See Land Development Ordinance 31

Sections 156, 159, 160, 161, 162 (1), 163, 389, 391, 392 (2)—Non-summary proceedings against accused persons—Magistrate discharging them under Section 162 (1)—Directions by the Attorney-General under Section 389 to Magistrate to read out to accused certain amended charges under Section 159 and to commit them for trial—Amended charges different from those originally under inquiry—Failure to direct that charges should be read out under Section 156 and that fresh proceedings should be taken from that stage—Compliance with directions of Attorney-General and committal of accused for trial in Supreme Court.

Preliminary objection to indictment that Attorney-General's directions ultra vires*—Scope of Sections 163, 389, 390 (2) and 391 of the Code—Should indictment be quashed.*

Where a Magistrate committed three prisoners (whom with two others he had discharged earlier under Section 162 (1) of the Code after due inquiry into charges relating to the same incident) for trial in the Supreme Court in obedience to the Attorney-General's instructions under Section 389 of the Code for offences which were different from those investigated earlier and which instructions were to the effect that the Magistrate (A) should read out to the prisoners under Section 159 of the Code certain amended charges alleging—

(*a*) That they together with one T. " and another person unknown to the prosecution " had in truth been members of an alleged unlawful assembly.

(*b*) That the murder of one S. had been committed by the 1st prisoner and this unknown person.

(B) should commit the persons for trial on these amended charges.

And where a preliminary objection was raised at the trial to the effect that the prisoners were not properly committed for trial and that the indictment should be quashed.

Held : (1) That the directions issued to the Magistrate by the Attorney-General were *ultra vires* as he had no power under Section 389 of the Code to direct a committal of the prisoners except on the basis of the charges which had been read out to them under Section 156 of the Code.

(2) That the power of a Magistrate to commit under Section 163 of the Code is determined by the scope of the particular charges which formed the subject-matter of the Magisterial inquiry ; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into.

(3) That the Attorney-General can only direct a Magistrate to enter an order of committal on charges in respect of which the Magistrate himself was previously vested with power to commit.

(4) That if the Attorney-General takes the view that the accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if properly committed), he is authorised to instruct the Magistrate under Section 390 (2) to reopen the proceedings by formulating an amended charge and thereafter to take all steps prescribed by Chapter 16.

(5) That where such directions have been given under Section 390 (2), it is for the Magistrate alone to decide in the first instance whether or not a commital on the amended charge should be justified.

(6) That the residual powers of the Attorney-General under Section 391 only come into operation

at a later stage, that is, if he considers that the Magistrate has wrongly exercised his discretion in favour of the accused.

THE QUEEN *vs.* THIAGARAJAH AND OTHERS ... 56

Section 335—Does not apply to an appeal under Section 798 of the Civil Procedure Code.

See Contempt of Court 86

Crown

Contract between plaintiff and Village Committee —Contract signed before officer employed by Assistant Local Government Commissioner—Breach of contract—Is Crown liable.

See Contract 11

Deed

Sale of minor's property by mother (curatrix) with Court approval—On attaining majority, action to have deed declared null and void ab initio*—Failure of consideration—Fraud and collusion.*

Where a plaintiff sought to have a deed of sale executed by his mother with the approval of Court during his minority, declared null and void *ab initio* on the grounds :—

(1) that the stipulated consideration had not in fact been paid and ;
(2) that the conveyance was executed fraudulently and collusively by his mother acting in concert with one of her judgment creditors. There was no allegation of fraud against the defendant.

Held : (1) that the issue of fraud did not properly arise out of the pleadings.

(2) that if the true position was that the defendant had not paid the stipulated consideration, the proper remedy was to sue him for its recovery and not to have the deed declared null and void.

SABARATNAM *vs.* KANDIAH 80

Delict

Delict—Patrimonial loss—Cause of Action—Does it arise when the wrong is committed or when the damage ensues—Prescription—Ordinance No. 22 of 1871, section 9.

The plaintiff was the headmaster and the defendant an assistant teacher of the school. The plaintiff alleged that the defendant on 15th June, 1944, falsified certain attendance registers of the school with the intention of putting the plaintiff into trouble and as the result of an inquiry held by the plaintiff's employer, the plaintiff was deprived of his employment on 1st December, 1947. On 28th May, 1948, the plaintiff sued the defendant for damages.

At the trial the defendant raised a preliminary issue of law that the plaintiff's action was prescribed as the cause of action, if any, arose when the alleged falsification of the registers took place. This issue was held in the defendant's favour and the plaintiff appealed.

Held : That in cases under the *Lex Aquilia* and other actions in which patrimonial loss is a condition of liability, the cause of action arises only when the damage has actually occurred, which need not necessarily be when the wrongful act or omission has been done. In this case it occurred only when the plaintiff was deprived of his employment in December, 1947, and hence his cause of action was not prescribed.

WIJERATNE *vs.* GABRIEL 25

Ejectment

Action for ejectment of and damages against tenant and persons occupying premises under his authority—Allegation in plaint that tenant allowed other persons to remain on premises—Liability of such persons for damages.

Plaintiff brought this action for ejectment and damages for wrongful occupation against 1st Defendant, his tenant, and 2nd to the 5th Defendants, who were alleged to be in wrongful occupation with 1st Defendant's permission.

Held : That the order of the trial judge for ejectment against the Defendants should be upheld : but that the order for damages against the 2nd to the 5th Defendants should be set aside, inasmuch as it was alleged that only the 1st Defendant was the wrongdoer, and damages could only be recovered from 1st Defendant for his personal default.

BASTIAMPILLAI *vs.* KASIPILLAI 111

Estoppel

Admission by party in pleadings—Does it amount to an Estoppel.

See Res Judicata 4

Excess Profits Duty Ordinance

Income Tax—Excess profit—Appellant and another partner in business—Notice of assessment served on Appellant's partner—Adequacy of notice—Income Tax Ordinance Section 80 (1) 68 (1)*—Excess Profit Duty Ordinance.*

Under the Excess Profit Duty Ordinance it is sufficient if assessment of excess profits for a particular year is made within the period prescribed by the Ordinance. Notice of such assessment can be served on the assessee either before or after the prescribed date.

A notice of assessment served on one of two partners with the words " For the information of A. L. Abdul Hamid Marikar (the other partner) " is a sufficient notice under the Ordinance to both partners and even if the notice was lacking in form, it was in substance and effect a notice that the assessee was required to pay the assessed amount and the defect was cured by section 68 (1) of the Income Tax Ordinance.

HAMID MARIKAR *vs.* COMMISSIONER OF INCOME TAX 28

Execution

Sale in execution—Fiscal's receipt for purchase price—No Conveyance—In whom is the title.

See Rei Vindicatio 92

Fiscal

Fiscal granting receipt for purchase price at Sale in Execution—No Conveyance—In whom is the title.

See Rei Vindicatio 92

Income Tax Ordinance

Sections 68 (1) and 80 (1).

See Excess Profits Duty Ordinance 28

Income Tax—Sections 76 (5) and 80 (1) and (2)—Commissioner issuing certificate to Magistrate—Magistrate's discretionary power to adjourn—Sufficiency of the particulars in Commissioner's certificate.

The Commissioner of Income Tax filed a certificate in the Magistrate's Court under Section 76 (5) of the Income Tax Ordinance certifying that the petitioner had defaulted in paying Rs. 536,499.99 being income tax due from him. On 10-3-54 the petitioner appeared before the Magistrate on summons and order was made on that day directing the case to be called on 25-3-54. On 25-3-54 the Magistrate made the following order: "As respondent had appealed he is not entitled to adjournment under Section 80 (2). So the respondent should pay this amount. Payment on 31-3-54."

At the hearing of the application to revise the Magistrate's order it was contended that :—

(*a*) the Magistrate was wrong in supposing that he had no discretion to adjourn the matter.

(*b*) that the certificate did not comply with the provisions of Section 80 (1) because it contained no particulars of the tax in default.

Held : (1) That a Court has an inherent power to direct that any matter which comes before it should stand over for a period, if the Court thinks that that is the proper way to deal with that matter.

(2) That Section 80 (2) of the Income Tax Ordinance which deals with the question of adjournment limits the discretion which ordinarily is vested in a Magistrate, but that is a power conferred only in a case where no appeal lies.

(3) That where the certificate sets out the actual tax and the penalty without further particulars as to the amount due for each year the certificate did contain sufficient particulars, as required by section 80 (1) of the Ordinance.

WILLIAM *vs.* THE COMMISSIONER OF INCOME TAX 83

In *pari delicto portior est conditio defendentis*

See Landlord and Tenant 1

Insurance

See under Contract ... ...

Jurisdiction

Of Collective Bench of Supreme Court to overrule previous decision of a Collective Bench.

See Criminal Law 39

Kandyan Law

Diga married wife dying intestate leaving child by former marriage—Right of husband to life-interest in property acquired during coverture—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938—Section 18—Effect of.

Held : That the surviving husband of a DIGA marriage has a life interest in the acquired property of his deceased wife, even though there are children of the marriage or children of a former marriage, and that this rule has not been altered by Section 18 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938.

WIMALAWATHIE *vs.* PUNCHI BANDA ... 49

Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938.

Effect of section 18.

See Kandyan Law 49

Land Development Ordinance

Accused charged for offence under—Proceedings instituted by a Range Forest Officer under section 148 (1) (6) Criminal Procedure Code—Objection that Range Forest Officer not empowered to institute proceedings under Land Development Ordinance—Can charge be maintained?—Accused charged under first plaint even though an amended plaint had been filed?—Effect of —Criminal Procedure Code.

The institution of proceedings under section 148 (1) (*b*) of the Criminal Procedure Code for an alleged contravention of a provision of the Land Development Ordinance is not a proceeding under that Ordinance, but is a proceeding under the Criminal Procedure Code. A Forest Range Officer can therefore institute proceedings under section 148 of the Criminal Procedure Code, although he is not an officer who is empowered under the Land Development Ordinance to institute proceedings.

Where the prosecution tenders an amended plaint setting out a charge different from the first plaint, and there is evidence to show that the prosecution intended that the accused should not be tried under the first plaint, the accused is entitled to be discharged if he is tried under the first plaint.

ATTORNEY-GENERAL *vs.* T. H. ALWISAPPU ... 31

Landlord and Tenant

See also under Rent Restriction

Landlord and Tenant—Premium—Payment of, illegally to landlord—Right of tenant to recover—Applicability of maxim "in pari delicto potior est condito defendentis"—*Rent Restriction Ord. No. 60 of 1942.*

Prescription—Transfer of case from Court of Requests to District Court under section 79 of Courts Ordinance—Proviso to section 79—Scope of—Prescription Ordinance, section 10—Meaning of "commenced."

The appellant landlord sued the respondent tenant for ejectment and damages in the Court of Requests on 15th May, 1950. The respondent filed answer on 10th July, 1950, claiming in reconvention (*a*) Rs. 551/88 as rent paid in excess of the authorized rent, (*b*) Rs. 1,800/- paid on 3rd September, 1947, by way of premium as a condition of the grant of tenancy. Owing to the claim in reconvention the case was transferred to the District Court on 8th October, 1950, under an order in terms of section 79 Courts Ordinance. The Rent Restriction Ordinance 1942 prohibited a landlord from demanding or receiving a premium "as a condition of the grant, renewal or continuance" of a tenancy of controlled premises. The trial Judge entered judgment for the tenant for the sum of Rs. 1,800/- in addition to Rs. 551/88 which the landlord admitted was due to the tenant.

The landlord appealed against the order on the following grounds :—

(*a*) that the claim was prescribed since the action for the recovery of the premium did not " commence " within the meaning of section 10 of the Prescription Ordinance, until the transfer of proceedings to the District Court on 6th October, 1950.

(*b*) that the principle *in pari delicto potior est conditio defendentis* precluded the tenant from asking the Court's aid to recover an illegal payment.

Held : (1) That the claim for the recovery of the premium was prescribed as the action for its recovery effectually " commenced " only in the District Court, which alone had jurisdiction.

(2) That the word " commenced " in section 10 of the Prescription Ordinance means initiated in a Court possessing jurisdiction to grant relief in the form of a decree upon the cause of action.

(3) That the words in the proviso to section 79 of the Courts Ordinance " shall thereafter be continued and prosecuted in such Court as if it had been originally commenced therein " do not amount to a statutory provision exempting the operation of the Prescription Ordinance. A direction under the proviso is only procedural, no fresh pleadings need be filed as preliminary to the trial in the new Court, and the proceedings continue in that sense from the stage at which they had been interrupted in the Court where the case was instituted.

Obiter where a landlord has received a premium in contravention of the law, the Court should aid the tenant to recover the premium, if in the circumstances of the case, it is in the interest of public policy and of justice.

AMARASEKERA vs. ABEYGUNAWARDENE ... 1

Landlord and tenant—Premises sold under writ issued against landlord—Bought by plaintiff—Tenant (defendant) failed to attorn to plaintiff and pay rent—Plaintiff's right to sue defendant—Tenancy.

Where under a writ issued against the landlord, the premises, of which the defendant was a tenant, were sold by the Fiscal and purchased by the plaintiff who obtained Fiscal's conveyance and was placed in possession and notwithstanding plaintiff's requests the defendant failed to pay rent due and where it was argued that plaintiff was not entitled to sue the defendant on the basis of a tenancy as admittedly the defendant had not attorned to the plaintiff.

Held : That the purchaser of the leased premises was entitled to sue on the contract of lease entered into between the landlord and the tenant.

W. A. S. DE COSTA *vs.* H. CHARLES PERERA ... 54

Lease

Lease of Hotel and Tea Kiosk business—Assignment of Lease—Is assignee tenant or licensee—Nature of rights involved.

See Rent Restriction 50

Lex Aquilia

Cases under—When does cause of action arise.

See Delict 25

Maintenance

Illegitimate children—Absence of corroboration—False statement of the defendant—Does it remove any doubt?—Maintenance Ordinance, Section 6.

Where the evidence of a mother claiming maintenance for her children is not adequately corroborated by the only other witness and the defendant's own evidence consisted of false statements.

Held : That the false statements made by the defendant remove any doubts that may have existed on the question of corroborative evidence.

WARAWITA *vs.* JANE NONA 41

Maintenance—Duty of children to support parents in indigent circumstances—Roman Dutch Law—How far applicable in Ceylon.

That part of the Roman Dutch Law which requires children to support and maintain their parents in indigent circumstances is applicable in Ceylon. The question whether a parent is in such a state of comparative indigency or destitution is a question of fact depending on the circumstances of each case.

AMBALAVANAR *vs.* NAVARATNAM 65

Mandamus

Request to convene special meeting—Discussion of motion—Chairman ruling motion out of order—Validity—Section 39 (2) Town Councils Ordinance No. 3 of 1946 and By-laws 8 (a), (b), (c), (d).

The petitioners are members of the Town Council, Kankesanturai, and the respondent is Chairman. The petitioners requested respondent in writing to convene a special meeting of the Town Council to discuss a motion which the respondent ruled out of order. The petitioners applied for a writ of *mandamus* on the respondent commanding him to convene a special meeting for that purpose.

The respondent contended firstly that a special meeting was not fundamentally different from an ordinary meeting and accordingly the request to convene a special meeting would be governed by the Council's by-laws, the provisions of which empowered the Chairman to exercise his discretion. Secondly, the petitioner should have sought the alternative remedy provided by the by-laws 1 (*b*) and 8 (*h*) before applying for a writ of *mandamus*.

Held : That the wording in section 39 (2) of the Town Councils Ordinance No. 3 of 1946 was unambiguous and therefore its provisions vested no discretion in the Chairman to refuse to convene a special meeting as requested by the members of the Council.

SEENIVASAGAM *et al vs.* CHAIRMAN TOWN COUNCIL KANKESANTURAI 8

Master and Servant

Vicarious liability of master for negligence of servant—Motor car accident.

See Negligence 97

Mortgage

Otty mortgage—nature of.

See Civil Procedure Code 91

Motor Traffic Act 1952

Section 150 (3)—Overtaking without having clear view of road ahead.

Muslim Law

Kaikuli—Nature of—Which is the proper Court for filing action for recovery of Kaikuli.

Negligence

Negligence—Actio Legis Aquiliae—*Motor-car accident—Rash and negligent driving—Motor Traffic Act of* 1952, *section* 150 (3)—*Vicarious liability of master for the negligence of servant—Servant's scope of employment.*

The appellant and two others were driving in the defendant's motor car from Negombo to Colombo. While travelling on a wet road at 30 or 45 M.P.H., the driver of the car increased this speed and attempted to overtake a lorry without a clear signal from its driver, but on seeing a car travelling in the opposite direction applied his brakes to avoid a collision. As a result the car overturned, and the plaintiff suffered bodily injuries. The car had been borrowed by the plaintiff from the defendant's attorney and was driven at the time by the defendant's driver at the request of the attorney. There was no evidence that when the plaintiff borrowed the car the driver was placed under his control.

Held : (1) (Reversing the finding of the trial Judge) that the driver had been negligent in—

(*a*) attempting to overtake without a clear and unobstructed view of the road—an offence under section 150 (3) of the Motor Traffic Act of 1952 ; and

(*b*) driving at a speed which was dangerous considering the wet road.

(2) That the driver was the servant of the defendant, in that—

(*a*) the fact of defendant's ownership of the car was *prima facie* evidence that it was driven by his servant, and

(*b*) the driver was the servant of the agent of the defendant. ....

(3) That the driver was acting within the scope of his employment. Although the plaintiff had borrowed the defendant's car, in order to escape liability for the acts of his servant, the defendant must discharge the heavy burden of proving that the servant was under the complete control of the plaintiff. The evidence however established that the driver was under the control of the defendant's agent.

Novation

Rent Restriction Act No. 27 *of* 1948, *section* 13 (1) (*d*)—*Action for ejectment of tenant on the ground of nuisance to "adjoining occupiers"—Pollution of drains outside the rented premises by tenant's workmen —Complaints to authorities by neighbour living opposite —Is tenant liable—Should the nuisance complained of be created in the premises itself—Meaning of the word "adjoining" in sub-section (d)—Failure of plaintiff to state that she considered such conduct amounted to nuisance—Effect.*

The plaintiff sued his tenant, a limited liability company, for ejectment from the premises rented out to it relying on section 13 (1) (*d*) on the ground that the tenant had been guilty of conduct which is a nuisance to the plaintiff and other adjoining occupiers. The nuisance was that one of the rooms of the rented premises was occupied by the tenant's workmen who urinated and polluted the drains just outside the room. A neighbour who lives opposite the premises gave evidence that he repeatedly complained to the Police and the Municipal authorities about their behaviour.

The learned Commissioner held in favour of the plaintiff and in appeal it was contended on his behalf that—

(*a*) the tenant could not be held responsible for the acts of other persons who use the premises;

(*b*) that the conduct complained of must be conduct on the rented premises, not outside it;

(*c*) that the neighbour who gave evidence was not an "adjoining occupier" within the meaning of the section ;

(*d*) that the plaintiff has not given evidence that she considered the conduct of the workmen a nuisance.

Held : (1) That the defendant has indirectly committed the nuisance as it is its responsibility to see that no nuisance is created by anybody who comes on the premises with its permission.

(2) That sub-section 13 (1) (*d*) does not require that the nuisance should exist on the rented premises itself.

(3) That the word "adjoining" in this sub-section does not mean mere contiguity. It also means "neighbouring" and all that the context seems to require is that the premises of the adjoining occupiers should be near enough to be effected by the tenant's conduct.

(4) That although there is no positive evidence of nuisance by the plaintiff herself, upon proof of conduct capable of having this effect, the Court is entitled to infer that it had that effect.

Rent Restriction Act, 1948—*Regulation* 2 *in Schedule—Premises leased in* 1941 *used as hostel for students and place of residence of its warden and teachers employed in Academy run by tenant in another place—At time of action Academy also run in the premises—Are they residential or business premises—Meaning of the expression "for the time being" in regulation* 2.

Held : (1) That in the context of regulation 2 in the Schedule to the Rent Restriction Act of 1948, the expression "for the time being" in the definition of residential premises refers to the time of the assessment of the annual value, (viz. November, 1941) and not to the time of filing the action for ejectment or the time when the Court is required to make the ejectment order. The same premises cannot be brought within or excepted from the operation of the act from time to time by a mere change in the purpose for which they are occupied.

(2) That when proprietors of an Academy took on rent certain premises which were used as a hostel for students and as a place of residence for its warden and the teachers employed at the Academy, and no part of the tenants' business being carried on

there, the premises must be regarded as residential premises within the meaning of the Rent Restriction Act.

FERNANDO *vs.* WIJEWARDENE AND TWO OTHERS 88

Res Judicata

Action for incumbency—Earlier action by plaintiff's tutor and predecessor against defendant's tutor and predecessor—Dismissal of action holding defendant's tutor's rights valid—Appeal to Supreme Court—Decree affirmed but without deciding that defendant's tutor's rights were valid—Plea by defendant that decision in earlier action precluded plaintiff from reagitating his rights upheld by District Court—Validity of such order—Rights to an incumbency cannot be acquired by prescription—Is plaintiff bound by decision against his tutor—Admission by party in pleadings—Does it amount to an estoppel.

Plaintiff sued the defendant claiming rights to an incumbency of a temple. It was common ground that one S was the lawful incumbent of a Buddhist temple. According to the plaintiff, S had no pupils and he was succeeded in the line of "*sisyanusisya paramparawa*" by I, plaintiff's tutor, whom he succeeded. According to the defendant S, who had no pupils, appointed R (presumably a stranger to the line of succession) to succeed him and the incumbency passed from R to G and then to defendant's tutor R J, whom the defendant succeeded.

In 1914 I instituted action No. 5232 D. C. Kurunegala claiming a declaration that he was the true incumbent of this temple as against the defendant's tutor R. J. who was actually functioning at the time as incumbent. The learned District Judge dismissed the action holding that the plaintiff's claim could not be sustained and that R. J. was the lawful incumbent. This decision was appealed from and the Supreme Court affirmed the decree but for entirely different reasons. The Supreme Court did not proceed to reject I's claim on the ground of validity of R. J.'s rights, but on I's failure to establish his case. At the trial of this case the defendant raised the plea that this action 5232 operated as *res judicata* against the plaintiff and the District Judge upheld it.

The plaintiff appealed.

Held: (1) That the plea of *res judicata* must be considered solely on the basis of the decision of the appellate tribunal as it superseded the decision of the trial Court.

(2) That although I. was precluded by the rule of *res judicata* from reasserting his rights against R. J. on any ground whatsoever, plaintiff is not embarrassed by that decree in his claim for the incumbency inasmuch as (*a*) the Appeal Court did not decide the validity of R. J.'s rights.

(*b*) it is well settled law that an incumbent cannot acquire a title to the office by mere prescriptive user.

(3) That an 'admission' in the pleadings of a party does not create a conclusive estoppel. It merely suggests an inference which a Court of trial may properly take into account and the weight to be attached to it in any particular case depends on many considerations.

Per GRATIAEN, J.—"For the purposes of a dispute concerning rights to the incumbency of a Buddhist temple, no privity can be assumed between a pupil and his tutor who is not proved to be the true incumbent."

REV. MORAGOLLE SUMANGALA *vs.* REV. KIRIBAMUNE PIYADASSI 4

Roman-Dutch Law

Of tender—

See Contract 21

Duty of children to support parents in indigent circumstances.

See Maintenance 65

Sale

Sale in Execution—Fiscal's receipt for purchase price—No conveyance—In Whom is the title.

See Rei Vindicatio 92

Partition

Interlocutory decree—in respect of two contiguous allotments—Exclusive possession of one lot by stranger under a planting agreement between a co-owner and stranger—Co-owner purporting to be owner of entirety—Adverse possession—Prescription.

Held: That where a stranger enters into possession of a divided allotment of property claiming to be sole owner, although his vendor in fact had legal title only to a share, his possession is adverse to the true owners and the date of his entry claiming to be sole owner was a good starting point for prescription.

FERNANDO AND OTHERS *vs.* PODI NONA AND OTHERS 33

Partition—Plaintiff's failure to establish title—Dismissal of plaintiff's action—Allotment of plantations and buildings to some parties thereafter—Jurisdiction of Court to make such allotment.

The plaintiffs instituted an action for the partition of a land. They failed to establish their title and the action was accordingly dismissed. The trial judge however proceeded to allot certain plantations and buildings among some of the defendants after investigating their rights.

Held: That, having dismissed the action on the ground that the plaintiffs had no title, the learned trial judge had no jurisdiction, in the absence of an agreement by the defendants to ask for a partition, to proceed to allot the plantations and the houses among the parties to it.

WEERAKOON *vs.* LENORIS WAAS 70

Partition Act No. 16 of 1951—Procedure to be adopted in cases of contempt under section 53 is the procedure laid down in Chapter 65 of the Civil Procedure Code.

See Contempt of Court 86

Penal Code

Section 294 First proviso to Exception 1—Party on whom burden lies to prove matters contained in such proviso—Extent of such burden.

See Court of Criminal Appeal Decisions ... 35

Section 72—Defence under—Is applicable to offences punishable under all other criminal statutes enacted in Ceylon.

See Criminal Law 39

Pleadings

Admission by party in pleadings—Does it amount to an Estoppel.

Prescription

Transfer of case from Court of Requests to District Court under section 79 of Courts Ordinance—Proviso to section 79—Scope of—Prescription Ordinance section 10—Meaning of "commenced."

Right to an incumbency cannot be acquired by mere prescription user.

Lex Aquilia—Cases under—When does cause of action arise.

Where a stranger enters into possession of a divided allotment of property claiming to be sole owner, although his vendor in fact had legal title only to a share, his possession is adverse to the true owners and the date of his entry claiming to be sole owner is a good starting point for prescription.

Public Servants (Liabilities) Ordinance

Public Servants (Liabilities) Ordinance (Cap. 88), section 2 (2) Amending Act No. 10 of 1951—Extension of immunity to public servants in receipt of salary up to Rs. 520—Defendant unprotected by principal Ordinance giving promissory notes to plaintiff prior to amending Act—Defendant in receipt of salary below Rs. 520—Defendant sued on promissory notes after amending Act came into operation—Is he entitled to protection under Amending Act?

In 1952 plaintiff sued the defendant, a public servant in receipt of a salary above Rs. 300 and below Rs. 520 and obtained decree against him in respect of promissory notes given by him prior to June, 1950. Defendant objected to the execution of the decree on the ground that he was entitled to protection under the Public Servants (Liabilities) Ordinance (Cap. 88) as amended by Act No. 10 of 1951 which amendment came into operation on the 15th March, 1951, and extended the immunity of public servants whose salary fell between Rs. 300 and Rs. 520. The learned District Judge upheld the objection and the plaintiff appealed.

Held: That the defendant was not entitled to protection under the amending Act as section 6 (2) (*b*) of the Interpretation Ordinance preserved the rights of the plaintiff against the defendant in respect of the notes sued upon inasmuch as the amending Act did not expressly or even by necessary implication provide a contrary effect.

Rei Vindicatio

Sale in execution—Fiscal's receipt for purchase price—No conveyance—In whom is the title—Civil Procedure Code Section 289.

A Fiscal's receipt for the payment of the purchase price at a sale in execution does not convey title to the purchaser. In the absence of a duly executed conveyance in the purchaser's favour the title to the land continues to remain in the judgment-debtor.

Rent Restriction

See also under Landlord and Tenant.

Rent Restriction Act, (1948)—Lease of hotel and tea kiosk business—Assignment of lease—Is assignee tenant or licensee—Nature of the rights involved.

Where plaintiff by an indenture of lease P1 "let, demised and leased" to A a hotel and tea kiosk business together with all the equipment for a term of 3 years from 1-1-1950 at a monthly rental of Rs. 350, and A by deed P2 assigned his rights under the lease P1 to the defendant with the consent of the plaintiff, and on the expiration of the lease the plaintiff claimed delivery of the hotel and tea kiosk, and the defendant resisted the said claim on the basis of P1 and P2 as a letting and hiring to him of immovable property, and sought the protection of the Rent Act.

Held: (1) That P1 was not a lease in the true sense of the term and was only the placing of the "lessee" in charge of a business.

(2) That defendant's position was no more than that of a licensee, and is not entitled to the benefit of the provisions of the Rent Restriction Act.

Servitude

Amicable partition—No reservation of rgiht of way—Circumstances under which it could be implied.

Where two co-owners amicably partitioned the common land by a deed according to a plan and the right of way of one owner over the land of the other was not expressly reserved.

Held: (1) That the right of way should be expressly reserved and cannot be lightly implied.

(2) In the absence of such an express reservation the claimant to a right of way could only succeed by proving that the dominant tenement would virtually be rendered ineffectual.

Specific Performance

Agreement for sale of premises—Action for specific performance—Decree for specific performance or damages in lieu of specific performance—Validity of decree—Civil Procedure Code, section 331 et seq.

Where in an action for specific performance of an agreement for the sale of premises the Court decreed the defendant-appellant to convey the premises 'within three years from the date hereof,' or to pay damages whereas the agreement sued upon stated that the conveyance should be within three years from the date of agreement.

Held: (1) That the words 'within three years from the date hereof' should not have been inserted

in the decree. As the period fixed for the execution of the conveyance had lapsed in 1951 and the Court should not have given a further three years.

(2) The decree for damages in lieu of specific performance should be set aside. If the Defendant-Appellants failed to execute the conveyance, plaintiffs-respondent will be entitled to take steps under Section 331 to 333 A of the Civil Procedure Code.

The appellant was directed to execute a conveyance within such time as may be fixed by the District Judge after the record reached his court.

Supreme Court

Jurisdiction of Collective Bench to over-rule previous decision of a Collective Bench.

Tender

Agreement under deed between plaintiff and defendant for transfer of land to plaintiff if certain sum of money was tendered before agreed date—Money undertaken to be paid on plaintiff's behalf by Industrial Credit Corporation provided land is transferred to plaintiffs and mortgaged to Corporation—Transfer and mortgage to be effected contemporaneously—Guarantee of Corporation adequate—Is it sufficient tender.

Thesawalamai

Pre-emption—Who is entitled to—Owner of share subject to life interest of predecessor in title—Is he a "partner" within meaning of Part 7 of Section 1 of Ordinance No. 5 of 1869 Chap. 55).

The word "partner" in Part 7 of Section 1 of the *Thesawalamai* Ordinance (Chap. 55) is confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property. Hence a person who is the owner of a share, subject to the life interest of another is not entitled to the right of pre-emption.

Selvaratnam vs. Sabapathy 2 Times 139 (distinguished).

Town Councils Ordinance No. 3 of 1946

Section 39 (2)—Request to convene special meeting—Chairman ruling motion out of order—Validity.

Trust

Trust—Money deposited by plaintiffs in the name of the defendant—Intention to give the money as dowry—Advancement or trust—Sections 83 and 84 Trust Ordinance.

The plaintiffs deposited from time to time various sums of money aggregating to Rs. 5,000/- in the Post Office Savings Bank in the name of their sister, the defendant, with the object of giving that money as dowry to her upon marriage. The Bank pass book always remained in the custody of the eldest brother. There was no express stipulation at any time that the right to draw the money would be conditional on her contracting a marriage approved by them. The defendant eloped with a young man without the approval of her family or brother.

The District Judge dismissed the plaintiff's action, in which they claimed that money on the ground that it never became her property although it was provisionally earmarked for her benefit.

Held: (1) That the defendant became disentitled to the money as the conditions attaching to the completion of the gift, failed when she married a person not approved by the plaintiffs.

(2) That the plaintiffs did not intend an absolute and unqualified gift to come into operation as soon as each sum of money was deposited in defendant's name.

Words and Phrases

"Commenced"

"Consult"

"Final judgment"

"Incumbent"

Co-owner building on common land—Opposition by another co-owner—Order for demolition in partition action—Can such order be made.

"Viharadhipathi"

Present : GRATIAEN, J. AND SANSONI, J.

AMARASEKARA *vs.* ABEYGUNAWARDENE

D. C. (F) 198/M of 1953—D. C. Colombo No. 28654/M

Argued on : 11th March, 1955
Decided on : 18th March, 1955

Landlord and Tenant—Premium—Payment of, illegally to landlord—Right of tenant to recover—Applicability of maxim " in pari delicto potior est conditio defendentis "*—Rent Restriction Ord. No. 60 of 1942.*

Prescription—Transfer of case from Court of Requests to District Court under section 79 of Courts Ordinance—Proviso to section 79—Scope of—Prescription Ordinance, section 10—Meaning of " *commenced* ".

The appellant landlord sued the respondent tenant for ejectment and damages in the Court of Requests on 15th May, 1950. The respondent filed answer on 10th July, 1950, claiming in reconvention (*a*) Rs. 551/88 as rent paid in excess of the authorized rent, (*b*) Rs. 1,800/- paid on 3rd September, 1947, by way of premium as a condition of the grant of tenancy. Owing to the claim in reconvention the case was transferred to the District Court on 6th October, 1950, under an order in terms of section 79 Courts Ordinance. The Rent Restriction Ordinance 1942 prohibited a landlord from demanding or receiving a premium " as a condition of the grant, renewal or continuance " of a tenancy of controlled premises. The trial Judge entered judgment for the tenant for the sum of Rs. 1,800/- in addition to Rs. 551/88 which the landlord admitted was due to the tenant.

The landlord appealed against the order on the following grounds :—

(*a*) that the claim was prescribed since the action for the recovery of the premium did not " commence " within the meaning of section 10 of the Prescription Ordinance, until the transfer of proceedings to the District Court on 6th October, 1950.

(*b*) that the principle *in pari delicto potior est conditio defendentis* precluded the tenant from asking the Court's aid to recover an illegal payment.

Held : (1) That the claim for the recovery of the premium was prescribed as the action for its recovery effectually " commenced " only in the District Court, which alone had jurisdiction.

(2) That the word " commenced " in section 10 of the Prescription Ordinance means initiated in a Court possessing jurisdiction to grant relief in the form of a decree upon the cause of action.

(3) That the words in the proviso to section 79 of the Courts Ordinance " shall thereafter be continued and prosecuted in such Court as if it had been originally commenced therein " do not amount to a statutory provision exempting the operation of the Prescription Ordinance. A direction under the proviso is only procedural, no fresh pleadings need be filed as preliminary to the trial in the new Court, and the proceedings continue in that sense from the stage at which they had been interrupted in the Court where the case was instituted.

Obiter where a landlord has received a premium in contravention of the law, the Court should aid the tenant to recover the premium, if in the circumstances of the case, it is in the interest of public policy and of justice.

Cases referred to : *Mudiyanse vs. Siriya* (1921) 23 N. L. R. 285.
Kuluth vs. Mohamadu (1936) 38 N. L. R. 48.
Vitharane vs. de Zylva (1954) 56 N. L. R. 57.
Gray & Others vs. Southouse and Another (1949) 2 A. E. R. 1019.
Jajbhay vs. Cassim (1939) S. A. A. D. 537.

H. V. Perera, Q.C., with *E. R. S. R. Coomaraswamy*, for the plaintiff-appellant
H. W. Jayawardene, Q.C., with *P. Ranasinghe*, for the defendant-respondent.

GRATIAEN, J.,

The appellant was the landlord, and the respondent the tenant, of a bungalow in Colombo to which the Rent Restriction Ordinance, No. 60 of 1942 applied. The landlord sued the tenant in the Court of Requests on 15th May, 1950 for the ejectment of the tenant who claimed in reconvention the return of certain sums paid by him (*a*) as rent in excess of the authorised amount and (*b*) by way of " premium " as a condition of the grant of the tenancy.

The total amount counter-claimed by the tenant far exceeded the monetary jurisdiction of the Court of Requests. Accordingly, he applied for and obtained from this Court on 6th October, 1950 an order under Section 79 of the Courts Ordinance transferring the entire proceedings to the District Court of Colombo.

Before the trial commenced in the District Court, the tenant had vacated the premises, so that only his claims in reconvention called for adjudication. The landlord admitted liability to refund a sum of Rs. 551/88 recovered by him in excess of the authorised rent. With regard to the outstanding claim for the return of the premium, the learned Judge held that the landlord had exacted a premium of Rs. 1,800/- in breach of Section 7 of the Rent Restriction Ordinance, No. 60 of 1942, and entered judgment in favour of the tenant for this amount in addition to the sum of Rs. 551/88 admitted to be due.

The landlord has appealed against that part of the decree which orders the repayment of the premium on two grounds :—

(1) that the claim is prescribed ;

(2) that in any event, the principle *in pari delicto potior est conditio defendentis* precluded the tenant from asking the Court's aid to recover an illegal payment.

As to the former plea, it is common ground that Section 10 of the Prescription Ordinance applies, and the learned Judge accepted the evidence that the premium sought to be recovered had been paid on 3rd September, 1947. If, therefore, the action on the claim in reconvention can properly be regarded as having " commenced " when the tenant filed his answer in the Court of Requests—*i.e.* on 10th July, 1950, the plea of prescription admittedly fails. On the other hand, Mr. Jayawardene concedes that the claim was prescribed if 6th October, 1950 is taken as the operative date—that is to say, if the action for the recovery of the premium did not " commence " within the meaning of Section 10 until the transfer of the proceedings to the District Court was authorised by the Supreme Court.

There are no earlier decisions precisely in point, but we do receive some guidance from *Mudiyanse vs. Siriya* (1921) 23 N.L.R. 285 and more particularly from *Kuluth vs. Mohamadu* (1936) 38 N.L.R. 48. Each of these cases was concerned with a " 247 action " in which the plaint (originally filed in a Court lacking jurisdiction in the matter) was subsequently filed in the proper Court (the transfer in one instance having been authorised by the Supreme Court). It was held in both cases that, for purposes of prescription the action " commenced " only on the date when the proceedings were initiated in the Court which did have jurisdiction to entertain the plaint. The *ratio decidendi* of Abraham's C. J's. judgment in *Kuluth's case* (*supra*) is that an action cannot be regarded as having effectively *commenced* in the first Court (and *continued* in the other) unless the former Court had jurisdiction to give relief upon the cause of action relied on ; and that an order of this Court authorising a transfer of the proceedings does not affect the issue in the absence of special statutory provision to that effect.

The learned Judge rejected the plea of prescription in view of the interpretation which he placed on the concluding words of the proviso to Section 79 of the Courts Ordinance—namely, that when the Supreme Court has authorised a transfer of proceedings from a Court of Requests (which lacks jurisdiction to enter judgment upon a claim in reconvention) to a District Court (which has such jurisdiction) the proceedings " *shall thereafter be continued and prosecuted in* (*the District Court*) *as if it had originally commenced therein.* " I find myself unable to accept this view. In my opinion, these words are not equivalent to a statutory provision that, upon a transfer, an action shall *for all purposes* (including an issue of prescription) be deemed to have commenced in the District Court on the date on which it had in fact commenced in the Court of Requests. On the contrary, the words relied on by the learned Judge seem to me to be only procedural in their nature : no fresh pleadings need be filed as a preliminary to the trial in the new Court, but the proceedings " continue " (in that sense) from the stage at which they had been interrupted in the Court of Requests.

In his original answer filed in the Court of Requests, the tenant pleaded certain facts relating to payments made by him to the landlord—in so far as those facts had a bearing on his defence to the landlord's claim, the Court of Requests certainly had jurisdiction to adjudicate upon them but in so far as he further asked for a decree in his favour for a sum exceeding Rs. 300/- upon his claim in reconvention based on these facts, the Court had no jurisdiction to grant him that additional relief. It is for this reason that the tenant obtained the sanction of this Court to have the whole proceeding (comprising the claims on which the Court of Requests had power to grant relief as well as those on which it had no such power) transferred to a Court " having jurisdiction over the whole matter in controversy ". This analysis seems to me to lead to the following conclusions as far as the issue of prescription is concerned:—

(1) The action must be regarded as having *commenced* in the Court of Requests and *continued* in the District Court in respect only of those claims over which the former Court had jurisdiction to grant relief ; these " matters in controversy " were confined only to the landlord's claim for ejectment and damages until ejectment, and the tenant's claim to recover excess rent (on

his first cause of action) limited however to a judgment in his favour for a maximum sum of Rs. 300/- ;

(2) With regard to the outstanding matters in controversy, which included the entirety of the defendant's cause of action for the recovery of the premium, the action cannot be regarded as having " commenced " (within the meaning of the Prescription Ordinance) in the Court of Requests which had no jurisdiction to grant him substantive relief in the form of a money decree. Therefore, the action for the recovery of the premium, effectually " commenced " only in the District Court which alone had jurisdiction to grant him the relief asked for ; it was in a different sense that the action " continued " for procedural purposes from an earlier procedural stage.

The word " commenced " appearing in " unless the same shall be *commenced* within three years from the time when such cause of action accrued " mean " initiated in a Court possessing jurisdiction to grant *relief in the form of a decree* upon the cause of action ". I would accordingly hold that the tenant's claim in reconvention for the recovery of Rs. 1,800/- paid as premium was prescribed. The decree in his favour must therefore be confined to a sum of Rs. 551/88 in respect of which no plea of prescription has been raised.

It is no longer necessary to give a definite finding on the landlord's alternative plea that the Court should not in any event lend its aid to a party seeking to recover money paid by him in pursuance of an illegal transaction. In deference to the interesting arguments addressed to us, however, I propose to make some observations on this issue.

Section 7 of the Ordinance of 1942 prohibited a landlord from demanding or receiving a premium " as a condition of the grant, renewal or continuance " of a tenancy of controlled premises, and Section 14 prescribes the penalty for this offence. The Ordinance did not directly penalise payments of premium *by tenants* (such as is now done in the later Act of 1948), but no doubt a tenant making a payment which his landlord was prohibited from receiving under the earlier enactment would generally be found to have committed the offence of abetment within the meaning of the Penal Code. I therefore agree with Mr. Perera that the judgment of Pulle, J., (Swan, J., concurring) in *Vitharane vs. de Zylva* (1954) 56 N.L.R. 57, which dealt with a case under the Act of 1948, cannot be distinguished on this narrow ground. Whichever enactment applies, the question whether the maxim *in pari delicto potior est conditio defendentis* should operate or not must be decided with due regard to the facts of the particular case.

Mr. Jayawardene relied strongly on a recent judgment of Devlin, J., in *Gray and others vs. Southouse and another* (1949) 2 A.E.R. 1019 in which, under the English law, a premium paid to a tenant by his sub-tenant was held to be recoverable. It is safer, however, to examine the question solely by reference to the provisions of our local enactments in the light of the principles of the Roman-Dutch law.

I am not convinced that a landlord can automatically claim that the *in pari delicto* principle affords a complete answer to any claim for the recovery of a premium illegally received by him in contravention of the Ordinance of 1942 or of the Act of 1948. The law is not so rigid, and it is quite wrong to assume that, under existing conditions, a tenant making an illegal payment is necessarily *in pari delicto* with his landlord who illegally receives it.

The true principle to be applied in a case of this kind has been explained by the Appellate Division of the Supreme Court of South Africa in *Jajbhay vs. Cassim* (1939) S.A.A.D. 537. The maxim *ex turpi causa non oritur actio* will, ofcourse, always preclude a litigant from seeking the assistance of a Court of law to enforce an illegal contract ; but the ancillary maxim *in pari delicto potior est conditio defendentis* " has not, in modern systems of law, been rigidly and universally invoked to defeat every claim by one of two delinquents to recover what he has delivered under such a contract ". The proper test is whether public policy would best be served by granting or refusing the plaintiff's case, and, in applying that test, " a Court should not disregard *the various degrees of turpitude* in delictual contracts ". Whatermeyer, J., said :—

> " The principle underlying the general rule is that the Courts will disregard illegal transactions, but the exceptions show that where it is necessary to prevent injustice or to promote public policy, it will not rigidly enforce the general rule ".

The underlying policy of the Rent Restriction Ordinance of 1942 and of the later Act of 1948 is to prevent certain abuses in a " seller's market " induced by the serious shortage of housing accommodation in certain localities. Both enactments make express provision for the recovery of payments illegally received (or illegally paid) by way of *excess rent*, but they are silent as to the right of a landlord to retain a premium illegally received by him. This omission does not convey to my mind that Parliament necessarily intended a landlord to retain the illegal premium in every case if he was willing to run the risk of paying a

fine or serving a term of imprisonment prescribed for his offence. On the contrary, Parliament was content to leave issues arising on a tenant's claim to recover the money to be decided in accordance with the principles of the general law.

I can well conceive of cases where, in the context of rent restriction legislation, public policy would require a landlord to refund the illegal premium. Similarly, I can conceive of cases where the tenant ought not to be allowed to claim the money back. An illustration of the former case is when a rapacious landlord exacts an illegal payment from a person who is desperately in need of a house, and who cannot find shelter for himself and his family unless he submits to the illegal terms exacted by the landlord. An illustration of the converse case is where a wealthy person in search of a house puts temptation in the way of a landlord by offering him a " bribe " in order to obtain preference over other prospective tenants. The proper way to promote public policy and to administer justice between man and man is to give careful consideration to the circumstances of the particular case instead of applying an inflexible rule of law.

In the present case, the learned Judge took the view that the money ought to be refunded because " the landlord had taken undue advantage of the tenant's need for a house and exacted from him a sum of Rs. 1,800/- notwithstanding the statutory prohibition ". If the evidence on record justifies that inference, I would be disposed to say that public policy would not be better served by compelling the landlord to return his ill-gotten gains. However, as the claim is prescribed, this question need not be pursued further for the purposes of the present appeal. But landlords would be unwise to assume that *Vitharane vs. de Zylva* (*supra*) has finally settled the law in their favour on the other issue.

SANSONI, J.,
I agree.

Appeal allowed.

Present : GRATIAEN, J. AND SANSONI, J.

REV. MORAGOLLE SUMANGALA *vs.* REV. KIRIBAMUNE PIYADASSI

D. C. (F) 3/L of 1953—*D. C. Kurunegala No.* 6730

Argued on : 16th February, 1955
Decided on : 23rd February, 1955

Res-judicata—*Action for incumbency—Earlier action by plaintiff's tutor and predecessor against defendant's tutor and predecessor—Dismissal of action holding defendant's tutor's rights valid—Appeal to Supreme Court—Decree affirmed but without deciding that defendant's tutor's rights were valid—Plea by defendant that decision in earlier action precluded plaintiff from reagitating his rights upheld by District Court—Validity of such order—Rights to an incumbency cannot be acquired by prescription—Is plaintiff bound by decision against his tutor—Admission by party in pleadings—Does it amount to an estoppel.*

Plaintiff sued the defendant claiming rights to an incumbency of a temple. It was common ground that one S was the lawful incumbent of a Buddhist temple. According to the plaintiff, S had no pupils and he was succeeded in the line of " *sisyanusisya paramparawa* " by I, plaintiff's tutor, whom he succeeded. According to the defendant S, who had no pupils, appointed R (presumably a stranger to the line of succession) to succeed him and the incumbency passed from R to G and then to defendant's tutor R J, whom the defendant succeeded.

In 1914 I instituted action No. 5232 D. C. Kurunegala claiming a declaration that he was the true incumbent of this temple as against the defendant's tutor R. J. who was actually functioning at the time as incumbent. The learned District Judge dismissed the action holding that the plaintiff's claim could not be sustained and that R. J. was the lawful incumbent. This decision was appealed from and the Supreme Court affirmed the decree but for entirely different reasons. The Supreme Court did not proceed to reject I.'s claim on the ground of validity of R. J.'s rights, but on I's failure to establish his case. At the trial of this case the defendant raised the plea that this action 5232 operated as *res judicata* against the plaintiff and the District Judge upheld it.

The plaintiff appealed.

Held : (1) That the plea of *res judicata* must be considered solely on the basis of the decision of the appellate tribunal as it superseded the decision of the trial Court.

(2) That although I. was precluded by the rule of *res judicata* from reasserting his rights against R. J. on any ground whatsoever, plaintiff is not embarrassed by that decree in his claim for the incumbency inasmuch as (*a*) the Appeal Court did not decide the validity of R. J.'s rights.
(*b*) it is well settled law that an incumbent cannot acquire a title to the office by mere prescriptive user.

(3) That an 'admission' in the pleadings of a party does not create a conclusive estoppel. It merely suggests an inference which a Court of trial may properly take into account and the weight to be attached to it in any particular case depends on many considerations.

Per GRATIAEN, J.—"For the purposes of a dispute concerning rights to the incumbency of a Buddhist temple, no privity can be assumed between a pupil and his tutor who is not proved to be the true incumbent."

Authorities cited *Kirikitta Saranankara Thero's case* (1954) 55 N. L. R. 313 at 315.
Spencer Bower on Res Judicata, at pages 9, 29 *and* 34.
Dhammajoti vs. Sobita (1913) 16 N. L. R. 408.

H. V. Perera, Q.C., with *C. V. Ranawake*, for the plaintiff-appellant.
N. E. Weerasooria, Q.C., with *Eardley Perera* and *B. S. C. Ratwatte*, for the defedannt-respondent.

GRATIAEN, J.,

The plaintiff claims a declaration in this action that he (and not the defendant) is the lawful incumbent of the Kendewela Vihara. It is common ground that the rules of succession known as the *Sisyanusisya paramparawa* apply.

Certain admissions were recorded at the commencement of the trial. The plaintiff is a pupil of a Buddhist priest called Indajoti who himself had been a pupil of Waradala. The defendant is a pupil of Ratnajoti who was in fact functioning as incumbent at the time of his death.

According to the plaintiff, the original incumbent of the temple was the "Ganangamuwe High Priest" who had three pupils named Dhammarakkita, Waradala (previously referred to) and Seelawantha; Dhammarakkita, being the senior pupil, in due course succeeded to the incumbency and he was in turn succeeded by his own pupil Sobita; Sobita died leaving no pupils, and the incumbency accordingly passed under the *Sisyanusisya paramparawa* to Indajoti (previously referred to) and, on Indajoti's death, to the plaintiff.

The defendant does not concede the earlier stages of succession pleaded in the plaint, but it is at least common ground between the parties that Sobita had at one stage been the lawful incumbent, and that Sobita died leaving no pupils. According to the defendant, Sobita duly appointed Ratnapala (presumably a stranger to the normal line of succession) to succeed him; the incumbency in due course passed from Ratnapala to Deela Guneratne and from Deela Guneratne to the defendant's tutor Ratnajoti (previously referred to); the defendant then succeeded to the incumbency on Ratnajoti's death. An important point for decision concerns the question as to who was entitled to succeed to the incumbency when Sobita died leaving no pupils.

There can be no doubt that the factual position was as stated by the defendant—namely, that (lawfully or otherwise) Ratnapala, Deela Guneratne and Ratnajoti had in turn functioned successively as *de facto* incumbents; similarly, the defendant was *de facto* incumbent when this action commenced. On the other hand, it is settled law that "an impostor cannot acquire a right to an incumbency by prescription; nor can the rights of the true incumbent be extinguished by prescription". Although the operation of Section 10 (of the Prescription Ordinance) may in certain circumstances destroy a particular incumbent's remedy against an impostor, his right or status itself still subsists. *Kirikitta Saranankara Thero's case* (1954) 55 N.L.R. 313 at 315. This latter proposition is of course subject to the exception that a true incumbent's status may be extinguished by other modes recognised by Buddhist ecclesiastical law—for instance, by abandonment of his office. What follows in such an event calls for no solution for the purposes of the present appeal.

Several issues were framed at the trial, but, by agreement of parties, the following question of law was disposed of as a preliminary issue:—

"5. Is the decree in case No. 5232 of this Court dated 27-11-14 *res judicata* between the parties in regard to the subject matter of this action?"

This issue was answered by the learned trial Judge in favour of the defendant. Accordingly, the plaintiff's action was dismissed without consideration of the other issues.

I shall now examine the scope of this earlier action No. 5232 which is claimed to have operated as *res judicata* between the parties to the present dispute. On 12th June, 1914 Indajoti (*i.e.* the present plaintiff's tutor) had claimed a declaration that he was the true incumbent of this temple as against the person who was actually functioning in that office at the time (namely, the defendant's tutor Ratnajoti). Indajoti's action was

dismissed by the District Judge of Kurunegala on 27th November, 1914, and his appeal against the judgment of the lower Court was dismissed on 4th March, 1915. One cannot but marvel at the admirable manner in which a complicated litigation in former times could be finally disposed of (in the original Court as well as the Court of Appeal) within a period of only nine months. The present action, by way of lamentable contrast, was instituted on 18th August, 1950, and 4½ years later, this Court is only disposing of a preliminary issue of law. Having permitted myself this melancholy reflection, I return to the immediate issue before us.

The dismissal of the action manifestly precluded Indajoti at any rate from re-agitating his claim to the incumbency against Ratnajoti. But a great deal more must be established before we can accept it as a corollary that this decree also operates as *res judicata* in respect of the dispute between the present plaintiff and the present defendant.

This plea of *res judicata* would without doubt have succeeded if a decision that Ratnajoti was in truth the lawful incumbent of the temple had been implicit in the dismissal of Indajoti's action. In that event, the present defendant's claim to have succeeded to the incumbency (by reason of the " privity of estate or interest " which exists under the *sisyanusisya paramparawa* between a proved incumbent and his pupil) could not have been challenged by the plaintiff (claiming the office as Indajoti's privy). A careful examination of the judgment of Walter Pereira, J. (Shaw J., concurring) dated 4th March, 1915 makes it clear, however, that this Court advisedly refrained from making, even by implication, any pronouncement as to the validity of Ratnajoti's claim to the incumbency.

Two important tests must be applied whenever a plea fo *res judicata* is raised (1) whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that sought to be controverted in the later litigation in which the estoppel was raised, and if so (2) whether the parties to the later litigation were the parties or the privies of the parties to the earlier decision. *Spencer Bower on Res Judicata* page 9.

As to the former test, let us first examine the grounds on which Indajoti sought to oust Ratnajoti from the office of incumbent in Action No. 5232 and also the grounds on which Ratnajoti challenged the validity of his claim. Finally, we must ascertain *the particular grounds on which Indajoti's claim was rejected.*

Indajoti admitted that Ratnapala did function as the incumbent of the Kandewela Vihara ; he also conceded that Ratnapala was the lawful holder of the office. Indeed, he claimed to succeed Ratnapala " as the only priest present at his death and as a co-pupil of the same tutor ". Ratnajoti, on the other hand, took up the position that the original incumbent was not Ratnapala but Deela Guneratne whom he (Ratnajoti) lawfully succeeded as sole pupil.

In the lower Court the trial Judge took the view that " Indajoti's claim could not be sustained on either of the grounds he relied on no more than Ratnajoti's claim could be sustained on the grounds he relied on ". His ultimate conclusions, however, were in favour of Ratnajoti's claim on a somewhat different basis, namely :—

(1) that Sobita had been the lawful incumbent and that he had, in the absence of any pupils in the normal line of succession, *validly appointed Ratnapala as his successor* ;
(2) that upon Ratnapala's death the incumbency passed (in the absence of pupils) to Ratnapala's own tutor (somebody else named Indajoti) ;
(3) that Deela Guneratne in due course succeeded that " other Indajoti " as incumbent ; and
(4) that eventually Ratnajoti, who was Deela Guneratne's pupil, succeeded him as his " lawful successor ".

If these conclusions had been the basis of the final decision in Action No. 5232, I am satisfied that the plea of *res judicata* ought to have succeeded in the present litigation. There was a categorical pronouncement that Ratnajoti was the lawful incumbent in preference to Indajoti, and the mere omission in the decree of a formal declaration to that effect would not I think have altered the position. As to the issue of privity, the present plaintiff is Indajoti's pupil claiming as such to succeed him as his privy while the present defendant is Ratnajoti's pupil claiming the office under Ratnajoti.

But, unfortunately for the defendant, the trial Judge's decision in Action No. 5232 did not constitute the final judicial pronouncement in those proceedings. The Supreme Court admittedly affirmed the decree of the lower Court, *but for entirely different reasons.* The plea of *res judicata* must therefore be considered solely by ascertaining the basis of the decision of the appellate tribunal dated 4th March, 1915. The judgment of

the original Court was " replaced by the appellate decision, which thenceforth holds the field ". *Spencer Bower* (*supra*) at page 34. It was in this respect that the judgment now appealed from has erred. Too much emphasis was placed on the terms of the superseded judgment of the original Court, and little or no consideration was paid to the narrower grounds on which the decree was ultimately affirmed in appeal.

I shall now examine the judgment pronounced by this Court on 4th March, 1915, in order to ascertain what precisely it did decide, either expressly or by necessary implication, in regard to the issues calling for adjudication in the present action. It at once becomes clear that the rejection of Indrajoti's claim to oust Ratnajoti *did not proceed* (*as was the case in the superseded judgment*) *on a recognition of the validity of Ratnajoti's rights to the incumbency*. For instance, Walter Pereira J's principal judgment said :—

> " *The deed whereby Sobita instituted Ratnapala as his successor to the incumbency is of very doubtful validity, because Ratnapala was not a pupil of Sobita*, and as pointed out in *Dhammajoti vs. Sobita* (1913) 16 N.L.R. 408, while an incumbent priest of a Buddhist temple may by means of a deed appoint his successor, he must confine the selection to his own pupils. *Anyway*, Indajoti could not claim to be the successor of Ratnapala because he was not a co-pupil with Ratnapala ".

In the result, Indajoti's action was dismissed because, *whether or not Ratnajoti's rights of succession were valid*, Indajoti at least had failed to furnish evidence establishing that he had a right to oust an alleged trespasser. To that extent, Indajoti was of course precluded by the rule of *res judicata* from re-asserting his own rights against Ratnajoti on any ground whatsoever. But the immediate parties to the litigation are now dead, and the issue as to whether the present plaintiff or the present defendant is the lawful incumbent is not embarrassed by the earlier decree. The defendant can only establish " privity in estate or interest " between himself and Ratnajoti *either* on proof that Ratnajoti was in truth the lawful incumbent *or* on production of a judicial decision (binding on the plaintiff) that he was. As I have pointed out, there is no earlier judicial decision, even by implication, to that effect. Accordingly, the plea of *res judicata* fails. For the purposes of a dispute concerning rights to the incumbency of a Buddhist temple, no privity can be assumed between a pupil and his tutor who is not proved to be the true incumbent.

Indajoti's concession in his pleadings that Ratnapala had at a certain stage lawfully succeeded to the incumbency has no bearing on the plea of *res judicata*, but it does at least constitute an " admission " within the meaning of Section 17 (1) of the Evidence Ordinance. It can be proved under Section 18 (3) (*b*) against the plaintiff who claims to have derived his " interest " from Indajoti. But an " admission " does not create a conclusive estoppel ; it merely " suggests an inference " which a Court of trial may properly take into account, and the weight to be attached to it in any particular case depends on many considerations.

The true principle of *res judicata* where a decision dismissing an earlier action is relied on as creating " an estoppel by record " in subsequent litigation is thus explained by *Spencer Bower* (*supra*) at page 39 :—

> " The answer to this inquiry depends upon whether, on reference to the record and such other materials as may properly be resorted to, the dismissal itself is seen to have *necessarily involved* a determination on any particular issue or question of fact or law, in which case there is an adjudication on that question or issue ; if otherwise, the dismissal decides nothing except, that in fact the party has been refused the relief that he sought . . . . . *Prima facie*, in the absence of materials on which such a necessary inference can be established, a dismissal is not a decision of any question of title without an express declaration of the Court ".

I have already explained why in my opinion the plea of *res judicata* fails. The judgment of Walter Pereira, J., and Shaw, J., decided only that Indajoti had not furnished proof entitling him to the immediate relief which he sought against his adversary. On that narrow ground, the position of Ratnajoti (whether he was the true incumbent or merely a trespasser functioning as such) could not be disturbed by Indajoti. Under Buddhist ecclesiastical law, as judicially interpreted, Ratnajoti and those who claim under him could not however acquire a title to the office by mere prescriptive user. The issue, as to who is now the present true, incumbent is therefore at large.

I would allow the appeal and answer issue 5 in favour of the plaintiff. The record must now br returned to the lower Court for a re-trial on the outstanding issues and on any other issues which may properly be raised by the parties. The plaintiff is entitled to the costs of this appeal and of the abortive trial.

SANSONI, J.

I agree.

Appeal allowed.

Present : SANSONI, J.

SUPPAR VELUPPILLAI SEENIVASAGAM *et al vs.* SUBRAMANIAM KIRUPAMOORTHY, CHAIRMAN TOWN COUNCIL, KANKESANTURAI

In the matter of an application for a writ of mandamus

Application No. 154

Argued on : 30th September and 7th October, 1954
Decided on : 20th October, 1954

Mandamus, writ of—Request to convene special meeting—Discussion of motion—Chairman ruling motion out of order—Validity—Section 39 (2) *Town Councils Ordinance No.* 3 *of* 1946 *and By-laws* 8 (*a*), (*b*), (*c*), (*d*).

The petitioners are members of the Town Council, Kankesanturai, and the respondent is Chairman. The petitioners requested respondent in writing to convene a special meeting of the Town Council to discuss a motion which the respondent ruled out of order. The petitioners applied for a writ of *mandamus* on the respondent commanding him to convene a special meeting for that purpose.

The respondent contended firstly that a special meeting was not fundamentally different from an ordinary meeting and accordingly the request to convene a special meeting would be governed by the Council's by-laws, the provisions of which empowered the Chairman to exercise his discretion. Secondly, the petitioner should have sought the alternative remedy provided by the by-laws 1 (*b*) and 8 (*h*) before applying for a writ of *mandamus*.

Held : That the wording in section 39 (2) of the Town Councils Ordinance No. 3 of 1946 was unambiguous and therefore its provisions vested no discretion in the Chairman to refuse to convene a special meeting as requested by the members of the Council.

Cases referred to : *De Silva vs. De Silva* 44 N. L. R. p. 337.
Inasitamby vs. Government Agent, N. P. 34 N. L. R. p. 33.
Goonesinghe vs. Municipal Council of Colombo 46 N. L. R. p. 85.
Perera vs. Municipal Council, Colombo, 48 N. L. R. p. 66.

S. Nadesan, Q.C., with *A. Nagendra*, for the petitioners.
H. V. Perera, Q.C., with *H. Wanigatunge*, for the respondent.

SANSONI, J.,

This is an application for a writ of mandamus. The respondent is the Chairman of the Town Council, Kankesanturai, and the petitioners are three members of that Council who complain that by their letter dated 6th February, 1953, they requested the respondent to convene a special meeting of the Council in terms of Section 39 (2) of the Town Council Ordinance, No. 3 of 1946 to discuss a particular motion, but he ruled the motion out of order. The petitioners ask that the respondent be commanded to convene a meeting to discuss the motion which was in the following terms :—

" As there is dissatisfaction among the rate-payers of this Council that there were bribery, corruption, threats and undue influence exercised during the election of the present Chairman of this Council, this Council resolves to request the authorities concerned to appoint an independent commission to inquire into the same and to take suitable action against such offenders so as to maintain the prestige and dignity of this Council ".

The election of the respondent as Chairman took place at a meeting held on 10th January, 1953.

Now section 39 of the Ordinance is in the following terms :—

(1) " The ordinary meetings of a Town Council shall be held for the despatch of business upon such day or days in every month as may be fixed by the Council.

(2) The Chairman may convene a special meeting of the Council whenever he may consider it desirable and shall, whenever requested in writing by any two or more members of the Council to convene a special meeting for any purpose specified in such writing, forth with convene a special meeting for that purpose. Two days' notice of the day appointed for any such special meeting shall be given to, or left at the residence of, each member of the Council ".

Mr. Nadesan for the petitioners submitted that the respondent had no power to rule the motion out of order. He based his argument on

the peremptory wording of sub-section (2) which, he submitted, does not give the Chairman any discretion at all in the matter. He stressed the change of language from " May " to " shall " and he claimed that the sub-section was quite clear as to the duty cast on the Chairman once he received the request in writing from two or more members. He put his case so high as to claim that the purpose specified by the members need not have anything to do with the administration or business of the Council, but in this part of his argument I think he went further than the necessity of the case demanded. Mr. H. V. Perera on the other hand submitted that a special meeting was not fundamentally different from an ordinary meeting, the only point of difference being that it was a meeting summoned out of turn in order to discuss urgent business, but only business which was relevant to the powers and duties of a Town Council. In this view of the matter he submitted that the by-laws made by this Council published in the Government Gazette of 30th June, 1950, applied both to ordinary and special meetings and he relied especially on by-laws 8(*a*), (*b*), (*c*), and (*d*).

Those by-laws read as follows :—

(*a*) " Every notice of a motion shall be in writing signed by the member of the Council giving the notice. Unless such notice has been in the hands of the Secretary five clear days—exclusive of Sundays and Government holidays before the meeting of the Council, the motion may not be included in the agenda.

(*b*) All notices of motions shall be dated and numbered as received, and shall be entered by the Secretary upon the agenda in the order in which they are received.

(*c*) Before any notice of a motion is placed on the agenda paper it shall be submitted to the Chairman, who, if he be of opinion that it is out of order, shall order that such motion shall not be included in the agenda and shall cause the giver of the notice to be so informed.

(*d*) Every motion of which notice is given shall be relevant to some question affecting the administration of the Council's affairs ".

If they apply to the special meeting such as the petitioners requested the respondent to convene—and the purpose specified by the petitioners was to discuss a particular motion—then notice of that motion has to be given to the Secretary five clear days before the meeting, it has to be submitted to the Chairman, if the Chairman is of the opinion that it was out of order he can refuse to include it in the agenda, and his opinion is not ordinarily subject to review by this Court. Since the purpose of the special meeting was only to consider the petitioners' motion if the respondent in the exercise of his discretion was entitled to rule it out of order there was of course nothing to be gained by summoning the meeting. It will thus be seen that the main point of dispute in this matter is whether the respondent had a discretion or not in the matter of convening a special meeting for the purpose of discussing this particular motion. The crucial question to be answered in determining this matter is whether by-laws (8)(*a*) to 8(*d*) apply in this case or not, and on the answer will depend the result of this application.

Now it seems to me that the words of Section 39 (2) are free of any ambiguity. They impose an obligation on the Chairman ; they vest in him no discretion ; and they provide the procedure to be followed with regard to the giving of notice to the members of the Council. Where the meaning of the words of a statute are as clear and unambiguous as those of this sub-section, I do not think it is open to a Court to restrict their meaning. This does not mean that an abuse of the powers given to members cannot be checked if they should try to take undue advantage of this provision. Now with regard to the question whether by-laws 8(*a*) to 8(*d*) apply to a special meeting or not, it seems to me that they do not, because all that section 39 (2) requires, once the Chairman has received a written requisition specifying the purpose, is that two days' notice of the day appointed for the meeting should be given and that the meeting should be convened for the specified purpose. The purpose should be specified in the notice to be given to each member and there is no agenda paper such as by-law 8 requires the Secretary to prepare beforehand. The other steps which by-law 8 requires the Secretary to take in such preparation therefore have no place where a special meeting is contemplated. Many of the by-laws are desirable and even necessary, and apply to both special and general meeting because they do not conflict with the provisions of the Ordinance ; their purpose is clearly to ensure that meetings are conducted decently and in order. By-laws 8(*a*) to 8(*d*) in my opinion apply only to motion which members wish to submit at ordinary meetings. They are inconsistent with the premptory provisions of section 39 (2) because, (1) they require notice of a motion to be given to the Secretary, (2) they require five clear days' notice, (3) they vest a discretion in the Chairman in that they confer on him the right to refuse to include a motion in the agenda in short they lay down a procedure which is materially different from, and more onerous than, that stipulated in section 39 (2). Consequently

the well settled rule that by-laws which are inconsistent with the provisions of the Ordinance will have to give way to latter will apply—*De Silva vs. De Silva* (44 N.L.R. p. 337). It is of some interest to find that the Ordinance provides in sections 33 and 35 for special meetings to be convened for two particular purposes, viz., the election of a Chairman and the removal from office of a Chairman. These sections do not contemplate anything more than notices being issued to the members indicating those particular purposes. They certainly do not contemplate compliance with by-laws 8(*a*) to 8(*d*), and I consider that the inapplicability of those laws to a meeting convened under Section 39 (2) is equally plain. It may well be that they were never intended by those who framed them, to apply to special meetings.

I should not wish it to be thought, however, that the words " any purpose " in section 39 (2) include any purpose under the sun, for that would be to construe the sub-section as though it stood in isolation, ignoring the fact that it is part of the Ordinance. It is necessary to give those words a reasonable construction having regard to the other provisions of the Ordinance and, if necessary, to modify their meaning to avoid an absurdity. Although I am not dealing with such a case, suppose two or more members should request the Chairman to summon a meeting to discuss a motion of an entirely scurrilous, or unlawful, nature, or one which could not even remotely concern a Town Council ; I doubt if the Chairman would be bound to convene such a meeting, and it is unlikely that this Court would permit those members to avail themselves of a discretionary remedy like Mandamus to attain such an object. An argument put forward against the grant of the present application was that two or more members may require a special meeting to discuss some outrageous motion which no sensible Chairman could place before a meeting. As I have already indicated, the Court is not powerless to prevent an abuse of its process particularly when the relief is a discretionary one. There is the rule that a Court will take into account the light in which the relators appear from their behaviour and conduct and motives and the consequences which the issue of a writ of Mandamus will entail—*Inasitamby vs. Government Agent, N.P.* 34 N.L.R. p. 33. But the motion which I am dealing with in this case cannot be said to be plainly one which does not fall within the ambit of the words " any purpose " giving those words a liberal construction in the light of the other provisions of the Ordinance. I am unable to agree with the objection raised on behalf of the respondent that the proposed motion could not possibly come within the purposes contemplated by section 39 (2). In my opinion the Chairman should have complied with the request made of him and convened a special meeting.

Another objection raised for the respondent was that the petitioners had an alternative remedy which they should have exercised and that there was no need for them to seek the extraordinary remedy by way of Mandamus. The remedy referred to is that provided in by-law 1(*b*) which I have quoted and by-law 8(*h*) which reads :—

> " Before any motion of which previous notice has not been given is moved in Council it shall be reduced to writing signed by the mover and handed to the Secretary ".

In regard to by-law 1(*b*) it was submitted that the petitioners could have obtained the permission of the Council at an ordinary meeting and then moved the motion in question. But this presupposes that the Council would have granted such permission. I cannot see why this Court should deprive the petitioners of a procedure which is clearly indicated in the Ordinance itself. The objection to the procedure under by-laws 1(*b*) and 8(*h*) is that there are obvious advantages in a procedure which requires that all the members of the Council should be given due notice of the purpose of, and the business to be transacted at a meeting ; such prior notice enables them to attend the meeting if they consider the motion of sufficient importance, while they may not attend an ordinary meeting the notice regarding which does not mention the particular motion ; it also enables them to consider the motion beforehand. That is the reason off the rule which requires due notice of every meeting, and if special business is to be done it is essential that timely and adequate notice of it should be given to all the members. This point has not been considered *Goonesinghe vs. Municipal Council of Colombo* 46 N.L.R. p. 85. The alternative remedy suggested should be equally convenient, beneficial and effectual—*Perera vs. Municipal Council Colombo* 48 N.L.R. p. 66 and it is not in this case.

For these reasons I consider that the application of the petitioners should be allowed with costs.

Allowed.

Present : GRATIAEN, J. AND GUNASEKARA, J.

H. K. J. APPUHAMY *vs.* THE ATTORNEYA GENELR

S. C. No. 371 *of* 1951—*D. C. Ratnapura No.* 8638/*M*

Argued on : 25th and 26th March, 1954
Decided on : 5th April, 1954

Contract—Breach of—Village Committee calling for tenders for construction of abutment of bridge—Condition of notice that successful tenderer should enter into contract with Government Agent and furnish security—Plaintiff signing contract in printed form supplied at Kachcheri before Superintendent of Works (employed by Assistant Local Government Commissioner who replaced Government Agent) and furnishing security—Commencement of work—Subsequent request to plaintiff to stop work till receipt of copy of agreement signed by Commissioner—Action for damages against Crown—Liability of Crown.

The Chairman of a Village Committee called for tenders for the construction of two abutments for a bridge. The notice stated that the successful tenderer should enter into an agreement with the Government Agent and furnish cash security. The Village Committee recommended to the Assistant Commissioner appointed in place of the Government Agent that the plaintiff's tender should be accepted and the plaintiff was in due course notified of it.

The plaintiff thereupon deposited at the Kachcheri the required security and signed in triplicate a printed agreement form before the Superintendent of Village Works. By this agreement the plaintiff bound himself (1) to execute the work, (2) to hypothecate in favour of the Assistant Commissioner the security money, and (3) to complete the work within six months or in default pay liquidated damages.

After the agreement was signed the Superintendent of Works showed the plaintiff where the work had to be done and he accordingly commenced work on the 16th May, 1947.

On 10th July, 1947, the plaintiff received from the Assistant Commissioner a letter dated 30th June, 1947, directing him not to commence work until he received a signed copy of the agreement form.

The plaintiff sued the Crown for the recovery of (*a*) the cost of work already performed under the contract, (*b*) the deposit of security, and (*c*) the profit which the plaintiff would have been entitled if the work was allowed to be completed.

The learned District Judge dismissed the plaintiff's action on the grounds (*a*) that there was no concluded contract as the Assistant Commissioner had not yet signed the agreement, and (*b*) even if the contract was concluded it was entered into by the Assistant Commissioner as agent of the Village Committee and not of the Crown.

In appeal—**Held :** (*a*) that when the plaintiff signed the agreement, the contract was concluded and left the Crown no *locus poenitentiae* to withdraw as the plaintiff has already complied with the condition of providing security. The clause that the plaintiff should complete the work within six months from the date of the agreement strongly supported the argument.

(*b*) In the circumstances it was clear that the Assistant Commissioner had acted on behalf of the Crown.

Cases referred to : *U. C. Matale vs. Weerasinghe* (1952) 54 N. L. R. 469.

Sir Ukwatte Jayasundera, Q.C., with *V. T. de Zoysa* and *G. T. Samarawickreme* for the appellant.
B. C. F. Jayaratne, C.C., for the Crown.

GRATIAEN, J.,

This is an action against the Crown for breach of contract.

In December, 1946 tenders were invited for the construction of two abutments for a bridge at Pellakada across the Heenganga. The notices stated that the tenders should reach the Chairman of the Village Committee of Palle Pattu, Kukul Korale, not later than the afternoon of 20th February, 1947, and that the successful tenderer " must be prepared to enter into an agreement *with the Government Agent* for the due performance of the work within 7 days of the notification of acceptance and to furnish cash security in a sum of not less than 10 per cent. of the amount of the tender ". It is common ground that the printed words " Government Agent " appearing in this clause should have read, and were understood to mean, " Assistant Commissioner of Local Government ".

The Village Committee recommended to the Assistant Commissioner that the plaintiff's tender for Rs. 4,795/- should be accepted, and the Assistant Commissioner's acceptance of that tender was in due course notified to the plaintiff. He thereupon deposited at the Ratnapura Kachcheri on 28th April, 1947 a sum of Rs. 480/-, and he contemporaneously signed in triplicate a printed agreement which was placed before him for signature by the Superintendent of Village Works attached to the Office of the Assistant Commissioner of Local Government. By this agreement (marked P3) :

1. he bound himself, *inter alia*, to execute the works as set forth in the relative plans, specifications and schedule of rates ;

2. he hypothecated in favour of the Assistant Commissioner the sum of Rs. 480/- as security for the due performance of his contractual obligations ;
3. he undertook to complete the work " *within 6 months from date hereof* " and, in default thereof, to pay liquidated damages to the Assistant Commissioner at specified rate.

After the plaintiff had signed this agreement, the Superintendent of Village Works (whose function it was to supervise contracts of this nature) showed the plaintiff where the work had to be done, and on 16th May, 1947 the plaintiff commenced building operations which the learned Judge assessed at Rs. 2,087/50. On 10th July, 1947, however, he received from the Assistant Commissioner a letter bearing the date 30th June, 1947 instructing him " not to commence work until you hear from me and receive a signed copy of the agreement form ".

The Assistant Commissioner sought to explain his attitude in writing this letter by stating that, shortly after the plaintiff had signed the agreement and deposited his security as required by the notice calling for tenders, departmental consideration was for the first time given to the question whether it would be " more expedient " to call for fresh tenders for the entire work to be undertaken by a single contractor. This new development was not however communicated to the plaintiff until July, 1947, and the authorities should have realised that, having already accepted a tender from the plaintiff for the execution of a part of the work, it was impossible for them to call for fresh tenders on this new basis without committing a breach of contract. Be that as it may, other complications followed, and the plaintiff was prevented from proceeding with the work entrusted to him. He therefore instituted this action against the Crown for the recovery of a sum of Rs. 3,067/50 made up as follows :—

(*a*) Rs. 2,087/50 being the cost of work already performed under the contract, and which was admittedly of no independent value to the plaintiff ;
(*b*) Rs. 480/- being the amount deposited on 20th April, 1947 ;
(*c*) Rs. 500/- representing the nett profit which the plaintiff would have earned if the contract had not been broken.

The learned Judge dismissed the plaintiff's action because in his opinion :

(*a*) there was no concluded contract between the parties, as the Assistant Commissioner had not yet signed the agreement P3 ;
(*b*) in any event, the contract, even if concluded, was entered into by the Assistant Commissioner as agent of the Village Committee and not of the Crown.

In my opinion there was no merit in either of these defences.

As for the second line of defence relied on by the Crown, it is quite obvious that the Assistant Commissioner was throughout the transaction acting as an agent of the Crown. He himself explained that the cost of construction of the proposed bridge was to be met from funds belonging to the Central Government and exclusively administered and controlled by the Department of the Commissioner of Local Government (which is a Government Department). Before that department was established under the provisions of Ordinance No. 57 of 1946, the proper authority for controlling such funds and entering into contracts in connection with expenditure of this kind was the Government Agent. The Village Committee, on the other hand, (beyond making recommendations for the acceptance of tenders by an officer of the Crown) could not and did not enter into contracts of this nature on its own account except in cases where the necessary funds were (by an entirely different procedure) placed under their direct control. The forms of the notices calling for tenders, and also the terms of the printed agreement P3, could not but have been intended to make it clear to the tenderer that he was being invited to negotiate with the Government (which controlled the relative funds) and not with the Village Committee (which had no funds from which payments under the proposed contract could be met).

The question remains whether the omission of the Assistant Commissioner to sign the agreement which the plaintiff had duly signed had the effect of leaving the parties still in the stage of " negotiations ", so that there was no concluded contract in force when the plaintiff commenced work under the honest and (according to the evidence) the induced belief that there was.

Let us analyse the position. The plaintiff had been invited to make a tender on the understanding that, if it was accepted, he would be required within a fixed period of time to (1) enter into an agreement for the due performance of the work and (2) furnish cash security in a sum not less than 10 per cent. of the tender. The acceptance of his tender would (but for these stipulated conditions) have automatically brought the parties into contractual relationship with one another. But in this case, the incidence of contractual rights and obligations was postponed until the plaintiff duly complied with both these conditions—*U. C. Matale vs. Weerasinghe* (1952) 54 N. L. R. 469. As soon as that was done, nothing

further was required to be done by the Assistant Commissioner to make the bargain binding on the Crown on whose behalf he was acting.

It is important to note that the terms of the formal agreement P3 expressly imposed very onerous obligations on the plaintiff and none (except by implication) on the other party. Moreover, by signing the agreement the plaintiff immediately became bound to complete the work *within six months from that date.* This clause strongly supports the argument that the contract became automatically operative as soon as the plaintiff signed the document. In other words, the unqualified acceptance by the Assistant Commissioner of the plaintiff's offer to complete the work for Rs. 4,795/-, subject only to the latter's due compliance with the unilateral conditions stipulated in the " notice calling for tenders ", left the former no *locus poenitentiae* to withdraw his acceptance after these conditions had been duly satisfied. The language of the agreement shows conclusively that the security was deposited and hypothecated on the basis that a contract had been entered into, not on the assumption that the other party was still free to change his mind.

I would allow the appeal with costs in both Courts, and enter judgment in favour of the plaintiff for Rs. 3,967/50 together with legal interest on the sum of Rs. 480/- from date of action until dated decree and on the aggregate amount of the decree in full.

Gunasekara, J.
I agree.

Appeal allowed.

Present : Sansoni, J.

S. A. PAUL *vs.* M. V. SELVARAJAH

S. C. 98—*C. R. Colombo No.* 48067

Argued and Decided on : 1st December, 1954

Court of Requests—Absence of defendant on summons returnable day—Ex-parte trial fixed—Application to file answer—Explanation that absence due to forgetfulness—Validity of excuse—Civil Procedure Code Section 823 (3).

Held : That forgetfulness on the part of a defendant to appear in Court on a date fixed for his appearance does not amount to an excuse within the meaning of section 823 (3) of the Civil Procedure Code.

H. W. Jayawardene, Q.C., with *V. Thillainathan*, for the plaintiff-appellant.
No appearance for the defendant-respondent.

Sansoni, J.,

In this case the defendant was served with summons to appear in Court on 14th October, 1953 but he did not do so and the case was fixed for ex-parte hearing on the 2nd November, 1953. On the 16th October an affidavit was filed in which the defendant stated that there was a death in his family and owing to the bereavement he forgot the date on which he had to appear in Court. At the inquiry in to this application by the defendant to be allowed to file answer in his evidence he stated that although this bereavement took place on the 7th October he attended office on the 9th October, attended the almsgiving on the 13th and he attended office on the 14th of October. In short his explanation for his failure to appear in Court on the 14th October was that he had forgotten the date. Section 823 (3) of the Civil Procedure Code requires that the defendant who is in default should satisfy the Commissioner that he was prevented from appearing by accident, misfortune or other unavoidable cause. I do not consider that a defendant's forgetfulness would come under any of these grounds and serve as a sufficient reason for failing to appear in Court. It is certainly not an unavoidable cause although it might in one sense be termed a " misfortune " but not in the sense in which that word is used in the section. I do not think therefore that the Commissioner should have granted the defendant the indulgence of allowing him to file answer. The plaintiff should have been permitted to go on with the trial ex-parte.

For these reasons I would set aside the judgment of the learned Commissioner. The plaintiff is entitled to judgment as prayed for with costs in both Courts.

Appeal allowed.

Present : GRATIAEN, J. AND SANSONI, J.

THOMA PERERA *vs.* PEMANANDA THERO

S. C. No. 387—*D. C. Kurunegala No.* 6133

Argued on : 23rd February, 1955
Decided on : 7th March, 1955

Buddhist Temporalities Ordinance (*Cap* 222) *Section* 4 (2) *meaning of term Viharadhipathi—Does a bhikkhu who is not in the line of pupillary succession come within the term Viharadhipathi.*

Held : (1) That the term " Viharadhipathi " in section 4 (2) of the Buddhist Temporalities Ordinance (Cap. 222) means the monk who is the principal bhikkhu in the line of pupillary succession from the first incumbent of a temple.

(2) That the cases *Sumana Therunnanse vs Somaratena Therunnanse* (1936) 5 C. L. W. 37 and *Chandrawimala Therunnanse vs Siyadoris* (1947) 47 N. L. R. 304 must be regarded as having been pronounced *per incuriam.*

Per SANSONI, J.—" At no time in the history of Buddhist temples in this Island has a priest who has no right to the incumbency of a temple been invested with the title to or the power to manage, the temporalities of the temple. I am unable to accept the suggestion that the Ordinance of 1931, Cap. 222 had the far-reaching effect of conferring an important legal status on one who may not even claim to be, and who is not in law, the chief priest of a temple. Instead of the words " the chief " in the earlier definitions of " incumbent " the definition of " Viharadhipati " contains the words " the principal " and the only other change is that a Bhikkhu could be a Viharadhipati whether he was resident in the temple or not—a change which was probably made because a priest can be an incumbent of more than one temple. In effect, therefore, a Viharadhipati after 1931 is the presiding priest who was known as an incumbent before 1931. with the difference that he need not be resident in the temple of which he claims to be the Viharadhipati. "

Cases referred to : *Sumana Therunnanse vs. Somaratana Therunnanse* (1936) 5 C. L. W. 37.
Chandrawimala Therunnanse vs. Siyadoris (1947) 47 N. L. R. 304.
Saranankara Unnanse vs. Indajoti Unnanse (1919) 20 N. L. R. 385.
Dhammananda vs. Ranasinghe (1919) 39 N. L. R. 567.
Rathanapala Unnanse vs. Kevitiagala Unnanse (1890) 2 S. C. C. 26.
Davarakkitta vs. Dhammaratne (1921) 21 N. L. R. 255.
Punchibanda vs. Dharmananda Thero (1948) 48 N. L. R. 11.
Algama vs. Buddharakkita (1951) 52 N. L. R. 150.

H. V. Perera, Q.C., with *S. W. Jayasuriya*, for the defendant-appellant.
H. W. Jayawardene, Q.C., with *D. R. P. Goonetilleke*, for the plaintiff-respondent.

SANSONI, J.,

The plaintiff in this action claimed a declaration that he was entitled to a lease hold interest in a certain land belonging to the Tekawa Vihare under a deed of lease executed in 1946. He complained that while he was in possession as lessee he was ousted by the defendant in 1948. He asked to be restored to possession and for damages. The lease was executed by Gorakadeniya Pemananda Thero who described himself as " Controlling Viharadhipati " of the Vihare, with the written sanction and approval of the Public Trustee for a term of 15 years. That Vihare has admittedly been exempted from the operation of section 4 (1) of the Buddhist Temporalities Ordinance, Cap. 222. The defendant Helamade Pemananda Thero claimed that he was the Adhikari Bhikkhu or Viharadhipati of that Vihare since his tutor Tekawa Ratnajothi Thero died in 1927, the latter having succeeded Tekawa Sumangala Thero in that office ; he claimed that he was the Controlling Viharadhipati and the proper authority to possess and lease the property belonging to the Vihare. He said that the plaintiff's lessor had been merely residing in the temple and looking after it with his permission. It was common ground that Gorakadeniya Pemananda gave up his robes in 1948 and the defendant thereupon took possession of the leased land.

The learned District Judge held that the defendant was the successor in title of Tekawa Sumangala the former Viharadhipati. Although the plaintiff's lessor was not in that line of succession, the learned Judge decided that he functioned as the *de facto* Viharadhipati from 1935 to 1948 while being in control of the temple and its temporalities during that period, and was therefore the Viharadhipati. He gave the plaintiff judgment as prayed for in the plaint save for a reduction of the quantum of damages. The question that arises in this appeal is whether Gorakadeniya Pemananda who was not the lawful incumbent of this Vihare could rightly have claimed to be the Controlling Viharadhipati as the term is defined in section 4 (2) of the Ordinance. Nothing, of course, turns on the fact that the Public Trustee sanctioned the lease in question, since under

section 29 (1) of the Ordinance it is only the trustee or Controlling Viharadhipati who is empowered to lease lands belonging to his temple, and if the lessor did not hold that office the lease would be void.

The term " Viharadhipati " is defined in section 2 as meaning " the principal bhikkhu of a temple other than a dewale or kovila whether resident or not ; and section 4 (2) reads, " The management of the property belonging to every temple exempted from the operation of the last preceding subsection but not exempted from the operation of the entire Ordinance shall be vested in the Viharadhipati of such temple hereinafter referred to as the " controlling viharadhipati ". It becomes clear that the first qualification required of a " Controlling Viharadhipati " is that he should be the Viharadhipati of the temple ; he receives the statutory label " Controlling Viharadhipati " only because the temple is exempted from the operation of section 4 (1) and the management of its property vests in him as Viharadhipati instead of in a duly appointed trustee. Section 20 similarly provides that all the movable and immovable property of the temple shall vest in the Controlling Viharadhipati in such a case ; by section 18 he is empowered to sue for the recovery of such property and to be sued ; by section 22 he is empowered to enforce all contracts and all rights of action in favour of the temple, all these being extensive powers which only a duly appointed trustee can exercise in the case of temples which have not been exempted from the operation of section 4 (1). It seems to have been assumed in the case of *Sumana Therunnanse vs. Somaratana Therunnanse* (1936 5 C.L.W. 37) that the term " Controlling Viharadhipati " would include any bhikkhu—be he the principal bhikkhu or not—so long as he exercised control over the affairs of the temple. The ratio decidendi of that case is that an Incumbent or Adhikari Bhikkhu who lived away from a temple and did not control its affairs could not be the Controlling Viharadhipati. The judgment of Soertsz, A.J., in that case was cited with approval by de Silva, J., (Howard, C.J. agreeing) in *Chandrawimala Therunnanse vs. Siyadoris* (1947) 47 N.L.R. 304. In the latter case, the plaintiff priest who was not and did not claim to be the lawful incumbent of a temple claimed to be its controlling Viharadhipati and to have the right to possess the properties belonging to the temple. He sued for declaration of title to a land as Sanghika property of the temple. De Silva, J., said :—" The next question which requires consideration is whether the plaintiff could maintain his action as he was not the lawful incumbent of the temple.....The plaintiff's tutor Sarananda had been Viharadhipati from 1928 and the plaintiff has succeeded him as such Viharadhipati. In the circumstances I agree with the learned Judge that this case falls within the principle laid down in the case of *Summana Therunnanse vs. Somaratana Therunnanse* (5 C.L.W. 37) and that the plaintiff is entitled to maintain this action ". That case therefore raised the question whether one who is not the incumbent of a temple can be its Viharadhipati or Controlling Viharadhipati. One should not lose sight of two essential matters in the statutory definition of " Viharadhipati ", viz., (1) he must be the *principal bhikkhu of* the temple ; (2) he *need not be resident* in the temple. No emphasis can properly be placed on the epithet " controlling " ; it was chosen by the draftsman as a convenient word to describe the principal bhikkhu who fills the role of a trustee. With respect, I think these judgements have overlooked these matters and must be regarded as having been pronounced *per incuriam*.

It is useful also to consider the question in the light of the earlier Ordinances and a few cases which seem to have a bearing. The Ordinance in force just prior to the enactment of Cap. 222, which was enacted in 1931, was the Buddhist Temporalities Ordinance, No. 8 of 1905. Section 2 of that Ordinance defined " Incumbent " as " the chief resident priest of a temple ". Ordinance No. 8 of 1905 repealed and replaced No. 3 of 1889 which had also been passed to provide for the better regulation and management of the Buddhist Temporalities in this Island. Section 2 of Ordinance No. 3 of 1889 defined " Incumbent " as " the chief resident priest of a Vihare ". There was therefore only one meaning to be attached to the word " Incumbent " between the years 1889 and 1931 ; it stood for the chief resident priest of a temple. What is more, the definitions in the Ordinances of 1889 and 1905 contain what has always been understood by the word " Incumbent " whenever that word was considered in judgments of this Court. A priest claiming to be the incumbent (or Adhikari Bhikkhu) of a temple had to establish that he had " *a right to the presidency* ", as de Sampayo, J., has termed it, as against all other priests *in the line of pupillary succession from the first incumbent.* The right to succeed to an incumbency is generally determined by seniority or by valid nomination by the previous incumbent, but as was held in *Saranankara Unnanse vs. Indajoti unnanse* (1919) 20 N.L.R. 385 " the office of Adhikari is single and indivisible. He is, indeed, primus inter pares, but his rule is monarchical.....An Adhikari may, it is true, nominate all the pupils to succeed him, but they can only suceed one at a time ".

Prior to the enactment of the Buddhist Temporalities Ordinance the endowments of a temple were vested in the incumbent and, to quote the judgment of the Privy Council in *Dhammananda vs. Ranasinghe* (1919) 39 N.L.R. 567 " property dedicated to the Vihare (was) the property of the incumbent for the time being for the purposes of his office, including his own support and the maintenance of the temple and its services ", words which are quoted almost verbatim from the judgment in the old case of *Rathanapala Unnannse vs. Kevritiagala Unnannse* (1890) 2 S.C.C. 26. After 1889, however, they were vested in trustees appointed under the Ordinances though the presiding priest or incumbent has the control and administration of the Vihare itself (per Ennis, J. in *Davarakkitta vs. Dhammaratne* (1921) 21 N.L.R. 255. At no time in the history of Buddhist temples in this Island has a priest who has no right to the incumbency of a temple been invested with the title to or the power to manage, the temporalities of the temple. I am unable to accept the suggestion that the Ordinance of 1931, Cap. 222 had the far-reaching effect of conferring an important legal status on one who may not even claim to be, and who is not in law, the chief priest of a temple. Instead of the words " the chief " in the earlier definitions of " incumbent " the definition of " Viharadhipati " contains the words " the principal " and the only other change is that a Bhikkhu could be a Viharadhipati whether he was resident in the temple or not—a change which was probably made because a priest can be an incumbent of more than one temple. In effect, therefore, a Viharadhipati after 1931 is the presiding priest who was known as an incumbent before 1931, with the difference that he need not be resident in the temple of which he claims to be the Viharadhipati. Bearing in mind that the expression " chief priest (or bhikkhu) of a temple " has always been the definition of the word " incumbent " and substantially the same expression has been used to define the word " Viharadhipati ", it seems only reasonable to assume that the legislature meant the new expression to be the equivalent of the old expression " incumbent ". Another consideration which leads me to the same conclusion is the presumption referred to in Maxwell's " Interpretation of Statutes " (10th Edition page 81),—

> " Presumption against Implicit Alteration of Law. One of these presumptions is that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares either in express terms or by clear implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would over-throw fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness ".

To attach any importance to the circumstances that a priest who is not the chief priest in the line of pupillary succession is actually living in a particular temple and managing its affairs while the chief priest is living elsewhere would be to lose sight of the most important elements of the definition of a Viharadhipati. It seems clear therefore, that in enacting Cap. 222 there was no intention on the part of the legislature to draw a distinction between a Viharadhipati and an incumbent. I suggest that this is the fallacy underlying the reasoning in *Chandrawimala Therunnanse vs. Siyadoris* (*supra*). I find support for this conclusion in the judgment of Canekeratne, J., in *Punchibanda vs. Dharmananda Thero* (1948) 48 N.L.R. 11. The learned Judge says " The bhikkhu may be the presiding officer of a Vihare, or a resident priest, or a non-resident priest (agantuge) ; the presiding priest is known as the Viharadhipati ; sometimes he is called the incumbent (the incumbency is called the adhipatikama) in some cases the Adhikhari Bhikkhu ". Later in the judgment he says : " A Viharadhipati is one who can lawfully claim to be the head of the Vihare ; one, generally, who can show that he is the pupil of the last incumbent or that he is in the line of pupillary succession ". I do not consider the judgment of Dias S. P. J., in *Algama vs. Buddharakkita* (1951) 52 N.L.R. 150 to be against this view. On the contrary the learned Judge cited with approval the judgment of Canekeratne, J., in *Punchibanda vs. Dharmaananda Thero* already referred to. But in dealing with the words " any Viharadhipati " in section 32 he considered that the context required that both those who claim to be and those who are functioning as Viharadhipatis were covered by those words, having regard to the purpose of the section.

These considerations lead me to the conclusion that the correct construction to be placed on the provisions of the Ordinance is that it was intended, in the case of a temple which was exempted from the operation of section 4 (1), to vest the management and the title to the property of such a temple in the priest who is the principal Bhikkhu in the line of pupillary succession from the first incumbent of that temple.

For these reasons I hold that the lease in favour of the plaintiff conveyed no right to him. I would therefore set aside the judgment under appeal and dismiss the plaintiff's action with costs in both Courts.

GRATIAEN, J.,

I agree.

Appeal allowed

Present : GRATIAEN, J. AND FERNANDO, A.J.

COREA AND TWO OTHERS vs. THE QUEEN

S. C. Cr. Nos. 33-35 of 1953 with Application No. 437 of 1953—D. C. (Criminal) Nuwara Eliya No. 279

Argued on : 19th and 21st May, 1954
Decided on : 28th May, 1954

Criminal Procedure Code, section 32—Arrest without warrant—Failure of police officer arresting to inform person arrested the reason for arrest—Legality of arrest.

Held : That a police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere " unexpressed suspicion " that a particular cognizable offence has been committed, unless of course " the circumstances are such that the man must know the general nature of the offence for which he is detained," or unless the man " himself produces the situation which makes it practically impossible to inform him ".

Per GRATIAEN, J.—" Police officers must also realise that before they arrest without a warrant, '*they must be persuaded of the guilt of the accused.* They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile, or taking him to some spot where they can or may find further evidence '—*per* Lord Porter in *John Lewis & Co. Ltd. vs. Tims* (1952) A. C. 676 at 691."

Cases referred to : *Muttusamy vs. Kannangara* (1951) 52 N. L. R. 324.
Christie vs. Leachinsky 1947 A. C. 676.
John Lewis & Co. Ltd. vs. Tims (1952) A. C. 676 at 691.
Chaman Lal's case A. I. R. (1940) Lah. 210 at 216.

G. E. Chitty with *O. M. de Alwis*, for the 1st appellant.
G. E. Chitty with *A. S. Vanigasooriar*, for the 2nd and 3rd appellants.
Arthur Keuneman, C. C., for the Crown.

GRATIAEN, J.

The 1st appellant was at the relevant time an Inspector of Police in charge of the Nuwara Eliya Police Station, while the 2nd and 3rd appellants were police constables attached to the same station. They were jointly indicted in the District Court of Nuwara Eliya for the following offences :-

1. committing house-trespass by entering the residence of F. D. Munaweera on 30th August, 1949, with intent (*a*) to use criminal force on him, (*b*) wrongfully to confine him and (*c*) to annoy him ;
2. using criminal force on him in attempting wrongfully to confine him ;
3. attempting wrongfully to confine him.

The 1st appellant was in addition charged in the 4th count of the indictment with having caused grevious hurt to Munaweera in the course of the same transaction by shooting him. They were all convicted on the 2nd and 3rd counts, but orders of acquittal were entered in respect of counts 1 and 4.

A particularly unsatisfactory feature of this case was that, although such serious offences were alleged to have been committed in August, 1949, and Munaweera's complaint was brought to the immediate notice of an Assistant Superintendent of Police, non-summary proceedings against the appellants were not commenced until 1st June, 1951, and that too at the instance of Munaweera in the exercise of his rights as a private citizen; the indictment was presented on 10th September, 1952 ; the trial was concluded on 25th March, 1953 ; and the present appeal listed for hearing only on 19th May, 1954. These delays speak for themselves.

In *Muttusamy vs. Kannangara* (1951) 52 N. L. R. 324 I pointed out that " the actions of police officers who seek to search private houses or to arrest private citizens without a warrant should be jealously scrutinised by their senior officers " and that, in cases of this nature, " it seems preferable that the facts should in the first instance be reported to the Law Officers of the Crown so that, after an impartial examination of all the available material, the real transgressors, whoever they might be, could be brought to justice ". I re-emphasise these observations in connection with the present case. Learned Crown Counsel who appeared before us in support of the convictions under appeal stated that the earliest communication received by his Department with regard to this case was dated 15th February, 1952, *i.e. 2-and-a-half years after the incident took place.* And even that communication was a request by

the 1st appellant's lawyers for an interview with a view to having the Magistrate's order of committal quashed by the Attorney General.

The learned District Judge gave the 1st appellant the benefit of the doubt on the charge of grevious hurt, although he was perfectly satisfied that the 1st appellant did (as Munaweera alleged) take a double-barrelled gun into his hands when Munaweera was resisting an illegal attempt to remove him forcibly from his house to the police station. The learned judge was not convinced, however, that the 1st appellant knew that the gun was loaded and though confidently rejecting the defence version of this part of the incident, he did not rule out the possibility that the grievous gunshot injuries sustained by Munaweera in the course of his illegal arrest had been accidentally inflicted by the 1st appellant.

The basis of the convictions on the 2nd and 3rd counts namely, the charges of using criminal force on Munaweera (section 348 of the Penal Code) and attempting unlawfully to confine him (section 333 read with section 490)—was that the 2nd and 3rd appellants, acting on the orders of the 1st appellant, had attempted to arrest Munaweera and to remove him forcibly to the police station in circumstances which made it illegal to arrest a private citizen without the authority of a warrant.

As to the validity of these convictions, I accept as correct the findings of fact recorded by the learned judge who had the advantage (which we lack) of assessing the oral testimony of the witnesses in the light of certain documents almost contemporaneously recording their respective versions of what took place on the night of 30th August, 1949. The appellants are without doubt entitled to the benefit of every finding in their favour which formed the basis of the orders acquitting them on the 1st and 4th counts (against which the Crown has not appealed). At the same time, after an independent examination of the evidence on record, I agree with learned Crown Counsel that there is no valid ground for rejecting the findings of fact which were unfavourable to them on the other counts. In the result, the question for our decision resolves itself into a question of law—whether, on the facts as found by the learned judge, the arrest (or attempted arrest) of Munaweera at the instance of the 1st appellant on the night in question was illegal.

On the afternoon of 30th August, 1949, a Sanitary Assistant named Viswalingam arrived at the Nuwara Eliya Police station and made an oral complaint to the 1st appellant who directed the reserve-sergeant to reduce it to writing. The gist of the complaint (D2) was that, after Viswalingam and Dr. Mendis (the Medical Officer of Health) had completed an official inspection of the premises of F. D. Munaweera's brother in connection with a pending case, Munaweera and his brother "obstructed their passage and threatened bodily harm to them". Viswalingam "felt greatly humiliated and disgraced". (Dr. Mendis, according to his evidence at the trial, did not take the incident so seriously as Viswalingam had done).

The 1st appellant was satisfied that this complaint called for police investigation. His purpose in visiting Munaweera's house at about 7-30 p.m. is best explained in his own written statement D9 recorded at 8-40 p.m. on the same night :—

> "On a complaint made by Mr. Viswalingam the Sanitary Assistant and supported by Mr. Bowen Sanitary Inspector that they had been *intimidated and obstructed* when on duty at Mahagastota by Munaweera and his brother Thomas, *I went for inquiry* with Police Constables 29 and 418 (the 2nd and 3rd appellants)".

Munaweera was at home, wearing a sarong and "pyjama coat", when the appellants arrived. The precise nature of the discussions which took place is in dispute, but admittedly some reference was made to the earlier incident in which Dr. Mendis and Viswalingam had been involved. It is also common ground that at a certain stage Munaweera was "asked" or "invited" by the 1st appellant to accompany the police party to the police station, and that originally he agreed to do so. Later, however, he expressed a wish (which was granted) to change into more suitable clothes before leaving his house. The 1st appellant then left the scene for a short while, one of the constables remaining behind with Munaweera. Munaweera also considered it prudent, before leaving for the police station, to write two letters asking a friend and a lawyer to protect his interests in the situation which had arisen. One of these letters (P3b) was addressed to a personal friend in the following terms :—

> "Dear Aiyah,
>
> *I am being called by the Inspector of Police to the Police station. I do not know why.* They say that there was a complaint made by this M. O. H. *I am going to the station at his (i.e. the 1st appellant's request.* Please look after my interests.

The subsequent events prevented this letter from being sent to Munaweera's friend. When the 1st appellant returned to the scene, Munaweera commenced to write another letter (P3c) to a senior Proctor who was also an Unofficial Magistrate. It reads as follows :—

Dear Mr. Modder,

Over the instance I told you today about the M. O. H., *I am now being called by the Inspector of Police to the police station. I am proceeding with him.* Please see about this matter kindly."

It will be observed that the last sentence of P3c is incomplete. The explanation is that Munaweera was not permitted to conclude his letter to Mr. Modder, nor was he allowed an opportunity to send it to Mr. Modder even in its incomplete form. His evidence at the trial was to the following effect :—

" The Inspector said, ' Come, let us go '. I said, ' I am just writing these letters ; I will get down somebody to look after my interests and then come '. *Even at this stage I did not refuse to go.* The Inspector said, ' You must come immediately ; otherwise I am going to drag you out '. *Then I refused.....*"

This version is substantially supported by his dying deposition which was recorded on the same night (after the shooting incident) by the Magistrate of Nuwara Eliya.

The 1st appellant's written statement D9 (previously referred to) is to the effect that, when Munaweera ultimately refused to go to the police station, " I told him he would have to come..... *and to do so without a fuss and he said that he would not. I told him that he must and told P. C. 418 to bring him out.*"

I shall now quote a passage from the 1st appellant's oral evidence as to the events immediately preceding Munaweera's refusal to acconpamy him to the police station :

" He wanted time to complete the letters. I said he could complete them. He continued to write. I asked him not to waste time and to come because he was delaying. As he kept on delaying *I said I would give him two minutes more and if he did not come we would have to take him.* I told the two constables to give him two minutes more and if he did not come, to bring him."

The 1st appellant falsely claimed that he had left the room before the 2nd and 3rd appellants carried out his orders to remove Munaweera from the room, and when they proceeded to " drag " him away by force on his refusal to accompany them " without a fuss ".

I accept the learned judge's findings as to the circumstances in which Munaweera was (perhaps accidentally) shot during the scuffle which ensued. Nor do I see the slightest reason for rejecting the conclusion that *Munaweera was not informed " on what charge or suspicion of what crime he was seized.*" Indeed, even if the 1st appellant's intention at that stage had been only be to have Munaweera removed by force to the Police Station in order to have his statement recorded under section 122 of the Criminal Procedure Code, such action would have been equally illegal.

It is not, perhaps, completely impossible to construe Viswalingam's complaint as having alleged facts constituting an offence punishable under section 344 of the Penal Code and for which a police officer, reasonably suspecting the truth of that complaint, may arrest the alleged offender without a warrant under section 32 (1) (*b*) of the Criminal Procedure Code. At the same time, the 1st appellant's written statement D9 strongly supports the learned judge's conclusion that " *when he went to inquire into this complaint, he did not suspect anything more than a case of intimidation or obstruction* " (both non-cognisable offences). The learned judge's impression was that, when Munaweera ultimately changed his mind and refused to accompany the police officers to the police station, the 1st appellant " took exception to the manner in which Munaweera spoke or behaved " and accordingly ordered Munaweera's arrest in order to " teach him a lesson ".

Chapter 12 of the Criminal Procedure Code affords many safeguards to a private citizen against whom an allegation of having committed a cognisable offence is made to the officer-in-charge of a police station. For instance, before the officer proceeds to investigate the facts and, if necessary, to arrest the suspect, he must " forthwith " send a report to his own immediate superior—section 122 (2). This was not done. In one sense, the omission is favourable to the 1st appellant, because it exonerates him of an intention to act illegally from the very outset. But in another sense, it supports the view that at a later stage he acted from improper motives.

Even on the view which is more favourable to the 1st appellant (namely, that he believed that he was entitled to have Munaweera arrested without a warrant on a reasonable suspicion that an offence under section 344 of the Code had been committed) the arrest or attempted arrest of Munaweera in the particular circumstances of this case was illegal. The charges of criminal force and attempted wrongful confinement were therefore equally established against the 1st appellant on either hypothesis. Let me explain why.

The Crown strongly relied in both Courts on *Muttusamy vs. Kannangara* (*supra*). I there held, following the decision of the House of Lords in *Christie vs. Leachinsky* 1947 AC 676, that a police officer who would otherwise be justified in arresting a man without a warrant under section 32 (1) nevertheless acts illegally if (subject to certain exceptions which do not here apply) he

does so *without informing the suspect of the nature of the charge upon which he is arrested.*

Mr Chitty has invited us to reconsider this ruling. He argued that, whereas section 53 of the Criminal Procedure Code in terms requires a police officer arresting a man on the authority of a warrant " to notify the substance of the warrant to the person arrested " no such duty is expressly imposed on a police officer who acts without a warrant under section 32. The submission is that in Ceylon the powers of police officers are regulated by statute, and cannot further be circumscribed by any general principles of the English law (on which the greater part of our Code is substantially based).

I have given most anxious consideration to Mr. Chitty's argument, and am very glad to re-affirm my conviction that in this country (as in England) a police officer who arrests private citizens *with or without the authority of a warrant* is equally obliged to notify the arrested person of the reason for interfering with his personal freedom. A recognition of this fundamental rule (which owes its origin to the English common law) is demonstrably implicit in the scheme of our Code.

It is sufficient to refer only to section 23 (1). " In making an arrest the person making the same shall actually touch or confine the body of a person to be arrested *unless there be a submission to the custody by word or action* ". The law does not require a man to consent or " submit " to his detention or arrest unless he knows " the reason why ". As Lord Simon observed in *Christie's case* (*supra*), " the matter is one of substance, and turns on the elementary proposition that in this country a person is, *prima facie*, entitled to his freedom and *is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.*" It follows as a necessary corollary that " in normal circumstances an arrest without warrant by a policeman or by a private citizen can only be justified if it is an arrest on a charge made known to the person arrested". How else can he arrive at a decision whether to "submit" or not? How else can he satisfy himself that his proposed detention is authorised by law?

The judgment of Lord Simonds in *Christie's case* (*supra*) is equally instructive. Having observed that " every citizen is entitled to resist arrest unless that arrest is lawful ", he asks, " *How can these rights be reconciled with the proposition that he may be arrested without knowing why he is arrested?* " Similarly, Lord du Parcq points out that " *the right to arrest and the duty to submit are correlative.* A man is entitled to his liberty, and may, if necessary, defend his own freedom by force. If another person has a lawful reason for seeking to deprive him of that liberty, the person *must, as a general rule, tell him what the reason is, for unless he is told, he cannot be expected to submit to arrest, or blamed for resisting.*"

A police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere " unexpressed suspicion " that a particular cognisable offence has been committed—unless, of course, " the circumstances are such that the man must know the general nature of the offence for which he is detained " or unless the man " himself produces the situation which makes it practically impossible to inform him ". I refuse to believe that the legislature intended police officers and private individuals making arrests in this country on their own initiative to enjoy the right to greater reticence than persons who execute warrants issued by a Magistrate after a judicial decision that the evidence before him justifies interference with the liberty of the subject *before trial.* Mr. Chitty's argument, if sound would equally apply to any private citizen purporting to make an arrest under section 35. That cannot be the law of any civilized country.

In *Christie's case* (*supra*) the House of Lords unanimously approved the following propositions laid down by Scott L. J. in the Court of Appeal in (1946) 1 KB 124 :

> " (1). Arrest on a criminal charge always was and still is a mere step on the procedural road to committal, trial, verdict, judgment, punishment or acquittal.
>
> (2). The power of arrest conferred by the law is limited to the purpose of the particular proceeding, namely, *the specific charge formulated.*
>
> (3). The arrest must be made *on that charge only. and the person arrested must be told by the constable, at the time of the arrest, what the charge is.* "

These rules are equally applicable in Ceylon. " The law does not allow an arrest *in vacuo*, or without reason assigned, and the reason assigned must be that the arrest is *for the purpose of a prosecution on the self-same charge as is the justification for the arrest* ".

Police officers must also realise that before they arrest without a warrant, " *they must be persuaded of the guilt of the accused.* They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile or taking him to some spot where they can or may find further evidence "—*per* Lord Porter in *John Lewis & Co., Ltd. vs. Tims* (1952) AC 676 at 691. In the present case, the 1st appellant asserted (and the learned judge believed) that he had not finally decided to arrest Munaweera at the time that he first entered Munaweera's house.

Munaweera had agreed in the first instance to accompany the police officers for a reason which was not made clear to him (P3*b*), but he was per-

fectly justified before leaving his house, in deciding to notify a lawyer of his own selection of what was taking place. The exercise of that elementary right was denied him, and he accordingly refused the " polite invitation " to go to the police station. The subsequent attempts to remove him forcibly *without any further intimation of the reasons for his proposed compulsory detention or arrest* were quite illegal. For these reasons, I would affirm the conviction of the 1st appellant on the 2nd and 3rd counts in the indictment. He was the senior officer present, and he was responsible for the actions of the 2nd and 3rd appellants who were admittedly acting on his orders. The sentences passed on the 1st appellant must be affirmed. In my opinion, they err on the side of leniency.

As to the convictions of the 2nd and 3rd appellants, however, I take the view, and learned Crown Counsel very fairly conceded, that their acquittal on the 1st count (involving as it did a rejection of the suggested inference that they had entered Munaweera's house in pursuance of a prior conspiracy to commit the offences alleged in the other counts) should as a necessary corollary have led to their acquittal on the charges of criminal force and wrongful confinement as well. It is not improbable that, when the senior police officer present eventually ordered Munaweera's arrest at a later stage, they reasonably and in good faith entertained the belief that the order was one which they ought to obey. In these circumstances, they were entitled to claim the benefit of the exception to criminal liability set out in section 69 of the Penal Code. Their case can be differentiated from one where obedience of an order known to be illegal is relevant only to the question of punishment, but not to the issue of guilt. *Chaman Lal's case* A. I. R. (1940) Lah. 210 at 216. I would therefore allow the appeals of the 2nd and 3rd appellants and make order acquitting them. Their applications in revision should for the same reason be granted.

FERNANDO, A. J.
I agree.

Appeals allowed.

Present : GRATIAEN, J. AND FERNANDO, A. J.

BAIYA vs. KARUNASEKERA

S. C. No. 92 of 1952—D. C. Kurunegala No. 5662/L

Argued on : 2nd July, 1954
Decided on : 20th July, 1954

Contract—Breach of, sale of land—Agreement under deed between plaintiff and defendant for transfer of land to plaintiff if certain sum of money was tendered before an agreed date—Money undertaken to be paid on plaintiff's behalf by Industrial Credit Corporation provided land is transferred to plaintiff and mortgaged to the Corporation—Transfer and mortgage to be effected contemporaneously—Guarantee of Corporation adequate—Is it sufficient tender ?—Roman Dutch Law.

Under a deed the defendant agreed to convey land to the plaintiff if a certain sum of money was tendered before a given date. The deed did not provide expressly the time for payment of the consideration, apart from the stipulated period. The Industrial Credit Corporation, from whom the plaintiff raised a loan, undertook to pay the money at any time within the agreed period provided that the land was transferred to the plaintiff by the defendant and mortgaged in favour of the Corporation, and that both deeds were registered. It was arranged that both the deeds of transfer and of mortgage were to be notarially attested and forwarded for registration at the same time. The plaintiff alternatively offered to deposit the money (pending registration) in Court or with the defendant's lawyer, who were to attest and register the documents. The adequacy of the security or the guarantee of the Corporation was not disputed by the defendant. The defendant refused to transfer the land on the ground that under the deed of agreement, he was entitled to receive the purchase price at or before the time when he actually signed the transfer.

In an action by the plaintiff to have the land conveyed to him by the defendant on the ground that he had made a good and sufficient tender of the consideration in terms of the agreement.

Held : (1) That under the agreement, the time fixed for the delivery of the deed of transfer by the defendant was also the proper time for the receipt of the purchase price.

(2) That the plaintiff's offer amounted to a valid tender and that the defendant was not justified in refusing to sign the deed of transfer in favour of the plaintiff.

Authorities referred to : *Odendhal vs. Plesis* (1918) S. A. A. D. 475.
Trichardt vs. Muller (1915) T. P. D. 175.
Breytenbach vs. Van Wijk (1923) S. A. A. D. 541.
Appuhamy vs. Appuhamy (1880) 3 S. C. C. 61 F. B.
Macedo vs. Strand (1922) A. C. 330 at 337.
Punchi Nilame vs. Dingiri Etana (1909) 1 Curr. L. R. 239.

Voet, 19-1-28.

H. V. Perera, Q.C., with *N. C. J. Rustomjee*, for the appellant.
N. K. Choksy, Q.C., with *C. E. S. Pereira, Q.C.*, and *T. B. Dissanayake*, for the respondent.

GRATIAEN, J.

The plaintiff had sold three allotments of land to two persons named Don Dharmadasa Gunasekera and Don Lewis Perera in 1945. He was anxious to reacquire the properties, but did not possess the means to do so. He succeeded, however, in persuading the defendant to purchase them for the time being from Perera and Gunasekera (by P1 dated 4th November, 1946) subject to an express condition that the defendant should in turn sell them to the plaintiff for Rs. 4,200/- at any time before 4th November, 1949.

The plaintiff was very energetic in his endeavours to place himself in a position to exercise this option in his favour. Certain proceedings between the parties were initiated before the Debt Conciliation Board, but I agree with Mr. Choksy that a settlement arrived at in January, 1948, before that tribunal has not materially altered the legal rights or obligations of the parties under P1. What is important, however, is that shortly afterwards, in pursuance of that settlement, the plaintiff successfully negotiated with the Agricultural and Industrial Credit Corporation to raise a loan on the properties for Rs. 5,000/- by mortgaging them to the Corporation immediately on the defendant signing a conveyance in his favour in terms of P1. The intention was that Rs. 2,000/- out of the loan should be applied towards the consideration required to settle the defendant's claim. The defendant agreed to co-operate in implementing this agreement which provided a practicable solution to the plaintiff's problem without derogating from the defendant's contractual rights.

The Corporation was precluded by statute from handing over the amount of the promised loan until the defendant's deed of transfer in favour of the plaintiff, and the plaintiff's primary mortgage in favour of the Corporation, had both been duly registered. It was therefore arranged that these two instruments should be signed, notarially attested, and forwarded for registration at the same time; this arrangement, if implemented, would make it possible for the Corporation to pay a sum of Rs. 4,200/- on the plaintiff's behalf to the defendant as soon as the registration of the transfer and the mortgage had been contemporaneously affected. Accordingly, the documents were prepared for signature and both parties were invited to attend a notary's office together on 25th January, 1949, in order to complete the transaction. Eventually, a deadlock arose because, although the defendant was still willing to implement the plan, he maintained that he was legally entitled to receive the purchase price at or before the time when he actually signed the transfer. The plaintiff denied that this was a correct interpretation of the defendant's rights under P1.

There were still several months to run before the expiry of the time-limit within which the plaintiff could exercise his option. Throughout this period the Corporation kept open its offer, in terms of the agreed plan, to hold a sum of Rs. 4,200/- (out of the promised loan of Rs. 5,000/-) at the defendant's disposal pending contemporaneous execution and registration of the necessary instruments. The defendant, however, was adamant in his refusal to execute the transfer unless the consideration was paid to him " against signature ". Alternative offers to deposit the money (pending registration) in Court or even with the defendant's own lawyer (who, it was suggested, should himself be responsible for attesting and attending to the registration of the documents were also rejected.

The plaintiff thereupon instituted the present action in October, 1949, and asked for a decree ordering the defendant to convey the properties to the plaintiff in fulfilment of his obligation under P1. The foundation of his claim was that he had made a good and sufficient tender of the consideration within the stipulated time-limit.

Upon the facts which I have set out, the question for our adjudication resolves itself into a question of law. The learned judge decided the issue in favour of the defendant and dismissed the plaintiff's action. He held that, upon a proper construction of the agreement of sale, the defendant was entitled to insist on payment of the consideration contemporaneously with the signing of the conveyance demanded by the plaintiff.

It is, of course, a sound proposition of law that a tender of payment is bad " if it is subject to conditions to which the (creditor) would have a right to object "—*Odenhal vs. de Plessis* (1918) S. A. A. D. 475. As to *the form of the tender*, the defendant was not averse to accepting in lieu of cash a cheque drawn in his favour by the Corporation. *His sole objection to the tender related to the point of time when the cheque was to be made available to him.*

A slight complication has no doubt arisen in the present case because, in order to obtain the funds to pay the purchase price, the plaintiff was under a necessity to mortgage the properties to the Corporation. I shall consider at a later stage

whether this complication had effect of vitiating the tender. At the outset, however, I shall discuss the question *whether the defendant was justified in demanding payment of the consideration as soon as he had signed the transfer, and in refusing otherwise to proceed further with the implementation of the agreed plan.*

Fulfilment of the covenant to sell the properties on payment of Rs. 4,200/- involved obligations on both sides. In the absence of an agreement fixing some other point of time for payment of the consideration, the commonrule law is that the payment of the purchase price and the effective passing of title from the vendor to the purchaser should take place *pari passu—Trichardt vs. Muller* (1915) T. P. D. 175. Where the parties to the contract are willing to co-operate with one another, the practical difficulty of synchronising the performance of reciprocal obligations presents no serious obstacles. *Voet* 19-1-23 discusses the situation which arises when, owing to mutual distrust or business caution, one party refuses to perform his obligations until the other's obligations have first been fulfilled. " Nothing else remains ", says the jurist, " but for both the thing sold (*if it be a movable*) and the promised price to be sequestered, and for the depositary to deliver the price to the vendor and the thing to the purchaser ; *or that both parties give adequate security for fulfilment of the contract* ".

This principle of the Roman-Dutch law has also been applied by the South African Courts *where immovable property is the subject of a sale.* " The expedient which is resorted to in practice is quite reasonable ; transfer is seldom or never passed into the name of the purchaser until some kind of guarantee is given, usually a bank guarantee, that the money will be paid "—*Trichardt's case* (*supra*) at p. 178. " When the rule (for simultaneous payment and delivery) cannot be strictly carried out, Voet says that some reasonable compromise may be adopted "—*ibid.* at p. 180.

This eminently sensible solution was approved by a very distinguished bench of judges in *Breytenbach vs. Van Wijk* (1923) S. A. A. D. 541. Wessels, J., delivering the principal judgment, explained that the vendor was obliged to transfer his title if he was, offered adequate security for the due fulfilment of the purchaser's part of the contract. " *Any guarantee that is reasonably sufficient,*" he said, " *will meet the case* ". The security or guarantee offered must of course be adequate ; in addition, its availability for immediate realisation must not be delayed beyond the point of time when the vendor's contractual obligations have been completely discharged. In the present case, the adequacy of the security or guarantee offered (*i.e.* payment by the Corporation's cheque) is not disputed ; the only question is whether the refusal to hand over the cheque *as soon as the transfer was signed and before it was even delivered,* constituted, in the circumstances of this case, a bad tender.

In this country the bare execution of a notarially attested conveyance of land represents only a partial fulfilment of the vendor's obligations under a binding agreement to sell immovable property. He must implement the agreement not only by executing an appropriate instrument in proper form, but also by taking certain other steps *effectively to transfer his title to the purchaser.* Under our law, the affixing of the vendor's signature to the conveyance does not automatically operate to pass title. *Delivery of the deed* is the minimum pre-requisite (as constituting constructive delivery of the land itself) to the creation of a title which is sufficient even to enable the purchaser to maintain an action to recover the property from " *a third party* in possession without or under a weaker, title "—*Appuhamy vs. Appuhamy* (1880) 3 S. C. C. 61 F. B. Berwick, J. explained at p. 67 that in Ceylon " the notarial execution and the registration of the deed—formerly in Court and now with the Registrar of Lands—with delivery of the deed takes the place of the old Dutch symbolicai delivery before the judge and registration of the proceedings among the acts of court ; with the same result as in Holland, the principles being the same—*viz.* contract of sale *plus* symbolic delivery, equal to *dominium,* with the consequent right to sue in ejectment ". *As against the vendor,* however, " the purchaser is not bound to accept the conveyance only ; he is entitled to ask to be put in vacant possession "—*Ratwatte vs. Dullewe* (1907) 10 N. L. R. 304 F. B.

It is always a wise precaution to insert an express term in the agreement of sale unambiguously fixing the time for payment of the consideration. In that event, the agreement would precisely regulate the rights and obligations of the parties in this respect. If the contract is, however, silent on the point, a purchaser would make a sufficient tender of the consideration if he offers securitywhich effectively guarantee payment ofthe consideration immediately upon the vendor's fulfilment of his reciprocal obligations. Provided, therefore, that the security offered is perfectly adequate to ensure the vendor's protection, he cannot justifiably refuse to fulfil his part of the contract unless he is assured of payment of the consideration before title has passed to the purchaser. In South Africa, apparently, the registration of the deed is a pre-requisite to the transfer of *dominium.* I do not say that this is also the law of Ceylon, but a binding agreement to

" convey " immovable property is not fulfilled in this country by the more affixing of a signature to a notarial conveyance. In the present case, the defendant had been invited, and he had agreed, to pass *dominium* by delivery of a deed of transfer only after if had been duly attested and registered. In view of this agreement, the time fixed for delivery of the deed was also the proper time for the receipt of the purchase price.

For these reasons, the plaintiff's action would certainly have been maintainable if the Corporation had, on the plaintiff's behalf, guaranteed payment of the purchase price *as soon as the defendant's conveyance, duly registered, was actually delivered to the plaintiff.* Indeed, the plaintiff might well have demanded vacant possession as well before the money was released.

The only outstanding question is whether the additional condition imposed by the Corporation vitiated the tender—namely, that the plaintiff's contemporaneous mortgage in favour of the Corporation must also be registered before the money was finally released to the defendant.

The defendant would certainly have been justified in rejecting this condition if it was calculated to prejudice the defendant's rights or, alternatively, if its implementation would have resulted in the slightest postponement of the appropriate point of time for the receipt of the consideration (for instance, if the execution and due registration of both instruments could not have been virtually synchronised). But in truth there was no such risk. Both instruments had been prepared for signature in due form, and the arrangement agreed to by the defendant was that both parties should attend the notary's office at the same time ; that the signature to the mortgage should be taken immediately after the transfer was signed, and that both instruments should contemporaneously be tendered for registration by the same attesting notary. In the result, the implementation of the agreed plan ensured that the defendant would receive the Corporation's cheque exactly as if the transaction had not been complicated by this special feature.

Mr. Choksy raised a pertinent question which I must not overlook. What, he asked, would be the position if the plaintiff refused to sign the mortgage after the transfer had been signed ? In that event (it was asked) would not the defendant have parted with his title to the land and also been deprived of his consideration ? The answer is that there was no legal or practical foundation for the entertainment of such fears. I have already explained that *the title could not have passed without delivery of the deed,* and it was implicit in the procedure agreed to that the deed should not be delivered to the plaintiff by the notary until after the contemporaneous registration of both instruments. In other words, the notary (selected by the defendant himself) was required in this particular case to perform the functions of the " depositary " recommended by Voet (*supra*). " A deed may be delivered on a condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only "—*Macedo vs. Strand* (1922) A. C. 330 at 337. If, therefore, the plaintiff dishonestly backed out of the arrangement by refusing to sign the mortgage after the transfer had been signed, the entire transaction would have fallen through and the title would have continued to vest in the defendant. *Vide* also Proviso (3) to section 92 of the Evidence Ordinance and *Punchi Nilame vs. Dingiri Etana.* (1909) 1 Curr. L. R. 239.

In the particular circumstances of this case, the defendant wrongfully rejected in anticipation any form of tender or guarantee except payment before the title had effectively passed to the plaintiff in terms of the agreed plan. The plaintiff has therefore established his cause of action to claim a transfer of the properties in terms of the covenant contained in P 1.

Mr. H. V. Perera informed us at the conclusion of his argument that the plaintiff is now willing and able to deposit Rs. 4,200/- unconditionally in Court, to be paid to the defendant upon the execution, attestation and delivery of the deed of transfer. I would therefore set aside the judgment under appeal in so far as it dismisses the plaintiff's action, and enter a decree in the following terms :—

(*a*) that the plaintiff be ordered to deposit a sum of Rs. 4,200/- to the credit of this action within 14 days from the date on which this record is received in the lower Court, and that an order for payment be issued in favour of the defendant upon the execution and attestation of the deed of transfer hereinafter mentioned ;

(*b*) that, within 14 days from the date of such deposit, the defendant must execute a conveyance at the plaintiff's expense in favour of the plaintiff (in a form agreed upon or, in the absence of such agreement, in a form approved by the Court) of the properties described in the schedule to the deed P 1 ;

(*c*) that if the defendant fails to comply with (*b*) above, the learned District Judge should take steps to have the approved conveyance signed by an officer of the Court in terms of the Civil Procedure Code.

There remains for consideration the defendant's claim in reconvention. It has been established that on 3rd March, 1950, *i.e. some months after the*

institution of the action, the plaintiff, without due process of law, took forcible possession of two of the properties specified in the schedule to P 1, and also refused to hand over a third property which he had previously occupied with the leave and license of the defendant. This conduct was wholly unjustified, and the decree ordering him to pay damages to the defendant at the rate of Rs. 350/- *per annum* must therefore be affirmed. The damages will be payable with effect from 3rd March, 1950, until the date of the conveyance ordered to be executed in terms of my judgment.

Should the plaintiff fail to deposit the consideration within the time stipulated in this decree the plaintiff's action will stand dismissed with costs in both courts, and the decree for ejectment in favour of the defendant will also be restored. In that event, the damages will be payable until the date on which the defendant is restored to possession of the properties. Subject to compliance with paragraph (*a*) of this decree the defendant must pay to the plaintiff the costs of this appeal together with half the costs of the proceedings in the Court below.

FERNANDO, A. J.

I agree.

Appeal

Present : GRATIAEN, J. AND FERNANDO, A.J.

WIJERATNE vs. GABRIEL

S. C. No. 451 *of* 1951—*D. C. Colombo No.* 19487/*M*

Argued on : 20th May, 1954
Decided on : 26th May, 1954

Delict—Patrimonial loss—Cause of Action—Does it arise when the wrong is committed or when the damage ensues—Prescription—Ordinance No. 22 *of* 1871, *section* 9.

The plaintiff was the headmaster and the defendant an assistant teacher of the school. The plaintiff alleged that the defendant on 15th June, 1944, falsified certain attendance registers of the school with the intention of putting the plaintiff into trouble and as the result of an inquiry held by the plaintiff's employer, the plaintiff was deprived of his employment on 1st December, 1947. On 28th May, 1948, the plaintiff sued the defendant for damages.

At the trial the defendant raised a preliminary issue of law that the plaintiff's action was prescribed as the cause of action, if any, arose when the alleged falsification of the registers took place. This issue was held in the defendant's favour and the plaintiff appealed.

Held : That in cases under the *Lex Aquilia* and other actions in which patrimonial loss is a condition of liability, the cause of action arises only when the damage has actually occurred, which need not necessarily be when the wrongful act or omission has been done. In this case it occurred only when the plaintiff was deprived of his employment in December, 1947, and hence his cause of action was not prescribed.

Cases referred to : *Reeves vs. Butcher* (1891) 2 Q. B. 509 at 511.
Backhouse vs. Bonami (1861) 9 H. L. C. 543 (—11E. R. 825).
Darley Colliery Co. vs. Mitchell (1886) 11 App. Cas. 127.
Coetzee vs. S. A. R. (1933) C.P.D. 565.
Alla Pitche vs. Adams (1877) Ram. Rep. 338.
Karolis vs. Woutersz (1888) 8 S.C.C. 153.
Wadurala vs. Sunderland Rubber Co. (1914) 18 N. L. R. 76.
Suppramaniam Chetty vs. Fiscal W. P. (1916) 19 N. L. R. 126.
Pollock on Torts (14th Ed.) pp. 150-1.
Matthews vs. Young (1922) S. A. A. D. 492 at 504.
Nelson vs. Municipal Council, Colombo (1909) 13 N. L. R. 43.
Oslo Land Co. vs. Union Government (1938) S. A. A. D. 584.

N. E. Weerasooria, Q.C., with *C. G. Weeramantry*, for the appellant.
H. W. Jayawardena with *D. R. P. Goonetilleke*, for the respondent.

GRATIAEN, J.

This is an appeal against a judgment upholding, on a preliminary issue of law, a plea that an action for damages instituted on 28th May, 1948, was prescribed. The defendant had raised a further preliminary issue as to whether the averments in the plaint disclosed a cause of action against him, but this plea was eventually withdrawn.

Section 9 of the Prescription Ordinance admittedly governs the case, so that the action could not be maintained unless it was instituted "within two years from the time the cause of action shall have arisen". The dispute is as to when precisely (assuming the averments in the

plaint to be true) the plaintiff's cause of action first accrued to him. In the absence of any allegation of concealed fraud, the period of limitation begins to run " from the earliest time at which an action could be brought "—*Reeves vs. Butcher* (1891) 2 Q. B. 509 at 511.

We must analyse the averments in the plaint (after discounting its unnecessary and irrelevant flourishes) so as to ascertain the true nature of the cause of action on which the plaintiff based his claim. It is alleged :—

(1) that the plaintiff has at all relevant dates been the Headmaster, and the defendant an Assistant master, of St. Lucia's Bilingual School in Kotahena (paragraphs 2 and 3) ;
(2) that the defendant " falsely and maliciously in order to put the plaintiff into trouble and to cause him loss " falsified certain attendance registers of the school *on 15th June* 1944 (paragraph 5 and 7) ;
(3) that in consequence of an investigation by the plaintiff's employers into these irregularities his services as Headmaster were discontinued on 1st December, 1947, (paragraph 6), and he suffered consequential loss and damage which he assessed in a sum of Rs. 7,500/- (paragraph 8) ;
(4) that a cause of action had accrued to the plaintiff to sue the defendant for the recovery of such damages (paragraph 8).

The question for our decision is whether, *if these averments be true*, the cause of action originally arose on 15th June, 1944, (as the learned judge has held) or whether it only became complete on 1st December, 1947, when the plaintiff lost his professional employment as headmaster as a direct consequence of the irregularities maliciously committed by the defendant on the earlier date. If the latter view be correct, the plea of prescription admittedly fails.

The gist of the plaintiff's complaint is that he suffered patrimonial loss on 1st December, 1947, and that the " real and proximate cause of the loss or injury " was the wrongful conduct of the defendant (committed on 15th June, 1944, and specified in paragraphs 5 and 7 of the plaint.)

The analogy of the English decisions where in the case of certain torts, " the proof of real damage is the foundation of the plaintiff's right " is instructive, because in such a situation the cause of action arises only when the plaintiff's enjoyment of his rights (whether they be of property or employment or take some other form) has been interfered with " by the actual occurrence of the mischief "—*Backhouse vs. Bonami* (1861) 9 H. L. C. 543 (-11 E. R. 825), *Darley Colliery Co. vs. Mitchell* (1886) 11 App. Cas. 127.

In this country, if an aggrieved party's claim is based on an actionable wrong, the question as to when his cause of action first arose must of course be answered with reference to the Roman-Dutch law. In actions under the *lex Aquilia and other actions in which proof of patrimonial loss is a condition of liability*, the period of prescription (as in England) does not begin to run until some damage has actually occurred. Gardiner J. P. summarised the law as follows in *Coetzee vs. S. A. R.* (1933) C. P. D. 565 :

> " There is ' no cause of action ' until everything has happened which would entitle the plaintiff to judgment. Now in delict a wrongful act or omission does not always by itself entitle a person complaining of it to judgment. There are cases where it does, *e.g.* where *contumelia* is involved. But there are many cases where the wrongful act does not give the plaintiff a right to judgment unless damage has been sustained, and *the damage need not be contemporaneous with the wrongful act*.....There may be a wrong without, at the time, any damage, and after an interval damage may for the first time result ".

As the present action was instituted within two years of the date on which the plaintiff claims to have suffered damage through deprivation of his employment as headmaster of the school, the learned judge was not justified in deciding the preliminary issue of prescription in favour of the defendant.

Certain local decisions were referred to us in which the impact of section 9 of the Prescription Ordinance (and of analogous statutory provisions) on actions for delict has been discussed—*Alla Pitche vs. Adams* (1877) Ram. Rep. 338, *Karolis vs. Woutersz* (1888) 8 S. C. C. 153, *Wadurala vs. Sunderland Rubber Co.* (1914) 18 N. L. R. 76 and *Suppramaniam Chetty vs. Fiscal W. P.* (1916) 19 N. L. R. 126. The true principle is that where an act whether lawful or wrongful at its inception is not actionable *per se*, but becomes so only by reason of consequential damage, prescription runs only from the actual happening of the damage.

The learned judge seems to have assumed that this principle is confined to cases where the conduct complained of was at its inception " lawful " but nevertheless becomes actionable when it subsequently caused damage to the plaintiff. This is not correct. In England, some categories of " wrongful acts " are not actionable unless and until they have caused actual damage to the aggrieved party—*e.g.* negligence, nuisance and deceit—*Pollock on Torts* (14th Ed.) pp. 150—1. Similarly, under the Roman-Dutch law, " the *actio legis Aquiliae* is only available for an *injuria* resulting in pecuniary loss (*damnum injuria data*)" —*Matthews vs. Young* (1922) S. A. A. D. 492 at 04.

In the present case, " damage is the gist of the action ", and the institution of proceedings by the

plaintiff before he actually suffered pecuniary loss would have been premature—because his cause of action was incomplete until the defendant's alleged plan (previously conceived and put into execution) succeeded in its purpose.

I observe that in *Nelson vs. Municipal Council, Colombo* (1909) 13 N. L. R. 43 this Court went so far as to hold that " where a cause of action accrues to the aggrieved party only at the date of the occurring of actual damage, a fresh cause of action arises in respect of each succeeding damage ". This may well be so where the act complained of was *ab initio* lawful, or in the case of a wrongful act which in truth constitutes a continuing cause of action, but not otherwise. " Where a negligent or wrongful act has caused *some damage*, a right of action accrues immediately for all the damage flowing from the unlawful act, *including prospective* damage "—*Oslo Land Co. vs. Union Government* (1938) S. A. A. D. 584. In situations of that kind, the difficulty of assessing the prospective damage cannot alter the fact that the cause of action has in fact already occurred.

In my opinion the judgment under appeal should be set aside and the case remitted for trial according to law on the merits. Should the plaintiff ultimately succeed in establishing a good cause of action, the damages awarded to him must of course be restricted to the pecuniary loss (actual and prospective) sustained or to be sustained on or after 1st December, 1947, by reason of the *injuria* complained of. The avertment that the plaintiff had, in addition, " suffered pain of body and mind " is extraneous to the true cause of action and therefore irrelevant to the issue as to damages.

The defendant must pay to the plaintiff the costs of this appeal and of the abortive trial. All other costs will be costs in the cause.

FERNANDO, A. J.

I agree.

Set aside.

Present : GRATIAEN, J. AND SANSONI, J.

HAI BAI vs. P. PERERA

S. C. No. 22 of 1954 (*Inty.*)—*D. C. Kandy No. M. S.* 3480

Argued on : 14th and 24th May, 1954
Decided on : 27th May, 1954

Public Servants (Liabilities) Ordinance (Cap. 88), section 2 (2) Amending Act No. 10 of 1951—Extension of immunity to public servants in receipt of salary up to Rs. 520—Defendant unprotected by principal Ordinance giving promissory notes to plaintiff prior to amending Act—Defendant in receipt of salary below Rs. 520—Defendant sued on promissory notes after amending Act came into operation—Is he entitled to protection under Amending Act ?

In 1952 plaintiff sued the defendant, a public servant in receipt of a salary above Rs. 300 and below Rs. 520 and obtained decree against him in respect of promissory notes given by him prior to June, 1950. Defendant objected to the execution of the decree on the ground that he was entitled to protection under the Public Servants (Liabilities) Ordinance (Cap. 88) as amended by Act No. 10 of 1951 which amendment came into operation on the 15th March, 1951, and extended the immunity of public servants whose salary fell between Rs. 300 and Rs. 520. The learned District Judge upheld the objection and the plaintiff appealed.

Held : That the defendant was not entitled to protection under the amending Act as section 6 (2) (*b*) of the Interpretation Ordinance preserved the rights of the plaintiff against the defendant in respect of the notes sued upon inasmuch as the amending Act did not expressly or even by necessary implication provide a contrary effect.

Cases referred to : *Fernando vs. Khan* 54 N. L. R. 142 explained and distinguished.

C. R. Gooneratne, for the appellant.

No appearance for the respondent.

R. S. Wanasundera, C. C., as *amicus curiae*.

GRATIAEN, J.

The defendant has at all material times been a public servant in receipt of a monthly salary exceeding Rs. 300/- but less than Rs. 520/-. On 19th November, 1949, and 30th June, 1950, respectively he incurred a liability to the plaintiff on two promissory notes, and was sued by the plaintiff on 17th January, 1952, for the recovery of the aggregate balance sum and interest due on the notes. A decree for this amount and costs was entered against him on 30th September, 1952.

On 30th October, 1952, the learned District Judge allowed the plaintiff's application for execution of the decree in his favour, but shortly thereafter the defendant objected that all the proceedings in the action were void because they contravened the provisions of the Public Servants (Liabilities) Ordinance (Cap. 88) as amended by the Public Servants (Liabilities) Amendment Act

No. 10 of 1951. The present appeal is from an order of the learned judge upholding the objection and recalling the writ.

The question for our decision, shortly stated, is whether the amending Act which passed into law on 15th March, 1951, operates retroactively so as to extend to the defendant a statutory protection which he had admittedly not enjoyed at the time when his liability was incurred under either of the notes sued on. The learned judge, purporting to follow the ruling of this Court in *Fernando vs. Khan* (1952) 54 N. L. R. 142, took the view that the amending Act does have retroactive operation except only in cases where an action to enforce the liability of a previously unprotected public servant had been instituted before 15th March, 1951. In my opinion this is not the ratio *decidendi* of Khan's case (*supra*).

Section 2 (1) of the principal Ordinance protected "public servants" from being sued in Courts of law upon certain classes of transactions, but section 2 (2) expressly limited the scope of this immunity to those who were in receipt of a monthly salary of less than Rs. 300/- *at the time when the liability sought to be enforced was incurred.* The defendant admittedly did not belong to the protected income-group when he became indebted to the plaintiff on the promissory notes sued on, and the common law right of the plaintiff to enforce the liability in civil proceedings was therefore unaffected by the impact of the Ordinance. Indeed, it was expressly preserved by Section 2 (2).

So matters stood until 15th March, 1951, when the amending Act extended the protection of the principal Ordinance to "public servants" of a higher income-group to which the defendant admittedly belonged at all material times—namely, "public servants" whose monthly salary fell between Rs. 300/- and Rs. 520/-.

The defendant was not represented in appeal, and, as our decision may well affect the rights and liabilities of other creditors and other public servants, we requested the Attorney General to be good enough to arrange for Crown Counsel to appear before us as *amicus curiae*. We are indebted to Mr. Wanasundera for the assistance he has given us.

The clear answer to the problem under consideration is to be found in section 6 (3) (*b*) of the Interpretation Ordinance (Cap. 2). A repealing Act, unless it expressly so provides, does not affect "any right acquired" under the earlier law. The amending Act does not expressly, or even by necessary implication, purport to destroy or reduce the rights which the creditors of previously unprotected public servants had acquired *on transactions entered into before 15th March*, 1951. In the result, section 6 (3) (*b*) of the Interpretation Ordinance preserves the right of the plaintiff against the defendant in respect of the promissory notes sued on.

Fernando vs. Khan (*supra*) was concerned only with a situation in which a creditor had, before 15th March, 1951, commenced an action to enforce the liability of a previously unprotected public servant who subsequently claimed the protection of the amending Act. In such a case, the rights of the plaintiff in the pending action were clearly preserved by section 6 (3) (*c*) of the Interpretation Ordinance. But the judgment must not be regarded as authority for the proposition that the prior institution of an action is a condition precedent to the preservation of a creditor's right to enforce a liability incurred before the amending Act passed into law. In the present case, it is section 6 (3) (*b*) of the Interpretation Ordinance which keeps the plaintiff's rights alive, and this Court had no occasion in *Khan's case* (*supra*) to consider a situation such as has now arisen.

In my opinion, the judgment under appeal must be set aside. The previous order dated 13th October, 1952, allowing the plaintiff's application for execution of his decree must be restored, and any seizure affected in pursuance of that order must be declared valid. The plaintiff is entitled to the costs of this appeal and to the costs of the inquiry in the Court below.

SANSONI, J.

I agree.

Set aside.

Present : SWAN, J.

HAMID MARIKAR *vs.* COMMISSIONER OF INCOME TAX

S. C. No. 369/1953—With Application No. 69/1953—*M. C. Kalutara* 15789

Argued on : 7th December, 1954
Decided on : 13th December, 1954

Income Tax—Excess profit—Appellant and another partner in business—Notice of assessment served on Appellant's partner—Adequacy of notice—Income Tax Ordinance Section 80 (1) 68 (1)—*Excess Profit Duty Ordinance.*

Under the Excess Profit Duty Ordinance it is sufficient if assessment of excess profits for a particular year is made within the period prescribed by the Ordinance. Notice of such assessment can be served on the assessee either before or after the prescribed date.

A notice of assessment served on one of two partners with the words " For the information of A. L. Abdul Hamid Marikar (the other partner) " is a sufficient notice under the Ordinance to both partners and even if the notice was lacking in form, it was in substance and effect a notice that the assessee was required to pay the assessed amount and the defect was cured by section 68 (1) of the Income Tax.

Cases referred to : *Pickford vs. The Commissioner of Inland Revenue* (13 Taxes Cases, page 251).

H. V. Perera, Q.C., with *Dr. H. W. Thambiah* and *H. L. de Silva*, for the appellant.
G. F. Sethukavaler for the respondent.

Swan, J.,

There is no right of appeal in this case, but as papers have been filed in revision as well I shall consider the matter. The respondent issued a certificate to the Magistrate of Kalutara under Section 80 (1) of the Income Tax Ordinance as applicable to the Excess Profits Duty Ordinance No. 38 of 1941 for the recovery of a sum of Rs. 8,470/- as excess profits duty from the appellant. The appellant duly appeared on summons and desired to show cause and the matter was fixed for inquiry. The appellant sought to prove that he was not a defaulter in as much as (1) the notice of assessment was not duly served on him but on his former partner A. L. M. A. Rahiman Marikar and (2) the notice of assessment was served out of time. The learned Magistrate held against the appellant on both these points and imposed the amount of the assessed levy as a fine.

At the hearing of this appeal the same two points were raised. I shall deal with the submission that the notice was served out of time. According to the Excess Profits Duty Ordinance as amended and extended the assessment had to be made before the 31st December, 1950. Mr. Perera contended that the notice of assessment should have been served also before that date. Mr. Sethukavaler who appeared for the respondent maintained that all that the ordinance required was that the assessment should in fact have been made before the end of December, 1950, but that the notice of assessment could be served at any time thereafter. In this connection he cited to me the case of *Pickford vs. The Commissioner of Inland Revenue* (13 Taxes Cases page 251) which supports his contention. A passage from " The Law and Practice of Income Tax " by Sri Kanga and Palkavala at page 581 referred to by the learned Magistrate in his judgment makes the position quite clear. I would therefore hold that the assessment was not made out of time.

The next point to consider is whether the appellant had notice of the assessment. The original notice had been produced by the respondent and is marked R5. That it was received by the appellant there can be no doubt. It is addressed to both partners. At the top is typed " For the information of A. L. Abdul Hamid Marikar. " If, as Mr. H. V. Perera contends, it was an " information copy " it is none the less a notice of assessment. But even if there are any mistakes, defects or omissions in it, or it is lacking in form it would be cured by Section 68 (1) of the Income Tax Ordinance if it is in substance and effect a notice that the assessee was required to pay the amount of the assessed levy.

The appeal is rejected and the application in revision refused.

Puisne Justice.

Present : Pulle, J. and Swan, J.

EBRAHIM VALIMOHAMED AND TWO OTHERS vs. D. JIWATRAM

Revision Application No. 76—D. C. Colombo 15754

Argued on : 1st, 5th and 12th March, 1954
Decided on : 18th March, 1954

Civil Procedure Code, section 704—Action under summary procedure for liquid claims—Leave to appear and defend—What the Court has to be satisfied with.

Held : That before an application for leave to appear and defend under section 704 of the Civil Procedure Code is granted, the Court has not only to be satisfied that there is a defence *prima facie* sustainable, but also that it is put forward in good faith.

Cases referred to : *Jacobs vs. Booths' Distillery Co.* 85 Law Times 262.
Sunderam Chettiah vs. Valli Ammah (1935) A. I. R. (Madras) 43.
Alla Venkata Kistnayya vs. Alapati Ramaswami (1935) A. I. R. (Madras) 302.

Sir Lalita Rajapakse, Q.C., with *H. W. Thambiah* and *F. Vannitamby*, for the petitioners.
N. K. Choksy, Q.C., with *V. A. Kandiah*, for the respondent.

SWAN, J.

The petitioners were sued by the respondent on three cheques for Rs. 5000/-, Rs. 2500/- and Rs. 7500/-, the first dated 12th September, 1953, and the other two 2nd November, 1953. The action was filed by way of summary procedure. On receipt of summons the petitioners applied for leave to appear and defend unconditionally. The learned District Judge however ordered them to give security in a sum of Rs. 10,000/- as a condition of their being allowed to file answer. From this order the petitioners have appealed. They have also filed papers in revision. It is with the application in revision that we are now concerned. It is submitted that the order of the learned District Judge is manifestly wrong and that the petitioners should have been allowed to defend the action unconditionally.

Section 704 of the Civil Procedure Code says that in actions by summary procedure on liquid claims the defendant shall not appear and defend the action without the leave of the court, but provides that he " shall not be required as a condition of his being allowed to appear and defend to pay into court the sum mentioned in the summons or to give security therefor *unless the court thinks his defence not to be* prima facie *sustainable or feels reasonable doubt as to its good faith.*" Section 706 sets out that he should be given leave to appear and defend upon his paying the sum into court, or " upon affidavits satisfactory to the court which disclose a defence or such facts as would make it incumbent on the holder to prove consideration or such other facts as the court may deem sufficient to support the application, *and on such terms as to security, framing and recording issues, or otherwise as the court thinks fit.*"

The application for leave to appear and defend was supported by the affidavit of the 2nd petitioner. In that affidavit it was stated that the plaintiff carried on the business of money lending, that he had lent money to the petitioners on the security of a promissory note and that the cheques sued upon were " renewal cheques ", that the interest charged was excessive, that on 25th November, 1953, the respondent had obtained from the petitioners a sum of Rs. 1,400/- as interest promising to give the petitioners three further months' time and that he had filed this action in breach of that undertaking. With this affidavit there was filed a statement of account marked X1 in which there appears a payment of Rs. 1,400/- on 25-11-53, being interest for an unspecified number of months. The petitioners also submitted a copy of a letter marked X2 from their proctor written to the respondent on 18-12-53. In that letter a request is made for a " true copy of the account of all loans.....and all documents relating to the said loans." The petitioners also relied on X3, the answer of the respondent's proctor to X2, and on X4 the petitioner's proctor's reply thereto in which the threat in X2 is repeated, namely that a prosecution would be entered unless a copy of the account was sent. X5 is an affidavit from another textile dealer in the Pettah saying that the respondent had also lent his firm money " charging interest as a money lender." X7 is a letter from somebody who signs for *Vally Noor Mohamed and Sons* stating that his firm had " connection with Mr. D. Jiwatram for the last 1½ years in respect of money transactions on interest " and that their connection still continued.

It is contended that upon this material the petitioners should have been granted unconditional leave to appear and defend. Learned counsel for the appellant argued that there was a triable issue disclosed, namely whether the plaintiff had kept proper books of account. He relied on the case of *Jacobs vs. Booths' Distillery Co.*, 85 Law Times 262, where it was held with reference to Order 14 of the English rules of procedure that leave should be granted where there is a triable issue though it may appear that the defence is not likely to succeed.

He also cited two Indian cases, namely *Sunderam Chettiah vs. Valli Ammah* 1935 A. I. R. (Madras) 43, and *Alla Venkata Kistnayya vs. Alapati Ramaswami* 1935 A. I. R. (Madras) 302. Both these cases were with reference to Order 37 Rule 3 which corresponds more or less to Sections 704 and 706 of the Civil Procedure Code. In the former case it was held that if the defence raises a triable issue the court has no discretion but to grant leave to defend, and the trial judge can go into the merits and discover whether that case is a true one. In the latter case too it was held

that where a triable issue was disclosed leave to defend should be granted. But it should be noted that in this case leave was not granted unconditionally. The defendant was required to deposit the amount which he admitted to be due, and a certain other amount towards the possible costs of the plaintiff. *Ramesam, J* remarked "at the same time I do not desire that the plaintiff should suffer by any concession shown to the defendant."

I think there can be no question that not only has the court to be satisfied that there is a defence *prima facie* sustainable but must also be satisfied that it is put forward in good faith. As *Lord Halsbury* said in *Jacobs vs. Booths' Distillery Co.* (*supra*). Order 14 was intended to "prevent sham defences from defeating the rights of the parties by delay."

In this case the material upon which the petitioners relied undoubtedly raised a triable issue but the question was whether that defence was put forward in good faith. It was a matter within the discretion of the learned District Judge and I am unable to say that he has exercised that discretion wrongly. On the contrary there is ample material to justify the learned District Judge's doubts as to the good faith of the defence. Before filing action the respondent's proctor sent the petitioners a letter of demand to which there was no reply. It was only after summons was served that letter X2 was sent calling for an account of the loans and payments, and threatening the respondent with a prosecution if no account was submitted. It should be noted that the 2nd petitioner in his affidavit X1 does not say how much would be due to the respondent upon a proper accounting with interest reckoned at the rates chargeable under the Money Lending Ordinance. The document X2 submitted with the affidavit X1 does not even purport to be a true copy or a sworn translation. As regards the allegation that the plaintiff carries on the business of money lending there is only the 2nd petitioner's affidavit X1 in support. The affidavit X5 does not state that the plaintiff is a professional money lender but merely that he "has been charging interest as a money lender." In letter X7 no allegation is made that the respondent is a money lender.

In my opinion the learned District Judge had sufficient reason to doubt the good faith of the defence. I would therefore affirm the order he made regarding security for the respondent's claim. The application in revision is dismissed with costs.

Pulle, J.
I agree.

Appeal dismissed.

Present : Gunasekara, J.

THE ATTORNEY-GENERAL vs. T. H. ALWISAPPU

S. C. 1343/1953—*M. C. Galle No.* 6135

Argued on : 26th June and 12th July, 1954
Decided on : 27th May, 1954

Land Development Ordinance (*Cap.* 320)—*Accused charged for offence under—Proceedings instituted by a Range Forest Officer under section* 148 (1) (6) *Criminal Procedure Code—Objection that Range Forest Officer not empowered to institute proceedings under Land Development Ordinance—Can charge be maintained ?—Accused charged under first plaint even though an amended plaint had been filed ?—Effect of—Criminal Procedure Code.*

The institution of proceedings under section 148 (1) (*b*) of the Criminal Procedure Code for an alleged contravention of a provision of the Land Development Ordinance is not a proceeding under that Ordinance, but is a proceeding under the Criminal Procedure Code. A Forest Range Officer can therefore institute proceedings under section 148 of the Criminal Procedure Code, although he is not an officer who is empowered under the Land Development Ordinance to institute proceedings.

Where the prosecution tenders an amended plaint setting out a charge different from the first plaint, and there is evidence to show that the prosecution intended that the accused should not be tried under the first plaint, the accused is entitled to be discharged if he is tried under the first plaint.

A. E. Keuneman, C.C., for the Attorney-General.
No appearance for accused-respondent.

GUNASEKARA, J.

The Attorney-General appeals against an order made by the Magistrate of Galle discharging the respondent who was charged before him with an offence punishable under section 168 (2) of the Land Development Ordinance (Cap. 320).

A written report to the effect that the respondent had committed such an offence on the 22nd May, 1952, was made to the magistrate by a range forest officer on the 29th July, 1952. It purported to be made in terms of section 148 (1) (*b*) of the Criminal Procedure Code, and the magistrate ordered the issue of a summons to the respondent. The summons was issued on the 12th August, and served on the respondent, and he appeared in obedience to it on the 21st August. On that day the statement of the particulars of the offence contained in the summons was read to the respondent as the charge, and he pleaded not guilty. The trial was postponed to the 5th November. The respondent failed to appear on that day and a warrant was issued for his arrest. He surrendered to the court on the 10th December and the magistrate ordered that the case should be " called " on the 18th December.

In the meantime, on the 25th October, 1952, the range forest officer had submitted to the magistrate a second report, which too purported to be a report in terms of section 148 (1) (*b*) of the Criminal Procedure Code. He described it in a covering letter as an amended plaint. On the 18th December, the respondent was again charged and he pleaded not guilty. The record of that day's proceedings reads :

" Accd : T. H. Alwisappu—pt.
Vide fresh plaint filed on 25-10-52.
Charged from Ss.
' I am not guilty'
Trial for 12-3—Cite prosecution witnesses.
Warned to appear."

The summons from which the respondent was charged on this day could only have been the one that was issued on the 12th August, 1952, for no other summons had been issued.

When the case was taken up for trial on the 12th March, 1953, a proctor appearing for the respondent submitted that a forest officer had no authority " to take any proceedings under the Land Development Ordinance." The learned magistrate heard argument on the question so raised and made order discharging the respondent.

The Land Development Ordinance assigns to various officers various powers, functions and duties, but none of these relate to the institution of prosecutions. The ground on which the learned magistrate discharged the respondent is that " under sections 3—6 of the Land Development Ordinance only such officers as are contemplated therein can institute proceedings under the Land Development Ordinance ", and a range forest officer is not one of them. But the institution of a prosecution is not a proceeding under this ordinance. It is a proceeding under the Criminal Procedure Code, even though the offence alleged is a contravention of a provision of the Land Development Ordinance. The Criminal Procedure Code provides that proceedings in a magistrate's court shall be instituted in one of the ways prescribed in section 148 (1, of that Code, and there is nothing in the Land Development Ordinance that qualifies this provision. The proceedings in the present case were instituted in the way prescribed by section 148 (1) (*b*) of the Code, namely, by a written report being made to the magistrate by a public officer to the effect that an offence had been committed, which the magistrate's court had jurisdiction to try. In my opinion, therefore the order of discharge was wrongly made.

This circumstance however, cannot conclude the question whether the appeal should be allowed, The charge to which the respondent pleaded and in respect of which the order was made was that on the 22nd May, 1952, he did (in the words of the summons) " break up for cultivation and encroach (*sic*) about 2½ acres and erect a building in the Crown land called the Kottawa-Kombola Reserve " and that he thereby committed an offence punishable under section 168 (2) of the Land Development Ordinance. The allegation contained in what the range forest officer described as an amended plaint was that the respondent committed an offence punishable under section 168 of the Ordinance by doing certain acts " after the mapping out survey of 1950 and thereafter ", and not " on the 22nd May, 1952, " as alleged in the summons, and that what he did was to " clear, break up for cultivation, cultivate, erect a building or structure, fell or otherwise destroy trees standing, otherwise encroach on " the crown land in question and that he was continuing " to do such acts ". The prosecution made no application for amendment of the charge, and there was no evidence before the magistrate upon which he could base an order for amendment. But the filing of a fresh report on the 25th October, 1952, (which alleged against the respondent a wider range of activity over a longer period of time than was alleged in the charge to which he had pleaded) indicates that the prosecution themselves desired that the respondent should not be tried on that charge. In these circumstances I do not think that there is sufficient ground for setting aside the order of discharge.

The appeal is dismissed.

Appeal dismissed.

Present : GRATIAEN, J. AND GUNASEKERA, J.

FERNANDO & OTHERS *vs.* PODI NONA & OTHERS

D. C. (Inty.) 124 *of* 1954—*D. C. Colombo No.* 5140/P

Argued on : 4th May, 1955
Delivered on : 19th May, 1955

Partition—Interlocutory decree—in respect of two contiguous allotments—Exclusive possession of one lot by stranger under a planting agreement between a co-owner and stranger—Co-owner purporting to be owner of entirety—Adverse possession—Prescription.

Held : That where a stranger enters into possession of a divided allotment of property claiming to be sole owner, although his vendor in fact had legal title only to a share, his possession is adverse to the true owners and the date of his entry claiming to be sole owner was a good starting point for prescription.

Corea vs. Iseris Appuhamy (1911) 15 N. L. R. 65 distinguished.

F. R. Dias with *H. L. de Silva*, for the 30th, 31st and 32nd defendants-appellants.
H. W. Jayawardene, Q.C. with *D. R. P. Goonetilleke*, for the plaintiffs-respondents.

GRATIAEN, J.

The plaintiff in this case was granted an interlocutory decree for the partition of two contiguous allotments of land marked A and B in the plan No. 4148 filed of record. The surveyor reported that Lot B was in the possession of the 8th defendant and of the appellants who were accordingly added as parties to the action. They claimed no interests in Lot A, but asked that Lot B should be excluded from the partition for reasons which I shall later explain.

Lots A and B had originally formed part of a single land, a little over three acres in extent, belonging to two brothers named Nandochchi and Samichchi in equal shares. In due course Nandochchi's share passed by inheritance to his five children one of whom was named Cornis.

On 22nd August, 1871, Cornis, who in fact had legal title to only an undivided 1/10 share, entered into a notarial agreement 30D1 with a stranger called Maththa. By this agreement, Cornis, purporting to be sole owner, employed Maththa to plant the entire land (described as "sufficient to plant 150 coconut trees") in coconuts and other crops. Maththa was to cultivate the property as planter for a period of 6 years expiring on 21st August, 1877, after which Cornis undertook "to separate a half of the land and the new plantations and to grant the same (*i.e.* the soil as well as the plantations) to Maththa".

Maththa carried out his part of the agreement, but Cornis does not appear, in implementation of his contractual obligation, to have executed a formal conveyance of any part of the common land to Maththa. Nevertheless, the land was in fact divided up into two allotments and Lot B (or at least a substantial part of it) and the plantations standing on it were exclusively occupied by Maththa after the expiry of the 6 year period referred to in 30D1. The learned Judge was also satisfied that Maththa, and members of his family after him, "built on this portion and raised other plantations on it". Nor did Cornis or his co-owners or their respective successors in title exercise proprietary rights over Lot B since 1877. It is in these circumstances that the appellants and the 8th defendant, claiming under Maththa, asked for the exclusion of this allotment from the proposed partition.

The learned Judge's decision that both Lots A and B, treated as an entity, should be partitioned was based on the following findings :—

(*a*) that Maththa had prescribed only to an undivided 1/20 share of the entire land (*i.e.* one-half of the 1/10 share to which alone Cornis had legal title) ;

(*b*) that, as Maththa occupied Lot B under what must be regarded as a derivative title from a co-owner, neither he nor persons claiming under him could prescribe against the other co-owners unless the presumptions laid down by the Judicial Committee in *Corea vs. Appuhamy* (1911) 15 N.L.R. 65 could be rebutted.

With great respect, I think that it is permissible to take a more realistic view of the legal position resulting from the continuous, exclusive occupation of Lot B (or at least a defined part of it) by Maththa and his family ever since 1877. In the facts of this case, the same consequence follows whether or not Cornis, in terms of his contractual obligation, had executed a formal conveyance to Maththa of a separated portion of the land

and plantations in consideration of the services rendered by the latter as planter. In either event, what is significant is that in 1877 Maththa went into possession claiming as of right to enjoy a defined portion of the land *ut dominus*, whereas Cornis and his co-owners were content to exercise proprietary rights over Lot A alone.

The *ratio decidendi* of *Corea vs. Appuhamy* (*supra*) is that a person *entering as a co-owner* into possession of the common property cannot, by merely forming a secret intention which has not been communicated to the other co-owners either by express declarations or by overt action, alter the character of his possession and thereby acquire title to their shares by prescription. This principle is, of course, subject to the rule of common sense that, in appropriate cases, an ouster may be presumed to have taken place at some point of time after the date of entry which was originally not adverse. *Tillekeratne vs. Bastian* (1918) 21 N.L.R. 12, *Hamidu Lebbe vs. Ganitha* (1925) 27 N.L.R. 33.

There is, however, no room for the application of presumptions or of counter-presumptions *where a man had from the inception entered into possession of an allotment of land unequivocally claiming title to the entirety.* In such a situation, his possession is at every stage adverse to the true owner or to his true co-owners (as the case may be), and in the latter event the other co-owners cannot be heard to say that his possession was merely " in support of their common title ".

If Cornis, pretending to be and believed by Maththa to be the sole owner, had in fact conveyed Lot B to him on that basis, the case would have been covered by the decision of Schneider. J. and Garvin, J. in *Mohamed Marikar vs. Kirilamaya* (1923) 1 T.C.L.R. 158. Similarly, in *Punchi Singho vs. Bandara Menika* (1942) 43 N.L.R. 547 Jayatilleke, J., sitting alone, held that where one of the co-owners purports to sell the entire property, and the purchaser enters into possession claiming title to the entirety, prescription begins to run at once. This principle, though acknowledged as correct, was distinguished on the facts by Howard, C.J., sitting alone, in *Cooray vs. Perera* (1944) 45 N.L.R. 455 and subsequently by the present Bench in *Kobbekaduwa vs. Seneviratne* (1951) 53 N.L.R. 354. At a later date it was expressly followed by two of the three Judges who decided *Sellappah vs. Sinnadurai* (1951) 53 N.L.R. 121.

We have not been referred to any decision of this Court where the rule laid down in *Mohamed Marikar vs. Kirilanaya* (*supra*) and *Punchi Singho vs. Bandara Menika* (*supra*) has been expressly dissented from.

After we reserved judgment, Sansoni, J. has referred me to certain decisions of the Indian Courts where a stranger purporting to have purchased the entire land from a person who was in fact only a co-owner, has been held to occupy adversely against the other co-owners for purposes of prescription. In *Bhavrao vs. Rakhmin*, I.L.R. 23 Bom. 137 the Full Court of the Bombay High Court took the view that prescription would run in favour of the purchaser as soon as he entered into exclusive possession of the property if he did so claiming to be the sole owner. " Adverse possession ", the judgment points out, " depends upon the claim or title under which the possessor holds and not upon a consideration of the question in whom the true ownership is vested ". The distinction between the possession of the entire land by a co-owner on the one hand and of a stranger who has purported to purchase the entire land is also emphasised in *Palania Pillai vs. Rowther* (1942) 55 L.W. 532. " While the possession of one co-owner " said Chief Justice Leach, " it in itself rightful, the position is different when a stranger is in possession. *The possession of a stranger in itself indicates that his possession is adverse to the true owners* ".

These observations are in accord with certain passages in *Angell on Limitations* (6th Ed.) mentioned by Jayatilleke, J. in *Punchi Singho vs. Bandara Menika* (*supra*). The text book refers at page 443 to a judgment of Mr. Justice Story in an American case where the defendant, a stranger, had a deed of the whole estate but his legal title was valid only as to an undivided 1/4 in common with others ; but he made an actual entry into the whole land, and claimed the whole in fee, that is to say, he entered as sole owner and his possession was openly and notoriously adverse to the true owners of the balance 3/4 share. Story, J. held that the date of his entry claiming to be sole owner was a good starting point for prescription. " Acts, if done by a stranger, would *per se* be a disseizin, whereas acts if done by a co-owner are susceptible of an explanation consistently with the real title ".

The true test now becomes clear. Where a stranger enters into possession of a divided allotment of property, claiming to be sole owner, although his vendor in fact had legal title only to a share, *Corea vs. Appuhamy* (*supra*) has no application unless his occupation of the whole was reasonably capable of being understood by the other co-owners as consistent with an acknowledgment of their title. In the present case, the conduct of Maththa and his successors in title was quite unequivocal, and must have clearly indicated that he claimed Lot B (or at least the

defined portion of it exclusively occupied by him) as sole owner adversely to Cornis and all others. The area of Lot B far exceeded the extent which Cornis had legal title to convey to a stranger, and it is not unreasonable to assume that he entered into the planting agreement as agent for all the co-owners. In the result, Maththa and his heirs have long since acquired prescriptive title to the entirety of the divided allotment.

I have so far assumed that Cornis had in fact granted a conveyance (which cannot now be traced) of a larger interest in the land than he himself enjoyed. If on the other hand, Maththa had entered into occupation of the allotment relying on the rights promised him under the agreement but without an actual conveyance, his possession would have been equally adverse to the co-owners. *Theiva vs. Arumugam* (1912) 15 N.L.R. 358 and *Silva vs. Lechiman Chetty* (000) 23 N.L.R. 372.

For these reasons, I would set aside the judgment under appeal and hold that the interlocutory decree for partition must be confined to so much of the land as not occupied by Maththa and his successors-in-interest. The learned District Judge has not given a definite finding as to whether this latter portion takes in the whole of Lot B or only a defined part of it. I would therefore send the record back for a direction that this issue should be decided and that an interlocutory decree must then be entered for the partition of the rest of the land depicted in plan No. 4148 among the co-owners claiming title in accordance with the pedigree proved by the plaintiff.

The appellants are entitled to the costs of this appeal and of the contest in the lower Court. The costs of the further inquiry which we now direct will be costs in the cause, and the other costs must be borne *pro rata* among the co-owners of Lot A and of any portion of Lot B which may be included in the ultimate partition.

GUNASEKERA, J.

I agree.

Set aside

IN THE COURT OF CRIMINAL APPEAL

Present : PULLE, J. (President), K. D. DE SILVA, J. AND SANSONI, J.

REG : *vs.* E. W. BATCHO

APPEAL 21 OF 1955 WITH APPLICATION 32 OF 1955
S. C. 31/*M. C. Colombo* 9899/A

Argued on : 16th, 17th, 18th & 19th May, 1955
Decided on : 31st May, 1955.

Court of Criminal Appeal—Charge of murder—Defence of sudden and grave provocation—Accused giving evidence in support—Cross-examination suggesting facts mitigating offence not mentioned by accused in statement to Police—Application in presence of jury to call Police Officer in rebuttal—Argument in absence of jury—Application disallowed—Effect of questions on jury—Evidence Ordinance, Section 25.

Penal Code, Section 294, first proviso to Exception I—Party on whom burden lies to prove matters contained in such proviso—Extent of such burden.

The appellant, who was charged with committing murder by inflicting on the deceased several stab wounds with a pointed knife gave evidence to the effect that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter.

While cross-examining him the prosecuting counsel questioned him as follows :—

Q. Did you tell a single Police Officer that the deceased had insulted you in this way?

A. Yes, to Mr. Nathan. I told him that this girl had insulted me very badly at the well and also that she spat at me at the well.

Q. I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness.

A. I told him.

At the end of the re-examination, prosecuting counsel, in the presence of the jury, moved to call Mr. Nathan to give evidence in rebuttal and in reply to a question by the learned trial Judge as to what part of the accused's evidence he proposed to rebut, stated that it was with regard to the statement that he told the Inspector that the deceased girl insulted him and spat at him when near the well.

At this stage the jury was asked to retire and after further argument the application to call this witness was disallowed. After trial the jury convicted the accused of murder and sentence of death was passed on him. On an appeal from the conviction and sentence it was contended on his behalf (*a*) that the cross-examination of the appellant on, what were in effect, the contents of a confessional statement to the Police, was contrary to Section 25 of the Evidence Ordinance ; (*b*) that the failure on the part of the learned trial Judge to direct the jury as to the party on whom lay the burden of proving the matters contained in the first proviso to Exception 1 to Section 294 of the Penal Code and the extent of that burden amounted to a non-direction which vitiated the conviction.

Held : (i) That the above questions put to the accused in cross-examination coupled with what was said by the prosecuting counsel when he moved in the presence of the jury to lead evidence in rebuttal, amounted to a contravention of Section 25 of the Evidence Ordinance.

(ii) That as the accused had adduced evidence to avail himself of Exception I to Section 294 of the Penal Code, the burden of proving positive averments which would justify the application of the first proviso to Exception I was on the Crown, and the extent of that burden was the same as and no higher than that rested on the accused who claimed the benefit of the Exception to which Section 105 of the Evidence Ordinance applies.

(iii) That the failure to give a direction on such burden of proof amounted to a misdirection.

The Court set aside the conviction and sentence and upon a consideration of the entirety of the admissible evidence ordered a re-trial.

Dr. Colvin R. de Silva, with *Daya Vithanage and G. F. Sethukavaler* for the accused appellant.
Ananda Pereira, Crown Counsel, for the Attorney-General.

PULLE, J.

The appellant was convicted on the charge that he did on the 6th October, 1954, commit murder by causing the death of one Marlene Ludowyke and was sentenced to death. There can be no doubt, indeed, it is admitted by the appellant, that on the evening of the 6th October he inflicted with a pointed knife as many as nine stab wounds on the deceased which cumulatively were necessarily fatal. The evidence called for the prosecution left no room for doubt that unless the appellant could prove the existence of mitigatory circumstances the jury had no alternative but to convict him of murder.

The appellant gave evidence and sought to bring his case within Exception 1 to Section 294 of the Penal Code which provides that culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation. Stated shortly, the appellant's story was that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter.

The first point taken on behalf of the appellant is that the learned Commissioner permitted the Crown, contrary to the provisions of Section 25 of the Evidence Ordinance, to cross-examine the appellant on what were, in effect, the contents of a confessional statement made by him to the Police. In the course of his evidence in cross-examination the appellant, after he had repeated what he had stated in the course of his examination in chief, namely, that after killing the deceased he went to the Police Station and gave himself up, was questioned as follows :—

"*Q.* Did you tell a single Police Officer that the deceased had insulted you in this way?

"*A.* Yes, to Mr. Nathan. I told him that this girl had insulted me very badly at the well and also that she spat at me at the well.

"*Q.* I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness?

"*A.* I told him."

The cross-examination proceeded and at the end of the re-examination the appellant's counsel closed the defence. Whereupon, *in the presence of the jury*, the prosecuting counsel moved to call Mr. Nathan to give evidence in rebuttal. These proceedings are recorded as follows :—

"*Crown Counsel :* I move under Section 237 to call Inspector Nathan in rebuttal. That is a matter which I specifically cross-examined the witness on. It arose, I submit, in circumstances which entitle me to lead evidence in rebuttal.

"*Court :* That is with regard to what?

"*Crown Counsel :* The accused's statement that he told the Inspector that the deceased girl had insulted him and spat at him when near the well."

At this stage, on the suggestion of counsel for the appellant, the jury retired and the argument was continued at the end of which it was ruled that the prosecution was not entitled to call the Inspector to contradict the appellant.

It is manifest, when one has regard to the state of the evidence at the point of time when the appellant was asked whether he stated to a

single police officer that he was insulted by the deceased, the jury must have received the impression that the Crown was seeking to prove that the appellant, in the course of a narrative in which he admitted to the Police that he killed the deceased, did not state the circumstances of mitigation on which he relied at the trial to avoid a verdict of murder. It is true that the prosecution did not in terms prove the confession as was done in *Rex vs. Seyadu* (1951) 53 N.L.R. 251, but that is not essential in order to give effect to the prohibition contained in Section 25 of the Evidence Ordinance. In *Reg. vs. Obiyas Appuhamy* (1952) 54 N.L.R. 32, evidence was led to the effect that the prisoner volunteered a statement to a police officer, who, thereupon, immediately handcuffed him and took him to the scene of the offence. The Court of Criminal Appeal held that evidence was inadmissible on the ground that, if it had been accepted, it would have led to the inference that the prisoner had made a confession to a police officer.

In the present case, although the police officer to whom the appellant made a statement was not allowed to be called, yet from what was said by the prosecuting counsel during the cross-examination—" I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness "—and at the time he moved to lead the evidence of Mr. Nathan in rebuttal the jury may well have come to the conclusion, especially in the absence of a caution by the trial Judge, that the appellant's story in mitigation of the crime committed by him ought not to be believed. Viewed in this light the present case is hardly distinguishable from *King vs. Kalu Banda* (1912) 15 N.L.R. 422. The observations of Lascalles, C.J., at p. 426 are particularly apposite:

> " For so far as the probative effect of the evidence is concerned, there is little difference between a police officer giving the particulars of a statement which is inconsistent with the defence and his stating in general terms that the accused, in his statement to him, did not mention the defence which he afterwards set up. The evidence in either case tells heavily against the accused. In many cases it will turn the scale against him."

In our opinion the appellant succeeds on the submission that the questions put to him in cross-examination to which exception has been taken coupled with what was said by counsel when he moved, in the presence of the jury, to lead evidence in rebuttal, amounted to a contravention of Section 25 of the Evidence Ordinance.

The second point taken on behalf of the appellant arises out of an alleged non-direction as to the party on whom lies the burden of proving the matters contained in the first proviso to Exception 1 and the extent of that burden. Section 294 states that Exception 1 is subject to the proviso.

" That the provocation is not sought or voluntarily provoked as an excuse for killing or doing harm to any person."

There were broadly speaking three major facts on which the prosecution was able to rely in order to prove that when the appellant went to the house of the deceased he had already formed the intention of killing her and putting an end to his own life.

The appellant had cause to resent the conduct of the deceased in transferring her affections to one Ivor Martinez after encouraging the appellant to believe that she would marry him. Secondly, on the day in question, he paid a visit to the house of the deceased armed with a dangerous lethal weapon which was actually used in killing her, and thirdly, in the letter P2 he had set down his alleged grievances against the deceased and virtually pronounced a sentence of death against her. The position taken up by the appellant was that at the time he went to the house of the deceased he did not have the slightest intention of killing her and that the letter was meant merely to frighten her. Admittedly the appellant was in the house for a considerable time, from 1-30 p.m. till about 4 p.m. when the stabbing occurred. He returned a pair of ear studs belonging to the witness Miss M. C. Klyn, then living in the same house as the deceased. The pair of ear studs had by mistake been left behind by Miss Klyn on a visit to the house of the appellant the previous evening. The appellant stated in evidence that the deceased threw a cup of tea at him and that later when he attempted to speak to her in the corridor of the house she burnt him with an iron which she was carrying. On neither occasion did he do anything in retaliation. The letter P2 was delivered to the deceased after she had finished washing her face at the well preparatory to attending a service at Church. According to the appellant when she had read the letter half way she turned to run away with it and he asked her to return it lest if it fell into the hands of the Police he would have to go to jail. There was in the evidence called for the prosecution support for the statement of the appellant that he was burnt in the arm and that after he delivered the letter P2 to the deceased he requested her to return it for fear that he might fall into trouble.

In the earlier portions of the summing up the trial Judge explained to the jury the extent of the burden resting on an accused person who seeks to avail himself of Exception 1. He did not then refer to the first proviso to the Exception. Having reviewed the evidence in con-

siderable detail he again referred to the Exception but this time he added that it was subject to the proviso which he then read out and continued his charge as follows :—

" Even if the deceased used those words and they amounted to grave and sudden provocation, and even if the accused was deprived of the power of self-control, still if you find that that provocation had been sought by the accused or voluntarily provoked as an excuse for killing or doing harm to any person, then the accused cannot have the benefit of this Exception, that is, his offence cannot be reduced from murder to culpable homicide not amounting to murder.

" There, again, you will have to consider his letter. Consider that paragraph which I read to you earlier, " The more I see you the more you appear in my eyes an object of contempt." The accused says he did not mean all this, but he gave the letter to this girl, and if the girl read this and if she used those words, the question is if there was any provocation whether that provocation was sought by the accused or voluntarily provoked by the accused. By voluntarily is meant this : " A person is said to cause an effect voluntarily when he causes it by means whereby he intended to cause it, by means which at the time of employing those means he knew or had reason to believe to be likely to cause it."

" The accused has written this letter and given it to this girl to read it, but he told you he did not intend all this. Are you going to believe all this ? Again, if this was going to bring about some sort of reaction on the girl can you say that the accused did not know that that sort of reaction would be likely to result or not, or can you say he had no reason to believe that that would result ? "

It was contended on behalf of the appellant that it was the duty of the trial Judge to have directed the jury that the burden was on the Crown to prove the facts necessary for the application of the proviso and that that burden could only be discharged by proof of those facts beyond all reasonable doubt. Learned Counsel on both sides have told us that they have not been able to find any discussion of this topic in any text book or decided case. We have, therefore, in the absence of any guidance, to apply the ordinary rule enunciated in section 103 of the Evidence Ordinance that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence. We hold that once an accused person has adduced evidence which, if believed, would entitle him to ask for a verdict of culpable homicide not amounting to murder under Exception 1 (read without the provisos), he can be deprived of that verdict only upon proof, the burden being on the Crown, of positive averments which would justify the application of the proviso. There is no burden on an accused person to prove the *absence* of circumstances that would render the proviso inapplicable. We are fortified in this view by a consideration of the second and third provisos. We are unable to accept the submission that the Crown has to prove beyond reasonable doubt the facts necessary for the application of the proviso, because proof of that standard is only required of the ingredients high which constitute *prima facie* the offence of murder. The proviso itself is part of the Exception and the extent of the burden on the Crown on the proviso is the same as and no higher than that resting on an accused person who claims the benefit of the Exception to which Section 105 of the Evidence Ordinance applies.

In our opinion the evidence, especially that of the appellant, required a direction to the jury that the burden was on the Crown to bring itself within the first proviso. The failure so to direct amounted to a misdirection.

The result of the improper questioning of the appellant in regard to what he is alleged not to have told the Police and the non-direction to which we have just adverted would compel us to set aside the conviction and sentence, unless we act under the proviso to Section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938, and dismiss the appeal. The Crown argues that this is a proper case for applying the proviso and dismissing the appeal and the appellant asks us to alter the conviction to one of culpable homicide not amounting to murder. We are unable to accede to either request. Upon a consideration of the entirety of the admissible evidence we cannot say in the words of Viscount Simon in *Stirland vs. Director of Public Prosecutions* (1944) A.C. 315, that " a reasonable jury, after being properly directed would, on the evidence properly admissible, without doubt convict." On the other hand the fact that the appellant went to the house of the deceased specially armed with a knife after putting down in writing that his intention was to kill the deceased and that Miss Klyn, who must be regarded as a disinterested witness, was unable to speak to any abuse or insult or other provocative act on the part of the deceased immediately preceding the attack on her and also the number and severity of the injuries inflicted are sufficient grounds for directing a new trial.

Accordingly we set aside the conviction and sentence and direct a new trial.

Set aside and new trial ordered.

Present : GRATIAEN, J., SWAN, J., K. D. DE SILVA, J., SANSONI, J., FERNANDO, J.

PERERA *vs.* MUNAWEERA, (FOOD AND PRICE CONTROL INSPECTOR.)

S.C. No. 1176—M.C. Colombo No. 57397.

Argued on : 26th May, 1955
Delivered on : 6th June, 1955

Criminal Law—Statutory offence—Mens Rea—*Accused charged with offence of selling bread in excess of control price in breach of Price Order under Control of Prices Act No. 29 of 1950—Sale above prescribed price absolutely prohibited by the Order—Evidence of honest belief by accused that sale did not violate the Order—Mistake of fact—Is it a defence to the charge ?—Section 72, Penal Code—Applicability of—Can a subsequent Collective Bench overrule a wrong decision of a previous Collective Bench ?—Section 51, Courts Ordinance.*

Held : (1) That where a person is charged with the offence of selling bread in excess of the price prescribed by a Price Order, which prohibited absolutely such sale, he is entitled to an acquittal, if he can prove on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not prohibited by law.

(2) That the defence available under Section 72 of the Penal Code is applicable not only to offences punishable under the Penal Code but also to offences punishable under all other criminal statutes enacted in Ceylon, even if the definition of the offence does not contain a particular state of mind or knowledge as one of its elements.

Per GRATIAEN, J.—"Even if the decision of a Collective Bench properly constituted under Section 51 of the Courts Ordinance is wrong, it cannot subsequently be over-ruled by even a subsequent Collective Bench, far less by a Bench to which an appeal has been referred under Section 48A (of the Courts Ordinance)."

Cases referred to : *Perumal vs. Arumagam* (1939) 40 N.L.R. 532 (disapproved).
Letchman vs. Murugappa Chettiar (1936) 39 N.L.R. 19.
Weerakoon vs. Ranhamy (1921) 23 N.L.R. 33.
King vs. Chandrasekera (1942) 44 N.L.R. 97.

H. V. Perera, Q.C. with *A. B. Perera*, for the appellant.
H. A. Wijemanne, C.C. with *V. T. Thamotheram, C.C.* and *V. S. A. Pullenayagam, C.C.* for the Attorney-General.

The judgment of the Court.

This appeal was reserved for the decision of a Bench of five Judges under the provisions of Section 48A of the Courts Ordinance.

The appellant was charged with having sold a loaf of bread purporting to weight 16 ounces, but in fact weighing only $15\frac{1}{4}$ ounces, at a price which was 17/32 cents in excess of the maximum control price fixed under a Food Price Order in force at the time ; this sale, it was alleged, constituted a contravention of Section 8 (1) of the Control of Prices Act No. 29 of 1950 and was punishable under Section 8 (6) of the Act.

The appellant admitted the bare facts relied on by the prosecution—namely, that the loaf of bread weighed slightly less than 16 ounces and that the price charged was accordingly in excess of the controlled price. He gave evidence, however, to the effect that, as a responsible person employed by a reputable bakery, he had taken all reasonable precautions to avoid selling bread at a price beyond the controlled price ; that he honestly believed that the weight of the offending loaf was in fact 16 ounces, and that, in demanding and receiving 26 cents for its sale, he acted in good faith and intended to charge only what was in truth the controlled price fixed for a 16 ounce loaf. In other words, he set up a defence under Section 72 of the Penal Code the relevant provisions of which are as follows :—

> " 72. Nothing is an offence which is done by any person who . . . by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it."

The learned Magistrate did not reject the appellant's version of the circumstances relating to the sale. He took the view, however, that the Food Price Order in question contained words of absolute and unqualified prohibition, and that in regard to such offences, as in England, the defence of " *bona fide* mistake of fact " was not available to an accused person against whom the commission of the *actus reus* had been established. In reaching this conclusion, the learned Magistrate adopted the *ratio decidendi* of Soertsz, J's judgment in *Perumal vs. Arumugam* (1939)

40 N.L.R. 532. In that case a person charged under Section 28 of the Poisons, Opium, and Dangerous Drugs Ordinance (Cap. 172) explained by way of defence that his possession of an article containing ganja was due to a *bona fide* mistake of fact. Soertsz, J. decided that Section 72 of the Penal Code was not applicable to offences punishable under Section 28 of the Ordinance because :

> " 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 without any *mens rea* ". The Poisons, Opium, and Dangerous Drugs Ordinance is such an Ordinance."

It was argued before us that this decision was wrong, and that it is in conflict with the earlier judgment of the same distinguished Judge in *Letchman vs. Murugappa Chettiar* (1936) 39 N.L.R. 19. In that case the accused was charged with plying an omnibus along a route not approved by the licensing authority. His defence was he honestly believed that he had a valid license authorising him to proceed along the particular route. Soertsz, J., in quashing the conviction, said :

> " The accused has given evidence and his defence is that he had not been informed, and he was not aware that the licensing authority had withdrawn his approval of a section of the route. There is no reason whatever for rejecting the accused's evidence on this point. The only question is whether his defence is good in law. I am of opinion it is. In *Weerakoon vs. Ranhamy* (1921) 23 N.L.R. 33, a Bench of four Judges considered the question of *mens rea* in relation to our law. They held that Section 72 of the Penal Code which enacts that " nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law in doing it " applies to all enactments alike, including those enactments which impose absolute obligations. The English law drew a distinction and made the plea of absence of *mens rea* inoperative in the case of charges framed under " certain exceptional enactments containing prohibitions which are interpreted as unqualified ". Our law knows no such distinction."

In our opinion this passage correctly sets out the general principle as to the applicability of Section 72 of the Penal Code not only to offences punishable under the Penal Code but also to offences punishable under all other criminal statutes enacted in Ceylon. Section 38 (2) of the Code unambiguously declares that the word " offences " in Chapter 4 of the Code (dealing with " General Exceptions ") includes " a thing punishable in Ceylon under any law other than this Code ". Accordingly, Section 72 equally applies to every statutory offence even if the definition of the offence does not contain a particular state of mind or knowledge as one of its elements. *Weerakoon vs. Ranhamy* (1921) 23 N.L.R. 33. It is therefore wrong to say that the rule laid down in Section 38 of the Code in its present form is " not inflexible ". Where the definition of an offence contains words of absolute and unqualified prohibition, the prosecution need only establish beyond reasonable doubt the commission of the prohibited act, and it is not required in addition to establish that the accused acted with any specific intention or knowledge. But this does not mean that in such a case of the former type the accused is to be denied the right to plead any of the general exceptions set out in Chapter 4 of the Code. The accused will therefore be entitled to an acquittal if he can prove on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not prohibited by law. The accused must, of course, prove affirmatively the existence of each of these circumstances, and he will not be entitled to the benefit of Section 72 if he fails to do so, or merely leaves that issue in doubt. *The King vs. Chandrasekera* (1942) 44 N.L.R. 97.

Learned Crown Counsel conceded that these principles are in accord with the rule unanimously laid down by a Full Bench of this Court nearly 34 years ago in *Weerakoon vs. Ranhamy* (1921) 23 N.L.R. 33. He invited us, however, to hold that that case had been wrongly decided, and that the general observations as to the applicability of Section 72 of the Code to all statutory offences were *obiter dicta*. We are quite unable to take this view. The observations referred to were considered by all the Judges to be strictly necessary for their ultimate decision, and therefore constituted an essential part of its *ratio decidendi*. The Court unanimously agreed, as a preliminary to its conclusions, that Section 72 of the Code did apply to proceedings under the Forest Ordinance, but the majority of the Judges then proceeded to hold that on the evidence the mistake relied on was one of law and not of fact. Even if the decision of a Collective Bench properly constituted under Section 51 of the Courts Ordinance is wrong, it cannot subsequently be over-ruled by even a subsequent Collective Bench, far less by a Bench to which an appeal

has been referred under Section 48A *vide Jane Nona vs. Leo* (1923) 25 N.L.R. 241.

We were invited to consider the undesirability of Section 38 of the Code making Section 72 inflexibly applicable to offences to which, under modern conditions, Parliament may, in the interests of justice, consider the defence of *bona fide* mistake to be inappropriate. This argument does not impress us. In such a contingency, it is always open to Parliament to enact that, in any particular criminal statute, Chapter 4 of the Penal Code or any part of it shall not apply: Section 38 (2) would then stand repealed or amended to that extent. No such appeal or amendment having been enacted in the case of offences punishable under the Control of Prices Act No. 29 of 1950, it was not open to the learned Magistrate to convict the appellant unless he rejected the appellant's evidence that he believed in good faith, and by reason of a mistake of fact, that he was justified in law in charging 26 cents for a loaf of bread which he honestly but erroneously believed to be 16 ounces in weight. We allow the appeal and quash the conviction.

Appeal allowed.

Present : SANSONI, J.

WARAWITA *vs.* JANE NONA

S. C. 1563/*Additional Magistrate's Court, Colombo, No.* 20040

Argued on : 28th October, 1954
Decided on : 2nd November, 1954

Maintenance—Illegitimate children—Absence of corroboration—False statement of the defendant—Does it remove any doubt?—Maintenance Ordinance, Section 6.

Where the evidence of a mother claiming maintenance for her children is not adequately corroborated by the only other witness and the defendant's own evidence consisted of false statements,

Held : That the false statements made by the defendant remove any doubts that may have existed on the question of corroborative evidence.

H. V. Perera, Q.C. for the defendant-appellant.
No appearance for the applicant-respondent.

SANSONI, J.

This is an appeal by the defendant against an order which condemned him to pay maintenance for four illegitimate children born to the applicant. The applicant's case briefly was that she had worked for some time as a domestic servant for the defendant and his family in the latter's house in Ambalangoda till 1938, when she went to live in a house on a small land of 10 acres belonging to him at Porowagama. She said that she was placed in charge of that land by the defendant and while she was there he often visited her and even stayed with her in that house; she claimed to have been his mistress for some years. About 1947, according to her, one Sadiris came to live in that house at the instance of the defendant, and she and Sadiris then lived there as man and wife till 1951 and she had three children by Sadiris before they were turned out of the land by the defendant. In 1953 she instituted these proceedings asking for maintenance for four children aged, 12, 10, 8 and 5 years respectively who she said were the defendant's children. The applicant produced a post-card of 1950 and a letter of 1941 said to have been received by her from the defendant: they contain instructions regarding the working of the land such as would normally be sent by an estate owner to one in charge of his estate. I shall have to refer again to these documents.

The defendant's position was that the applicant first came to work on his land in 1945 together with Sadiris and that she did so because her elder sister and brother-in-law were already there from 1941. He first said that he used to write to the applicant's sister but not to the applicant, but he later changed his story by saying that he wrote the post card of 1950 to the applicant and the letter of 1941 to her sister. I should add that the person addressed in both writings is Jane. He denied that the applicant had ever been his mistress.

In order to corroborate her evidence the applicant called a witness Parlis who lives about 9 miles away from that land. Parlis said that the defendant brought the applicant to live on that land from his house in Ambalangoda, that she was living alone on the land and was frequently

visited by the defendant, and that she had four children by him. He also said that the defendant once told him that he would board and educate these children. According to Parlis, Sadiris was brought by the defendant to live on the land some time after the applicant had come there.

The learned Magistrate held that the defendant was the father of the four children in question and that he had been maintaining them from their birth until 1951. He clearly preferred to believe the applicant and Parlis rather than the defendant. It was submitted for the defendant that the evidence of the applicant as to paternity had not been corroborated, but I think that the evidence of Parlis affords some corroboration though not perhaps of a very weighty nature. I agree that as the defendant was the owner of the land on which the applicant was living he could well have visited the land frequently, given instructions to applicant as to its working, and treated her and her children generously, consistently with his position as owner. This case should not lead estate owners in general to feel that if they adopt a generous attitude towards their employees, and pay regular visits to their lands, they would find themselves in the same position as the defendant.

But there is an aspect of the evidence given by the defendant, as compared with that given by the applicant, which seems to me to be decisively in the applicant's favour. It is clear that the defendant was not speaking the truth when he said that the applicant came to live on this land only in 1945, that it was to the applicant's sister and not to the applicant that he sent the written instructions regarding the working of the land in 1941, and that the applicant was known as Caroline and came to be known only later as Jane. In themselves these details were not very important, and if the defendant had spoken the truth in regard to them it might have been difficult to say that the relationship between him and the applicant was anything more than that of an employer and employee. Parlis' evidence might then have been of a merely equivocal nature and it may well have been argued that the evidence established only the mere opportunity for intimacy. The situation is different when it becomes clear that the defendant has been lying on these matters. He has attempted to disclaim any knowledge of the applicant prior to 1945, obviously in order to render it impossible for him to be the father of the two elder children, and highly improbable that he is the father of the two younger children.

It is in such a situation that the dictum of Lord Dunedin in *Dawson vs. Mckenzie* (1908) S.C. 648, quoted by Lawrence, J., in *Jones vs. Thomas* (1934) 1 K.B. 323, serves as a valuable guide, for he said: "Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defendant which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made". Lord Hewart, L.C.J., in *Jones vs. Thomas* (*supra*) said: "As I read those dicta it is only when the untrue statements are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother that they can be regarded as corroborative evidence, and not that the mere fact of the alleged father having knowingly made false statements is in itself corroboration within the statute". More recently Lord Goddard, L.C.J., in *Credland vs. Knowler* 35 Criminal Appeal Reports, quoted these dicta and said: "In other words one has to look at the whole circumstances of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence and the nature of the lie that was told". In this case the learned Magistrate was satisfied that the applicant's evidence was corroborated and to quote Lord Goddard again: "What this Court has to decide is whether or not there was evidence which could corroborate the evidence of" (the applicant) "because, if there was such evidence, it was for the appeal committee to decide whether they regarded it as corroboration. That is always the position when an appeal is brought on the question of corroboration, whether in a case tried before a jury or by justices. It is not for this Court to say whether the tribunal of fact ought to be satisfied. We have to decide whether the evidence given is such as in law can be regarded as corroboration; and it is for the tribunal of fact, the jury or justices, whichever it may be, to decide for themselves whether it did corroborate".

Applying these principles, I think the false statements made by the defendant remove any doubt that may have existed on the question of corroborative evidence, and I dismiss this appeal.

Appeal dismissed.

Present : DE SILVA, J. AND SANSONI, J.

THAMBI PILLAI *vs.* CANAGARATNE

S. C. Nos. 53-54—*D. C. (Inty) Jaffna No.* 4398

Argued on : 12th, 15th and 18th November, 1954
Decided on : 29th November, 1954

Civil Procedure Code, Sections 232, 350 *and* 352—*Concurrence—Money deposited in Court by sale in execution of decree on primary mortgage—Balance, after satisfying primary mortgagee seized by judgment creditors including secondary and tertiary mortgagees of the land sold—Applications by some seizing creditors to transfer sums of money to the credit of their actions to satisfy their claims—Order by Court after inquiry that only seizing creditors who had applied for transfer of money entitled to concurrence—Validity of such order.*

Held : That where no order in favour of any particular seizing creditor had been made, all judgment-creditors who had effected seizures are entitled to share in the money deposited to the credit of a case after execution of a decree and they all had the same right to claim concurrence under sections 350 and 352 of the Civil Procedure Code.

Per SANSONI, J.—" On the contrary, the basis of the decision in *Shaw & Sons vs. Sulaiman* (*supra*) is that a judgment-creditor who applies for execution is not shut out from claiming concurrence so long as the money lying in the custody Court has not been appropriated to a particular decree holder or holders by an order of that Court ".

Cases referred to : *Mendis vs. Peris* 18 N. L. R., p. 310.
Shaw & Sons vs. Sulaiman 29 N. L. R., p. 481.
Wijesekera vs. Rawal 20 N. L. R., p. 126.
Pathinayake vs. Wickremesinghe 25 N. L. R., p. 102.

S. J. V. Chelvanayagam, Q.C., with *M. Rafeek*, for appellants in S.C. 53.

S. J. V. Chelvanayagam, Q.C., with *A. Nagendra*, for appellants in S.C. 54.

A. C. Nadarajah, for 1st respondent in S.C. 53 and for 2nd respondent in S.C. 54.

T. W. Rajaratnam, for 2nd respondent in S.C. 53 and for 3rd respondent in S.C. 54.

C. Manohara, for 3rd and 6th respondents in S.C. 53 and for 4th to 7th respondents in S.C. 54.

SANSONI, J.

A hypothecary decree was entered in this action on 16-6-48 in favour of two primary mortgagees and by order of Court the land mortgaged was sold by a Commissioner. The primary mortgagees claim has been satisfied and the money in Court is the balance left over out of the proceeds of the sale. After this money was deposited in Court seizure notices under section 232 of the Civil Procedure Code were forwarded to the Court by the Fiscal on behalf of three classes of judgment creditors, viz., unsecured creditors holding money decrees of the same Court, unsecured creditors holding money decrees of another Court, and secondary and tertiary mortgagees of the land sold, who had obtained hypothecary decrees prior to the sale but subsequent to the entering of the decree upon the primary mortgage. Some of the seizing creditors went a step further and applied in this action that sums of money be transferred to their actions to satisfy their claims. The District Judge very properly directed that the parties and all the seizing creditors be given notice of such applications. Ultimately an inquiry was held into the claims of all the seizing creditors and the learned Judge held that only those seizing creditors who had applied for a transfer of money from this action to their respective actions could claim concurrence. He appears to have thought that this result followed from the decisions in *Mendis vs. Peris* (18 N.L.R. p. 310) and *Shaw & Sons vs. Sulaiman* (29 N.L.R. p. 481). The secondary and tertiary mortgagees have appealed and Mr. Chelvanayagam has pressed only their claim to concurrence. He said he was not claiming preferential payment out of the money in Court. Mr. Nadarajah, however, has contested the appellants' claims even to concurrence.

I do not think the decisions cited have established the proposition on which the learned Judge based his order. On the contrary, the basis of the decision in *Shaw & Sons vs. Sulaiman* (*supra*) is that a judgment creditor who applies for execution is not shut out from claiming concurrence so long as the money lying in the custody Court has not been appropriated to a particular decree holder or holders by an order of that Court. No such order had been made in this case prior to the

inquiry. There is nothing in either section 350 or section 352 to indicate that an application for transfer of the money, such as had been made by the respondents to these appeals, confers any particular privilege on a judgment creditor. The esential order of appropriation had not been made. The position then is, that all the judgment creditors had effected seizures, and since no order in favour of any particular seizing creditor had been made they were all entitled to share in the money and they all had the same rights. The latter part of section 350 seems to govern the matter. The seizing creditors had notified the Court of their claims to the money, and the Court rightly caused notices to issue to all of them before making any order as to payment. The justice of the case requires—and that is the test laid down in the section—that all the seizing creditors, including the appellants, should share rateably.

But Mr. Nadarajah also relied on the rule enunciated by De Sampayo, J., in *Wijesekera vs. Rawal* (20. N.LR. p. 126) that a mortgagee who has obtained a hypothecary decree should first realize the property mortgaged and can resort to other property of the debtor only for any deficiency, unless the debtor consents otherwise. He submitted that although the land sold under the decree in favour of the primary mortgagee had been mortgaged on the secondary and tertiary bonds, other lands had also been mortgaged and the appellants should first sell those other lands before they claimed concurrence in the proceeds of sale of the land sold. I think there are two answers to this submission. Firstly, it cannot be said that the appellants are seeking to resort to property which has not been mortgaged to them. The land sold was subject to secondary and tertiary mortgages in favour of the appellants, and by claiming to share in the money in Court, which was brought there by the sale of the land, they do not seem to me to be offending against the rule in question. It is not, in my opinion, " either property of the debtor " within the meaning of the rule. Secondly, that rule was obviously introduced for the benefit of the mortgagor whose unsecured property it was probably intended to protect. This aspect of it is emphasised by the words " unless the debtor consents otherwise." If the rule was introduced to protect other creditors of the mortgagor, obviously it could not have been open to the mortgagor to waive it. I therefore do not think this objection can be taken by the respondents who are creditors of the mortgagor. I would also draw attention to the reservation made by De Sampayo, J., to which Schneider, J., referred in *Pathinayake vs. Wickremesinghe* (25 N.L.R. p. 102) viz., that there might be good reasons for a Court not enforcing the general principle that the mortgaged property should be first discussed. It is only too obvious that if the money lying in Court is drawn by the other creditors, the appellants will lose a great part of their security, and if they have to proceed against the other mortgaged lands first it will be too late for them to claim concurrence. The decrees entered in favour of the appellants first direct the debtors to pay the amounts due under the bonds, and are in that respect like any money decrees ; they then direct that in default of such payment the mortgaged lands (including of course the land sold under the primary mortgage) should be sold. The appellants are doing no more than levying execution under the first part of their decrees.

For these reasons I would set aside the order of the learned Judge so far as it rejects the claims of the appellants. They will be entitled to share the money in deposit along with the seizing creditors in whose favour the learned Judge has already held. The appellants are entitled to recover their costs of these appeals from the 1st, 2nd, 3rd and 6th respondents in appeal No. 53, and the 2nd to 7th respondents in appeal No. 54. The order of the learned Judge as to costs in the District Court will stand.

DE SILVA, J.

I agree.

Set aside.

Present : GRATIAEN, J. AND FERNANDO, J.

SHIVAGURUNATHAN AND OTHERS *vs.* VISALADCHI AND OTHERS

S. C. No. 482 *of* 1951—*D. C. Jaffna No.* 1105/L

Argued on : 4th, 7th and 9th June, 1954
Decided on : 21st June, 1954

Thesawalamai—*Pre-emption—Who is entitled to—Owner of share subject to life interest of predecessor in title—Is he a " partner " within meaning of Part* 7 *of Section* 1 *of Ordinance No.* 5 *of* 1869 *Chap.* 55).

The word " partner " in Part 7 of Section 1 of the *Thesawalamai* Ordinance (Chap. 55) is confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property. Hence a person who is the owner of a share, subject to the life interest of another is not entitled to the right of pre-emption.

Selvaratnam vs. Sabapathy 2 Times 139 (distinguished).

H. V. Perera, Q.C. with *C. Shanmuganayagam*, for the appellants.
S. J. V. Chelvanayakam, Q.C. with *C. Renganathan*, for the 7th and 8th defendants-appellants.
C. Thiagalingam Q. C. with *H. W. Thambiah* and *S. Sharvananda*, for the plaintiff-respondents.

GRATIAEN, J.

This was an action for pre-emption under the *Thesawalamai*. The plaintiffs claimed to have purchased an undivided 1/2 share of two properties by P14 dated 17th August, 1943, subject to a life-interest in their predecessor-in-title Arunachalam. Three months later, Arunachalam conveyed his life-interest to them by P15 dated 24th November, 1943.

The plaintiffs' complaint was that the 7th and 8th defendants had purchased the remaining half-share of the properties *either* from the 4th and 6th defendants (by P18 dated 21st November, 1943) *or* from the 1st and 2nd defendants (by P8 dated 22nd November, 1943). They were presumably uncertain as to whether the title to this share had in truth belonged to the purported vendors under P18 or to the purported vendors under P8, but they claimed that in either event the conveyance had been executed without notice to them in derogation of their rights as " partners " under the *Thesawalamai*. They accordingly asked for a decree for pre-emption (binding on both groups of purported vendors) whereby, on payment of such consideration as may be fixed by the Court, they should be substituted as purchasers of this share in the place of the 7th and 8th defendants who were admittedly " strangers ".

The learned District Judge entered a decree (1) declaring the plaintiffs entitled to pre-empt the share conveyed to the 7th and 8th defendants under P8 dated 22nd November, 1943 (*i.e.* on the basis that it was the 1st and 2nd defendants who had title to this share), (2) declaring that the 4th and 6th defendants had no title which they could have conveyed under P18.

I shall assume (without deciding) for the purposes of this appeal that the learned Judge's findings as to title were correct. We are also bound by an earlier judgment of this Court (reported in 51 N.L.R. 500) rejecting the plea that the action was bad for misjoinder of parties and causes of action.

Mr. Chelvanayakam submitted for our consideration the argument (which was supported by Mr. Perera) that, even upon the basis of the learned Judge's findings, the plaintiffs did not possess at the relevant date (*i.e.* 22nd November, 1943, when P8 was executed) the requisite qualifications entitling them to exercise rights of pre-emption under *Part 7 Section* 1 of the *Thesawalamai* (Cap. 51). Admittedly they were not the " heirs " of either group of vendors who had purported to sell a share of the property to the 7th and 8th defendants ; nor were they adjacent landowners with hypothecary rights over the common property. The only question, therefore, is whether on 22nd November, 1943, by virtue of the earlier conveyance P14 dated 17th August, 1943, in their favour, they were " partners " who could impugn the sale of the share to a " stranger " by the other " partners ". I have already pointed out that their title to that property was at that time subject to the rights of Arunachalam who (according to the learned Judge's findings) in fact continued to exercise them until he transferred his life-interest to the plaintiffs' *after the date of the impugned sales.*

The question is whether a person whose title to a share in a common property is limited by the usufructuary rights enjoyed by someone else is a " partner " within the meaning of *Part 7 Section* 1 of the *Thesawalamai*. The view which I have formed is that in this context the word " partners " is necessarily confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property. Voet has explained why the Roman-Dutch law has rejected the *jus retractus legalis* (based on custom) —because " it is a deviation from the common law and also to freedom of commerce " (18.3.9) ; in another passage, he describes it as " a thing odious or at least *not to be aided by favourable interpretation* ". In Ceylon, as I observed in *Sivapiragasam vs. Vellaiyan* (1954) 55 N.L.R. 300, there is no justification for extending the principle of a customary law (under the *Thesawalamai*) *beyond the purposes which it is intended to serve.*

The rights of pre-emption recognised by the *Thesawalamai* trace their origin to the methods of cultivation originally adopted by the persons whom it governed. If an owner desired to sell

his property, his "heirs" had a prior claim to purchase it so that it might continue to be enjoyed and cultivated for the benefit of the family as a unit. Similarly, co-owners could, by exercising their right of pre-emption, exclude "strangers" from the intimate relationship of the co-parcenary group. Again, the only form of mortgage known to the *Thesawalamai* was a transaction whereby the creditor possessed and enjoyed his debtor's land (or share) until the loan was repaid; for that reason, the mortgagee neighbour was entitled to pre-empt the land rather than permit it to go to a stranger. In each instance, therefore, the underlying principle is evident. I am therefore satisfied that a person who himself has no present right to claim admission within the "community" lacks the essential qualification for demanding the exclusion of some other "stranger" from the enjoyment (by purchase) of co-proprietary rights.

From a practical point of view, a member of a co-parcenary unit of cultivators would always know who precisely were the "partners" in the enterprise whereby they collectively enjoyed the profits of the common property by their joint exertions. But, particularly in former times when no modern system of registration of titles was in force, persons subject to the *Thesawalamai* would have found it virtually impossible to trace the identity of strangers claiming interests in the common property (short of full co-proprietorship) who had not previously been admitted into the group of co-sharers. Indeed, I doubt if transactions whereby a man who purchased a share in land subject to a life-interest in favour of someone else were ever contemplated at a time when these customary laws were first introduced into the province of Jaffna. I conceive therefore that the rights of pre-emption preserved by the *Thesawalamai* should not be extended so far as to meet situations which were entirely foreign to that system of law.

Nagalingam, J. has pointed out in the earlier appeal in this case (51 N.L.R. 500) that a co-owner's right of pre-emption under the *Thesawalamai* "must be deemed to be based upon an implied contract whereby the co-owners are jointly bound to one another, and the co-owners in this view of the matter become joint contractors in regard to the enforcement of this obligation". This analysis admirably describes a system of cultivation whereby persons work together on the common land and share the profits accruing from their joint exertions, each of them recognising the desirability of ensuring that, if possible, the "partnership" based on mutual confidence should be preserved as an entity even if one of its members desires to break away. But the theory of an implied contract would be reduced to an absurdity if we were to assume that it equally applies to persons like the plaintiffs who were in fact complete strangers to the actual "partnership". I fail to see how a true "partner" can reasonably be required by custom to give notice of his intentions to an implied quasi-"partner" of whose rights he was totally unaware.

In my opinion, the facts which the plaintiffs claim to have established at the trial destroy the foundation of their cause of action, and for this reason I would allow both appeals and dismiss the plaintiffs' action with costs in both courts. The plaintiffs did not possess the requisite qualifications for pre-empting the 7th and 8th defendants' share on 21st or 22nd November, 1943, and it is therefore unnecessary to adjudicate upon the other disputes as to title which arose at the trial.

FERNANDO, A.J.

I agree. I would like to add that *Selvaratnam vs. Sabapathy* 2 Times 139, which was cited for the respondents does not deal with the question now under consideration. That was a case where the claim of the plaintiffs to be co-sharers was disputed on the ground that, their mother being yet alive, they were not entitled to the share claimed by them and therefore not entitled to a right of pre-emption. Reference was made to *Section 9 of Part 1* of the *Thesawalamai* and to the custom that the sons divide the acquired property of the parents when the latter become incapable by age of administering it. It was held that in accordance with this custom the plaintiffs had become entitled to their mother's share in the property, and their duty to maintain her did not disentitle them to the right of pre-emption. In that case, unlike in the present one, the plaintiffs had title and possession unqualified by the reservation in favour of someone else of a life-interest in the property. They were *de facto* "partners" of the other co-owners in a very complete sense.

Appeals allowed.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

Present : GRATIAEN, J.

EVELYN BEATRICE DE SILVA AND ANOTHER *vs.* MERVYN FERNANDO

Application No. 256—*C. R. Panadura No.* 13782

In the matter of an application under Section 753 *Chapter* 86 *of the Legislative Enactments of Ceylon*

Argued on : 19th January, 1955
Decided on : 24th January, 1955

Costs—Bill of—Proctor resident within four miles from Courts summoned as witness—Payment made to compensate for loss of professional income while attending Court—Is the amount of such payment recoverable as part of costs incurred by successful litigant.

Payment made to a Proctor, who was summoned as a witness and who resided within 4 miles of the precincts of the Court, to compensate him for the loss of his professional income, while attending the Court in obedience to the summons, is not an expense which the unsuccessful party to a litigation can be compelled to meet.

Cecil de S. Wijeratne in support.
Vernon Wijetunge for the respondent.

GRATIAEN, J.,

This application relates to a dispute concerning the taxation of costs as between party and party in an action in the Court of Requests of Panadura. The respondent, who had been awarded costs in a decree in his favour against the petitioner, claimed that sums amounting to Rs. 157/50 paid to two witnesses were permissible items in his bill of costs. The witnesses concerned were proctors, but had given evidence at the trial as private citizens, so that no question of payment of fees to expert witnesses arises for consideration.

Both witnesses resided within 4 miles of the precincts of the Court, so that they were liable to attend the Court on summons without pre-payment or guarantee of travelling or other expenses. Nevertheless, the learned Commissioner allowed the retention in the taxed bill of costs of " batta " at the rate of Rs. 31/50 per day to each witness. He stated that it was customary in his Court to allow the payment of " batta " at this rate to lawyer-witnesses, and that he did not wish to interfere with " the usual practice."

The scale of costs as between party and party in actions in the Court of Requests is laid down in Part 3 of the Second Schedule of the Civil Procedure Code. " Witnesses' expenses " are no doubt payable " as the Commissioner may determine ", but in this case the payments do not purport to represent any " expenses " incurred by either witness, but were made apparently to compensate him to some extent for the loss of his professional income while attending the Court in obedience to the summons. That is not an expense which the unsuccessful party to a litigation can be compelled to meet. I therefore allow the application and disallow these items aggregating Rs. 157/50 from the respondent's bill of costs. The respondent must also pay to the petitioner the costs of this application and the costs of the relevant proceedings in the lower Court.

Application allowed.

Present : GRATIAEN, J. AND SANSONI, J.

MOHAMED CASSIM SOWDOONA *vs.* HADJIAR ABDUL MUEES

D. C. (*F*) 35/*M of* 1953—*D. C. Matara N.* 21473

Argued on : 1st March, 1955
Decided on : 4th March, 1955

Jurisdiction—Contract of marriage between Muslims—Payment of money as kaikuli *by plaintiff's father to defendant at Galle—Marriage subsequently contracted at Matara—Action by plaintiff instituted at Matara for recovery of* kaikuli—*Which Court has Jurisdiction ?—Civil Procedure Code Section* 9 *Kaikuli—Nature of.—*

Where a sum of money was paid as *kaikuli* by the plaintiff's father to the defendant at Galle and the marriage between the plaintiff and the defendant was thereafter celebrated at Matara.

Held : That the Matara Court had jurisdiction to entertain an action by the plaintiff to recover the *kaikuli* from the defendant as the obligation to pay the *kaikuli* to the plaintiff was undertaken by the defendant at Matara when he married her.

Per GRATIAEN, J.—If the obligation be equated to an obligation in the nature of a trust, the English Law applies and the trustee debtor must seek out the beneficiary in order to discharge the trust. Alternatively (if *kaikuli* is regarded as an implied contractual obligation to pay upon marriage to the wife whenever she demands it or if she dies, to her heirs) there was a breach of a contractual obligation undertaken at Matara.

Authorities cited : *Haniffa vs. Ocean Accident and Guarantee Corp.* (1933) 35 N. L. R. 216.
Pathumma vs. Cassim (1919) 21 N. L. R. 221.
Pathumma vs. Idroos (1929) 31 N. L. R. 230.
Zainabu Natchia vs. Usoof Mohamadu (1936) 38 N. L. R. 37 at p. 45.
Lee's Roman-Dutch Law (5th ed.), p. 258.
Vanderstraaten's Reports, 162.

H. W. Jayawardene, Q.C., with *M. I. M. Haniffa, M. I. M. Cassim* and *A. C. M. Uvais*, for the appellant.

A. M. Ameen, for the respondent.

GRATIAEN, J.,

The plaintiff who is a Muslim lady, sued the defendant (her husband) in this case for the payment of Rs. 1,500/- paid to him as *kaikuli* a few days before they were married. The marriage was celebrated at Matara and still subsists although the parties have separated. She resided at Matara, and he at Galle, when this action commenced. The money had been received by him from her parents at Galle.

The only ground on which the plaintiffs claim was dismissed was that, in the learned Judge's opinion, the cause of action arose at Galle (where the defendant resided) because, under the Roman-Dutch law, it is " the duty of the creditor to seek out the debtor ". With great respect, the rule is not quite so rigid. Performance of a contractual obligation must *prima facie* be made where the obligation was contracted, unless another place of performance has been expressly or impliedly agreed. *Lee's Roman-Dutch Law*, (5th ed.) p. 258 ; *Haniffa vs. Ocean Accident and Guarantee Corp.* : (1933) 35 N.L.R. 216. I should be very surprised indeed if the principles of a civilised system of jurisprudence would automatically entitle a Muslim husband who had deserted his wife to insist that she must seek him out in order to obtain satisfaction of her just demands.

But apart from these considerations, I am satisfied that the District Court of Galle did not have exclusive jurisdiction to try this case. *Kaikuli* is a sum of money given by the parents of a Muslim bride to her intended husband. Once the marriage has taken place, he owns it but is nevertheless liable to pay it over to the wife if she demands it, even during the subsistence of the marriage. *Vanderstraaten's Reports* 162. This is an incident of a Muslim marriage according to a well-recognised custom in Ceylon. Sampayo, J., took the view that the money is held in trust by the husband for the wife.—*Pathumma vs. Cassim* (1919) 21 N.L.R. 221, and this opinion was adopted by the judges who decided *Pathumma vs. Idroos* (1929) 31 N.L.R. 230, and *Zainabu Natchia vs. Usoof Mohamadu* (1936) 38 N.L.R. 37 at 45. Perhaps an equally acceptable theory is that the husband undertakes, *upon his marriage*, an implied contractual obligation to pay the money to his wife whenever she demands it or, if she dies, to her heirs. But in either view, it seems clear to me that the obligation to pay the money *to the wife* is not finally imposed until the marriage has actually taken place ; until then, the intended husband holds it in trust *for her parents* to whom he must return it if the marriage, for whatsoever reason, should not take place.

I, therefore, conclude that the defendant's obligation to pay the *kaikuli* to the plaintiff on demand was first undertaken at Matara where he married her. If the obligation be equated to an obligation in the nature of a trust, the English law applies, and the trustee debtor must seek out the beneficiary in order to discharge the trust. Alternatively, there was a breach of a contractual obligation undertaken at Matara. In that event, the action was properly instituted in the Court within whose jurisdiction " the contract sought to be enforced was made." Section 9 of the Civil Procedure Code. For either reason, the learned District Judge should, in accordance with his findings on the merits of the dispute, have entered a decree for the plaintiff. I would therefore allow the appeal and enter judgment in her favour as prayed for with costs in both Courts.

SANSONI, J.
I agree.

Appeal allowed.

Present : BASNAYAKE, A.C.J. and PULLE, J.

WIMALAWATHIE vs. PUNCHI BANDA

S.C. No. 449—*D.C.* (*Final*) *Kegalla No.* 8517

Argued and Decided on : 24th June, 1955.

Kandyan Law—Diga married wife dying intestate leaving child by former marriage—Right of husband to life-interest in property acquired during coverture—Kandyan Law Declaration and Amendment Ordinance, No. 39 *of* 1938—*Section* 18—*Effect of.*

Held : That the surviving husband of a DIGA marriage has a life interest in the acquired property of his deceased wife, even though there are children of the marriage or children of a former marriage, and that this rule has not been altered by Section 18 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938.

Cases referred to : *Tikiri Banda vs. Appuhamy* (1914) 18 N. L. R. 105.

C. R. Gunaratne for the Plaintiff-Appellant.

H. W. Jayewardene, Q.C., with *P. Ranasinghe* for the Defendant-Respondent.

BASNAYAKE, A.C.J.

The only question for determination in this appeal is whether the husband of a *diga* married spouse who dies intestate leaving a child by a former marriage has a life interest over the property acquired by the deceased spouse during coverture.

In the instant case, one B. M. Ukku Etana who had married in *diga* died intestate leaving the plaintiff-appellant, Kottapola Vidanelage Wimalawathie (hereinafter referred to as the appellant), a child by a former marriage; the defendant, her surviving husband; and four children of her marriage with the defendant.

The appellant claims title to an undivided one-fifth share of a paddy field acquired by her deceased mother during her second marriage, and disputes her step-father's right to a life interest over that share.

Learned Counsel on behalf of the appellant argued that the effect of section 18[1] of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 (hereinafter referred to as the Ordinance), was to wipe out the rights of the surviving husband of a woman married in *diga* to a life interest over the property acquired by her during coverture. He supported his argument by reference to section 15[2] of that Ordinance wherein it is enacted that the succession of a child to the father's estate is subject to the interests of the surviving spouse. Alternatively he argued that the *diga* husband's life interest over his deceased spouse's property acquired during coverture does not extend to the shares of a child or children by a former marriage of the deceased spouse.

Although prior to the decision in *Tikiri Banda vs. Appuhamy* (1914) 18 N. L. R. 105 there was some uncertainty as to a *diga* married husband's rights over his deceased wife's property acquired during coverture, that case has put an end to that uncertainty by laying down authoritatively the proposition that the surviving husband of a *diga* marriage has a life interest in the acquired property of his deceased wife even though there are children of the marriage.

We are unable to uphold learned Counsel's submission that the law as laid down in that case has been altered by section 18 of the Ordinance. The rule is that statutes are to be construed in reference to the principles of the common law. It is not to be presumed that the Legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the statute did not intend to make any alteration, other than what is specified, and besides what has been plainly expressed. It would be wrong to construe the enactment by instituting a textual comparison of the sections 15 and 18 and inferring from the fact that, while in the former the life interest of the surviving spouse is expressly preserved and in the latter it is not, the Legislature intended to take away the rights of a *diga* husband to his life interest over the wife's property during coverture. Such an interpretation would be contrary to the accepted rule of interpretation of statutes of this nature.

Learned Counsel's alternative argument is not supported by any authority, nor is he able to give any sound reason why the *diga* husband's rights to the life interest over the deceased wife's acquired property should be diminished by the fact that she has left offspring by a former marriage.

We are of opinion that the rule as formulated in the case of *Tikiri Banda vs. Appuhamy* (supra) admits of no such exception.

The appeal is dismissed with costs.

Pulle, J.
I agree.

1. Section 18 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 :

" 18. (1) When a woman unmarried, or married in *diga*, or married in *binna* on her mother's property, shall die intestate after the commencement of this Ordinance leaving children or the descendants of a child or children, the estate of the deceased shall devolve in equal shares upon all such children, (the descendant or descendants of any deceased child being entitled to his or their parent's share by representation) whether male or female, legitimate or illegitimate, married or unmarried and, if married, whether the marriage be in *binna* or in *diga* :

Provided that if the deceased was married in *binna* as aforesaid, an illegitimate child or children shall not be entitled to succeed to the paraveni property of the deceased.

Provided further that the descendant of a deceased child shall be entitled to that child's share by representation whether or not he or she has been kept apart from the deceased intestate.

(2) When a woman married in *binna* on her father's property shall die intestate after the commencement of this Ordinance leaving children or the descendants of a child or children, such child or children, and his or their descendant by representation, shall be entitled to succeed *inter se* in like manner and to the like share as they would have become entitled out of the estate of their father.

Provided that if the deceased was married in *binna* as aforesaid an illegitimate child or children shall not be entitled to succeed to the paraveni property of the deceased."

2. Section 15 of the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938 :

" 15. When a man shall die intestate after the commencement of this Ordinance leaving an illegitimate child or illegitimate children—

(*a*) such child or children shall have no right of inheritance in respect of the paraveni property of the deceased ;

(*b*) such child or children shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased in the event of there being no legitimate child or the descendant of a legitimate child of the deceased ;

(*c*) any such child shall, subject to the interests of the surviving spouse, if any, be entitled to succeed to the acquired property of the deceased equally with a legitimate child or the legitimate children, as the case may be—

(i) if the deceased intestate had registered himself as the father of that child when registering the birth of that child ; or

(ii) if the deceased intestate had in his lifetime been adjudged by any competent court to be the father of that child."

Appeal dismissed with costs.

Present : Nagalingam, S.P.J. & Fernando, A.J.

KARUNANAYAKA CHARLES APPUHAMY vs. TIKIRI BANDA ABEYESEKERA

S. C. No. D. C. (F) 406 M/1954—D. C. Kandy No. M. R. 5051

Argued on : 19th November, 1954
Decided on : 8th December, 1954

Rent Restriction Act, (1948)—*Lease of hotel and tea kiosk business—Assignment of lease—Is assignee tenant or licensee—Nature of the rights involved.*

Where plaintiff by an indenture of lease P1 " let, demised and leased " to A a hotel and tea kiosk business together with all the equipment for a term of 3 years from 1-1-1950 at a monthly rental of Rs. 350, and A by deed P2 assigned his rights under the lease P1 to the defendant with the consent of the plaintiff, and on the expiration of the lease the plaintiff claimed delivery of the hotel and tea kiosk, and the defendant resisted the said claim on the basis of P1 and P2 as a letting and hiring to him of immovable property, and sought the protection of the Rent Act,

Held : (1) That P1 was not a lease in the true sense of the term and was only the placing of the " lessee " in charge of a business.

(2) That defendant's position was no more than that of a licensee, and is not entitled to the benefit of the provisions of the Rent Restriction Act.

H. V. Perera, Q.C., with *N. E. Weerasooria, Q.C.*, and *W. D. Gunasekera*, for the defendant-appellant.

H. W. Jayawardene, Q.C., with *P. Somatilakam*, for the plaintiff-respondent.

NAGALINGAM, S. P. J.

A novel point is raised in this case and it is said to be *res integra*. The Plaintiff by a document P1 of 1950, which is expressed on the face of it to be an indenture of lease, 'let, demised and leased' unto one Edwin Silva 'the Hotel and Tea kiosk known and registered as the Kandy Restaurant' together with all the equipment for a term of three years commencing from the 1st January, 1950, at a monthly rental of Rs. 380/-.

Edwin Silva by deed P2 of 1950, with the consent of the plaintiff, assigned all his rights, title and interest in and to the indenture of lease P1 to the defendant. The period of lease provided under the 'indenture of lease', P1 of 1950, expired on the 31st December, 1952, and the plaintiff claimed delivery of the 'Hotel and the Tea kiosk'. The defendant denied the plaintiff's claim and has taken up the position that as the business had been carried on in certain premises bearing assessment No. 39, Brownrigg Street, Kandy, to which the provisions of the Rent Restriction Act apply and as the possession of the premises too had been delivered to him by virtue of the document P1 and P2, he is entitled to claim the protection given by the said Act to a tenant as against his landlord.

The question therefore resolves itself into a determination as to whether the relationship created between the plaintiff and the defendant by virtue of the deeds P1 and P2 is one of letting and hiring of immovable property as contended for by the defendant or whether the delivery of possession of the immovable property was ancillary to the delivery of possession of the business of the hotel and tea kiosk. It is to be observed that the mere affixing of a label to a transaction by the parties or by their legal advisers does not control or govern the true nature of the rights and liabilities created which have to be determined by an examination of the terms and conditions of the instrument itself. Though the document P1 is described as an indenture of lease it is not a lease in the true sense of the term, for a lease relates to the letting and hiring of immovable property.

If one examines the document P1 one would seek in vain to gather from the document any letting and hiring of any immovable property—much less of 39, Brownrigg Street, Kandy, where the business was carried on; but on the other hand what is 'leased' is the Hotel and Tea kiosk known and registered as the Kandy Restaurant. That the parties did not regard the transaction that they entered into or the instrument recording such transaction as one of a lease of immovable property is manifest from the circumstances that there is no description given of any immovable property. But on the other hand a full description is given of the various fittings, equipment and furniture of the business, and one of the principal covenants to be observed on the part of the "lessee" is stated to be 'to manage and control the said hotel and business in a proper manner' and to yield up, surrender and deliver the said business known as the Kandy Restaurant and all the movables therein described at the expiration or sooner determination of the term of the 'lease'. It is abundantly clear therefore that the document itself is no lease and definitely not a lease of any immovable property.

It is however contended on behalf of the defendant appellant that under the document P1 the lessee was required to permit one Perera who was carrying on the business of oilman stores in a part of the premises No. 39, Brownrigg Street, to carry on that business there, and to permit the lessor to use and occupy a room in the upstairs of the said premises and those requirements indicate that there was in truth a letting of the entirety of the building No. 39, Brownrigg Street.

Further, it is said that *de facto* possession of the premises having been given and the quantum of rent payable in respect of the premises in accordance with the provisions of the Rent Restriction Act, *viz*: Rs. 130/- a month having been taken into computation in fixing the amount of 'rent' of Rs. 380/- a month payable by the lessee under P1, all the essential elements necessary to constitute a letting and hiring of immovable property have been established. I do not think that this argument is sound. A simple illustration will suffice to demonstrate the fallacy underlying it. Take, for example, the case of a guest who is charged a composite sum for board and lodging by a hotel-keeper; if it can be shown as indeed it easily can be, that in arriving at the figure the guest is charged, the hotel-keeper took separately into account the following items:—

(*a*) Rent for bed room,
(*b*) Hire of furniture, crockery and cutlery,
(*c*) Cost of food,
(*d*) Charges for service,

can it be said that the guest becomes a tenant of the room and that the term 'guest' is a misnomer in his case? Obviously, the answer is 'No'.

In the absence of any words of assurance of premises bearing No. 39, Brownrigg Street, to the lessee under P1, the covenant that the lessee should permit certain persons to carry on and use part of the premises would at best lead to the inference that the lessee had some interest in the immovable property but *non constat* that such

interest is a lease or an interest in the nature of a lease. Indeed, the document P1 should properly have been described as Articles of Agreement entered into between the two parties whereby one party gave over the management, control and conduct of the business for a term of years to the other party subject to the stipulations contained in the document P1.

It is however necessary to ascertain what is the nature of the interest in the immovable property that has been recognised as having been vested in the lessee under P1 by the instrument itself. Any business, if it is to be conveyed as a going concern, excepting that of a hawker or a pedlar, must ordinarily have a place of business and when the management of a business is handed over, particularly a business of the nature of a hotel and tea kiosk, it is impossible to imagine that possession of the place where the business is carried on could be withheld. A business of a hotel and tea kiosk does not merely consist of the equipment but must necessarily include the building where the beds and bedding are kept, the dining room where the tables and chairs at which customers are served with meals and refreshments are kept, and also of the good-will attaching to such business which may be the most valuable part of the whole concern, namely, the name of the business and the situation of the premises where the business is carried on, for as is well known, a reputed name as well as a favourable site, both attract custom.

On a proper reading of the document P1, it is impossible to resist the conclusion that the transaction entered into between the parties was not of letting any immovable property for the purpose of enabling one party to carry on a business, nor the letting of the building to that party with the option to him to carry on or not the business previously carried on there, but of placing the 'lessee' in charge of a business that had been and was being carried on for the sole purpose of its being continued as a going concern and with a view to its being delivered back as such going concern together with the good-will and the improvements and advantages gained or accrued thereto in the meantime; and as ancillary to the object which the parties had in contemplation, it was that possession of the premises was delivered. The defendant's position was no more than that of a licensee and if far removed from that of a tenant.

There is another matter to which I should advert before concluding my judgment. The basis for the defendant's claim to remain in occupation of the premises is that 'he is unable to vacate the said premises till he finds suitable alternative accommodation *for his business*'. This I consider to be a most extraordinary claim. The defendant was never the owner of the business. The business undoubtedly was that of the plaintiff. He, the defendant, had been placed in charge of the business to be run by him, for his benefit no doubt, but for the limited period of the unexpired term stipulated in the document P1. But that term has expired and I cannot see how he can be permitted to claim the business as his own. If the business is not his, and he has no business of his own, when the foundation of his claim 'that he cannot vacate the premises till he finds suitable accommodation for his business' vanishes. Probably the defendant does not realise that by the claim put forward by him he is exposing himself to the charge that he is making an attempt to betray the trust placed on him and to perpetrate a fraud on the plaintiff.

In these circumstances I do not think that it could properly be said that there was a letting of immovable property to which the provisions of the Rent Restriction Act apply. I am therefore of opinion that the judgment of the learned District Judge is right and that the appeal should be dismissed with costs.

FERNANDO, A. J.
I agree.

Appeal dismissed.

Present: DE SILVA, J. & FERNANDO, J.

V. RAJARATNAM vs. V. RAJASEKERAM

S. C. 220—*D. C. Pt. Pedro* 4323

Argued on: 19th July, 1955
Decided on: 21st July, 1955

Civil Procedure Code, sections 143 *and* 214—*New issues raised—Adjourned hearing—Order to pay incurred costs—Factors for consideration in awarding costs—Judicial discretion how to be exercised.*

Held : (1) That when the hearing of a case is adjourned on the application of a party and costs are awarded, the trial Judge is not entitled to make an order that is vague or arbitrary. He must take into consideration such factors as the amount involved, the extra expenditure incurred by the postponement, the stage of the case, etc.

(2) That it is undesirable to order incurred costs unless the Judge is in a position to form a fairly accurate estimate of such costs.

(3) That a Judge should not enhance the amount of costs merely for the reason that a party is in affluent circumstances.

Per de Silva, J.—Although I would not go so far as to say that a Judge in no circumstances should order a party to pay " incurred costs " I would however venture to observe that such an order is an undesirable one and should be made only in cases where the Judge is in a position to form a fairly accurate estimate of the " incurred costs ". Where he makes such an order the record also should show that he had material before him to arrive at the estimate of " incurred costs ". Otherwise it would not be possible for this Court to ascertain whether or not the Judge had exercised his discretion judicially. In this case it is not possible to gather from the Judge's record even a very rough idea of the amount of costs incurred by the plaintiff and which the defendant was ordered to pay. If the Judge had no means of knowing what the plaintiff had spent, it cannot be said that he used his discretion judicially in ordering the defendant to pay the " incurred costs ". The learned District Judge should have stated in his order his estimate of the " incurred costs " and the grounds on which he based that estimate before he made the order.

Cases cited : *Sunderam vs. Gonsalves* 51 N. L. R. p. 15.
Yapa vs. Don Davith 10 C. L. W. p. 25.

S. Nadesan, Q.C., with *C. Renganathan*, for the defendant-appellant.

H. V. Perera, Q.C., with *T. Arulambalam*, for the plaintiff-respondent.

De Silva, J.

The plaintiff instituted this action on July 28th, 1952, against his brother, the defendant, for a declaration that he was the owner of 2/3 share of the business carried on under the name of " S. Veeragaththippillai & Sons " at Jaffna and of the assets and goodwill thereof and for an order for an accounting. In the plaint the subject matter of the action was valued at Rs. 600,000/-. The defendant in his answer denied the claims of the plaintiff and set up various defences. The case first came up for trial on 25-6-53 when issues were framed and adopted. Thereafter the hearing was continued on 6-11-53 and adjourned for the 11th and 12th January, 1954. On 11-1-54 in the course of cross-examining the plaintiff the Counsel for the defendant sought to add three new issues to the fifty issues which had been adopted earlier. The Counsel for the plaintiff objected to the three new issues and the learned District Judge made order rejecting them. Thereupon the defendant's Counsel moved to amend the answer to enable him to raise the three issues in question. The plaintiff's Counsel objected to that application also, on the ground that it was an attempt to keep his client away from the business. The learned District Judge, however, allowed the application to amend the answer but ordered the defendant to pay to the plaintiff the " incurred costs " of that day and the following day. Later, on the suggestion of the Counsel for the plaintiff, the three issues in question were adopted without the amendment of pleadings in order to obviate delay. But the order for costs however already made was retained. Further hearing was refixed for 15th and 16th March, 1954. This appeal is by the defendant against the order for costs referred to above. The order appealed from was obviously made under section 143 of the Civil Procedure Code, (herein after referred to as the Code). The sub-section 1 of that section empowers the Court to adjourn the hearing of the action on the application of either party if sufficient cause is shown. Sub-section 2 of the same section enacts " in all such cases the Court shall fix a day for the further hearing of the action, and may make such order as it thinks fit with respect to the costs occasioned by the adjournment." Mr. Nadesan conceded that the Court in granting an adjournment of the hearing, is entitled to order the party at whose request the adjournment is granted, to pay costs as taxed by the Court or to pay a specified amount fixed by it as costs." He however argued that there is no provision in the Code which empowers the Court to order a party to pay the " incurred costs." Provision is made in section 214 to tax bills of costs. According to that section a bill of costs in a District Court has to be taxed by the Secretary, according to the rates specified in the Second Schedule. Mr. Nadesan in support of this argument submitted that there was no provision in the Code to tax bills in respect of " incurred costs." But I do not think that there is any insurmountable difficulty in the matter of taxing such bills. Section 214 itself can be availed of for that purpose, subject to one variation, the variation being the substitution of the costs actually incurred in place of the rates specified in the Second Schedule. Of course, the party who is to

receive " incurred costs " would be entitled to recover such costs only in respect of items taxable under that Schedule. In other words he would be entitled to get the bill taxed in terms of the Second Schedule, but free from the restrictions set out therein in regard to the amounts permitted under it. Such amounts will be limited to the sums actually incurred.

The awarding of costs is a matter in the discretion of the Judge. But that discretion must be exercised judicially. The Judge is not entitled to make an order in a vague or arbitrary manner. But he should be guided by rules of reason and justice—*Sunderam vs. Gonsalves* 51 N. L. R.. In *Yapa vs. Don Davith* 10 C. L. W. Hearne J., stated, " It is true that a Court of Appeal does not ordinarily interfere with the discretion exercised by a Court of trial as to costs but where it is clear that a Court of trial has exercised no discretion at all and has arbitrarily given costs against the party who succeeded on the issues before the Court, it would be contrary to all principles of justice if it did not interfere." As observed by Basnayake, J., in *Sunderam vs. Gonsalves* 51 N. L. R. the interference should not be restricted to the instance referred to by Hearne J., if it is evident that the Judge has not exercised his discretion at all or if he has used it arbitrarily. There are various factors to be taken into consideration in fixing the amount of costs when the hearing of a case is adjourned on the application of a party. One such factor is the amount involved in the litigation, and another is the extra expenditure that is incurred by the other party as a result of the postponement. The Judge is also entitled to take into consideration the stage of the case at which the postponement is granted, in fixing the costs. But in no case should a Judge enhance the amount of costs for the reason that the party who is condemned to pay the same is in affluent circumstances. In this case the learned District Judge in making the order for costs has made the observation " the defendant is not a poor person." That is indeed an unfortunate remark to have been made. The fact that the defendant was not a poor person appears to have influenced the Judge in ordering him to pay unusually heavy costs. Although I would not go so far as to say that a Judge in no circumstances should order a party to pay " incurred costs " I would however venture to observe that such an order is an undesirable one and should be made only in cases where the Judge is in a position to form a fairly accurate estimate of the " incurred costs." Where he makes such an order the record also should show that he had material before him to arrive at the estimate of " incurred costs." Otherwise it would not be possible for this Court to ascertain whether or not the Judge had exercised his discretion judicially. In this case it is not possible to gather from the Judge's record even a very rough idea of the amount of costs incurred by the plaintiff and which the defendant was ordered to pay. If the Judge had no means of knowing what the plaintiff had spent it cannot be said that he used his discretion judicially in ordering the defendant to pay the " incurred costs." The learned District Judge should have stated in his order his estimate of the " incurred costs " and the grounds on which he based that estimate before he made the order. In these circumstances I am not satisfied that the Judge used his discretion judicially. If the learned District Judge felt that an order for taxed costs in favour of the plaintiff was inadequate it would have been desirable if he fixed a specified amount as costs after consulting the Counsel for both parties. The order to pay " incurred costs " is set aside. The plaintiff however is entitled to an order for costs. I would fix the costs at Rs. 1,000/-. There will be no costs of this appeal.

Fernando, J.

I agree.

Set aside.

Present : de Silva, J.

W. A. S. de COSTA vs. H. CHARLES PERERA

S. C. 72—*C. R. Colombo* 46975

Argued on : 24th and 25th February, 1955

Decided on : 18th July, 1955

Landlord and tenant—Premises sold under writ issued against landlord—Bought by plaintiff—Tenant (defendant) failed to attorn to plaintiff and pay rent—Plaintiff's right to sue defendant—Tenancy.

Where under a writ issued against the landlord, the premises, of which the defendant was a tenant, were sold by the Fiscal and purchased by the plaintiff who obtained Fiscal's conveyance and was placed in possession and notwithstanding plaintiff's requests the defendant failed to pay rent due and where it was argued that plaintiff was not entitled to sue the defendant on the basis of a tenancy as admittedly the defendant had not attorned to the plaintiff,

Held : That the purchaser of the leased premises was entitled to sue on the contract of lease entered into between the landlord and the tenant.

Cases referred to : *Silva vs. Silva* 16 N. L. R. 315.
Wijesinghe vs. Charles 18 N. L. R. 168.
Simon Morris vs. Henry Mortimer 2 S. C. C. 96.
Zackariya vs. Benedict 53 N. L. R. 311.
de Alwis vs. Perera 52 N. L. R. 433.

H. W. Jayawardene, Q.C., with *D. R. P. Goonatilleke* for the defendant-appellant.
C. Renganathan for plaintiff-respondent.

De Silva, J.

This is an appeal in an action for rent and ejectment. The plaintiff instituted this action on July 29th, 1953, to eject the defendant from premises No. 23 1/1 situated at Kirillapone on the ground that he had failed and neglected to pay rent from May 18th, 1950. According to the plaintiff the premises in question belonged to one Piyadasa Perera and the defendant occupied the same on a monthly tenancy under the said Piyadasa Perera. On a writ issued against Piyadasa Perera the land on which the building stands together with everything standing thereon was sold by Fiscal on 20-5-49 and purchased by the plaintiff. This sale was confirmed on 7-7-49 and the plaintiff obtained Fiscal's conveyance P3 dated 18-5-50. The plaintiff was placed in possession of the land on 4-10-50. At that time the buildings standing on the land were in the occupation of the tenants of Piyadasa Perera. On 15-6-50 the plaintiff gave an informal lease of the land and the buildings to Ratnayake. But as the tenants failed to attorn to Ratnayake this lease fell through. Thereupon the plaintiff asked those tenants including the defendant to pay rent direct to him. The defendant failed to comply with that request. Admittedly the defendant did not attorn to the plaintiff although he was asked to do so. It is in evidence that the defendant was present at the Fiscal's sale at which the plaintiff became the purchaser of the land in question. The defendant filed answer stating that premises Nos. 23 1/1 to 1/5 belonged to one K. D. Mithrasena and that he was in occupation of premises No. 23 1/2 as Mithrasena's tenant. He prayed that the plaintiff's action be dismissed with costs. After trial the learned Commissioner of Requests held that the defendant was in occupation of premises No. 23 1/1 and not 23 1/2 as alleged by him. He further held that the defendant entered into possession of premises 23 1/1 as the tenant of Piyadasa Perera and that the plaintiff had terminated the tenancy by a notice to quit given on June 26th, 1952. Accordingly judgment was entered in favour of the plaintiff. This appeal is from that judgment.

The learned Commissioner's findings of fact were not canvassed at the hearing of this appeal. Mr. Jayawardene who appeared for the defendant argued that the plaintiff was not entitled to sue the defendant on the basis of a tenancy as admittedly the defendant had not attorned to the plaintiff. In *Silva vs. Silva*, 16 N. L. R. 315 Pereira J. and de Sampayo A. J. held that the purchaser from the landlord of the leased premises was entitled to sue on the contract of lease entered into between the landlord and the tenant and cited with approval the following passage from Wille on " Landlord and Tenant in South Africa." (221).

> " A purchaser from the landlord of the property leased steps into the shoes of the landlord, and receives all his rights and becomes subject to all his obligations so that he is bound to the tenant, and the tenant is bound to him, in the relation of landlord and tenant."

This principle was affirmed by Wood Renton C.J. and de Sampayo J. in the subsequent case *Wijesinghe vs. Charles* 18 N. L. R. 168. In regard to these two cases Mr. Jayawardene submitted that the purchaser at a Fiscal's sale did not stand on the same footing as a purchaser from the landlord. I am unable to agree with that contention. There is authority for the proposition that the purchaser at a Fiscal's sale of the landlord's interest in the leased property stands in the shoes of the execution-debtor in regard to a contract of tenancy. It was so held in *Simon Morris vs. Henry Mortimer* 2 S. C. C. 96. In that case the plaintiff had purchased the landlord's interest, in the premises of which the defendant was a tenant at an execution-sale. It was held that the tenant was bound to pay rent to the plaintiff.

Dias J. stated in that case :—

> " He (tenant) seems to have been aware of the execution sale and the purchase by the plaintiff and he cannot now be allowed to set up a payment of the rent to the execution-debtor after the plaintiff had purchased the land. The defence set up is that the execution-debtor's interest in the land was merely a life interest. This may or may not be true, but whether the execution-debtor had an absolute or conditional right, that right is now in the plaintiff, and the defendant is bound to pay the rent to the plaintiff who now stands in the shoes of the execution-debtor."

Mr. Jayawardene relied on the case of *Zackariya vs. Benedict*, 53 N. L. R. 311 a case decided by a single judge. The facts in that case were as follows :—Benedict took on rent certain premises from one Ahamed who was the owner of the same. Ahamed later gifted these premises to Zackariya the plaintiff. When the plaintiff requested Benedict to pay rent to him the latter refused to do so and even questioned the validity of the deed of gift. Thereupon the plaintiff sued Benedict for rent and ejectment. But his action was dismissed in the Court below. The plaintiff appealed, and the appeal too was dismissed. Swan J. who decided the appeal appears to have based his decision on certain observations made by de Sampayo J. in *Wijesinghe vs. Charles* (*supra*). Those observations were made by de Sampayo J. in regard to a purchaser who was not prepared to take over possession of the property along with the vendor's tenant. Such a purchaser the learned Judge stated,

> " May either stand on the strength of the title and sue the third party in ejectment, or he may at once bring the action *ex empto* against his vendor for failure to implement the sale by delivery of possession."

That this dictum applied only to a purchaser who was unwilling to take over possession of the property with a tenant on it, is clear, from an earlier statement made in the same judgment which reads :—

> " There is no doubt that under the Roman-Dutch Law a purchaser has the right to recover the rent accruing since the sale from a tenant who had been let in by the vendor."

There is no doubt that there is a conflict between *Silva vs. Silva* and *Wijesinghe vs. Charles* on the one hand and *Zackariya vs. Benedict* on the other. If I may say so with respect, the two earlier cases should be followed as each one of them was decided by a Bench of two judges. The position is also made clear in the judgment of Gratiaen J. in *de Alwis vs. Perera* 52 N. L. R. 433 where he stated :—

> " It would therefore seem that a tenant who remains in occupation with the notice of the purchaser's election to recognize him as a tenant may legitimately be regarded as having attorned to the purchaser so as to establish privity of contract between them."

In the instant case the plaintiff expressed his willingness to recognize the defendant as his tenant.

For the reasons set out above the judgment of the learned Commissioner is affirmed and the appeal is dismissed with costs.

Appeal dismissed.

Present : Gratiaen, J.

THE QUEEN vs. THIAGARAJAH AND OTHERS

2nd Northern Circuit of 1955—*S. C.* 9/*M. C. Mallakam* 1408

Argued and decided on : 21st July, 1955
Reasons pronounced on : 1st August, 1955

Criminal Procedure Code, Sections 156, 159, 160, 161, 162 (1), 163, 389, 391, 392 (2)—Non-summary proceedings against accused persons—Magistrate discharging them under Section 162 (1)—Directions by the Attorney-General under Section 389 to Magistrate to read out to accused certain amended charges under Section 159 and to commit them for trial—Amended charges different from those originally under inquiry—Failure to direct that charges should be read out under Section 156 and that fresh proceedings should be taken from that stage—Compliance with directions of Attorney-General and committal of accused for trial in Supreme Court.

Preliminary objection to indictment that Attorney-General's directions ultra vires—Scope of Sections 163, 389, 390 (2) and 391 of the Code—Should indictment be quashed.

Where a Magistrate committed three prisoners (whom with two others he had discharged earlier under Section 162 (1) of the Code after due inquiry into charges relating to the same incident) for trial in the Supreme Court in obedience to the Attorney-General's instructions under Section 389 of the Code for offences which were different from those investigated earlier and which instructions were to the effect that the Magistrate (A) should read out to the prisoners under Section 159 of the Code certain amended charges alleging—

(*a*) That they together with one T. " and another person unknown to the prosecution " had in truth been members of an alleged unlawful assembly

(*b*) That the murder of one S. had been committed by the 1st prisoner and this unknown person.

(B) should commit the persons for trial on these amended charges,

And where a preliminary objection was raised at the trial to the effect that the prisoners were not properly committed for trial and that the indictment should be quashed.

Held : (1) That the directions issued to the Magistrate by the Attorney-General were *ultra vires* as he had no power under Section 389 of the Code to direct a committal of the prisoners except on the basis of the charges which had been read out to them under Section 156 of the Code.

(2) That the power of a Magistrate to commit under Section 163 of the Code is determined by the scope of the particular charges which formed the subject-matter of the Magisterial inquiry ; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into.

(3) That the Attorney-General can only direct a Magistrate to enter an order of committal on charges in respect of which the Magistrate himself was previously vested with power to commit.

(4) That if the Attorney-General takes the view that the accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if properly committed), he is authorised to instruct the Magistrate under Section 390 (2) to reopen the proceedings by formulating an amended charge and thereafter to take all steps prescribed by Chapter 16.

(5) That where such directions have been given under Section 390 (2), it is for the Magistrate alone to decide in the first instance whether or not a committal on the amended charge should be justified.

(6) That the residual powers of the Attorney-General under Section 391 only come into operation at a later stage, that is, if he considers that the Magistrate has wrongly exercised his discretion in favour of the accused.

M. Balasunderam (with *S. Gurunathan*, assigned), for 1st accused.

A. Amirthalingam, for 2nd accused.

S. Kannadurai, for 3rd accused.

N. T. D. Kanakaratne, *C. C.*, for the Crown.

GRATIAEN, J.

A retired post-master named Kadiresu Sambandar (of the Vellala community) lived with his wife in the village of Urelu, where he cultivated a plantain garden adjoining the compound of his house. The adjoining allotment of land, similarly cultivated, belonged to Thevasi Kanavathy (a Palla man).

Mr. Sambandar also owned some cattle. At about 2 a.m. on 21st October, 1953, he woke up and went into his compound to tether a cow-calf. Shortly afterwards, his wife heard some suspicious noises and, as her husband had not yet returned, she and their immediate neighbours (the Thambidurais) went in search of him. A few moments later they heard the sound of a gun being fired, and of people running away. Mr. Sambandar was found lying, with bleeding injuries, near the entrance to Thevasi Kanavathy's land. He was not in a fit condition to make a dying declaration before he died. He had sustained a blow on the head with a heavy, sharp cutting instrument and had also been shot in the stomach from a very close range. Each injury was necessarily fatal. It was also discovered that 135 plantain trees standing on Thevasi Kanavathy's land had been wantonly destroyed. Obviously more than one person had been concerned in the commission of these crimes.

The Police were unable for some time to discover any clue to the mystery. There had admittedly been caste ill-feeling in the locality, and Mrs. Sambandar suspected that her husband had been murdered by members of the Palla community. Thevasi Kanavathy, on the other hand, was equally convinced that Vellalas were responsible for the mischief committed on his land. The most likely theory, of course, is that a number of people entered Thevasi Kanavathy's land with the primary object of causing damage to it, and, in order to escape detection, murdered Mr. Sambandar when he unexpectedly arrived on the scene.

A few Palla men were from time to time arrested on suspicion, but they were released after the Police contacted a motor-car driver named V. Krishnasamy on 12th November, 1953. He was detained (perhaps illegally) in Police custody for about four days, and eventually told them a remarkable story in consequence of which the three prisoners who appeared before this Court were eventually prosecuted upon the following indictment dated 25th June, 1955 :—

" (1) That on or about the 21st day of October, 1953, at Urelu, in the division of Jaffna, within the jurisdiction of this Court, you *with one Swaminathan Thiagarajah and another person unknown to the prosecution* were members of an unlawful assembly the common object of which was to

commit mischief by cutting down the plantain trees standing on a land at Urelu cultivated by one Thevasi Kanavathy; and that you have thereby committed an offence punishable under Section 140 of the Penal Code.

(2) That at the time and place aforesaid and in the course of the same transaction one or more of the members of the said unlawful assembly did use force or violence in prosecution of the common object of the said unlawful assembly; and that you have thereby committed an offence punishable under Section 144 of the Penal Code.

(3) That at the time and place aforesaid and in the course of the same transaction one or more members of the said unlawful assembly did commit murder by causing the death of one Kadiresu Sambandar, which offence was committed in prosecution of the said common object, or was such as the members of the said unlawful assembly knew to be likely to be committed in prosecution of the said common object, and that you being members of the said unlawful assembly at the time of the committing of the said offence of murder have thereby committed an offence punishable under Section 296 read with Section 146 of the Penal Code.

(4) That at the time and place aforesaid and in the course of the same transaction *you Kandiah Thiagarajah, the 1st accused, and a person unknown to the prosecution* did commit murder by causing the death of the said Kadiresu Sambandar; and that you Kandiah Thiagarajah, the 1st accused, have thereby committed an offence punishable under Section 296 of the Penal Code."

A preliminary objection was raised on behalf of all three prisoners to the effect that they were not properly committed for trial upon these counts and that the indictment should be quashed.

It was argued that each count in this indictment is fundamentally at variance with the charges which formed the basis of the Magisterial inquiry; that the Magistrate, in the exercise of his judicial discretion under Section 162 (1) of the Criminal Procedure Code, had discharged all three prisoners and their (then) co-accused, four in number, on "the particular charges under inquiry"; and that the Attorney-General's subsequent directions (which had been obeyed by the Magistrate) requiring him to commit the prisoners for trial upon substantially different charges (now contained in the indictment) were *ultra vires*. I upheld the objection and quashed the indictment, ordering the prisoners to be released from Fiscal's custody.

The proceedings against the three prisoners and their co-accused under Chapter 16 of the Code had commenced on 30th November, 1953, by the Magistrate reading out the charges which formed the subject matter of the inquiry. These charges were later amended in minor details on the instructions of the legal adviser of the Police. Accordingly, the inquiry commenced afresh on 10th February, 1954, when it was duly explained to the three prisoners and their Co-accused under Section 156 of the Code that they stood charged with the commission of 12 offences :—

(1) the first charge alleged that 5 persons consisting of *the three prisoners and two named co-accused* had been members of an unlawful assembly the common object of which was to commit mischief by cutting down the plantain trees on Thevasi Kanavathy's land; and it was not alleged that any person besides these 5 persons had been a member of the unlawful assembly;

(2) the second charge alleged that the same 5 persons were guilty of rioting in prosecution of their common object;

(3) the third charge alleged that mischief had been committed by one or more members of the said unlawful assembly in prosecution of their common object;

(4) the fourth charge similarly alleged that the murder of Mr. Sambandar had been committed by one or more members of the unlawful assembly in prosecution of their common object;

(5) the fifth charge alleged that the three prisoners and *two named co-accused* had committed mischief;

(6) the sixth charge alleged that one of the other accused (not himself an active member of the unlawful assembly) had abetted the commission of the offence of mischief;

(7) the seventh charge alleged that yet another co-accused (also not a member of the unlawful assembly) had abetted the commission of the same offence;

(8) the eighth charge alleged that the 1st prisoner and *one of his co-accused named Murugesu Sinnadurai* (who had since been discharged) had committed the murder of Mr. Sambandar;

(the additional charges numbered 9 to 12 are not material to the present discussion).

It will be observed generally that the case for the prosecution was to the effect that *the unlawful assembly consisted of precisely 5 named accused persons, instigated by 2 other named co-accused.* In support of all 12 charges, the prosecution relied almost entirely on the evidence of the motor-car driver Krishnasamy, and on certain statements of a confessional character alleged to have been made by some (but not all) of the 7 accused persons.

The witness Krishnasamy was, according to his own version, a most disreputable character who claimed to have been engaged on the night in question in transporting illicit immigrants by motor-car and thereafter in conveying a number of persons to Thevasi Kanavathy's land where the murder was committed.

On 12th August, 1954, the learned Magistrate decided that there was insufficient evidence to put any of the accused persons on trial. Accordingly, they were all discharged under the provisions of Secion 162 (1) of the Code.

So matters stood until about three months later when the Law Officers of the Crown intervened. On 24th November, 1954, the Solicitor-General (acting under the authority of the Attorney-General in terms of Section 393) issued a direction to the Magistrate under Section 391 to reopen the inquiry *into* " *the charges* " *preferred against the 1st, 2nd and 3rd prisoners and against one of their co-accused named Swaminathan Thiagarajah,* but not against the three other persons previously accused. The specific directions were that the Magistrate should (*a*) record any further evidence adduced by the prosecution, (*b*) read " *the said charges* " to the accused as required by Section 159, (*c*) comply with the provisions of Sections 160 and 161, and (*d*) commit the 3 prisoners and Swaminathan Thiagarajah for trial to the Supreme Court upon " the said charges ".

The 3 prisoners were re-arrested and produced before the Court, and further evidence was recorded in their presence. Efforts to trace the whereabouts of Swaminathan Thiagarajah, however, proved of no avail. The prosecution therefore decided to proceed for the time being against only the 3 prisoners, the case against Swaminathan Thiagarajah being left in abeyance.

The case against the prisoners still rested largely on the evidence which the Magistrate had previously considered insufficient to justify a committal. But, being bound by the Solicitor-General's directions, he made a brave attempt to comply with them. He discovered, however, that strict obedience would produce a most incongruous result. The reason was that, whereas 5 persons (no more, no less) were alleged in " the said charges " to have formed themselves into an unlawful assembly, one of them (Murugesu Sinnadurai) had already been discharged, and the Solicitor-General had given no direction that the order in his favour should be vacated. In these circumstances it was felt that the prosecution of the remaining 4 members of the alleged unlawful assembly would rest on an illegal foundation—there being an insufficient quorum of allegedly guilty persons to constitute an unlawful assembly as defined by Section 138 of the Penal Code. Finding himself in this predicament, the Magistrate invited the Attorney-General's department to clarify the earlier directions received by him. In reply, he received a fresh communication, dated 2nd March, 1955, and signed by a Crown Counsel, directing the Magistrate to amend the charges based on the alleged formation of an unlawful assembly by substituting the name of Duraisamy Velupillai for that of Murugesu Sinnadurai against whom the case has not been re-opened.

These new directions, purporting to have been given on behalf of the Attorney-General *under Section 389 of the Criminal Procedure Code,* were clearly *ultra vires.* In the first place, Section 389 only empowers the Attorney-General to order fresh evidence to be recorded *after committal* if in his opinion the earlier evidence forming the basis of the committal was " not sufficient to afford a foundation for a full and proper trial ". In the second place, it had never been alleged in " the particular charges " read out to the prisoners at the commencement of the inquiry under Chapter 16 that Duraisamy Velupillai had in fact been a member of the unlawful assembly; on the contrary, the implied suggestion at that time was that he had not. And finally, Duraisamy had already been discharged from the proceedings and there was no direction that the case against him should be re-opened for any purpose whatsoever.

All or some of those difficulties seem to have been realised 10 days later by the Department, and on 12th March, 1955, a further communication was sent to the Magistrate cancelling the letter dated 2nd March, 1955. Instead, Crown Counsel purported to give fresh directions in the name of the Attorney-General (*also under the provisions of Section 389 which was inappropriate*) requiring the Magistrate to take action as follows :—

(*A*) to read out to the 3 prisoners *under Section* 159 of the Code certain amended charges alleging (1) that they, together with Swaminathan Thiagarajah " *and another person unknown to the prosecution* " had in truth been the members of the alleged unlawful assembly, and (2) that the

murder of Mr. Sambandar had been committed by the 1st prisoner and this "unknown person";

(*B*) to commit the prisoners for trial on these amended charges.

It must here be observed that no direction was given that the amended charges should be read out to the prisoners under Section 156 and that fresh proceedings under Chapter 16 should be taken from that earlier stage.

The defence very naturally protested against this further change of front on the part of the prosecution. The learned Magistrate, however, considered himself under a statutory obligation to obey the Attorney-General's directions. Accordingly, but without enthusiasm, the charges (amended as directed) were formally read out and explained under Section 159 to the prisoners, each of whom, while protesting his innocence, truthfully replied as follows in answer to the statutory question addressed to him under Section 160:

"I am not guilty. There is no inquiry in respect of these charges".

I am satisfied that in the circumstances described by me the order of committal and the subsequent indictment embodying the charges so amended were invalid and contrary to the provisions of the Criminal Procedure Code.

In England, "*when a person charged has been committed for trial*, the indictment presented against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any examination or deposition taken before a justice in his presence being counts which may lawfully be joined in the same indictment". *Administration of Justice (Miscellaneous) Provisions Act*, 1933, *Section* 2 (2) (8) *proviso* 1. Indeed even when the justices have refused to commit on any particular charge a man who has been committed on other charges, the prosecution may include in the indictment a count based on that charge subject to the power of the presiding Judge, upon objection, to rule that there was no evidence to support the allegations. *R. vs. Morry* (1945) K.B. 153.

In Ceylon, however, the powers of the prosecution in this respect have become narrower since Chapter 16 of the Criminal Procedure Code was subjected to the sweeping amendments contained in Ordinance No. 13 of 1948. Apart from an exception to which I shall shortly refer, an accused person can in no circumstances be committed for trial or tried upon indictment except upon the basis of the charges which had been read out to him under Section 156 and to which he was later called upon to answer in terms of Section 159 and 160. In other words, the power of the Magistrate to commit under Section 163 and the powers of the Attorney-General to direct a committal under Section 391 are both determined by the scope of the particular charges which formed the subject matter of the Magisterial inquiry; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into. All this has been very clearly explained in the Judgment of Gunasekera J. in *Vaithilingam vs. The Queen* (1953) 54 N. L. R. 345.

The Ceylon procedure is admittedly far from satisfactory in this respect, because it involves an unprofitable expenditure of time in framing amended charges followed by the commencement of what are virtually fresh proceedings under Chapter 16. But this is still the law, and recommendations for simplifying the procedure have not yet received the attention of Parliament.

On the other hand, the Attorney-General in Ceylon is vested with certain extraordinary powers (unknown in the English system) whenever a Magistrate, at the conclusion of the inquiry under Chapter 16, has discharged an accused person in terms of Section 162 (1) of the Code, Section 391 then authorises the Attorney-General if he considers that the accused should not have been discharged, to override the Magistrate's discretion by directing a committal, and the Magistrate in that event has no option but "to reopen the inquiry" and comply with "such instructions as to (the Attorney-General) shall appear requisite". But the Attorney-General's powers are themselves controlled by the requirements of Chapter 16. Section 391 must clearly be read in the context of Section 162, so that a direction to commit must necessarily be confined to "the particular charges under inquiry" in respect of which the Magistrate had discharged an accused person. In other words, the Attorney-General can only direct a Magistrate to enter an order of committal on charges in respect of which the Magistrate himself was previously vested with power to commit.

If the Attorney-General takes the view that an accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if properly committed) a different procedure must be restored to. He is authorised to instruct the Magistrate *under Section* 390 (2) to reopen the proceedings by formulating an amended charge, and thereafter to take all the steps prescribed by Chapter 16. It is certainly not permissible to give a direction that the accused person should be

committed for trial upon an amended charge after complying only with the requirements of Sections 159, 160 and 161—because, if that were done, the accused would be deprived of a fundamental right which the Legislature has (under the present Code) conferred on him. *Moreover, where such directions have been given under Section* 390 (2), *it is for the Magistrate alone to decide in the first instance whether or not a committal on the amended charge would be justified.* The residual powers of the Attorney-General under Section 391 only come into operation at a later stage—that is to say, if he considers that the Magistrate has wrongly exercised his discretion in favour of the accused on this vital issue.

Let us consider, in the light of these principles, the steps which were taken in the present case after the Magistrate had lawfully discharged the prisoners on 12th August, 1954. The original directions issued to the Magistrate on 25th November, 1954, in terms of Section 391 and 393 of the Code were (for what they were worth) *intra vires* the Solicitor-General because they ordered a committal, after certain formalities had been complied with, on the " particular charges " which had in fact been " under inquiry ". But these instructions were subsequently cancelled by implication, if not expressly, and are not relied on as having any bearing on the objections now under consideration.

The second set of instructions issued in the name of the Attorney-General on 2nd March, 1955 call for no discussion because they too were cancelled before they were obeyed. The order of committal made in compliance with the final instructions issued on 12th March, 1955, was contrary to law for the following reasons :—

(1) the instructions went far beyond the particular powers vested in the Attorney-General under Section 389 ;

(2) even if they had been given under Section 391, they would have been equally *ultra vires* because they directed a committal on charges substantially different from those which formed the subject matter of the inquiry under Chapter 16 ;

(3) if, again, the intention had been merely to instruct the Magistrate in terms of Section 390 (2) to hold a fresh inquiry upon the charges as finally amended, the direction to commit the prisoners *automatically* upon those charges would also have been *ultra vires* because they would in that event have purported to relieve the Magistrate of his duty to decide judicially whether or not an order of committal was justified by the evidence ;

The offences punishable under sections 140, 144 and 146 of the Penal Code on which the Magistrate committed the prisoners for trial in obedience to the Attorney-General's final instructions were clearly different from those which were originally " under inquiry ". An allegation that a man was a member of an unlawful assembly of 5 consisting of himself and four named persons is not the same as an allegation that he was a member of an unlawful assembly of 5 consisting of himself, three named persons and " a person unknown to the prosecution ". Just as it requires at least two persons to form a criminal conspiracy punishable under section 113 B of the Penal Code, the offence of being a member of an unlawful assembly cannot be committed except in association with 4 others. The acquittal of one of two accused persons on a conspiracy charge therefore necessarily results in the acquittal of the other unless the indictment or charge specifically alleged (and it is proved) that someone else, known or unknown, had also participated in the crime. *The King vs. Dharmasena* (1950) 52 N. L. R. 481. The same principle applies, *mutatis mutandis*, to an indictment or charge alleging participation in an unlawful assembly. *Jayaram vs. Saraph* (1954) 56 N. L. R. 22.

In this case, the scope of the inquiry under Chapter 16 was confined to the issue whether the prisoners had joined an unlawful assembly of 5 persons in association with Murugesu Sinnadurai (the original 2nd accused) and Swaminathan Thiagarajah (the original 4th accused) ; but there was no inquiry at any time into the later allegation that " a person unknown to the prosecution " had been a member of any such assembly. Accordingly, counts 1, 2 and 3 in the indictment cannot be allowed to stand.

The 4th count in the indictment alleges that the 1st prisoner " *and a person unknown to the prosecution* " committed the murder of Sambandar, whereas the relevant charge " under inquiry " under Chapter 16 alleged that he and *Murugesu Sinnadurai* (a named person) had committed the offence. Mr. Kanakaratne invited me during the argument to cure any objectionable features in this count by permitting the words .' and a person unknown to the prosecution " to be deleted. I declined to do so. It is no doubt correct to say that, if two persons are properly committed for trial for an offence punishable under section 296 of the Penal Code, one of them may be convicted even though the other is acquitted. But in the present case the 1st prisoner has in his favour the earlier order of discharge validly entered by the Magistrate on

12th August 1954, and that order has not been validly superseded.

As far as can be gathered from the record of the inquiry held by the Magistrate under Chapter 16, and also from the subsequent directions issued by the Attorney-General's department, the prosecution had considered it essential at every stage to call in aid the provisions of section 32 of the Penal Code in order to establish that either the 1st prisoner or a guilty associate killed Mr. Sambandar in furtherance of the common intention of both. There is certainly no indication that the Law Officers of the Crown had specially addressed their minds to the question of preferring against the 1st prisoner alone a charge of murder based solely on his individual acts. In these circumstances, the order of discharge entered by the Magistrate on 12th August 1954 stands in the way of an indictment for murder against the 1st prisoner alone until it is supplemented by an overriding decision, unequivocally made in the exercise of the extraordinary powers vested in the Attorney-General under section 391 of the Code.

Indictment quashed.

Present : SANSONI, J.

MANKU *vs.* ANTHONY

S. C. 112—*C. R. Puttalam No.* 154/87

Argued on : 5th April, 1955
Decided on : 2nd May, 1955

Administration—Sale by heir of his undivided share in intestate property to defendant—Decree obtained by plaintiff against the estate of the deceased—Right of plaintiff to seize and sell property sold to the defendant.

A creditor has the right to follow the intestate property of deceased, which has been alienated by his heirs, even when there are other assets of the estate to satisfy the creditor.

A purchaser of the intestate property cannot plead in defence that he bought the property from the heir for valuable consideration without notice. But it would be a good defence to such an action if the purchaser can prove that the purchase money had been expended for purposes of administration.

Cases referred to : *Tilakaratne vs. Wijewardene* 2 C. L. J.89.
Albert Perera vs. Marimuttu Canniah 45 N. L. R. 337.
Kandiah vs. Saraswathy 54 N. L. R. 137.
Suriyagoda vs. William Appuhamy 43 N. L. R. 89.
Muttiah Chetty vs. Ukkurala Korale 27 N. L. R. 336.

Dr. H. W. Thambiah, for the plaintiff-appellant.
K. C. de Silva with *J. A. de Silva* for the defendant-respondent.

SANSONI, J.

A one fifth share of the land in dispute in this action formerly belonged of Y. Sebamalai who died intestate in 1950 leaving as his heirs his three children Anthonia, Johnpulle and Bastiana. Anthonia by deed P2 to 10th January 1952 sold her 1/3rd of 1/5th share to the defendant. The plaintiff subsequently obtained a decree in June 1952, against the three children of Sebamalai as executors *de son tort* of his estate for a sum of Rs. 450/- claimed as due on a promissory note executed by their father. When he caused the Fiscal to seize the land in dispute in execution of his decree the defendant claimed the share which he had purchased on deed P2 and on the claim being upheld the plaintiff brought his action for a declaration that the share in question was liable to be seized and sold under his decree. The defendant pleaded that as he was a *bona fide* purchaser for valuable consideration the share he purchased was not liable to be seized and sold. The learned Commissioner dismissed the plaintiff's action on the ground that he failed to prove that the estate of Sebamalai was rendered insolvent by the transfer to the defendant and there was still a 2/15th share of the land available for seizure and sale by the plaintiff.

The plaintiff has appealed and it is urged that the learned Commissioner misdirected himself by treating this as a Paulian action. I think this submission must be upheld. The right of a creditor to follow property which belonged to a deceased person and had been alienated by his

heirs, even where there are other assets remaining in the estate, has been upheld in *Tillakaratne vs. Wijewardene*, 2 C. L. J. 89, *Albert Perera vs. Marimuttu Canniah*, 45 N. L. R. 337, *Kandiah vs. Saraswathy*, 54 N. L. R. 137, It is no answer to say that the purchaser bought from the heir for valuable consideration without notice, because he must be presumed to have known that he acquires a title which is defeasible at the instance of a creditor of the estate. Nor again will it help him to plead that there are other assets of the estate against which the creditor can go; the dictum of Soertsz, J., to that effect in *Suriyagoda vs. William Appuhamy*, 43 N. L. R. 89 must be disregarded as obiter. It would, however, be a good defence if the purchaser proved that the purchase money had been expended for purposes of administration as was decided in *Muttiah Chetty vs. Ukkurala Korale*, 27 N. L. R. 336, but that is not the case here.

For these reasons I would set aside the judgment under appeal and order that a decree be entered in favour of the plaintiff as prayed for with costs in both Courts.

Appeal allowed.

Present : SANSONI, J.

PATE *vs.* PERERA & SONS

S. C. No. 52—C. R. Colombo No. 46488

Argued on : 1st February, 1955
Decided on : 15th February, 1955

Rent Restriction Act No. 27 of 1948, *section* 13 (1) (*d*)—*Action for ejectment of tenant on the ground of nuisance to "adjoining occupiers"—Pollution of drains outside the rented premises by tenant's workmen—Complaints to authorities by neighbour living opposite—Is tenant liable—Should the nuisance complained of be created in the premises itself—Meaning of the word "adjoining" in sub-section* (*d*)—*Failure of plaintiff to state that she considered such conduct amounted to nuisance—Effect.*

The plaintiff sued his tenant, a limited liability company, for ejectment from the premises rented out to it relying on section 13 (1) (*d*) on the ground that the tenant had been guilty of conduct which is a nuisance to the plaintiff and other adjoining occupiers. The nuisance was that one of the rooms of the rented premises was occupied by the tenant's workmen who urinated and polluted the drains just outside the room. A neighbour who lives opposite the premises gave evidence that he repeatedly complained to the Police and the Municipal authorities about their behaviour.

The learned Commissioner held in favour of the plaintiff and in appeal it was contended on his behalf that
(*a*) the tenant could not be held responsible for the acts of other persons who use the premises;
(*b*) that the conduct complained of must be conduct on the rented premises, not outside it;
(*c*) that the neighbour who gave evidence was not an "adjoining occupier" within the meaning of the section;
(*d*) that the plaintiff has not given evidence that she considered the conduct of the workmen a nuisance.

Held : (1) That the defendant has indirectly committed the nuisance as it is its responsibility to see that no nuisance is created by anybody who comes on the premises with its permission.

(2) That sub-section 13 (1) (*d*) does not require that the nuisance should exist on the rented premises itself.

(3) That the word "adjoining" in this sub-section does not mean mere contiguity. It also means "neighbouring" and all that the context seems to require is that the premises of the adjoining occupiers should be near enough to be affected by the tenant's conduct.

(4) That although there is no positive evidence of nuisance by the plaintiff herself, upon proof of conduct capable of having this effect, the Court is entitled to infer that it had that effect.

Cases referred to : *Frederick Platts Co., Ltd. vs. Grigor* (1950), 66 T. L. R. 859.

H. W. Jayawardene, Q.C., with *P. Ranasinghe*, for the defendant-appellant.
E. A. G. de Silva, for the plaintiff-respondent.

SANSONI, J.

In this action the landlord relying on section 13 (1) (*d*) of the Rent Restriction Act, No. 29 of 1948, has sued to eject a tenant from the rented premises on the ground that the tenant has been guilty of conduct which is a nuisance to the landlord and other adjoining occupiers. The tenant is a limited liability Company carrying on the business of bakers. Its main bakery, to which are attached lavatories and bathrooms, is about 50 yards away from the rented premises. The

evidence has conclusively proved that one of the rented rooms has for a long time prior to this action been used as a rest room by the Company's workmen. Although the Managing Director denied this, he admitted that his workmen change in that room and leave their clothes there before they go to work. But the evidence of independent witnesses, whom the learned Commissioner has believed, has established much more. It has proved that the room in question was being habitually occupied at all times of the day and night even for the purpose of sleeping.

The particular nuisance complained of is that the occupants of the room used to urinate and pollute the drains on both sides of the road just outside that room. A neighbouring occupier, Mr. Ebert, who lives opposite these premises repeatedly complained to the police, to the defendant, and to the Municipal authorities about the objectionable behaviour of the occupants of the room, but the defendant permitted the nuisance to continue. The learned Commissioner held in favour of the landlord and in this appeal it was argued that the case does not fall within section 13 (1) (*d*) because (1) the tenant has not been guilty of the conduct complained of and the Act does not provide that the tenant may be held responsible for the conduct of other persons who use the premises ; (2) the conduct must be conduct on the rented premises and not outside them ; (3) Mr. Ebert was not an " adjoining occupier " ; (4) the plaintiff has not given evidence that she considered the conduct of those persons a nuisance. I shall consider these submissions in the above order.

(1) Although the Company which is the tenant of the premises has not directly committed this nuisance, I am satisfied that it has indirectly committed it and is therefore penalised by the Act, for it must be held liable for the nuisance committed by those who occupied the room in question. The Managing Director was repeatedly informed that the occupants of the room were behaving in an objectionable manner, and this was obviously due to the absence of lavatory accommodation ; if he was unable to provide such accommodation or otherwise abate the nuisance, he should not have permitted the room to be used as a rest room. I do not think this is a matter which turns on the liability of a master for the acts of his servants but rather on the responsibility of an occupier of premises to see that a nuisance is not created by anybody who comes on those premises with his permission. I think such a liability exists because the nuisance may be said to have been committed under his implied authority. The following passage in " The Rents Act in South Africa " (2nd Edition) p. 106 by Rosenow and Diemont seems relevant. " The onus is on the lessor to satisfy the Court that the lessee is responsible for the nuisance. So, for example, an ejectment order was refused in a case where a nuisance in the form of brawling and drinking was alleged, and it appeared that *chance intruders* might be responsible for the nuisance ".

(2) The sub-section does not require that the nuisance should exist on the rented premises and I am not prepared to limit it in the way suggested. Mr. Megarry in " The Rent Acts " (7th Edition) p. 245 cites a case where an order was made on account of a married tenant's acts of undue familiarity with the landlord's adolescent daughter who lived in a flat in the same house, even though those acts took place not in the house but in an alley some distance away ; for on a claim based on annoyance (which is an additional ground in the English Statute) to adjoining occupiers, " What arises from their being adjoining property may properly be considered in the light of an event which took place outside the premises ".

(3) On page 246 Mr. Megarry refers to a case where the word " adjoining " seems to have been construed as meaning " contiguous " but he comments : " This seems too strict a construction, for one meaning of the word is ' neighbouring ' and all that the context seems to require is that the premises of the adjoining occupiers should be near enough to be affected by the tenant's conduct on the demised premises ". My own view of the meaning of the word accords with this comment.

(4) There is no question that the plaintiff herself is an adjoining occupier even in the most limited sense of the term and that the plaint alleges a nuisance to her as well. I do not think it was necessary that evidence should have been given by the plaintiff herself that she considered the conduct complained of a nuisance. Upon proof of conduct capable of having this effect the Court is entitled to infer that it had that effect even if there is no positive evidence that it did. The Court is entitled to presume that the adjoining occupiers are reasonable people to whom the conduct in question would be a nuisance. See *Frederick Platts Co., Ltd. vs. Grigor* (1950) 66 T. L. R. 859.

I would therefore dismiss this appeal with costs in both Courts.

Appeal dismissed.

Present : SANSONI, J.

AMBALAVANAR *vs.* NAVARATNAM

S. C. No. 63—*C. R. Kayts No.* 7155

Argued on : 1st April, 1955
Decided on : 6th April, 1955

Maintenance—Duty of children to support parents in indigent circumstances—Roman Dutch Law—How far applicable in Ceylon.

That part of the Roman Dutch Law which requires children to support and maintain their parents in indigent circumstances is applicable in Ceylon. The question whether a parent is in such a state of comparative indigency or destitution is a question of fact depending on the circumstances of each case.

Oosthuizen vs. Stanley (1938) A. D. at page 327.
Subaliya vs. Kannangara (1901) 4 N. L. R. p. 121.
Justina vs. Arman (1910) 12 N. L. R. 263.
Lamahamy vs. Karunaratne (1922) 22 N. L. R. 289.
Samed vs. Segutamby (1925) 25 N. L. R. 481 at page 497.

C. Renganathan, for plaintiffs-appellants.

No appearance for defendant-respondent.

SANSONI, J.

The two plaintiffs are the parents of the defendant who is their eldest son. Admittedly the defendant has not been maintaining the plaintiffs and in this action they plead that they are in indigent circumstances and ask that the defendant be ordered to pay them a monthly sum for their maintenance. Several issues were framed at the trial but the learned Commissioner dismissed the action on the purely legal ground that in Ceylon today a child is under no legal liability to maintain his parents. He held that there is no evidence that such a liability was ever part of the law of Ceylon even though the authorities cited at the trial seemed to establish that such a liability existed under the Roman Dutch Law.

I think the first question to be decided is whether under the Roman Dutch Law children are liable to support their parents who are in indigent circumstances. It is enough to quote from the judgment of Tindall, J.A., in *Oosthuizen vs. Stanley* (1938) A.D. at page 327. The liability of children to support their parents, if these are indigent (inopes), is beyond question ; see Voet 25-3-8 ; van Leeuwen Cens. For. 1-10-4. The fact that a child is a minor does not absolve him from his duty, if he is able to provide or contribute to the required support ; see In *re* Knoop (10 S.C. 198). Support (alimenta) includes not only food and clothing in accordance with the quality and condition of the persons to be supported but also lodging and care in sickness ; see Voet 25-3-4, van Leeuwen, Cens. For. 1-10-5 ; Brunnemann, in Codicem 5-25. Whether a parent is in such a state of comparative indigency or destitution that a Court of law can compel a child to supplement the parent's income is a question of fact depending on the circumstances of each case. I find, in an old Scottish case quoted by Fraser (Parent and Child, 3rd ed. p. 137) and in Green's Encyclopaedia of Scots Law (vol. 1 p. 300), that a widow having an annual income of £60 was held to be not entitled to claim additional aliment from a son who had an income of £1,500 a year. No doubt the higher value of money 80 years ago was an important factor in the failure of the parent's claim in that case. However, though each case must depend on its own peculiar circumstances, that decision supports the view, I think, that the parent must show that, considering his or her station in life, he or she is in want of what should, considering his or her station in life, be regarded as coming under the head of necessities.

It must also be mentioned that a parent is not entitled to claim support from a child if the parent is able to maintain himself by working ; see 2 Holl. Cons. No. 279. Van Leeuwen says in the passage referred to " As children are entitled to support from their parents, so also are parents entitled to be supported by their children who are in wealthy circumstances. I say, by their children who are in wealthy circumstances, for children who are in poverty are not bound to support their parents. So that there is between relatives in the ascendant and descendant lines an inherent duty of mutual support ". Several other cases to the same

effect have been cited in Spiro's Law of Parent and Child (1950) page 247 and the learned author comments :—" The duty of support prevailing between parents and children, may, therefore, be said to be reciprocal, and here again South African Law differs from the Common Law in England and in the United States of America where neither parent nor child is bound to support the one or the other ".

The enactment of the Maintenance Ordinance Cap. 76, has no bearing on this matter since it does not purport to deal with the entire law of maintenance but only with the maintenance of wives and children. The absence of any reference in the Ordinance to the maintenance of parents by their children therefore seems to be no argument at all. Bonser, C.J., in *Subaliya vs. Kannangara* (1901) 4 N. L. R. p. 121, Wood Renton, J., in *Justina vs. Arman* (1910) 12 N. L. R. 263, Schneider, A.J., in *Lamahamy vs. Karunaratne* (1922) 22 N. L. R. 289 have taken the view that that branch of Roman Dutch Law which dealt with maintenance did form a part of the law of this Island while Ennis, A.C.J., in *Lamahamy vs. Karunaratne* (1922) 22 N. L. R. 289 doubted if the Roman Dutch Common Law in this respect was ever introduced into Ceylon. Is the rule in question, then, part of the law of Ceylon ?

Now the question as to how much of that system of law was imported into Ceylon was considered in *Samed vs. Segutamby* (1925) 25 N. L. R. 481 at page 497 where Bertram, C.J., said, that the propositions that the Roman Dutch Law pure and simple does not exist in this country in its entirety, and that it is not the whole body of Roman Dutch Law, but only so much of it as may be shown or presumed to have been introduced into Ceylon that is now applicable here, do not apply to fundamental principles of the Common Law enunciated by authorities recognized as binding wherever the Roman Dutch Law prevails. " Such principles ", he said, " may in course of time become modified in their local application by judicial decisions, but it would be only by a series of unbroken and express decisions that such a development could take place ". Jayawardene, A.J., in the same case, speaking of the Roman Dutch Law on the subject of damage by fire, used words which, I think, are appropriate in this connection also :—" But there is no decision by which this Court has declared that the Roman Dutch Law on the subject of damage by fire is inapplicable in this Colony by its being obsolete or for any other reason. It is not a special or local law which is only suited to conditions in Holland and unsuited to local conditions. It is a law of general application, and it cannot be suggested that it was not imported to Ceylon. This law is to be found in the works of institutional and other writers on the Roman Dutch Law recognized in Ceylon and appealed to in the Colony upon all questions of Roman Dutch Law. As this Court said in 1835 ; ' If the right exists, it is not the less law because hitherto suitors may not have thought it expedient to exercise it ' ". Undoubtedly the rule which requires children to maintain their indigent parents obtains in South Africa and I think it may be properly regarded as a fundamental principle of our Common Law. It is also interesting to find two cases decided in the District Court of Jaffna in 1803 reported in Mutukisna's Thesawleme p. 572, where parents who were in indigent circumstances successfully claimed maintenance from their children. In my opinion the rule that children are liable to support their parents who are in indigent circumstances obtains in Ceylon.

I, therefore, set aside the order of dismissal and send the case back in order that the parties may lead evidence on the other issues of fact and law already framed and any further issues which may be raised on the pleadings. The appellants are entitled to the costs of this appeal. All other costs will abide the result of the action.

Set aside.

Present : GRATIAEN, J. AND SWAN, J.

PERERA & OTHERS *vs.* SCHOLASTICA PERERA

D. C. (F) 89M of 1954—D. C. Negombo No. 17010

Argued on : 19th May, 1955

Delivered on : 26th May, 1955

Trust—Money deposited by plaintiffs in the name of the defendant—Intention to give the money as dowry—Advancement or trust—Sections 83 and 84 Trust Ordinance.

The plaintiffs deposited from time to time various sums of money aggregating to Rs. 5,000/- in the Post Office Savings Bank in the name of their sister, the defendant, with the object of giving that money as dowry to her upon marriage. The Bank pass book always remained in the custody of the eldest brother. There was no express stipulation at any time that the right to draw the money would be conditional on her contracting a marriage approved by them. The defendant eloped with a young man without the approval of her family or brother.

The District Judge dismissed the plaintiffs' action, in which they claimed that money on the ground that it never became her property although it was provisionally earmarked for her benefit.

Held : (1) That the defendant became disentitled to the money as the conditions attaching to the completion of the gift failed, when she married a person not approved by the plaintiffs.

(2) That the plaintiffs did not intend an absolute and unqualified gift to come into operation as soon as each sum of money was deposited in defendant's name.

Authorities cited : *Fernando vs. Fernando* (1918) 20 N.L.R. 244.
Mutalibu vs. Hameed (1950) 52 N.L.R. 97.
Shephard vs. Cartwright (1954) 3 A.E.R. 649.
Snell's Equity (22nd Edition) page 122 (1953) 1 ch. 728.

N. E. Weerasooria, Q.C. with *A. B. Perera* and *S. W. Walpita*, for the plaintiffs-appellants.
A. K. Premadasa with *S. M. H. de Silva*, for the defendant-respondent.

GRATIAEN, J.

All the plaintiffs, who are the elder brothers of the defendant, had met with a moderate degree of success in trade or business. Their father was himself a person of some substance, but he became a chronic invalid in 1942, with the result that the plaintiffs very commendably took over the responsibility of providing dowries in due course for their two unmarried sisters. Accordingly, a cash dowry of Rs. 5,000/-, towards which each brother made a proportionate contribution according to his means, was collected and handed over to their elder sister when she was " given out " in marriage in 1947. In July, 1949, when the defendant was 19 years old, a Post Office Savings Bank account was opened in her name with the same object in view, and sums aggregating Rs. 5,000/- were deposited from time to time to her credit by the plaintiffs. The Bank pass book was, however, retained for the time being by the eldest brother (the 1st plaintiff), and has never left his custody. The fact that this book was withheld from the young lady has some significance to the issues arising on this litigation.

In May, 1951, the defendant, having but recently attained her majority, eloped with and married a young man of her own selection without the approval of her parents or her brothers. The plaintiffs claim that in these circumstances the sum of Rs. 5,000/- provisionally ear-marked for her benefit never became her property ; she contends on the other hand that the money had passed to her absolutely as and when each item was deposited in her name with the Savings Bank.

The learned Judge rejected the plaintiffs' submission, and held that " when they deposited the money they intended that the defendant should have the benefit of it *and that this money should be her dowry* ". His decision was much influenced by the admitted absence of any express stipulation by the brothers (at the time when the money was deposited) that the right to draw the money would be conditional on her contracting a marriage approved by them.

The circumstances in which the money came to be deposited by the plaintiffs with the Savings Bank in the name of their unmarried sister certainly rules out the inference that they had committed themselves irrevocably to the granting of an unconditional gift to her. The brothers had no doubt placed themselves *in loco parentis* towards the defendant, so that the normal presumption of a resulting trust under Section 84 of the Trusts Ordinance does not arise in their favour. *Fernando vs. Fernando* (1918) 20 N.L.R. 244. *Mutalibu vs. Hameed* (1950) 52 N.L.R. 97. Under Section 83 of the Ordinance, however, it was open to the brothers to rebut " the counter-presumption of advancement " by proof that they did not intend at the relevant dates to dispose of the beneficial interest in the money unconditionally to the defendant.

Sections 83 and 84 of our Trusts Ordinance have introduced the English law on this subject, and the true principle was recently elucidated in the House of Lords by Lord Simonds in *Shephard vs. Cartwright* (1954) 3 A.E.R. 649. Where a man purchases property in the name of (or transfers property to) a stranger, a resulting trust is presumed in favour of the purchaser (or transferor) ; on the other hand, if the transfer is in the name of a child or one to whom the purchaser or transferer then stood *in loco parentis*, there is no such resulting trust but a presumption of advancement. The presumption may, however, be rebutted, but " it should not give way to slight circumstances ". The judgment proceeds to adopt the following passage from *Snell's Equity* (22nd Ed.) page 122 as to the kind of evidence which would be admissible for the

purpose of rebutting the presumption of advancement in any particular case :

> " The acts and declarations of the parties before or at the time of the (purchase) or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration ; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour."

The decision of the Court of Appeal as to the admissibility of evidence of subsequent statements or declarations in favour of the person making them has been over-ruled, but the following observations of Denning, L.J. in (1953) 1 Ch. 728 at 761 may be accepted as correctly setting out the general principle as to the presumption of advancement :

> " If there is no (admissible) evidence on either side, an advancement will unhesitatingly be inferred ; but, if there is other evidence pointing one way or the other, then the tribunal of fact must, at the end of the case, come to its own conclusion whether an advancement was intended or not, giving proper weight to the natural inclination of a father (or a person *in loco parentis*) to provide for the child, but also taking into account all other circumstances."

In the present case, the learned Judge correctly, in my opinion, accepted by implication the evidence that the plaintiffs did not intend an absolute and unqualified gift to come into operation as soon as each sum of money was deposited in the defendant's name. In other words, he was satisfied that the contemplated advancement was at any rate to be postponed until the time arrived for her to receive a dowry. But I cannot agree that she could ever have been intended to enjoy the beneficial ownership of the money if she ultimately chose to contract a marriage without the approval of her family. We are concerned only with the actual intention of the donors, and not with the desirability or otherwise of parents or persons *in loco parentis* imposing on a young woman (as a condition of their liberality) their own decision as to whom she ought to marry. If one pays regard to the habits and customs of the class of society to which these parties belong, the inference seems to me irresistible that the beneficial interest in the money provisionally ear-marked for her benefit was intended to be " given as dowry " to the young lady only if and when she was " given in marriage ", as her elder sister had been, to a bridegroom approved by the family. She elected instead to contract a marriage, " for better, for worse ", with someone of her own selection. The unfortunate consequence of that decision (which has, one hopes, been justified in all other respects) was that she became disentitled to receive a dowry which would otherwise have been available to her in accordance with her brother's intentions. The conditions attaching to the completion of the gift having failed, I would accordingly allow the appeal and enter judgment for the plaintiffs as prayed for with costs in both Courts. The money belongs to them.

SWAN, J.
I agree.

Appeal allowed.

Present : GRATIAEN, J. AND PULLE, J.

W. M. H. C. RODRIGO *vs.* K. V. NARAYANASAMY

S. C. No. 349/L *of* 1952—*D. C. Colombo No.* 5664/L

Argued on : 26th and 27th January, 1955
Delivered on : 8th February, 1955

Servitude—Amicable partition—No reservation of right of way—Circumstances under which it could be implied.

Where two co-owners amicably partitioned the common land by a deed according to a plan and the right of way of one owner over the land of the other was not expressly reserved.

Held : (1) That the right of way should be expressly reserved and cannot be lightly implied.

(2) In the absence of such an express reservation the claimant to a right of way could only succeed by proving that the dominant tenement would virtually be rendered ineffectual.

N. K. Choksy, Q.C., with *Eric Amerasinghe*, for the defendant-appellant.

H. W. Jayawardene, Q.C., with *E. Gunaratne* and *P. Ranasinghe*, for the plaintiff-respondent.

GRATIAEN, J.

This is an appeal against a judgment declaring that the defendant is not entitled to a right of way over the plaintiff's contiguous allotments of land depicted as D1, E1 and F1 in the plan filed of record.

The defendant and his sister Jane Wijetunga had admittedly been co-owners of a larger land including lots D1, E1 and F1. In order to implement an agreement to partition the land, two contemporaneous notarial deeds of exchange P5 and P7 were executed in 1944. By P5, defendant conveyed the entirety of his undivided interests in lots A, B, D1, E1 and F1 to Jane Wijetunga and she in turn conveyed to him all her interests in lots C, C3, D, E, F and G by P7. Each of them accordingly became (to the exclusion of the other) the sole owner of separate land comprising the several allotments conveyed by P5 and P7 respectively. At a later date, the plaintiff succeeded to Jane Wijetunga's rights by purchase.

It is admitted that, before the date of the amicable partition referred to, there was a well-defined footpath which proceeded across lots D1, E1 and F1 and then continued beyond F1 until it reached a main highway leading to Colombo.

This footpath had previously been used by both the defendant and Jane Wijetunga in the exercise of their rights of common ownership. The defendants claim is that, upon a true construction of the conveyances P5 and P7 in his favour, he either acquired or reserved to himself a servitude entitling him to continue to use this particular section of the footpath (with which this action is alone concerned) as owner of the dominant tenement comprising his contiguous allotments C, D, E, F and G. His alternative submission that he had acquired the alleged servitude by certain other means was abandoned at the trial and does not now arise for our consideration.

The terms of the conveyance P5 by Jane Wijetunga in favour of the defendant did not expressly purport to grant him the servitude which he claims to have acquired; it is even more significant that the servitude was not expressly reserved in his favour in the contemporaneous deed P7 whereby his interests in D1, E1, F1 were, without express qualification, conveyed to his sister. Nevertheless, it was argued at the trial that the servitude was either granted by implication (under P5) or reserved by implication (under P7). In my opinion, the rejection of these submissions by the learned Judge was perfectly correct.

Under the Roman-Dutch law, a servitude cannot as a general rule be granted by mere implication—*Meiyappa Chettiar vs. Ramasamy Chettiar* (1939) 41 N.L.R. 324 at 327. Similarly with regard to the grant of an easement under the English law. The exceptions to the general rule fall within the same principle in both systems. In the ultimate analysis, of course the question always turns on the true meaning of a particular written instrument.

The argument that Jane Wijetunga's conveyance P5 had by implication granted a right of way over lots D1, E1 and F1 (as servient tenements) in favour of lots C, D, E, F and G (as dominant tenements) could only have succeeded upon convincing proof that the use and enjoyment of lots C, D, E, F and G would otherwise be rendered virtually ineffectual. It was not sufficient to show that the footpath had in fact been used before the partition took place; the defendant had also to establish that its continued use after the severance of the common property was, even if not absolutely essential, at least " reasonably necessary for the reasonable and comfortable enjoyment of the part granted " —*i.e.* lots C, D, E, F and G,—*per* Bowen, L.J. in *Bayley vs. G.W.R. Co.* (1884) 26 Ch.D. 434 at 453. The evidence indicates that there were other reasonable and equally convenient means of access from these allotments to the main highway.

In the circumstances of the present case, the failure of the defendant to reserve the servitude in his favour in express terms in the cross-conveyance P7 not merely affords a very strong additional argument against his claim; it conclusively destroys his case. The deeds of exchange were contemporaneously executed in order to implement a mutual agreement between the co-owners. They must be read together in order to ascertain the common intention of the parties, and in this case an implied grant of a servitude should not be read into the terms of P5 unless its implied reservation in P7 can be inferred with equal propriety.

A reservation of a servitude by a grantor in his own favour must generally be made in express terms—*Wheeldon vs. Burrows* (1879) 12 Ch.D. 31. " Two well established exceptions relate to (servitudes) of necessity and mutual

(servitudes) such as rights of support between adjacent buildings. But these two specific exceptions do not exhaust the list which is indeed incapable of exhaustive statement, as the circumstances of the particular case may be *such as to raise a necessary inference that the common intention of the parties must have been to reserve some (servitude) to the grantor, or such as to preclude the grantee from denying the right consistently with good faith.*"—*per* Jenkins, L.J. in *Sandom vs. Webb* (1951) 1 Ch.D. 808 at 823. The Court there held that a claim based on an implied reservation of an easement must fail unless the grantor can show that the facts were (not reasonably consistent with any other explanation ". It is idle to suggest that the defendant has satisfied this formidable test. I would therefore dismiss the appeal with costs.

Pulle, J.
I agree.

Appeal dismissed.

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

WEERAKOON *vs.* LENORIS WAAS

S.C. No. 377-378—*D.C. (Final) Colombo No.* 3077/P.

Argued on : 21st & 22nd June, 1955.
Decided on : 22nd June, 1955.

Partition—Plaintiff's failure to establish title—Dismissal of plaintiff's action—Allotment of plantations and buildings to some parties thereafter—Jurisdiction of Court to make such allotment.

The plaintiffs instituted an action for the partition of a land. They failed to establish their title and the action was accordingly dismissed. The trial judge however proceeded to allot certain plantations and buildings among some of the defendants after investigating their rights.

Held : That, having dismissed the action on the ground that the plaintiffs had no title, the learned trial judge had no jurisdiction, in the absence of an agreement by the defendants to ask for a partition, to proceed to allot the plantations and the houses among the parties to it.

H. W. Jayawardene, Q.C., with *D. P. R. Goonetilleke* for the Plaintiff-Appellant in No. 377 and the Plaintiff-Respondent in No. 378.

D. S. Jayawickrema, Q.C., with *M. Rafeek* and *H. L. de Silva* for the 1st and 2nd Defendant-Appellants in No. 378 and the 1st and 2nd Defendants-Respondents in No. 377.

N. E. Weerasooria, Q.C., with *T. B. Dissanayake* for the 30th-34th Defendant-Respondents in both appeals.

Basnayake, A.C.J.

This is an action for partition of a land called Pelengahawatta described in the Schedule to the plaint as all that allotment of land called Pelengahawatta with the buildings and plantations thereon situated at Maharagama in the Palle Pattu of Salpiti Korale in the District of Colombo, Western Province, bounded on the North by Dewata Road, East by Weerakkodigewatta and Embuldeniyawewatta, on the South by a part of this land, and on the West by Kalutantrigewatta, containing in extent land sufficient to plant about 300 coconut plants in extent four acres. After trial the learned District Judge found that the plaintiff had not established title to the land and dismissed the plaintiff's action. But he added :—

" The defendants 30 to 34 in their answer denied the title of the defendants 1 to 22 but admitted the title of the 20 to 22 defendants to an acre at the trial. I find that the owners of the land sought to be partitioned are the defendants 30 to 34, 21, 22, 71, 72, as well as the other heirs of Jeelis and Babanis and the defendants 4 to 19, 61 to 64, and 69 and 70 who are the children and grandchildren of Githan Hamy.

The improvements are owned as follows :

The plantations on the eastern side of the land of the age of 50 years and above belong to the heirs of Jeelis and Babanis.

The other plantations belong to the 30 to 34 defendants.

The buildings and other structures are owned as follows : .....".

He then proceeded to allot the buildings.

It would appear from section 2 of the Partition Act, No. 16 of 1951, that an action for partition can be instituted only by a person to whom a

land belongs in common with two or more persons. The Act creates a special jurisdiction and provides for a special procedure. Where after trial it appears that the basis on which the action can be brought is non-existent, the Court cannot make any order other than the dismissal of the action and any other order which is ancillary to such order. This Court has decided that in an action under the repealed Partition Ordinance each party to a partition action had the double capacity of plaintiff and defendant and that he who first brought the action was taken to be the plaintiff. It has also been held by this Court that in an action under the same Ordinance where the plaintiff failed to prove his title there was no objection to a partition among the defendants who had established their title if they so desired it, because defendants in a partition action are for some purposes in the position of plaintiffs. The new Act is not different from the old Ordinance in respect of the provisions under which those decisions have been given and decisions under the repealed Ordinance can properly be regarded as applicable to the new Act. But in the instant case the defendants did not agree to ask for a partition.

There are two appeals, one by the plaintiff and the other by the 1st and 2nd defendants. The plaintiff-appellant has not satisfied us that the learned District Judge is wrong in his finding that he has no title to the land. We do not think that after having dismissed the action on the ground that the plaintiff had no title the learned District Judge had any jurisdiction to proceed to allot the plantations and the houses among the parties to it.

We accordingly set aside that part of the order which proceeds to allot plantations and buildings to various parties. Subject to that variation, the appeal of the plaintiff is dismissed with costs.

The parties who are dissatisfied with the learned trial Judge's order made without jurisdiction have had to come to this Court to have it set aside.

The 1st and 2nd defendants-appellants are declared entitled to recover the costs of this appeal from the 30th to 34th defendants who resisted their claims to the land.

Pulle, J.

I agree.

Order allotting interests to defendants set aside.

Present : Gratiaen, J. and Fernando, J.

KALAWANE DHAMMADASSI THERO vs. MAWELLA DHAMMAVISUDDHI THERO AND ANOTHER

Application for Restitutio-in-Integrum *or in the alternative for Revision in—S.C.* 348 L. *of* 1952 *D.C. Colombo No.* 5517/L.

Argued on : 2nd June, 1955
Delivered on : 7th June, 1955

Civil Procedure Code, Section 771*—Civil Appeal allowed—Respondent not represented by Counsel—Application by respondent to set aside judgment and decree of Supreme Court—*Restitutio-in-integrum *or revision—Re-hearing ordered—Jurisdiction of Supreme Court.*

Where at the hearing of an appeal before the Supreme Court, the respondent was not represented and the appeal was allowed, and the respondent thereafter applied to the Supreme Court by way of *restutio-in-intrgram* or revision to have the judgment and decree set aside and satisfactorily explained his failure to be represented at the hearing of the appeal, the Supreme Court ordered a re-hearing of the appeal under the provisions of Section 771 of the Civil Procedure Code.

H. W. Jayawardene, Q.C., with *Daya Perera* for the petitioner.

H. V. Perera, Q.C., with *H. A. Kottegoda* for the respondent.

Gratiaen, J.

This is an application to have a judgment and decree of this Court dated 19th July, 1954, in civil proceedings vacated. Arguments were addressed to us on behalf of both parties on the assumption that the facts set out in the petitioner's affidavit were substantially correct. I shall summarise these facts in so far as they are necessary for the purposes of our decision.

The petitioner had sued the respondents in the District Court of Colombo for a declaration that he was the lawful incumbent of Rajapushparama Vihara situated at Galkissa. After a contested

trial, judgment was entered in his favour as prayed for with costs on 19th September, 1951. The respondents then appealed to this Court and the appeal was heard on 12th and 13th July, 1954. The case for the respondents was fully argued by Counsel appearing on their behalf, but the petitioner himself was absent and was not represented by Counsel. Having reserved judgment, this Court made order on 19th July, 1954, allowing the appeal and dismissing the petitioner's action with costs in both Courts.

The petitioner has now explained the circumstances in which he was not represented at the hearing of the appeal. In the lower Court he had granted the partners of Messrs. Perera and Senaratne, Proctors, a joint proxy appointing them to represent him at the trial and also in this Court. In October and November, 1952, he had, at Mr. Senaratne's request, paid sums aggregating Rs. 735/- which were stated to be required as fees for a senior Counsel and a junior Counsel who had been retained by Mr. Senaratne to argue the petitioner's case on appeal. Mr. Senaratne later informed the petitioner that the advocates concerned had been duly briefed on his behalf, and the petitioner thereafter assumed that he would be represented at the argument when the appeal came up for hearing.

After the appeal had been disposed of, it was brought to the petitioner's notice that Counsel had not appeared for him at the argument because their fees had not been paid by Mr. Senaratne's firm. He also discovered for the first time that Mr. Senaratne had, in terms of an order of this Court dated 27th October, 1953, been suspended from the practice of his profession for a period of three years on the ground of misconduct. In the result, the partners of Messrs. Perera and Senaratne had become incapable of acting jointly for the petitioner by virtue of the proxy previously granted to them.

Mr. Jayawardene's main argument was that failure to comply, even inadvertently, with the provisions of section 28 of the Civil Procedure Code had the effect of rendering the judgment of this Court a nullity. The full implications of this section cannot be determined without an examination of questions of much nicety, but for the purposes of this application it is sufficient, I think, to base our jurisdiction to order a re-hearing of the appeal on the provisions of section 771 of the Code. The petitioner has satisfactorily explained that he was prevented by "sufficient cause" from appearing either personally or by Counsel at the hearing of the appeal. Moreover, the dispute as to the incumbency was certainly of sufficient gravity to make it desirable that the petitioner should not be denied an opportunity of supporting the judgment of the lower Court in his favour. I would accordingly vacate the judgment of this Court dated 19th July, 1954, and direct that the appeal be re-heard before a Bench of which my brother and I (who heard the original appeal) are not members. In my opinion, the costs of this application should be costs in the cause.

There is another matter to which it is my duty to refer before I conclude. The serious allegations in the petitioner's affidavit concerning Mr. C. E. de S. Senaratne's conduct clearly calls for an investigation, and the question prominently arises whether he is a fit and proper person to be permitted to resume his practice in an honourable profession after his period of suspension comes to an end. I would therefore direct that copies of the petitioner's petition and affidavit dated 21st September, 1954, and of all supporting documents annexed thereto, be forwarded by the Registrar to the Attorney-General and to the Incorporated Law Society so as to enable them to take such action as they may consider appropriate.

FERNANDO, J.
I agree.

Set aside.

Present : SWAN, J. AND SANSONI, J.

UKKU BANDA *vs.* THE RAHATUNGODA CO-OPERATIVE STORES SOCIETY, LTD.

S. C. No. 123/*D. C. Kandy No.* 1592/X

Argued on : 26th November, 1954
Decided on : 2nd December, 1954

Co-operative Society—Dispute between Society and Manager—Reference to arbitration—Appeal from award to Registrar—Dismissal of appeal, later award held to be ultra vires*—Second reference to arbitration—Validity—Section* 37, *Co-operative Societies Ordinance No.* 34 *of* 1921.

A dispute having arisen between a Co-operative Society and its Manager over the value of goods entrusted to the appellant and not accounted for, the matter was referred to arbitration under Rule 29 made under Section 37 of the Co-operative Societies Ordinance No. 34 of 1921. On an award being made directing appellant to pay Rs. 737/40 to the Society the appellant appealed to the Registrar who dismissed the appeal but thereafter declared the award to be *ultra vire* on the ground that on the date of the award the appellant had ceased to be an employee of the Society.

On a second reference being made for arbitration an award was made directing the appellant to pay the Society Rs. 808/98. The Society then applied for a writ and the appellant objected on the ground (*a*) that the Assistant Registrar had no authority to refer the matter for arbitration for the second time and (*b*) that the first award was valid.

Held: (1) That the first award was valid since on the date of the reference to arbitration the appellant had not ceased to be the Manager.

(2) That no authority except a court of law could declare an award to be *ultra vires* or invalid.

C. R. Gunaratne, for the defendant-appellant.
No appearance for the plaintiff-respondent.

Sansoni, J.

This is an appeal by the defendant from an order made by the Additional District Judge, Kandy, allowing the application of the Rahatungoda Co-operative Stores Society to issue writ against him to recover a sum of Rs. 808.98. The appellant was the Manager of the Society from 1st February, 1945, to 20th July, 1947. On 17th July, 1947, acting under Rule 29 of the rules made under Section 37 of the Co-operative Societies Ordinance No. 34 of 1921 the Assistant Registrar of Co-operative Societies referred to one H. M. W. Tennekoon a dispute which had arisen between the Society and the appellant over the value of goods entrusted to the appellant and not accounted for. The arbitrator made an award dated 27th December, 1947, directing the appellant to pay the Society a sum of Rs. 737.40. The appellant appealed against the award but his appeal was dismissed by the Registrar of Co-operative Societies.

Apparently the Registrar thereafter declared that award to be *ultra vires* on the ground that on the date of the award the appellant had ceased to be an employee of the Society. He is said to have taken that step in consequence of the decision of Gratiaen, J. in *Illangakoon vs. Bogollagama* 49 N.L.R. 103. Another reference of the dispute was then made by an Assistant Registrar of Co-operative Societies to one M. B. Tennekoon on 11th October, 1950, and the latter made an award dated 21st November, 1950, directing the appellant to pay the Society a sum of Rs. 808.98. The order appealed from was made when the Society applied to issue writ to execute that award. Notice of that application was given to the appellant and two objections were taken on his behalf: (1) that after the first award was made the Assistant Registrar had no authority to refer the dispute again to a arbitrator; (2) that as the appellant was an officer of the Society when the first reference to arbitration was made the dispute was properly referable to arbitration even under the unamended Section 45 of the Co-operative Societies Ordinance (Cap. 107), and the award made on such reference was valid. These objections among others were taken before us at the hearing of this appeal and as they are sufficient to dispose of the appeal I shall deal only with them.

To deal with the second objection first, I think the judgment of Dias, J. in *Canagasabai vs. Kondavil Co-operative Stores* 50 N.L.R. 465, concludes the matter the learned Judge decided, and I respectfully agree with that decision, that the crucial date is the date of reference. If on that date the appellant was the manager, it matters not if the appellant ceased to be the manager thereafter. The vital difference between *Canagasabai vs. Kondavil Co-operative Stores* (*supra*) and the present case on the one hand, and *Illangakoon vs. Bogollagama* (*supra*) on the other is, that the manager in the last mentioned case had ceased to be the manager before the matter was referred to arbitration. It seems to me that the second reference to arbitration was made because the Registrar of Co-operative Societies misunderstood the judgment of Gratiaen, J. The first award was in fact a valid award. Since there was a valid award made on 27th December, 1947, the second reference of 11th October, 1950, was unwarranted. In saying this I do not mean to imply that a second reference would have been permissible if the first award was bad. Whether the award was good or bad I do not see how it is open to any authority except a Court of law to declare an award *ultra vires* or invalid. Such a declaration is a usurpation of the authority which is properly vested in a Court. If the Registrar can claim to make such a declaration, the appellant may also claim an equal right to make a declaration that the award is *intra vires*. The Registrar is empowered by Section 45 (4) to make a decision in an appeal and he did so; but he has no statutory authority

to make a declaration as to the validity or invalidity of an award. His decision on the appeal with respect to the first award is declared by Section 45 (4) to be final and that would seem to be the end of the matter so far as he is concerned. It follows then that there was nothing to justify the second reference of the dispute and the first objection is also sound.

In the result I would hold that the award dated 27th December, 1947, was final; it had never been properly set aside; the award dated 21st November, 1950, on which the application for writ was founded is invalid and the application to execute it should have been refused. For these reasons I would allow this appeal with costs.

Swan, J.

I agree.

Puisne Justice.

Privy Council Appeal No. 39 *of* 1954

Present : Lord Oaksey, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow, Mr. L. M. D. de Silva

De SILVA vs. HIRDARAMANI LIMITED

FROM THE SUPREME COURT OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the 9th May, 1955

Contract—Agreement between owner of business, P and his employees S and W—Payments made to S in terms of agreement—Business taken over by Company subsequently formed with P as managing director—Oral undertaking by company to make the payments to S—Refusal of company to continue payments after death of P—Action by S to enforce agreement—Novation—Delegation—Estoppel—Roman-Dutch Law—English Law.

S was employed in a business known as ' Hirdaramani ' owned by P. W was also an employee of the business. An agreement was entered into between P, S and W by which S was to retire from the business and W was to succeed him as leading jeweller. S after retirement was to receive during his lifetime monthly payments of Rs. 150/- from P and towards these payments W was to contribute Rs. 75/- per month. In the event of W's employment ceasing by death, dismissal or otherwise the monthly payments to S were to cease. In terms of the agreement S received the payments of Rs. 150/- monthly.

Later a private limited company (Hirdaramani Ltd.) was formed with P as Managing Director, which took over the business owned by P. W then ceased to be in P's employment and became an employee of the company. Soon after the company was formed P as Managing Director of the company, undertook to make the payments to S under the agreement, and in fact continued to make the monthly payment with the Company's cheques.

Some time afterwards P died. The company thereupon denied liability to continue payments to S under the agreement. S then instituted an action to enforce payment against the company.

The learned District Judge entered judgment in favour of S holding (1) that there had been a novation of the original contract by which the defendant-company undertook the liability of P to make payments in terms of the contract.

(2) that the defendant-company was, by reason of its having made payments to S until the death of P, estopped from denying its liability to continue the payments.

On appeal the Supreme Court reversed the judgment of the learned trial judge holding :

(1) that in the absence of an express declaration a novation cannot be inferred unless it is a necessary inference from all the circumstances of the case and that there had been no novation as the correspondence ruled out the inference that the company had unequivocally undertaken the obligation to pay S.

(2) that the company was not estopped from denying its liability to pay as it could not be said that the plaintiff was misled into the belief that the company would continue the payments throughout his lifetime.

S appealed against the judgment of the Supreme Court to the Privy Council.

Held : (1) That the obligation to make the payments to S was binding on the Company either because a completely new form of contract which might be regarded as a mixture of novation proper and delegation was made between the Company and S irrespective of any condition with regard to W's employment, or because there was a novation of the original agreement by which the Company was substituted for P at all points of the agreement.

(2) That W's obligation to pay half the monthly payment to P was a separate obligation from P's obligation to make the monthly payments to S and that there was no interdependence between the two obligations. W's failure to pay his share would not have excused P from paying the full sum to S.

Per Lord Keith of Avonholm.—" The names given to different kinds of novation in Roman-Dutch law and in other systems of law drawing on the civil law are a convenient means of classifying different kinds of transactions, but introduce no principle which would not equally operate in similar circumstances under the law of contract in England."

Case referred to : *Scarf vs. Jardine* (1882) 7 App. Cas. 345.

L. G. Weeramantry, with *Biden Ashbrooke*, for the plaintiff-appellant.

Stephen Chapman for the defendant-respondent.

Lord Keith of Avonholm

This is an appeal from a judgment of the Supreme Court of Ceylon reversing a judgment of the District Court of Colombo in favour of the appellant and dismissing his action.

The facts of the case can be briefly stated.

The appellant had for some 11 years been employed as leading jeweller in a business known as Hirdaramani which in 1944 was owned by one Parmanand Tourmal. There was also employed in the business the appellant's brother-in-law, Wijeratne, whom the appellant had earlier introduced into the business.

In 1944 the appellant decided to retire from his employment and an agreement was entered into between Parmanand, the appellant and Wijeratne the effect of which was to give the appellant a conditional annuity of Rs. 150/- a month during his life and to put Wijeratne into his place as leading jewellery maker also on certain conditions. The agreement which was duly signed by all the contracting parties and witnessed was in the following terms :—

" This Agreement made and entered into between Parmanand Tourmal carrying on business at No. 65/69, Chatham Street, Colombo under the name and style of Hirdaramani hereinafter referred to as ' Mr. Parmanand ' (which term as herein used shall mean and include the said Parmanand Tourmal his heirs, executors and administrators) of the one part and Thenuwera Acharige Karnolis de Silva of Ambalangoda (hereinafter referred to as ' Silva ') and Alahendrage Acharige Charles Perera Wijeratne of Kalutara (hereinafter referred to as ' Wijeratne ') of the other part.

Whereas the said Silva and Wijeratne have for some time past been employed under Mr. Parmanand as leading jewellery maker and Assistant respectively.

And whereas Silva has agreed with Mr. Parmanand to retire from service as leading jewellery maker in the firm of Hirdaramani and has requested Mr. Parmanand to employ Wijeratne as his leading jewellery maker which Mr. Parmanand has agreed to do subject to the terms and conditions hereinafter set forth.

Now this Agreement witnesseth and it is hereby mutually covenanted and agreed between the parties hereto as follows :—

(*a*) The said Silva shall retire as leading jewellery maker in the firm of Hirdaramani as from the first day of February One thousand nine hundred and Forty Four and shall in consideration of the sum of Rupees Four Hundred and Seventy five (Rs. 475/-) being the purchase price, deliver to Mr. Parmanand all machines tools and other implements that are now at Hirdaramani and owned by Silva.

(*b*) The said Wijeratne shall as from the 1st day of February One thousand nine hundred and fourty four serve under Mr. Parmanand as leading jewellery maker on such remuneration as may be agreed upon from time to time and shall devote his whole time and attention to such work and shall not work for any other person or firm whomsoever without the consent first had and obtained from Mr. Parmanand.

(*c*) In consideration of the services rendered as aforesaid by Silva and as long as Wijeratne is employed under Mr. Parmanand he Mr. Parmanand shall as from 1st February One thousand nine hundred and forty four pay to Silva monthly at the end of each and every month a sum of Rupees One hundred and Fifty (Rs. 150/-) during the life time of Silva.

(*d*) Towards the payment of the aforesaid monthly sum of Rupees One hundred and Fifty (Rs. 150/-) by Mr. Parmanand he the said Wijeratne shall contribute a sum of Rupees Seventy five (Rs. 75/-) monthly from his remuneration.

(*e*) The said Silva shall be at absolute liberty to undertake orders and carry on his usual business of jewellery maker.

(*f*) In the event of the said Wijeratne dying or being dismissed from service or being incapacitated by illness or otherwise or

leaving the service of Hirdaramani at any time or in the event of the death of Silva then the payment to Silva of the said sum of Rupees One hundred and Fifty (Rs. 150/) shall immediately cease anything herein contained to the contrary notwithstanding.

(*g*) In the event of the said Wijeratne proving at any time hereafter in the opinion of Mr. Parmanand incompetent, insubordinate, negligent or dishonest then it shall be lawful for Mr. Parmanand to dismiss Wijeratne immediately and in that event this Agreement shall cease and be of no avail.

(*h*) In addition to any other remuneration that Mr. Parmanand shall pay to Wijeratne for his service as leading jewellery maker and as long as the said Wijeratne shall serve Mr. Parmanand he Mr. Parmanand shall pay to Wijeratne monthly at the end of each and every month as from 1st February One thousand nine hundred and Forty four the sum of Rupees Fifty (Rs. 50/-) as salary.

In witness whereof the said Parmanand Tourmal, the said Thenuwera Acharige Karnolis de Silva and the said Alahendrage Acharige Charlis Perera Wijeratne do set their respective hands hereunto at Colombo on this Twenty ninth day of January One thousand nine hundred and Forty four."

The appellant left the service of Hirdaramani on the 1st February, 1944, and Wijeratne took the appellant's place in the business. The appellant thereafter received the sum of Rs. 150/- monthly in terms of the agreement.

On the 27th June, 1946, the private limited company of Hirdaramani Limited (the defendant in this action) was formed, with Parmanand as managing director and chairman of the Board of Directors. He and various relatives were also appointed by the Articles of Association first directors and life directors of the company and were allotted shares in the issued and subscribed capital of the company. It is not in dispute that the company took over the business of Hirdaramani.

The appellant came to know that the business had been converted into a limited company and in or about July, 1946, he spoke to Parmanand. His evidence (the only evidence in the case) in this matter is contained of the following passages. In examination-in-chief he said :—

" After I came to know that the business had been converted into a limited liability Company I spoke to Mr. Tourmal. I spoke to him about the payments that were being made to me. I asked him whether there would be any change in the payments made to me according to the agreement after the business was incorporated into a limited liability Company. He said he was the Managing Director and Chairman of the Board of Directors, and that there would be no change, and that the Company would pay. The Company continued to pay me according to the agreement. Wijeratne continues to work in Hirdaramani Ltd. He is working there up to date. I spoke to Mr. Tourmal about my payments on the agreement in June or July, 1946. By that time Mr. Tourmal was the Managing Director of the Defendant-Company."

In cross-examination he said :—

" After the Company was formed I spoke to Mr. Tourmal. He said that he was the Managing Director of the Defendant-Company and that there would not be any change in regard to the payment on the agreement, and that he would continue to pay me. That was a very important matter so far as I was concerned. I had no misgivings in my mind that he would continue to pay me."

Later in cross-examination with reference to a passage in a letter which he wrote on the 28th June, 1948, he was asked :—

" You stated there ' I feel that the Company or in the alternative the estate of the late Mr. Parmanand Tourmal is liable to pay me the said amount throughout my life '. Why did you say that ?

A. I expected either the Company or the estate of Mr. Parmanand to pay me according to the agreement, because Mr. Parmanand had told me so.

To Court :

Q. What did Mr. Tourmal tell you ?

A. He said the Company would continue to pay.

Following on this meeting with Parmanand the appellant continued to receive his monthly payments of Rs. 150/- which were made by company cheques, occasionally sent to him with covering letters from the company.

Parmanand died on the 23rd March, 1948. The company then took the view that there was no longer any liability on anyone to make payments to the appellant under the agreement but was prepared to continue to do so, on an *ex gratia* basis, and accordingly sent to the appellant two letters dated the 9th and 30th April, 1948, respectively :—

The first was in the following terms :—

" Dear Sir,

We enclose herewith a cheque for Rs. 150/- being the amount paid to you monthly by the late Mr. T. Parmanand,

As you are aware of Mr. Parmanand died recently and before his death our Company was formed.

We are therefore continuing this payment without any obligation or binding on our part.

Please acknowledge receipt.

Yours faithfully,
Hirdaramani, Ltd."

The second was as follows :—

" Dear Sir,

By our letter of 9th inst., we informed you the condition subject to which we will be paying you your monthly payment and you have doubtless accepted the payment subject to that condition.

We are enclosing herewith cheque for Rs. 150/- being April payment and shall be glad if you will acknowledge receipt.

Please note that all future payments will be subject to that condition.

Yours faithfully,
Hirdaramani, Ltd."

The appellant did not at this time reply to these letters but after receiving the second letter he called on Parmanand's son, Bagawandas, who was one of the directors of the company. In his evidence the appellant says he told Bagawandas that according to the agreement the payment could not be stopped and that he was trying to do an injustice to him by including a condition in the letter in regard to future payments and that he, the appellant, expected to receive payment. Bagawandas told him that the company was not bound to pay.

Thereafter the company sent the appellant a further cheque along with the following letter dated the 31st May, 1948 :—

" Dear Sir,

Enclosed please find cheque No. T. 174596 on Chartered Bank for Rs. 150/- drawn in your favour subject to the condition mentioned in our previous letter and which you have accepted.

Please acknowledge receipt.

Yours faithfully,
Hirdaramani, Ltd."

To this the appellant replied by the following letter dated the 28th June, 1948 :—

" Agreement dated 29-1-44, between the Late Mr. Parmanand Tourmal and K. de Silva.

Sirs,

I am in receipt of your letters, dated 9-4-48, 30-4-48, and 31-5-48, enclosing cheques due to me and thank you for same.

However, I find it difficult to understand why you state that these payments are being made without any obligation or binding on your part and I shall be glad if you will explain your position clearly for my future guidance.

I have not in anyway accepted this position of yours although you state that I have done so.

I feel that the company or in the alternative the estate of the late Mr. Parmanand Tourmal is liable to continue the payment of the said sum throughout my life.

Yours faithfully,
T. A. K. de Silva."

This correspondence is concluded by a letter from the company to the appellant dated the 29th June, 1948, re-affirming its position and stating that " the agreement is now at an end ". No payment has been made to the appellant since May, 1948.

In September, 1949, the appellant began the present suit claiming Rs. 2,250 arrears of payment from June, 1948, to September, 1949, and payment of Rs. 150/- per month from September onwards.

The learned District Judge (K. D. de Silva, A.D.J.) in an able and careful judgment found for the appellant. On appeal the Supreme Court set aside his judgment and dismissed the appellant's action with costs.

The crucial question for consideration is what happened to the agreement when the business of Hirdaramani was turned into a limited company? The District Judge has found that at the meeting between the appellant and Parmanand in July, 1946, " Parmanand as managing director of the defendant-company undertook to make the payments due to the plaintiff under the agreement " and answered affirmatively the relevant issue on this point, " Did the defendant-company undertake to pay the plaintiff the sum of Rs. 150/- per month mentioned in the said agreement ?" As their Lordships read the opinion of Gratiaen J., in the Supreme Court, concurred in by Gunasekera J., the other member of the Court, the Supreme Court has also accepted this finding. It is not their Lordships' practice to upset concurrent findings in fact of two courts, but their Lordships would observe that the evidence already quoted amply supports the finding so made.

The real controversy is as to what the effect of this undertaking was on the rights of the appellant under the agreement. Both Courts below treated the matter as falling to be determined on an application of the doctrine of novation under Roman-Dutch law. Their Lordships were re-

ferred to two species of novation recognised under the Roman-Dutch system. One is novation properly so called by which the obligations under an agreement are altered, the new obligations being substituted for the old while the parties remain the same. Another is known as delegation, by which the obligations remain the same but a new debtor is substituted for the original debtor, with the consent of both and of the creditor, the original debtor being discharged of his obligation. The terms of the agreement thus remain the same, but the parties are altered. Other species of novation are recognised under Roman-Dutch law but need not for the purposes of this case be considered. In the present case the Supreme Court considered the form of novation relied on to be " a transaction described by the Roman-Dutch jurists as delegation ".

The principle of novation in contract is not foreign to English law. As was pointed out in *Scarf vs. Jardine* (1882) 7 App. Cas. 345 it frequently operates on a change of partnership where the new partners take over the obligations of the old partners with the consent of the creditors. But Lord Selborne, L.C. recognised also that novation might include a new contract substituted for the original contract between the same parties (p. 351). The names given to different kinds of novation in Roman-Dutch law and in other systems of law drawing on the civil law are a convenient means of classifying different kinds of transaction but, as their Lordships apprehend, introduce no principle which would not equally operate in similar circumstances under the law of contract in England.

The agreement here was a tripartite agreement. But the contractual relationships set up were between Parmanand and the appellant on the one hand and Wijeratne and Parmanand on the other, although the contractual obligation of Parmanand to the appellant might be conditioned in certain circumstances by what happened within the contractual relationship existing between Parmanand and Wijeratne. When, therefore, on the formation of the company, the company took over Parmanand's obligation to the appellant the immediate result was to substitute the company for Parmanand as the appellant's debtor and to release Parmanand from his obligation for, on their Lordships' view of the effect of the evidence, it must be assumed that the appellant was a consenting party to this transaction. It is to be observed, however, that one of the conditions of Parmanand's liability to the appellant under the original agreement was that Wijeratne should be in his employment. When the company took over the business of Hirdaramani, Wijeratne ceased to be in Parmanand's employment and became an employee of the company. It is upon this fact that the defence to this case and the judgment of the Supreme Court are based.

Their Lordships would here observe that if the defence is well founded the undertaking given by the company to the appellant had no meaning at all, for at that time Wijeratne was in fact no longer employed by Parmanand and was employed by the company. None the less the company as from the date of the undertaking made payment to the appellant without condition or qualification for some two years until the death of Parmanand. Their Lordships are quite unable to hold in these circumstances and taking the evidence as a whole that some form of new contract was not made on the formation of the company whereby the company became bound to the appellant. In certain eventualities it might be necessary to determine what the precise terms of this new contract were but, in their Lordships' opinion, on any view of the contract the company is bound, as matters at present stand, to fulfil the obligation undertaken by them to pay the appellant Rs. 150/- a month.

Two possible views, in their Lordships' opinion, are alone tenable on the evidence. One is that a completely new form of contract was made by which the company undertook to pay the appellant for his life an annuity of Rs. 150/- per month, irrespective of any condition with regard to Wijeratne's employment. This it may be observed would not be novation proper according to Roman-Dutch law, because there would be a change of debtor, as well as a change in the terms of the obligation. Nor would it be delegation, because there would be a change of the terms of the contract, as well as a change of debtor. It might be regarded as a mixture of novation and delegation, and in principle their Lordships see no reason why this could not be so.

The other view is that the company was substituted for Parmanand at all points of the agreement, so that not only did the company become the debtor of the appellant for the payment of Rs. 150/- per month, but also became the employer of Wijeratne, with the benefit of all the rights and subject to all the obligations previously existing between Parmanand and Wijeratne under the agreement and with the right to terminate the payment to the appellant on Wijeratne's ceasing to be in the company's employment for a reason contemplated in the agreement. This would be difficult to bring under any single category of novation in Roman-Dutch law. It would be novation of a somewhat composite character. But again there is no reason in principle why such a new arrangement could not be made with the consent of all the parties.

Prima facie the facts of the case so far as brought out by the evidence suggest that the latter was the true view of the arrangement come to on the formation of the company. The evidence that Parmanand said there would be no change made to the appellant according to the agreement and that the company would pay may be thought to support that view. Wijeratne also in fact became an employee of the company and is still employed by the company. But there is no evidence of Wijeratne or of the company as to what are the contractual relations between them and in the absence of such evidence it would be improper to make any assumption in this matter. Their Lordships, however, see no escape from the view that in fact and in law the company took over Parmanand's obligation to the appellant. Their Lordships are unable to hold that this obligation was subject to a condition which was impossible of fulfilment at the time of the novation, namely that Wijeratne should continue in the employment of Parmanand. If it was subject to any other condition, or conditions, it was for the company to prove this by evidence.

The learned District Judge said that it was necessary to consider whether the other party to the agreement, namely Wijeratne, was a consenting party to the novation and held that in the absence of evidence to the contrary it was legitimate to presume that he was. This may well have been so but as already observed it is not, in their Lordships' view, necessary so to find. Wijeratne's obligation to pay half of the monthly payment to Parmanand was a separate obligation from Parmanand's obligation to make the monthly payment to the appellant and there was no interdependence between the two obligations. The appellant could not have sued Wijeratne for half the annuity and Wijeratne's failure to pay his share would not have excused Parmanand from paying the full annuity to the appellant. Wijeratne's position on the formation of the company was a matter for agreement between Wijeratne, Parmanand and the company with which strictly the appellant had no concern, except in so far as it affected the receipt of his monthly payment.

The ground of judgment of the Supreme Court would seem to be contained in the following passage in the opinion of Gratiaen, J. :—

> "The plaintiff could not succeed by pleading and proving that the Company had undertaken only the original obligation of Parmanand Tourmal under the agreement dated 29th January, 1944, for even upon an interpretation most favourable to the plaintiff, that particular obligation was no longer subsisting after the date of Parmanand Tourmal's death. Indeed, the action could not be maintained except upon the basis of a fresh contract whereby the Company undertook an obligation not measured by the limits of Parmanand Tourmal's extinguished liability but continuing *for a period of time extending far beyond that which had been contemplated in the terms of the original contract*, namely, so long as Wijeratne served 'Hirdaramani Limited' as its 'leading jeweller'. No such contract has been pleaded or proved by the plaintiff."

The words emphasised in italics are so emphasised by the learned judge, not by their Lordships' Board.

As their Lordships understand this passage the learned judge is intending to convey that, as the original obligation of Parmanand, or his heirs, executors and administrators, under the agreement was confined to the period during which Wijeratne served him or his heirs, etc., the company's obligation could not be extended beyond that period, for Wijeratne had ceased to serve Parmanand and was now in the service of the company. But that event happened when the company was formed and their Lordships do not appreciate the significance of looking at things as at the date of Parmanand's death. By that time the company had assumed the liability and there is nothing to suggest that it was limited to the period of Parmanand's life. If on the other hand Gratiaen, J., means that all liability ceased on the formation of the company and the transfer of Wijeratne's services to it, that, as has already been pointed out, gives no meaning to the evidence that the company would take over Parmanand's liability and that there would be no change in the payments.

Some importance was attached by Gratiaen, J., to the correspondence already quoted that took place between the company and the appellant after Parmanand's death. The learned judge appears, however, to have omitted to notice the evidence of the meeting of the appellant with Bagawandas when the appellant protested against the attitude taken up by the company. But in any event what the company wrote after Parmanand's death could not affect a liability which had already been accepted by the company during his life.

An argument was addressed to their Lordships for the appellant, based on the doctrine of estoppel, but, in their Lordships' view, there are no circumstances in this case which call for any consideration of that doctrine.

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

Appeal allowed.

Present : GRATIAEN, J. & FERNANDO, J.

T. M. SABARATNAM vs. V. KANDIAH

D.C. (F) 221 L. of 1953—D.C. Vavuniya No. 1027

Argued on : 29th and 30th June and 1st July, 1955
Delivered on : 5th July, 1955

Sale of minor's property by mother (curatrix) with Court approval—On attaining majority, action to have deed declared null and void ab initio*—Failure of consideration—Fraud and collusion.*

Where a plaintiff sought to have a deed of sale executed by his mother with the approval of Court during his minority, declared null and void *ab initio* on the grounds :

(1) that the stipulated consideration had not in fact been paid and ;

(2) that the conveyance was executed fraudulently and collusively by his mother acting in concert with one of her judgment creditors. There was no allegation of fraud against the defendant.

Held : (1) that the issue of fraud did not properly arise out of the pleadings.

(2) that if the true position was that the defendant had not paid the stipulated consideration, the proper remedy was to sue him for its recovery and not to have the deed declared null and void.

S. J. V. Chelvanayakam, Q.C., with *A. Nagendra* for the defendant-appellant.

H. W. Thambiah with *M. L. S. Jayasekera* and *Jagath de Silva* for the plaintiff-respondent.

GRATIAEN, J.

On 2nd March, 1944, when the plaintiff was 15 or 16 years of age, his mother Sithamparam, having been appointed curatrix of his estate for this special purpose, sold the plaintiff's interests in certain properties to the defendant. The consideration agreed upon for the sale was approved by the Court, and was to be applied in satisfaction of a joint and several money decree in favour of a man called Manikam against Sithamparam, the plaintiff and a woman named Theivani.

On 16th March, 1952,—that is, more than eight years after the sale previously referred to, the plaintiff sued the defendant to have the transaction declared null and void *ab initio*. He alleged in his plaint (1) that the stipulated consideration had not in fact been paid, as the judgment-debt had already been satisfied on the plaintiff's behalf and (2) the execution of the conveyance had been fraudulently and collusively obtained by Sithamparam acting in concert with the judgment creditor Manikam. The defendant, against whom no allegation of fraud was made in the pleadings, denied these averments.

The main issues upon which the parties went to trial were as follows :—

"1. Was deed No. 88 of 2-3-44 executed by Sithamparam in favour of the defendant without consideration ?

2. Was the deed executed fraudulently by the said Sithamparam to defraud the plaintiff ?

It will be observed that the allegation of fraud was thus persisted in only against the plaintiff's mother. Nevertheless, the learned Judge took a different view of the facts. He decided that Sithamparam was not the perpetrator but the victim of a fraud which had been practised upon her by Manikam and perhaps by the defendant as well. I do not propose to express any view as to whether these findings were justified, because in my opinion they did not properly arise upon the issues at all. It is a serious matter for a purchaser, eight years after the event, to have the transaction impugned upon allegations which he was never called upon to meet. Issue 2 was correctly answered against the plaintiff, and no other issue of fraud arose for adjudication.

With regard to issue 1, the parties led evidence which could not be reconciled. But here again I am content to say that, if the true position was that the defendant had not paid the stipulated consideration, the proper remedy was to sue him for its recovery, and not to have the sale itself declared null and void. Even if Sithamparam's version was true, this was not the kind of case in which the property in the land had not passed under the Roman-Dutch Law.

I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

FERNANDO, J.

I agree.

Appeal allowed.

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

NANDARAMA THERO vs. RATHANAPALA THERO

S. C No. 85—*D. C. (F) Matara No.* 21128

Argued on : 22nd, 32rd and 24th June, and 12th July, 1955
Decided on : 12th July, 1955

Sissyanu sissya paramparawa—*Nomination of junior pupil to succession in preference to senior pupil—Deed of settlement between pupils—Can pupil renounce his rights under nomination—Common law and ecclesiastical law.*

A viharadhipathi of two vihares nominated by deed, J, the junior of his two pupils, to succeed him as *Adikari* to both vihares in preference to S, the senior pupil. After his death a settlement was reached between the pupils whereby J was to be in charge of one vihare, and S of the other vihare. In derogation of the settlement J, by deed, appointed one of his co-pupils to be in charge of the vihare allotted to him and went to reside in the temple assigned to S where he died in 1949. The appellant, the senior pupil of J, prayed that he be declared viharadhipati of the other vihare, as against the respondent, the senior pupil of S.

Held : (1) That there is nothing in the Vinaya or the decisions of the Supreme Court which forbids a *bhikku* from renouncing his right to the management of a vihare.

(2) That under the settlement J had renounced his rights to the management of the other vihare.

(3) That upon J's renunciation, S, as the original Viharadhipati's senior pupil, became *viharadhipati* of the other vihare (J having no pupils at the time) ; and that the respondent, as pupil of S, is entitled to be Viharadhipathi.

Cases referred to : *Saranankara Unnanse vs. Indajoti Unnanse* 20 N. L. R. 385 at 394.
Punnananda vs. Welivitiye Soratha 51 N. L. R. 372
Premaratne vs. Indasara 40 N.LR. 235.

H. W. Jayewardene, Q.C., with *P. Ranasinghe*, for the plaintiff-appellant.
N. E. Weerasooria, Q.C., with *A. F. Wijemanne*, for the defendant-respondent.

BASNAYAKE, A.C.J.

This is an action by Malimboda Nandarama (hereinafter referred to as the appellant), the senior pupil of the late Godagama Jinaratana, against Akurugoda Rathanapala (hereinafter referred to as the respondent), the senior pupil of the late Murungasyaye Sumana, praying that he be declared the Viharadhipathi of the temple known as Ogaspe Vihare (hereinafter referred to as Ogaspe) and that he be placed in possession thereof. The appellant claims that one Talgahagoda Dhammadara was the original Viharadhipathi of Ogaspe, and Indurukawa Vihare (hereinafter referred to as Indurukawa). The former was the larger of the two and better endowed than the latter. Dhammadara had two pupils, Godagama Jinaratana, also known as Ehadugoda Jinaratana, and Murungasyaye Sumana. Of these two Sumana was the senior, having been ordained on the same day but before Jinaratana. Dhammadara died on 28th October, 1914, at Ogaspe. Shortly before his death he executed a deed No. 2432 of 2nd April, 1914, which for the purposes of this action is marked P1. In that instrument Dhammadara after reciting how he succeeded to the office of Viharadhiwasi of Ogaspe and Indurukawa and expressing his desire to nominate Jinaratana as his successor states—

" I, the aforesaid Talgahagoda Dhammadara Therunnanse, do hereby appoint my own pupil Godagama Jinaratana Unnanse to be the Adikari after my demise of Ogaspe Vihare (here follows a description of the vihare and its grounds) and also of Indurukawa Vihare (here follows a description of the Vihare and its grounds). Further that the aforesaid Godagama Jinaratana Therunnanse shall enjoy the income of the aforesaid premises in accordance with the rules and regulations laid down in the Vinaya and shall spend for the repairs, upkeep and improvements of the aforesaid Vihares ; should assist who is presently my pupil Murungasyaye Sumana Unnanse to prosecute his studies financially and also premit him to reside at Ogaspe Temple ".

Dhammadara died on 28th October, 1914. Immediately after his death dispute arose between Jinaratana and Sumana. Parties interested in the welfare of the temple appear to have brought about a settlement of those disputes. That settlement is recorded in the document D11 which is set out below ;

" The writing attaches to the list bearing the date 11th November, 1914 ".

" On the 23rd January, 1915, at Ogaspe Vihare, the trustees of the said Vihare and D.C. Wiratunga Ralahamy, President of the

District Committee, having met the dispute that existed between Murungasyaye Sumana Therunnanse and Ehadugoda Jinaratana Therunnanse was settled there :

Murungasyaye Sumana Therunnanse shall reside and be in charge of Ogaspe Vihare.

Ehadugoda Therunnanse shall reside and be in charge of Indurukawa Vihare.

That the priests resident thereon shall have the right to make use of the produce and income of the said two Vihares in a reasonable manner.

That Murungasyaye Sumana Therunnanse as chief shall in the knowing of the trustee in charge of the vihare protect the goods etc. mentioned in this list ".

In derogation of the settlement of 23rd January, 1915, and without making even a reference to it, Jinaratana by a deed dated 6th November, 1915, appointed Munamalpe Pemananda another pupil of Dhammadara to manage Indurukawa claiming that he did so because it was difficult to manage both Ogaspe and Indurukawa. After reciting the particulars in P1 and expressing Jinaratana's desire to appoint Pemananda as Viharadhiwasi of Indurukawa, the instrument proceeds as follows :-

" I, the aforesaid Godagama Jinaratana Therunnanse because of the right devolved on me by the aforesaid deed No. 2432 and on behalf of the person who assigned that right and on behalf of myself who exercise it do hereby appoint the aforesaid Munamalpe Pemananda Therunnanse to carry on the management and administration subject to and in accordance with the conditions and in the manner laid down in the aforesaid document of the premises called and known as Indurukawa Viharastana and all fruit trees, image house, residing premises, etc. appertaining thereto and to be the chief incumbent of the aforesaid Indurukawa Vihare (here follows a statement of the boundaries) ".

Thereafter, Jinaratana continued to live at Indurukawa and Sumana at Ogaspe. Sumana died in 1927, aged 50 and the respondent, his pupil, succeeded to the management of Ogaspe. Some time after Sumana's death, Jinaratana who was living at Indurukawa came to reside at Ogaspe and continued to live there without any objection from the respondent till his death on 9th November, 1949, at the age of 71. It is alleged that Jinaratana left Indurukawa after the death of Sumana in order to escape ill-treatment by Pemananda, to whom he had in 1915, by the deed above referred to transferred the management of that temple.

The learned District Judge, after examining the evidence both oral and documentary, dismissed the appellant's action holding that from the time of the death of Dhammadara, Sumana had acted as Viharadhipathi of Ogaspe and that Jinaratana, when he entered into the agreement D11, waived and abandoned whatever rights he got on P1 to Ogaspe and that since the death of Sumana the respondent has acted as the Viharadhipathi of that Vihare.

The present appeal is from that decision. Learned Counsel for the appellant has argued with force that under our law according to the rule of *sissyanu sissya paramparawa* the senior pupil succeeds the tutor unless the tutor nominates another pupil to succeed him and that where there is a nomination by the tutor the co-pupils have no power to vary that nomination even with the consent of the nominated pupil. While conceding that a pupil who succeeds to the office of Viharadhipathi by virtue of being the senior pupil of his tutor may renounce his office learned Counsel contended that a pupil nominated by his tutor as his successor was not free to renounce his right.

Learned Counsel also further contended that D11 is of no effect in law even though Jinaratana had consented to it and did not operate as a variation of the nomination made by Dhammadara.

None of the authorities cited by Counsel support the proposition he was seeking to establish. There is nothing in the Vinaya or the decisions of this Court which forbids a bhikku from renouncing his right to the management of a vihare.

To hold that a bhikku is not free to renounce the office of Viharadhipathi under any circumstances and that he is bound to hold that office whether he likes it or not would be going counter to the fundamental concepts of the Vinaya.

It would be appropriate in this connexion to refer to the words of Bertram C.J. in the case of *Saranankara Unnanse vs. Indajoti Unnanse* 20 N. L. R. 385 at 394. " But when we are dealing with ecclesiastical property, a region in which we are enforcing simply the ecclesiastical law based upon the original authoritative texts developed by religious customs, we ought not to recognize claims and transactions which are in their terms or in their nature inconsistent with the fundamental principles of those texts and those customs ". Under our law a person is free to renounce a right. *Voet Bk.* 1 *Tit* 4*s.* 22.

Upon Jinaratana's renunciation of his right to Ogaspe even if the document D11 did not mention Sumana as the Viharadhipathi of that temple he would, by virtue of his being Dhammadara's senior pupil, have become the Viharadhipati as Jinaratana had no pupils at that time.

Jinaratana's renunciation of whatever rights he had to Ogaspe by virtue of P1 is valid not only

according to ecclesiastical law but also according to the common law.

The view we have taken is in accord with the decision of this Court in the case of *Punnananda vs. Welivitiye Soratha* 51 N. L. R. 372.

We therefore hold that Jinaratana's surrender of whatever rights he obtained under the deed executed by his tutor Dhammadara was valid and effectual and that as Jinaratana had no pupil at the time, Sumana as the senior pupil of Dhammadara rightfully became Viharadhipati of Ogaspe and that the respondent as the pupil of Sumana was entitled to be Viharadhipathi of that Vihare.

There were two other matters which were raised at the trial. They are—

(*a*) whether the decree in C.R. Matara No. 13998, an action by Sumana against Don Thedias Wimalagunasekera, trustee of Ogaspe, and Jinaratana claiming the produce of certain lands and for maintenance, operated as *res judicata* between the appellant and the respondent, and,

(*b*) whether the appellant was barred by the Prescription Ordinance from maintaining this action.

In the matter referred to as (*a*) above, Wimalagunasekera filed answer that Jinaratana was the chief incumbent of the temple and was in possession of the property. The case was settled by consent. The material part of the decree reads :—

> " It is ordered and decreed of consent that the plaintiff be and he is hereby declared the chief incumbent of Ogaspe Vihare at Malimboda ".

The learned District Judge held that the decree operated as " *res judicata* " between the appellant and the respondent.

On the question of prescription the learned District Judge held that the appellant's action was barred by prescription in view of the decision of this Court in the case of *Premaratne vs. Indasara* 40 N. L. R. 235. As we held that Sumana was the rightful Viharadhipathi of Ogaspe the questions of *res judicata* and prescription need not be discussed for the purposes of this Judgment.

The appeal is dismissed with costs.

Pulle, J.

I agree.

Appeal dismissed with costs.

Present : Sansoni, J.

WILLIAM vs. THE COMMISSIONER OF INCOME TAX

S. C. No. 343 with Application No. 468—M. C. Colombo 249

Argued on : 28th October, 1954
Decided on : 2nd November, 1954

Income Tax—Sections 76 (5) and 80 (1) and (2)—Commissioner issuing certificate to Magistrate—Magistrate's discretionary power to adjourn—Sufficiency of the particulars in Commissioner's certificate.

The Commissioner of Income Tax filed a certificate in the Magistrate's Court under Section 76 (5) of the Income Tax Ordinance certifying that the petitioner had defaulted in paying Rs. 536,499.99 being income tax due from him. On 10-3-54 the petitioner appeared before the Magistrate on summons and order was made on that day directing the case to be called on 25-3-54. On 25-3-54 the Magistrate made the following order : " As respondent had appealed he is not entitled to adjournment under Section 80 (2). So the respondent should pay this amount. Payment on 31-3-54."

At the hearing of the application to revise the Magistrate's order it was contended that :

(*a*) the Magistrate was wrong in supposing that he had no discretion to adjourn the matter.

(*b*) that the certificate did not comply with the provisions of Section 80 (1) because it contained no particulars of the tax in default.

Held : (1) That a Court has an inherent power to direct that any matter which comes before it should stand over for a period, if the Court thinks that that is the proper way to deal with that matter

(2) That Section 80 (2) of the Income Tax Ordinance which deals with the question of adjournment limits the discretion which ordinarily is vested in a Magistrate, but that is a power conferred only in a case where no appeal lies.

(3) That where the certificate sets out the actual tax and the penalty without further particulars as to the amount due for each year the certificate did contain sufficient particulars, as required by section 80 (1) of the Ordinance.

Case referred to : *In re Yates Settlement Trust* (1954) 1 W.L.R. 564.

H. V. Perera, Q.C., with *W. D. Gunasekera* and *W. P. N. de Silva*, for the appellant-petitioner.

V. Thamotheram, for Attorney-General.

SANSONI, J.

The Commissioner of Income Tax issued a certificate to the Magistrate, Colombo, certifying that the present petitioner has made default in payment of Rs. 536,499.98 cts. being income tax due from him. The following particulars appear at the foot of the certificate :—

	Rs. cts.
Total Tax in default ...	447,084 98
Sums added for non-payment under section 76 (5) Cap. 188 ...	89,415 00
Rs. ...	536,499 98

The petitioner was summoned to appear in Court on 10-3-54. He appeared and the Magistrate directed the case to be called on 25-3-54, having made the entry " Appeal pending ". On 25-3-54 the Magistrate made the order : " As respondent has appealed he is not entitled to adjournment under section 80 (2). So the respondent should pay this amount. Payment on 31-3-54 ". The petition of appeal against this order was filed on 26-3-54, but as there was no right of appeal papers were later filed to have this order revised. Two points were urged against the order : firstly, that the Magistrate was wrong in supposing that he had no discretion to adjourn the matter : secondly, that the certificate did not comply with the provisions of section 80 (1), Cap. 188, because there were no particulars of the tax in default. In regard to the first submission, the general principle is well established that an adjournment or refusal of an adjournment is a matter which *prima facie* is entirely within the discretion of a judge. A Court has an inherent power to direct that any matter which comes before it should stand over for a period if the Court thinks that that is the proper way to deal with the matter. Romer, L.J., referred to this principle in the case of *In* re *Yates Settlement Trust* (1954) 1 W. L. R. 564. But having regard to the terms of section 80 (2) of the Income Tax Ordinance which in terms deals with the question of adjourning a matter such as this, I am doubtful whether the discretion to adjourn, which is ordinarily vested in a Magistrate, is not limited in a case such as this. Section 80 (2) empowers the Magistrate to adjourn such a matter " for not more than thirty days to enable such person to submit to the Commissioner his objection to the tax ", but this is a power conferred only in a case where no appeal against the assessment has been filed. This provision seems to me by implication to divest the Magistrate of a discretion to adjourn the matter in other cases or for any longer period. The matter is of secondary importance in the present proceedings because the petitioner has, by filing an appeal, obtained very much more time than any judge would have granted him even if he had a discretion in the matter.

In regard to the second submission, the relevant portion of section 80 (1) reads :—

> " Where the Commissioner is of opinion in any case that recovery of tax in default by seizure and sale is impracticable or inexpedient, or where the full amount of the tax has not been recovered by seizure and sale, he may issue a certificate containing particulars of such tax and the name and last known place of business or residence of the defaulter to a Magistrate having jurisdiction in the division in which such place is situate ".

The provisions of section 76 (5) are also relevant. They read :—

> " Where any tax is in default, the Commissioner may n his discretion order that a sum or sums not exceeding twenty per centum in all of the amount in default shall be added to the tax and recovered therewith ".

It was submitted that the particulars required to be specified in the certificate were not merely particulars of the actual tax and the penalty separately, but particulars about the actual tax itself, such as, the year for which it was due, and where it was due in respect of more than one year, then the particular amount due for each year. Now it seems to me that when the Commissioner acting under section 76 (5) adds a sum or sums, the entire amount may be recovered in one proceeding under section 80 (1), and the amount to be so recovered is the " tax in default ". The sum so added is thus also recoverable as " tax in default ", the actual tax apart from this penalty not forming the only permissible subject of the certificate. It follows then that " particulars of such tax " could be particulars specifying separately the actual tax and the penalty. In this view of the matter it could be said that the certificate under consideration does contain particulars.

But I also take the view that the question of the sufficiency or otherwise of the particulars contained in a certificate is not a fundamental matter affecting the jurisdiction of the Magistrate. I regard it rather as a matter which the defaulter should raise when he is summoned and asked to show cause. If he is taken by surprise through want of sufficient particulars, he should say so at

that stage, and I have no doubt that in such a case the Magistrate has jurisdiction in his discretion to order further particulars to be furnished. Such cases will probably be rare, for there would have been earlier proceedings, to which the defaulter would have been a party, and it is only at the final stage that a certificate under section 80 (1) is issued. Since the petitioner made no complaint regarding the adequacy of the particulars in the certificate under consideration he must be taken to have been well satisfied with them.

I see no reason to interfere with the order of the Magistrate. The petitioner has already obtained far too much time and the Magistrate will take the necessary action to recover the amount in default.

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

ADONIS de SILVA vs. HENRY de SILVA *et al.*

S. C. No. 87—D. C. Colombo No. 6264

Argued and decided on : 1st August, 1955

Agreement for sale of premises—Action for specific performance—Decree for specific performance or damages in lieu of specific performance—Validity of decree—Civil Procedure Code, section 331 et seq.

Where in an action for specific performance of an agreement for the sale of premises the Court decreed the defendant-appellant to convey the premises ' within three years from the date hereof,' or to pay damages whereas the agreement sued upon stated that the conveyance should be within three years from the date of agreement.

Held : (1) That the words ' within three years from the date hereof ' should not have been inserted in the decree. As the period fixed for the execution of the conveyance had lapsed in 1951 and the Court should not have given a further three years.

(2) The decree for damages in lieu of specific performance should be set aside. If the Defendant-Appellants failed to execute the conveyance, plaintiffs-respondent will be entitled to take steps under Section 331 to 333 A of the Civil Procedure Code.

The appellant was directed to execute a conveyance within such time as may be fixed by the District Judge after the record reached his court.

Sir Ukwatte Jayasundera, Q.C., with *S. K. Rodrigo*, for the defendant-appellant.
L. G. Weeramantry, for substituted plaintiffs-respondents.

Basnayake, A.C.J.

This is an action for specific performance of an agreement for the sale of certain premises in Colombo. The plaintiff respondents (hereinafter referred to as the respondents) while asking the Court for a decree for specific performance of the agreement also prayed for an award of Rs. 10,000/- as damages in the event of the defendant being unable to execute a convèyance. That sum was the value placed on the land by the respondents at the time of action brought, the land having appreciated in value since the date of the agreement. The agreement which was entered into on 13th December, 1948, between the vendor Kamburugamuwage Loku Archarige Adonis de Silva the defendant appellant (hereinafter referred to as the appellant) and the vendees John Henry de Silva and his wife Clarice Mabel de Silva the respondents for the sale of certain premises bearing assessment Nos. 411, 413 & 415 Maligawatte Road in Colombo for a sum of Rs. 3,500/- was subject to the following conditions :—

(*a*) That the vendor shall within three years from the date of the agreement by a valid and effectual deed convey the premises to the vendees free from encumbrances and the vendees shall pay a sum of Rs. 3,500/- at the execution of the conveyance which was to be prepared by and at the expense of the vendees.

(*b*) That in the event of the vendor failing or refusing to convey the premises within the period of three years the vendees being ready and willing to pay the sum of Rs. 3,500/- the vendor shall pay the sum of Rs. 100/- as liquidated damages ; and

(*c*) That in the event of the vendees failing or refusing to pay the sum of Rs. 3,500/- the vendor being ready and willing to execute a conveyance the vendees shall pay to the vendor a sum of Rs. 100/- as liquidated damages.

After trial the learned District Judge gave judgment for the respondents declaring them entitled to a conveyance of the premises in ques-

tion and directing the appellant to execute the conveyance. He further declared the respondents entitled to withdraw the sum of Rs. 3,500/- purchase money deposited by them in court and to damages in the sum of Rs. 4,000/- if specific performance could not be enforced.

The present appeal is from that order. Learned Counsel for the appellant does not seek to canvass the order for specific performance. He however submits that, having regard to the terms of the agreement, the learned District Judge was wrong in awarding damages. We are impressed by the argument of learned Counsel and we find ourselves unable to uphold that part of the order which awards damages in the event of the specific performance of the contract becoming impossible. We accordingly set aside the order for the payment of damages and affirm the order for specific performance.

Paragraph (2) of the decree entered by the learned District Judge which reads—

> "The said vendor shall within three years from the date hereof by a valid and effectual deed convey and transfer the said premises to the said purchasers."

is defective. The vendor is ordered to effect a conveyance within three years from the date of decree. The period fixed for the execution of the conveyance expired on 13th December, 1951, and it cannot be that after the lapse of nearly four years from that date the District Judge intended to give the appellant a further three years. Clearly the words "three years from the date hereof" should not have been inserted. The right of a plaintiff to the specific performance of a contract where the defendant is in a position to discharge his obligations is beyond all doubt. There is no evidence in the instant case that the appellant is not in a position to perform his part of the contract. The respondents are in possession of the land and the title is still in the appellant. All that remains to be done for the performance of the contract by the appellant is the execution of the conveyance, expecially as the respondents have deposited the purchase price in Court. If owing to the death of any one of the parties to these proceedings he or she is not properly represented when the record reaches the District Court the District Judge is hereby directed to order that steps be taken to have the parties represented.

We therefore set aside the decree save and except paragraph (1) and the Schedule thereof and direct that the appellant shall within such time as may be fixed by the District Judge upon the receipt of the record in his Court execute a valid and effectual conveyance of the premises described in the Schedule to the decree free from encumbrances. Upon the execution of such a conveyance the appellant shall be entitled to an order of payment for the sum of Rs. 3,500/- lying in deposit to the credit of the action. The conveyance shall be prepared by and at the expense of the respondents. Should the appellant neglect or refuse to execute the conveyance as directed herein the respondents shall be entitled to take such proceedings as are prescribed by section 331 and the succeeding sections of the Civil Procedure Code in order to obtain a conveyance from the Court.

There will be no costs of this appeal.

Pulle, J.

I agree.

Appeal set aside.

Present : Sansoni, J. and Fernando, J.

DON ABILIAN vs. DON DAVITH SINGHO AND ANOTHER

S. C. 28/1955 (*Cr.*)—*D. C. Avissawella* 6510

Argued on : 8th September, 1955
Decided on : 13th September, 1955

Contempt of Court—Conviction under section 53 *of Partition Act No.* 16 *of* 1951—*Right of appeal under section* 798, *Civil Procedure Code—Is it limited by section* 335 *of Criminal Procedure Code?—Proper procedure for contempt of Court under chapter* 65 *of Civil Procedure Code—Section* 797—*Meaning of "explanation".*

The accused was convicted on a charge of contempt of court under section 53 of the Partition Act. The learned judge who tried the case did not ask the accused whether or not he admitted the truth of the charge in terms of section 796 of the Civil Procedure Code and the evidence of the accused was mainly in the form of answers to questions put by the learned judge.

A preliminary objection to the appeal was taken that, having regard to the sentence, leave of court was necessary under section 335 of the Criminal Procedure Code.

Held : (1) That section 335 of the Criminal Procedure Code did not apply to an appeal under 798 of the Civil Procedure Code

(2) That the conviction must be set aside as Section 797 of the Civil Procedure Code had been infringed by the failure of the learned judge to hear the explanation of the accused, which under the section must be voluntary.

(3) That the procedure to be adopted in cases of contempt under section 53 of the partition act is the procedure laid down in Chapter 65 of the Civil Procedure Code.

Dr. H. W. Thambiah and *U. P. Weerasinghe* and *H. L. de Silva*, for the 1st defendant-appellant.

S. J. Kadirgamar with *P. Somatillakam*, for the plaintiff-respondent.

FERNANDO, J.

The appellant has been convicted of the offence of contempt of Court on the ground that, after a Fiscal's officer had given symbolic possession of a land to the plaintiff in execution of a partition decree, the appellant (a defendant in the partition action) refused to give up physical possession of the land to the plaintiff and also tapped the rubber trees and plucked coconuts on the land. The learned District Judge purported to act under section 53 of the Partition Act, No. 16 of 1951, which enacts a new provision empowering the Court to punish as for a contempt persons guilty of disobedience, resistence or obstruction of the description specified in the section; it is not necessary for the purposes of this appeal to consider whether the conduct of the appellant falls within the specified description, and I shall assume that the section was applicable.

In the absence of specific provision in the Act as to the procedure to be followed in cases falling under section 53, the learned Judge rightly decided that the provisions of Chapter 65 of the Civil Procedure Code would apply. Section 57 of the Courts Ordinance confers on a District Court a special jurisdiction to punish *inter alia* offences " declared by any law to be punishable as contempts of Court ", and section 53 of the Partition Act is but one instance of a law contemplated in the Courts Ordinance. Hence the procedure in the case of offences declared by section 53 of the Act, would be the procedure " in that behalf by law provided ", namely Chapter 65 of the Code.

The learned Judge sentenced the appellant to two weeks simple imprisonment. The preliminary objection has been taken that, having regard to the sentence imposed, leave of Court was necessary as required by section 335 of the Criminal Procedure Code. It was argued that this requirement applied, because section 798 of the Civil Procedure Code provides that the procedure in an appeal from a conviction for contempt shall " follow the procedure laid down in the Criminal Procedure Code regulating appeals from orders made in the ordinary criminal jurisdiction." I do not think that the argument is sound. In the first place, section 798 confers a right of appeal " from every order, sentence or conviction" for contempt; and it is at least doubtful whether this apparently absolute right of appeal is limited by any qualifying provision in the Criminal Procedure Code. Moreover, it is only the *procedure* laid down in the Criminal Procedure Code regulating appeals, that is declared to be applicable; but the limitations in section 335 (though contained in a code of procedure) are substantive restrictions of the right of appeal conferred by section 338 and are not merely procedural. I would therefore hold that section 335 of the Criminal Procedure Code does not apply in the case of an appeal under section 798 of the Civil Procedure Code.

The procedure prescribed by Chapter 65 of the Code requires the Court to commence the hearing by asking the accused person whether or not he admits the truth of the charge; this the learned Judge failed to do in the present case. Even if that failure does not invalidate the conviction, there was a more serious irregularity in the proceedings. After recording evidence in support of the charge against the appellant, the learned Judge " called upon him " for his statement if any. Thereafter the Judge questioned the appellant and recorded his answers. The appellant was also permitted to be cross-examined. The order convicting the appellant was based to an appreciable extent on the answers given by him in the course of this interrogation by the Judge.

Section 797 contemplates that the Court will hear the accused persons explanations, but that obviously would mean hearing an explanation voluntarily given; the section cannot be construed as authorising the procedure which the learned Judge has adopted in this case.

I would accordingly set aside the conviction and sentence and acquit the accused.

SANSONI, J.

I agree.

Conviction set aside and accused acquitted.

Present : GUNASEKARA, J. AND FERNANDO, A.J.

FERNANDO vs. WIJEWARDENE AND TWO OTHERS

S. C. 201-202/1952—*D. C. Colombo* 21595/*M*

Argued on : 1st, 7th, 8th and 9th September, 1954

Decided on : 8th October, 1955

Rent Restriction Act, 1948—*Regulation* 2 *in Schedule—Premises leased in* 1941 *used as hostel for students and place of residence of its warden and teachers employed in Academy run by tenant in another place—At time of action Academy also run in the premises—Are they residential or business premises—Meaning of the expression "for the time being" in regulation* 2.

Held : (1) That in the context of regulation 2 in the Schedule to the Rent Restriction Act of 1948, the expression " for the time being " in the definition of residential premises refers to the time of the assessment of the annual value, (viz. November, 1941) and not to the time of filing the action for ejectment or the time when the Court is required to make the ejectment order. The same premises cannot be brought within or excepted from the operation of the act from time to time by a mere change in the purpose for which they are occupied.

(2) That when proprietors of an Academy took on rent certain premises which were used as a hostel for students and as a place of residence for its warden and the teachers employed at the Academy, and no part of the tenants' business being carried on there, the premises must be regarded as residential premises within the meaning of the Rent Restriction Act.

Cases referred to : *Hepponstall vs. Corea* (1952) 54 N. L. R. 214.
Standard Vacuum Oil Co., vs. Jayasuriya (1951) 53 N. L. R. 22.

H. V. Perera, Q.C., with *N. M. de Silva, K. Herat, G. T. Samarawickreme, H. L. de Silva* and *K. Shinya* for the plaintiff-respondent in 201 and the plaintiff-appellant in 202.

M. M. K. Subramaniam, for the 1st defendant-respondent in both appeals.

GUNASEKARA, J.

These appeals arise out of an action in the District Court of Colombo in which the plaintiff sued for the ejectment of the defendants from premises known as Knowsley, Bagatelle Road, Kollupitiya, upon the footing that the first defendant was an overholding tenant and the second and third were in occupation of the premises on behalf of the first, and for the recovery of damages from the first defendant at the rate of Rs. 750 a month, which was the agreed rent. The premises are situated within the Municipality of Colombo, where the Rent Restriction Act, No. 29 of 1948, is in operation. The defendants alleged that the premises had been let by the plaintiff to the second defendant and not to the first, that they were business premises to which the Act applied, and that the authorised rent was Rs. 287.25 a month. They also claimed in reconvention a sum of Rs. 8,668.10, made up of two sums alleged respectively to have been spent on necessary repairs to the premises and to have been paid on the plaintiff's behalf to his landlord's son so that the latter might be provided with a house without the plaintiff being ejected from the one of which he was the tenant. The learned District Judge held that the premises had been let to the first defendant and not to the second, but that they were business premises to which the Rent Restriction Act applied and the plaintiff was not entitled to a decree for ejectment of the defendants and also that he was entitled to recover a monthly rent of only Rs. 302.50 as the authorised rent and not the agreed rent of Rs. 750. He rejected the claim in reconvention.

At the conclusion of Mr. Thambiah's argument in support of the second defendant's appeal, No. 201, we intimated to Counsel that we saw no reason to interfere with the findings against which the 2nd defendant has appealed and we did not call upon Counsel for the respondents in that appeal. Appeal No. 201 must be dismissed and the 2nd defendant must pay to the plaintiff-respondent his costs of appeal.

No. 202 is an appeal by the plaintiff against the findings that the Rent Restriction Act applies to the premises and that the plaintiff is therefore entitled to recover only Rs. 302.50 a month as the authorised rent, and against the learned

Judge's refusal of the plaintiff's prayer for ejectment of the defendants.

The main contention advanced in support of this appeal is that upon the facts accepted by the learned Judge the premises in question are excepted premises and the Act does not apply to them. It is provided by sub-section (4) of section 2 that so long as the Act is in operation in any area its provisions shall apply to all premises in that area, not being excepted premises, and by sub-section (5) that the regulations in the Schedule shall have effect for the purpose of determining the premises which shall be excepted premises. Regulation 2 of these regulations provides that any premises situated within the Municipality of Colombo shall be excepted premises if the annual value of the premises, being residential premises, exceeds Rs. 2,000, or, being business premises, exceeds Rs. 6,000; and " annual value " is defined in regulation 1 as " the annual value of the premises as assessed for the purposes of any rates levied by any local authority under any written law during the month of November, 1941, or, in the case of premises first assessed or first separately assessed thereafter, such annual value as so first assessed or first separately assessed." In November, 1941, the annual value of the premises in question was Rs. 2,750, and the District Judge has answered in the affirmative an issue as to whether at that time they were " residential premises within the meaning of the Rent Restriction Act, No. 29 of 1948 ". It is contended for the plaintiff-appellant that the learned District Judge having arrived at this finding should have held that the premises were excepted premises, for the reason that in November, 1941, they were residential premises the annual value of which exceeded Rs. 2,000.

The view taken by the District Judge is that the character of the premises that is material is their character either at " the time of filing the action or it may be the time when the Court is required to make the ejectment order "; and he holds that at the time of the institution of the action, and indeed even at the time of the letting (which was the 1st May, 1949,) they were business premises, and consequently, as their annual value in November, 1941, did not exceed Rs. 6,000, that they are not excepted premises. He reaches this view upon a consideration of the provisions of sections 13 and 27 of the Act and the absence of any express provision for determining the character of any premises as " residential " or " business " premises by reference to their character in November, 1941.

Section 27 provides that, unless the context otherwise requires, " ' residential premises ' means any premises for the time being occupied wholly or mainly for the purposes of residence ", and " ' business premises ' means any premises other than residential premises ". The learned Judge, rightly if I may say so, holds that " the phrase ' for the time being '.....is used to suggest the idea that the character of any particular premises must be considered with reference to different points of time depending on the circumstances of each particular case ", and that their character may change from time to time. A question that arises for decision then is at what time the premises must be residential premises so that they may be excepted premises as defined by regulation 2. The learned District Judge takes the view that the answer is to be found in section 13 which, he points out, " provides that an action may be brought for the ejectment of a tenant of any premises to which the Act applies if the premises are in the opinion of the Court reasonably required for occupation as a residence for the landlord or for the purpose of his trade, business etc."; and in which " there is nothing to prevent a landlord seeking to eject a tenant of business premises on the ground that he required such premises for occupation as his residence and *vice versa* ". He proceeds to hold " that one has to consider whether any particular premises are residential or business premises with reference to their use ' for the time being ', and so far as this action is concerned that section 13 provides that the material time is either the time of filing the action or it may be the time when the Court is required to make the ejectment order ".

The argument appears to be that the expression " for the time being " must, in the context of an action for the ejectment of the tenant, be taken to refer to the time at which it is sought to have him ejected, whether that time is the time of the bringing of the action or " the time when the Court is required to make the ejectment order ". There would have been force in this argument if the question regarding the premises which the Court had to decide in the present case had been merely whether they were residential premises. But the question was whether the annual value of the premises, being residential premises, exceeded Rs. 2,000; that is to say, whether the annual value of the premises as assessed during the month of November, 1941, being premises for the time being occupied wholly or mainly for the purposes of residence, exceeded Rs. 2,000. It seems to me that in the context of regulation 2 the expression " for the time being " in the definition of " residential

premises " refers to the time of the assessment of the annual value. It appears also to be a reasonable view that the character of the premises that is contemplated in the regulation is its character at that time. In this view of the meaning of the regulation the same premises cannot be brought within or excepted from the operation of the Act from time to time by a mere change in the purpose for which they are occupied. It seems unlikely that the legislature intended the effect of enabling landlords or tenants of any class of premises to subject them to or exclude them from the operation of the Act at will; but this effect has been achieved in respect of some premises if the learned District Judge's construction of the enactment is its true construction. In my opinion the premises in question are excepted premises if they were residential premises in November, 1941.

It is contended for the 1st and 2nd defendants-respondent that the evidence does not support the finding that the premises were residential premises in November, 1941. The evidence is that they had been let in 1940 to the proprietor of a school known as the Pembroke Academy, who used them from that time until the time of the air raid in April, 1942, as a hostel for the students and a place of residence for the Warden of the hostel and some of the teachers. The business of the Academy itself was carried on at another place, known as Duff House, until those premises were requisitioned for military purposes at the end of 1941, and it was then moved to Knowsley in January, 1942. It is contended that according to this evidence the main use to which the premises were put in November, 1941, was the running of a hostel, and that therefore they were not occupied " wholly or mainly for the purposes of residence " and were not " residential premises ". The case of *Hepponstall vs. Corea*, (1952) 54 N. L. R. 214 decided by Swan, J. and L. M. D. de Silva, J., was cited as supporting this contention. It was laid down in that case that in order to decide whether premises are residential premises " the character of the physical occupation of the premises judged by the use to which they are put by the tenant must be examined ", and that " if the character of the occupation so judged is ' wholly or mainly for residential purposes ' then the premises are ' residential premises ' ". It was held that judged by this test premises taken on rent for the purpose of running a boarding house and used by the tenant for that purpose and also to serve as a residence for herself were business premises. " There can be no doubt that the main use to which they were put was the running of a hostel. It is clear therefore that the premises were not occupied ' wholly or mainly for residential purposes ' and therefore they are not ' residential premises ' within the meaning of the Ordinance. Consequently they are ' business premises ' ".

In an earlier case, *Standard Vacuum Oil Co., vs. Jayasuriya*, (1951) 53 N. L. R. 22 decided by Gratiaen, J. and myself, we held that certain premises taken on rent by the Standard Vacuum Oil Company and used by it mainly as a residence for its manager, although some portion of its business was transacted there, were residential premises, notwithstanding that it was for the purposes of the company's business that it provided the manager with a residence. This case was distinguished in *Hepponstall vs. Corea* (1952) 54 N. L. R. 214 on the ground that in the latter case " business was conducted on the premises, and was the main purpose of its occupation by the respondent " (the tenant), while in the former " only a very small amount of business was conducted on the premises and the main purpose of occupation was residence ". It seems to me that in the present case the whole purpose of the occupation of Knowsley in November, 1941, was residence, although it was for the purposes of the tenant's business at Duff House that he provided this place of residence for some of the students and the staff, and no part of the tenant's business was carried on at Knowsley. In my opinion, therefore, judged by the test laid down in *Hepponstall vs. Corea*, (1952) 54 N. L. R. 214 the premises in question were residential premises in November, 1941.

For these reasons I hold that the premises are excepted premises. The appeal must be allowed and judgment entered for the plaintiff as prayed for in the plaint. The three defendants must pay the plaintiff's costs in the District Court, and the 1st and 2nd defendants his costs of appeal. I would direct, however, that writ of ejectment shall not be issued until the lapse of three months.

FERNANDO, A.J.

I agree.

Appeal allowed.

Present : ROSE, C.J.

NALLATHAMBY AND ANOTHER vs. SOMASUNDARAKURUKKAL

S. C. No. 126—*C. R. Vavuniya Case No.* 10558

Argued on : 20th January, 1955

Decided on : 15th February, 1955

Civil Procedure Code, section 9 (*b*) *Jurisdiction—Land "in respect of which" the action is brought—Court Ordinance, section* 75—"*Interest in or the right to the possession of*" *land—Otty mortgage —Nature of.*

The plaintiff-appellants brought this action in the Court of Requests, Vavuniya, for the redemption of an otty mortgage and the release of the mortgaged lands from the mortgage. The lands in respect of which the action was brought lay within the limits of the jurisdiction of the Court ; but the Commissioner had held that the action was not brought "in respect" of the lands within the meaning of Section 9 (*b*) of the Civil Procedure Code and that no "interest or right to the possession " of the lands in question was in dispute within the meaning of Section 75 of the Courts Ordinance.

Held : (1) That the question, whether this particular usufructuary mortgage should be redeemed and the lands released from the encumbrance, is a dispute affecting an interest in the lands in question within Section 9 (*b*) of the Civil Procedure Code.

(2) That moreover, as the defendant has a right to possess the land as long as the mortgage is in existence the dispute may be said to be one relating to the possession of the mortgaged lands. The action was therefore instituted in the proper Court.

Per ROSE, C.J.—" It seems to me that it would be wrong to hold that a mortgage—usufructuary or otherwise—cannot be said to be an interest in land."

Cases referred to : *Don John Appuhamy vs. A. de Silva Goonesekera* —1909 2 Weerakoon's Reports 68. —2 Leader Law Reports 155.
Ranis de Silva vs. Siyaris 1909 2 Weerakoon's Reports 64, 2 Leader Law Reports 138.

C. Suntheralingam with *T. Arulananthan*, for the plaintiffs-appellants.

S. Sharvananda, for defendant-respondent.

ROSE, C.J.

This matter raises a question of jurisdiction. The plaintiffs-appellants brought this action in the Court of Requests of Vavuniya for the redemption of an otty mortgage and for the release of the mortgaged lands from the mortgage. It is common ground that the action could only properly have been brought in that court on the ground that the lands in respect of which the action is brought lie within the local limits of the jurisdiction of the Vavuniya court.

There is no doubt that the lands in respect of which the mortgage was entered into do lie within the jurisdiction of the court but the learned Commissioner held that the action was not brought " in respect of " the lands within the meaning of section 9 (*b*) of the Civil Procedure Code and that no " interest in or right to the possession " of the lands in question was in dispute within the meaning of Section 75 of the Courts Ordinance.

The learned Commissioner appears to have relied in part upon two cases reported in 2 Weerakoon. In the first case, at page 68, the action was brought to compel the lessor to accept rent and the learned judge very naturally held that the action was not brought in respect of any land at all.

The second case, at page 64, although it was a possessory action, raised only the question as to the method by which the action was to be valued. In that case too, therefore, no interest in the land was in dispute.

It seems to me therefore that neither of these cases are of assistance in deciding the present point.

Learned counsel for the appellants did not press in appeal the point that this is a hypothecary action within the meaning of Section 75 of the Courts Ordinance but he contended that it is an action in which both an interest in the land is in dispute as also the right to the possession of the mortgaged lands. The plaintiffs-appellants pray not only that the defendant-respondent should accept the money brought into court to settle the debt but also that the mortgaged lands should be released from the mortgage. It seems to me that it would be wrong to hold that a mortgage—usufructuary or otherwise—cannot be said to be

an interest in land. The matter may not be free from difficulty but it seems to me that a dispute as to whether this particular usufructuary mortgage should be removed and the lands released from the encumbrance is a dispute affecting an interest in the lands in question. Moreover, so long as a mortgage is in existence the defendant has a right to possess the lands and in that sense the dispute may also be said to be one relating to the possession of the mortgaged lands.

For these reasons I am of opinion that the action was properly instituted in the Court of Requests of Vavuniya. The appeal is therefore allowed and the matter remitted to the learned Commissioner to determine according to law. The appellants will have the costs of this appeal and of the proceedings hereto completed in the lower court in any event.

Appeal allowed.

Present : Weerasooriya, J. and Fernando, J.

BABY SINGHO *et al* vs. PERERA *et al*

S. C. 198—*D. C.* (*F*) *Kalutara* 28908—*L*

Argued on : 16th September, 1955
Decided on : 3rd October, 1955

Rei Vindicatio—*Sale in execution—Fiscal's receipt for purchase price—No conveyance—In whom is the title—Civil Procedure Code Section* 289.

A Fiscal's receipt for the payment of the purchase price at a sale in execution does not convey title to the purchaser. In the absence of a duly executed conveyance in the purchaser's favour the title to the land continues to remain in the judgment-debtor.

Sir Lalitha Rajapakse, Q.C., with *G. P. J. Kurukulasuriya*, and *B. S. Dias*, for the plaintiffs-appellants.

No appearance for defendants-respondents.

Weerasooriya, J.

The main ground on which this appeal was pressed is that the learned trial Judge was wrong in holding that title to the land in dispute was at one time vested in Selohamy who was the first wife of Podi Singho, the original owner. The case for the defendants-respondents is that the land had been sold by the Fiscal in execution of a decree entered in D. C. Kalutara Case No. 8731 against Podi Singho and purchased by his wife Selohamy and that an undivided half share of it subsequently devolved on Disihamy. By deed 1D4 of 1918 Disihamy conveyed her interests to O. Pabilis who died leaving as his heirs the 1st and 2nd defendants-respondents and three other children, Amis, Vionis and Lizzie, and the 3rd defendant-respondent, his widow.

The only evidence adduced by the defendants-respondents in support of Solohamy's title relates to the document 1D2 dated the 2nd August, 1884, which purports to be a receipt granted by the Fical's officer who conducted the execution sale acknowledging the payment by Solohamy of the purchase price. But in the absence of a formal conveyance by the Fiscal of the land which was the subject matter of the sale (and it is not the case for the defendants-respondents that such a conveyance was ever executed) it is clear from the express terms of section 289 of the Civil Procedure Code that the right and title of Podi Singho, the judgment debtor, were not divested by virtue of that sale although he and others concerned may have thought otherwise.

The learned trial Judge has observed that the fact that Podi Singho subsequently, by deed P1 of 1912, sold to the 1st plaintiff-appellant, who is his son by his second wife Ketchi Nona, only a half share of the land in question indicates that he " acquiesced in the title of his (first) wife Selohamy ". Even if such an inference is permissible, it seems to me that Podi Singho's " acquiescence " cannot have the effect of conferring on Selohamy a title which she did not acquire by virtue of the execution sale, which is the only source of title relied on by the defendants-respondents. The judgment and decree of the Court below declaring the defendants-respondents entitled to a half share of the land cannot, therefore, stand.

Although the present action is for a declaration of title to the entirety of the land in dispute, *i.e.* lots 2 and 3 depicted in the plan P7, it was conceded by learned Counsel for the plaintiffs-

appellants that the defendants-respondents are entitled to an undivided 1/8 share of it, which had devolved on Disihamy through her daughter Punchihamy. The remaining 7/8th share (inclusive of the half-share which the 1st plaintiff-appellant got on P1 of 1912) devolved on W. Pabilis on deeds P2 of 1922 and P3 of 1923. W. Pabilis died intestate leaving as heirs his widow Podihamy and seven children of whom Ungo Nona married the 1st plaintiff-appellant. The 2nd plaintiff-appellant is a son of the 1st plaintiff-appellant and Ungo Nona. The other six children and their mother Podihamy conveyed their interests to the 1st plaintiff-appellant by deed P4 of 1938, and by deed P5 of 1950 the 1st plaintiff-appellant (reserving to himself a life interest) gifted to the 2nd plaintiff-appellant what was conveyed to him on P4 and also the share which devolved on him by inheritance from his wife Ungo Nona who predeceased him. Ungo Nona is said to have left surviving her several children besides the 2nd plaintiff. On the basis that W. Pabilis became entitled to no more than an undivided 7/8 (or 28/32 share, the 1st plaintiff-appellant would have acquired on P4 and by inheritance from his wife Ungo Nona an undivided 26/32 and 1/32 shares respectively, and the 2nd plaintiff-appellant and the other children of Ungo Nona would have become jointly entitled to the remaining undivided 1/32 share.

In the year 1915 the 1st plaintiff-appellant filed in the District Court of Kalutara Case No. 6164 praying for a declaration of title to the entirety of the land in dispute and pleading as his title the deed P1 of 1912. Among the defendants to that action was O. Pabilis through whom the defendants-respondents claim. In that action the 1st plaintiff-appellant was declared entitled to only a half share of the land in dispute. The learned trial Judge held that the decree in the earlier action operated as *res judicata* and precluded the 1st plaintiff-appellant from claiming in the present action anything more than a half-share. If this finding means that the 1st plaintiff-appellant is precluded from asserting in the present action an interest in the land based on a title accruing to him after the filing of the plaint in the earlier action, it cannot be supported. According to paragraph 3 of the plaint he did not claim any present interest in the land on the basis that he became entitled to more than a half-share of the land on P1.

The judgment and decree appealed from are set aside and decree will be entered declaring the interests of the parties to the land as follows—

(*i*) an undivided 27/32 share to the 2nd plaintiff-appellant subject to a life-interest in the 1st plaintiff-appellant over the same ;

(ii) an undivided 1/32 share to the 2nd plaintiff-appellant along with the other children of the 1st plaintiff-appellant and his wife Ungo Nona ; and

(iii) an undivided 4/32 share to the 1st, 2nd and 3rd defendants-respondents along with Amis, Vionis and Lizzie the other children of the 3rd defendant-respondent and deceased O. Pabilis.

As regards the claim and counter-claim of the plaintiffs-appellants and the defendants- respondents for damages in respect of the two nadun and two halmilla trees which have been cut down, the Court below will issue appropriate directions for their sale by public auction and the proceeds (after deducting the expenses of sale) will be divided among the respective co-owners in the proportion of their undivided shares as indicated above.

The defendants-respondents will pay to the plaintiffs- appellants half the costs of the appeal and of the trial.

FERNANDO, J.

I agree.

Set aside.

Present : GUNASEKARA, J.

H. G. THEDIAS, INSPECTOR OF POLICE vs. S. SIRISENA PERERA

S. C. 785P/1954—*M. C. Colombo* 2916/B

Argued on : 25th March, 1955

Decided on : 11th July, 1955

Criminal Procedure—Charge under section 457 of Penal Code—Magistrate assuming jurisdiction under section 152 (3) of Criminal Procedure Code—Appeal from conviction—Crown not supporting conviction—Application to remit case for non-summary proceedings—When it should not be granted.

Where on a charge under section 457 of the Penal Code, the Magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code, and after summary trial convicted the accused, and on appeal the Crown did not support the conviction on the merits, but urged that a charge of so grave an offence should not have been tried summarily,

Held : That as both parties had acquiesced in the procedure adopted by the Magistrate in the exercise of his discretion, the gravity of the offence is by itself not a sufficient ground for making an order in the exercise of the powers of revision vested in the Supreme Court, to remit the case for non-summary investigation.

Cases referred to : *Inspector of Police vs. Agosingho* (1934) 1 C. L. W. 432.
Sahabandu vs. Wineman Singho (1941) 22 C. L. W. 42.

Dr. Colvin R. de Silva, for the accused-appellant.

Arthur Keuneman, C.C., for the Attorney-General

GUNASEKARA, J.

The appellant was tried summarily under the provisions of section 152 (3) of the Criminal Procedure Code on a charge of having committed an offence punishable under section 457 of the Penal Code by fraudulently or dishonestly using as genuine a document which he knew or had reason to believe to be a forged document. He was convicted of this offence and sentenced to one year's rigorous imprisonment.

According to the case for the prosecution the appellant had been occupying a house belonging to one M. E. Perera as the latter's tenant and had left it in August, 1953, after Perera had filed an action against him in the Court of Requests to recover arrears of rent and to have him ejected. The document in question (P1), which is dated the 4th August, 1953, purports to be signed by the appellant and M. E. Perera and states that the appellant had been living in a house belonging to Perera and had on that day " given over the keys to him without having to pay any arrears ". There is no evidence as to the custody from which P1 was produced before the Magistrate's Court, but it was stated in evidence by both Perera and the proctor who appeared for him in the civil action that it had been produced by the appellant at the trial of that action on the 23rd November, 1953, and Perera stated further that it was not a document signed by him or by his authority. Perera was also permitted to say in his evidence in chief that " P1 was sent to the E.Q.D. with some other documents ". (One surmises that the letters E.Q.D. stand for Examiner of Questioned Documents.) The only other witness called in the case was the record keeper of the Magistrate's Court of Colombo who produced, marked P2, the record of the action in the Court of Requests (without stating how he came by it) and also produced, marked P3, " the report of the E.Q.D." that was filed in that case.

The report P3 is inadmissible hearsay, and, no doubt for this reason, the learned Magistrate does not refer to it in his judgment. The only matter to which he refers as evidence on the issue of forgery is that the existence of P1 is not mentioned in the appellant's answer in the civil action, which was filed in September, 1953. He holds that if the document had been in existence at the time it would have been mentioned in the answer. With all respect to the learned Magistrate, I am unable to agree that an omission to plead evidence can be a ground for a conclusion that the evidence did not exist at the time. Moreover, the answer filed by the appellant in the civil case was not in evidence in this case; for although the entire record P2 was produced the only portion of it that was put in evidence was the report P3.

The only evidence there is in the case to prove that P1 is a forgery is Perera's statement that the document was not signed by him or by his authority. This evidence is not discussed or mentioned in the learned Magistrate's judgment, and it does not appear whether he would have acted upon it without corroboration. The conviction must therefore be quashed.

It was conceded by the learned Crown Counsel that the conviction could not be supported, but he maintained that a charge of so grave an offence should not have been tried summarily and that the case should therefore be remitted to the Magistrate's Court for non-summary proceedings. In support of this contention he cited the cases of *Sheddon* (*Inspector of Police*) *vs. Agosingho* (1934) 1 C. L. W. 432 and *Sahabandu vs. Wineman Singho* (1941) 22 C. L. W. 42, in which convictions of offences involving forgery or the dishonest use of a forged document were quashed on the ground that in those cases the charges should not have been tried summarily under the provisions of section 152 (3) of the Criminal Procedure Code, and the Magistrate was directed to take non-summary proceedings In each of those cases, however, the accused had appealed on this ground, contending in effect, that if he was to be tried he was entitled to the advantage of a trial on indictment after a preliminary Magisterial inquiry. In the present case the appellant has no objection to his having

been tried summarily, and the Crown had no objection either until after the appellant had demonstrated that he was entitled to have the conviction set aside on the merits. Until then it appears that both parties were satisfied with the procedure that the learned Magistrate adopted in the exercise of his discretion. Neither of them raised any objection at the trial, the accused has not made it a ground of appeal that he should not have been tried summarily, and the Attorney-General has not appealed although he has a right of appeal in terms of section 338 (2) of the Criminal Procedure Code. I do not think that in these circumstances the gravity of the offence charged in this case is by itself a sufficient ground for making an order, in the exercise of the powers of revision vested in this Court, remitting the case for a non-summary investigation.

The conviction of the appellant and the sentence passed on him are set aside and he is discharged.

Set aside.

Present : Nagalingam, S.P.J. and Fernando, A.J.

AGNES PERERA and EDWARD PERERA *et al*

S. C. No. D. C. (Int.) 94/1953—D. C. Colombo 6099/P

Argued on : 23rd November, 1954

Delivered on : 10th December, 1954

Co-owner—Rights to land co-owned—Co-owner building on common land—Opposition by another co-owner—Order for demolition in partition action—Can such order be made.

Where a co-owner put up buildings on the common land contrary to and in spite of the protests of another co-owner,

Held : That an order for demolition of such building can properly be made in a partition action.

Per Nagalingam, J.—" It is obvious that such a question as whether the co-owner who has put up the building without the consent of his co-owners should be permitted to retain it or not in appropriate circumstances cannot be as conveniently determined in a proceeding which has for its object the grant either of a prohibitory injunction or a mandatory order as in a partition action ".

" I think it is settled law that where a co-owner puts up or becomes solely entitled to a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation to him for it ".

Cases referred to : *de Silva vs. Caraneris* (1918) 1 Ceylon Law Recorder 28.
Silva vs. Silva (1906) 9 N. L. R. 114.
Muthaliph vs. Munsoor et al (1937) 39 N. L. R. 316.
Perera vs. Podisingho (1946) 47 N. L. R. 347.

H. V. Perera, Q.C., with *H. W. Jayawardene, Q.C.*, and *D. R. P. Goonetilleke*, for the 1st defendant-appellant.

N. E. Weerasooria, Q.C., with *Vernon Wijetunge*, and *S. Sharvananda*, for the plaintiff-respondent.

Nagalingam, S.P.J.

The main point for decision on this appeal is whether an order for demolition of a building constructed by one co-owner contrary to and in spite of the protests of another co-owner can be legally made in an action for partition. Learned Counsel for the 1st defendant-appellant contends that where one co-owner builds or is alleged to have built in defiance of the protests of another co-owner, the remedy of the latter co-owner is to institute an action for an injunction to prohibit the continuance of the building and, if necessary for a mandatory order to compel the demolition of the structure or any part thereof that may have been put up, but not to commence an action under the Partition Ordinance. No authority however for this proposition has been cited and there is nothing in the writings of Roman Dutch jurists to support this view. I should have thought that a partition action would be the most appropriate form of proceedings to determine all the questions that arise in connection with an allegation that one co-owner

has wrongfully put up buildings infringing the rights of the other co-owners.

Any building put up on common property by a co-owner accedes to the soil and itself becomes common, but of course the co-owner who put up the building is entitled to the use and enjoyment of it until such time as common ownership is put an end to; and in fact at a division of common property the co-owner who has put up a building, though erected contrary to the wishes of the other co-owners is entitled to be allotted that building if he can satisfy the Court that having regard to the nature, extent and amenities available in respect of the land, he could not be said to have violated the rights of his co-owners by erecting the structure.

It is obvious that such a question as whether the co-owner who has put up the building without the consent of his co-owners should be permitted to retain it or not in appropriate circumstances cannot be as conveniently determined in a proceeding which has for its object the grant either of a prohibitory injunction or a mandatory order as in a partition action.

The absence of judicial opinion on this question may be ascribed to the view that the proposition qeing so evidently patent the matter has never qefore received judicial attention. But there is e case which may be regarded as deciding the converse of the proposition contended for on behalf of the appellant. That is the case of *de Silva vs. Caraneris* (1918) 1 Ceylon Law Recorder 28. That was a case where one co-owner brought an action for declaration of title for his undivided shares and for an injunction against the defendant co-owner restraining him from building on the common land. In granting the injunction, Shaw, J. expressed the view that where a co-owner meets with opposition in putting up a building on the common land "his proper method would be to apply for a partition of the land when he would be able to do whatever he likes with the portion allotted to him,"—a view which fully recognises the suitability of partition actions for settling disputes arising between co-owners even in regard to their right to build on the common land.

I am of opinion that the learned Judge exercised his jurisdiction properly in these proceedings in adjudicating upon the rights of parties in regard to the building put up by the 1st defendant-appellant in opposition to the wishes of her co-owners.

During the course of the argument, in view of the very substantial nature of the building that has been put up I was inclined to uphold the submission on behalf of the appellant that as she was not unwilling that while building No. 3 in the plan may be allotted to her, order might be made allotting buildings Nos. 1 or 2, or both, to her co-owners subject to the latter paying her compensation as the quantum of such compensation would not be so heavy as if lot 3 had been allotted to them; we postponed delivering judgment in the hope that the parties might arrive at a settlement on the footing of that submission, but the parties have not been able to compose their differences. It therefore becomes necessary to decide the rights of parties on the basis of legal considerations.

I think it is settled law that where a co-owner puts up or becomes solely entitled to a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation to him for it.

Building No. 1 was allotted to the 1st defendant under an earlier partition decree and she is the owner of it. Building No. 2 was erected by her not only without protests on the part of the plaintiff and the 2nd defendant, but also without violating, it may be said, the rights of the other co-owners. The direction of the learned District Judge that these buildings should be allotted to her at the partition is unobjectionable. In this view it is easy to see that in putting up building No. 3, the 1st defendant has, as has been found by the learned District Judge—a finding which has not been challenged on appeal—committed a flagrant invasion of the undoubted rights of her co-owners to have if not a proportionate, at least an adequate, in so far as circumstances will permit, road frontage along the main thoroughfare, to enable them as well to put up one or more buildings on the portion of the land which, it is common ground, is the most valuable part as a building site.

In this view of the matter, it cannot be said that the order of the learned District Judge, which is in conformity with the principles laid down in the cases of *Silva vs. Silva*, (1906) 9 N. L. R. 114 *Muthaliph vs. Munsoor et al*, (1937) 39 N. L. R. 316 and *Perera vs. Podisingho*, (1946) 47 N. L. R. 347 is liable to be disturbed. The judgment of the learned District Judge is therefore affirmed and the appeal is dismissed with costs.

FERNANDO, A.J.
I agree.

Appeal dismissed with costs.

Present : GRATIAEN, J. AND DE SILVA, J.

SUBRAMANIAM vs. SUDALAIMANY NADAR

S. C. 589—*D. C. Colombo* 30472/*M*

Argued on : 16th September, 1955
Decided on : 21st September, 1955

Negligence—Actio Legis Aquiliae—*Motor-car accident—Rash and negligent driving—Motor Traffic Act of* 1952, *section* 150 (3)—*Vicarious liability of master for the negligence of servant—Servant's scope of employment.*

The appellant and two others were driving in the defendant's motor car from Negombo to Colombo. While travelling on a wet road at 30 or 45 M.P.H., the driver of the car increased this speed and attempted to overtake a lorry without a clear signal from its driver, but on seeing a car travelling in the opposite direction applied his brakes to avoid a collision. As a result the car overturned, and the plaintiff suffered bodily injuries. The car had been borrowed by the plaintiff from the defendant's attorney and was driven at the time by the defendant's driver at the request of the attorney. There was no evidence that when the plaintiff borrowed the car the driver was placed under his control.

Held : (1) (Reversing the finding of the trial Judge) that the driver had been negligent in—
(*a*) attempting to overtake without a clear and unobstructed view of the road—an offence under section 150 (3) of the Motor Traffic Act of 1952 ; and
(*b*) driving at a speed which was dangerous considering the wet road.

(2) That the driver was the servant of the defendant, in that—
(*a*) the fact of defendant's ownership of the car was *prima facie* evidence that it was driven by his servant, and
(*b*) the driver was the servant of the agent of the defendant.

(3) That the driver was acting within the scope of his employment. Although the plaintiff had borrowed the defendant's car, in order to escape liability for the acts of his servant, the defendant must discharge the heavy burden of proving that the servant was under the complete control of the plaintiff. The evidence however established that the driver was under the control of the defendant's agent.

Cases referred to : *Jafferjee vs. Munasinghe* (1951) 52 N. L. R. 313.
Mersey Docks and Harbour Board vs. Coggins and Griffiths (Liverpool) Ltd. and Mcfarlane (1946) 2 All. E. R. 345, (1947) A. C. 1.
Barnard vs. Sully (1931) 47 T. L. R. 557.

Ivor Misso, with *R. Manicavasagar*, for the plaintiff-appellant.
V. A. Kandiah, for defendant-respondent.

DE SILVA, J.

This is an appeal from the judgment of the District Judge, Colombo, dismissing the plaintiff's action to recover damages resulting from a motor-car accident.

The defendant is the owner of motor-car bearing No. CN 4738. He resides in India, but he carries on a business in Colombo. His Attorney in Ceylon is one V. Chelliah. On October 17th 1952, the plaintiff borrowed this car from Chelliah to go to Negombo. It was driven by the defendant's driver M. W. Perera who was instructed by Chelliah to take the plaintiff to Negombo and bring it back before 2-30 p.m. that day. Accordingly the driver took the plaintiff and two others to Negombo. They left Negombo at about 1-15 or 1-30 p.m. on the return journey. When they had proceeded about 16 miles from Negombo they met a lorry proceeding in the same direction. At the time, this car was being driven, according to the driver, at a speed of 30 or 45 miles per hour. The defendant's driver wanted to overtake this lorry and sounded his horn. Then he saw a hand from the lorry moving forward and he concluded that it was the signal for him to overtake. Thereupon he increased his speed and swerved the car to the right and attempted to overtake the lorry when he found a car coming in front of him from the opposite direction. He then swerved the car to the left and applied the brakes in order to prevent a collision with the lorry. The car however overturned and fell on its side in the middle of the road. As a result of the accident the plaintiff sustained a compound fracture of the left radius and also an injury to the medial nerve of the left forearm. In consequence of these injuries the plaintiff had to remain nearly two weeks in hospital and also had to undergo two operations. Dr. Francis Silva who attended on him stated in his evidence that the plaintiff's left forearm was incapacitated to the extent of 20 to 25 per cent.

The plaintiff instituted this action to recover a sum of Rs. 5,000/- as damages on the ground that the accident was caused by the rash and negligent manner in which the defendant's vehicle was being driven at the time. The defendant filed answer stating, *inter alia*, that the overturning of the car was due to the state of the road at the time and therefore it was beyond the control of the driver. In other words, he set up the defence that, it was an inevitable accident. There was also a general denial that the driver was acting in the course of his employment at the time.

The case proceeded to trial on the following issues :—

1. Was motor-car No. CN 4738, belonging to the defendant driven by his driver, acting in the scope of his employment on 17-10-'52 ?
2. Did the said car overturn as the result of all, or any of the acts of negligence on the part of the driver of the car, set out in para 4 of the plaint ?
3. What damages, if any, is plaintiff entitled to recover from the defendant ?

The learned District Judge held that the plaintiff had failed to prove negligence on the part of the defendant's driver. He also took the view that the driver was not acting within the scope of his employment. He further held that the plaintiff had failed to prove that Chelliah was the defendant's Attorney at the time in question. Accordingly, he dismissed the plaintiff's action with costs.

I am unable to agree with the trial Judge that the plaintiff had failed to establish negligence on the part of the driver of the car. The driver who gave evidence for the defendant admitted that at the time he saw the lorry ahead he was driving at a speed of 30 or 45 miles an hour. When he attempted to overtake the lorry he increased that speed further. At the time the road was wet. The driver also admitted that he did not see clearly the signal alleged to have been given by the lorry driver. What he in fact saw were four fingers projecting from the lorry. He admitted that, as he was in a hurry, he concluded that this was a signal for him to overtake. On this evidence it is not possible to hold that the driver of the lorry in fact gave the signal to overtake. Even if such a signal was given the responsibility was still with the driver of the car to satisfy himself that the road ahead was clear. Section 150 (3) of the Motor Traffic Act of 1952 enacts that a motor-car shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead. This is a rule of the road the breach of which is an offence. That the defendant's driver had no unobstructed view of the road is clear from the fact that immediately he took his vehicle to the right to overtake the lorry he found himself suddenly confronted with a car coming from the opposite direction. He admits that there would have been a head-on collision with that car if he proceeded any further in that direction. Not only did he fail to have a clear and an unobstructed view of the road ahead when he attempted to overtake the lorry but he also attempted to overtake it at a speed which must be considered to be dangerous considering the fact that the road was wet at the time. It is therefore clear that the overturning of this car was due to the negligent driving of the driver.

The learned District Judge has also erred in holding that the defendant's driver was not acting within the scope of his employment. Admittedly, M. W. Perera drove the defendant's car on the day in question at the request of Chelliah. If Chelliah was the Attorney of the defendant the latter would be *prima facie* liable in damages if the accident was due to negligence of his driver. I have already held that negligence on the part of M. W. Perera has been established. The learned District Judge took the view that the driver was not acting within the scope of his employment probably because the plaintiff had borrowed the car on this occasion. That however does not relieve the defendant of his responsibility for the negligence of the driver. It was so held by this Court in *Jafferjee vs. Munasinghe* 52 N. L. R. 313. The burden is on the defendant—and this is a heavy burden—that he had placed the driver under the complete control of the plaintiff, if the defendant seeks to escape liability—*Mersey Docks and Harbour Board vs. Coggins and Griffiths (Liverpool) Ltd. and Mcfarlane* (1946) 2 A. E. R. 345. There is no evidence whatsoever that when the car was lent to the plaintiff the driver was placed under his control. On the contrary, the driver was carrying out the instructions of Chelliah in the course of this journey. Chelliah had ordered the driver to bring back the car before 2-30 p.m. Indeed, the driver admitted that he was anxious to overtake the lorry because he was in a hurry. He further stated that the only instructions he got regarding the use of the car that day were from Chelliah. Where a plaintiff has established that damage has been caused to him by the negligent driving of the defendant's motor-car the fact of ownership is *prima facie* evidence that the motor-car, at the material time, was driven by the owner or by his servant or agent—*Barnard vs. Sully* (1931) T. C. R. 557. In this case it has been established that the defendant's car was

driven by M. W. Perera. That amounts to *prima facie* evidence that M. W. Perera was a servant of the agent of the defendant. Indeed, it is not denied that M. W. Perera was in fact the servant of the defendant at the material time.

The learned trial Judge also took the view that the plaintiff had failed to prove that Chelliah was the Attorney of the defendant. Chelliah was called as a witness by the plaintiff. He produced his power of Attorney for the year 1954 and stated that during the years 1952 and 1953 also he was the Attorney of the defendant. His evidence stands uncontradicted. It was not even suggested to him in cross-examination that he did not have the power of Attorney from the defendant during the year 1952. On this evidence the learned District Judge should have held that Chelliah was the Attorney of the defendant at the time of the accident. The answers to issues 1 and 2 should be in the affirmative. The plaintiff therefore is entitled to recover damages from the defendant. The learned District Judge stated in his judgment that if the plaintiff succeeded in the action he would not have been entitled to recover more than Rs. 1,500/-. In my view Rs. 1,500/- is a fair assessment of the plaintiff's damages. I would therefore allow the appeal and enter judgment for the plaintiff in the sum of Rs. 1,500/- with costs in both Courts.

Gratiaen J.
I agree.

Appeal allowed.

Present : Gratiaen, J. and Fernando, J.

MARIYA UMMA vs. THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD.

D. C. (F) 278 M of 1954—D. C. Colombo No. 23590/M

Argued on : 7th, 8th, 10th, 20th, 21st, 22nd, 23rd, 24th, 27th, and 28th June, 1955
Delivered on : 3rd August, 1955

Contract—Insurance—Proposal and personal statement in company's form in English—Assured illiterate in English—Assured's answers translated into English by defendant company's canvasser—Assured's health certified by company's doctor to be good—Death of assured—Repudiation of liability by company on the ground of withholding material information regarding state of health and inaccurate or untrue statements in the proposal—Principles governing construction of insurance policy—Meaning of "consult".

Civil Procedure—Defective pleadings—Judge's powers under section 77 of the Civil Procedure Code.

The plaintiff's husband entered into a contract of insurance of life with the defendant company on the company's proposal form, which was in English, and containing a number of questions, which he had to answer together with questions under "personal statement", also in English. As the assured did not know English the questions were translated into Malayalam and the answers into English by the company's inspector S, and likewise the answers in the personal statement were recorded by the company's doctor, who after examination certified him to be of good health. The assured agreed that the statements should be the "basis of the contract".

In an action by the plaintiff as administratrix to recover the money under the contract after the assured's death, the company repudiated liability on the ground that the deceased had withheld material information regarding his health and ailments and that he had given inaccurate and untrue answers to the questions in the proposal and the personal statement, namely, (*a*) whether he had consulted any medical man for any ailment within the past five years ; (*b*) whether he had ever suffered from any other illness, accident or injury.

The burden of proving nullity of contract was on the defendant company.

The trial Judge rejected the evidence of one Dr. Shenoy the defendant's witness and that of Dr. Narayan, the plaintiff's witness regarding the state of deceased's health at the time of the contract, and acting on the evidence of Nair, the company's canvasser, and the medical report of the company's doctor found in plaintiff's favour that the deceased was perfectly healthy at the time of effecting the assurance.

The trial Judge relying on the admission of Dr. Narayan that the deceased had a mild attack of "influenza" in 1945 also held that the assured had given an untrue or incorrect answer to the questions in the proposal and the personal statement.

Held : (1) That there was sufficient evidence to justify the trial Judge's finding that the deceased was in good health at the time of effecting the policy.

(2) That the answers given by the assured to the questions in the proposal and the personal statement have not been proved by the defendant to be untrue or incorrect as—

(*a*) the defendant had failed to establish that the relevant questions were correctly interpreted and explained by the company's inspector and that the answers thereto were correctly inserted by him ;

(*b*) the answers given by the assured, on a fair construction of the questions, cannot in the context be said to be untrue, and that the defendant should not be permitted to plead that the question was put in a sense different from or more comprehensive than the assured's answer.

Observations regarding the duty of a trial Judge under sections 77 and 146 of the Civil Procedure Code to clarify the issues between the parties before evidence is recorded and to prevent parties being taken by surprise.

Authorities cited : McGillivray's Insurance Law (4th ed.) paras 925, 926.
Dawson vs. Bonnin (1922) A. C. 413.
Thomson vs. Weems (1884) 9 App. Case 671 at 687.
Condogianis vs. Guardian Assurance Co. (1921) 2 A. C. 125.
Connecticut Mutual Life Insurance Co. vs. Moore (1881) 6 App. Cas. 644.
Mutual Life Insurance Co. vs. Ontario Metal Products Co. (1925) A. C. 344.
Joel vs. Law Union and Crown Assurance Co. (1908) 2 K. B. 863.
Anderson vs. Fitzgerald (1853) 4 H. L. C. 484.
Keeling vs. Pearl Insurance Co. (1923) 129 L. T. 573.
Biggar vs. Rock Life Insurance Co. (1902) 1 K. B. 516.
Newsholme Bros. vs. Road Transport and General Insurance Co. (1929) 2 K. B. 356.
Bawden vs. London, Edinburgh and Glasgow Assurance Co (1892) 2 Q. B. 534.
Kulla Ammah A. I. R. (1954) M. A. D. 636.
Glicksman vs. Lancashire and General Assurance Co. (1927) A. C. 139.
Yuill vs. Yuill (1945) p. 15.
Watt vs. Thomas (1947) A. C. 484.

C. Thiagalingam, Q.C., with *N. Nadarasa, S. Sharvananda* and *T. Parathalingam*, for the plaintiff-appellant.

H. V. Perera, Q.C., with *S. Nadesan, Q.C., S. J. Kadirgamar* and *J. de Saram*, for the defendant-respondent.

GRATIAEN, J.

The administratrix of the estate of K. Ahamed sued the defendant Company, whose head office is in Bombay, for the recovery of Rs. 30,000/- under a policy of insurance payable on his death.

On 30th November, 1947 the deceased, who was the proprietor of Pilawoos Hotel, had submitted to the Company's branch office in Colombo a proposal (D1) for the insurance of his life. The business was introduced to the Company's Inspector Sivasubramaniam by a canvassing agent Nair who gave evidence at the trial in support of the plaintiff's claim. The printed proposal form, drafted by the Company in the English language, contained a number of questions which the applicant for insurance was required to answer "fully and distinctly in his own handwriting". A similar requirement appears with regard to the questions in the "Personal Statement" which was to be answered before his examination by a Medical Referee nominated by the Company.

The deceased could sign his name in English, but was otherwise illiterate in that language. The questions in the proposal form and the Personal Statement were therefore interpreted to him in Malayalam by Sivasubramaniam who also translated his answers into English. At the foot of the proposal form is a declaration printed in English and signed by him in both languages purporting *inter alia* to agree that his statements in the documents "shall be the basis of the contract". A further declaration, also printed in English in somewhat different terms, was signed by him in both languages in the presence of the Medical Referee, Dr. Sivapragasam, after the medical examination.

Dr. Sivapragasam's report P4 pronounced that, after a detailed medical examination, he considered the deceased a "first class life", that is to say, "a life in perfect health and of sound constitution with good personal and family history and with prospects of longevity as good as those of healthy persons generally of the same age". The Company accepted the proposal on the 15th December, 1947 and the terms of the contract are contained in the policy dated 12th January, 1948. There is no evidence as to when the policy was forwarded to the deceased.

The deceased died at Cannanore in South India on 21st March, 1948, and payment under the policy was claimed shortly afterwards on behalf of his estate. On 8th August, 1950, *i.e.* more than two years later, the Company repudiated liability on the grounds specified in its letter P2.

It was alleged, *inter alia* (1) that the deceased had "withheld material information at the time of effecting the assurance" and (2) that the Company had "indisputable proof to show that the deceased had for some months before he submitted the proposal and even till the date of issue of the Acceptance Letter been suffering from heart trouble and "its complications and that he had also been suffering from piles and hernia". Upon receipt of this letter, the plaintiff instituted the present action in October, 1950.

Paragraph 6 of the Company's answer is to the following effect :—

"6. The defendant Company states that after the death of the said Kalingal Ahamed deceased, it was discovered that he had failed to disclose facts regarding the state of his health and/or about ailments which he had been suffering from at or about the date of the said Personal Statement and of the proposal for insurance, at or about the date of the letter of acceptance or at or about the date of issue of the Policy of Assurance, and that the deceased had either fraudulently or wilfully given false answers or information in the said Personal Statement and/or Proposal for Assurance in regard to his health or ailments or had either fraudulently or wilfully concealed or withheld material information from the defendant Company in regard to his health or ailments. The defendant Company therefore avers that the said policy of insurance effected thereunder ceased and determined and all monies paid thereunder have become forfeited to the defendant Company and the defendant Company is under no liability whatsoever to pay the sum of Rs. 30,000/- or any sum whatsoever".

These allegations (so Counsel appearing for the Company informed us during the argument) were later slightly modified to the extent that the Company did not consider it necessary to pursue the earlier imputation of an express fraud. The modified grounds of repudiation are set out in issues 3 and 4 which (as amended during the trial) read as follows :—

"3. Had the deceased failed to disclose facts regarding the state of his health and/or about the ailments that he had been suffering from on or about the date of the personal statement D1, or date of proposal, acceptance of the proposal or date of issue of the policy of Insurance ?

4. Had the deceased given untrue or incorrect answers and information in the personal statement and proposal for insurance in regard to any one or more of the following particulars :—

(*a*) Date of birth and age—Cage 3 of page 1 of D1.

(*b*) In regard to the question in cage 14 of page 1 of D1.

(*c*) In respect of the personal statement at page 2 of D1, in regard to the answers to questions 3A (1), 3A (2), 3A (3), 3A (4) of page 2 of D1 and 3C, 3D (1, 2) and 9A and 9B ?

Issue 4 (*a*) was withdrawn at an early stage of the trial, and we were informed that the Company did not invite even an incidental finding that the deceased's age in fact exceeded 46 in November, 1947.

Issue 3 raises the question whether the deceased had in fact withheld material information concerning the state of his health, and thus disregarded the duty imposed by law on any person proposing to take out a policy of life insurance. As to issue 4, the Company took up the alternative position that the validity of the policy was by mutual agreement made conditional upon the "truth" and/or "accuracy" of the deceased's answers to the specific questions put to him in the proposal and the Personal Statement. It is common ground that the burden of proving that the contract was either voidable for the reasons alleged in issue 3 or void *ab initio* for the reasons alleged in issue 4 was on the Company.

Issue 3 was framed in terms of the utmost generality, and gave no indication of the ailments from which the deceased allegedly suffered at the relevant dates. Counsel for the plaintiff therefore asked at the commencement of the trial for particulars of these allegations. He claimed that the Company's defence on this issue should be restricted to the grounds of complaint specified in its letter of repudiation P2. The learned Judge over-rules the objection and said :—

"The answer is no doubt couched in general terms, and in my view should have specifically referred to the various items in the proposal for insurance and the Personal Statement which are alleged to have been made by the deceased. But at the same time one cannot lose sight of the fact that by interrogatories the plaintiff could have clarified the position. This has not been done. I allow the issues".

The Company's pleadings were certainly defective for want of precise information as to the grounds on which liability was repudiated. The answer should therefore have been returned for amendment under Section 77 of the Civil Procedure Code. I also take the view that, although the plaintiff would have been better advised to serve interrogatories on the Company for the purpose of obtaining clarification of allegations made

against the deceased, the learned Judge took far too narrow a view of his own powers and duties in such a situation.

No express provision is made in our Code for the salutary machinery of " summons for directions " as in England or for pre-trial proceedings as in America. Nevertheless, and indeed for this very reason, Section 146 imposes a special duty on the Judge himself to eliminate the element of surprise which could arise when the precise nature of the dispute is not clarified before the evidence is recorded. The defendant's pleadings were defective, and the plaintiff (let it be conceded) had not been as vigilant as she should have been to protect herself against surprise. But it was still the Judge's duty to control the trial. He should have ordered the defence to furnish full particulars of its grounds for avoiding liability, and the issues for adjudication should only have been framed after the Judge had ascertained for himself " the propositions of fact or of law " upon which the parties were at variance. This was especially necessary where the administratrix of an estate was confronted with serious allegations against a person who had never had an opportunity, when alive, to answer personally to the charges.

The same observations apply to issue 4. Each printed question in the Personal Statement refers to a formidable catalogue of " ailments ", and, if the Company intended to rely on other charges than those specified in its earlier letter of repudiation (namely heart disease, hernia and piles) it should certainly have specified the additional " ailments " in respect of which the deceased was alleged to have given untrue or incorrect answers.

The trial commenced upon issues which were left far too vague, and, as the learned Judge himself points out in the closing paragraph of his judgment, the proceedings were unduly protracted for a variety of reasons. The advantage which this experienced Judge of first instance enjoyed of seeing and hearing the witnesses was therefore " perhaps not so great " as it would have been if the dates of trial had been less widely separated each from the other.

I now pass on to review some of the facts which came to light in the course of the trial. The Company was clearly entitled to view with some suspicion the fact that a man who was pronounced a " first class life " in November, 1947 should have died of heart failure (according to the certificate of death) in March, 1948. Indeed, the mystery deepened when this certificate, which originally gave his age as " 55 " and the name of his last medical attendant as " Dr. L. S. Shenoy ", was subsequently amended, first by altering his age to " 46 " and, at a later date, the name of the medical attendant to " Dr. M. Narayanan ".

Dr. Narayanan, a medical practitioner of Tillichery in South India, reported to the Company that he treated the deceased for coronary thrombosis from about 14th March, 1948 until he died—first at the residence of the patient's wife's family in the village of Eddakat, and later at Cannanora. He said that he had known the deceased quite well since about 1944, and that the deceased had been in good health until the date of his last illness. Dr. Narayanan categorically denied that Dr. Shenoy was consulted at any stage of the deceased's last illness, and his version, if true, left no room for the complaint that the deceased had been guilty in November, 1947 of non-disclosure of any material facts concerning the state of his health.

When Dr. Shenoy was contacted by the Company, he wrote a letter (D2) of 5th February, 1949 giving a completely different history of the last illness. He said that it was he alone who had been in charge of the patient, first at Eddakat from the middle of February, 1948 until about 5th March, and later at Cannanore until he died 16 days later. He also claimed to have called a Dr. Miller (then Civil Surgeon at Sholapur) in consultation on two occasions. According to him, the deceased died of cerebral oedema, and had been suffering for a considerable time from chronic myocarditis, unguinal hernia on both sides, and external piles. These details were elaborated in a further letter to the Company (D3) of 8th June, 1949 and clearly forms the basis of the letter of repudiation P2 of October, 1950. If Dr. Shenoy's version was substantially correct, the facts would without doubt have established that the deceased, when he was virtually a dying man, had fraudulently, and with the connivance of others, induced the Company to insure his life upon a completely false hypothesis.

Dr. Miller's name was disclosed by Dr. Shenoy in February, 1949, but he was not contacted by the Company until about October or November, 1951, *i.e.* after the action had commenced. He was unable at first to recollect the case, but, after his memory had been stimulated (I do not use the word in a sinister sense) by reference to the details of Dr. Shenoy's version, he agreed to give evidence to the effect that he had in fact been consulted in March, 1948 concerning a patient answering to the description of the deceased, and that he remembered having agreed with Dr. Shenoy's diagnosis.

One can well appreciate the additional difficulties which the learned Judge encountered in a trial where medical men gave irreconcilable versions on questions of fact. He ultimately found

it impossible to accept the evidence of either Dr. Shenoy or Dr. Narayanan " with any degree of confidence ", and decided that the value of Dr. Miller's evidence was greatly reduced because, in attempting to reconstruct what had occurred 3½ years before the Company contacted him, he had been " much influenced " by what Dr. Shenoy had previously stated. The Judge finally concluded that " neither Dr. Shenoy nor Dr. Narayanan had spoken the whole truth ", and that it was " perhaps right " to draw the inference that " both doctors had been called in, Shenoy at the last moment when the relations of the deceased became desperate ".

The Company relied on the evidence of another witness called Kochchakan who had also been contacted for the first time after the trial commenced. His evidence, if true, strongly supported Dr. Shenoy's opinion that the deceased man must have been a " very sick man " in November, 1947. But he was disbelieved, and certain documents produced by him (alleged to have been written by the deceased during the relevant period) were not accepted as genuine.

As to the plaintiff's witnesses, the learned Judge was much impressed by the evidence of the Company's canvasser Nair who stated that the deceased was in excellent health in November, 1947 and earlier. Acting on his evidence and on the medical report of Dr. Sivapragasam (who died on 17th May, 1950 before the Company repudiated liability) the learned Judge said " I have no doubt that at that particular time (*i.e.* in November, 1947) the deceased Ahamed was perfectly healthy ". Issue 3 was accordingly answered in favour of the plaintiff.

With regard to issue 4, the Company again relied on the inference drawn by Dr. Shenoy as to the probable state of the deceased's health in November, 1947, and on the evidence of both Dr. Shenoy and Kochchakan as to what the deceased had himself told them in that connection. If this evidence had been accepted, the policy was clearly void because the deceased had given false answers to several questions in the proposal form and the Personal Statement. But here again the learned Judge was not prepared to place reliance on the statements of fact made by either witness, or on the inferences drawn by Dr. Shenoy from the symptoms which he claimed to have observed during the last illness. In the result, there was no evidence adverse to the deceased which the Judge found himself in a position to accept on controversial matters covered by issue 4 up to the stage when the case for the Company had been closed. Nevertheless, the extremely general form in which the issue was framed enabled the Company to rely on a matter incidentally mentioned by Dr. Narayanan when he was called to rebut Dr. Shenoy's version of the deceased's last illness. Let me explain how this anticlimax occurred.

According to Dr. Narayanan, the deceased had not suffered from any serious illness since about 1944, but he had had a mild attack, diagnosed as " influenza ", early in 1945 ; and this indisposition was speedily cured by a few doses of mixture. Upon this isolated item of evidence given by a witness whom the learned Judge otherwise regarded as demonstrably unreliable, issue 4 was answered in favour of the Company—the reason being that the deceased had on 30th November, 1947 answered in the negative (1) the question (in the proposal form) whether he had " consulted any medical man for any ailment " within the past five years and (2) the question (in the Personal Statement) whether he had " ever suffered from *any other illness*, accident or injury, *whether considered (by the deceased) to be important or not* ".

It was conceded on behalf of the Company that in any view of the matter, influenza, having already been included specifically in an earlier question No. 3 (*a*) (3) of the Personal Statement, is not caught up by the words " any other illness " in question 3 (*c*). It was also conceded that the words " whether considered to be important or not " qualified the word " injury ", but not necessarily the words preceding it. Mr. Perera argued, however, that the policy ought to have been declared void *ab initio* because question 3 (*a*) (3) was answered in the negative. This submission was rejected by the learned trial Judge because in his opinion question 3 (*a*) (3) referred in this context only to ailments, including influenza, " of a somewhat serious and severe character ".

For the reasons which follow, I have come to the conclusion that, upon the learned Judge's findings of fact, the deceased has not been proved to have given an " untrue " or " incorrect " answer either to question 14 in the proposal form or to question 3 of the Personal Statement. The truth of the impugned answers was made the " basis of the contract ", and it must certainly be conceded that the question of their materiality to the insurance risk does not directly arise. *Dawson vs. Bonnin* (1922) A.C. 413. But were the answers in fact " untrue "? As Lord Watson pointed out in *Thomson vs. Weems* (1884) 9 App. Cas. 671 at 687, " the subject matter of the warranty is a point to be determined in each case according to the just construction of the question and answer taken *per se*, and without reference to the warranty given .....If the words are ambiguous, they must be construed *contra proferentes* and in favour of the assured ".

An insurance Company is always entitled to stipulate that a policy is void even if the assured gives information which, upon extreme literalism, is incorrect on matters however trivial and immaterial; but in that event the Company must have the commercial courage to communicate its intention to the other party in the clearest possible terms. "It is a weighty matter that the questions are framed by the insurer, and, if an answer is obtained which is, upon a fair construction, a true answer, it is not open to the insuring Company to maintain that the question was put in a sense different from or more comprehensive than the proponent's answer covered. When an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of the question. Otherwise, the ambiguity will be a trap against which the insured should be protected by the Courts of law". Per Lord Shaw in *Condogianis vs. Guardian Assurance Co.*, (1921) 2 A.C. 125.

Let us consider in the first instance the case of an applicant for insurance who was a person of good education and perfectly conversant with the language in which the following questions were addressed to him:—

(1) "Have you ever suffered from any of the following ailments—typhoid, *influenza*, filariasis, elephantiasis of leg or scrotum, kala-azar, blackwater or any other fever"?

(2) "Have you within the past five years *consulted* any medical man for any ailment, not necessarily confining you to your house? If so, give details and state names and addresses of medical men consulted".

How would a reasonable man making a proposal for life insurance fairly read these two questions if he assumed (as he is entitled to assume) that reasonable insurance Companies do not require information frivolously or through pure inquisitiveness on matters which have no conceivable relevancy to the risk which they are invited to undertake? In my opinion, the question as to "influenza" is "one which the Company could hardly reasonably have expected to be answered with strict and literal truth" in a country where perfectly healthy persons occasionally "suffer" from slight indispositions of brief duration, loosely described as "influenza". It must therefore be read "with some limitation and qualification to make it reasonable". *Connecticut Mutual Life Insurance Co. vs. Moore* (1881) 6 App. Cas. 644.

"Influenza" was classified in the Personal Statement as an "ailment", and (leaving aside "Kala-azar" which conveyed no meaning to any of us who heard or argued the appeal) was included in a group of diseases notoriously calculated to reduce longevity. That the term catches up a serious attack of "influenza" which might well be attended by consequences impairing a man's general health is clear enough. But, can it fairly be read as having been intended also to include what a layman would describe colloquially as a "touch of flu"? One cannot imagine that a reasonable insurance Company negotiating with a person residing in Ceylon would seriously wish to know whether he had never in his life had a slight indisposition of that kind. I therefore agree with the learned Judge's view of what "influenza" meant in the context of question 3 (*a*) (3).

As to question 14 appearing in the proposal form, the purpose of the insurance Company in asking whether the deceased had ever "consulted" any medical man for "any ailment" was to obtain the "means of testing his other answers by reference to the medical gentlemen who had been consulted during the past five years". *Mutual Life Insurance Co. vs. Ontario Metal Products Co.*, (1925) A.C. 344. But there remains the question as to how the terms "consult" and "ailment" should be construed in the context in which they appear. In the decision of the Judicial Committee to which I have just referred, a similar question required the names of "every physician or practitioner who has *prescribed for* or *treated* you or whom you have *consulted* in the past five years". This indicates that the three terms are not synonymous in the minds of all insurance Companies. In that particular case, the assured had on several occasions obtained from a doctor a tonic when he was "feeling overworked and run down". The Judicial Committee considered that the doctor had "prescribed for him" or "treated him", but did not go so far as to hold that the doctor had also been "consulted".

It cannot at any rate be said that there is no ambiguity in question 14, and I am not convinced that a person who, when slightly indisposed, was given an influenza mixture on an isolated occasion by his wife's family doctor would be guilty of untruthfulness or even of substantial inaccuracy if he denied that he "consulted" the gentleman concerned "for an ailment". A reasonable applicant for insurance might well assume that the Company was concerned only to obtain information as to whether he had during the relevant period sought the professional advice of a medical man in connection with some ailment (real or imagined) of a serious nature. "The question *what medical men have you consulted?* involves some necessary explanation, and some

limit to this question must have been intended". *Joel vs. Law Union and Crown Assurance Co.*, (1908) 2 K.B. 863.

This brings me to another reason for holding that the Company has not discharged the burden of proving that the "basis of the contract" was destroyed on grounds covered by issue 4. The printed questions were addressed to the deceased in a language which (to the knowledge of the Company's agent Sivasubramaniam who attended to the preliminary negotiations) he could not understand. They were interpreted by Sivasubramaniam in Malayalam, and the answers given in Malayalam were then translated into English by Sivasubramaniam. In these circumstances, proof of the accuracy of the translations was, I think, essential to the success of the Company's defence. Moreover, the Medical Referee was himself specially directed to, "read over carefully" the answers in the Personal Statement before examining the deceased, and to obtain "fuller information such as will explain the meaning of ambiguous terms like fever, cough, etc.". There is no evidence as to what was said, or what explanations given, at that stage.

Finally there are the declarations signed by the deceased at the foot of the proposal form and of the Personal Statement. How were these English terms explained in Malayalam to the deceased? Consider, for instance, the phrase "the foregoing statements are true". The Muslim hotel-keeper was entitled to elucidation from the Indian insurance agent as to what precisely the Company meant by "truth". Did Sivasubramaniam explain that, as far as the Company was concerned, the term included "any inaccuracy unaccompanied by moral guilt"? Did he also say that the policy would be void even if statements of honest opinion were subsequently found to be incorrect? The deceased had no doubt added a statement in Malayalam that what Sivasubramaniam had put down as representing his answers was "written to (his) dictation" and that he "understands the contents". This does not mean that he pretended to understand anything other than what had been explained to him in the only language with which he was conversant.

Even when the trial was in progress, Sivasubramaniam continues to be entrusted by the Company with responsible duties, but he was not called by the Company. Indeed, strenuous attempts were made to procure his attendance as a witness on the plaintiff's behalf, but they were frustrated because, in the learned Judge's opinion, which I am unable to reject, the Company "kept him out of the witness box". In these circumstances, we cannot assume that the interpretation which Sivasubramaniam gave to the relevant questions coincided with the meaning for which the Company now contends. And I do not agree that, when Counsel for the plaintiff admitted at the commencement of the trial that the deceased had "submitted" the Personal Statement and the proposal for insurance to the Company, he could reasonably have been understood to concede the accuracy of Sivasubramaniam's translation. This admission was recorded long before the points at issue which later assumed so much importance were brought to the plaintiff's notice.

The principles laid down in *Joel's case* (supra) apply in a very special way when the meaning of questions to answers which form the "basis of the contract" has been explained to an illiterate "assured" by an insurance agent acting within the express or apparent scope of his authority. It was pointed out in *Anderson vs. Fitzgerald* (1853) 4 H.L.C. 484 that "a policy ought to be so framed that he that runs can read". How much greater is the obligation imposed on insurance Companies who have constructive knowledge that the applicant cannot read at all? No doubt an illiterate man, if left to construe the documents for himself, runs the risk of being misled by an interpreter of his own selection. But the position is quite different when the Company's agent volunteers the explanations and, as a step towards securing the business, fills up the form for a person who cannot fill it up for himself. *Keeling vs. Pearl Insurance Co.*, (1923) 129 L.T. 573. In such a situation, he is not "the mere amenuensis" of the illiterate person. Accordingly, the *prima facie* inaccuracy in the English language of an answer given in Malayalam does not avoid the policy unless it is established that the relevant questions were correctly interpreted and explained and that the answers thereto were correctly inserted by the insurance agent.

This is a very different case from *Biggar vs. Rock Life Insurance Co.*, (1902) 1 K.B. 516 and *Newshoime Bros. vs. Road Transport and General Insurance Co.*, (1929) 2 K.B. 356, where an assured person, though literate and perfectly competent to understand the documents, was content to adopt, without reading them, answers invented or incorrectly inserted by a dishonest insurance canvasser. Obviously, the assured in those cases "could not escape the consequences of his own negligence", and the "very distinguished case" of *Bawden vs. London, Edinburgh and Glasgow Assurance Co.*, (1892) 2 Q.B. 534 did not therefore apply. I respectfully agree with the judgment of the High Court of Madras in *Kulla Ammal's case* A.I.R. (1954) Mad. 636 that in a situation such as has arisen in the present case, the Company cannot succeed without proof that the questions and the

impugned answers were correctly interpreted and recorded by the Company's agent.

In this country, people are becoming increasingly aware of the advantages of making family provision through life insurance, and many honest persons proposing to avail themselves of these benefits are handicapped by their inability to read or write the language in which the preliminary documents are drafted by insurers. The legal relationship of the insurance agent *vis a vis* his employer on the one hand and the illiterate applicant for insurance on the other therefore becomes vitally important. The agent generally has no authority to conclude the contract of insurance, but the illiterate applicant is *prima facie* entitled to assume that the agent has authority at least to explain the meaning of the questions contained in the documents and to put the answers when given into proper shape. *Macgillivray's Insurance Law* (4th Ed.) paras 925 and 926. If the law does not protect the illiterate man to this extent, the *impar congressus*—condemned by Lord Dunedin in *Glicksman's case* (1927) A.C. 139—between an insurance agent and "a wretched little (person) who could neither read nor write" would be frought with danger to the latter.

In the present case, the completed documents, when received in Bombay, must have made it clear to the Company that the deceased did not understand the language in which the questions were addressed to him; it must have been equally apparent that their own agent in Ceylon was the person who interpreted the questions, reduced his answers into writing, and explained the stipulation that those answers would form the "basis of the contract". In these circumstances the Court should refuse to declare the contract void in the absence of proof that the interpreting agent's functions had been properly discharged. I cannot agree with the argument that, in such a situation, the plaintiff's only remedy was to obtain a rescission of the contract on the basis of some misunderstanding, and to claim a refund of any premia previously paid under the policy. The correct analysis seems to be that the assured and the agent of the insurance Company were in truth *ad idem*, but we do not know what precisely they were *ad idem* about in relation to the special warranties relied on by the Company. Issue 4 must therefore be answered in favour of the plaintiff.

There remains the Company's final contention that we should reverse the learned Judge's conclusions of fact on issues 3 and 4, and to hold that Dr. Shenoy's evidence and Kochchakan's evidence ought to be believed—in which event the deceased's answers in the proposal form and Personal Statement must have been false to his knowledge in many respects. Mr. Nadesan, who argued this part of the Company's case, subjected the judgment under appeal to microscopic analysis. It is certainly a pity that the dates of trial were unduly spread out, and some of the reasons given for rejecting the evidence of Dr. Shenoy are perhaps less convincing than others. After all, no judgment, when so meticulously dissected, will be found to be completely beyond criticism. But, generally speaking, I think it can fairly be said that the learned Judge's conclusions are not vitiated by substantial misdirection. Bearing in mind the well-known principles laid down by Lord Greene in *Yuill vs. Yuill* (1945) P. 15 and by Lord Thankerton in *Watt vs. Thomas* (1947) A.C. 484, I cannot accept the argument that the findings to which the Company takes exception were "so clearly wrong that the appellate tribunal's judgment of fact should be substituted for his". As to whether, if I had enjoyed the advantage of seeing and hearing the witnesses for myself, I would have taken a different view of the merits of the case, it is idle to speculate. But there is no reason for holding that the canvasser Nair, who made a favourable impression on the trial Judge, ought to have been disbelieved—particularly when Sivasubramaniam was not called to contradict him. The acceptance of Nair's evidence rules out the possibility that it was not the deceased but some healthy man, fraudulently impersonating him, who had been taken before Dr. Sivapragasam; indeed the Company concedes that what purports to be the signature and handwriting of "K. Ahamed" in the relevant documents were in fact his. Why should one assume that Dr. Sivapragasam, who was specially directed to see that the declaration was made and signed in his presence had failed in this duty? Dr. Sivapragasam held a responsible position in the Government Medical Service in November, 1947, and continued to enjoy the Company's confidence until he died. If his report was made after an honest medical examination, Dr. Shenoy's version cannot be accepted. There was no evidence to justify the assumption that Dr. Sivapragasam was the kind of man who would have performed his professional duties dishonestly or even lightly. It is not the plaintiff's fault that the Company's decision to repudiate liability was postponed for so long that Dr. Sivapragasam died in the interval. One cannot understand why Dr. Sivapragasam was not asked his views on Dr. Shenoy's version as soon as the letter D2 was received in February, 1949.

I would allow the appeal and order a decree to be entered in favour of the plaintiff as prayed for, with costs in both Courts.

FERNANDO, J.

Counsel for the respondent Company at the appeal have argued quite insistently that the state of health of the assured had been proved to be such that the trial Judge should have held that the assured gave incorrect answers to the questions put in the following items in the personal statement D1 :—

3A. for the reason that he had suffered from swelling of the knees and joints shortly before the date of the proposal.

3D. for the reason that he did in fact suffer from hernia.

9A1. for the reason that to his own knowledge

&

9A2. he suffered from various complaints in August and September, 1947, and was under medical treatment in Ceylon and in India.

It was also argued that, quite apart from the consultation of Dr. Narayannen for influenza in 1944 or 1945, the treatment in 1947 should have been disclosed in cage 14 of the proposal form, and that the failure to do so entitled the Company to a finding that the answer given was incorrect. Counsel did not press for a finding in their favour upon the third issue framed at the trial, but only for the reason that the alleged non-disclosures relevant to that issue were the same as are relied upon to establish the incorrectness of the answers given in the items to which I have just referred.

Upon this part of the case, the criticism offered by Counsel for the Company is that the trial Judge failed to recognise the importance of two planks of the prosecution case, namely, (*a*) that it was Dr. Shenoy, *and not Dr. Narayannen*, who attended on the assured during the three weeks of his last illness, and (*b*) that during the months of August and September, 1947, the assured had written a number of letters from India to one Kochakan in Ceylon which disclosed that the assured was then suffering from various ailments and was then under medical treatment. We were invited to say that both these facts were conclusively proved at the trial, and that, considered together with certain other parts of the evidence, they established the incorrectness, if not also the deliberate falsity, of some of the answers in D1.

There was firstly Dr. Shenoy's own evidence that he treated the assured "from about the middle of February until his death" on 21st March, 1948, at first at Eddakat and later at Cannanore, visiting him daily, and being present at his bedside two hours before his death. During the entirety of this period Dr. Shenoy did not see Dr. Narayannen attend on the patient. There was then the evidence of Dr. Miller that he had been called in consultation by Dr. Shenoy and had examined the assured on the day of his death as well as on an occasion about 10 days before. The copy of the death registration entry (D17A) shows that the death was registered on 22nd March, 1948 at the Cannanore Municipal office, that the name of the medical attendant was entered as "Dr. L. S. Shenoy" and that the age as furnished was 55 years, the same as that estimated by Dr. Shenoy according to his evidence; copies of this entry were attached to applications made by the widow of the assured to this Court in July, 1948 and to the District Court in August, 1948 in connection with the administration of the estate of the assured. The position taken by the appellant with regard to this entry is that there were two errors in it—the first (as to age) was corrected (D20) in July, 1948 by the Stationary Sub-Magistrate of Cannanore upon application (D18) made by Andutty the brother-in-law of the assured, and the second (as to the name of the medical attendant) was corrected by the same Magistrate (D22) in September, 1948, upon the petition of the widow and Dr. Narayannen's name was substituted. The contention of the Company is that the corrections were sought only because Dr. Shenoy had (about a month after the death) declined to accede to a request by Andutty for a certificate informing the Company that coronary thrombosis was the cause of death, and that the need for a correction as to the name of the doctor became urgently apparent only when the Company had early in August, 1948 (P25) called for an extract from the death register. It was argued for the Company, not only that the death registration entry confirmed the evidence of Dr. Shenoy of the fact that he attended, but also that the correction was a device employed to support the false position that Dr. Narayannen had been in attendance. With respect, the second part of the argument is difficult to appreciate. The Company relies upon the widow's application for the correction as being confirmation of Dr. Shenoy's evidence of the attempt to induce him to certify to an untrue statement as to the cause of the death of the assured. If there were extrinsic circumstances suggesting an inference that the application to correct the entry was based upon false averments, then undoubtedly the making of such an improper application would be strong corroboration of Dr. Shenoy's evidence. But here the only available means by which we can test the propriety of the motive behind the application consists in the evidence of Dr. Shenoy himself. I thought at first that Counsel for the appellant justifiably complained that the trial Judge did not address his mind to the fact that

the orders for correction were made by a judicial officer who, in one at least of the orders (as to age) stated " I have made inquiries and I was satisfied that the age of the deceased was 45 years ", and who in making the later order which now turns out to be so important, must be presumed to have been judicially satisfied as to the facts which rendered his order necessary. It is significant that the petition by the widow (D21) contained this statement :—

" Dr. L. S. Shenoy did not treat him. The Doctor who treated him was Dr. M. Narayannen of Tellichery. *If you verify this from the said Doctors*, they will testify the truth of this statement ".

Counsel for the Company relied on section 35 of the Evidence Ordinance, but in my opinion the section gives greater support to the appellant. So far as the trial Judge was concerned, the entry that was relevant was the entry as corrected and he was quite entitled to assume by reason of the Magistrate's orders that what were relevant were the particulars in the *corrected entry*. So that on fuller consideration I have little doubt that the Judge realised that the original entry was of little or no avail to the Company as corroboration of Dr. Shenoy unless it could be shown *aliunde* that the Magistrate was actually misled by false misrepresentations.

In support of the proposition that Dr. Shenoy alone attended on the assured, it has been further submitted that the evidence of Dr. Narayannen as to his attendance on the assured is demonstrably false. In the certificate P5 which he issued on 15th August, 1948, Dr. Narayannen set down the cause of death as " coronary thrombosis ", but he described the symtoms as " anaemia, palpitation and weakness", which latter, the Company argues, are not the characteristic symptoms of coronary thrombosis. Where further particulars were required, he referred (in P28 of 7th September, 1948) to the following symptoms :—

" The blood pressure was very low (100 mm.) systolic and he was in a collapsed condition with pain over the chest, with dyspnoea nausea and vomiting. The patient was restless with a sensation of oppression. There was cynosis, skin cold with profuse sweating and the pulse was imperceptible.

Dyspnoea was on the increase ".

In his evidence in chief, the doctor omitted to mention some of the symptoms described in P28, and he made good the omission only in the course of cross-examination.

Dr. Narayannen admitted in evidence that he had consulted a medical text-book and his diary before he wrote P28. The diary was apparently one kept for income tax purposes : his explanation that an entry as to fees is more readily accepted by the income tax authorities when supported by details of a patient's symptoms is scarcely credible ; and the failure to produce the diary deprived the Court of the only reasonable means of testing so curious an explanation. He tried to account for the omission from P5 of important symptoms by stating that he wrote it without consulting his diary, and when pressed upon the matter said that he " thought anything was good enough for the Insurance Company ".

Dr. Narayannen's need to consult a text-book is not so difficult to appreciate : he has treated only a few cases of coronary thrombosis, each with the settled expectation that immediate or very early death was inevitable, and this particular case was no exception. Furthermore, although Dr. Narayannen observed that the assured was continuously screaming and writhing with pain, his personal convictions as to the fatal effects of morphia with heart patients, despite the contrary opinions of text-book writers, prevented him from administering even small doses of that drug. He did not think fit to call in another doctor, even though such a practice was usual and though the family could well afford the cost of a second opinion. Although the doctor observed that the patient was semi-conscious during the whole period, he nevertheless consented, upon the patient's insistence, to his removal from Eddakat to Cannanore on 19th March at the risk of death during the journey.

These and other features of the evidence of Dr. Narayannen rendered it highly improbable, either that he could have made a correct diagnosis, or that he was aware of the correct treatment of thrombosis, even if fortuitously diagnosed ; and they amply justify the view taken by the trial Judge that " it is utterly impossible to act upon his evidence with any degree of confidence ". But considering that much of what is unsatisfactory in his evidence can be reasonably accounted to ignorance of or at least unfamiliarity with the subject of thrombosis, I am unable to agree with Counsel for the Company that the trial Judge should necessarily have concluded that the witness *did not ever* attend on the assured during the relevant period.

The learned Judge rejected the evidence of Dr. Shenoy in identical terms. It was argued that his evidence (unlike that of Dr. Narayannen) not being intrinsically false should not have been rejected " only upon a mere reading of it ", and that the specific reason stated as the ground for its rejection was only that the condition of the patient in February and March as observed by Dr. Shenoy did not justify the inferences which

he purported to make as to the state of health at the time of the proposal. While conceding to some degree that the Judge may have been justified in declining to accept Dr. Shenoy's opinions as to the patient's state of health in November, 1947, Counsel argued that a mere reading of his evidence did not demonstrate the falsity of two statements in the evidence of Dr. Shenoy, namely, (*a*) that he did attend on the patient regularly during the last illness, and (*b*) that the patient made the admissions reported to the Company by Dr. Shenoy's letter D3 of 8-6-49 :—

> " That he had swelling of the legs for about three months prior to February, and that he got serious from Colombo, and, therefore had to fly to Madras in a plane, and then to Eddakat by train. He had breathlessness, and there was difficulty in passing urine. The motions were scanty. He never reported to me the previous history of rheumatic fever. He told me that he had this swelling some six months previous to the recent illness and that he was treated by a native physician ".

What we are asked by Counsel for the Company to say in appeal is that Dr. Shenoy must necessarily have been believed by the trial Judge when he stated that these admissions were made, and that these admissions, either by themselves or together with admissions alleged to have been made by the assured in certain letters alleged to have been written to the witness Kochakan, demonstrate the inaccuracy if not also the falsehood of various answers given in D1.

The learned Judge clearly appreciated that it would be a great advantage to ascertain which of the two doctors was the medical attendant during the relevant time. But he was faced with a situation where two professional men gave completely irreconcilable versions on a simple question of fact, so that to believe the one was to brand the other a perjurer. In other circumstances, it would have been his duty to choose between the two, however unreliable the evidence of both. In this case, however, what was important was the state of the assured's health at the time of the proposal, and there was other material upon which to form an opinion as to his health, namely the evidence of the canvasser Nayar and the report of the medical referee Dr. Sivapragasam made on 30th November, 1947 in the proposal form. I feel quite unable to say in appeal that the Judge erred in acting upon that material and in ignoring completely the evidence of both the other doctors.

Dr. Shenoy's evidence was not rejected solely because he was contradicted by Dr. Narayannen; a stronger reason was that acceptance of the truth of his evidence would necessarily have led to the inference that Dr. Sivapragasam was either a knave or the victim of a clever fraud practised by persons now unknown. Here again, having regard to Dr. Sivapragasam's standing in the medical profession in Ceylon and to the responsible office which he held in 1947, the Judge could not fairly have entertained any such inference unless he was forced to do so by reliable evidence as to the actual circumstances in which the medical examination of the assured was conducted. The failure of the Company to call its agent Sivasubramaniam made it obvious that the circumstances would not have supported such an inference.

It is useful in this connection to consider certain relevant dates. Notice of the death was given to the Company in June, 1948, (P16); the claim forms were furnished in July, 1948, and Dr. Narayannen's certificate as to the cause of death in the same month (P5); the same doctor's explanatory letter (P28) was written in September, 1948; thereafter no further queries or complaints whatever were made by the Company until they wrote the letter of repudiation (P2) in August, 1950. The Company contacted Dr. Shenoy towards the end of 1948, and he stated to them on 5th February, 1949, (D2) that he had attended on the assured and in June, 1949, (D3) that the assured had made certain admissions as to his state of health. Although Dr. Sivapragasam was alive until July, 1950, there is nothing to show that the Company made any inquiries of him during the 18 months which elapsed after Dr. Shenoy's first letter, inquiries which would have greatly assisted both the Company and the Court. Moreover, if the plaintiff had been informed earlier of the Company's intention to repudiate, her action might have been filed at a time when Dr. Sivapragasam would have been available as a witness. The Company had, at the latest in June, 1949, all the information upon which it subsequently repudiated the claim in August, 1950, but the claimant was given no inkling in the meantime of the difficulties in store for her. In these circumstances, it was quite pardonable for her Counsel to suggest that the decision to repudiate was only taken after it was known that Dr. Sivapragasam was no longer alive to confirm the statements in his medical report.

Having regard to the evidence of the canvasser Nayar which the learned Judge chose to believe, there were no suspicious circumstances attendant on the medical examination by Dr. Sivapragasam in November, 1947, and doubt could only have been cast upon his evidence by the other eyewitness Subramaniam who was the Company's agent. The only explanation offered by the

Company for the failure to call his agent was the bare allegation by Counsel that there must have been a deception to which the agent also was a party and that he would therefore obviously have been an adverse witness. I feel quite unable to countenance this allegation against a person who, right up to the time of the termination of the trial in October, 1953 continued to function as the Company's agent in this country. But even if the Company laboured under the misfortune that they were unable to rely upon the evidence of their own agent, it would be unreasonable to take a mere suggestion of his dishonesty into account to the prejudice of the plaintiff.

What the learned Judge was in substance invited by the Company to do upon Dr. Shenoy's evidence was to form seriously adverse inferences as to the conduct of two persons who are no longer alive to defend their interests. Dr. Sivapragasam would have been able to explain his conduct to the Company but for the failure to communicate with him when he was alive; he might have been able to explain his conduct to the Court but for the failure to repudiate this claim within a reasonable time. The Judge had no explanation before him for either failure and I think it a fair observation that the Company had only itself to blame if the Judge decided on the faith of Dr. Sivapragasam's certificate that the assured enjoyed perfect health in 1947 and that accordingly the story of contrary admissions to Dr. Shenoy had necessarily to be rejected.

The remaining evidence relied upon by the Company in proof of the assured's ill-health at the time of the proposal consisted of letters D6, D8, D9, D10 and D11 alleged to have been written to one Kochakan in Colombo by the assured from India. Kochakan had apparently been a close business friend of the assured before his death and had jointly purchased with him two houses of considerable value. But differences arose thereafter between Kochakan and the relatives of the assured, so much so that he was sued by the present plaintiff in the District Court of Colombo on a claim of Rs. 10,000/- and judgment was entered against him. That action was fixed for trial on 11th October, 1951, and Kochakan's name came on the Company's list of witnesses in this case for the first time on the 19th October, 1951 together with the names of one Dr. T. Sivapragasam (not of course the medical referee) and Ayurvedic Dr. Abdul Rahiman. It was still later that the Company listed the letters which Kochakan would produce. One of the letters (D8) referred (according to Kochakan) to this ayurvedic physician who was in India in August, 1947 and his name was presumably placed on the list of witnesses in order to support the letter D8 and Kochakan's oral evidence that this physician had attended on the assured. But the Company did not ultimately call this physician or even Dr. Sivapragasam who according to Kochakan had attended on the assured. Another of the letters (D9) refers to a draft for Rs. 2,000/- which according to Kochakan was sent to the assured in India through the Imperial Bank; but despite the fact that the Exchange Control requires careful checks to be kept as to remittances abroad, no evidence was adduced at the trial to support Kochakan's bare word that he did post the draft.

Kochakan admittedly was not a careful business man, and had to admit that in a former case he professed that he had no proper place to keep *business* books and documents. That being so, it is strange that he should have retained from 1947 until late in 1951, inconsequential letters like those he produced. It is abundantly clear that at the lowest he was quite prepared to play the part of a sneak against the plaintiff in revenge for her suing him in an action which was ultimately successful, and indeed the Company's counsel quite rightly stated that his evidence was unworthy of credit without corroboration. Called as he was to corroborate Dr. Shenoy, the latter's evidence was no corroboration of Kochakan. Accordingly, the only element of corroboration consisted in the fact that certain of the statements in the letters did refer to events which actually took place at the time they were written; but the plaintiff's very argument was that the introduction into the letters of factually correct statements was necessary to support the claim that they were genuine. The witness Mamoo, the brother of the plaintiff, was confident that the assured never signed his name on private letters in English and a glance at the actual signatures on these letters is sufficient to show that there is nothing characteristic about these signatures which would enable a person like Kochakan to identify them. In the face of the contradiction by Mamoo and in view of the suspicion with which Kochakan's evidence had necessarily to be regarded, the Company could not, without calling some expert witness, have reasonably expected the learned Judge to hold that the letters were actually written by the assured.

The considerations to which I have referred lead me to conclude that the learned District Judge rightly declined to hold in favour of the Company upon the alleged state of health of the assured at the time of the proposal and his

alleged admissions as to ill-health and treatment in 1947. These same considerations would at the lowest prevent me from holding as a Judge of appeal that the District Judge should necessarily have found in favour of the Company on those matters.

There is nothing which I can usefully add to what my brother Gratiaen has written upon the important questions of law raised by the appellant. I respectfully agree with his judgment on those questions and with the order he proposes.

Puisne Justice.

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

BASTIAMPILLAI vs. KASIPILLAI

S. C. No. 179—*D. C. Jaffna No.* 11308

Argued and decided on : 2nd August, 1955

Action for ejectment of and damages against tenant and persons occupying premises under his authority—Allegation in plaint that tenant allowed other persons to remain on premises—Liability of such persons for damages.

Plaintiff brought this action for ejectment and damages for wrongful occupation against 1st Defendant, his tenant, and 2nd to the 5th Defendants, who were alleged to be in wrongful occupation with 1st Defendant's permission.

Held : That the order of the trial judge for ejectment against the Defendants should be upheld ; but that the order for damages against the 2nd to the 5th Defendants should be set aside, inasmuch as it was alleged that only the 1st Defendant was the wrongdoer, and damages could only be recovered from 1st Defendant for his personal default.

C. Thiagalingam, Q.C., with *K. Sivagurunathan*, for 2nd and 3rd defendant-appellants.

S. J. V. Chelvanayagam, Q.C., with *Dr. H. W. Thambiah* and *A. Nagendra*, for plaintiff-respondent.

BASNAYAKE, A.C.J.

This is an action for ejectment of five persons who are named as defendents to the action and for damages for wrongful occupation of premises No. 3, Clock Tower Road, Jaffna. The first defendant who was the plaintiff's tenant is no party to this appeal nor did he contest the action against him. He offered to quit the premises and did actually quit them before the institution of the action. But it is alleged by the plaintiff that he failed to deliver possession of the premises and has unlawfully and wrongfully, without the consent of the plaintiff, allowed the 2nd to the 5th defendants to occupy the premises causing damage in a sum of Rs. 750/- to him and further damage at Rs. 50/- a month, till the defendants are ejected from the premises.

Only the 2nd and 3rd defendants resisted the plaintiff's action and made a claim in reconvention in a sum of Rs. 5,000/-. The learned trial Judge gave judgment for the plaintiff as prayed for with costs and ordered that all the defendants be ejected from the premises in question. We are satisfied that the order of the learned District Judge that the defendants be ejected is right. But we are unable to uphold his judgment in so far as it relates to the damages awarded to the plaintiff. If the 1st defendant was the wrongdoer and he has not produced anything to contradict the plaintiff's assertion that he was, we do not see how the 2nd and 3rd defendants can be cast in damages. The plaintiff came into court on the basis that the personal default of the 1st defendant by allowing the 2nd to the 5th defendants to remain in the premises has caused and was causing damage to him. The plaintiff is therefore not entitled to anything more than a decree for ejectment against the 2nd to the 5th defendants. The person in default was the 1st defendant and the 2nd to the 5th defendants were occupying the premises by virtue of his authority. On the question of costs, we think that as the appellants have only partially succeeded in the appeal the proper order should be that there would be no costs of this appeal.

As the judgment of this Court is that the order for damages against the 2nd and 3rd defendants was wrong in law, we are of the opinion that the order for costs of the trial against them should be varied to an order for half the costs of the trial. We accordingly set aside the order for damages against the 2nd, 3rd, 4th and 5th defendants, and affirm the order for ejectment against all the defendants and the order for damages against the 1st defendant.

PULLE, J.

I agree.

Present : SWAN, J.

MOLODDUWA VILLAGE COMMITTEE vs. G. H. BABIYAS APPU

S.C. No. C.R. 107/1954—*C.R. Matara* 3882

Argued on : 29th October and 1st November, 1954
Decided on : 9th November, 1954.

Court of Requests—Right of footpath—Plaintiff absent on trial date—Action dismissed—Motion to file fresh action allowed on terms—Defendant's right to appeal—Section 78 of Courts Ordinance and Section 823 (6) of Civil Procedure Code.

Where plaintiff filed action in the Court of Requests for a declaration that defendant was not entitled to a right of foot-path over plaintiff's land and at the trial the plaintiff being absent the action was dismissed, and the plaintiff thereafter moved for permission to institute fresh action, and the Court allowed it on terms and the defendant appealed from that order :

Held : That the order appealed from is not an order having the effect of a " Final Judgment " and therefore no appeal lay.

Cases referred to : *Baron Appuhamy vs. Tivanahamy* 40 N. L. R. 149.
Vairavan Chetty vs. Ukkubanda 27 N. L. R. 65.

A. F. Wijemanne for the defendant-appellant.

S. J. Kadirgamar with *P. Somatilakam* for the plaintiff-respondent.

SWAN, J.

The appellant was sued by the respondent for a declaration that the appellant was not entitled to a right of footpath over the land of the respondent. On the date of trial the respondent was absent and judgment was entered dismissing his action with costs. Thereafter the respondent moved for permission of Court to institute a fresh action and that application was allowed upon the respondent's paying the appellant the costs of the previous action. From this order the appellant has appealed. The chief ground of appeal is that Section 823 (5) of the Civil Procedure Code does not apply inasmuch as the order dismissing the respondent's action was made not *exparte* but *inter partes*.

Mr. Somatilakam appearing for the respondent has taken a preliminary objection that there is no right of appeal, or rather that the appeal is premature. He argues that Section 78 of the Courts Ordinance gives a right of appeal only against a final judgment or an order having the effect of a final judgment ; the order from which this appeal has been taken is not such an order ; the appellant can canvass the correctness of that order if and when judgment is finally given against him.

In *Baron Appuhamy vs. Tivanahamy*, 40 N.L.R. 149 Koch J. held that an appeal does not lie from the order of a Commissioner of Requests setting aside a judgment entered by default. Not only is an appeal expressly disallowed by Section 823 (6) of the Civil Procedure Code but it is not an order having the effect of a final judgment. By a parity of reasoning an order giving a plaintiff permission to institute a fresh action is not a final order.

In *Vairavan Chetty vs. Ukkubanda*, 27 N. L. R. 65 Jayawardene A.J. said that a judgment on order which can be considered on appeal at a later stage of the proceedings, that is when the case is finally decided, does not fall within the term " final judgment ", but an order which can never be brought up in appeal is a " final judgment ".

If the correctness of the order whether in law or on the facts can be brought up in appeal when the fresh action is instituted and disposed of, then clearly the order appealed from is not an order having the effect of a final judgment. I am of the opinion that it can.

The appeal is dismissed with costs.

Appeal dismissed.

END OF VOLUME LII