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 LIII

WITH A DIGEST

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Arbitration

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The appellant company contracted with the respondent to purchase from him a certain quantity of rubber within a certain period. On the margin of the relevant contract was printed a clause to the effect that any dispute arising from the contract should be settled by arbitration.

The respondent defaulted in the performance of his part of the contract and the appellant submitted the matter to arbitration after due notice to the respondent. The respondent was not represented at the arbitration and an award was made in favour of the appellant. When the award was sought to be enforced the respondent objected on the ground that the submission to arbitration should have been by a formal agreement signed by both parties and hence he was not bound by the award.

Held : That the award was valid. The fact that the clause referring to arbitration in the contract is printed in the margin of the document was no justification for treating it as if it had not existed. According to the law of England which regulated the transaction in this case the requirements are (1) that there must be an agreement in the sense that the parties must be " *ad-idem* " and (2) that the agreement must be in writing.

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Crossed cheque paid over the counter contrary to the crossing—Action for declaration that the bank is not entitled to debit the amount from the drawer's account—Cause of action, elements of—Section 79 (2) and 8 (3) of the Bills of Exchange Ordinance (Cap. 68).

Plaintiff had borrowed Rs. 2,000/- from a Dr. T. (the payee) and given as security a cheque for this amount on the defendant bank in favour of the payee or order, to be presented for payment later. The cheque was crossed generally. Six months later, at the payee's request, the plaintiff altered the date as the cheque was " stale ", and authenticated the alteration with his signature. The payee thereupon endorsed the cheque in blank, and gave it to someone to be posted for collection to the Bank of Ceylon. The cheque was not endorsed specially to the Bank of Ceylon, or made " not negotiable ". The plaintiff later discovered that the cheque had been paid by the defendant bank across the counter to a subsequent indorser, signing himself " W. D. Fernando ". When presented for payment the cheque bore words cancelling the crossing, the cancellation purporting to be authenticated by the drawer's signature. The trial Judge found that this signature was a forgery. The plaintiff sued the defendant bank for a declaration that it was not entitled to debit plaintiff's account with the amount paid.

Held : Assuming that the bank realized (or should have realized) that when the cheque was presented for payment it was still crossed generally and should not have been paid across the counter:—

(1) Section 79 (2) of the Ordinance was irrelevant to plaintiff's claim, as he was not the " true owner " of the cheque within the meaning of the section.

(2) The plaintiff had no cause of action against the defendant bank under the English Common Law, which was applicable, because he had suffered no loss (which was an essential element of the cause of action) by payment of the crossed cheque over the counter. For the plaintiff's debt to the payee was now extinguished. Even assuming that the cheque was accepted by the payee as conditional payment of the debt, the payee's endorsement in blank converted the cheque into a " bill payable to bearer " (section 8 (3) of the Ordinance). Accordingly, payment to " W. D. Fernando ", the holder at that point of time, operated as a discharge of the bill. The fact that the cheque was paid over the counter and not through a bank did not divert the proceeds into wrong hands.

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Held : That an indictment under the Bribery Act No. 11 of 1954, signed by a Crown Counsel and presented to the District Court in a case where there has been no preliminary inquiry by a Magistrate, contravenes the provisions of section 78 (1) that no prosecution shall be instituted in any court except by the Attorney-General.

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volved the acceptance of responsibility by the Crown for the decree which might ultimately be awarded in favour of the plaintiff upon the cause of action alleged against the public officer individually, and ought to be allowed.

Per GRATIAEN, J.—" The amendment of section 463 after the present action commenced does not offend the *prima facie* rule against retrospective legislation ; it has in no way enlarged the ambit of the Crown's right of intervention in certain classes of private litigation."

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By a written agreement, the defendants-appellants undertook to convey to the plaintiff-respondent for Rs. 1,000 " all such portion or portions as may eventually be allotted to them " in the final decree of a pending partition action. The final decree allotted to them an extent of the land much more than they expected. At the time the agreement was entered into, the defendants were doubtful of the extent of share in the land and even whether they were entitled to any share in the land subject to partition action. The plaintiff-respondent had suggested that the extent of the defendants-appellants' share might be a " quarter of an acre more or less ", but the defendants-appellants considered this as speculative. The defendants-appellants repudiated the agreement on the ground that the plaintiff-respondent had induced them to enter into the agreement on a false representation of the shares in the partition action.

Held : (1) That the representation by the plaintiff-respondent was merely an expression of opinion as to the probable extent of the interest of the defendants-appellants and was understood as such by them, and that the agreement was binding on the parties.

(2) That under Roman-Dutch Law where a party to a contract makes a representation to the other party that a certain set of facts exists and the latter contracts with the former on that basis, the contract can, if the representation turns out to be untrue, be repudiated at the instance of the latter even if the party who made it believed it to be true provided the representation was material. But a mere expression of opinion, or a statement which merely amounts to the judgment of a party, or which represents something probable or likely to happen will not avoid a contract.

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Held : That for proving an offence under the Control of Prices Act No. 29 of 1950 for contravening a price order made under section 4 (1) of the Act, it is not obligatory on the prosecution to place before Court the fact (whether as a matter to be proved by evidence or to be taken judicial notice of) that the price order has duly received the Minister's approval, and, therefore, is not necessary to refer to it in the charge or produce the *Gazette* notification of its approval.

Per WEERASOORIYA, J.—In the present case there was publication in the *Gazette* (as proved by the production of P4) of what purported to be an order under section 4 (1) of the Control of Prices Act No. 29 of 1950, and I see no reason why in the circumstances the Court should not take judicial notice of the order referred to in P4 as one which was duly made and signed under section 4 (1) of the Act. Alternatively, even if the Court were not disposed to take judicial notice of the order referred to in P4, it seems to me that P4 itself constitutes *prima facie* proof that such an order was duly made and signed, since under section 78 (3) of the Evidence Ordinance the original order (being, in my view a public document issued by a department of Her Majesty's Government) may be proved by a copy or extract of it contained in the *Government Gazette*.

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Co-Owners

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Where a possessory decree was granted to a co-owner who was stated to have been in possession some time earlier of a defined portion of the common land, without evidence of physical possession by the plaintiff during recent years against a co-owner who interfered with its possession and without joining the other co-owners.

Held : (1) That the plaintiff is entitled to the decree in his favour.

(2) That the general rule that disputes between co-owners should be settled in action to which all

the co-owners are parties is subject to the following exceptions :—

(*a*) Where a person in good faith possesses the whole land under the impression that it is not subject to co-ownership.

(*b*) Where one co-owner has grown and possessed a plantation whether on the whole or part of a common land in the exercise of his due right as a co-owner and then seeks recognition of his *jus retentionis* of the plantation until such time as co-ownership is terminated by partition.

(*c*) Where a co-owner erects a house on the common land and seeks to be protected in his possession of it.

(*d*) Where a co-owner whose crops are improperly taken by another co-owner asks for a declaration of title to a share of the land as incidental to his claim for damages for the unlawful removal of his crops.

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Held : (1) That the offence of criminal breach of trust under section 50B of the Co-operative Societies Ordinance is the same as the offence defined under section 388 of the Penal Code.

(2) That section 50B of the Ordinance merely facilitates, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion, if he has failed to pay over or produce or duly account for monies admitted to be due by him.

(3) That the Court should acquit an accused in such a charge if the ingredients of the offence under section 388 of the Penal Code, are not established by the prosecution, and there is nothing to show that the burden of proof has been shifted to an accused person under section 50B.

(4) That the Registrar or the Deputy Registrar has power under section 50B to authorize any person to receive the money due by the co-operative officer at a suitable time and place.

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Criminal Procedure Code, sections 233, 160, 161, 286 (1) *and* 302 (1), *meaning of the expression "All statements" in section* 233*—Separate trials for accused jointly indicted : section* 184 *Cr. P. Code—Inspection of scene of crime and experiments thereat : section* 238*, Cr. P. Code—Admissibility of confession : section* 134*, Cr. P. Code and section* 80*, Evid. Ord.—Admissibility of deposition before Magistrate : section* 9*, Evid. Ord. Court of Criminal Appeal.*

The expression "all statements" in section 233 of the Criminal Procedure Code means all statements of an accused, other than his evidence recorded under section 161.

Where accused persons are jointly indicted, whether separate trials should be ordered or not is governed by section 184, Criminal Procedure Code, and is at the discretion of the trial Judge.

Generally speaking, the conducting of experiments at an inspection of the scene of the offence should be avoided unless it is necessary to do so in the interests of justice. Where a view of the scene has been followed by the evidence of the witness who gave the demonstration, there can be no valid objection to the procedure adopted, even though one of the accused did not in person accompany the Judge and jury.

A deposition before a Magistrate cannot be admitted in evidence under section 9, Evidence Ordinance, apart from its truth or falsity.

REGINA *vs.* PERERA AND ANOTHER LIII. 33

Penal Code (*Cap.* 15), *sections* 303 *and* 305*—Causing death of woman with child by doing an act with intent to cause miscarriage—Section* 81*—General exception—Evidence Ordinance* (*Cap.* 11) *section* 15*—Evidence of similar occurrences—Misdirection—Benefit of reasonable doubt.*

The accused, a registered medical practitioner, was convicted of an offence under section 305, Penal Code, viz., causing the death of a woman with child by doing an act with intent to cause miscarriage. It was argued in appeal :—

(1) That the words "cause the miscarriage" in section 305 should be read in the light of the definition of the offence in section 303.

Held : Section 305 is not controlled by section 303, and it is not necessary under the former for the prosecution to prove that the miscarriage was not caused in good faith for the purpose of saving the life of the woman.

(2) That, because of the general exception in section 81 Penal Code, the accused had committed no offence.

Held : Section 81 did not apply, because there was no evidence to show that the accused consented to suffer or take the risk of the harm which was actually caused to her.

(3) That inadmissible evidence of similar occurrences in which the accused had performed abortions had been led.

Held : That the evidence was admissible under section 15 Evidence Ordinance as it was relevant to the issue whether the accused had done the act with the *intention* of causing miscarriage.

(4) That there was no direction by the Commissioner that the appellant should be given the benefit of any reasonable doubt caused by the evidence.

Held : That there was in fact such a direction. That it is only necessary to clearly direct the jury as to the burden and standard of proof ; the use of a particular formula is unnecessary.

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Murder—Misdirection to jury about the defences of accused—Evidence of confession—Court of Criminal

Appeal Ordinance 23 *of* 1938—*Sections* 4, 5 (1), 8 (1) *and* 16—*Form XXXIII, rule* 24 (*a*)—*Notices of appeal and grounds of appeal.*

To a charge of murder, the 1st and 3rd accused pleaded an *alibi*, the 2nd accused the right of private defence incidentally confirming the plea of the 1st and 3rd accused. In summing up, the Commissioner, while stating that if the 2nd accused was believed the 1st and 3rd accused had to be acquitted, did not state that even if the evidence of the 2nd accused created a reasonable doubt as to the presence of the 1st and 3rd accused, they were yet entitled to acquittal.

Held : This was a misdirection entitling 1st and 3rd accused to acquittal.

Further, at the hearing of the appeal grounds of appeal other than those set out in Form XXXIII of the rules made under the Ordinance were urged.

Held by a majority : When grounds of appeal are urged for the first time at the hearing section 5 (1) does not compel a Court to set aside a verdict on those grounds, even though they may be valid. An "appeal" referred to in section 5 (1) is one that conforms to the Ordinance in regard to notices. The grounds of an appeal or application are an integral part of a proper notice under section 8 (1) and must be set out.

Per PULLE, J.—"Unfortunately it is still being assumed, especially in capital cases, that as a matter of course fresh grounds of appeal would be entertained after the expiration of the time limit laid down in section 8 (1). This Court will in future show no indulgence and strictly limit argument only to matters of law raised within the prescribed limit of 14 days."

REGINA *vs.* PINTHERIS AND OTHERS LIII. 90

Charge of rape—Is corroboration of evidence of the prosecutrix necessary ?

Where an accused was charged with the offence of rape and the prosecution was not corroborated by independent evidence.

Held : That our Penal Code does not require that the evidence of the prosecutrix in a charge of rape should be corroborated. Except where corroboration is expressly required by statute our rule of evidence is that no particular number of witnesses shall in any case be required for the proof of any fact.

Per BASNAYAKE, C.J.—"For the guidance of counsel we should like to add that where in a summing up the Judge makes an erroneous statement as to the evidence he should be invited to correct it immediately."

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Section 152 (3)—*Magistrate assuming jurisdiction —Serious nature of the offence—Facts not simple—Undesirability of a summary trial.*

Where one of the charges against an accused was forgery of a cheque for Rs. 10,000/- and the trial took at least four whole days, the Magistrate having assumed jurisdiction under section 152 (3) of the Criminal Procedure Code on the ground that the facts were simple.

Held : That in view of the serious nature of the offence the Magistrate should not have assumed jurisdiction to try summarily.

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Section 233—"*All statements*" *means all statements of an accused other than his evidence recorded under section* 161.

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Held : That where a Magistrate acts under section 253B of the Criminal Procedure Code, he must give the complainant an opportunity of showing cause against the making of the order and record his reasons. The failure to do so is an illegality.

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Section 440 (1)—*When it should be used.*

Held : (1) That the summary power conferred by section 440 (1) of the Criminal Procedure Code is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury.

(2) That it was never intended that in the course of a criminal trial, a Judge should, in the exercise of the power under this section, set on foot a subsidiary criminal investigation not against the person charged, but against the witnesses in the case.

(3) That if such an investigation is necessary, it can and should be set on foot under section 440 (4) of the Code.

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Held : That a Magistrate has no power in making an order under sections 325 or 326 of the Criminal Procedure Code to impose a condition expelling a citizen from any part of the country for however short a time.

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Sections 190, 195—Absence of prosecution witness —Discharge of accused—Is it an acquittal?—Effect of withdrawing a case.

When a prosecution witness is absent on trial date and the accused is discharged, such discharge constitutes an acquittal under section 190 of the Criminal Procedure Code and a plea of *autrefois acquit* may be raised where proceedings are again instituted on the same charge.

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Where a person is charged on two counts each containing more than one alternative charge and the charges failed to set out particulars of each offence.

Held : (1) That the charges so framed in the alternative involving many different offences were bad on account of duplicity.

(2) That a charge should furnish particulars of the offence alleged to have been committed.

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Sections 178, 179, 180 Joinder of charges—Four charges—Same offence against several persons—Two transactions.

Where an accused was charged on four counts of causing hurt to three persons on one day and one person on another day.

Held : That section 178 of the Criminal Procedure Code enables sections 179 and 180 to be applied in combination and therefore two transactions involving several offences of the same kind can be tried together.

STIVEN *vs.* PERERA, SUB-INSPECTOR OF POLICE LIII. 112

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Deed—Interpretation of.

The plaintiff-appellant to the 1st defendant conveyed " boutique room No. 5 with the undivided soil covered thereby out of the five boutique rooms bearing Nos. 1, 2, 3, 4 and 5 built abutting the high road ", on a land within given boundaries. There was another boutique bearing No. 6 behind boutique No. 5 which appellant claimed in this action. The defendants contended that it was a part of boutique No. 5. This contention was upheld by District Judge on the ground that the reference to all the boutique rooms with the boundaries of the whole land and the transfer of an undivided share of the soil " indicated that the bare land and buildings behind were considered as part and parcel of all the rooms ".

Held : (1) That the interpretation given by the learned District Judge was wrong, as according to the plain meaning of the words used the transfer was of the boutique room No. 5 with the soil covered thereby.

(2) That in construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words they have used.

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Donation

Donation—Gift of property subject to life-interest of donor and to fidei commissum *in favour of donee's children—Acceptance of gift by donee's aunt—Not authorised by donee to accept gift—Property dealt with by donee as absolute owner during donor's life-time and after death—No evidence of acceptance by donee either before or after donor's death—Validity of donation—Onus of proof of acceptance.*

By a deed of gift a Muslim lady donated property to her grandson M. U. reserving to herself a life-interest and subject to a *fidei commissum* in favour of the donee's children. There was evidence to show that the donee had leased the property during the life-time of the donor and had mortgaged it after her death and that in 1907 after donor's death the donee asserting absolute title had sold the property to a person from whom it ultimately passed to the appellant's father.

Although the donee was of age, the deed of gift was accepted by his aunt. There was no proof that the donee had authorized his aunt to accept this gift or that he was aware of the donor's intention to make it. There was also no evidence that the donee had accepted the gift either during the life-time of the donor or after her death.

The plaintiff claimed the property as a *fidei commissary* under the deed of gift.

Held : (1) That the gift was inoperative as there is no evidence of acceptance of the gift by the donee either during the lifetime of the donor or after her death.

(2) That the burden was on the plaintiff to prove a valid acceptance of the gift and not on the defendant to disprove it.

Per GRATIAEN, J.—" When A conveys his property to B, reserving a life-interest to himself, the title to the property passes immediately to B and the enjoyment of only one of the rights incidental to full ownership is postponed. I doubt if it can fairly be said that in such a situation there has been a postponement of the " fulfilment ' of the donation. The law would therefore seem to require " a present acceptance of the dominium which the deed confers subject to the life-interest ".

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Section 115—Mortgagee bidding at sale under Partition Ordinance—Subsequent action to enforce mortgage by sale of land—Does it amount to an estoppel?

Where under a Partition decree a land is sold and a mortgagee of an undivided share of the same land bids at the sale, he is by that act alone not estopped from bringing an action to enforce his mortgage by the sale of the land. The mere act of bidding does not in any way operate as an inducement to the purchaser to buy the land or represent to him that it was free from any encumbrance. A mortgage is not a right or interest in the land that would be violated by the sale and hence section 115 of the Evidence Ordinance is not applicable in this instance.

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REGINA *vs.* WAIDYASEKERA ... LIII. 71

Excise Ordinance

Section 44—Possession of unlawfully manufactured liquor—Analyst's report that liquor seized not liquor manufactured under license issued by Commissioner—Is the report sufficient to prove charge?

In a prosecution under section 44 of the Excise Ordinance for possessing without lawful authority unlawfully manufactured liquor, the report of the Government Analyst was led in evidence to prove the charge. The Analyst's report expressly stated that the liquor seized was not a liquor manufactured under a license issued by the Excise Commissioner.

Held: That though the Analyst was not called as a witness, his report was sufficient evidence to bring the liquor seized within the category of an unlawfully manufactured liquor.

Per SANSONI, J.—" If the defence intended to raise an objection to the contents of the report on the ground that certain findings made by the Government Analyst should be disregarded for any particular reason, the Government Analyst should have been summoned and cross-examined on his means of knowledge, or the sources of his information.

GUNAWARDENA *vs.* FERNANDO ... LIII. 12

Forests

Forests Ordinance (Cap. 311), section 20—Rule 2 of the Rules dated 2nd June, 1934, framed thereunder—Conviction for breach of such rule—Section 23 of Ordinance.

The accused was convicted of clearing land at the disposal of the Crown without a permit in breach of Rule 2 of the Rules dated 2nd June, 1934, framed under section 20 of the Forests Ordinance. It was argued in appeal that the conviction could not be sustained in view of section 23 of the Ordinance. Section 23 provides that no person shall be deemed to have committed an offence of the kind in question if—

(*a*) The complainant fails to prove that the trees in the said forest are of more than twenty years' growth, and

(*b*) The accused satisfies the Court that he claims the said forest by inheritance or deed based on inheritance and has cultivated it for a prescribed period.

Held: That conceding that the complainant failed to discharge the onus placed on him by (*a*) the accused had not satisfied the Court in regard to condition (*b*), for the deed on which the accused relied was executed, not in *his* favour, but in favour of his brother. It could not possibly be said that the accused claimed the chena upon a deed, or that he or his predecessors in title had cultivated it.

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Held: (1) That a dispute as to the custody of children of parents who are non-nationals resident in Ceylon should be determined according to the law of Ceylon, viz. the Roman-Dutch Law.

(2) That where there has been no legal dissolution of the common home, the father's right to custody remains unaffected by the fact of the separation of the spouses and can only be interfered with in special circumstances.

(3) That special circumstances which justify the denial of the right of a father in such a situation to the custody of the children must relate to the prospective danger to the life, health or morals of the children or other circumstances positively establishing detriment to their interests.

Per H. N. G. FERNANDO, J.—" Parent " where father and mother are both alive, means of course, the father who is the natural guardian of his children, *Van Rooyan vs. Werner*, 9 S.C. 425."

IVALDY *vs.* IVALDY AND OTHERS LIII. 81

Husband and Wife

Husband and wife—Marriage not dissolved—Father's right to custody of children remains unaffected by the fact of the separation of the spouses—What are the special circumstances which justify a denial of this right.

IVALDY *vs.* IVALDY AND OTHERS LIII. 81

Income Tax Ordinance

Income Tax Ordinance—Refusal to admit appeal and make order under section 69 (2)—Refusal to consider objections before issuing certificate under section 80 (3)—Mandamus directing respondent to

admit appeal and consider objections—Interpretation of section 69 (1) *and* 69 (2).

The petitioner complained that the Commissioner (*a*) wrongly refused to admit his notice of objections under section 69 (2); (*b*) refused to consider his objections before issuing a certificate under section 80 (3).

He sought a writ of *mandamus* to compel these actions.

The petitioner did not furnish returns of income in respect of three specific years, and he was accordingly assessed under section 64 (3), and notice of assessment dated 17th August, 1953, posted to him. Although under section 63 (3) such a notice is deemed to be received on the day succeeding the day on which it would have been received in the ordinary course of post (*i.e.* 19th August, 1953, in this case) yet it was only received on the 29th October, 1953. Section 69 (1) fixes a period of 21 days after receipt of the assessment, for appeal by way of notice of objections, by a person aggrieved thereby. This period began on 30th October, 1953. After receipt of notice the petitioner lodged a protest at the assessment, but did not furnish returns of income till 19th November, 1953. When the petitioner did not take further steps within twenty-one days from 30th October, 1953, the Commissioner issued a certificate to a Magistrate under section 80 (1), but proceedings in that Court were adjourned under section 80 (2) to enable the petitioner to submit objections to the Commissioner. Nothing was done during this period and the Magistrate ordered the petitioner to pay on 13th November, 1954. The present application was filed on 17th December, 1954.

Held : (1) That there had been no valid appeal by way of a notice of objections under section 69 (1); for there were no precise grounds of objection contained in the petitioner's communication to the Commissioner. Nor could the Commissioner, by waiver of the requirements of section 69 (1), confer validity on an intrinsically invalid notice.

(2) Assuming without conceding that the notice of objections was valid, it became invalidated later by the fact of the returns of income not being filed within the twenty-one days as required by the section.

Per DE SILVA, J.—" A notice of objection to be valid must satisfy the following requirements :—

(1) It must be in writing and addressed to the Commissioner.
(2) It must be filed within the prescribed time.
(3) It must set out the grounds of objection precisely.
(4) If the assessment appealed against was made in the absence of a return of income the return of income must be tendered within the period allowed for filing the notice of objections.

BAHARAM *vs.* ASST. COMMISSIONER OF INCOME TAX ... ... LIII. 4

Income Tax Ordinance section 80 (1)—*Non-payment of Tax—Sentence of imprisonment—Assessee adjudged insolvent—Commissioner's discretion to choose method of recovery.*

The Commissioner of Income Tax can, at his discretion, choose the most suitable method for the recovery of tax from a defaulter. He can, if he so decides, proceed to issue a certificate to a Magistrate under section 80 (1), even when the assessee is an insolvent, before proceeding against his property.

KUMATHERIS APPUHAMY *vs.* COMMISSIONER OF INCOME TAX ... ... LIII. 46

Indian and Pakistani Residents (Citizenship) Act

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, *section* 15—*Order under section* 14 (7) (*b*)—*Power of Supreme Court to remit for further investigation.*

Where an application was made to the Supreme Court to remit a case to the Commissioner for further investigation.

Held : That the powers of the Supreme Court in appeal are found in section 15 and the Supreme Court is not entitled to exercise any powers outside those conferred by that section. The power to remit for further investigation is not inherent in that section and cannot be exercised unless it is expressly granted.

Per BASNAYAKE, A.C.J.—" Where a statute creates a new jurisdiction and confers new powers for carrying out the objects of the statute and gives a right of appeal from the decisions of the tribunal so created the powers of the Appellate Court when hearing an appeal under the statute are limited to those expressly granted."

PITCHAMUTTU *vs.* THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS ... ... LIII. 57

Indian and Pakistani Residents (Citizenship) Act—Order made by Supreme Court under—Is it a civil suit or action.

TENNEKONE *vs.* DURAISWAMY ... LIII. 63

Judicial Notice

Judicial notice—Of Price Control Order.

FOOD AND PRICE CONTROL INSPECTOR *vs.* PIYASENA ... ... LIII. 25

Kandyan Law

Kandyan Law—Adoption—Evidence required to prove.

M claimed the entirety of a land sought to be partitioned on the ground that he was the adopted son of U who was admittedly the original owner of the land. M's evidence as to the adoption was entirely disbelieved by the learned trial Judge and the only other evidence on this point was that of a priest who said that some fifty years ago U had requested him to teach letters to M, his adopted son, in order that he may succeed to his inheritance. There was no clear and definite finding by the learned trial Judge on the priest's evidence and M's claim was dismissed.

Held : That the learned trial Judge should have given his mind to the accuracy of the recollection of the priest regarding the conversation and that this evidence if accepted was sufficient to prove the adoption.

MEDIYANSE *vs.* DINGIRI MENIKE *et al.* LIII. 1

Mandamus

Mandamus—*On Municipal Commissioner—To compel him to hold a meeting.*

MOHAMED *vs.* GOPALLAWA AND ANOTHER LIII. 68

Matrimonial Rights and Inheritance Ordinance

Matrimonial Rights and Inheritance Ordinance—Effect of—Mukkuwa Law—Thaiwaly Muthisam—Customary tenure.

MARIMUTTU AND TWO OTHERS *vs.* SINNATHAMBY AND OTHERS ... ... LIII. 97

Merchandise Marks

Trade Marks Ordinance No. 15 of 1925—Section 17—" Calculated to deceive "—Test to be applied.

The words " calculated to deceive " in section 17 of the Trade Marks Ordinance (Chap. 121) means no more than likely to deceive. No standard test of what is likely to deceive the purchaser can be laid down. In the present case the test would be whether the average person seeing the appellants' trade mark in the absence and in view only of his general recollection of the registered trade mark would mistake the appellants' trade mark for the registered trade mark.

MOHIDEEN AND ANOTHER *vs.* THE REGISTRAR OF TRADE MARKS ... ... LIII. 48

Motor Traffic Act

Motor Traffic Act—Sections 46 and 226—Plying for hire without a proper revenue licence—No notice under section 66 of the Evidence Ordinance—Can secondary evidence of the contents of the revenue licence be produced.

In a prosecution under section 226 of the Motor Traffic Act for using a car for a purpose not authorised by the revenue licence, it is necessary to place the licence before the Court. If no notice to produce the licence has been given to the accused, secondary evidence of its contents cannot be led.

ARASARATNAM, SUB-INSPECTOR OF POLICE *vs.* HERATH HAMY ... ... LIII. 16

Motor Traffic Act, sections 153 (2) and 219 (1).

EDWIN SINGHO *vs.* SUB-INSPECTOR OF POLICE, KADAWATA ... ... LIII. 109

Mukkuwa Law

Mukkuwa Law—Thaiwaly Muthisam—Customary tenure—Effect of Matrimonial Rights and Inheritance Ordinance.

MARIMUTTU AND TWO OTHERS *vs.* SINNATHAMBY AND OTHERS ... ... LIII. 97

Municipal Council

Writ of Mandamus—*Municipal Commissioner—Compel him to hold meeting—Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment Act) No. 7 of 1954 sections 15 (2) and 19 (2) (a) and (b).*

On a requisition made by the petitioner and other Councillors, a meeting was held and a resolution passed by the requisite majority for the removal of the Mayor of the Municipal Council. Thereafter the Municipal Commissioner in terms of section 19 (2) (*b*) of the Municipal Councils Ordinance summoned a second meeting to consider whether or not the resolution passed at the first meeting, (the full text of which he reproduced in his second notice) should be confirmed. At the second meeting when the petitioner who was also the mover of the resolution at the first meeting rose to move the confirmation of the resolution that had been passed at the first meeting, the Mayor rose to a point of order on the ground that no notice of the second resolution of the confirmation of the first resolution had been given and that the petitioner therefore was precluded from moving it. The Commissioner upheld the point of order and declared the meeting closed. The petitioner moved for a writ of *mandamus* to compel the Commissioner to continue the meeting.

Held : (1) That it was clear from the notice convening the second meeting that the members were required to attend a meeting at which the matter for consideration was whether or not the resolution referred to in the notice should be confirmed.

(2) The notice of the meeting specifies the business to be transacted thereat and satisfies in every way the requirements of section 20 (2).

MOHAMED *vs.* GOPALLAWA AND ANOTHER LIII. 68

Muslim Law

Muslim Law—Donation by grandmother—Revocability—Muslim Intestate Succession and Wakfs Ordinance—Section 3.

Where a Muslim lady gifted immovable property to her grandchildren in terms of a notarial transfer.

Held : That the deed was revocable.

SINNA MARIKAR *vs.* THANGARATNAM LIII. 44

Parent and Child

Dispute as to custody of children of parents who are non-nationals resident in Ceylon—Should be determined according to the law of Ceylon viz. Roman-Dutch Law.

IVALDY *vs.* IVALDY AND OTHERS LIII. 81

Partition

Does sale under Partition Ordinance wipe out tenants' rights under section 13 of Rent Restriction Act.

BRITTO *vs.* HEENATIGALA ... LIII. 52

Partition—Sale under Ordinance—Mortgagee of undivided share bidding at sale—Subsequent action to enforce mortgage by sale of land—Does it amount to an estoppel.

SALISHAMY *vs.* SALISHAMY *et al.* ... LIII. 65

Penal Code

Sections 398 *and* 400 — *Charge that deed was executed fraudulently and dishonestly—What is necessary to be proved—Can charge be altered in appeal.*

Where the charge against the appellant was that he did deceive one Noiya, the complainant, by fraudulently and dishonestly executing a deed bearing No. 5423 dated 23-7-1951 in her favour thereby purporting to sell to her a land, after having sold the very same land to his minor son by an earlier deed, and that he thereby intentionally induced the complainant to pay the purchase price of Rs. 1,000/- and thereby committed an offence punishable under section 400 of the Penal Code, and the evidence showed that the transactions were really with Noiya's husband, Bastia Veda.

Held : (1) That there was no proof that Noiya was deceived.

(2) That there was also no proof that she parted with any property.

KAROLIYA *vs.* NOIYA ... ... LIII. 13

Sections 303 *and* 305—*Meaning of the words "cause the miscarriage" in section* 305.

REGINA *vs.* WAIDYASEKERA ... LIII. 71

Poisons, Opium and Dangerous Drugs Ordinance

Possessing pods, seeds, flowers, leaves and other parts of the Hemp plant known as cannabis sativa L, *without a license from the Minister, in breach of section* 26 *together with* 2 (2)—*Offence punishable under section* 76 (5) (*a*).

The accused was charged with possessing, without a license from the Minister, pods, deeds, flowers, leaves and other parts of the Hemp plant known as *Cannabis sativa L*, in breach of section 26 read with section 2 (2) of the Ordinance, and thereby committing an offence punishable under section 76 (5) (*a*). The constable who detected the offence stated that he saw the accused at a table on which was a parcel containing " the leaves of ganja in the pure state ", and that the accused was making up eight small packets with the contents of the larger parcel. An Excise Inspector identified the contents of two of the eight packets as " parts of the Hemp plant commonly and locally known as ganja, botanically as *Cannabis sativa L* ".

Held : That all the essential ingredients of the offence had been set out in the charge and established by the evidence.

ISMAIL *vs.* KALMUNAI POLICE ... LIII. 10

Possessory Action

Possessory action—By one co-owner against another co-owner—Is it necessary to join all co-owners—Evidence necessary to prove possession.

EMIS ALWIS *vs.* PIERIS APPUHAMY ... LIII. 104

Prevention of Crimes Ordinance

Sentence of imprisonment under section 6—*Failure to impose sentence or offence—Aggregate term of imprisonment previously imposed below one year—Validity.*

A sentence of imprisonment under section 6 of the Prevention of Crimes Ordinance can only be imposed when an offender has been previously, twice or oftener, convicted of any crime and has been sentenced to undergo rigorous imprisonment exceeding one year in the aggregate.

SOLOMONSZ, S. I. POLICE *vs.* JINADASA LIII. 60

Prevention of Crimes Ordinance, section 6—*Sentence of imprisonment for* 1½ *years—Additional term of one year purporting to act under the Ordinance—Illegality.*

HAMID *vs.* NONIS ... ... LIII. 60

Privy Council Appeals Ordinance No. 31 of 1909

Order made by Supreme Court under the Indian and Pakistani Residents (Citizenship) Act No. 3 *of* 1949—*Is it a civil suit or action.*

The order made by the Deputy Commissioner refusing the respondent's application for registration as a citizen of Ceylon fundamentally affects the civil status of the person concerned and therefore the parties to the appeal are parties to a civil suit or action in the Supreme Court within the meaning of the Appeals (Privy Councils) Ordinance.

TENNEKONE *vs.* DURAISWAMY ... LIII. 63

Promissory Notes

Promissory note indorsed by second defendant to plaintiff—Contract between second defendant as indorser and plaintiff as immediate indorsee that maker only liable—Nature of such contract—Rights of plaintiff against the drawer and second defendant.

In pursuance of an agreement between them, to the effect that only the maker of the note will be liable the second defendant ' delivered ' to the plaintiff certain promissory notes held by and made out to the second defendant by 3rd parties. The promissory note on which this action was brought was signed and delivered by the second defendant to the plaintiff, without any express words on the face of the instrument negativing or limiting the second defendant's liability thereunder as an indorser. Thereafter the plaintiff sued both the first defendant as maker and the second defendant as indorser for the balance sum due on the note, ignoring the terms under which the note had been transferred, namely, that the plaintiff's rights on the note should only be against the first defendant, as maker, and that his rights against the second defendant should be regulated by the terms of the agreement.

Held : (1) That the terms of the contract between the indorser (2nd defendant) and his immediate indorsee (plaintiff) did not consist solely in the writing popularly called an indorsement, but included the intention with which the delivery was made and accepted, as evidence by the attendant words and circumstances

(2) That where the immediate indorsee has later indorsed the instrument to a holder for value without notice of such a contract between indorser and indorsee, then the absence of express words on the

face of the document negativing or limiting the original indorser's liability precludes the latter from relying (as against the subsequent holder) on the terms of the original agreement with his immediate indorsee.

The second defendant was therefore not liable, though the first defendant was liable as maker.

DORAISAMY REDDIAR *vs.* SUNDARARAJ REDDIAR AND ANOTHER ... ... LIII. 55

Reciprocal Enforcement of Judgements Ordinance

Section 3.

MARCHANT HEYWORTH AND SWIFT LTD. *vs.* MOHAMED USOOF ... ... LIII. 17

Rei Vindicatio

Rei vindicatio — *Mukkuwa Law — Thaiwaly Muthisam—Customary tenure—Effect of Matrimonial Rights and Inheritance Ordinance No.* 15 *of* 1876—*Prescription.*

By Crown grant of 1898 the lands which form the subject-matter of this action were, along with some other lands, granted to the male representatives of 16 families or " kuddies " of the Kamala caste, who were governed by the Mukkuwa Law, the chief feature of which was that the legal ownership remained in the females of the families, the males being allowed to cultivate or manage them and for the purposes of such cultivation to enter on behalf of the owners into legal transactions with third parties.

Plaintiffs are the female heirs of one of the 16 families whose predecessors in title had the lands in question in lieu of their undivided 1/16 share. Veerakutty was one of the males representing this family and was managing them on behalf of the female heirs. He had granted a lease and a usufructuary mortgage of these lands to the first defendant. 2-13 defendants are the heirs of Veerakutty.

Plaintiffs claimed title to the three lands on the basis (1) of succession under the customary Mukkuwa Law.

(2) Of prescriptive possession. The first defendant did not claim title. The 2-13 defendants claimed title through Veerakutty.

The learned District Judge held against the plaintiffs on both points and dismissed their action. On appeal—

Held : (1) That the oral evidence led with regard to the customary law was unreliable and inadequate and that such customary law seems to have been impliedly repealed by the Matrimonial Rights and Inheritance Ordinance of 1876.

(2) That the documents P2 and P3 clearly showed that Veerakutty entered into those bonds as representative of the female heirs and therefore the question of prescription should have been answered in favour of the plaintiffs, as Veerakutty's possession was in reality a possession on behalf of his sisters who are the predecessors in title of the plaintiffs.

MARIMUTTU AND TWO OTHERS *vs.* SINNATHAMBY AND OTHERS ... LIII. 97

Rent Restriction

See also under Landlord and Tenant.

Rent Restriction Act—Section 13*—Statutory tenant —Partition Ordinance—Sale—Purchase by co-owner —Right of purchaser to eject tenant—Does the sale wipe out tenant's rights under section* 13 ?

Held : That a decree for sale entered under section 4 of the Partition Ordinance has the effect of bringing to an end the contractual relationship subsisting between the " tenant " and the co-owners (taken collectively) as " landlord " but the statutory protection conferred on the tenant by section 13 of the Rent Restriction Act was not extinguished either by the decree for sale or by the certificate of sale.

BRITTO *vs.* WILSON HEENATIGALA ... LIII. 52

Roman Dutch Law

Roman-Dutch Law applies to determination of dispute as to custody of children of parents who are non-nationals resident in Ceylon.

IVALDY *vs.* IVALDY AND OTHERS ... LIII. 81

Sentence

Punishment—Matters that should be taken into consideration in inflicting—Charges of forging important documents against public servnt—Accused pleading guilty—Court instead of inflicting punishment, dealt with under section 325 (2) *of the Criminal Procedure Code—Applicability of section to grave offences.*

The accused, a clerk in the Food Control Department, was indicted with another on three counts of forgery of important documents to enable non-citizens of Ceylon to obtain resident permits. He pleaded guilty to two out of the three counts and the learned District Judge, instead of inflicting punishment ordered him to enter into a bond in a sum of Rs. 300 with one surety to be of good behaviour for two years, purporting to act under section 325 (2) of the Criminal Procedure Code.

The Attorney-General applied for revision of the said order.

Held : That the offence is far too grave to be dealt with under section 325 (2) of the Criminal Procedure Code.

Per BASNAYAKE, A.C.J.—(*a*) " In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the diffi-

culty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweights the previous good character, antecedents and age of the offender, public interest must prevail."

(*b*) " Offences committed in the course of their duties by post office officials *Henry Charles Victor Turner* (1947) 32 Cr. App. Rep. 45 by those who defraud the Post Office Savings Bank *Thomas Elliott* 32 Cr. App. R. 36 (1947), by police officers *Ernest Moore* (1910) 4 Cr. App. Rep. 135, bank clerks *R. C. Mason & J. J. A. Soper* (1908) 1 Cr. App. Rep. 73 at 77, solicitors *R. C. Mason & J. J. A. Soper* (supra) and other persons, whether professional men or not, in positions of trust are invariably on grounds of public policy, dealt with severely. Age, previous good character and antecedents are of little avail in such cases."

ATTORNEY-GENERAL *vs.* DE SILVA ... LIII. 49

Sentence—Magistrate's Court—Sentence of Imprisonment for 1 1/2 years—Additional term of 1 year purporting to act under Prevention of Crimes Ordinance, section 6—Illegality.

Where a sentence of 18 months' rigorous imprisonment was imposed on an accused by a Magistrates' Court and a further one year was added purporting to act under section 6 of the Prevention of Crimes Ordinance.

Held : That the additional one year's imprisonment was illegal.

HAMID *vs.* NONIS ... ... LIII 60

Statute

Statute—Creating new jurisdiction and conferring new powers for carrying out the objects of the statute and giving a right of appeal from decisions of the tribunal so created—The powers of the Appellate Court when hearing an appeal under the statute are limited to those expressly granted.

PITCHAMUTTU *vs.* THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS ... ... LIII. 57

Thesawalamai

Thesawalamai—Pre-emption—Ordinance No. 59 of 1947—Notice under section 5—Consideration on impugned deed—Plaintiffs' ability and willingness to pay.

Plaintiff in an action for pre-emption, cannot succeed, even if due notice under section 5 has not been given, unless he can satisfy the Court that he would and could have exercised his rights of pre-emption under section 6 (1) within 3 weeks of the date on which the vendor ought to have given due notice under section 5, and unless the action for pre-emption is instituted within one year of the date on which the conveyance to the stranger was registered.

RAJARATNAM AND ANOTHER *vs.* WIJEYARATNAM AND OTHERS ... ... LIII. 45

Urban Council

Claim of pension by retiring officer from Council—Order by Local Government Service Commission directing Council to pay pension in full—Failure of Council to comply with Commission's direction—Application by Commission for writ of Mandamus *on Council—Costs of the application paid out of Council's funds—Costs surcharged against members of Council by the Auditor-General—Validity of—Scope of section* 194 (1) *Urban Councils Ordinance* 61 *of* 1939 *—Meaning of " Misconduct "—English Law compared.*

On the retirement of an officer of the Urban Council of Panadura, the members of the Council recommended to the Local Government Service Commission, in whom the power to grant pension was statutorily vested, that the officer should be paid a reduced pension on account of his unsatisfactory work. The Commission rejected this, and directed payment of the pension in full. The Council, however, tendered a cheque to the Commission at the reduced rate for payment, which the Commission returned and then applied to the Supreme Court for a writ of *mandamus* on the Council. Before the action was heard, the Council paid the pension in full, but the Supreme Court condemned the Council to pay the costs of the application, which was ultimately met from the Council's funds.

The Auditor-General charged this amount to the Chairman and members of the Council on the ground that the loss to the Council was incurred by the negligence or misconduct of those persons within the meaning of section 194 (1) of the Urban Councils Ordinance No. 61 of 1939.

Held : That the Chairman and members were not liable as their conduct in this case was not illegal or improper or negligent or tainted by bad faith so as to amount to misconduct, and consequently section 194 (1) of the Ordinance did not apply.

Per GRATIAEN, J.—" It is therefore clear that in Ceylon any member of an Urban Council may be compelled not only to refund the amount of any payment (made or authorised by him) which is ' contrary to law ', but also to make good ' any loss suffered by the Council owing to his negligence or misconduct as such member '. If the payment authorised is contrary to law, the liability to be surcharged is absolute ; but if any deficiency or loss is not tainted by illegality, negligence or misconduct is a condition precedent to liability."

MENDIS AND ANOTHER *vs.* COMMISSIONER OF LOCAL GOVERNMENT ... LIII. 29

Wages Boards

Wages Boards Ordinance—Exercise of power under section 51 (*b*)*—Hindrance of prescribed officer in the exercise of his powers.*

The appellant was convicted of having hindered a prescribed officer under the Wages Boards Ordinance in the exercise of his powers under section 51 (*b*). The officer had carried on a shouted conversation with a labourer in charge of a noisy machine, and the appellant had objected.

Held : That such questioning of the labourer in order to ask routine questions was unreasonable, and that the appellant in objecting did not bring

himself within the scope of the Ordinance, and therefore, the conviction should be quashed.

Words and Phrases

"*May*"

"*Parent.*"

Workmen's Compensation Ordinance 10 of 1934

Section 16 (1) *and* 16 (2)—*Time within which claim for compensation may be made*—"*Sufficient cause*" *for failure to institute claim within statutory period.*

The applicant-respondent, the widow of a deceased workman, instituted a claim for compensation in respect of the death of her husband in an accident, nearly three years after the date of the death. *Prima facie*, therefore, the widow's failure to make the claim within the period of six months fixed by section 16 (1) of the Ordinance would operate as a bar to the maintenance of the proceedings. The Commissioner, however, was satisfied that the delay of six months was due to 'sufficient cause' within the meaning of section 16 (2), and that the proceedings were maintainable. But in appeal it was argued that the further delay of two years was unreasonable and barred the proceedings, even though the delay of six months was sufficiently excused.

Held: If the delay of six months was excused for 'sufficient cause' under section 16 (2), no subsequent lapse of time without reasonable cause could operate as a bar to proceedings.

Held further: That the word 'may' in section 16 (2) gave the Commissioner a discretion whether or not to admit a claim even where sufficient cause had been shown for the delay of six months in instituting the claim. However, even then, further delay in instituting a claim after expiry of the six months would not automatically bar the proceedings; but the reasons for the further delay would be relevant to the Commissioner's decision whether or not he ought to exercise in favour of the claimant his discretion to admit the claim.

Per GRATIAEN, J.—"I respectfully take the view that in Ceylon the Commissioner's jurisdiction under section 16 (2) of the Ordinance to admit and decide a claim for compensation after the expiry of the six month period is regulated by the question whether the failure to institute the claim *within that period* has been sufficiently excused; the section nowhere states that any subsequent delay ousts the Commissioner's jurisdiction under the Ordinance."

Present : PULLE, J. AND WEERASOORIYA, J.

MUDIYANSE vs. DINGIRI MENIKE *et al*

S. C. 192/1954—*D. C.* (*Inty.*) *Kurunegalle No.* 6333

Argued on : 23rd and 25th March, 1955
Delivered on : 30th March, 1955

Kandyan Law—Adoption—Evidence required to prove.

M claimed the entirety of a land sought to be partitioned on the ground that he was the adopted son of U who was admittedly the original owner of the land. M's evidence as to the adoption was entirely disbelieved by the learned trial Judge and the only other evidence on this point was that of a priest who said that some fifty years ago U had requested him to teach letters to M, his adopted son in order that he may succeed to his inheritance. There was no clear and definite finding by the learned trial Judge on the priest's evidence and M's claim was dismissed.

Held : That the learned trial Judge should have given his mind to the accuracy of the recollection of the priest regarding the conversation and that this evidence if accepted was sufficient to prove the adoption.

Cases referred to : *Tikirikumarihamy vs. Niyarapola et al* 44 N. L. R. 476.
Ukkubanda Ambahera et al vs. Somawathie Kumarihamy 44 N. L. R. 457.

C. R. Gunaratna, for the defendant-appellant.

A. Jayasuriya, for the plaintiff-respondent.

WEERASOORIYA, J.

This is an action for the partition of a land depicted in plan X filed of record. The plaintiff-respondent claimed an undivided one-third share and he allotted to the 1st defendant-appellant and the 2nd defendant-respondent each an undivided one-third share on the basis that they were the three intestate heirs of their deceased father Kirihamy on whom the land had devolved from his brother Ukkubanda upon the latter's death without issue.

It is common ground that Ukkubanda was at one time entitled to the land. The appellant, however, asserts that although he is a son of Kirihamy he is also the adopted son of Ukkubanda through whom he claims the entirety of the land to the exclusion of his father Kirihamy, and on the strength of this assertion he denied that upon Kirihamy's death either the plaintiff or the 2nd defendant succeeded to any interest in the land.

The parties to this action are governed by Kandyan Law, and in order to prove his adoption the appellant called as a witness the Rev. Ratanapala Nayake Thero who stated that the appellant was brought to his temple as a small boy of six or seven years to be educated by him at the request of Ukkubanda and that shortly before the appellant was brought there Ukkubanda told him that " he would be sending his adopted son to be taught letters in order that he may succeed to his entire property ".

Within a year of this arrangement Ukkubanda was convicted of murder and sentenced to death, the sentence commuted to twenty years' rigorous imprisonment and he died in jail while serving the sentence.

Such evidence as the appellant himself was in a position to give of the alleged adoption of him when a young boy by his uncle Ukkubanda was completely discredited by the trial Judge. Apparently the appellant's previous record was not such as inspired any confidence in the Judge in his veracity. Fiver years after he was sent to the temple he entered the priesthood but he relinquished his robes at the age of eighteen on the death of his father Kirihamy. Thereafter he returned to his village and married in due course. In more recent times he has served two substantial terms of imprisonment, one on being convicted of arson and the other on conviction for house-breaking and theft.

The only other evidence regarding the alleged adoption is that given by the Rev. Ratanapala of the statement made to him by Ukkubanda when it was arranged that the appellant should be sent to the temple for his education. In dealing with this evidence in his judgment the learned trial Judge expressed himself as follows :

> " *Perhaps* Ukkubanda also mentioned to the priest that the 1st defendant should be taught letters in order that he may succeed to his property. This statement by Ukkubanda to the priest, in my opinion, does not amount to a declaration by Ukkubanda that the 1st defendant was being adopted by him and that he was to succeed to his property. It was more or less an informal statement to make

the priest take an interest in the 1st defendant and teach him letters.....I hold that the statement made by Ukkubanda to the priest is not sufficient to prove an adoption ".

Despite certain earlier observations made by the learned trial Judge that he had no reason to hold that the evidence of the priest was untrue, the passage quoted above indicates that he refrained from arriving at a definite view regarding the acceptability of the priest's evidence on the particular point relating to the adoption and the purpose of it, as stated to him by Ukkubanda, since according to the finding of the Judge that evidence, even if true, was not sufficient to prove an adoption. In regard to this finding it was submitted by Counsel for the appellant on the authority of the decisions of this Court in *Tikirikumarihamy vs. Niyarapola et al* 44 N. L. R. 476 and *Ukkubanda Ambahera et al vs. Somawathie Kumarihamy* 44 N. L. R. 457 that the trial Judge was wrong, and that in each of these cases a statement made in the course of conversation by the alleged adoptive parent speaking to the adoption, for the purpose of inheritance, of the person whose adoption was in issue was held to be sufficient in the circumstances of the case to prove the adoption.

But even if on the authority of these decisions the view be taken that the evidence of the priest, that Ukkubanda told him that he would be sending his adopted son to be taught letters in order that he may succeed to his property, is sufficient to prove the adoption in the present case, learned Counsel for the appellant was faced with the difficulty (as he frankly conceded) that there is no clear finding by the Judge on this evidence. Although the Judge was not prepared to go to the length of saying that this evidence deliberately represented what is untrue, the accuracy of the recollection of the priest (who gave his age as ninety seven years) regarding a conversation that took place nearly fifty years before was a matter which the Judge had necessarily to give his mind to if he thought that the evidence, if accepted, was sufficient to prove the adoption.

In the circumstances it seems to me that the judgment and interlocutory decree must be set aside and the case remitted to the Court below for a trial *de novo* before another Judge. All costs incurred by the parties in regard to the contest, including the costs of this appeal, will abide the result of the fresh trial.

Set aside.

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

JINARATANA THERO vs. DHAMMARATANA THERO

S. C. No. 350—*D. C. (F) Kegalle : No.* 7158

Argued on : 4th and 5th August, 1955
Decided on : 9th September, 1955

Viharadhipati—Renunciation—Need not be expressly made—Inference from facts and circumstances must be clear—Onus on party asserting—Cannot be abandoned by residence in another temple.

A bhikkhu's intention to renounce his right to be the *viharadhipati* of a temple will not be inferred unless it clearly appears from the facts and circumstances of the case. If the facts and circumstances leave the matter in doubt the inference to be drawn is that there is no renunciation. There being no presumption in favour of renunciation of a right the onus is on the party who asserts the renunciation to prove the facts and circumstances from which an intention to renunciate could be clearly inferred. The office of Viharadhipati is not one that can be abandoned by mere residence in another temple.

Cases referred to : *Punnananda vs. Weliwitiya Soratha* 51 N. L. R. 372.
Voet Bk. 1, Tit. 4 s. 22.

C. V. Ranawake, with *U. B. Weerasekera*, for the plaintiff-appellant.

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

BASNAYAKE, A.C.J.

This is an action between two bhikkhus in respect of their right to be Viharadhipati of Hungampola Vihare (hereinafter referred to as Hungampola). Degalathiriya Jinaratana, the plaintiff-appellant (hereinafter referred to as the appellant), and Kehelwatte Dhammaratana, the defendant-respondent (hereinafter referred to as the respondent), are the rival claimants.

The only question that arises for decision in this appeal is whether the respondent's tutor forfeited his right to be Viharadhipati of Hungampola.

It would appear that Hettimulle Sumana was the incumbent of the Hungampola. He died in

July, 1855, leaving two pupils, Hapuwita Ratanapala (hereinafter referred to as Ratanapala) and Ambamalle Gunaratana (hereinafter referred to as Gunaratana), of whom Ratanapala was the senior. Shortly after the death of his tutor, Ratanapala was invited to reside in a vihare in his own village of Hatgampola and having accepted that invitation he continued to reside there visiting Hungampola, only on formal occasions. Gunaratana remained at Hungampola and conducted a pirivena and a school there. He acquired a reputation for Pali scholarship and attracted a large number of pupils, including the respondent, to his pirivena. Gunaratana himself had other temples ; but he resided at Hungampola on account of his educational work. Since 1916, the date of his higher ordination, the appellant resided in one of them known as Gurullawala Salawewatte. Ratanapala died in October, 1924, at Hatgampola, leaving as his pupil the respondent. Gunaratana died in August, 1942, at Hungampola. He had several pupils of whom the appellant was the most senior and Somaratana was the most junior. Prior to his death Gunaratana executed a deed of gift in favour of Somaratana. This led to litigation between Somaratana and the other pupils, including the appellant, after Gunaratana's death.

In December, 1948, Somaratana executed a deed assigning to the respondent all movable and immovable property belonging to Hungampola and the office of Viharadhipati of that Vihare. In 1950, Somaratana left the order. This event led to the present action. The appellant claims the vihare as the senior pupil of Gunaratana while the respondent claims it as the senior pupil of Ratanapala and also on the deed executed by Somaratana. It is clear that Somaratana had no right to dispose of the vihare and its adhipatiship in the way he did. His deed is of no effect or avail in law. If the respondent's claim had rested on that deed alone he would not be entitled to succeed.

His claim based on his succession to Ratanapala is one that the appellant has to meet. That the respondent is Ratanapala's successor is not denied ; but the appellant maintains that Ratanapala abandoned his rights to Hungampola when he took up permanent residence at Hatgampola and that upon such abandoment Gunaratana became Viharadhipati of Hungampola.

It has been held by this Court that a bhikkhu can renounce his right to be Viharadhipati of a Vihare and that the renunciation of the right need not be expressly made ; but may be inferred from facts and circumstances *Punnananda vs. Weliwitiye Soratha* 51 N. L. R. 372. But an intention to renounce will not be inferred unless that intention clearly appears therefrom upon a strict interpretation of the facts and circumstances of the case. If the facts and circumstances leave the matter in doubt then the inference to be drawn is that there is no renunciation *Voet* Bk. 1 Tit. 4 section 22.

There being no presumption in favour of the renunciation of a right, the onus is on the appellant to prove facts and circumstances from which it can be clearly inferred that Ratanapala renounced his right to the office of Viharadhipati of Hungampola.

Learned Counsel for the appellant has not cited any authority in support of his contention that a Viharadhipati forfeits his right to the office when he leaves the temple of which he is Viharadhipati and takes up residence in another of which he is also Viharadhipati. The office of Viharadhipati is not one that can be abandoned by mere residence in another place. There is nothing in the Vinaya or the decisions of this Court which requires a Viharadhipati to reside in the temple of which he is Viharadhipati. A bhikkhu who is Viharadhipati of more than one temple must of necessity reside in one place at a time and the mere fact that he makes one of the temples his permanent residence does not operate as a renunciation of his right to the others.

The appellant has not gone beyond proving that Ratanapala took up permanent residence at Hatgampola and that Gunaratana remained at Hungampola and conducted a pirivena and a school and generally acted as if he were in charge of the vihare to the extent of even nominating his successor to it. But that is not sufficient. It is not denied that Hungampola is a vihare granted to the Sangha and that Gunaratana was entitled to reside there and carry on his educational work. The residence of a pupil in his tutor's Sanghika Vihare for whatever length of time can confer no right on him to be Viharadhipati of that vihare as against the senior pupil because every pupil is entitled to residence in the vihare so long as he conducts himself properly as a member of the Sangha. Scholarship, renown or the rendering of service in the field of education does not confer on a bhikkhu entitled to residence in a vihare any special right or claim as against the rightful Viharadhipati.

To succeed, the appellant must prove facts and circumstances from which a clear inference of a renunciation by Ratanapala can be drawn. This he has failed to do. His appeal must therefore fail and is dismissed with costs.

Pulle, J.

I agree.

Appeal dismissed with costs.

Present : K. D. DE SILVA, J.

BAHARAN vs. ASSISTANT COMMISSIONER OF INCOME TAX

S. C. Application No. 690 of 1954

Argued on : 24th March, 1955, and 6th June, 1955
Decided on : 22nd September, 1955.

Income Tax Ordinance (Cap. 188)—Refusal to admit appeal and make order under Section 69 (2)—Refusal to consider objections before issuing certificate under Section 80 (3)—Mandamus directing respondent to admit appeal and consider objections—Interpretation of Section 69 (1) and 69 (2).

The petitioner complained that the Commissioner (*a*) wrongly refused to admit his notice of objections under Section 69 (2) ; (*b*) refused to consider his objections before issuing a certificate under Section 80 (3).

He sought a writ of mandamus to compel these actions.

The petitioner did not furnish returns of income in respect of three specific years, and he was accordingly assessed under Section 64 (3), and notice of assessment dated 17th August, 1953 posted to him. Although under Section 63 (3) such a notice is deemed to be received on the day succeeding the day on which it would have been received in the ordinary course of post (*i.e.* 19th August, 1953, in this case) yet it was only received on the 29th October, 1953. Section 69 (1) fixes a period of 21 days after receipt of the assessment, for appeal by way of notice of objections, by a person aggrieved thereby. This period began on 30th October, 1953. After receipt of notice the petitioner lodged a protest at the assessment, but did not furnish returns of income till 19th November, 1953. When the petitioner did not take further steps within twenty-one days from 30th October, 1953, the Commissioner issued a certificate to a Magistrate under Section 80 (1), but proceedings in that Court were adjourned under Section 80 (2) to enable the petitioner to submit objections to the Commissioner. Nothing was done during this period, and the Magistrate ordered the petitioner to pay on 13th November, 1954. The present application was filed on 17th December, 1954.

Held : (1) That there had been no valid appeal by way of a notice of objections under Section 69 (1) ; for there were no precise grounds of objection contained in the petitioner's communication to the Commissioner. Nor could the Commissioner, by waiver of the requirements of Section 69 (1), confer validity on an intrinsically invalid notice.

(2) Assuming without conceding that the notice of objections was valid, it became invalidated later by the fact of the returns of income not being filed within the twenty-one days as required by the section.

Per DE SILVA, J.—" A notice of objection to be valid must satisfy the following requirements :—

(1) It must be in writing and addressed to the Commissioner.
(2) It must be filed within the prescribed time.
(3) It must set out the grounds of objection precisely.
(4) If the assessment appealed against was made in the absence of a return of income the return of income must be tendered within the period allowed for filing the notice of objections.

S. Ambalavanar with *E. B. Vannitamby*, for the petitioner.
J. W. Subasinghe, C. C. for the respondent.

DE SILVA, J.

The petitioner complains, firstly, that the respondent who is the Assistant Commissioner of Income Tax, Unit 3, wrongly refused to admit his appeals and make his order in terms of Section 69 (2) of the Income Tax Ordinance (Cap. 188) and secondly, the respondent refused to consider his objections before issuing a Certificate under Section 80 (3). He therefore seeks to obtain from this Court a Mandate in the nature of a Writ of Mandamus directing the respondent (1) to admit the appeals and make his order in terms of Section 69 (3) or (2) to consider the objections, make his decision thereon, and issue a Certificate to the Magistrate's Court, Colombo South, in terms of Section 80 (3). The respondent opposes this application.

Although the petitioner originally made this application in respect of the years of assessment 1948/1949, 1949/1950, 1950/1951, 1951/1952, and 1952/1953 his Counsel, at the hearing, restricted the matter to the last mentioned 3 years of assessment.

The petitioner did not furnish returns of income in respect of these 3 years to the Commissioner of Income Tax. Accordingly, the Assessor in terms of Section 64 (3) estimated the petitioner's assessable income and assessed him accordingly, and notices of assessment dated 17th August, 1953, were sent by registered post to the petitioner to his address at No. 22, Gorakapola, Panadura. These notices of assessment called upon the petitioner to pay Rs. 1,585/-, Rs. 1,300/- and Rs. 2,475/- respectively. Section 69 (1) provides that any person aggrieved by the amount

of assessment made under this Ordinance is entitled to appeal to the Commissioner against the assessment by giving notice of objection in writing within 21 days of the date of notice of the assessment. Section 63 (3) enacts that any notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post. So that these notices should be deemed to have been served on the petitioner on the 19th August, 1953. The petitioner did not appeal to the Commissioner within 21 days from that date. He however addressed the letter R1 dated 31st October, 1953, to the Commissioner stating that he received the notices of assessment only two days earlier. He also in that letter objected to the assessments in the following terms :—

> " I hereby lodge an emphatic protest at your assessment of my income for these years. Details of these particulars will be forwarded to you shortly".

That the petitioner received the notices only on the 29th October, 1953, is not denied by the Commissioner. Therefore the period of 21 days contemplated by Section 69 (1) has to be calculated from 30th October, 1953. The petitioner did not take any further steps within 21 days from 30th October, 1953, although in R1 he had undertaken to furnish the particulars shortly. The Commissioner thereafter on 3rd September, 1954 issued in terms of Section 80 (1) the Certificate R2 to the Magistrate, Colombo South, certifying that a sum of Rs. 8,115/- was due as income tax. The Magistrate on receipt of this Certificate issued summons on the respondent who appeared in Court on 10th October, 1954, and obtained an adjournment till 13-11-54, under Section 80 (2) to enable him to submit objections to the Commissioner. Nothing appears to have been done during this period of adjournment. When the petitioner appeared in Court on 13-11-54 the Magistrate made the following order :—

> " Amount confirmed. I call upon him to pay. Time till 4/12".

On 4-12-54 the petitioner's Counsel submitted to Court that his client was not liable to pay the full amount and moved for another adjournment. The learned Magistrate refused this application and sentenced the petitioner to 3 months' simple imprisonment. On the same day the petitioner filed an appeal against that order and also paid an instalment of Rs. 100/- out of the amount due. Certain other payments were also made on subsequent dates. The petitioner filed the present application for a Writ of Mandamus on 17-12-54.

It is contended on behalf of the petitioner that the letter R1 is a notice of objection contemplated by Section 69 (1) and that by that notice the petitioner preferred an appeal to the Commissioner. It is also submitted on his behalf that on R1 being filed, the Commissioner should have proceeded under Section 69 (2) and, if no agreement was reached between parties, he should have in terms of Section 69 (3) fixed a time and place for the hearing of the appeal. The learned Crown Counsel argued that R1 cannot be regarded as a valid notice of objection contemplated by Section 69 (1) and that even if it was so regarded it ceased to be valid because the relevant returns of income were not filed by the petitioner within 21 days from 30-10-53. As this argument involves the interpretation of Sub-Sections 1 and 2 of Section 69 I will quote those two Sub-Sections in full :—

> (1) Any person aggrieved by the amount of an assessment made under this Ordinance may within twenty-one days from the date of the notice of such assessment appeal to the Commissioner by notice of objection in writing to review and revise such assessment. Any person so appealing (hereinafter referred to as the appellant) shall state precisely in his notice the grounds of his objection and the notice shall not be valid unless it contains such grounds and is made within the period above-mentioned :
>
> Provided that the Commissioner, upon being satisfied that owing to the absence from Ceylon, sickness, or other reasonable cause the appellant was prevented from giving notice of objection within such period, shall grant an extension thereof :
>
> Provided further that, where the assessment appealed against has been made in the absence of a return of income by the appellant, no notice of objection shall be valid unless and until such return has been duly made.
>
> (2) On receipt of a valid notice of objection under sub-section (1), the Commissioner may cause further inquiry to be made by an Assessor, and if in the course of such inquiry an agreement is reached as to the amount at which the appellant is liable to be assessed, any necessary adjustment of the assessment shall be made".

Section 69 (1) enacts that the appellant " shall state precisely the grounds of objection in the notice". The learned Crown Counsel submits that no grounds of objection, whatever, are set out in R1. That submission cannot be assailed. By R1 the petitioner merely lodged " an emphatic protest ". That surely is not a ground of objection. The Counsel for the petitioner however contends that the respondent is not entitled to take this objection because he did not raise it earlier. According to him, the only

ground urged by the respondent against validity of R1 was that the returns of income were not filed within 21 days as contemplated by proviso 2 Section 69 (1). It is true that in the affidavit filed by the respondent that he did not specifically take up the position that R1 was an invalid notice for want of the necessary particulars. However, even if the respondent treated R1 as a valid notice it is clear that he was not entitled in law to treat it as such. Section 69 (1) not only requires that the grounds of objection should be set out precisely in the notice but it proceeds to state further:

> "And the notice shall not be valid unless it contains such grounds and is made within the period abovementioned".

The Commissioner cannot confer validity on a notice which is intrinsically invalid. It is not within his power to waive the requirements which are unequivocally set out in Section 69 (1) in regard to this notice. Therefore the Commissioner was entitled to ignore it. On this ground alone the petitioner's application must fail because the petitioner also failed to appear before the Commissioner as required by the letter or to submit his objections to him in terms of Section 80 (2). If R1 cannot be regarded as a valid appeal the petitioner was entitled to claim relief under Section 80 (2). This he has failed to do.

Even if it is assumed that R1 is a valid notice of objection—which I am not prepared to concede—the petitioner is still confronted with another difficulty in that he failed to furnish the returns of income within a period of 21 days calculated from 30-10-53. Indeed, he furnished these returns only on 19th November, 1954. The Counsel for the petitioner however contends that Section 69 (1) does not require that the returns of income should be filed within 21 days. According to him it is sufficient if the notice of objection alone is filed within that period. His argument is that if the notice of objection is filed within 21 days, it remains in a state of suspense, as if it were, ready to be invested with validity once the return of income is filed. There is no time limit within which the return of income is to be filed, according to him. He also submits that although the 1st proviso of Section 69 (1) empowers the Commissioner to extend the period of 21 days for filing the notice of objection there is no similar provision in regard to the filing of the return of income. I am unable to share his view that the appellant is entitled to file the return of income after the expiry of the period within which the notice of objection has to be filed. Section 69 (1), *inter alia*, enacts that the notice shall not be valid unless it is made within 21 days. The 1st proviso, as I observed earlier, empowers the Commissioner, in certain instances, to extend the period of 21 days. It is only a notice of objection which is filed within the 21 days or within the extended period that is valid. But according to the 2nd proviso to Section 69 (1) even a notice of objection filed within the prescribed time becomes invalid "unless and until" the return of income is duly made. The word "until" appearing in this proviso shows that the return of income need not necessarily be filed with the notice of objection. The word "unless" occurring in the same proviso however, makes it clear that the return of income should be filed within the period allowed to tender the notice of objection. A notice of objection which is otherwise valid loses its validity unless there is a return of income to support it. If no extension of time is granted for filing the statement of objection the last day on which it can be filed is the 21st day from the relevant point of time. If on the 21st day it is found that the notice of objection has been filed within the prescribed period but no return of income has been tendered then the notice of objection is clearly invalid.

A notice of objection to be valid must satisfy the following requirements:—

1. It must be in writing and addressed to the Commissioner.
2. It must be filed within the prescribed time.
3. It must set out the grounds of objection precisely.
4. If the assessment appealed against was made in the absence of a return of income the return of income must be tendered within the period allowed for filing the notice of objection.

It is only a notice of objection which satisfies the above requirements which would constitute a valid appeal against the assessment.

Accordingly, even if R1 is a proper notice of objection, it is invalid for the reason that the petitioner had failed to tender his return of income within 21 days from 30-10-53. Therefore the respondent was justified in refusing to make an order under Section 69 (2).

For these reasons I dismiss the application with costs.

Puisne Justice.

Present : GRATIAEN, J. AND SWAN, J.

THE MERCANTILE BANK OF INDIA LTD. vs. V. S. RATNAM

S. C. 366 M/1953 F—D. C. Colombo 25215/M

Argued on : 7th and 9th November, 1955
Decided on : 17th November, 1955

Bills of Exchange—Crossed cheque paid over the counter contrary to the crossing—action for declaration that the bank is not entitled to debit the amount from the drawer's account—Cause of action, elements of—Section 79 (2) and 8 (3) of the Bills of Exchange Ordinance (Cap. 68).

Plaintiff had borrowed Rs. 2,000/- from a Dr. T. (the payee) and given as security a cheque for this amount on the defendant bank in favour of the payee or order, to be presented for payment later. The cheque was crossed generally. Six months later, at the payee's request, the plaintiff altered the date as the cheque was " stale ", and authenticated the alteration with his signature. The payee thereupon endorsed the cheque in blank, and gave it to someone to be posted for collection to the Bank of Ceylon. The cheque was not endorsed specially to the Bank of Ceylon, or made " not negotiable ". The plaintiff later discovered that the cheque had been paid by the defendant bank across the counter to a subsequent indorser, signing himself " W. D. Fernando ". When presented for payment the cheque bore words cancelling the crossing, the cancellation purporting to be authenticated by the drawer's signature. The trial Judge found that this signature was a forgery. The plaintiff sued the defendant bank for a declaration that it was not entitled to debit plaintiff's account with the amount paid.

Held : Assuming that the bank realized (or should have realized) that when the cheque was presented for payment it was still crossed generally and should not have been paid across the counter—

(1) Section 79 (2) of the Ordinance was irrelevant to plaintiff's claim, as he was not the " true owner " of the cheque within the meaning of the section.

(2) The plaintiff had no cause of action against the defendant bank under the English Common Law, which was applicable, because he had suffered no loss (which was an essential element of the cause of action) by payment of the crossed cheque over the counter. For the plaintiff's debt to the payee was now extinguished. Even assuming that the cheque was accepted by the payee as conditional payment of the debt, the payee's endorsement in blank converted the cheque into a " bill payable to bearer " (section 8 (3) of the Ordinance). Accordingly, payment to " W. D. Fernando ", the holder at that point of time, operated as a discharge of the bill. The fact that the cheque was paid over the counter and not through a bank did not divert the proceeds into wrong hands.

Authorities referred to : *Bobbett vs. Pinkett* (1876) 1 Ex. D. 368 ; 45 L. J. Ex. 555 ; 34 L. T. 851 ; 24 W. R. 711.
Smith vs. The Union Bank of England (1875) 1 Q. B. D 31 ; 45 L. J. Q. B. 149 ; 33 L. T. 557 ; 24 W. R. 194.
Baines vs. The National Provincial Bank (1927) 96 L. J. K. B. 801 ; 137 L. T 631 32 Com. Cas. 216.
Grant : Law of Banking : 5 Edn. p. 214, 193.

G. E. Chitty with *J. de Saram*, for the defendant-appellant.
N. K. Choksy, Q.C., with *D. J. Tampoe K. M. U. Jayanetti*, for the plaintiff-respondent.

GRATIAEN, J.

According to the facts as found by the learned trial Judge, the plaintiff had borrowed Rs. 2,000 from Dr. Thurairajah (hereinafter called " the payee ") on the security of his cheque dated 1st December, 1950, drawn on the defendant Bank in favour of the payee " or order ". At the time of its delivery to the payee, the cheque had been crossed generally. The arrangement was that the cheque should be presented for payment on a future date to be agreed upon, and in the meantime the payee was to be paid Rs. 13/33 each month by way of interest on the loan. Six months later (*i.e.* on 1st June, 1951) the plaintiff was in a position to repay the loan but, as the cheque in its original form might be rejected as " stale ", the plaintiff, at the payee's request, altered the date " 1-12-50 " to " 1-6-51 ". and placed his signature below the alteration. The payee then took back the cheque and shortly afterwards, having indorsed it in blank, gave it to someone to be sent by post to the Bank of Ceylon for collection.

Unfortunately, the payee had not taken the precaution of indorsing the cheque specially in favour of the Bank of Ceylon or even of making it " not negotiable ".

On or about 11th June, 1951, the payee began to feel uneasy because the Bank of Ceylon had not acknowledged receipt of the cheque. He then learnt that his letter, with the cheque enclosed, had not reached them. The plaintiff was informed, and he visited the defendant Bank where he discovered that the amount of the cheque had been paid across the counter on 4th June, 1951, to a subsequent indorser signing himself as " W. D. Fernando ". The cheque, at the time when it was presented for payment, bore words cancelling the original crossing and

also purporting to contain, immediately beneath those words, the plaintiff's signature.

The plaintiff has repudiated the signature purporting to authorise the cancellation of the crossing, and his evidence on the point has been accepted by the learned Judge. I would therefore hesitate to take a different view, but the resemblance of the impugned signature to his admitted signatures is so remarkable that (as the learned Judge himself remarked) the officers of the Bank could not be blamed for acting upon the purported cancellation.

The payee's honesty was not challenged at the trial, so that (upon the trial Judge's findings of fact) the inference is irresistible that somebody had dishonestly intercepted the letter containing the cheque either before or after it was sent by post to the Bank of Ceylon. The details of what occurred thereafter have not been investigated, and there is no evidence on record from which we can determine whether "W. D. Fernando" whose indorsement appears below that of the payee participated in the fraud. He may have been the thief, or he may have been an innocent person with whom the thief negotiated the stolen cheque for valuable consideration. Speculation on these intriguing questions is unprofitable and unnecessary for the purpose of our decision.

The plaintiff and the payee were uncertain as to which of them should claim the value of the stolen cheque from the defendant Bank. At first the payee sent the Bank a letter of demand, but ultimately it was decided that the plaintiff should institute this action on his own account for a declaration that the Bank was not entitled to debit his account with the sum of Rs. 2,000 representing the payment made across the counter on 4th June, 1951.

The learned Judge entered a decree in favour of the plaintiff on the ground that, by reason of the Bank having paid the crossed cheque otherwise than to a Banker, the plaintiff's original debt to the payee was revived by operation of law. The Bank was therefore held liable to indemnify the plaintiff for the loss resulting to him from its disobedience of his mandate as to the mode of payment.

It may be assumed for the purposes of this appeal that, when the cheque was presented for payment by "W. D. Fernando" on 4th June, 1951, the Bank realised (or should have realised) that it was still crossed generally and ought not to have been paid across the counter. The question is—what legal consequences flow from this unauthorised mode of payment?

Section 79 (2) of the Bills of Exchange Ordinance expressly provides that where a cheque crossed generally has been paid by the drawee "otherwise than to a Banker", he is liable to the "true owner" for "any loss he may sustain owing to the cheque having been so paid". The proviso to the section introduces a statutory exemption from liability which has no bearing on the present case. Indeed, section 79 (2) admittedly does not apply to the plaintiff. It was the payee who became the "true owner" of the cheque when he took delivery of it on 1st June, 1951; and, for reasons which I shall later explain, the payee had himself been divested of ownership before the cheque was paid across the counter to "W. D. Fernando".

In what circumstances then, can the drawer of a cheque which was generally crossed refuse to let the drawee debit his account if the cheque was paid across the counter? The Ordinance does not prohibit this mode of payment in express terms, nor does it provide the drawer himself (as opposed to the "true owner") with a statutory remedy in such a situation. Nevertheless, under the common law of England which applies to Ceylon in cases of this kind, the general crossing of a cheque operates as a mandate to the drawee to make the payment to a banker *and to no one else*; accordingly, a drawee who makes a payment across the counter in disobedience of the mandate acts at his peril. His liability to the drawer in such an event is not, however, automatic: it arises only if, by reason of the unauthorised mode of payment, the drawer proves that he has incurred a loss for which responsibility may fairly be imputed to the drawee.

In *Bobbett vs. Pinkett* (1876) 1 Ex. D. 369, Bramwell, J., has given an example of a situation in which the drawer of a crossed cheque can, if so minded, repudiate a payment made by the drawee in an unauthorised manner. In that case a specially crossed cheque was stolen from the payee *before he had indorsed* it, and the drawee ultimately paid the cheque upon a forged indorsement to a banker other than that named in the crossing. It was held *inter alia* that the drawer could have objected to his account being debited with the amount of the cheque. The reason is quite clear. The payee had not parted with his title to the cheque at the time it was stolen, and the forged indorsement could not operate to pass title to a subsequent holder (however innocent). In that state of things, the drawer's original debt to the payee was revived because the payee had relied on the protection of the special crossing when he "accepted the cheque as discharge of the debt". *Grant's Laws of Banking* (Edn. 5th) p. 214. Accordingly the drawer's loss, *resulting* from the revival of the earlier debt, was directly referable to the drawee's failure to obey the mandate contained in the crossed cheque.

A different situation was incidentally discussed in *Smith vs. The Union Bank of London* (1875) 10 Q. B. 291. *If, notwithstanding the unauthorised mode of payment, the money is in fact paid to the lawful holder of a crossed cheque* no action lies against the drawee. In other words, it is an essential element of the drawer's cause of action that he had sustained a loss directly resulting from the unauthorised mode of payment. Provided that the money reaches the hands of the true holder of the cheque, the actual mode of payment is irrelevant. The Court of Appeal affirmed the judgment of Blackburn, J., in *Smith's case* (1875) 1 Q. B. D. 531.

The principle that an unauthorised mode of payment of a crossed cheque does not automatically attach liability to the disobedient banker seems to be tacitly recognised in *Baines vs. The National Provincial Bank* (1927) 96 L. J. K. B. 801. A bookmaker had there delivered a crossed cheque for £200 to a customer shortly before 3 p.m. on 14th August, 1925. The customer arrived in great haste on the same day at the office of the Bank on whom the cheque was drawn and persuaded them to pay the money to him across the counter (instead of through a collecting Bank) a few minutes after their normal closing hour. On the next morning the bookmaker sent a message to the Bank stopping payment of the cheque, but was told that the instructions had arrived too late. The bookmaker unsuccessfully repudiated the payment on the ground that the payment had been made shortly after closing time. It was not suggested that objection could be taken to the payment across the counter in disobedience to the mandate, because the true purpose of a mandate contained in a crossed cheque is to prevent the money reaching the hands of some person other than "the true holder".

It is in the light of these principles that the plaintiff's claim against the defendant Bank must be examined. He did not allege in his plaint that any loss had resulted to him from the payment of the crossed cheque across the counter, nor was an issue raised at the trial as to whether such loss had in fact occurred. For this reason alone, the learned Judge should have upheld the objection that the plaint disclosed no cause of action against the Bank. The learned Judge took the view, however, that the plaintiff's liability to the payee on the original debt was revived when the cheque, having been stolen in transit, fell into the wrong hands. Mr. Chitty contended, on the other hand, that in this particular case the cheque had been accepted in complete satisfaction and not as conditional payment, of the earlier debt. There is much to support Mr. Chitty's argument, but in my opinion, even upon the theory of a conditional payment, the debt did not revive. Let me explain why.

Assuming that the cheque was accepted only as conditional payment of the original debt, the payee had indorsed it in blank and subsequently ceased to be its "true holder" at the time when it was stolen. The payee's indorsement converted the cheque into a "bill payable to bearer" by virtue of section 8 (3) of the Ordinance. Accordingly, "W. D. Fernando" who presented the cheque bearing the payee's genuine indorsement in blank was its "holder" at that point of time, so that payment to "W. D. Fernando" (even if he were the actual thief) operated as "a discharge of the bill". *Grant* (*supra*) p. 193. The circumstances that the crossed cheque was paid across the counter instead of through a Bank did not divert the proceeds into wrong hands. Indeed, the payee's failure to protect himself by making the cheque "not negotiable" was the primary cause of his loss. He was in no better position, after losing the cheque which he had indorsed in blank, than he would have been if he had lost a currency note which he had taken in satisfaction of the earlier debt. In such a situation, the loss clearly lies (as between himself and his debtor) where it falls.

In this case the plaintiff had delivered to the payee a cheque in precisely the form in which it was asked for, and funds were available in the Bank to meet it upon presentation. The subsequent conversion of the document, by indorsement, into a "bearer cheque" was the primary consequence of the loss sustained by the payee. Once the cheque was paid to "W. D. Fernando" the payee had no further claims upon the plaintiff; nor indeed, had he a remedy against the Bank under section 79 (2) because he was not the "true holder" of the cheque at the time that it was paid. His only remedy is against the thief if he can find him.

For these reasons I would hold that the plaintiff has not established a right to repudiate the payment by the Bank. He intended the cheque to discharge his earlier liability to the payee, and he achieved that result. Accordingly, the Bank was clearly entitled to debit his account with the sum of Rs. 2,000 paid across the counter. I would allow the appeal and dismiss the action with costs in both Courts.

Swan, J.

I agree.

Appeal allowed.

Present : SANSONI, J.

MOHAMED A. M. ISMAIL vs. KALMUNAI POLICE

S. C. No. 764 P/M. C. Kalmunai No. 14270

Argued on : 31st August, 1955
Decided on : 7th September, 1955

Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172)—Possessing pods, seeds, flowers, leaves and other parts of the Hemp plant known as cannabis sativa L, *without a license from the Minister, in breach of Section 26 together with 2 (2) Offence punishable under Section 76 (5) (a).*

The accused was charged with possessing, without a license from the Minister, pods, seeds, flowers, leaves and other parts of the Hemp plant known as *Cannabis sativa L*, in breach of Section 26 read with Section 2 (2) of the Ordinance, and thereby committing an offence punishable under Section 76 (5) (*a*). The constable who detected the offence stated that he saw the accused at a table on which was a parcel containing " the leaves of ganja in the pure state ", and that the accused was making up eight small packets with the contents of the larger parcel. An Excise Inspector identified the contents of two of the eight packets as " parts of the Hemp plant commonly and locally known as ganja, botanically as *Cannabis sativa L* ".

Held : That all the essential ingredients of the offence had been set out in the charge and established by the evidence.

Cases distinguished : *Samarasekera vs. Soysa* (1951) 52 N. L. R. 380 ; 44 C. L. W. 80.
Cases referred to : *Weerasooriya vs. Excise Inspector, Mullaitivu* (1952) 54 N. L. R. 430.
Gampaha Police vs. Caithan (13th July, 1953—Excise Judgments File).
Wilson vs. Kotalawala (1946) 47 N. L. R. 45 ; 31 C. L. W. 81.

No appearance for the accused-appellant.
Arthur Keuneman, C. C., for the Attorney-General.

SANSONI, J.

The charge framed against the accused was that, without a license from the Minister, he possessed pods, seeds, flowers, leaves and other parts of the Hemp plant known as Cannabis sativa L, in breach of Section 26 of the Poisons, Opium and Dangerous Drugs Ordinance (Cap. 172) read with Section 2 (2), and thereby committed an offence punishable under Section 76 (5) (*a*). The Police Constable who claimed to have detected the offence, said that he saw the accused at a table on which was a parcel containing " the leaves of ganja in the pure state ". The accused also had in front of him eight small packets which he was making up with the contents of the larger parcel. An Excise Inspector gave evidence identifying the contents of two of the eight packets as " parts of the Hemp plant commonly and locally known as ganja, botanically known as " Cannabis sativa L ".

Although no Counsel appeared at the hearing of this appeal, Mr. Keuneman brought to my notice certain authorities which have a bearing on the questions which arise in this case. Now Section 26 prohibits possession of a Hemp plant or any part of such plant. The evidence of the Excise Inspector identified the contents of two of the packets which the accused had in his possession as parts of the Hemp plant which he described both by its botanical name and its popular name. It seems to me that all the essential ingredients of the offence have therefor. been set out in the charge and they have also been established by the evidence.

This case is distinguishable from that of *Samarasekera vs. Soysa* (52 N. L. R. 380 XLIV C. L. W. 80) in two respects. In that case the evidence described the plant in question as the ganja plant, and did not identify it by its botanical name. The charge too described the plants as Hemp plants without adding the botanical name contained in Section 25 of the Ordinance. Both these defects are absent from the present case. The later case of *Weerasooriya vs. Excise Inspector, Mullaitivu* (54 N.L.R. 430) was also decided in favour of the accused because the charge described the plant as the Hemp plant commonly known as ganja, and the evidence referred to the accused as having been in possession of ganja. The last case decided on the point appears to be that of *Gampaha Police vs. Caithan* decided by de Silva, J. on 13th July, 1953, and published in the Excise Judgments File. In that case the charge against the accused was that he possessed " two packets of ganja weighing 50 grains, an extract or a portion of the Hemp plant commonly known as ganja ", and thereby

committed an offence against Section 26. It was pointed out in that case that Section 26 does not refer to ganja while Section 28 does, and the language used in the charge was loose. I must confess that I find it difficult to understand why reference is made to ganja in charges under Section 26.

On the other side of the line is the case of *Wilson vs. Kotalawala* (47 N. L. R. 45, XXXI C. L. W. 81) where a conviction under Section 26 was affirmed although no mention was made either in the charge or in the evidence to the botanical name Cannabis sativa L, and the plant in the accused's possession was merely described as " the hemp plant ". It is not necessary to consider which of the decisions I prefer to follow, for all uncertainty will be eliminated in cases filed for breach of Section 26 if the prosecution would only refrain from making any reference to ganja.

As I have already pointed out, there is no uncertainty in this case as to what the accused was being charged with, nor did the evidence fall short of the proof required to establish the necessary ingredients mentioned in Section 26. It would be better if in cases where accused persons are charged under Section 26 the word " ganja " were omitted both from the charge and from the evidence.

This appeal is dismissed.

Appeal dismissed.

Present : Rose, C.J.

BALIN FERNANDO vs. ASST. COMMISSIONER OF LABOUR, KANDY

S. C. No. 103—*M. C. Kandy Case No.* 3209

Argued on : 26th January, 1955
Decided on : 15th February, 1955

Wages Boards Ordinance—Exercise of power under section 51 (*b*)—*Hindrance of prescribed officer in the exercise of his powers.*

The appellant was convicted of having hindered a prescribed officer under the Wages Boards Ordinance in the exercise of his powers under Section 51 (*b*). The officer had carried on a shouted conversation with a labourer in charge of a noisy machine, and the appellant had objected.

Held : That such questioning of the labourer in order to ask routine questions was unreasonable, and that the appellant in objecting did not bring himself within the scope of the Ordinance, and therefore, the conviction should be quashed.

H. V. Perera, Q.C., with *Sir Ukwatte Jayasundera, Q.C.*, and *M. M. Kumarakulasingham*, for the accused-appellant.

V. T. Thamotheram, Crown Counsel, for the Attorney-General.

Rose, C.J.

In this matter the appellant was convicted of having on 8th June, 1953, hindered an Inspector of Labour, a prescribed officer under the Wages Boards Ordinance, in the exercise of his powers under Section 51 (*b*) of the Ordinance. The allegation was that the appellant prevented this said officer from questioning persons in the Tea Factory on Palagalla Estate.

It is to be noted that the questions which were sought to be asked from the labourer in question who was engaged in the actual operation of the machinery at that time did not relate to such matters as the safety conditions applicable in the factory during working hours but concerned questions as to the rate of wages that the worker in question was receiving and whether or not he had been awarded an annual holiday with full pay.

The history of the matter discloses that on a previous occasion the appellant and the Inspector of Labour in question had had a difference of opinion, the Inspector stating that the appellant had been obstructive and the appellant contending that the Inspector had asked for a gratification. Whatever the true position as to that may be, the fact remains that on the present occasion at about 10-30 in the morning this machinery, which according to the uncontradicted evidence was extremely noisy in operation, was in full blast. The Inspector of Labour accompanied by another official entered the factory and carried on a shouted conversation with a labourer in charge of the machine. The appellant objected to this—quite possibly in heated tones—and it is that objection on his part that is alleged to be the " hindering " in question.

It is, of course, obvious that on the part of a factory owner or manager obstructive tactics against officials carrying out their functions under the Ordinance cannot be tolerated. On the other hand, the officials themselves must take every precaution to see that their conduct is reasonable and does not verge upon the provocative. After a careful consideration of all the factors in the present matter, I have come to the conclusion that the questioning of the labourer at the time when this noisy machinery was operating, in order to ask him perfectly routine questions as to wages and holidays, was unreasonable and that therefore the appellant in objecting to the official's conduct did not bring himself within the scope of the Ordinance.

I would refer to one answer in cross-examination that was given not by the Inspector of Labour but by his companion Appadurai, Assistant Commissioner of Labour, Kandy. This witness when asked whether it was not a dangerous thing to question a factory worker who was actually in charge of the machinery in operation answered, " when workers are actually working it is the best time to question them ".

Had the questions related to safety conditions —adequate fencing and so on—such an answer might be correct. When, however, the questions relate to such purely routine matters as wages and holidays with pay, it seems to me that the answer discloses an ignorance of the proper functions of the officials under the Ordinance.

The appeal is therefore allowed and the conviction quashed. If the fine has been paid it must be remitted.

Appeal allowed.

Present : Sansoni, J.

GUNAWARDENA vs. FERNANDO

S. C. No. 496 *E—M. C. Colombo South No.* 62792

Argued on : 22nd August, 1955
Decided on : 24th August, 1955

Excise Ordinance, Section 44—Possession of unlawfully manufactured liquor—Analyst's report that liquor seized not liquor manufactured under license issued by Commissioner—Is the report sufficient to prove charge.

In a prosecution under Section 44 of the Excise Ordinance for possessing without lawful authority unlawfully manufactured liquor, the report of the Government Analyst was led in evidence to prove the charge. The Analyst's report expressly stated that the liquor seized was not a liquor manufactured under a license issued by the Excise Commissioner.

Held : That though the Analyst was not called as a witness, his report was sufficient evidence to bring the liquor seized within the category of an unlawfully manufactured liquor.

Cases referred to : *Ramsamy Kone vs. Ginigathena Police* (56 N. L. R. 404).

Per Sansoni, J.—" If the defence intended to raise an objection to the contents of the report on the ground that certain findings made by the Government Analyst should be disregarded for any particular reason, the Government Analyst should have been summoned and cross-examined on his means of knowledge, or the sources of his information".

Srimath B. Lekamge, for the accused-appellant.
Ian Wickremanayake, C. C., for the Attorney-General.

Sansoni, J.

The accused in this case was charged with having in his possession without lawful authority 7 gallons and 2 drams of unlawfully manufactured liquor in breach of Section 44 of the Excise Ordinance. The defence raised was an alibi which was disbelieved.

The only point urged in appeal was that the prosecution failed to prove that the liquor was unlawfully manufactured.

The evidence led by the prosecution on this point was the report of the Government Analyst who found on examination that the samples P2, P4 and P6 of the liqour sent to him contained 6%, 5·7% and 6·7% by volume of alcohol respectively. He also reported :—

> " The characteristics of P2, P4 and P6 are not similar to those of samples of either approved brands of imported liquors or liquors manufactured under licences issued under the Excise Ordinance.

"In my opinion P2, P4 and P6 are liquors which do not fall under the following categories :—

(1) Approved brands of imported liquors,

(2) Liquors manufactured under licences issued under the Excise Ordinance".

It is argued, however, that in spite of this report the prosecution has failed to establish that the liquor seized in the accused's possession was unlawfully manufactured, and I have been referred to the judgment of Nagalingam, S. P. J. in *Ramasamy Kone vs. Ginigathena Police* (56 N. L. R. 404). I would point out that the report of the Government Analyst in that case did not say that the liqour which was the subject matter of the charge was not a liquor which has been manufactured under licence issued by the Excise Commissioner, and the learned Judge held that the prosecution had failed to exclude the possibility of the liquor having been manufactured under a licence. But the report furnished in this case does exclude that possibility, and says expressly that the liquor seized is not a liquor manufactured under a licence issued under the Excise Ordinance. This is sufficient to bring it within the category of an unlawfully manufactured liquor.

Nagalingam, S. P. J. however also said in that case that when the Government Analyst said in his report that the liquor seized was not manufactured under a licence issued by the Excise Commissioner "he is giving utterance to some information which he has probably obtained from the Excise Commissioner himself. The Government Analyst cannot say of his own knowledge what licenses have been issued by the Excise Commissioner". With respect, I am not prepared to take this view of the Analyst's means of knowledge in the absence of further proof. It is not, it seems to me, a necessary inference that the Government Analyst was acting on hearsay, for there is nothing in the record which compels me to arrive at that conclusion. The Analyst's report is evidence, even though he was not called to testify in person.

No such course was adopted by the defence. It was therefore quite permissible for the learned Magistrate to act upon the report and that is what he has done. Having regard to the terms of the report I think the prosecution has proved that the liquor in question was unlawfully manufactured. The appeal is dismissed.

Appeal dismissed.

Present : Nagalingam, S.P.J.

A. R. KAROLIYA vs. T. R. NOIYA

S. C. No. 545/1953—M. C. Kegalle No. 37,780

Argued on : 8th December, 1954
Delivered on : 13th December, 1954

Penal Code—Sections 398 and 400—Charge that deed was executed fraudulently and dishonestly—What is necessary to be proved—Can charge be altered in appeal.

Where the charge against the appellant was that he did deceive one Noiya, the complainant, by fraudulently and dishonestly executing a deed bearing No. 5423 dated 23-7-1951 in her favour, thereby purporting to sell to her a land, after having sold the very same land to his minor son by an earlier deed, and that he thereby intentionally induced the complainant to pay the purchase price of Rs. 1,000/- and thereby committed an offence punishable under section 400 of the Penal Code, and the evidence showed that the transactions were really with Noiya's husband Bastia Veda.

Held : (1) That there was no proof that Noiya was deceived.
(2) That there was also no proof that she parted with any property.

Case referred to : *De Alwis vs. Selvaratnam* (1947) 48 N. L. R. 172.

G. E. Chitty with *A. S. Vanigasooriyar*, for appellant.
H. W. Jayawardene, Q.C., with *D. R. P. Goonetilleke*, for respondent.

Nagalingam, S.P.J.

The charge against the appellant was that he did deceive one Noiya, the complainant, by fraudulently and dishonestly executing a deed bearing No. 5423 dated 23rd July, 1951, in her favour, thereby purporting to sell to her an allotment of land called Unapandura-mukalana, after having sold and transferred the very same land to his minor son, Cyril Fernando, by an earlier deed on 19th July, 1951, and that he thereby intentionally induced the complainant to pay the purchase price of Rs. 1,000 for the said land and

thereby committed an offence punishable under section 400 of the Penal Code.

The learned Magistrate, after trial, convicted the accused and sentenced him to undergo six months' rigorous imprisonment.

The point urged on behalf of the appellant is that there is no evidence to show that the complainant was in fact deceived or that as a result of any deception practised on her she was induced to part with the sum of Rs. 1,000.

The evidence led in the case conclusively establishes that the complainant Noiya took no part in the transactions which led up to the execution of the deed in her favour. The husband of Noiya, Bastia Veda, gave evidence in Court and categorically stated that the land had been offered to him for sale by the accused, and that he attended to the entirety of the transactions culminating in his getting the deed executed in favour of his wife. He further stated that had he known that the accused had previously conveyed the land to his son, he would not have paid the sum of Rs. 1,000 or had the deed executed in favour of his wife.

The offence of cheating is defined by section 398, the relevant words of which, for purposes of this case, are " whoever by deceiving any person fraudulently or dishonestly induces *the person so deceived* to deliver any property to *any person*..... is said to cheat ".

The first requisite to be proved is that there was some person who has been deceived, and the second that the person so deceived was fraudulently or dishonestly induced to deliver the property to some other person.

The charge here is that the complainant, Noiya, was deceived and that she, in view of the deception practised on her, parted with a sum of Rs. 1,000. While there can be little doubt that Noiya's husband was deceived and that he, as a result of the deception practised on him, paid the money to the accused, there can be equally little doubt that, as contended for on behalf of the accused, there is no evidence whatsoever of Noiya having been deceived or that, in pursuance of any deception practised on her, she paid out any money. Noiya has not given evidence herself. It has been urged that if Noiya had been aware of the previous conveyance by the accused to his son, then any deception practised on the husband would not establish the charge.

Though the identical point is not covered by authority, the case of *De Alwis vs. Selvaratnam* 1947 48 N. L. R. 172 is of some assistance. In that case the charge was that a Proctor and Notary had been cheated by the accused by a representation that certain property mortgaged by the accused was free from encumbrances and thereby he had induced the notary to attest another mortgage of the premises belonging to him, while the earlier mortgage remained unsatisfied. Howard, C.J., held that assuming that the appellant did deceive the notary and thereby induced him to attest the mortgage bond there was no proof of any damage or harm caused to the notary in body, mind, reputation, or property, and that the charge therefore failed. That case therefore is an authority for the proposition that there must be proof that the party who is alleged to have been deceived had in fact suffered some damage or harm.

In the present case, as stated earlier, not only is there no proof that Noiya was deceived, but there is also no proof that she parted with any property. The conviction therefore cannot be sustained. But I have little doubt in my mind that had the charge been properly framed and had alleged that Bastia Veda had been deceived, a conviction can be sustained on the present material on record.

I entirely agree with the learned Magistrate that " the accused has perpetrated a fraud of the biggest kind ".

The learned Counsel for the respondent invited me to sustain the conviction altering the charge by deleting therefrom the word " Noiya " and substituting in its place " Bastia Veda ". The learned Counsel for the appellant strenuously opposed the application and contended that such a course would gravely prejudice the accused in that whatever defence he might have had to such a charge he had not been called upon to place before Court in view of the nature of the charge upon which the case went to trial, and further, that both parties—the complainant and the accused—having been represented by Senior practitioners, Counsel for the appellant advisedly refrained from cross-examining any of the witnesses—as for the prosecution, as the case against the appellant was not made out in the slightest degree by the evidence given by the several witnesses in their examination in chief. I have, with great reluctance and extreme regret, come to the conclusion that however monstrous the fraud which the accused is alleged to have perpetrated may be, he should not, in common fairness, be put in jeopardy a second time by being called upon to meet a fresh charge on the same facts, for that is what such a proceeding would amount to, if the charge be amended as suggested by learned Counsel for the respondent.

In this view of the matter the charge against the appellant fails. I therefore set aside the conviction and acquit the accused.

Set aside.

Present : SANSONI, J.

PERERA vs. THE DIVISIONAL REVENUE OFFICER

S. C. No. 272—*M. C. Badulla No.* 16783

Argued on : 24th August, 1955
Decided on : 29th August, 1955

Forests Ordinance (Cap. 311), *section* 20—*Rule* 2 *of the Rules dated* 2*nd June*, 1934, *framed thereunder—Conviction for breach of such rule—Section* 23 *of Ordinance.*

The accused was convicted of clearing land at the disposal of the Crown without a permit in breach of Rule 2 of the Rules dated 2nd June, 1934, framed under section 20 of the Forests Ordinance. It was argued in appeal that the conviction could not be sustained in view of section 23 of the Ordinance. Section 23 provides that no person shall be deemed to have committed an offence of the kind in question if—

(*a*) The complainant fails to prove that the trees in the said forest are of more than twenty years' growth, and
(*b*) The accused satisfies the Court that he claims the said forest by inheritance or deed based on inheritance and has cultivated it for a prescribed period.

Held : That conceding that the complainant failed to discharge the onus placed on him by (*a*) the accused had not satisfied the Court in regard to condition (*b*), for the deed on which the accused relied was executed, not in *his* favour, but in favour of his brother. It could not possibly be said that the accused claimed the chena upon a deed, or that he or his predecessors in title had cultivated it.

Cases referred to : *Weerakoon vs. Ranhamy* (1921) 23 N. L. R. 33.

M. M. Kumarakulasingham with *T. B. Dissanayake*, for the accused-appellant.
Shiva Pasupati, C. C., for the Attorney-General.

SANSONI, J.

The accused in this case was charged : (1) With having cleared about ten acres of land called Kukulkotuweheneya at the disposal of the Crown, without a permit in breach of Rule 2 of the Rules dated 2nd June, 1934, framed under section 20 of the Forests Ordinance; (2) with having felled timber therein without a permit in breach of Rule 6 (1) of the said Rules.

He was acquitted on the second count but he was convicted on the first and fined Rs. 100.

It was argued in appeal that if section 23 of the Ordinance had been given effect to by the Magistrate the accused should not have been convicted. That section provides :

> " No person shall be deemed to have committed an offence in respect of clearing or cutting or setting fire to, or breaking up the soil of, any chena in any case in which the forest in respect of which the prosecution has been instituted has not been declared under the Land Settlement Ordinance, or any Ordinance repealed thereby to be the property of the Crown, if—
>
> (*a*) the complainant fails to prove that the trees in the said forest are of more than twenty years growth ; and
>
> (*b*) the accused satisfies the Court that he claims the said forest by inheritance or upon deed based upon inheritance and that he or his predecessors in title have on at least two occasions cultivated it according to the customary cycle of cultivation after intervals of several years for similar lands in the same locality."

It may be conceded that in this case the complainant, Divisional Revenue Officer, failed to prove that the trees on the chena were of more than twenty years' growth. The evidence on this point given by his witness, the Village Headman, was to the effect that there was one tree on the chena in question, it had been cut, and it was a satinwood tree of about ten years of age. Other prosecution witnesses have referred to two or three trees which they said were about thirty years old. In the absence of satisfactory evidence on this point I think the accused must be given the benefit of the doubt as to the age of the trees.

But the second condition stipulated in section 23 has certainly not been satisfied, although the burden lay upon the accused to prove the facts covered by it. The whole case for the defence was conducted on the basis that this chena had belonged to Pitawela Korala by inheritance from his mother who had in turn inherited it from her father. It was proved that the chena had been cultivated for over twenty years by villagers as a chena, until it was cleared in 1950 and planted in oranges. But even if it be assumed that the deed, D. 3, executed by the Korala in 1950 refers to this particular chena, one matter which is fatal to the accused's defence is that this deed was executed not in his favour but in favour of his

brother. Therefore it cannot possibly be said that the accused has satisfied the Court that he claims the chena upon a deed and that he or his predecessors in title have cultivated it on at least two occasions as chena land.

It may seem unfortunate that the accused was charged in respect of the clearing of this chena, whereas if his brother had been charged he might have had a good defence under section 23. But the accused has only himself to blame for this situation. He claimed the land as his in May, 1951, when the Village Headman issued his Illicit Clearing Report. He again claimed it as his when he was charged in this case. If he had not adopted this attitude the probabilities are that his brother, who had obtained the deed from the Korala and who in his evidence claimed that he had cleared the land, would have been the accused.

I do not think I need go into the other points which were mentioned in appeal. I suppose the reason for the enactment of section 23 was in order to mitigate the far-reaching effects of the decision of this Court in *Weerakoon vs. Ranhamy* (23 N. L. R. 33). As was the case there, this land too is a chena in the Kandyan provinces; the Rule under which the accused was charged prohibits the clearing of chenas; the learned Magistrate has found, and there is ample evidence to support that finding, that it was this accused who cleared the chena in question.

I therefore affirm the conviction in this case, but having regard to the circumstances under which the chena came to be cleared by the accused I reduce the fine to Rs. 50, in default six weeks' rigorous imprisonment.

Conviction affirmed, fine reduced.

Present : PULLE, J.

ARASARATNAM, SUB-INSPECTOR OF POLICE vs. UDAWELA LEKAMALAGE HERATH HAMY

S. C. No. 176—*M. C. Kegalle No.* 4444

Argued on : 6th June, 1955
Decided on : 27th June, 1955

Motor Traffic Act No. 14 *of* 1951—*Sections* 46 *and* 226—*Plying for hire without a proper revenue license—No notice under Section* 66 *of the Evidence Ordinance—Can secondary evidence of the contents of the revenue license be produced*

In a prosecution under section 226 of the Motor Traffic Act for using a car for a purpose not authorised by the revenue license, it is necessary to place the license before the Court. If no notice to produce the license has been given to the accused, secondary evidence of its contents cannot be led.

Walter Wimalachandra, for the accused-appellant.
V. S. A. Pullenayagam, Crown Counsel, for the Attorney-General.

PULLE, J.

In this case the appellant was convicted under section 226 of the Motor Traffic Act, No. 14 of 1951, on the charge that on the 19th August, 1954, he did, being the driver and owner of motor car No. X 9339 used it for a purpose not authorised by the revenue licence of the car, namely, ply for hire in breach of section 45 of the Act and sentenced to pay a fine of Rs. 35/-. Of the grounds urged against the conviction only one need be considered. For the proof of the charge it was essential for the prosecution either to place before the court the licence or to lead secondary evidence of its contents after satisfying the conditions which permit of secondary evidence being led. No notice under section 66 of the Evidence Ordinance was given to the appellant to produce the revenue licence and yet evidence of its contents was admitted in spite of objection. The position then is that at the trial there was no legal evidence of the terms of the licence which the appellant was alleged to have contravened and the conviction and sentence must, therefore, be set aside.

I desire to make one observation regarding the charge. The evidence as to what was detected on the 19th August, 1954, hardly amounts to proof of " plying for hire " as that expression is defined in the Act.

Set aside.

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

MARCHANT HEYWORTH & SWIFT, LTD. vs. AHAMED EBRAHIM MOHAMED USOOF

S. C. No. 167—*D. C.* (*Inty.*) *Colombo, No.* 28778

Argued and decided on : 19th July, 1955

Arbitration—Contract—Clause that disputes arising from contract to be settled by arbitration printed on margin of contract—Validity—Default by one party—Submission to arbitration—No formal agreement to submit to arbitration necessary—Reciprocal Enforcements of Judgments Ordinance Cap. 79 section 3.

The appellant company contracted with the respondent to purchase from him a certain quantity of rubber within a certain period. On the margin of the relevant contract was printed a clause to the effect that any dispute arising from the contract should be settled by arbitration.

The respondent defaulted in the performance of his part of the contract and the appellant submitted the matter to arbitration after due notice to the respondent. The respondent was not represented at the arbitration and an award was made in favour of the appellant. When the award was sought to be enforced the respondent objected on the ground that the submission to arbitration should have been by a formal agreement signed by both parties and hence he was not bound by the award.

Held : That the award was valid. The fact that the clause referring to arbitration in the contract is printed in the margin of the document was no justification for treating it as if it had not existed. According to the law of England which regulated the transaction in this case the requirements are (1) that there must be an agreement in the sense that the parties must be " *ad-idem* " and (2) that that agreement must be in writing.

Cases referred to : *Caerleon Tinplate Co. Ltd. vs. Hughes and another* 60 Law Journal, Q. B. D. 640.
T. W. Thomas & Co. Ltd. vs. Portsea Steamship Co. Ltd. 1912 A. C. page 1, at page 8.

H. W. Jayewardene, Q. C., with *E. R. S. R. Coomaraswamy*, for the petitioner-appellant.
R. M. Markhani, for the respondent-respondent.

BASNAYAKE, A.C.J.

The appellant, Marchant Heyworth & Swift, Limited, a limited liability company incorporated in the United Kingdom (hereinafter referred to as the appellant), applied under section 3 of the Reciprocal Enforcement of Judgments Ordinance to have a judgment given in its favour by the Queen's Bench Division of the High Court of Justice in England registered in the District Court of Colombo.

The material portion of that judgment reads—

"PURSUANT to the Arbitrators' Award herein dated the 26th day of October, 1950, WHEREBY IT WAS AWARDED that Sellers have defaulted and shall pay to the Buyers the sum of Fifteen Thousand Pounds (£15,000/-) and Association Fee Ten Shillings (10/-) and Arbitration Fee Three Guineas (£3-3-0d) to be paid by Sellers. And the said Applicants Marchant Heyworth & Swift Limited having by the Order of Master Diamond dated the 3rd day of October, 1952, obtained leave to enforce the said Award in the same manner as a Judgment or Order to the same effect.

"IT IS THEREFORE ADJUDGED that the Applicants Marchant Heyworth & Swift Limited recover against the Respondents, Ceylon Trading Corporation, £15,003-13-0d."

The appellant's application was opposed by the respondent Ahamed Ebrahim Mohamed Usoof, the judgment debtor (hereinafter referred to as the respondent), the sole proprietor of the Ceylon Trading Corporation, on the ground that—

(*a*) he did not submit to the jurisdiction of the High Court of Justice in England ;
(*b*) the High Court of Justice in England acted without jurisdiction ;
(*c*) he was not duly served with the process of the original Court ; and
(*d*) the judgment was not registrable under section 3 (2) of the Ordinance.

The learned District Judge after trial held that the respondent had been duly served with the process of the High Court of Justice in England but that that Court had no jurisdiction over the respondent as he had not submitted himself to its jurisdiction, and refused the appellant's application to have the Judgment in its favour registered.

Dissatisfied with that decision, the appellant has appealed to this Court. It will be convenient to refer shortly to the material facts. They are as follows :—

By a contract dated 22nd June, 1950, the appellant contracted to buy from the respondent a consignment of 50 tons of rubber. The instrument of contract was in the following form :—

CONTRACT

MARCHANT, HEYWORTH & SWIFT, LIMITED

Ref. No. 664.

London House,
3, New London Street,
London, 22nd June, 1950.

Messrs. Ceylon Trading Corporation,
360, Union Place,
Colombo.

We have this day Bought from you the following goods :—

About 50 (fifty) tons FAIR AVERAGE QUALITY RIBBED SMOKED SHEETS RUBBER, R. M. A. 3, packed in cases and/or bales and/or bareback bales, fit for export, at 1s/9d. (one shilling and nine pence) per lb., nett., c.i.f. Liverpool :

For shipment from the East during June and/or July, 1950.

Terms.—Payment by Sight Draft on presentation in London with Shipping Documents attached. Confirmed Credit to be opened immediately.

Yours respectfully,
For and on behalf of
Marchant, Heyworth & Swift, Limited.
Director.

Please Sign and Return the Receipt attached hereunder.

Each delivery to stand as a separate contract. This contract is made subject to the Rules, Regulations and Bye-Laws of the Rubber Trade Association of London and any dispute arising thereon or in relation thereto is to be settled by Arbitration here in accordance with such Rules, Regulations and Bye-Laws. The said Rules, Regulations and Bye-Laws of the Rubber Trade Association of London are made, so far as not expressly varied by the special conditions of this contract, part of this contract as if same were set forth herein in full.

Below the words " Please Sign and Return the Receipt attached Hereunder " was a detachable receipt which the respondent duly perfected and sent to the appellant. That receipt and the letter which accompanied it are set out below :

To : Marchant, Heyworth & Swift, Limited.

Ref. No. 664.

London House,
3, New London Street,
London, E. C. 3.

We hereby confirm having sold to you about 50 (fifty) tons FAIR AVERAGE QUALITY RIBBED SMOKED SHEETS RUBBER R. M. A. 3, packed in cases and/or bales and/or bareback bales, fit for export, at 1s/9d. (one shilling and nine pence) per lb., nett, c.i.f. Liverpool :

Delivery. For shipment from the East during June and/or July, 1950.

Terms as per your Contract Ref. No. 664 dated 22nd June, 1950.

Date.....

Ceylon Trading Corporation.

Sgd.

Manager.

CEYLON TRADING CORPORATION

Colombo, 28th June, 1950.

Dear Sirs,

We thank you for your letter of the 22nd instant enclosing your contract No. 664 covering your purchase of the 50 Tons RSS3.

We confirm cables mutually exchanged as per copy attached and in confirmation of our cable we now have pleasure in enclosing our formal contract No. 008/50 in respect of 50 Tons RMA 3—RSS rubber sold to your goodselves at 1s. 9d. per lb. CIF Liverpool shipment June/July.

Now we have received your Letter of Credit, we shall make arrangements to have this rubber shipped as early as possible.

We thank you for your valued order and co-operation and assure you of our best and careful attention.

Yours faithfully,

Ceylon Trading Corporation,

Sgd.

Manager.

The respondent failed to perform his part of the contract. His excuse was that the export duty on rubber had been increased by the Ceylon Government by $2\frac{3}{4}$ pence. Over this failure the parties exchanged a series of communications both by post and telegraph. The respondent at first asked for time to perform his contract till the end of August and also for an increase in the credit value. Then he asked for time till the end of September and finally till the 15th of December, 1950, and even suggested 31st March, 1951. The appellant was willing to give the respondent time till even 15th December, 1950, but asked him to give proof of his *bona fides* by shipping at least part of the amount contracted for and specifying the name and date of sailing of the steamer. The respondent failed to give such proof but kept on asking for time and repeating his difficulties and claiming that his default was caused by *force majeure*.

After giving repeated extensions and finding that the respondent was not going to honour his obligations, on 10th October, 1950, the appellant cabled—

"FINAL WARNING INTEND REQUESTING RUBBER TRADE ASSOCIATION LONDON NOON TOMORROW TO APPOINT ARBITRATORS DEAL WITH YOUR DEFAULT."

As this cable evoked no response the appellant proceeded with the reference to arbitration, and on 19th October, 1950, cabled—

"ARBITRATION *re* DEFAULT MONDAY NEXT THREE P.M. TELEGRAPH WHETHER YOU WILL BE REPRESENTED AND IF SO BY WHOM."

The respondent objected to the arbitration by the following cable—

"YOUR 19th CANNOT AGREE ARBITRATION DELAY DUE *FORCE MAJEURE*."

On 23rd October, 1950, the appellant cabled—

"UNLESS WE HEAR BY WEDNESDAY NOON THAT YOU WILL BE REPRESENTED AT THE POSTPONED ARBITRATION AT THREE P.M. THAT DAY ARBITRATORS WILL PROCEED WITH THE CASE."

This cable was followed by another dated 26th October, 1950 :

"ARBITRATORS AWARDED US FIFTEEN THOUSAND POUNDS STERLING DAMAGES FOR DEFAULT IF YOU WISH APPEAL YOU MUST DO SO WITHIN FIVE DAYS AND REMIT FIFTEEN GUINEAS FEES."

The respondent.

The respondent cabled back on 27th October, 1950—

"YOUR 26th CANNOT ACCEPT ANY AWARDS WILL SHIP GOODS IF SUFFICIENT TIME GIVEN DELAY DUE *FORCE MAJEURE*."

The appellant replied—

"YOUR CABLE 27th ARE POSTING ALL DOCUMENTS RELATIVE TO CLAIM TO OUR LAWYERS IN COLOMBO ON THURSDAY EVENING NEXT WITH INSTRUCTIONS TAKE APPROPRIATE LEGAL ACTION."

On 9th November, 1950, the appellant's lawyers in Ceylon sent to the respondent a copy of the arbitrator's award together with the following letter :—

9th November, 50,
EL/PRS/NG.

Messrs Ceylon Trading Corporation,
360, Union Place,
Colombo.

Dear Sirs,

Claim of Marchant, Heyworth & Swift, Ltd.

Our clients Marchant Heyworth & Swift, Ltd., London, have sent us the correspondence and documents in respect of the 50 tons Fair Average Quality Ribbed Smoked Sheets Rubber R. M. A. 3, which you had contracted to supply them by shipment during June/July 1950, together with the award of the Rubber Trade Association of London, and we are instructed to demand payment from you and in default of payment to take legal proceedings against you to enforce recovery of £ 15,003-13-0d. representing the amount due to our clients.

You have failed to fulfil your part of the contract with our clients although at your request and for the purpose of assisting you our clients amended the relative credit without prejudice to their rights under the contract to permit shipment to be effected by the end of September last. You have sought to give the impression to our clients that the delay in shipment of the rubber was due to the uncertainty caused by the increase in the Export Duty on rubber and to "*force majeure*". But the reasons given by you for your failure to ship have no substance and cannot be entertained. You are aware that the Government of Ceylon has taken steps to assist shippers of rubber by reimbursing their losses consequent on the increase of the Export Duty.

It is clear that your failure to ship the rubber even at the end of September cannot be excused by the increase in Export Duty on rubber and the rise in the price of rubber and our clients consider that you were hoping for a fall in price to fulfil your contract with financial advantage to you.

In the circumstances our clients were obliged to refer the matter to the Rubber Trade Association of London for Arbitration in terms of the contract entered into with you which provided that it was governed by the Rules, Regulations and Bye-Laws of the Rubber Trade Association of London which fact was acknowledged by you in signing the contract receipt. You were given ample notice of the reference to Arbitration and ample opportunity was given to you to be represented at the Arbitration proceedings but you failed to make any response. The Arbitrators have awarded that you defaulted and that you as sellers should pay to our clients the buyers the sum of £ 15,000/- and costs. We enclose the original Arbitration Award No. 5689* of the Rubber Trade Association of London together with our clients' account showing a sum of £ 15,003-13-0d. due to them and we have to request you to make immediate payment of Rs. 200,645.70 representing the approximate equivalent in Ceylon currency of £ 15,003-13-0d.

In default of payment forthwith we shall take appropriate legal proceedings against you to enforce recovery."

Yours faithfully,
Sgd. F. J. & G. DE SARAM.

* "We the undersigned having been appointed by the committee to settle a dispute arising out of a contract dated 22nd June, 1950, made between Messrs. Marchant Heyworth & Swift, Ltd., and the Ceylon Trading Corporation, Colombo, for Fair Average Quality R. S. S., R. M. A. 3, C. I. F., Liverpool, have carefully considered the same award as follows, viz. about 50 tons Fair Average Quality Ribbed Smoked Sheets Rubber R. M. A. 3.

That sellers have defaulted and shall pay to the buyers the sum of Fifteen Thousand Pounds (£ 15,000/-)"

As the respondent failed to satisfy the award, the appellant obtained an originating summons from the High Court of Justice under section 26

of the Arbitration Act of 1950. The originating summons was served on the respondent by Mr. V. Murugesu, Proctor, of Messrs. F. J. & G. de Saram and an affidavit to that effect was filed in the High Court. The respondent did not appear in the High Court and took no part in the proceedings.

Learned Counsel for the respondent contended that a party to a contract is not bound to submit to arbitration any dispute thereunder unless he has formally agreed to be so bound. He invited our attention to the case of *Caerleon Tinplate Co., Ltd. vs. Hughes and another*, 60 Law Journal, Q.B.D. 640 and to the case of *T. W. Thomas & Co., Ltd. vs. Portsea Steamship Co., Ltd.* 1912 A.C. page 1, at page 8. Neither of these cases has any application to the case under consideration.

The question in the former case was, whether or not there had been a submission to arbitration within the meaning of the Arbitration Act, 1889 (52 and 53 Vict. C. 49) section 27 of which provided that " in this Act, unless the contrary intention appears, ' submission ' means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not ".

The action was for the price of goods sold, and it appeared that the defendants sent a bought-note, duly signed by them, to the plaintiffs' agents, containing the following provision :

> " Any dispute arising on this contract to be settled by arbitration in Liverpool."

On the same day the plaintiffs' agents signed a sold-note which contained no provision for arbitration whatever. It was held that section 27 required an agreement signed by both parties and that as there was no such agreement there was no valid reference to arbitration.

In the latter case, it was held that an arbitration clause found in the charter party was not applicable to the contract evidenced by the Bill of Lading, and to disputes arising between the shipowners and the holders of the Bill of Lading under that document the Bill of Lading being the primary document to be considered in that case.

It was sought to bring into the Bill of Lading the arbitration clause in the charter party by virtue of the following words in the Bill of Lading :—

> " William Malcolm Mackay or to his assigns, he or they paying freight for the said goods, with other conditions as per charter party with average accustomed " and " Deck load at shippers' risk, and all other terms and conditions and exceptions of charter to be as per charter party, including negligence clause."

The House of Lords refused to permit such a construction of the Bill of Lading. The speech of Lord Atkinson at page 6 states the principle of construction thus—

> " I think it would be a sound rule of construction to adopt that when it is sought to introduce into a document like a Bill of Lading—a negotiable instrument—a clause such as this arbitration clause, not germane to the receipt, carriage or delivery of the cargo or the payment of freight,—the proper subject-matters with which the Bill of Lading is conversant,—this should be done by distinct and specific words, and not by such general words as those written in the margin of the Bill of Lading in this case."

Counsel for the respondent argued that the words " terms as per your contract Ref. No.664 dated 22nd June, 1950 ", in the respondent's cable did not include the arbitration clause and referred only to what was stated in the appellant's letter in regard to the Terms of Payment. We are unable to uphold his contention. This is not the respondent's first business transaction with the appellant. The respondent's plea that the arbitration clause was unknown to him cannot be accepted in view of the appellant's letter dated 4th April, 1949. It reads :

> " We duly received your of the 19th March enclosing Contracts 001/49 and 002/49, and would like to point out to you that these purchases from you have already been covered by our Contracts which are made under the Rules of the Terms and conditions of the Rubber Trade Association of London. We naturally assume that these terms and conditions are well known to you and hope that you are agreeable to them. As you know they fully protect you in every respect."

Even in the letter by which the instant contract was concluded pointed attention is drawn to the fact that disputes arising on the contract are to be settled by arbitration. The fact that that clause is printed in the margin of the document is no justification for treating it as if it did not exist.

According to the law of England which regulates the transaction in the instant case there is nothing which requires that the agreement to refer a dispute to arbitration should be a formal document signed by both parties. The requirements of that law are that there must be an agreement in the sense that the parties must be *ad idem* and that the agreement must be in writing. The view we have taken finds support in the case of *Frank Fehr & Co., vs. Kassan Jivraj & Co., Ltd.*, (1949) 82 LIL. Rep. 673 which is quoted at p. 25 of the 15th Edition of Russell on Arbitration. Such an agreement may even be extracted from the correspondence between the parties. It may even be incorporated by reference as in the appellant's letter

of 4th April, 1949. In the instant case the respondent is not free to plead ignorance of the provision to refer disputes to arbitration as it is not only stated expressly in the formal letter of April, 1949, explaining the terms of business but it is also included in the letter by which the contract was concluded. The contention that there has been no valid agreement to refer is not entitled to succeed.

Even applying the test of our Law the respondent will not be heard to say in the instant case that there was no submission to arbitration. The only requirement of a voluntary submission is that the parties should consent to it either expressly or tacitly by conduct or action.

Once it is held that there was an agreement to refer all disputes to arbitration the only question that remains to be decided is whether the arbitration was properly held in England as provided in that clause. We think the arbitration was properly held in England, and that the petitioners correctly made an application to enforce it in the Queen's Bench Division of the High Court of England.

In our opinion the learned District Judge should not have set aside the order that the Judgment should be registered under section 3 of the Reciprocal Enforcement of Judgments Ordinance. We accordingly set aside the order of the learned District Judge and allow the appeal with costs in both Courts.

Pulle, J.
I agree.

Appeal allowed with costs.

Present : De Silva, J. & Sansoni, J.

THE ATTORNEY-GENERAL vs. R. V. WILLIAM *et al.*

S. C. No. 12—*D. C.* (*Crim.*) *Jaffna No.* 4489

Argued on : 4th and 5th August, 1955
Decided on : 22nd August, 1955

Bribery Act, No. 11 *of* 1954—*Indictment without preliminary inquiry before Magistrate—Sections* 5 *and* 8—*Indictment signed by Crown Counsel—Preliminary objection that absence of Attorney-General's signature contravened section* 78 (1) *of the Act.*

Held : That an indictment under the Bribery Act No. 11 of 1954, signed by a Crown Counsel and presented to the District Court in a case where there has been no preliminary inquiry by a Magistrate, contravenes the provisions of section 78 (1) that no prosecution shall be instituted in any court except by the Attorney-General.

Douglas Jansze, Actg. Solicitor-General, with *L. B. T. Premaratne, C. C.,* and *V. S. A. Pullenayagam, C. C.,* for Attorney-General.

S. Nadesan, Q.C., with *J. V. C. Nathaniel,* for respondent.

Sansoni, J.

This is an appeal by the Attorney-General against the order of the learned District Judge of Jaffna discharging both the accused who appeared before him in these proceedings upon being served with copies of an indictment in the following terms :—

"You are indicted at the instance of Thusew Samuel Fernando, Esquire, Q.C., Her Majesty's Attorney-General, and the charge against you is—

That on or about the 18th day of June, 1954, at Jaffna within the jurisdiction of this Court, you, Rajapaksa Vithanage William, being a public servant, to wit, Examiner of Motor Vehicles in the Department of the Commissioner of Motor Traffic, did accept a gratification, to wit, a sum of Rs. 50/-, as an inducement or reward for your performing an official act, to wit, the examining of and recommending the issue of a license to drive a motor vehicle to P. B. R. S. Cooray of Jaffna, and that you are thereby guilty of an offence punishable under Section 19 (*b*) of the Bribery Act, No. 11 of 1954.

2. That at the time and place and in the course of the same transaction aforesaid you, Arunasalam Sinnapodiya Nagalingam, the second accused above-named, did abet the commission of the said offence of bribery which said offence was committed in consequence of such abetment, and that you are thereby guilty of an offence punishable under Section 19 (*b*) read with Section 25 of the said Bribery Act No. 11 of 1954.

This 19th day of October, 1954.

Sgd......
Crown Counsel."

A preliminary objection was taken by their Counsel based on Section 78 (1) of the Bribery Act No. 11 of 1954 which reads : " No prosecution for any offence under this Act shall be instituted in any Court except by, or with the written

sanction of, the Attorney-General". It was contended that this prosecution had not been instituted by the Attorney-General or with his written sanction. The Act makes provision for the prosecution of two classes of offences, namely, offences of bribery and offences other than bribery, and these two classes are dealt with in Part II and Part V respectively. The offences with which the accused were charged fall within Part II, and all prosecutions for such offences have to be instituted by the Attorney-General.

The earliest stage at which it can be said that a prosecution has been initiated is when the Attorney-General requires a Magistrate, upon a warrant under Section 148 (1) (*e*) of the Criminal Procedure Code, to hold an inquiry in respect of an allegation of bribery—Section 3 (2), but that course was not adopted in this prosecution. A prosecution can also be said to be initiated where without such preliminary inquiry the Attorney-General indicts the offender before the Supreme Court or the District Court, or arraigns him before a Board of Inquiry—Section 5 and Section 8. It will be observed that the Attorney-General alone is empowered to act under Sections 3 (2), 5 and 8.

There are two Sections which confer upon the Attorney-General the power to indict for bribery. One is Section 5 which reads :—

> " If the Attorney-General is satisfied that there is a *prima facie* case of bribery he may—
> (*a*) where the offender is not a public servant, indict the offender before the Supreme Court or the District Court, as the Attorney-General may determine and
> (*b*) where the offender is a public servant, either; indict the offender as provided in the preceding paragraph (*a*) or arraign the offender before a Board of Inquiry, after informing the Public Service Commission."

The other is Section 8 which empowers the Attorney-General to indict a person for bribery without a preliminary inquiry by a Magistrate's Court as provided in Chapter 16 of the Criminal Procedure Code.

Now although the two accused were indicted in this case upon a supposed exercise of the powers vested in the Attorney-General by Sections 5 and 8, the indictment presented was not signed by the Attorney-General but by a Crown Counsel, and the preliminary objection was based on this omission. The learned Judge in his order took the view that the general scheme of the Act was that the Attorney-General himself should be concerned with the prosecution of cases arising under the Act, and he held that this was not a prosecution by the Attorney-General. The point that arises for decision is whether an indictment signed by a Crown Counsel and presented to the District Court in a case where there has been no preliminary inquiry by a Magistrate, contravenes the express provision of Section 78 (1) that no prosecution shall be instituted in any Court except by the Attorney-General.

The Act contemplates power being exercised by the Attorney-General in three different ways. In some matters he must act himself; in other matters he may act himself or through an officer authorised by him; in yet other matters he may authorise an officer *in writing* to take action.

Instances where the Attorney-General himself must act are :—

(1) Under Sections 3 (2) and 3 (3) to require a Magistrate upon warrant under Section 148 (1) (*e*) of the Criminal Procedure Code, to hold an inquiry under Chapter 16 of that Code, and at the conclusion of the inquiry to require the Magistrate to record such further evidence as the Attorney-General may consider necessary.

(2) Under Section 4 (1) by written notice (*a*) to require an accused person to furnish a sworn statement in writing of his property and the property of the members of his family; (*b*) to require the Manager of any Bank to produce the accounts of an accused person or of any member of his family; (*c*) to require the Commissioner of Income Tax to furnish all information available to him relating to the affairs of an accused person or any member of his family; (*d*) to require the person in charge of any Government Department or of a Local Authority or of a scheduled institution to produce any document in his possession or under his control.

(3) Under section 42 to select the members of a Board of Inquiry.

(4) Under section 80 (2) to determine how long a person remanded to Fiscal's custody in default of bail should be kept in such custody.

Instances where the Attorney-General may act himself or through an officer authorised by him are :

(1) Under section 3 (1) to direct and conduct the investigation of allegations of bribery.

(2) Under section 3 (4) to direct in writing any person to appear and answer questions orally on oath or affirmation, to state facts by means of an affidavit, and to produce documents.

(3) Under sections 4 (3) and (4) to enter and search any Department, office or establishment of the Government with such assistance as may be necessary; and to apply to any public servant or any other person for assistance in the exercise of his powers and

and the discharge of his duties under the Act.

(4) Under section 7 to apply to such Magistrate as the Attorney-General may determine for a search warrant to enter and search any place or building and to remove anything relevant to an investigation.

Instances where an officer authorised in writing by the Attorney-General may act are :

(1) Under section 11, to present the case against a Public Servant who is arraigned before a Board of Inquiry.

(2) Under section 81 (1) to authorise a Magistrate to tender a pardon to a person directly or indirectly concerned in or privy to an offence of bribery, with the view of obtaining the evidence of such a person.

(3) Under section 83, to delegate to the Solicitor-General any of his powers and functions under the Act, except the power to sanction civil or criminal proceedings.

That the legislature intended to draw a clear distinction between these three classes of cases becomes apparent when one considers some of these sections which I have already referred to. If one considers sections 3, 4 and 7, to mention only three, one finds that each of them requires the Attorney-General to exercise certain powers himself, and authorises him to exercise other powers through an officer authorised by him. It is only too clear that this distinction has been deliberately drawn, and there is no room for the argument that where a Crown Counsel acts it should be presumed that he acted with the authority of the Attorney-General. The reason, I think, is obvious. Some of the powers conferred on the Attorney-General are of such magnitude that it was probably considered necessary that they should be exercised by him and by him alone to ensure that his judgment and decision will serve as a guarantee that those powers would be properly exercised.

When we examine the question arising on this appeal in the light of these considerations, we can understand why section 5 empowers the Attorney-General (and nobody else) if he is satisfied that there is a *prima facie* case of bribery, to indict or arraign an offender, and also why section 8 confers on the Attorney-General (and nobody else) the power to indict a person for bribery without a preliminary inquiry by a Magistrate. Section 5 makes the opinion of the Attorney-General the deciding factor as to whether there should be a prosecution or not. Section 8 brings into being an entirely novel procedure, since it abolishes such safeguards as the preliminary examination of witnesses on oath or affirmation, and their cross-examination. Section 3 (2) is another drastic provision which relates to cases where a preliminary inquiry has been held by a Magistrate : the Magistrate is not permitted to exercise the normal judicial function of discharging the accused in a case where he considers that no useful purpose will be served by committing him for trial, but is required instead to transmit the record to the Attorney-General. Powers such as these which have been entrusted to the Attorney-General are not to be regarded lightly; they must be exercised by him and him alone.

Mr. Nadesan who appeared for the accused submitted that the words " no prosecution shall be instituted except by the Attorney-General " to be found in section 78 connote that the Attorney-General and nobody else shall institute the prosecution. He drew attention to the analogous provisions of section 148 of the Criminal Procedure Code which enumerate the different ways in which proceedings shall be instituted by different categories of persons in a Magistrate's Court, and his contention was that since the Act empowered the Attorney-General to indict an offender the signing of the indictment by the Crown Counsel would not be in compliance with the Act, for if Crown Counsel signs it is he who indicts.

Now prosecution for an offence of bribery can be instituted in one of two ways :

(1) By warrant under the hand of the Attorney-General requiring a Magistrate to hold an inquiry under Chapter 16 of the Criminal Procedure Code—section 3 (2).

(2) By indictment before the Supreme Court or District Court, or arraignment before a Board of Inquiry—section 5. It seems to me that it is only where the Attorney-General signs the warrant or the indictment or the order for arraignment that the prosecution can be said to have been instituted by him, just as it is only where he signs the written sanction for the institution of proceedings that it can be said that they have been instituted with his written sanction.

Mr. Nadesan also relied on the judgment of Pereira, J. in the case of the *Attorney-General vs. Silva* (17 N. L. R. 193) where the learned Judge had to interpret the provisions of sections 336 and 393 of the Criminal Procedure Code. Under section 336 there can be no appeal from an acquittal by a District Court or a Magistrate's Court except " at the instance or with the written sanction of the Attorney-General ". In that case the Solicitor-General acting on a delegation under section 393 preferred a petition of appeal which was in the name of the Attorney-General, but signed by himself as Solicitor-General.

Pereira, J. held that the petition of appeal should in such a case have been in the name of the Solicitor-General, and that one which ran in the name of the Attorney-General should have been signed by the Attorney-General. This position is all the clearer in view of the many references to cases where officers other than the Attorney-General have been specifically empowered to act where the legislature has thought fit to empower them.

The Solicitor-General relied strongly on section 9 (1) of the Act which directs that " an indictment prepared in the manner prescribed by section 186 of the Criminal Procedure Code shall be transmitted by the Attorney-General to the Court of trial selected by him ". We submitted that since section 186 of the Code provides that all indictments shall be brought in the name of the Attorney-General and be in accordance with the prescribed form, and shall be signed by the Attorney-General or the Solicitor-General or a Crown Counsel or some Advocate authorised by the Attorney-General, the indictment in this case could have been signed by any of those persons. But this argument overlooks the purpose for which section 186 of the Code has been referred to in section 9. Section 9 merely provides that the indictment should be *prepared* in the manner prescribed in section 186, and not that it may be signed by the different officers mentioned in section 186. The reference to section 186 is limited in scope, and is confined to the manner of the preparation of the indictment, which I understand to mean the form in which it shall be made ready or drawn up. To that extent the indictment in question is in order, but I cannot extend the meaning of the word " prepared " to include the essential operation of signing. This duty, it seems to me, has already been cast upon the Attorney-General by sections 5 and 8. I would refer in this connection to section 165 F of the Criminal Procedure Code which speaks of an indictment being " drawn up " and " signed " as two distinct operations : also to section 188 of the Civil Procedure Code which similarly speaks of a decree being " drawn up " and " signed ". Section 9 does not, it will be noted, require the Attorney-General to prepare the indictment, and this duty can therefore be performed by any officer in his Department but it does require the Attorney-General to transmit the indictment to the Court of trial selected by him, and to transmit copies of the indictment for service on the accused persons to the Fiscal. A later provision of the section requires the Fiscal to make return of such service to the Court of trial and to the Attorney-General *or any officer appointed by the Attorney-General* to represent him. Here again, then, we find a provision which draws a sharp distinction between the Attorney-General acting himself and acting through an officer appointed by him.

The Solicitor-General, however, contended that where the Act requires the Attorney-General to sign a document it says so, and therefore the absence of any provision in sections 5 and 8 requiring the Attorney-General to sign the indictment implies that any other officer of his Department mentioned in section 186 of the Code may sign it.

It is true that instances of the Attorney-General being required to sign documents are to be found, for example, in section 11, under which he may authorise in writing an Advocate or Proctor or other officer to present the case against the public servant before a Board of Inquiry, and in section 83 under which he may by writing under his hand delegate all but one of his powers and functions to the Solicitor-General. But it is one thing for the Act to require the Attorney-General to confer authority, or to delegate his functions, or to give directions, by writing under his hand ; it is a different thing to require that he and he alone—for that, it seems to me, is the necessary inference in the absence of all reference to any other person exercising the function—should indict. The very reference to the act of indicting necessarily involves the duty of signing, for one cannot indict except by a written document, whereas one can delegate or authorise or direct orally.

In passing I would refer to section 6 (1) of the Act which enacts that such of the provisions of the Criminal Procedure Code as are not inconsistent with the provisions of the Act shall apply to proceedings in any Court for bribery, but in my opinion those provisions of section 186 which empower persons other than the Attorney-General to sign as indictment are inconsistent with sections 5 and 8 of the Act, and cannot therefore apply to this case.

Section 393 of the Code which empowers the Solicitor-General and Crown Counsel to exercise all or any of the powers conferred upon, and to perform all or any of the duties imposed upon the Attorney-General *by the Code* if the Attorney-General so directs, except the power to enter a *nolle prosequi*, and to pardon an accomplice, does not apply either.

The absence from the Act of any provision similar to section 393 of the Code, and the pointed references in the Act to certain duties being performed by the Attorney-General alone, and others being performed by him or officers authorised by him, necessarily flow from the far-reaching nature of certain of the powers conferred upon the

Attorney-General by the Act. It is only reasonable to presume that the legislature designedly abstained from conferring upon any officer but the Attorney-General the right to exercise the more responsible powers conferred upon that officer. It was not prepared to permit the Attorney-General to delegate the power to sanction civil or criminal proceedings. This is the power which has to be exercised in connection with the prosecution of offences other than bribery. It would not be unreasonable to expect that the corresponding power of indicting or arraigning, in the case of offences of bribery, should be exercised by the Attorney-General and nobody else, and it is not easy to see why the legislature appears to have empowered the Attorney-General by writing under his hand to delegate to the Solicitor-General the power to indict, but not the power to sanction civil or criminal proceedings. The question does not however arise for decision in this case whether section 83 requires such an interpretation to be placed upon it, since it is not suggested that there has been any such delegation, and in any event the indictment has not been signed by the Solicitor-General.

For the reasons I have given I would hold that the indictment in this case failed to comply with the requirements of sections 5, 8 and 78 (1) of the Act. The District Judge therefore had no jurisdiction to try the accused upon such indictment, and the proper order to be made was that the indictment was quashed. I would make that order now and dismiss this appeal.

De Silva, J.
I agree.

Appeal dismissed.

Present : Weerasooriya, J.

FOOD AND PRICE CONTROL INSPECTOR vs. PIYASENA

S. C. 594/1954—*M. C. Matale* 4316

Argued on : 9th and 10th November, 1955
Delivered on : 22nd November, 1955

Control of Prices Act, No. 29 of 1950—Price Order made under section 4 (1)—Charge of contravening price order—Price order referred to in the charge, but notification in Gazette of Minister's approval required by section 4 (7) of the Act not referred to in charge—Price order produced at trial, but not notification of Minister's approval—Does such omission entitle an accused person to an acquittal—Judicial notice—Evidence Ordinance Section 57.

Held: That for proving an offence under the Control of Prices Act No. 29 of 1950 for contravening a price order made under section 4 (1) of the Act, it is not obligatory on the prosecution to place before Court the fact (whether as a matter to be proved by evidence or to be taken judicial notice of) that the price order has duly received the Minister's approval, and, therefore, is not necessary to refer to it in the charge or produce the *Gazette* notification of its approval.

Per Weerasooriya, J.—In the present case there was publication in the *Gazette* (as proved by the production of P 4) of what purported to be an order under section 4 (1) of the Control of Prices Act No. 29 of 1950, and I see no reason why in the circumstances the Court should not take judicial notice of the order referred to in P 4 as one which was duly made and signed under section 4 (1) of the Act. Alternatively, even if the Court were not disposed to take judicial notice of the order referred to in P 4, it seems to me that P 4 itself constitutes *prima facie* proof that such an order was duly made and signed, since under section 78 (3) of the Evidence Ordinance the original order (being, in my view, a public document issued by a department of Her Majesty's Government) may be proved by a copy or extract of it contained in the *Government Gazette*.

Cases referred to : *Solicitor-General vs. Aradiel* 50 N. L. R. 233.
Menon vs. Lantine 43 N. L. R. 34.
Bogtstra vs. The Custodian of Enemy Property 26 C. L. W. 5.

H. A. Wijemanne, C. C., with *Shiva Pasupati, C. C.*, for the appellant.
G. E. Chitty with *Daya Perera*, for the respondent.

Weerasooriya, J.

The respondent to this appeal was charged under the Control of Prices Act, No. 29 of 1950, with the commission of an offence the gist of which was that he sold two pounds of wheat flour at a price which, in terms of a certain price order referred to in the charge, was two cents in excess of the maximum retail price of forty eight cents.

The price order in question was one made under Section 4 (1) of the Act. Section 4 (3) provides that an order under Section 4 (1) shall come into operation when it is made and signed.

The Act contains further provision for an order when signed to be published in the Government Gazette and also to be submitted to the Minister, who is empowered either to approve or rescind it. Under Section 4 (6), where an order is rescinded notice of such rescission shall be published in the Gazette and the order shall be deemed to be rescinded with effect from the date of such publication " but without prejudice to anything done or suffered thereunder or any right, obligation or liability acquired, accrued or incurred thereunder "; and under Section 4 (7) an order which has been approved by the Minister is, upon notification of the approval in the Gazette, deemed to be as valid and effectual as if it were part of the Act itself.

These provisions make it clear, I think, that once an order has been made and signed (and also, perhaps, duly published) it becomes fully operative independently of any further efficacy it may receive from the subsequent notification of its approval by the Minister. That the particular order under consideration was duly made, signed and published was sought to be proved by the Gazette notification P 4 which was put in evidence by the prosecution. The charge framed against the respondent also contained a reference to the Gazette in which the order was published.

At the close of the case for the prosecution although the defence was called upon to meet the charge no evidence was adduced on its behalf and counsel for the respondent, instead, addressed certain submissions to Court on an acceptance of one of which, at least, the Magistrate acquitted the respondent. The ground for the acquittal is set out in these terms in the Magistrate's order : " The failure on the part of the prosecution to produce the Gazette notification of the approval by the Minister of the price order made, or even to make mention or reference to it in the *plaint* is, in my opinion, a fatal irregularity which will enure to the benefit of the accused ". It would seem that the reference to the " plaint " in the above quoted passage was intended to be a reference to the charge as framed against the respondent, but whether the order of the learned Magistrate is regarded in its express terms or in the amended form suggested by me, it is clear that it is not one which can be supported. In my opinion the charge framed against the respondent (which follows the wording of the accusation in the plaint) contained all the particulars of the offence which need have been given under Section 167 of the Criminal Procedure Code. For the proof of the offence charged it was not obligatory on the prosecution to have placed before the Court the fact (whether as a matter to be proved by evidence or to be taken judicial notice of) that the price order had duly received the Minister's approval, and it was therefore not necessary to refer to it in the charge or produce the Gazette notification of its approval. Indeed, Mr. Chitty who appeared for the respondent did not attempt to maintain that the ground given by the learned Magistrate for acquitting the respondent was valid. Nevertheless, he asked that this Court should not interfere with the order of acquittal since, in his submission, the prosecution had failed to adduce evidence that the price order had been duly made and signed. The basis of this submission (if I understood it correctly) is as follows : An order under Section 4 (1) of the Act is not a matter of which a Court is required to take judicial notice under Section 57 of the Evidence Ordinance. Therefore the Gazette notification P 4 purporting to contain a copy of the order in question did not constitute *prima facie* proof of that order, and the prosecution should have produced in evidence either the original order or a certified copy of it under The Proof of Public Documents Ordinance (Cap. 12). In support of this submission Mr. Chitty referred to the case of the *Solicitor General vs. Aradiel* 50 N. L. R. 233 where it was held that a closing order made under the Shops Ordinance, No. 66 of 1938, did not come within the classes of documents enumerated in Section 57 of the Evidence Ordinance and a Court is, therefore, not bound to take judicial notice of it and the prosecution should have produced it in evidence. But while Section 57 of the Evidence Ordinance deals with what facts a Court is bound to take judicial notice of, there is ample authority for the view that the Court may, in its discretion, take judicial notice of various other facts not enumerated in Section 57 though not bound to do so. See, for example, *Menon vs. Lantine* 43 N. L. R. 34 and *Bogtstra vs. The Custodian of Enemy Property* 26 C. L. W. 5.

In the present case there was publication in the Gazette (as proved by the production of P 4) of what purported to be an order under Section 4 (1) of the Control of Prices Act No. 29 of 1950, and I see no reason why in the circumstances the Court should not take judicial notice of the order referred to in P 4 as one which was duly made and signed under Section 4 (1) of the Act. Alternatively, even if the Court were not disposed to take judicial notice of the order referred to in P 4, it seems to me that P 4 itself constitutes *prima facie* proof that such an order was duly made and signed, since under Section 78 (3) of the Evidence Ordinance the original order (being, in my view, a public document issued by a department of Her Majesty's Government) may be proved by a

copy or extract of it contained in the Government Gazette.

I, therefore, set aside the order of acquittal and remit the case for a fresh trial before another Magistrate. But having regard to the nature of the offence charged and the allegation that it was committed as far back as the 6th of March, 1954, and the principle of law sought to be established in filing this appeal having now been fully vindicated, the complainant will, no doubt, consider whether the charge should be proceeded with or whether this is not a proper case for an application under section 195 of the Criminal Procedure Code for its withdrawal.

The respondent will pay the Crown Rs. 105/- as costs of this appeal.

Set aside.

IN THE COURT OF CRIMINAL APPEAL

Present : GRATIAEN, J. (President), GUNASEKARA, J., K. D. DE SILVA, J.

DISSANAYAKE vs. REGINA

Appeal No. 12 *of* 1955—*S. C.* 16/*M. C. Panadure* 28939 *with application* 17 *of* 1955

Argued on : 2nd and 3rd May, 1955
Delivered on : 20th May, 1955

Court of Criminal Appeal—Criminal breach of trust—Accused cashier of Co-operative Society charged with the offence for misappropriating moneys—Order by Deputy Registrar of Co-operative Societies after audit directing accused to pay the amount—Section 50 B Co-operative Societies Ordinance (Ch. 107) amended by Act No. 21 of 1949—Accused's failure to pay—Is the offence of criminal breach of trust under the Co-operative Societies Ordinance different from that under the Penal Code ?—Burden of proof—Deputy Registrar's right to delegate his powers under section 50 B

Held : (1) That the offence of criminal breach of trust under section 50 B of the Co-operative Societies Ordinance is the same as the offence defined under section 388 of the Penal Code.

(2) That section 50 B of the Ordinance merely facilitates, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion, if he has failed to pay over or produce or duly account for monies admitted to be due by him.

(3) That the Court should acquit an accused in such a charge if the ingredients of the offence under section 388 of the Penal Code, is not established by the prosecution, and there is nothing to show that the burden of proof has been shifted to an accused person under section 50 B.

(4) That the Registrar or the Deputy Registrar has power under section 50 B to authorize any person to receive the money due by the co-operative officer at a suitable time and place.

Cases cited : *King vs. Ragal* (1902) 5 N. L. R. 314.
Somanandar vs. Uduma Lebbe (1924) 24 N. L. R. 146.
Gunasekere vs. The King (1952) 53 N. L. R. 522.

M. M. Kumarakulasingham, for the accused-appellant.
V. T. Thamotheram, C. C., for the Attorney-General.

GRATIAEN, J.

The appellant was the cashier of a Co-operative Society registered under the provisions of the Co-operative Societies Ordinance (Cap. 107) as amended by the Co-operative Societies (Amendment) Act No. 21 of 1949. He was convicted at the Kalutara Assizes of the offence of " criminal breach of trust " in the following circumstances :—

The accounts of the Society had been audited in March, 1953, in terms of section 17 of the Ordinance, and it appeared from books and documents maintained by the appellant as cashier that he was accountable for a sum of Rs. 24,099/39 entrusted to him from time to time in that capacity. A letter P12B dated 11th May, 1953, was thereupon addressed to him by the Deputy Registrar of Co-operative Societies (who was admittedly vested by the appropriate Minister with all the statutory powers of a Registrar) " requiring " him " to pay over the said sum of Rs. 24,099/39 on demand by Mr. D. P. Gunawardene, Assistant Registrar of Co-operative Societies ". It purported to be a requisition under section 50B of the Ordinance.

This letter was forwarded to the appellant together with a covering letter P12A dated 13th

August, 1953, from Mr. Gunawardene calling upon him to hand over the money in question to Mr. Gunawardene at the latter's office at 10 a.m. on 18th May, 1953. No part of the money was, however, paid by the appellant at the specified time or at any time thereafter. He was in due course charged with criminal breach of trust, punishable under section 50 the Ordinance (as amended by the Act of 1949) which reads as follows :—

> " 50B. It shall be lawful for the Registrar, after the accounts of a registered Society have been audited as provided in Section 1 after an inquiry or inspection into the affairs of a registered Society has been held under section 35, to require any person being a person entrusted with or having the dominion of any money in his capacity as an officer or a member or a servant of the Society, to pay over or produce such amount of money or balance thereof which is shown in the books of accounts or statements kept or signed by such person as held or due from him as such officer, member or servant; and if such person, upon being so required, fails to pay over or produce such amount of money or balance thereof forthwith or to duly account therefor, he *shall be guilty of criminal breach of trust*, and shall on conviction be subject to imprisonment of either description for a term which may extend to ten years and also be liable to a fine."

It is necessary to give a meaning to the words " shall be guilty of the offence of criminal breach of trust ". The offence itself has not been separately defined in either the Ordinance or the amending Act. We receive guidance, however, from the interpretation consistently given by the Supreme Court to these identical words in a similar context in section 392A of the Penal Code (introduced by Ordinance No. 22 of 1889) relating to alleged defalcations by public servants. Section 50B does not create a new offence, also designated " criminal breach of trust ", containing elements separate and distinct from the elements of the well-known offence bearing the same name and defined in section 388 of the Penal Code. Applying the *ratio decidendi* of the earlier decisions in *The King vs. Ragal* (1902) 5 N. L. R. 314, *Somanander vs. Uduma Lebbe* (1924) 24 N. L. R. 146 and *Gunasekera vs. The King* (1952) 53 N. L. R. 522, we hold that the intention of section 50B of the Ordinance was merely to facilitate, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion if he has failed to pay over or produce or " duly account for " monies admitted under his own hand to be due by him in his official capacity. In other words, proof of the facts enumerated in section 50B furnishes *prima facie* evidence—indeed, strong *prima facie* evidence—that the officer concerned had dishonestly converted the funds to his own use and thereby committed the offence of criminal breach of trust. No burden, however, is imposed on the accused person to prove his innocence in such a situation, so that if the Court, upon consideration of all the evidence, is left in reasonable doubt as to whether, for instance, the essential element of dishonesty has been established against him, he must be acquitted.

Proof of the facts specified in section 50B does not give rise to an irrebuttable presumption that the offence of " criminal breach of trust " has been committed. That theory must be rejected if we take as a guide to the interpretation of this penal enactment the particular mischief which the legislature intended to remove (as in cases now covered by section 392A of the Code) and also pay regard to the earlier construction given by the Courts to the language of the earlier penal statute which meets a precisely similar difficulty of proof where defalcation by a public servant is alleged. Parliament could not have conceived that the stigma of a conviction for " criminal breach of trust " involving liability to a term of imprisonment for 10 years was appropriate to a case where the dishonesty of a man was left in doubt at the end of his trial or was conclusively negatived. Nor is there compelling evidence in section 50B of an intention to shift the burden of proof to an accused person charged with an offence of such gravity.

For these reasons the learned Commissioner quite correctly directed the jury that they could not convict the appellant in the present case unless they were satisfied that he had dishonestly converted to his own use the monies admittedly entrusted to him as cashier of the Society. The verdict necessarily implies that his own explanation at the trial of his failure to produce the money was rejected as quite untrue. The evidence accepted by the jury therefore established that he had failed " duly to account for " the shortage in the absence of an explanation, consistent with his innocence, which might reasonably be true. In the result, the Crown discharged the heavy burden of establishing the appellant's guilt. No complaint was made before us to the effect that the verdict was unreasonable.

We were invited by the defence to quash the verdict on the ground that the appellant had only been " required " to produce the money by a person who was not authorised by section 50B to call for it. The argument was elaborated as follows :—

> (1) Only the Registrar or an officer duly vested with the statutory powers of a Registrar is authorised to " require " the payment or proportion of money so

as to satisfy the conditions laid down by Section 50B; powers cannot validly be delegated;

(2) in addition, the officer authorised by Section 50B must "require" the payment (or production) of the money to (or before) himself and no one else;

(3) although the Deputy Registrar was vested with the requisite statutory powers, his letter P 12B amounted only to an invalid delegation to Mr. Gunawardene of the power to "require" the payment or production of the money;

(4) Mr. Gunawardena alone "required" the appellant to pay the money in terms of P 12A; but the appellant was under no obligation to comply with this demand as Mr. Gunawardene admittedly had no power to take action under Section 50B.

The first of these submissions is certainly correct, but the rest of the argument is without substance. The statutory power of the Deputy Registrar to require the payment of the money in this case is conceded, and his letter P 12B, although some parts of it were drafted in unduly legalistic terms, constituted a valid demand for payment under Section 50B. He was of course entitled to "require" that the money should be paid to himself, but he was equally entitled, for reasons of administrative convenience, to nominate some other person to receive the money at a suitable time and place. The words "on demand" in P 12B are not indicative in the present context of a decision by the Deputy Registrar to delegate or surrender his statutory powers to Mr. Gunawardene. On the contrary, Mr. Gunawardene's letter P 12A to the appellant was written in accordance with the Deputy Registrar's wishes and under the authority of P 12B which it accompanied. No usurpation by Mr. Gunawardene of statutory powers which he did not enjoy was involved at any stage of the transaction. The letters P 12B and P 12A, read together, meant, and were understood to mean, that the Deputy Registrar retained control of the situation throughout and that he had, on his own initiative directed Mr. Gunawardene to call for and receive the money, if forthcoming, at a very early date at a time and place which was to be notified to the appellant.

It has been brought to our notice that the arguments for the appellant on this issue receive support from an unreported decision pronounced by another learned Commissioner at the Kandy Assizes on 26th May, 1954, *R vs. Jayawardene* S. C. 27/M. C. Polonnaruwa, 11993. The reasons set out in our judgment sufficiently explain why we find ourselves unable to adopt the view expressed on that occasion.

We dismiss the appellant's appeal and refuse his application. The conviction is affirmed.

GUNASEKARA, J
I agree.

K. D. DE SILVA, J
I agree.

Appeal dismissed.

Present: GRATIAEN, J. & FERNANDO, J.

MENDIS & ANOTHER vs. COMMISSIONER OF LOCAL GOVERNMENT.

S. C. No. 187 (*Inty.*)—*U. C. Appeal L*—1/29/9

Argued on: 27th September, 1955
Decided on: 6th October, 1955

Local authority—Urban Council—Claim of pension by retiring officer from Council—Order by Local Government Service Commission directing Council to pay pension in full—Failure of Council to comply with Commission's direction—Application by Commission for writ of Mandamus *on Council—Costs of the application paid out of Council's funds—Costs surcharged against members of Council by the Auditor-General—Validity of—Scope of section* 194 (1) *Urban Councils Ordinance* 61 *of* 1939—*Meaning of "Misconduct"—English Law compared.*

On the retirement of an officer of the Urban Council of Panadura, the members of the Council recommended to the Local Government Service Commission, in whom the power to grant pension was statutorily vested, that the officer should be paid a reduced pension on account of his unsatisfactory work. The Commission rejected this, and directed payment of the pension in full. The Council, however, tendered a cheque to the Commission at the reduced rate for payment, which the Commission returned and then applied to the Supreme Court for a writ of *mandamus* on the Council. Before the action was heard, the Council paid the pension in full, but the Supreme Court condemned the Council to pay the costs of the application, which was ultimately met from the Council's funds.

The Auditor-General charged this amount to the Chairman and members of the Council on the ground that the loss to the Council was incurred by the negligence or misconduct of those persons within the meaning of section 194 (1) of the Urban Councils Ordinance No. 61 of 1939.

Held : That the Chairman and members were not liable as their conduct in this case was not illegal or improper or negligent or tainted by bad faith so as to amount to misconduct, and consequently section 194 (1) of the Ordinance did not apply.

Per GRATIAEN, J.—" It is therefore clear that in Ceylon any member of an Urban Council may be compelled not only to refund the amount of any payment (made or authorised by him) which is " contrary to law ", but also to make good " any loss suffered by the Council owing to his negligence or misconduct as such member ". If the payment authorised is contrary to law, the liability to be surcharged is absolute ; but if any deficiency or loss is not tainted by illegality, negligence or misconduct is a condition precedent to liability ".

Cases referred to : *R. vs. Roberts* (1908) 1 K. B. 247 C. A.
Re Dickson (1948) 2 K. B. 95.
Davies vs. Carperthwaite (1938) 2 A. E. R. 685.

S. P. C. Fernando with *Stanley Perera*, for the appellants.

A. C. Alles, C. C., for the respondent.

E. R. S. R. Coomaraswamy with *B. A. R. Candappa*, for the Urban Council. (party noticed)

GRATIAEN, J.

This is an appeal under section 195 of the Urban Councils Ordinance No. 61 of 1939 against an order made by the Auditor General on 13th July, 1954, charging against the 1st and 2nd appellants, as members of the Panadura Urban Council, a sum of Rs. 3,899/- representing a loss to the Council alleged to have been incurred in consequence of their " misconduct ". A similar order has been made against other members of the Council who are not parties to the present appeal.

The 1st appellant had been the Chairman, and the 2nd appellant a member, of the Council from 1st January, 1950, until 24th April, 1953. The Superintendent of Works of the Council, who had retired from office on 15th March, 1950, had requested the Local Government Service Commission (hereafter called ' the ' Commission ') to fix the amount payable to him as retiring pension under the Council's by-laws. He had originally been employed directly by the Council, but was transferred by operation of law to the service of the Commission under the provisions of the Local Government Service Ordinance No. 43 of 1945. Accordingly, the power and discretion to grant him a pension on retirement, though previously vested in the Council, now vested in the Commission. Nevertheless, under section 51 of the Ordinance as amended by section 19 of the Act No. 8 of 1949 the ultimate financial responsibility for the pension payable to him by the Commission continued to be imposed on the Council.

Some members of the Council, including the appellants, took the view that the retiring officer had not qualified himself for the maximum pension payable under the by-laws. On 9th October, 1950, the Council also resolved by a majority vote that the payment of his pension should in any event be withheld "until this officer hands over all documents that were in his charge". The terms of this resolution were communicated to the Commission which later decided, however, that the officer should be granted the maximum pension payable to him under the Council's by-laws with effect from the date of his retirement.

The appellants and certain other members of the Council were dissatisfied with the Commission's decision, and a sub-committee was appointed to make counter proposals in the matter. In due course, the Council passed a resolution on 9th July, 1951, recommending to the Commission that, as the work and conduct of the officer concerned had not been " altogether satisfactory ", his pension should be fixed at a reduced rate representing two-thirds of the maximum pension. This recommendation was duly considered by the Commission but was rejected. The question was again brought up for discussion at a meeting of the Council on 24th August, 1951. The 1st appellant, as Chairman, proposed " that eminent counsel should be consulted and that a further appeal be made to the Local Government Service Commission ". The majority of the members resolved, however, that representations by way of protest should be made to the (then) Prime Minister. In the meantime, the Council acknowledged its liability to make payments to the Commission in respect of the officer's pension at the reduced rate, and a cheque was tendered on this basis on the 19th September, 1951. Three days later, the Commission returned the cheque and at the same time applied to this Court for a mandate in the nature of a writ of *mandamus* to compel the Council to fulfil its statutory obligation to pay the full pension as fixed by the Commission.

The appellants and other members who shared their views now gave up the unequal struggle. They had not succeeded in obtaining an interview with the Prime Minister in time to achieve any

practical results, and they abandoned all hope of persuading the Commission, with whom the final decision in the matter of pensions obviously rested, to alter its earlier ruling. Accordingly, the Council unconditionally acknowledged its liability to make good the full amount of the pension payable. Payment on this basis was made before the *mandamus* proceedings came up for hearing. There remained only the question as to who should pay the costs incurred by the Commission in making the application to the Supreme Court. On that issue this Court decided that the Council must pay the costs which were taxed at Rs. 3,899/-. This amount was accordingly paid out of the Councils funds.

We are now in a position to examine the propriety of the Auditor General's order which is under appeal. Having audited the accounts of the Council for the relevant period as required by section 193 of the Urban Councils Ordinance, he decided, after hearing the appellants, that the expenditure incurred by the Council in paying the Commission's costs in terms of the order of the Supreme Court ought to be charged against the appellants and the other members of the Council who had opposed the payment of the full pension fixed for the retired officer. He purported to make this surcharge in pursuance of section 194 (1) of the Ordinance which provides as follows :—

> " Every auditor acting in pursuance of this Part shall disallow every item of account contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment, and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person and any sum which ought to have been, but is not, brought into account by that person, and shall in every case certify the amount due from such person."

The relevant words of the section which the Auditor General purported to apply to this particular case are : " .....and *shall* charge *against any person accounting* the amount of any deficiency or loss incurred by the *negligence or misconduct* of that person....."

Section 194 (1) corresponds to section 247 (7) of the Public Health Act, 1875, of England, and the words " any person accounting " have been construed to be wide enough to include any member of the local authority whose accounts are before the auditor. *R. vs. Roberts* (1908) 1 K. B. 247 C. A. In order to remove doubts as to whether a narrower interpretation ought to be preferred, the words " any person " were substituted for " any person accounting " in the corresponding section of the later Statute (section 228 of the Local Government Act, 1933)—see *re Dickson* (1948) 2 K. B. 95. It is therefore clear that in Ceylon any member of an Urban Council may be compelled not only to refund the amount of any payment (made or authorised by him) which is " contrary to law ", but also to make good " any loss suffered by the Council owing to his negligence or misconduct as such member ". If the payment authorised is contrary to law, the liability to be surcharged is absolute ; but if any deficiency or loss is not tainted by illegality, negligence or misconduct is a condition precedent to liability.

The Council has doubtless incurred a loss because the majority of its members (including the appellants) persisted for too long in their attempt to persuade the Commission to reconsider its decision to fix the retiring officer's pension at a level which they considered too high. But the question is whether such conduct amounted to ' misconduct '.

The Auditor General presumably had in mind the decision of the Court of Appeal of England in *Davies vs. Cowperthwaite* (1938) 2 A. E. R. 685 which bears some resemblance to the facts now under consideration. The members of an Urban District Council had there resolved to make a contribution out of the rate fund in support of a march of unemployed persons to London to protest against the unemployment assistance regulations. The proposed expenditure was manifestly *ultra vires*, and the Council was restrained by an order of the High Court from making the illegal payment. It was held that the costs incurred by the Council in the injunction proceedings should be surcharged upon those members who has passed the resolution. They had been guilty of " misconduct " within the meaning of section 228 (1) (*d*) of the Local Government Act, 1933—which substantially corresponds to the relevant words of section 194 (1) of the local Ordinance—because " notwithstanding a warning that the conduct which was proposed was unlawful, *and without in any way combatting the correctness of the advice*, they took part in passing a resolution which they had been told was an illegal resolution ". For these reasons, their behaviour constituted ' misconduct' and went far beyond " mere imprudence or want of judgment which cannot be called misconduct ". In sanctioning an illegal expenditure of the rate-payers' money, they had " acted in a way in which no reasonable men, acting reasonably, and desirous of doing their duty to the rate payers according to law, would have acted."

The facts of the present case are clearly distinguishable. The Auditor General has not

suggested that the appellants were actuated by improper motives ; indeed there is no evidence on the record to support such an imputation. It is neither illegal not improper for the elected members of a local authority to make recommendations to the Local Government Service Commission on the subject of pensions which must ultimately be paid out of the rate-payers' money. Let it be assumed that, in seeking to protect the rate-payers, the appellants acted with too much tenacity, and with insufficient tact. As things turned out, their over-enthusiasm during the later stages of the discussions resulted in a loss to the Council, but their behaviour cannot be said to contain that element of bad faith which is necessarily involved in the term ' misconduct.'

I would allow the appeal and quash the order of surcharge by the Auditor General upon the appellants. As this is a first occasion on which the provisions of section 194 of the Ordinance have arisen for clarification in this Court, I think, that each party should bear his own costs in these proceedings.

FERNANDO, J.
I agree.

Appeal allowed.

Present : WEERASOORIYA, J.

HETTIARATCHI vs. PERERA

S. C. 405—*J. M. C. Colombo No.* 47737

Argued and Decided on : 4th October, 1954

Criminal Procedure Code—Section 152 (3)—*Magistrate assuming jurisdiction—Serious nature of the offence—Facts not simple—Undesirability of a summary trial.*

Where one of the charges against an accused was forgery of a cheque for Rs. 10,000/- and the trial took at least four whole days, the Magistrate having assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code on the ground that the facts were simple,

Held : That in view of the serious nature of the offence the Magistrate should not have assumed jurisdiction to try summarily.

Sir Lalitha Rajapakse, Q.C., with *Seyad Ahamed* and *Ananda G. de Silva*, for the accused-appellant.

M. Kanagasundaram, Crown Counsel, for the Attorney-General.

WEERASOORIYA, J.

In this case the Magistrate assumed jurisdiction under Section 152 (3) of the Criminal Procedure Code although one of the charges was, the forgery of a cheque for a sum of Rs. 10,000/-, an offence punishable under Section 456 of the Ceylon Penal Code with a maximum of 20 year's rigorous imprisonment as well as a fine. The reasons stated by the learned Magistrate for assuming jurisdiction are that the facts are simple, that there are no complicated points of law and evidence and that the case could be expeditiously disposed of and otherwise was a proper case for summary trial. As pointed out by the judgment of this Court reported in 49 N. L. R. page 503 the serious nature of the charge is in itself an important factor in determining whether a Magistrate may properly assume jurisdiction under Section 152 (3) of the Criminal Procedure Code. The trial of this case, not taking into account the postponements that were allowed for one reason or other, seems to have taken at least four whole days which itself would show that the facts were not as simple as the Magistrate thought they were when he assumed jurisdiction. The learned Counsel for the appellant has referred to the facts of the case for the prosecution and I am unable to say that they are of a simple nature. I am however principally influenced by the very serious nature of the offence alleged against the accused and I am unable to take the view that an offence of this nature was one in respect of which a Magistrate should have assumed jurisdiction to try it summarily. I therefore set aside the conviction and sentence against the accused and remit the case to the lower court so that non-summary proceedings could be taken in respect of the charges.

Set aside and sent back for inquiry.

IN THE COURT OF CRIMINAL APPEAL

Present : BASNAYAKE, A.C.J. (PRESIDENT), PULLE, J. & WEERASOORIYA, J.

REGINA vs. PERERA AND ANOTHER

Appeals Nos. 105 *and* 106 *with Applications Nos.* 162 *and* 165 *of* 1955.
S. C. 3/*M. C. Colombo* 14281

Argued on : 13th, 14th, 15th and 16th December, 1955
Decided on : 23rd January, 1956

Criminal Procedure Code, sections 233, 160, 161, 286 (1) *and* 302 (1), *meaning of the expression "All statements" in section* 233—*Separate trials for accused jointly indicted : section* 184 *Cr. P. Code—Inspection of scene of crime and experiments thereat : section* 238, *Cr. P. Code—Admissibility of confession : section* 134, *Cr. P. Code and section* 80, *Evid. Ord.—Admissibility of deposition before Magistrate : section* 9, *Evid. Ord. Court of Criminal Appeal.*

The expression "all statements" in section 233 of the Criminal Procedure Code means all statements of an accused, other than his evidence recorded under section 161.

Where accused persons are jointly indicted, whether separate trials should be ordered or not is governed by section 184, Criminal Procedure Code, and is at the discretion of the trial Judge.

Generally speaking, the conducting of experiments at an inspection of the scene of the offence should be avoided unless it is necessary to do so in the interests of justice. Where a view of the scene has been followed by the evidence of the witness who gave the demonstration, there can be no valid objection to the procedure adopted, even though one of the accused did not in person accompany the Judge and jury.

A deposition before a Magistrate cannot be admitted in evidence under section 9, Evidence Ordinance, apart from its truth or falsity.

Authorities referred to : *Queen vs. Sathasivam*, 54 N. L. R. 541.
King vs. Punchimahatmaya, 44 N. L. R. 80.
Phipson on Evidence, 9 Edn., pp. 532 533.
Rex vs. Gibbin, 13 Cr. App. Rep. 134.
Daniel Youth vs. The King (1945) A. I. R. Privy Council 140.
Rex vs. Kritzinger and another 1952 (4) S. A. L. R. 651.
Rex vs. Marian Grondkowski and Henryk Malinowski (1946) 1 All. E. Rep. 559.
Ibrahim vs. The King-Emperor (1914) A. C. 599 at 615.
The King vs. Seneviratne (1936) 38 N. L. R. 208.
Samaranayake vs. Wijesinghe (1951) 52 N. L. R. 516, 44 C. L. W. 74.
Vol. LXVIII, South African Law Journal, p. 8, Feb., 1951.
Vol. 213, Law Times Journal, p. 161, 21st March, 1952.
Scott vs. Numurkah Corporation (1954) 91 Commonwealth Law Reps. 300 at 309 *et seq.*
Wigmore on Evidence, 3 Ed., 1940, Vol. IV, p. 268 (Sec. 1162) *et seq.*

Dr. Colvin R. de Silva with *J. C. Thurairatnam* (Assigned), for 1st accused-appellant.

G. E. Chitty with *A. S. Vanigasooriyar, Daya Perera* and *E. A. D. Atukorala* (Assigned), for 2nd accused-appellant.

H. A. Wijemanne, Acting Deputy Solicitor-General, with *A. C. M. Ameer, Crown Counsel*, for the Attorney-General.

BASNAYAKE, A.C.J.

The first appellant has been convicted of the offence of murder and the second appellant of abetment of that offence.

Although one of the grounds of appeal was that the verdict of the Jury was unreasonable learned Counsel who appeared for the appellants did not canvass the verdict on that ground. It would appear from the transcript of the proceedings that there was ample evidence which, if believed, proves conclusively the guilt of the appellants.

Of the 18 other grounds raised in the notice of appeal of the first appellant Counsel argued only the fourth, sixth, and seventh. They are set out as follows :—

> "(4) The failure to put in and read in evidence before the close of the case for the prosecution the statement made by the 2nd accused in the Magistrate's Court under section 161 of the Criminal Procedure Code rendered illegal the

entire trial and in any event gravely prejudiced the accused;

(6) It is respectfully submitted that there should have been a separation of trials; and

(7) Portions of a statement alleged to have been made by the 1st accused to the Police were illegally admitted into the case ".

Of those grounds learned Counsel very strongly urged the first. It arises in this way. At the magisterial inquiry into the case the second appellant, on being addressed under section 160 of the Criminal Procedure Code said " I am not guilty ", and on being immediately thereafter addressed under section 161 of the Code stated " I wish to give evidence here "; but expressed no desire to call witnesses on his behalf. Thereupon the Magistrate proceeded to take his evidence. Earlier this appellant had made a statement which was recorded under section 134 of the Code. It was produced in evidence as document P38. In that statement this appellant described in elaborate detail how the first appellant whom he had known for twelve years planned and carried out the murder of the deceased and confessed the part he had played in the entire transaction. In his evidence he alleged—

(*a*) that he was assaulted by the Police and coerced into making the statement he made to the Magistrate.

(*b*) that the statement was false, and

(*c*) that he knew nothing about the crime.

At the trial, after the statements of the appellants under sections 160 and 161 had been read, but before the close of the case for the Crown. the pleader for the second appellant, in the absence of the Jury, made an application—

> " that the evidence given by the second appellant before the Magistrate at the non-summary proceeding be also led in evidence ".

He relied on the case of *Queen vs. Sathasivam*, 54 N.L.R. 541. Learned Counsel for the Crown said that he did not propose to put in the evidence of the second appellant and cited in support of his contention the judgment of this Court in *King vs. Punchimahatmaya*, 44 N.L.R. 80. The learned trial Judge after hearing argument ruled that the Crown was not bound to put in under section 233 of the Code the evidence given by the second appellant before the Magistrate at the inquiry under Chapter XVI of the Code.

Counsel contended that the evidence given by the second appellant before the Magistrate was a statement within the contemplation of the words " all statements " in section 233 of the Code. That section reads—

> " All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution ".

Counsel's contention was that the expression " statement " includes both a statement on oath and a statement not on oath and evidence being a statement on oath is included in the expression " all statements ". But while the word " statement " may in certain provisions of law to which our attention was drawn be wide enough to include evidence, the question that arises for determination is whether in the context in which the expression " all statements " occurs in section 233 of the Code it must be given that wide meaning or whether it must be restricted to all statements made by an accused in the course of the non-summary inquiry in contradistinction to evidence given by him. That question has to be decided by reference to the provisions of the Code dealing with non-summary inquiries as contained in Chapter XVI thereof.

It is common ground that prior to the amendment of the law relating to non-summary inquiries by Ordinance No. 13 of 1938, the expression " all statements " in section 233 of the Code could only have meant statements of an accused recorded in the course of the non-summary inquiry other than evidence, since there was no provision then for an accused to give evidence on his own behalf at the inquiry. The amending Ordinance was designed to provide for direct committal by a Magistrate for trial by a higher Court of cases which a Magistrate has no power to try summarily. While retaining the existing provision under which, at the close of the evidence for the prosecution, when a *prima facie* case is made out on that evidence, the Magistrate is required to explain the charge to the accused and give him an opportunity of making an unsworn statement after cautioning him that whatever he says would be recorded and put in evidence at his trial, the legislature at the same time made provision enabling an accused to give evidence and for the recording of such evidence should he elect to give such evidence. It is clear from section 161 (2) that the object of the new provision was to enable the accused to place before the Court at that stage of the inquiry the evidence he would be able to give himself so that in deciding whether the case should be committed the Magistrate may, subject to the provisions of section 164 of the Code, take into account such evidence and also the arguments of his Counsel or pleader, and not to allow that evidence to be read at the trial in terms of section 233 of the Code.

We also wish to state that an accused electing to give evidence on his own behalf would be liable to cross-examination under the provisions of Chapter XII of the Evidence Ordinance subject, however, to the provisions of section 54 thereof. Although the question arose only incidentally, and it was not contended before us that the legal position is otherwise, we have thought it fit to express our opinion on the point as there appears to be uncertainty as to the practice hitherto adopted by Magistrates when an accused gives evidence at a non-summary inquiry.

Learned Counsel relied strongly on section 157 (1) in Chapter XVI of the Code which refers to the evidence of witnesses as "statements on oath", but it is not without significance that such statements are referred to in the subsequent provisions in the same chapter as either "depositions" or "evidence" while the expression "statements" is used only to denote statements other than evidence.

Section 157 deals with the manner in which the evidence of witnesses other than an accused at a non-summary inquiry shall be taken, and the fact that in sub-section (1) thereof that evidence is referred to as statements on oath is not, in our opinion, a convincing reason for interpreting the expression "all statements" in section 233 as including evidence given by an accused under section 161.

Learned Counsel for the second appellant, whose petition of appeal contained a ground of appeal in the same terms as the one under consideration, sought to reinforce the arguments addressed to us on this ground of appeal by reference to certain other provisions of the Code outside Chapter XVI where, in his submission, the expression "statement" includes evidence. In this connection he was able to refer us specifically only to section 286 (1) and section 302 (1). Even assuming that the expression "statement" in section 286 (1) includes any evidence given by an accomplice who, having accepted a tender of a pardon, is examined as a witness under section 283 (3), it does not follow that the same interpretation must be given to the expression "statements" in section 233. The meaning of that expression must, as already stated, be gathered from a consideration of the provisions of Chapter XVI of the Code. In regard to section 302 (1), although Counsel went to the length of saying that evidence given by an accused at an inquiry under Chapter XVI of the Code must be recorded in the manner set out in that section, in our opinion this argument is quite untenable since it is clear that the section deals (though not expressly) with statements other than evidence, and where an accused gives evidence at the inquiry the manner of recording it is governed by section 298 and not section 302 (1). Section 302 (1) is, thus, an instance where the expression "statements" is used in the Code in a sense other than evidence.

Although the Crown relied on the case of *The King vs. Punchimahatmaya* (*supra*) both at the trial and before us the precise question under discussion did not arise in that case.

While the answer to the question which we are called upon to decide is not entirely free from difficulty, we have considered all the arguments which were addressed to us in support of the contrary view, and we are of the opinion that the expression "all statements" in section 233 of the Code means all statements of an accused, other than his evidence recorded under section 161, for the recording of which express provision is contained in Chapter XVI. This ground of appeal, therefore, fails.

The conclusion which we have reached seems to be in accordance with the English practice, as stated in Phipson on Evidence, 9th Edn, pp. 532-533, of putting in at the trial, as part of the case for the prosecution, the statements (commonly referred to as statutory statements) made by an accused at the preliminary inquiry, whether such statements tell for him or against him. Although under the provisions of the Criminal Justice Act, 1925, relating to the procedure at the preliminary inquiry, some of which are closely analogous to the provisions in Chapter XVI of the Code, an accused is a competent witness for the defence, there appears to be no provision which obliges the prosecution to put in evidence at the trial any evidence given by the accused at the inquiry.

The next point learned Counsel for the first appellant argued was that the appellants should not have been tried jointly. At the trial no application was made for a separation of trials, but the learned Judge appears to have taken upon himself the question of considering the matter and deciding that the case did not call for separation. Whether a separate trial should be ordered or not is a matter entirely at the discretion of the trial Judge and is governed by section 184 of the Code. Once that discretion has been judicially exercised, as it has been done in the instant case, this Court will not interfere, except where it appears to it that a miscarriage of justice had resulted from the prisoners being tried together *Rex vs. Gibbin*, 13 Cr. App. R. 134. Where, as in this case, there has been no application to separate the trials, much less would it be possible to interfere *Daniel Youth vs. The King*, (1945) A.I.R. Privy Council 140. In the

instant case the joint trial has not resulted in a miscarriage of justice. As the question of separation of trials appears to need clarification, we wish to take this opportunity of making a few observations thereon. *Prima facie* when the essence of the case is that the accused persons were engaged in a common enterprise it is proper that they should be jointly indicted and tried, and generally speaking it would be as much in the interests of the accused as in the interests of the prosecution that they should be. There is no rule of law that where it appears that the essential part of one accused's defence amounts to an attack upon another there should be separate trials. The matter is entirely, as stated above, at the discretion of the trial Judge, exercised with due regard to the interests of the prosecution and the interests of the accused. In considering the question of separation of trials it would be wrong to look at the matter exclusively from the point of view of the accused. The interests of justice demand that the Crown should not be unduly hampered in its presentation of the case *Rex vs. Kritzinger and another*, 1952 (4) S.A.L.R. 651. If it should appear that there is a real danger that a separation of trials may so hamper the Crown in its presentation of the case as to lead to a miscarriage of justice by the acquittal of guilty persons, that is a consideration which may outweigh the consideration of prejudice to the accused *Rex vs. Marian Grondkowski and Henryk Malinowski*, (1946) 1 All E.R. 559.

In this case the confession of the second appellant, the abettor, was admitted in evidence subject to the warning given by the trial Judge to the Jury that it was not evidence against the first appellant. The only ground on which it was contended that the trial Judge should have ordered a separation of trials was that this warning to the Jury, though admittedly given in adequate terms, would not have entirely removed the possibility of prejudice being caused to the first appellant. The same question was considered in the case of *Daniel Youth vs. The King* (*supra*) where the following observations were made by Lord Porter in delivering the judgment of the Privy Council :—

> " It is true no doubt that in all joint trials the mind of the Jury may be influenced by the reception of evidence which is only admissible against one of the accused, but the practice in this country has always been in a joint trial to admit such evidence, leaving it to the presiding Judge to warn the Jury that the evidence must not be used to strengthen the case against or lead to the conviction of a prisoner against whom it is not admissible."

This ground of appeal, therefore, fails.

The last ground of appeal set out earlier was not pressed by Counsel for the first appellant and need not be discussed here.

Counsel also submitted that, in view of the fact that this Court had intimated in a recent judgment that it was proper for Counsel to draw the attention of the Court to any matter which affects the validity of the conviction even though it has not been raised in the petition of appeal, he wished to bring to the notice of the Court certain irregularities which, he alleged, occurred at the visit to the scene by the Jury though they were not included in the grounds of appeal. The visit was suggested by learned Crown Counsel who addressing the Court said :

> " My Lord, I think it is desirable to lead the evidence of the Government Analyst after visiting the scene. The evidence of Inspector Syms could also be led after that ".

The view of the scene was accordingly fixed for the next day at 9-30 a.m. Crown Counsel made the following further application :—

> " Your Lordship might instruct Mr. Syms to mark out the position in which the bed and the bedside table of the deceased were and also to put back these two flower boxes ".

The Judge made order as follows :—

> " The flower boxes could be taken there by the Fiscal officers. If there is anything else which you wish to suggest you could see me in Chambers ".

The Court then adjourned for the day. Thereafter in Chambers learned Counsel defending the first appellant made an application to the Judge which is recorded thus :—

> " Mr. Aelian Pereira on behalf of the 1st accused informs me that the 1st accused does not desire to join in the visit to the scene tomorrow morning, apparently because he does not wish to be seen by the crowd. Since his Counsel will be present on his behalf the 1st accused need not accompany the Court. He can be kept in custody in Court till our return ".

When the Judge, Jurors, Counsel, the Court staff, and the appellants assembled at Hultsdorf the next day at 9-30 a.m. prior to the drive to the scene the learned Judge addressed the Jurors in the presence of the Clerk of Assize, in whose charge they were placed during the visit, and requested them not to discuss, except with him, any matter concerning the trial at the scene. What happened at the scene is thus recorded :

> " The room in which the deceased slept on the night of the incident is pointed out by Inspector Syms who also indicates the position of the bed on which the deceased slept marked with chalk lines. The

position of the bed-table on which was the reading lamp. The height of the bed is shown marked on the wall and the height of the bed-table just below the switch. The height of the window sill on the inside is indicated. The Inspector is asked to stand outside the window through which the shot is alleged to have been fired with the flower boxes placed in the position in which they were said to have been at the time of the incident, and insert his hand through the grill over the flower box at the left hand corner of the window.

The lobby, and the lights in the lobby with the light switches are shown, the bell switches and the bell itself, the back door for the use of the servants, the lock of the door of the deceased's room are also shown. The Inspector is also asked to stand at the window outside and the Jury see the position from outside the house. The new building of Proctor Thenuwara, the brother of the deceased, is shown. The Clerk of Assize is asked to stand on the short parapet wall in front of the window of the deceased's bed-room, looking into it. The gate at the entrance to the sandy lane is shown and the lamp post opposite the gate. The gate of No. 108 at which the witness Gurusamy stood is also indicated. The Court then returns by the route said to have been taken by the accused's car on the return trip from the deceased's house after the shooting ".

When the Court re-assembled after the visit to the scene at 10-45 a.m. the same day, Mr. Sirimanne the Government Analyst was called as a witness. He said that he visited the scene of the offence, for the first time on the day after the murder and several times thereafter, and carried out certain experiments to test whether the deceased could have been shot from the place the prosecution alleged he was. His opinion was that a man of 5′ 9″ in height could have shot the deceased from outside the window from which the deceased was alleged to have been shot. The first appellant is 5′ 11″ and Mr. Sirimanne is 5′ 11½″.

Mr. Syms was called next. He said, that he entered the room of the deceased only at 5 a.m. of the day on which the deceased had been shot and that although he had come earlier he was unable to enter it as it was locked. He made careful observations of the room and its contents. Then he examined the outside, observed the windows, and the two flower boxes on the window sill at a height of 5′ 2″. He found the plants disturbed and some uprooted. Then he proceeded to describe the house by reference to certain photographs produced in evidence. The witness then described how he stood by the window and put his hand through the grill and he said he did it with a fair amount of ease. He was then asked :

"*Q.* Actually this morning when the Court visited the scene you introduced your hand into that room over the flower box?
A. Yes.
Q. You could do it without much effort?
A. Yes.
Q. Standing on the ground?
A. Yes.
Q. This morning you accompanied the court when they went to the scene?
A. Yes.
Q. On the order of His Lordship you pointed out certain spots to the court?
A. Yes.
Q. The position of the bed, the actual height and width of which you had actually marked on the wall at the bottom of the window?
A. Yes.
Q. You showed the position of the bedside table on which the lamp P66 and the book and purse were found?
A. Yes.
Q. You also indicated the switch-board which contained all the switches to the other parts of the house and the passage leading to Mrs. Thenuwara's room?
A. Yes.
Q. And also the bells and bell switches?
A. Yes.

To Court :

Q. You showed us the points where the bells ring?
A. Yes.

Examination continued.

Q. You also showed the actual window through which it is alleged the shot was fired?
A. Yes.

To Court :

Q. You stood at that window and introduced your hand while the Jury were inside the room and you remember standing there again outside the door so that the Jury could see you standing?
A. Yes.

Examination continued.

Q. Could you introduce your hand without straining?
A. Yes.
Q. You also pointed out the spot where the car was and the spot where Gurusamy said he was at the time he heard the shot?
A. Yes."

Cross-examined by pleader for the second appellant, Inspector Syms gave the following evidence :—

"*Q.* You went and stood by the window-sill this morning and put your hand through the grill work?
A. Yes.
Q. You did that with ease being 6 feet 2 inches in height?
A. Yes.
Q. You could only insert your hand up to about the wrist through the grill work?
A. No. I could put my hand in as far as my arm extended.
Q. How much of your hand was protruding on the inner side of the bedroom?
A. About 7 inches".

Counsel submitted that what was done at the scene was open to serious objection on the ground that there was no authority in section 238 of the Code, for the taking of evidence or the carrying out of tests when the Jury views the scene of the offence. He further submitted that in this instance the illegality was even more serious as the tests were conducted in the absence of the first appellant. Before we discuss the submissions of learned Counsel it will be helpful if the section of the Code is first set out. That section reads:

> "238. (1) Whenever the Judge thinks that the Jury should view the place in which the offence charged is alleged to have been committed or any other place in which any other transaction material to the trial is alleged to have occurred the Judge shall make an order to that effect; and the Jury shall be conducted in a body under the care of an officer of the Court to such place which shall be shown to them by a person appointed by the Judge.
>
> (2) Such officer shall not except with the permission of the Judge suffer any other person to speak to or hold any communication with any of the Jury; and unless the Court otherwise directs they shall when the view is finished be immediately conducted back into Court".

The section does not require that the Judge, Counsel, and accused should accompany the Jury. It only provides for a view of the scene by the Jury who will be conducted under the care of an officer of Court. As the officer of Court is not likely to know where the scene of the offence would be it also provides for the appointment by the Judge of a person who shall show the Jury the scene of the crime.

The question which remains for consideration is whether the act of Inspector Syms in standing at the window and introducing his hand through the grill in the presence of the Judge, Jury, and Counsel at the instance of the Judge is irregular and if so whether it is such an irregularity as to vitiate the conviction. Learned Counsel for the second appellant strenuously argued that the irregularity was so serious that it, in the words used in Ibrahim's case *Ibrahim vs. King-Emperor* (1914) A.C. 599 at 615, "tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future".

Generally speaking the conducting of experiments at an inspection of the scene of the offence is fraught with danger and should be avoided unless it is necessary to do so in the interests of justice.

In the case of *The King vs. Seneviratne*, 38 N.L.R. 208, the Privy Council declined to lay down as a general proposition that on a view by the Jury experiments should under no circumstances be conducted. In the case of *Samaranayake vs. Wijesinghe*, 52 N.L.R. 516, the whole question of the scope of a visit to the scene of offence and the carrying out of experiments has been discussed. What was done in the instant case, was a demonstration which was not intended to be evidence in itself but was designed to assist the Jury to better understand the evidence, for it was only after the visit that the evidence of the Government Analyst and Inspector Syms was taken. Both of them gave evidence bearing on the theory of the prosecution that the deceased was shot by a man of 5′ 9″ or over in height from outside the window shown to the Jury. Where, as in this case, a view of the scene has been followed by the evidence of the witness who gave the demonstration and indicated the various matters the Jury were expected to view there can be no valid objection to the procedure adopted even though the first appellant did not in person accompany the Judge or Jury. Though it is not necessary in every case that the observations made at an inspection *in loco* should be put before the Court in the form of a statement from a witness who is called, or recalled, after the inspection has been made, it is usual in some jurisdictions when the hearing is resumed, after an inspection, to call, as in this case, witnesses to give evidence in open Court under oath as to the demonstrations given, explanations made and as to the matters indicated by them at the inspection. Learned Counsel for the appellants relied on the case of *Samaranayake vs. Wijesinghe* (*supra*) and *The King vs. Seneviratne* (*supra*). What was done in the instant case does not come within the range of experiments which both those decisions have pronounced as irregular. The extent and scope of an inspection *in loco* is a much discussed subject, Vol. LXVIII South African Law Journal, p. 8—February, 1951; Vol. 213 Law Times Journal, p. 161—21st March, 1952; *Scott vs. Numurkah Corporation*, (1954) 91 Commonwealth Law Reports 300 at 309 *et seq.*; Wigmore on Evidence, 3rd Edn., 1940,

Vol. IV, p. 268 (sec. 1162), *et seq.* But it is not necessary to elaborate the matter further for the purpose of this judgment.

Learned Counsel for the second appellant also submitted that the statement of the second appellant (P38) recorded under section 134 of the Criminal Procedure was a confession and was improperly recorded by the Magistrate and admitted by the learned trial Judge. His submissions under this head he classified as follows :—

"(*a*) It (the statement) was made while the 2nd accused was actually or constructively in Police custody and the Magistrate had not adequately ensured that the accused was free from duress or influence by the Police and had not adequately questioned the accused to ascertain whether any promise or inducement had been offered to him for the making of the confession.

(*b*) The circumstances under which the Police brought the 2nd accused before the Magistrate and remained in or about the precincts of the Court during the recording of the confession and before and after it and obtained immediately from the Magistrate a copy of the confession are strongly indicative that circumstances existed which vitiated the taking of the confession and which would serve also to exclude the confession by virtue of the provisions of section 24 of the Evidence Ordinance.

(*c*) The circumstances under which a Proctor purporting to represent the 2nd accused was present in the Magistrate's chambers during the recording of the confession far from ensuring that the 2nd accused had independent legal advice strongly suggest that he had no such advice and that his presence in no way ensured to the benefit of the 2nd accused or served the purpose of his interests but rather served only to give the Magistrate an unjustified sense of confidence that the interests of the 2nd accused were adequately safeguarded by legal advice. Upon the admissions of this Proctor alone it is clear that he neither advised the 2nd accused nor gave himself an adequate opportunity of acquainting himself with the matters relevant to the interests of his client before he was present at the recording of the confession.

(*d*) It should have been obvious that a man who is allegedly confessing to murder could have had no interest to be served by the presence of a Proctor at the recording of the confession, even if the Proctor had as this Proctor had not, been fully instructed as to what the 2nd accused was about to tell the Magistrate. The presence of the Proctor provided him with neither protection nor independent advice nor could it have mitigated the full rigour of the consequences of such a confession ".

We are unable to agree with learned Counsel that the provisions of section 134 of the Criminal Procedure Code have not in this instance been satisfied. Section 134 reads :

" 134. (1) Any Magistrate may record any statement made to him at any time before the commencement of an inquiry or trial.

(2) Such statement shall be recorded and signed in the manner provided in section 302 and dated, and shall then be forwarded to the Magistrate's Court by which the case is to be inquired into or tried.

(3) No Magistrate shall record any such statement being a confession unless upon questioning the person making it he has reason to believe that it was made voluntarily ; and when he records any such statement he shall make a memorandum at the foot of such record to the following effect :—

I believe that this statement was voluntarily made. It was taken in my presence and hearing and was read over by me to the person making it and admitted by him to be correct, and it contains accurately the whole of the statement made by him.

(Sgd.) A. B.
Magistrate of the Magistrate's Court of....."

According to the record the learned Magistrate appears to have questioned the accused before he recorded the statement and satisfied himself that it was voluntary. These are the questions he asked him :

"*Q.* Are you making this statement due to any inducement?
A. No.
Q. Have you been threatened or assaulted to make a statement?
A. No.
Q. Have you been offered any relief if you make this statement?
A. No.
Q. Why are you making this statement?
A. Injustice has been done and I wish to make this statement ".

Thereafter the Magistrate proceeded to record the statement of the second appellant which runs into six and a half manuscript and eight and a half typewritten pages.

Under section 80 of the Evidence Ordinance whenever any document is produced before any Court purporting to be a record or memorandum of the evidence or of any part of the evidence given by a witness in a judicial proceeding or before any officer authorised by law to take such evidence, or to be a statement or confession by any prisoner or accused person taken in accordance with law and purporting to be signed by any Judge or Magistrate or by any such officer as aforesaid, the Court shall presume—

(i) that the document is genuine ;
(ii) that any statements, as to the circumstances under which it was taken, purporting to be made by the persons signing it, are true ; and
(iii) that such evidence, statement, or confession was duly taken.

In the instant case the prosecution without relying on the presumption created by the section led evidence in order to prove that the

statement was voluntary. At an enquiry held by the Judge in the absence of the Jury the second appellant gave evidence and stated that the statement was not voluntary and that he was forced to make it by the Police under threats and that the statement was false. It was urged on behalf of the second appellant that he was virtually in the custody of the Police at the time he made the statement because Police officers were about the place and were constantly using the telephone in the passage which gave access to the room in which the second appellant was detained till he was called into the adjoining room in which the Magistrate was.

It would appear from the learned trial Judge's order that all these matters were considered by him when he decided to admit the statement and we see no grounds for holding that he was wrong.

Counsel for the second appellant also complained that when the Clerk of Assize was called to prove certain statements which had been put to witnesses in cross-examination the trial Judge had refused to allow the second appellant's deposition before the Magistrate to be produced in evidence. The application of the second appellant's pleader and the ruling of the trial Judge are recorded as follows :—

> " At this stage Mr. Weerakoon makes a formal application to have the deposition of the second accused made a part of the defence case and read. The Court disallows the application ".

It was contended by Counsel for the second appellant that the disallowance of this application was wrong and that even if the deposition was not admissible under section 233 of the Code it was admissible in order to prove the fact that the statement P38, which the prosecution had already put in as a confession of the second appellant, had been retracted by him in his evidence at the non-summary inquiry. When asked to state under which section he sought to have the statement admitted he referred us to section 9 of the Evidence Ordinance.

Evidence given by a witness in a previous judicial proceeding, even though it be that of an accused person, cannot be admitted in evidence in a subsequent proceeding except in accordance with the provisions of the Evidence Ordinance or the Criminal Procedure Code. Learned Counsel for the second appellant did not seek to come under any provision of the Criminal Procedure Code. A previous deposition may be proved if relevant under sections 32, 33, 155 (*c*) and 157 of the Evidence Ordinance. It was not argued before us, however, that any of these provisions permitted the use of the second appellant's evidence in the manner in which it was sought to be put in at the trial. While the evidence in question would be an admission as defined in section 17 (1) of the Evidence Ordinance, it does not appear to be one which could have been proved on behalf of the second appellant under either of the paragraphs (*a*) or (*b*) of section 21 of that Ordinance. With regard to paragraph (*c*) of section 21, as stated above, section 9 was the only provision of the Evidence Ordinance under which Counsel urged that the evidence was relevant, otherwise than as an admission. That section declares as relevant, *inter alia*, facts " which rebut an inference suggested by a fact in issue or relevant fact ". In so far as the evidence of the second appellant at the inquiry may have been relevant under this section to rebut any inference that the Jury may have drawn against him from the alleged confession of his which had been put in evidence by the prosecution, its relevancy could have arisen only on the basis that the facts deposed to in that evidence were true, and not otherwise. Learned Counsel urged on us, however, that the evidence in question was relevant and admissible apart from the truth or falsity of the facts deposed to in it. But we fail to see how the Jury could possibly have been invited to assess the weight to be placed on the alleged confession by merely taking into account the bare fact that it had been subsequently retracted by the second appellant and without considering the truth or falsity of what was stated by him on that occasion. We are unable, therefore, to agree with the proposition of learned Counsel and we are of the opinion that the application made on behalf of the second appellant was rightly disallowed by the trial Judge.

It was plainly open to the second appellant to have given evidence at the trial and relied on the deposition as corroborating his evidence under section 157 of the Evidence Ordinance. Having chosen not to do so he could not be permitted to achieve a result in a manner not provided by the Evidence Ordinance, namely, by substituting for evidence which he might have given at the trial, the evidence which he gave before his commitment by the Magistrate.

If the second appellant had made only a statement from the dock when called upon for his at the trial and in that statement he

retracted the confession, the terms of section 157 of the Evidence Ordinance would have precluded him from reading as part of the defence his evidence at the inquiry. If, as it happened, the second appellant did not even make an unsworn statement it would be surprising that he should be in a position to mark his evidence before the Magistrate as part of his defence at the trial.

For the above reasons the appeals are dismissed and the applications are refused.

Appeals dismissed.

Present : Gratiaen, J. and Swan, J.

THE ATTORNEY-GENERAL OF CEYLON vs. RUSSELL

S. C. 24/1955 (*Inty.*)—*D. C. Colombo* 32425/*M.*

Argued on : 1st and 3rd November, 1955
Decided on : 11th November, 1955

Civil Procedure Code—Section 463—Amended by section 5 of Act No. 48 of 1954—Action in tort against Minister—Application by Attorney-General for substitution—Scope of section —Public officer.

In an action founded in tort filed by plaintiff against a Minister of State, the application by the Attorney-General to be substituted as party defendant signifies " the Crown's consent to remedy wrongs " committed by a public officer, and involved the acceptance of responsibility by the Crown for the decree which might ultimately be awarded in favour of the plaintiff upon the cause of action alleged against the public officer individually, and ought to be allowed.

Per Gratiaen, J.—" The amendment of section 463 after the present action commenced does not offend the *prima facie* rule against retrospective legislation ; it has in no way enlarged the ambit of the Crown's right of intervention in certain classes of private litigation ".

Cases referred to : *Mackenzie vs. Air Council* (1927) 2 K. B. 517 at 531
Adams vs. Naylor (1946) A. C. 543 and *Royster vs. Cavey* (1947) K. B. 207.
Le Mesurier vs. Layard (1898) 3 N. L. R. 227.
Podi Singho vs. Goonesinghe (1948) 49 N. L. R. 344.

V. Tennekone, C. C., for the petitioner-appellant.

S. J. Kadirgamar, for the plaintiff-respondent.

Gratiaen, J.

This is an appeal by the Attorney-General against an order of the District Court of Colombo refusing his application under section 463 of the Civil Procedure Code (as amended by section 5 of the Amending Act No. 48 of 1954) to be substituted as a party defendant in an action between private parties.

The plaintiff had sued Mr. R. G. Senanayake of Gregory's Road, Colombo, on 29th June, 1954, to recover Rs. 6,600/- as damages. The action is founded in tort, the allegation being that, shortly prior to 16th March, 1954, Mr. Senanayake had " intentionally or knowingly and without legal justification " induced or procured the Galle Face Land and Building Company Ltd. to commit a breach of its subsisting agreement with the plaintiff for the tenancy of a residential apartment in Galle Face Court. Mr. Senanayake entered an appearance in the action on 16th July, 1954, and was directed to file his answer to the plaint on 20th August, 1954, on which date he applied for and obtained, an extension of time until 3rd September, 1954. A further indulgence was granted him until 8th October, 1954, but on the previous day the Attorney-General made an application under section 463 (as amended) to be substituted as a party defendant on the ground that he (the Attorney-General) had " undertaken the defence of the said R. G. Senanayake." The application was supported by Mr. Senanayake's affidavit to the effect that he had held the office of Minister of Commerce, Trade, and Fisheries at all times material to the cause of action set out in the plaint, and continued to do so until 10th July, 1954.

Section 463 of the Civil Procedure Code, in its original form, provided as follows :—

" 463. If *the Government* undertake the defence of an action against *a public officer*, the Attorney-General shall apply to the Court, and upon such application the Court shall substitute the name of the Attorney-General as a party defendant in the action."

By virtue of section 5 of the Amending Act No. 48 of 1954, which passed into law pending the present action, section 463 now reads :

> " If *the Attorney-General* undertakes the defence of an action against a *Minister, Parliamentary Secretary or public officer*, the Attorney-General shall apply to the Court, and upon such application the Court shall substitute the name of the Attorney-General as a party defendant in the action."

The Attorney-General's application seems to have been viewed by the plaintiff with considerable apprehension. The action having been filed on the basis that Mr. Senanayake had personally committed an actionable wrong, it was feared that his sudden disappearance through " the trap-door," so to speak, of section 463 might leave the plaintiff (if he established his cause of action) without a judgment-debtor. Moreover, so Mr. Kadirgamar explained, doubts were entertained as to whether the substitution of the Attorney-General as defendant might not completely alter the character of the litigation so as to divest the plaintiff of his remedy against the only person who could be held directly liable under the law of this country for the tort complained of. Let me summarise the suggested consequences : the Crown enjoys complete immunity in Ceylon from liability for torts committed by one of its executive officers (be he a Cabinet Minister or only a subordinate servant of the Crown). Was it not therefore open to the Attorney-General, upon his substitution, to plead that no judgment could be entered against him (as legal representative of the Crown) in respect of Mr. Senanayake's personal tort ? In all these circumstances, the plaintiff expressed a strong preference for proceeding against Mr. Senanayake alone.

Having expressed these apprehensions to the learned District Judge, Mr. Kadirgamar raised a number of objections to the Attorney-General's application, and relied in particular on the argument that section 463, having been amended only after the action commenced, could not operate retrospectively to deprive the plaintiff of rights which had previously accrued to him. This latter objection was upheld by the learned Judge.

During the argument in appeal, I pointed out that, upon a proper construction of section 463 (in its original as well as its amended form), there was no substantial reason for fearing the legal consequences which the plaintiff has in contemplation. In my opinion, the section, when invoked, can never operate to the detriment of a plaintiff who establishes that he has suffered injury at the hands of a public officer. It merely empowers the Attorney-General in cases which seem to him appropriate, to indemnify a plaintiff against (for instance) actionable wrongs committed by public officers or servants. In reaching this conclusion, I am fortified by the statement made to us by learned Crown Counsel that no other interpretation is suggested on behalf of the Attorney-General. It is indeed a matter for regret that this assurance was not given in the Court below.

The true scope of section 463 must be examined in the background of the Crown's continued (but much deplored) immunity in this country from liability for the torts of its public officers. This immunity is precisely the same as it was in England until the Crown Proceedings Act of 1947, passed into law. In Ceylon, therefore, what Lord Atkin (then Atkin, L.J.) said in *Mackenzie vs. Air Council* (1927) 2 K.B. 517 at 531, is still correct :

> " The Crown itself can do no wrong, and the public revenues cannot be made liable without the Crown's consent to remedy wrongs committed by servants of the Crown."

Only the individual public officer who commits or authorises the commission of a tort is answerable in law to the victim of his wrongful act ; and it is no defence for him to say in such a situation that he acted in obedience to the orders of the executive government or of anyone else. " Since the King can do no wrong, he can authorise no wrong."

In England, before the Act of 1947 was passed, government departments resorted to a beneficial device for making the public revenue available for the settlement of claims for tort in situations where a moral obligation was considered to be imposed upon the Crown. The Treasury Solicitor would, on request, nominate a party against whom the plaintiff could institute proceedings. The Crown stood behind the "nominal" defendant in the litigation, and, if the plaintiff succeeded, the Crown made an *ex gratia* payment of the sum awarded as damages. But the Courts eventually refused to recognise this colourable device in *Adams vs. Naylor* (1946) A.C. 543 and *Royster vs. Cavey* (1947) K.B. 207. Hence the Crown Proceedings Act, 1947.

But in Ceylon, the Code of Civil Procedure expressly provides machinery by which the

Crown may do justice in similar situations without resorting to the subterfuges which had been found necessary to achieve that end under the earlier English practice. Section 463 in its original form contemplated a case in which the Government "undertakes the defence of an action against a public officer." Once that has been done, the Attorney-General "shall" (the word is imperative) apply for substitution as a defendant, and the Court "shall" (the word is once again imperative) allow the application. By this means, effect was given to "the Crown's consent to remedy wrongs" committed by a public officer. In the action that is continued after the Attorney-General's substitution as defendant, the same issues arise as would have arisen in the action against the public officer himself; if the plaintiff's cause of action against the public officer is established, a decree is entered against the Attorney-General. As any decree against the Attorney-General in his representative capacity is in truth a decree against the Crown, the judgment-debt is paid from the public funds, although, procedurally, section 462 prohibits the issue of a writ of execution against the Attorney-General (either as an original or a substituted defendant).

It will thus be seen that the Government's decision to "undertake the defence" connoted a great deal more than a mere decision to provide legal representation for the public officer concerned. It involved the acceptance of responsibility by the Crown for the decree which might ultimately be awarded in favour of the plaintiff upon the cause of action alleged against the public officer individually.

But was the learned District Judge correct in deciding that the substitution and addition of certain words which now appear in section 463 (as amended after this action commenced) have in any way altered or enlarged the scope of its machinery? I do not think so. The section now applies if "the Attorney-General" undertakes the defence in the action against the public officer. This does not mean that the decision is the personal decision of "Mr. So-and-so who happens to be the Attorney-General of Ceylon". On the contrary, it is made on behalf of and in the name of the Crown acting through its traditional and constitutional representative in any litigation in which the Crown is interested in our Courts. Before the amendment, the term "Government of Ceylon" was equivalent in this context to "the Crown": *Le Mesurier vs. Layard* (1898) 3 N.L.R. 227, and the later substitution of the words "Attorney-General" only introduces a distinction without a difference.

Let us now consider the express inclusion of Ministers and Parliamentary Secretaries in the class of persons whose defences may be undertaken by the Attorney-General. I am perfectly satisfied that these words were also added out of an abundance of caution and in order to remove doubts as to what was always obvious. Ministers and Parliamentary Secretaries held office under the Crown. *Podi Singho vs. Goonesinghe* (1948) 49 N.L.R. 344. They are "public officers" within the meaning of section 463 in its original form, and the language of the amending Act serves only to emphasise their inclusion.

For these reasons, the amendment of section 463 after the present action commenced does not offend the *prima facie* rule against retrospective legislation; it has in no way enlarged the ambit of the Crown's right of intervention in certain classes of private litigation. The Court had therefore no option but to allow the Attorney-General to be substituted for Mr. Senanayake as a party defendant. Indeed, Mr. Kadirgamar made it clear to us that, if the Crown's acknowledgement of the correctness of this interpretation of section 463 had been communicated to the plaintiff in the lower Court, the application would not have been resisted. The true position is now made clear, and I repeat it only to avoid the possibility of any misunderstanding as to the legal effect of the order which I propose. The defence which the Attorney-General has undertaken is in truth the *defence of Mr. Senanayake*. The real issues arising for adjudication are whether Mr. Senanayake was personally liable in damages upon the cause of action pleaded in the plaint. If those issues be answered in favour of the plaintiff, the decree will be entered against the Attorney-General and will be satisfied in the same way as any other decree awarding relief against the Crown. Upon this understanding, I would allow the appeal, and direct that the Attorney-General be substituted as defendant in the place of the original defendant. In all the circumstances of the case, the costs of this appeal and of the argument in the Court below should be costs in the case.

SWAN, J.
I agree.

Appeal allowed.

Present : GRATIAEN, J. AND SWAN, J.

M. SINNA MARIKAIR vs. K. THANGARATNAM

S. C. 481 *L*/1955 (*F*)—*D. C. Batticaloa* 559 (*Land*)

Argued on : 17th November, 1955
Decided on : 23rd November, 1955

Muslim Law—Donation by grandmother—Revocability—Muslim Intestate Succession and Wakfs Ordinance—Section 3.

Where a Muslim lady gifted immovable property to her grandchildren in terms of a notarial transfer,

Held : That the deed was revocable.

Cases referred to : *Razeeka vs. Mohamed Sathuck* (1931) 33 N. L. R. 176 at 179.
Rafeeka's case (1931) 33 N. L. R. 295
Saraumma vs. Mainona (1948) 50 N. L. R. 319.

S. J. V. Chelvanayakam, Q.C., with *J. N. David*, for the defendant-appellant.
V. A. Kandiah with *S. Sharvananda*, for the plaintiff-respondent.

GRATIAEN, J.

The only question for our decision on this appeal is whether a gift of immovable property by a Muslim lady to her grandchildren in terms of a notarial transfer dated 11th December, 1935, was irrevocable.

According to the *Minhaj et Talibin* (Howard's translation) page 235 " a father or any ancestor " may, under the Shafei law, revoke a gift in favour of a child or other descendant, provided that the donee has not irrevocably disposed of the thing received, *e.g.* by selling or dedicating it. Sir Roland Wilson " suspects ", however, that the term " ancestor " in this passage only includes " the true grandfather but not female ancestors or false grandparents." A *Digest of Anglo-Mohammedan Law* (1930 Edn.) page 430. The learned District Judge adopted this latter opinion, and held that the deed was irrevocable.

The proviso to section 3 of the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) was enacted for the special purpose of relieving Judges in Ceylon from the responsibility of solving these knotty problems. The proviso expressly states :

> " . . . no deed of donation shall be deemed to be irrevocable unless it is so stated in the deed . . . ."

As the deed of gift in question was made after the proviso came into operation, it is quite unnecessary for us to determine what precisely is meant by the word " ancestor " appearing in Mr. Howard's admirable translation into English of Mr. Van den Berg's French translation of a treatise written in Arabic. The proviso is intended to remove doubts and difficulties on issues of this kind. As Garvin, J. observed in *Razeeka vs. Mohamed Sathuck* (1931) 33 N.L.R. 176 at 179, " Under the Kandyan Law gifts are ordinarily revocable, but this Court has held and it is now settled law that when such a gift is expressed to be irrevocable the donor may not revoke it. I can see no reason why the principle of these decisions should not be applied to the case of gifts between Muslims. This view of the law is affirmed in (the proviso to) section 3 of the Ordinance." Garvin, J's opinion was cited with approval in *Rafeeka's case* (1931) 33 N.L.R. 295 and, with respect, I think that it should be followed. Ever since the Ordinance passed into law, a Mohammedan deed of donation (whoever the donor may be) must be deemed to be revocable unless the contrary is so stated in the document itself. *Saraumma vs. Mainona* (1948) 50 N.L.R. 319 has decided nothing which compels us to take a different view.

Mr. Kandiah argued that the Ordinance ought not to be given an interpretation which may possibly have the result of introducing a violent change in what he described as the " common law rights of Muslims." With respect, the Ordinance does not purport to change the general law of Ceylon. It merely limits in certain ways the extent to which recognition can reasonably be given to the personal laws of a particular section of the community. The necessity for this limitation became apparent when the Courts found it increasingly difficult to determine the true scope of certain aspects of those personal laws. The language of section 3 and its proviso

are clear and unambiguous, and cannot work hardship to Muslim donors and donees who take the trouble to examine it before entering into transactions of the kind to which this action relates.

In the present case, I find no words in the deed from which a renunciation of the right of revocation appears either expressly or by necessary implication. Accordingly, the donor was entitled to revoke the gift, and she did so in fact. Mr. Kandiah conceded that if this be so, the judgment under appeal must be varied by declaring the plaintiff entitled only to an undivided ¼ share of the lands in dispute and to damages at Rs. 18/75 per month from 27th February, 1950, until they are restored to their rights of co-ownership. The appellant must be paid his costs in both Courts.

Swan, J.

I agree.

Decree varied

Present : Gratiaen, J. and Swan, J.

RAJARATNAM & ANOTHER vs. WIJAYARATNAM & OTHERS

S. C. 377 *L*/1954 (*F*)—*D. C. Jaffna* 8252

Argued on : 18th November, 1955
Decided on : 24th November, 1955

Thesawalamai—Pre-emption—Ordinance No. 59 *of* 1947—*Notice under section* 5—*Consideration on impugned deed—Plaintiffs' ability and willingness to pay.*

Plaintiff, in an action for pre-emption, cannot succeed, even if due notice under section 5 has not been given, unless he can satisfy the Court that he would and could have exercised his rights of pre-emption under section 6 (1) within 3 weeks of the date on which the vendor ought to have given due notice under section 5, and unless the action for pre-emption is instituted within one year of the date on which the conveyance to the stranger was registered.

Cases referred to : *Velupullai vs. Pulendra* (1951) 53 N. L. R. 473
Ramalingam vs. Mangaleswari (1952) 55 N. L. R. 133.

Dr. H. W. Thambiah with *V. Arulambalam*, for the plaintiffs-appellants.
No appearance for defendants-respondents.

Gratiaen, J.

The plaintiffs, who had at all material times been co-owners with the 1st and 2nd defendants of a land situated " at Changuvely in the parish of Uduvil in the Jaffna District ", brought this action to exercise their right to pre-empt the shares which the 1st and 2nd defendants had sold to the 3rd and 4th defendants on 21st May, 1951, for an allegedly fictitious consideration of Rs. 4,500/-. They claimed that the true market value of the shares at the relevant date was only Rs. 2,500/- which they would have been willing to pay if the 1st and 2nd defendants had given them due notice of their intention or proposal to sell the shares to " strangers ".

The plaintiffs' rights of pre-emption were admittedly regulated by the provisions of the Thesawalamai Pre-emption Ordinance No. 59 of 1947 which passed into law on 4th July, 1947, for the purpose of amending and consolidating the earlier law on the subject. It is common ground that the 1st and 2nd defendants had omitted, before the date of the impugned sale to publish due notice of their intention to sell the shares as required by section 5. Accordingly, the plaintiffs instituted this action to enforce their right of pre-emption under section 8 (2) (i) within the period of limitation prescribed by section 9 (2). They also stated that, if the consideration of Rs. 4,500/- alleged to have been paid by the 3rd and 4th defendants was not held to be fictitious, they were willing to pre-empt the shares at that price.

The learned District Judge dismissed the plaintiffs' action because he was satisfied that they would not have been in a position to pre-empt the shares within a reasonable time even if there had been due compliance with the requirements of section 5 as to notice and publication. He took the view that a pre-emptor's rights, though now regulated by the new Ordinance, are still subject to the earlier principle laid down in *Velupullai vs. Pulendra* (1951) 53 N.L.R. 473, and *Ramalingam vs. Mangaleswari* (1952) 55 N.L.R. 133, namely, that " it is fundamental to the pre-emptor's cause of action that he would and could have purchased the property

himself within a reasonable time rather than permit it to be sold to a stranger." In other words, if a person who was entitled to pre-empt had no sufficient means to purchase the property at the time it was sold, non-compliance by the co-owning vendor with the requirements as to notice was immaterial.

In my opinion, the learned Judge's ruling as to the application of these earlier judgments to sales effected after 4th July, 1947, is substantially correct. The new Ordinance has in certain respects restricted the scope of the law of pre-emption under the Thesawalamai; in other respects it has tidied up the procedure for giving notice and fixed the time limit within which the right may be exercised. But subject to these restrictions and modifications, the fundamental character of the cause of action itself has not been subjected to statutory alteration. In *Velupillai's case* (*supra*) I explained that " a would-be pre-emptor cannot claim to be in a better position by not receiving notice of the intended sale than he would have been if he had received such notice." That is still the law in my opinion. Indeed, a would-be pre-emptor is placed in a slightly worse position after 1947 than he was before. If he complains that the notice required by section 5 was not given, or was irregular or defective, he cannot impugn a concluded sale to a stranger, unless he can prove that he would and could have exercised his rights of pre-emption under section 6 (1) *within three weeks of the date on which the vendor ought to have given due notice under section* 5. In addition, section 9 (2) requires that the action for pre-emption must be instituted within one year of the date on which the conveyance to the stranger was registered.

In the case now under consideration, the learned Judge was satisfied that the plaintiffs could not have made a valid tender of Rs. 4,500/- (which was the genuine consideration paid by the 3rd and 4th defendants) on or before 21st May, 1951. I am unable to say that this finding of fact was wrong. It is true that the plaintiffs deposited Rs. 2,500/- to the credit of the action on 31st October, 1951, but this does not mean that nearly twice that amount would have been forthcoming five months earlier.

The learned Judge has also accepted the evidence that, before the 1st and 2nd defendants commenced to look out for an outside purchaser, they had offered to sell their interests to the plaintiffs who explained however, that they could not afford to buy the shares. In these circumstances, the 1st and 2nd defendants might well have pleaded that the plaintiffs had expressly waived or relinquished their right of pre-emption. However, it is unnecessary to consider this question further. I accept the learned Judge's findings of fact upon the issues which were framed at the trial, and would dismiss the appeal. As the defendants were not represented at the argument before us, there will be no order as to the costs of this appeal.

SWAN, J.

I agree.

Appeal dismissed.

Present : SANSONI, J.

K. D. KUMATHERIS APPUHAMY *vs.* COMMISSIONER OF INCOME TAX

S. C. No. 514—*M. C. Panadure No.* 38380

Argued on : 26th August, 1955

Decided on : 31st August, 1955

Income Tax Ordinance No. 2 *of* 1932 *Section* 80 (1)—*Non-payment of Tax—Sentence of imprisonment—Assessee adjudged insolvent—Commissioner's discretion to choose method of recovery.*

The Commissioner of Income Tax can, at his discretion, choose the most suitable method for the recovery of tax from a defaulter. He can, if he so decides, proceed to issue a certificate to a Magistrate under section 80 (1), even when the assessee is an insolvent, before proceeding against his property.

Case referred to : *Commissioner of Income Tax vs. de Vos* (35 N. L. R. 349).

H. Wanigatunge with *J. E. R. Candappa*, for the accused-appellant.

Arthur Keuneman, C.C., for the respondent.

Sansoni, J.

This is an appeal by an assessee who has been sentenced to six months simple imprisonment for failing to pay a sum of Rs. 28,688.02 due as income tax. As no appeal lies from an order made by a Magistrate under section 80 (1) of the Income Tax Ordinance, an application for revision was also filed. It has been urged for the assessee that he had been adjudicated an insolvent on 15th December, 1954, and therefore the Magistrate should not have made the order in question. The argument was that as all the assets of the insolvent were under sequestration and had vested in the assignee, the assessee was therefore not in a position to pay the tax. I was also referred to section 78 of the Ordinance which provides that tax in default shall be a first charge upon all the assets of a defaulter, subject to certain provisos, and it was submitted that in view of these provisions the Commissioner of Income Tax should have proved his claim in the insolvency proceedings. In such an event he would be entitled to recover the tax due for one complete year of assessment as a first charge on the assets, while the remaining arrears of tax will rank with the other unsecured debts of the insolvent.

I have not been referred to any authority which suggests that an assessee who is an insolvent and has been adjudicated accordingly is exempt from action under section 80 (1) of the Ordinance. The procedure laid down in that section may be taken by the Commissioner whenever he is of opinion 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. In the case of an insolvent assessee it is reasonably certain that recovery of a tax in default would be impracticable: in view, therefore, of the fact that the section vests a discretion in the Commissioner, I can see no objection to such a course as is prescribed in section 80 (1) being taken by him where the assessee is insolvent.

It has been decided by Maartensz, A.J. in *Commissioner of Income Tax vs. de Vos* (35 N. L. R. 349) that the Commissioner is not bound to follow any particular method of recovering the tax from the defaulter. Section 79 (2) provides a method of recovering tax by seizure and sale of movable property; section 79 (3) provides a method of recovering tax by seizure and sale of movable and immovable property; section 81 provides a method of recovering tax out of monies lying in the hands of third parties for the use of the defaulter. But section 83 makes it quite clear that where the Commissioner is of opinion that action under any of these provisions has failed or is likely to fail to secure payment of the whole of the tax due from any person, he may proceed to recover any sum remaining unpaid by any other means. The discretion is his and he may exercise it as he chooses. It follows that the Commissioner need not go against the property of the defaulter before he takes action under section 80 (1) and that is what he has done in this case. The application of section 78 only arises in a case where the Commissioner seeks to recover the tax out of the assets of the defaulter, but that is not the case here.

It may be unfortunate that the insolvent is prevented from paying the tax in default by reason of his assets having vested in the assignee, but he is in no worse position than any other person in insolvent circumstances upon whom a fine has been imposed by a Magistrate. The appeal is therefore dismissed and the application for revision is refused.

Application dismissed.

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

MOHIDEEN AND ANOTHER vs. THE REGISTRAR OF TRADE MARKS

S. C. No. 196—*D. C. (Inty.) Colombo No.* 481/*Spl.*

Argued and Decided on : 13th July, 1955

Trade Marks Ordinance No. 15 *of* 1925—*Section* 17—"*Calculated to deceive*"—*Test to be applied.*

The words "calculated to deceive" in Section 17 of the Trade Marks Ordinance (Chap. 121) means no more than likely to deceive. No standard test of what is likely to deceive the purchaser can be laid down. In the present case the test would be whether the average person seeing the appellants' trade mark in the absence and in view only of his general recollection of the registered trade mark would mistake the appellants' trade mark for the registered trade mark.

H. V. Perera, Q.C., with *N. K. Choksy, Q.C.*, and *S. H. Mohamed*, for the petitioner-appellants.

Mervyn Fernando, C.C., for the respondent.

BASNAYAKE, A.C.J.

Shahul Hamid Mohamed Mohideen and Mohamed Assan Kizar, exporters of tea and Ceylon produce, both carrying on business in Colombo under the business name of "Kizar & Co." (hereinafter referred to as the appellants), applied to the Registrar of Trade Marks for the registration of a trade mark in respect of tea in class 42. The trade mark is depicted in the application and has the words "TWO RAMS" above what appear to be two hornless rams in a gambolling attitude as in the illustration given below * The Registrar refused the application on the ground that he was precluded by the terms of Section 17 of the Trade Marks Ordinance from registering the appellants' trade mark as it so nearly resembled a registered trade mark in respect of the same class of goods (hereinafter referred to as the registered trade mark) belonging to a firm trading under the name of T. V. K. Cader Meera Saibo & Co. as to be calculated to deceive.

The registered trade mark as shown in the illustration given below† depicts two bearded goats with curved horns standing almost erect on a box or stand with the legend "Marque Deposse". On the heads of the goats rests a circle with a lotus device with the capital letters "SIT" in the centre.

The appellants appealed under Section 10 (3) of the Trade Marks Ordinance from the Registrar's decision to the District Judge. The learned District Judge upheld the Registrar's decision that the appellants' trade mark so nearly resembled the registered trade mark as to be calculated to deceive.

Before deciding the question whether the appellants' trade mark so nearly resembles the registered trade mark, it is necessary to decide the meaning of the words "calculated to deceive" in Section 17 of the Trade Marks Ordinance. These words are identical with the words in the corresponding provision of the English Trade Marks Act of 1905 and the decisions on that Act afford some guidance in the interpretation of those words in our Act. It has been held in England that the word "calculated" in the context "calculated to deceive" does not imply any intention to deceive and means no more than "likely". The question then is whether the appellants' trade mark is likely to deceive.

Apart from the two gambolling rams and the words "TWO RAMS" there are no other features in the appellants' trade mark while the registered trade mark has many features which are not to be found in the appellants' trade mark. The registered trade mark has a bold outline within which the two goats are placed. The features of the two goats are entirely different from those of the animals in the appellants' trade mark. The lotus design with the letters "SIT" on the registered trade mark is not to be found in the appellants' trade mark and is a distinctive feature of it. The stand or box on which the goats are standing is peculiar to the registered trade mark and even the attitude of the goats in it is different.

No standard test of what is likely to deceive the purchaser can be laid down. The tests laid down in the decided cases are rarely capable of extension to other cases. In the circumstances of this case we think the test to apply is not whether if a person is looking at the two trade marks side by side there would be a possibility of confusion; but whether the average person who sees the appellants' trade mark in the absence of the registered trade mark and in view only of his general recollection of the registered trade mark would mistake the appellants' trade mark for the registered trade mark. With all these marked differences no customer is likely to mistake the appellants' trade mark for the registered trade mark. The appellants have not taken into their trade mark any distinctive feature of the registered trade mark.

For the above reasons we are unable to agree with the learned District Judge that taken as a whole the appellants' trade mark so nearly resembles the trade mark already registered as to be likely to deceive the purchaser.

We therefore set aside the order of the learned District Judge and of the Registrar. There will be no costs of this appeal.

PULLE, J.

I agree.

Set aside.

* Illustration omitted. † Illustration omitted.

Present : BASNAYAKE, A.C.J. AND WEERASOORIYA, J.

Application in Revision in D. C. Kandy Case No. 602/7467 (457)

ATTORNEY-GENERAL vs. H. N. DE SILVA

Application in Revision in D. C. Kandy Case No. 602/7467 (457)

Argued on : 27th September, 1955
Decided on : 8th November, 1955

Punishment—Matters that should be taken into consideration in inflicting—Charges of forging important documents against public servant—Accused pleading guilty—Court instead of inflicting punishment, dealt with under section 325 (2) *of the Criminal Procedure Code—Applicability of section to grave offences.*

The accused, a clerk in the Food Control Department, was indicted with another on three counts of forgery of important documents to enable non-citizens of Ceylon to obtain resident permits. He pleaded guilty to two out of the three counts and the learned District Judge, instead of inflicting punishment ordered him to enter into a bond in a sum of Rs. 300 with one surety to be of good behaviour for two years, purporting to act under section 325 (2) of the Criminal Procedure Code.

The Attorney-General applied for revision of the said order.

Held : That the offence is far too grave to be dealt with under section 325 (2) of the Criminal Procedure Code.

Per BASNAYAKE, A.C.J.—(*a*) " In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail ".

(*b*) " Offences committed in the course of their duties by post office officials *Henry Charles Victor Turner* (1947) 32 Cr. App. Rep. 45, by those who defraud the Post Office Savings Bank *Thomas Elliott* 32 Cr. App. R. 36 (1947), by police officers *Ernest Moore* (1910) 4 Cr. App. Rep. 135, bank clerks *R. C. Mason & J. J. A. Soper* (1908) 1 Cr. App. Rep. 73 at 77, solicitors *R. C. Mason & J. J. A. Soper* (supra), and other persons, whether professional men or not, in positions of trust are invariably, on grounds of public policy, dealt with severely. Age, previous good character and antecedents are of little avail in such cases ".

Cases referred to : *Gardner vs. James* (1948) 2 All E. R. 1069 ; *Pickett vs. Fesq.* (1949) 2 A.. E. R. 705.
Rex vs. Nash (1950) 1 D. L. R. 543 ; *Kenneth John Ball* (1951) 35 Cr. A. R. 164.
Rex vs. Dash (1948) 91 Can. C. C. 187 at 191
Rex vs. Boyd (1908) 1 Cr. App. Rep. 64.
Henry Charles Victor Turner (1947) 32 Cr. App. Rep. 45.
Thomas Elliott 32 Cr. App. R. 36 (1947).
Ernest Moore (1910) 4 Cr. App. Rep. 135.
R. C. Mason and J. J. A. Soper (1908) 1 Cr. App. Rep. 73 at 77.

J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.
G. G. Ponnambalam, Q.C., with *Cecil Goonewardene,* for the accused-respondent.

BASNAYAKE, A.C.J.

This is an application by the Attorney-General for the revision of the order made by the learned District Judge in respect of the first accused, a clerk in the Food Control Branch of the Kandy Kachcheri (hereinafter referred to as the respondent). He pleaded guilty to two out of three charges of forgery made against him along with another (hereinafter referred to as the second accused) who was indicted with abetting the respondent.

The learned District Judge, instead of inflicting any punishment on the respondent, ordered him to enter into a bond in a sum of Rs. 300/- with one surety to be of good behaviour for two years purporting to act under section 325 (2) of the Criminal Procedure Code. The second

accused was acquitted as there was no evidence against him.

It is submitted by learned Crown Counsel on behalf of the Attorney-General that the learned District Judge should have punished the offender, and that, in the circumstances of this case, the course adopted by him was wrong.

The evidence established the charges of forgery of surrender certificates in respect of a barber of Indian nationality holding an Indian passport named V. Manickavasagam and an Indian Muslim named Mohamed Ibrahim Saibo. Of the persons who received forged certificates of surrender, only V. Manickavasagam gave evidence at the trial. He made an application on 16th February, 1953, for the extension of his Temporary Residence Permit which was due to expire on 19th February, 1953, and was asked to furnish further proof of his having been in Ceylon in the years 1944 and 1945. In order to furnish the further proof he was required to provide, he applied to the Deputy Food Controller, Kandy, for a certificate of the fact that he had surrendered his rice ration books in those years. He was requested to call over at the Office of the Deputy Food Controller, and the respondent handed him two certificates, one for 1944 and another for 1945. These certificates were forwarded by Manickavasagam to the Assistant Controller of Immigration and Emigration. One of those certificates referred to in the proceedings as P5 was sent by the Assistant Controller of Immigration and Emigration to the Deputy Food Controller for verification. The Deputy Food Controller, Kandy, replied that P5 was a forgery. After this and other forgeries had been detected, the respondent went to the residence of Mr. Kodikara, Assistant Food Controller, and confessed his crime and asked for his intercession. He also requested that the matter be hushed up, and even suggested that Mr. Kodikara should destroy the Register by reference to which the forgery had been detected. He was naturally turned out of the house by Mr. Kodikara who resented the suggestion. The next day he formally called upon the respondent to explain the irregularity, and he admitted that he had no explanation to give and that he had issued extracts which were not genuine. He said:

> "I confess that I have issued an extract for 1944 for which there is no entry in the Register."

The evidence of the Assistant Controller of Immigration and Emigration and of the Examiner of Questioned Documents, reveals that other forged documents were received from the source from which P5 came including the document referred to in the third charge. The evidence disclosed a very serious offence. The respondent had forged very important documents in order to enable non-citizens of this country to obtain residence permits. What is more, when the crime was detected he had the audacity to suggest to his superior officer that he should destroy all evidence of his crime and save him.

I cannot escape the conclusion that the respondent has been too leniently treated by the learned trial Judge. The offence is far too grave to be dealt with under section 325 (2) of the Criminal Procedure Code. That section was never intended to be applied to grave offences involving deliberation *Gardner vs. James* (1948) 2 All E.R. 1069; *Pickett vs. Fesq.* (1949) 2 All E.R. 705. When in 1919 the Legislature introduced these provisions based on the Probation of Offenders Act 1907, it was intended that they should be applied to the class of offence to which the corresponding provisions of the English Act were applied. Such lenient treatment of an offender for so serious a crime is bound to defeat the main object of punishment, which is the prevention of crime. Other persons, similarly placed, will not be deterred from acting in the same way. The learned District Judge has indicated the considerations that influenced him. Here are his very words:

> "As regards the 1st accused he is about 22 years old and has lost his job as a temporary clerk, and although he has passed the General Clerical Examination he will not be taken in. Seeing that he is a young man, I do not wish to send him to jail."

It is clear that the learned District Judge has only looked at one side of the picture, the side of the respondent: his age, his youth, his previous good character, that he has lost his employment, and will not be taken into the Clerical Service even though he has passed the qualifying examination. These are certainly matters to be taken into account; but not to the exclusion of others which are of greater importance. He has failed to take into consideration the gravity of the offence and the circumstances in which it was committed, the degree of deliberation involved in it, the trusted position which the respondent held, the punishment provided by the Code for the offence, the difficulty of detection of this kind of offence, and the reprehensible conduct of the respondent after the offence was detected showing his criminal mind. These are all matters which far outweigh the considerations on the offender's side.

This Court has power in the exercise of its revisionary jurisdiction to increase or reduce a sentence, and it is not contrary to the rules which apply to appellate tribunals that it should exercise its independent judgment in a matter which is brought up before it in review and increase a sentence if it thinks it should be increased. Learned Counsel for the respondent urged that the quantum of sentence is a matter for the discretion of the trial Judge and that the Court of Appeal ought not to interfere, unless it appears that the trial Judge proceeded upon a wrong principle. He cited a number of cases which state the principles which should guide an appellate tribunal in altering a sentence passed by a Court of subordinate jurisdiction. Those cases quite properly lay down the rule that an appellate Court will interfere only when a sentence appears to err in principle or when the subordinate Court has either failed to exercise its discretion or has exercised it improperly or wrongly.

It may not always appear as in this case how the Court below has reached its decision, but, if upon the facts the appellate Court may reasonably infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Court of first instance, the exercise of the discretion may be reviewed.

The rules that should be observed by an appellate tribunal in interfering with the discretion of the Judge below are the same whether it be in a question of sentence or in any other matter. They have been stated over and over again and it is unnecessary to repeat them here. On the material before me I am satisfied in this case that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to the relevant considerations enumerated above. The order made by the learned trial Judge in respect of the respondent is therefore one that falls properly to be revised.

The all too frequent use of section 325 of the Criminal Procedure Code in cases to which it should not be applied requires that the considerations that Judges of first instance should take into account in the imposition of punishments on offenders should be laid down by this Court. Primarily the punishment for crime is for the good of the State and the safety of society *Rex vs. Nash* (1950) 1 D.L.R. 543; *Kenneth John Ball* (1951) 35 Cr.A.R. 164. It is also intended to be a deterrent to others from committing similar crimes *Rex vs. Dash* (1948) 91 Can.C.C. 187 at 191. There must always be a right proportion between the punishment imposed and the gravity of the offence.

In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty *Rex vs. Boyd* (1908) 1 Cr.App.Rep. 64, and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail.

A Government servant would invariably be a person of good character for he would not be in the service if he were not so. The fact that a Government or other servant would lose his employment by the conviction is not a sound reason for not imposing a term of imprisonment where his offence merits it. It is of vital importance that the confidence of the public in the services managed by the State should be preserved. In the same way in the case of a professional man the fact that the conviction would deprive him of membership of the professional body to which he belongs affords no valid ground for not sentencing him to imprisonment for a grave crime involving his honesty or integrity.

It should be remembered that the public are entitled to place their trust in professional men by virtue of the fact that they belong to honourable professions which enjoy public confidence. It would be extremely detrimental to the public interest that the betrayal of that trust should not be met with such punishment as will safeguard the interests of the public and the honour of the profession to which the offender belongs. The reformation of the offender in so far as it appears as a matter of practical consideration and such extenuating circumstances as appear from the evidence, though proper considerations

in the assessment of punishment, are not overriding considerations.

It is not out of place to state here that in England the provisions of the Probation of Offenders Act (1907)—(since repealed and replaced by the Criminal Justice Act 1948)—from which section 325 of the Criminal Procedure Code is derived, were rarely applied to cases of offenders in positions of trust who betray their trust.

Offences committed in the course of their duties by post office officials *Henry Charles Victor Turner* (1947) 32 Cr.App.Rep. 45, by those who defraud the Post Office Savings Bank *Thomas Elliott* 32 Cr.App.R. 36 (1947), by police officers *Ernest Moore* (1910) 4 Cr.App.Rep. 135, bank clerks *R. C. Mason and J. J. A. Soper* (1908) 1 Cr.App.Rep. 73 at 77, solicitors *R. C. Mason and J. J. A. Soper* (*supra*), and other persons, whether professional men or not, in positions of trust are invariably, on grounds of public policy, dealt with severely. Age, previous good character and antecedents are of little avail in such cases.

Another matter that should be borne in mind by Judges of first instance is that a heavy fine is not a substitute for a term of imprisonment when the appropriate punishment for the offence is imprisonment. Heavy fines are generally meant for such offences as profiteering, etc. where such fines are specially prescribed partly for the purpose of depriving the offender of his ill-gotten gains.

Applying to this case the considerations governing punishment above enumerated, the respondent should, in my opinion, despite his age, antecedents, and previous good character, be sentenced to a term of one year's rigorous imprisonment on each count of the indictment, the sentences to run concurrently. I accordingly set aside the order of the learned District Judge under section 325 (2) of the Criminal Procedure Code and sentence the respondent to undergo a term of one year's rigorous imprisonment in respect of each charge to which he has pleaded guilty, the sentences to run concurrently.

WEERASOORIYA, J.

I agree.

Set aside.

Present : GRATIAEN, J. AND GUNASEKERA, J.

BRITTO vs. WILSON HEENETIGALA

S. C. 432 L/1954 (*F*)—*D. C. Colombo* 6532 *L*

Argued on : 16th and 17th February, 1956

Decided on : 27th February, 1956

Rent Restriction Act—Section 13—*Statutory tenant—Partition Ordinance—Sale—Purchase by co-owner—Right of purchaser to eject tenant—Does the sale wipe out tenant's rights under section* 13 ?

Held : That a decree for sale entered under section 4 of the Partition Ordinance has the effect of bringing to an end the contractual relationship subsisting between the " tenant " and the co-owners (taken collectively) as " landlord " but the statutory protection conferred on the tenant by section 13 of the Rent Restriction Act was not extinguished either by the decree for sale or by the certificate of sale.

Cases referred to : *Heenatigala vs. Bird* (1954) 55 N. L. R. 279 at 281.
Gunaratne vs. Thelenis (1946) 47 N. L. R. 433.
Baker vs. Turner (1950) A. C. 401 at 417.
Marcroft Wagons Ltd. vs. Smith (1951) 2 K. B. 496 at 502.
Remon's case (1921) 1 K. B. 49 at 54.
Sideek vs. Sainambu Natchiyar (1954) 55 N. L. R. 367, 368.
Read vs. Goater (1921) 1 K. B. 611, 615.
Bernard vs. Fernando (1913) 16 N. L. R. 438, 439.
Khan Bhai vs. Perera (1923) 26 N. L. R. 204 (FB).
Fernando vs. Cadiravelu (1927) 28 N. L. R. 492, 498.
Samaraweera vs. Cunjimoosa (1915) 18 N. L. R. 408 (FB).

H. W. Jayawardene, Q.C., with *W. P. N. de Silva*, for the defendant-appellant.

Sir Lalitha Rajapakse, Q.C., with *C. G. Weeramantry*, for the plaintiff-respondent.

GRATIAEN, J.

The question for our decision on this appeal is whether the statutory protection of a tenant under the Rent Restriction Act No. 29 of 1948 is automatically extinguished if the leased premises are purchased (either by a co-owner or by a third party) in terms of a decree for sale under the Partition Ordinance. In *Heenatigala vs. Bird* (1954) 55 N.L.R. 279 at 281. Pulle, J. expressed the opinion *obiter* that " the certificate of sale issued (under section 8 of the Ordinance) had the effect of terminating the relationship of landlord and tenant and of constituting (the purchaser) an independent title holder to whom the restriction contained in section 13 of the Act could not apply because the certificate conferred a title which was not subject to the tenancy agreement." Swan, J. who pronounced the principal judgment in that case, did not discuss this problem because counsel appearing for the tenant " did not think it worthwhile to pursue the matter, and stated that his client was willing to surrender possession if he was given time." We are therefore free to examine the question afresh. In the rest of my judgment, I shall refer to the Partition Ordinance as " the Ordinance " and to the Rent Restriction Act No. 29 of 1948 as " the Act."

The premises to which this action relates are situated in an area in respect of which the Act is in operation. The plaintiff had entered into occupation of it as a tenant on 15th October, 1947, by virtue of a notarial lease executed in her favour by the plaintiff (as co-owner) and by virtue of contracts of monthly tenancy granted to her by all the other co-owners. During the subsistence of these tenancy agreements, the plaintiff instituted an action against his co-owners for the sale of the premises under the Ordinance, a partition being admittedly impracticable. On 6th July, 1950, a decree was entered under section 4 declaring the plaintiff and three others to be entitled to an undivided 1/4 share each and ordering the premises to be sold under section 8 subject to the rights of a mortgagee. The premises were accordingly put up for sale by public auction on 12th October, 1950, and the plaintiff was declared the purchaser. The sale was in due course confirmed by the Court, and on 5th February, 1952, a certificate of sale was issued to the plaintiff under section 8 as evidence of his title as sole owner. Shortly afterwards he sued the defendant for ejectment on the footing that her former rights as tenant had been extinguished by the decree for sale and that, as purchaser, he was now vested with a title which brought to an end the statutory protection which she would otherwise have enjoyed under the Rent Restriction Act No. 29 of 1948. The learned District Judge upheld this contention and ordered a decree for ejectment as prayed for, awarding damages at Rs. 40/55 per mensem less a sum of Rs. 280/24 which the defendant had paid on the plaintiff's behalf as Municipal rates.

I have come to the conclusion that the propositions of law relied on in support of the plaintiff's cause of action must be rejected. The decree for sale entered under section 4 of the Ordinance certainly had the effect of bringing to an end the contractual relationship which previously existed between the defendant as tenant and the co-owners (taken collectively) as " landlord ". Nevertheless, the statutory protection conferred on the defendant by section 13 of the Act was not extinguished either by the decree for sale dated 6th July, 1950, or by the certificate of sale dated 5th February, 1952. The plaintiff is therefore precluded from claiming the ejectment of the defendant without the authorization of the Rent Control Board because he has not established that the defendant's protection under the Act has come to an end for one or other of the reasons set out in the proviso to section 13.

It is important to realise that section 13 of the Act operates " notwithstanding anything in any other law." This means that the " tenant " is protected even though his contractual rights may have been terminated (*e.g.* by due notice or by effluxion of time) or extinguished by operation of law (*e.g.* by virtue of the combined effect of sections 4, 8 and 9 of the Ordinance). In the context of section 13, the word " tenant " necessarily includes (and generally means) a person who continues to occupy the protected premises after his contractual rights under the common law have come to an end. *Gunaratne vs. Thelenis* (1946) 47 N.L.R. 433. The observations of Lord Porter in *Baker vs. Turner* (1950) A.C. 401 at 417 may usefully be quoted in this connection:

> " The rules of formal logic must not be applied (to the language of Rent Restriction legislation) with too great strictness. As Scrutton, L.J., has more than once pointed out, they must be viewed in the light of their aim and object and it must always be remembered that the difficulty in construing them is enhanced by the fact that words and phrases apt to describe the relationship of a common law landlord and tenant one to another have been used without specific definition of another and statutory relationship, viz. that of a protected tenant or sub-tenant to his immediate, or perhaps remote, landlord."

Referring to this statutory relationship, Evershed, M.R. observed as follows in *Marcroft Wagons Ltd. vs. Smith* (1951) 2 K.B. 496 at 502.

> " A few sentences from the judgment of Bankes, L.J. in *Remon's case* (1921) 1 K. B. 49 at 54 will illustrate as well as possible the strangeness, at any rate as it would have appeared to a pedantic lawyer of the nineteenth century, of this conception. Referring in that case to the person claiming to retain possession of the premises, the Lord Justice said : ' In no ordinary sense of the word was respondent a tenant of the premises on July 2nd. His term had expired. His landlord had endeavoured to get him to go out. He was not even a tenant at sufferance. It is however clear, that in all the Rent Restriction Acts the expression *tenant* has been used in a special a peculiar sense, and as including a person who might be described as an ex-tenant, someone whose occupation had commenced as tenant and who has continued in occupation without any legal right except possibly such as the Acts themselves conferred upon him '."

The further question arises in the present case as to whether the plaintiff, after purchasing the premises under the provisions of the Ordinance, could fairly be described as the defendant's " landlord " within the meaning of the Act. Section 27 defines the term as meaning " the person for the time being entitled to receive the rent of such premises . . . " Under the common law, the word ' rent ' presupposes a subsisting contractual relationship whereby an agreed sum is paid by one of the parties for the occupation of the other's property. But here again the object of the Act would be defeated if we were to interpret the word " with too great strictness ". In my opinion, the reference to ' rent ' implies that " so long as a tenant enjoys a statutory right of occupation notwithstanding the termination of the earlier contract, a statutory obligation is imposed upon him to pay *rent* at the original contractual rate ". *Sideek vs. Sainambu Natchiyar* (1954) 55 N.L.R. 367, 368. In short, words such as ' landlord ', ' tenant ', and ' rent ', which are strictly appropriate only to describe a common law relationship, must all receive a meaning in the Act consistent with the conception (which is no doubt fictitious) that the old relationship still subsists during the period of statutory protection. The justification for this " broad, practical, common-sense interpretation " is that it provides the only means of giving effect to the intention of the legislature. *Read vs. Goater* (1921) 1 K.B. 611, 615. At the same time I agree entirely with Sir Lalitha Rajapakse that it would be quite wrong to include within the definition of a " landlord " any person other than the original lessor or someone who derives his title from the original lessor. If, therefore, the true owner of the leased premises vindicates his title against the tenant's contractual lessor, the statutory protection which the tenant enjoyed against the lessor would not be available against the true owner.

Sir Lalitha's main argument is that a purchaser at a sale held under the Ordinance acquires " a title paramount " which is not in truth derived from the person declared in the decree to be the co-owners, and that there is no *nexus* by derivation from the co-owners (the tenant's lessors) sufficient to give him the status of a " landlord " within the meaning of the Act. In support of this submission, much reliance was placed on de Sampayo, J's frequently quoted observation in *Bernard vs. Fernando* (1913) 16 N.L.R. 438, 439, that " partition decrees are not like other decrees affecting land, merely declaratory of the existing rights of the parties *inter se*. They create new title in the parties absolutely good against all the world." I would not presume to question the correctness of this analysis, and, with respect, I think that it admirably explains the effect of a final decree *for partition* whereby a co-owner receives, in lieu of his former undivided interests, absolute title to a divided allotment of the common property. But de Sampayo, J. has nowhere suggested that this analysis is equally appropriate where a decree *for the sale* of the common property has been entered under section 4 of the Ordinance.

A decree for sale under section 4 expressly declares that the common property belongs to certain specified co-owners in certain specified proportions, and then proceeds to order a sale of the property by public auction. In such a situation, it is the title of the persons declared to be co-owners which is put up for sale. The only substantial difference between a sale under the Ordinance and an ordinary sale in execution proceedings is that in the former case section 9 declares the title to be unimpeachable and good against all the world.

Until the certificate of sale is issued to the purchaser " the common bond of co-ownership " continues between the persons in whose favour the decree under section 4 was passed. *Kahan Bhai vs. Perera* (1923) 26 N.L.R. 204 (FB). " Upon the issue of the certificate of sale to the purchaser under a decree for sale, the title declared to be in the co-owners is definitely passed to the purchaser . . ." per Garvin, J. in *Fernando vs. Cadiravelu* (1927) 28 N.L.R. 492, 498. Indeed, section 8 emphasises that the certificate of sale merely operates to pass the co-owners' title to the purchaser as effectively as if they themselves had executed a conveyance in his favour. Accordingly, I would hold that the purchaser's title is in truth a title derived from the persons declared to be the co-owners

of the property. If, therefore, they had been the tenant's "landlords" within the meaning of the Act, that statutory status was transferred to him by operation of law.

It is quite correct to say that the decree for sale under section 4 of the Partition Ordinance had the effect of wiping out the contractual rights of lessors and monthly tenants. *Samaraweera vs. Cunjimoosa* (1915) 18 N.L.R. 408 (FB). Under the common law, therefore, the defendant could not have resisted the claim for her ejectment. But it is at this stage that the Act intervenes to give her protection. Although the common law relationship of landlord and tenant between the co-owners and herself was extinguished, a statutory relationship was created in its place which prevented them from ejecting her except upon one or other of the conditions permitted in section 13. In February, 1952, the plaintiff, as purchaser, succeeded to the status of a statutory landlord.

Distinguished Judges have explained in different ways the protection granted to tenants by Rent Restriction legislation. Evershed, M.R. in the *Marcroft* Wagons Ltd. (*supra*) case speaks of a "statutory right of irremovability" and of a "right to occupy premises with many of the attributes of a tenancy without the essential qualifications of an interest in land" (page 503). Denning, L.J. tells us in the same case that a "tenant" is clothed in "the valuable status of irremovability" (page 506). Whichever explanation be regarded as more appropriate in terms of jurisprudence, the fact remains that the legislature has found it necessary to impose a statutory fetter on the common law right of landlords and their successors in title to eject the tenant after the contract itself has (for whatsoever reason) come to an end. I would allow the appeal and dismiss the plaintiff's action with costs in both courts. The defendant is entitled to credit in the sum of Rs. 280/24 previously referred to against sums due by her to the plaintiff as "rent" (which the learned Judge has rightly fixed at Rs. 40/55 per mensem).

GUNASEKARA, J.
I agree.

Appeal Dismissed.

Present : GRATIAEN, J. & K. D. DE SILVA, J.

DORAISWAMY REDDIAR vs. SUNDARARAJ REDDIAR & ANOTHER

S. C. No. 601 *M*/1954 (*F*)—*D. C. Hatton No.* 4025

Argued on : 12th September, 1955
Decided on : 19th September, 1955

Negotiable instrument—Promissory note indorsed by second defendant to plaintiff—Contract between second defendant as indorser and plaintiff as immediate indorsee that maker only liable—Nature of such contract—Rights of plaintiff against the drawer and second defendant.

In pursuance of an agreement between them, to the effect that only the maker of the note will be liable the second defendant 'delivered' to the plaintiff certain promissory notes held by and made out to the second defendant by 3rd parties. The promissory note on which this action was brought was signed and delivered by the second defendant to the plaintiff, without any express words on the face of the instrument negativing or limiting the second defendant's liability thereunder as an indorser. Thereafter the plaintiff sued both the first defendant as maker and the second defendant as indorser for the balance sum due on the note, ignoring the terms under which the note had been transferred, namely, that the plaintiff's rights on the note should only be against the first defendant, as maker, and that his rights against the second defendant should be regulated by the terms of the agreement.

Held : (i) That the terms of the contract between the indorser (2nd defendant) and his immediate indorsee (plaintiff) did not consist solely in the writing popularly called an indorsement, but included the intention with which the delivery was made and accepted, as evidenced by the attendant words and circumstances.

(ii) That where the immediate indorsee has later indorsed the instrument to a holder for value without notice of such a contract between indorser and indorsee, then the absence of express words on the face of the document negativing or limiting the original indorser's liability precludes the latter from relying (as against the subsequent holder) on the terms of the original agreement with his immediate indorsee.

The second defendant was therefore not liable, though the first defendant was liable as maker.

Cases referred to : *Castrique vs. Buttigieg* (1856) 10, Moore. P. C. 94 : 4 W. R. 445.

Walter Jayawardene, for the second defendant-appellant.
N. D. M. Samarakone, with *J. C. Thurairatnam*, for the plaintiff-respondent.

GRATIAEN, J.

The Plaintiff and the second defendant were Head Kanganies on a tea estate in the Nanu Oya district. On the 11th July, 1948, they entered into a written agreement, P 1, which had been negotiated by the Head Kanganies' Association to which both of them belonged, whereby the gang of labourers under the second defendant was transferred to the plaintiff's gang with effect from the 1st August, 1948, upon the following among other terms :—

(*a*) The plaintiff was to pay Rs. 5,000/- to the second defendant as consideration for the agreement, and for the assignment by the second defendant to the plaintiff of certain debts due to him from the labourers concerned.

(*b*) The second defendant was to 'deliver' to the plaintiff all promissory notes and negotiable instruments held by him in respect of the said debts, and was to give him "all assistance wherever and whenever necessary" to recover these debts from the labourers.

One of the promissory notes which the second defendant had "delivered" to the plaintiff under the agreement was the first defendant's promissory note dated 30th December, 1946, on which a balance sum of Rs. 339/50 was still outstanding. This note was duly signed and delivered without any express words on the face of the instrument negativing or limiting the second defendant's liability thereunder as an indorser. If, therefore, the plaintiff had subsequently indorsed the note in favour of a holder for value, that latter person (not having notice of the actual circumstances attending the transaction between the plaintiff and the second defendant) would have been entitled to recover any balance due on the notes, not only from the first defendant (as maker) but also from the second defendant.

On the 13th August, 1952, the plaintiff sued both defendants for the recovery of Rs. 339/50 and interest due to him on the promissory note. The first defendant filed no defence, but the second defendant contested the claim on the ground that it had never been the intention that the normal liability of an indorser in the strict sense of the term should attach to him. The learned District Judge rejected this defence, but without discussing in his judgment the principles which apply to the proved facts.

The liability of an indorser to his immediate indorsee is regulated by considerations different from those which would have arisen if the negotiable instrument sued on had passed into the hands of a subsequent holder for value who had no notice of the terms of the contract in pursuance of which the original indorsement had been made. The distinction has been authoritatively explained in *Castrique vs. Buttigieg* (1855) 10 Moo. P. C. 94 :-

"The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question, but that contract arises out of the written indorsement itself, the delivery of the bill to the indorsee, *and the intention with which that delivery was made and accepted as evidenced by the words, either spoken or written, of the parties and the circumstances under which the delivery takes place.*"

It is only where an immediate indorsee has at a later date indorsed the bill or note to a holder for value without notice, that the absence of any express words on the face of the document negativing or limiting the original indorser's liability precludes the latter from relying (as against the subsequent holder) on the terms of the original agreement with his immediate indorsee.

In the present case, we are concerned only with the rights of the plaintiff (as immediate indorsee) against the second defendant (as indorser). The reliable evidence in the case, including that of the plaintiff's own witness C. K. Ramaswamy, and the terms of the written agreement in pursuance the note was indorsed, all make it perfectly clear that there had been an unequivocal stipulation that the plaintiff's rights on the note would be enforceable only against the first defendant (as maker), whereas the rights and obligations of the plaintiff and the second defendant *inter se* would be regulated by the terms of the agreement. If, for instance, the second defendant had committed a breach of his contractual obligations to "assist" the plaintiff to recover monies due from the first defendant, the plaintiff's remedy would have been to sue the second defendant for damages for breach of contract; but even in that event the second defendant's stipulated immunity from liability as indorser would not have been affected.

The learned judge seems to have formed the opinion that the second defendant had in fact committed a breach of his obligations under the original agreement, but no issue had been raised on that point; indeed, it is irrelevant to the question of the second defendant's alleged liability *as indorser*. Besides, the rights and obligations of the parties *under the agreement* had, according to the evidence, already been finally settled in a separate litigation.

I would set aside the judgment under appeal and dismiss the plaintiff's action against the second defendant with costs in both courts. The decree against the first defendant will, however, stand.

K. D. DE SILVA, J.

I agree.

Appeal allowed.

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

PITCHAMUTTU vs. THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS

S. C. No. 489—*Indian and Pakistani Residents (Citizenship) Appeal No. C. C.* 3347

Argued and Decided on : 1st and 2nd September, 1955

Indian and Pakistani Residents (Citizenship) Act No. 3 *of* 1949, *section* 15—*Order under section* 14 (7) (*b*)—*Power of Supreme Court to remit for further investigation.*

Where an application was made to the Supreme Court to remit a case to the Commissioner for further investigation.

Held : That the powers of the Supreme Court in appeal are found in section 15 and the Supreme Court is not entitled to exercise any powers outside those conferred by that section. The power to remit for further investigation is not inherent in that section and cannot be exercised unless it is expressly granted.

Per BASNAYAKE, A.C.J.—" Where a statute creates a new jurisdiction and confers new powers for carrying out the objects of the statute and gives a right of appeal from the decisions of the tribunal so created the powers of the Appellate Court when hearing an appeal under the statute are limited to those expressly granted ".

Walter Jayawardene with *S. P. Amarasingham*, for the applicant-appellant.

H. A. Wijemanne, Acting S.-G., with *R. S. Wanasundera, Crown Counsel*, for the respondent.

BASNAYAKE, A.C.J.

When this appeal came up for hearing before my brother Pulle, on 6th June this year, learned Counsel for the appellant invited him to remit the case back to the Commissioner for the Registration of Indian and Pakistani Residents to enable him to adduce further evidence regarding the residence of the appellant's children.

As my brother was not satisfied that such an order could properly be made by this Court in an appeal under section 15 of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 (hereinafter referred to as the Act), he gave Counsel an opportunity of presenting a fuller argument on the point and ordered that the case be relisted when they were ready. The matter has now been listed in pursuance of that order.

Learned Deputy Solicitor-General who appears for the Crown has raised a preliminary objection to the appeal being heard at all. He contends that the order against which the appeal has been taken is one made under section 14 (7) (*b*) of the Act and that an appeal does not lie against such an order. He submits that an appeal lies only against an order made under section 11 or 14 (6).

It will be helpful if I were to state shortly the facts of this case before I discuss the argument of the learned Deputy Solicitor-General.

The appellant Pitchamuthu Pitchamuthu who applied for registration as a citizen of Ceylon under the Act was given notice under section (9) 1 by the Deputy Commissioner that he had decided to refuse his application on the grounds specified in the notice, unless he showed cause to the contrary within a period of three months from the date thereof. Thereupon the appellant asked the Deputy Commissioner to fix an inquiry under section 9 (3) (*a*) so that he may show cause.

The Deputy Commissioner accordingly made order under section 9 (3) (*a*) appointing the time and the place for an inquiry. At the close of the inquiry the Deputy Commissioner made order refusing the application under section 14 (7) (*b*). The present appeal is from that order.

Section 15 which provides for an appeal to this Court reads as follows :—

> " (1) An appeal against an order refusing or allowing an application for registration may be preferred to the Supreme Court in the prescribed manner by the applicant or, as the case may be, by the person who lodged any objection which has been overruled by the order.
>
> " (2) Each appeal under this section shall be preferred within three months of the date of the order by means of a petition setting out the facts and the grounds of appeal.
>
> " (3) The date on which an order allowing an application takes effect shall—
>
> (*a*) where an appeal has been preferred, be the date on which the Supreme Court affirms such order or makes or directs the Commissioner to make such order ; and
>
> (*b*) where an appeal has not been preferred, be the date next succeeding the day on which the time limit for appeals, specified in sub-section (2), expires."

Learned Deputy Solicitor-General's argument that an appeal has been given only against an order made by the Commissioner under section 11 or section 14 (6) is one that does not commend

itself to us. We are unable to read into section 15 the restriction he seeks to place on it. That section gives a right of appeal " against an order refusing or allowing an application for registration ". An order made under section 14 (7) (*b*) at the close of an inquiry held in pursuance of section 9 (3) (*a*) refusing an application is clearly within the words of section 15 and cannot be excluded from its ambit. There is nothing in the statute that restricts the application of the words in section 15 to appeals from orders refusing or allowing application for registration under section 11 or 14 (6). We therefore overruled the preliminary objection and proceeded to hear the appeal on its merits.

The appellant has not satisfied us that the Deputy Commissioner was wrong, nor has he been able to point to any provision of law under which this Court may remit an appeal back to the Commissioner for further investigation. Indeed we do not think that such a procedure is contemplated by the Act. The powers of this Court in an appeal are to be found in section 15 itself, and this Court is not entitled to exercise any powers outside those conferred by that section. The power to remit for further investigation is not inherent in that section and cannot be exercised unless it is expressly granted. Here there is no such express grant. Such a power is granted by section 37 of the Courts Ordinance, section 347 of the Criminal Procedure Code and section 773 of the Civil Procedure Code. But those provisions apply only to proceedings which are regulated by those enactments and do not extend to an appeal under section 15 of the Act.

When a statute creates a new jurisdiction and confers new powers for carrying out the objects of the statute and gives a right to appeal from the decisions of the tribunal so created, the powers of the appellate Court when hearing an appeal under the statute are limited to those expressly granted.

We accordingly dismiss the appeal with costs which we fix at Rs. 105/-.

PULLE, J.

I agree.

Appeal dismissed with costs.

Present : BASNAYAKE, A.C.J.

JAYAKODY vs. DON KARTHELIS

Application for Revision in M. C. Avissawella No. 13990 (605)

Argued and Decided on : 5th September, 1955

Criminal Procedure Code—(Cap. 16) *section* 66 (1)*—Order to produce a document or thing—When can a Court make such order.*

Held : That before an order under section 66 of the Criminal Procedure Code is made, the evidence on which the Magistrate forms the opinion that it is necessary or desirable that a particular document or thing should be produced before the Court, should be on the record.

H. V. Perera, Q.C., with *M. M. Kumarakulasingham*, for the 2nd accused-petitioner.

C. E. Chitty with *A. S. Vanigasooriyar*, for the complainant-respondent.

BASNAYAKE, A.C.J.

This is an application for the revision of an order made by the learned Magistrate in proceedings for criminal breach of trust against two persons named L. Don Karthelis Appuhamy and W. H. Jayakody. The allegation in the plaint was that Karthelis Appuhamy, the 1st accused, committed criminal breach of trust of an elephant valued at Rs. 7,000/- and that the 2nd accused aided and abetted the 1st accused in the commission of that offence.

On the very day that the plaint was filed and summons ordered on the accused, the learned Magistrate made the following order regarding the production of the animal :—

" Issue summons for 14-10-54 and notice 2nd accused under section 66 of the Criminal Procedure Code to produce animal on that day ".

As summons had not been served by 14th October it was re-issued and made returnable on 28th October. On that date the accused appeared and pleaded not guilty to the charge ; but the elephant was not produced. The learned Magistrate thereupon made the following order :—

" Call case on 11-11-54 regarding custody of the elephant and question of security. Elephant to be produced on that date ".

On 11th November the Proctor for the accused contended that the learned Magistrate had no jurisdiction to order the elephant to be produced. After hearing Counsel for the prosecution the learned Magistrate made the following order :—

" I do not think that I could go back on my earlier order even assuming that it was done without jurisdiction. My own view is that the case cited by Mr. Jacolyn does not apply in this case ".

" For these reasons I direct that the animal be produced in Court on 25-11-54 ".

Learned Counsel for the petitioner submits that the learned Magistrate has no power to make the order he made.

Section 66 (1) of the Criminal Procedure Code provides that whenever any Court considers that the production of any document or other thing is necessary or desirable for the purpose of any proceedings under the Code by or before such Court, it may issue a summons to the person in whose possession or power such document or thing is believed to be, requiring him to attend and produce it or to produce it at the time and place stated in the summons.

It is clear from the sub-section that no order can be made thereunder unless the Court considers that the production of a particular document or thing is necessary. A Court can consider that the production of any document or thing is necessary or desirable only upon material properly placed before it.

Here there is no material on the record to show why it was necessary or desirable that the elephant should be produced for the purpose of trying the charges against the accused. In the absence of such material the order of the learned Magistrate cannot be sustained. Before an order under section 66 of the Criminal Procedure Code is made, the evidence on which the Magistrate forms the opinion that it is necessary or desirable that a particular document or thing should be produced before the Court should be on the record. After such material is placed before the Court it should weigh such evidence and make the order.

I set aside the order of the learned Magistrate directing the production of the elephant at the present stage of the proceedings leaving it open to him to make such an order should it become necessary or desirable to do so upon evidence placed before him at any future stage of the trial. The record should go back so that the proceedings which were interrupted by this application may now be continued.

Set aside.

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

FERNANDO vs. SIMON

Revision Application No. 143—*M. C. Colombo South No.* 61289

Argued and Decided on : 13th September, 1955

Criminal Procedure Code, section 253 *B* (3)—*Order for Crown costs and compensation—Failure to record and consider complainant's objections—Legality.*

Held : That where a Magistrate acts under section 253 B of the Criminal Procedure Code, he must give the complainant an opportunity of showing cause against the making of the order and record his reasons. The failure to do so is an illegality.

D. R. P. Goonetilleke in support.

Basnayake, A.C.J.

At the close of the prosecution in this case the learned Magistrate acquitted the accused and made the following order :—

" I am of opinion that this is a frivolous and vexatious complaint as defined under section 253 of the Ceylon Penal Code. I discharge the accused and I order the complainant to pay Rs. 5/- as Crown costs and Rs. 10/- each as compensation to the 2nd and 3rd accused in the case " (The reference to the Penal Code appears to be a typographical error).

Learned Counsel for the petitioner submits that under section 253B (3) of the Criminal Procedure Code the learned Magistrate is required to " record and consider any objection which the complainant may urge against the making of the order and if he makes such an order, he shall record his reasons for making the same. In this case the learned Magistrate has not given the complainant an opportunity of showing cause against the making of the order nor has he recorded his reasons. The order is therefore illegal and is set aside.

Pulle, J.

I agree.

Appeal set aside.

Present : WEERASOORIYA, J.

HAMID vs. NONIS

S. C. 525—*M. C. Kanadulla No.* 4033

Argued and Decided on : 4th October, 1954

Sentence—Magistrate's Court—Sentence of Imprisonment for 1½ *years—Additional term of* 1 *year purporting to act under Prevention of Crimes Ordinance, Section* 6*—Illegality.*

Where a sentence of 18 months' rigorous imprisonment was imposed on an accused by a Magistrates' Court and a further one year was added purporting to act under Section 6 of the Prevention of Crimes Ordinance.

Held : That the additional one year's imprisonment was illegal.

S. B. Lekamge, for the second accused-appellant.
M. Kanagasundaram, Crown Counsel, for the Attorney-General.

WEERASOORIYA, J.

I see no reason to interfere with the conviction in this case. The Magistrate sentenced the accused to 18 months' rigorous imprisonment on each count, the sentences to run concurrently and purporting to act under Section 6 of the Prevention of Crimes Ordinance he sentenced him to a further one year's rigorous imprisonment which it would appear the Magistrate intended as punishment in addition to the sentences of imprisonment already imposed on counts one and two. In fact therefore he has sentenced the accused to imprisonment for terms totalling 2½ years. I do not think Section 6 of the Prevention of Crimes Ordinance empowers the imposition of a sentence in excess of two years. Crown Counsel concedes that the imposition of the sentence of one year's rigorous imprisonment in addition to the sentences already imposed on counts one and two is irregular. I set aside the order of the Magistrate relating to the sentence of one year's rigorous imprisonment under Section 6 of the Prevention of Crimes Ordinance. Subject to that modification the appeal is dismissed.

Sentence varied.

Present : BASNAYAKE, A.C.J.

SOLOMONSZ S. I. POLICE vs. JINADASA

S. C. No. 1097—*M. C. Avissawella No.* 15651

Argued and Decided on : 24th October, 1955

Prevention of Crimes Ordinance—Sentence of imprisonment under section 6*—Failure to impose sentence for offence—Aggregate term of imprisonment previously imposed below one year—Validity.*

A sentence of imprisonment under section 6 of the Prevention of Crimes Ordinance can only be imposed when an offender has been previously, twice or oftener, convicted of any crime and has been sentenced to undergo rigorous imprisonment exceeding one year in the aggregate.

No appearance for accused-appellant.
L. H. de Alwis, Crown Counsel, for Attorney-General.

BASNAYAKE, A.C.J.

The learned Magistrate has not imposed any sentence on the accused appellant (hereinafter referred to as the appellant) for the offence he committed but has sentenced him to two years' rigorous imprisonment under section 6 of the Prevention of Crimes Ordinance and to two years' police supervision under section 5 of that Ordinance. A sentence of imprisonment under section 6 of the Prevention of Crimes Ordinance can only be imposed when an offender has been previously, twice or oftener, convicted of any crime and has been sentenced on such conviction or convictions to undergo rigorous imprisonment exceeding one year in the aggregate. In this case

the aggregate term of rigorous imprisonment to which the appellant has been sentenced previously is three months. The learned Magistrate was therefore not entitled to act under section 6 of the Prevention of Crimes Ordinance. I would therefore set aside the sentence of imprisonment passed by the learned Magistrate under that section.

The appellant has been convicted of an offence under section 368 (*a*) of the Penal Code. An offence under section 368 (*a*) is summarily triable by a Magistrate where, as in this case, the value of the animal stolen does not exceed Rs. 200/-.

As no sentence has been imposed on the appellant for the offence committed by him, I sentence him to six months' rigorous imprisonment. The order for police supervision will stand.

Subject to the above variation of the sentence the conviction is affirmed and the appeal is dismissed.

Appeal dismissed.

Privy Council Appeal No. 20 of 1955

Present at the Hearing : Lord Oaksey, Lord Tucker, Lord Cohen, Lord Keith of Avonholm, Mr. L. M. D. de Silva

SUBRAMANIAM vs. THE QUEEN

From
THE SUPREME COURT OF CEYLON

Judgment of the Lords of the Judicial Committee of the Privy Council
Delivered the 10th April, 1956

Criminal Procedure Code, section 440 (1)—When it should be used.

Held : (1) That the summary power conferred by section 440 (1) of the Criminal Procedure Code is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury.

(2) That it was never intended that in the course of a criminal trial, a Judge should, in the exercise of the power under this section, set on foot a subsidiary criminal investigation not against the person charged, but against the witnesses in the case.

(3) That if such an investigation is necessary, it can and should be set on foot under section 440 (4) of the Code.

Delivered by Lord Oaksey.

This is an appeal, by special leave, against the Order of a Commissioner of Assize of the Supreme Court of Ceylon, dated the 18th March, 1954, whereby the appellant was sentenced to one month's rigorous imprisonment for having given false evidence during the course of a trial for a murder on the 27th November, 1952, before the said Commissioner who, in sentencing the appellant purported to exercise the summary powers vested in him under section 440 (1) of the Criminal Procedure Code of Ceylon.

The appellant has served the said sentence.

It is convenient to set out section 440 of the Criminal Procedure Code :—

Summary punishment for perjury in open Court.

" 440. (1) If any person giving evidence on any subject in open Court in any judicial proceeding under this Code gives, in the opinion of the Court before which the judicial proceeding is held, false evidence within the meaning of Section 188 of the Penal Code it shall be lawful for the Court, if such Court be the Supreme Court, summarily to sentence such witness as for a contempt of the Court to imprisonment either simple or rigorous for any period not exceeding three months or to fine such witness in any sum not exceeding two hundred rupees ; or if such Court be an inferior Court to order such witness to pay a fine not exceeding fifty rupees and in default of payment of such fine to undergo rigorous imprisonment for any period not exceeding two months. Whenever the power given by this Section is exercised by a Court other than the Supreme Court the Judge or Magistrate of such Court shall record the reasons for imposing such fine.

" (2) Any person who has undergone any sentence of imprisonment or paid any fine imposed under this Section shall not be liable to be punished again for the same offence.

" (3) Any person against whom any order is made by any Court other than the Supreme Court under Subsection (1) of this Section may appeal to the Supreme Court and every such Appeal shall be subject to the provisions of this Code.

" (4) In lieu of exercising the power given by this Section the Court may if it thinks fit transmit the record of the judicial proceeding to the Attorney-General to enable him to exercise the powers conferred on him by this Code or proceed in manner provided by Section 380.

"(5) Nothing in the Section contained shall be construed as derogating from or limiting the powers and jurisdiction of the Supreme Court or the Judges thereof."

The appellant was sentenced in the following circumstances:—

The accused man, one Verrakathey Tharuman *alias* Tharmalingam, was charged under section 296 of the Penal Code with the murder of one Kandasamy on the 27th November, 1952, at or near a road junction known as Nelliadi Junction.

The appellant was at that time the Village Headman of Karavetti North, a village which abutted on the north side of Nelliadi Junction which was the scene of the offence. The village of Karavetti West abutted on the south side of Nelliadi Junction.

The case for the prosecution appears to have been that the deceased was seriously assaulted and beaten by the accused and two others (who were not before the Court) on the north side of Nelliadi Junction soon after it had become dark (*i.e.* about 6-30—7 p.m.). His assailants left the injured man lying on the road where he was attacked but subsequently he was removed to the southern side of the Junction by two innocent persons who placed him under a tamarind tree. After the attack the attackers went away but the accused returned shortly after and finding the injured person under the tree attacked him again, this time with a knife. The injured man died as a result of the injuries he had thus received.

The case for the prosecution was supported principally by the evidence of two alleged eye-witnesses and by the evidence of police officers and others (the appellant among them) who had either assisted at the police investigation or otherwise had played some part therein.

The appellant was called for the prosecution and testified that he was not an eye witness nor in possession of information which definitely identified any person with the crime. He was first informed of the offence at about 7-30 p.m. on the day in question and within 10 minutes or so of his receiving such information he went to Nelliadi Junction: On his arrival at the Junction he found the injured man alive but gravely wounded lying under a tree within the jurisdiction of the Karavetti West Headman in whose absence he (the appellant) assumed jurisdiction to deal with the emergency: He reported the offence to the police by telephone very shortly after—at about 7-45 p.m.—and until the police arrived at about 9 p.m. he carried out his duties as best he could: At about 8-15 p.m. he said he sent a written message to the Karavetti West Headman asking for his car for the removal of the injured person but the message was not accepted and was returned to him. He was unable to find the letter. The Karavetti West Headman did not arrive on the scene before about 9 p.m.: The appellant tried vainly to enlist the assistance of car owners for removing the injured person who died eventually at about 8-30 p.m. *i.e.* before the arrival of either the police or the Karavetti West Headman. Later the appellant telephoned to the hospital and arranged for the removal of the deceased.

Before the arrival of the police or the Karavetti West Headman he questioned, among others, one Kandappu a neighbouring boutique-keeper and recorded his statement: The appellant stated that there was a general reluctance on the part of several persons who had been questioned to come forward with any information of the attack on the deceased: He denied that there was any truth in the suggestion that "we all of us got together and suppressed the fact as to who the assailant was." The Karavetti West Headman was not called as a witness.

The Commissioner appears to have formed the opinion that evidence of the murder had been and was being suppressed and he therefore on his own initiative called a number of witnesses and cross examined the prosecution witnesses and the witnesses he had called not in connection with the alleged murder which he was trying but in connection with the alleged suppression of evidence of that murder. In the course of this cross examination he formed the opinion that the appellant and some of the police and other witnesses were committing perjury and proceeded to direct the acquittal of the prisoner although he stated that he had not the slightest doubt that the prisoner was guilty and that he had with the assistance of the police and of the appellant suppressed the evidence. At a later hearing the Commissioner after hearing counsel for the police and other witnesses and the appellant sentenced them to various terms of imprisonment.

In their Lordships' opinion the course taken by the learned Commissioner was misconceived. The summary power conferred by section 440 (1) is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury. It was in their Lordships' opinion

never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case.

If such an investigation is necessary it can and should be set on foot under section 440 (4). Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed and the Order of the Commissioner of Assize Supreme Court of Ceylon dated the 18th March, 1954, set aside. In all the circumstances of the case they think it right to make the unusual order that the appellant shall have his costs of the appeal and of the petition for special leave.

Present : Basnayake, A.C.J. and Gratiaen, J.

H. E. TENNEKONE, Commissioner for the Registration of Indian and Pakistani Residents vs. P. K. DURAISWAMY

In the matter of an Application for Conditional Leave to Appeal to the Privy Council in re *an Application made under section 7 of the Indian and Pakistani Residents (Citizenship) Act No. 3 of* 1949

S. C. Application No. 150

Argued on : 16th and 17th June, 1955
Decided on : 20th December, 1955

Privy Council Appeals Ord. No. 31 *of* 1909 *Order made by Supreme Court under the Indian and Pakistani Residents (Citizenship) Act No.* 3 *of* 1949— *Is it a civil suit or action.*

The order made by the Deputy Commissioner refusing the respondent's application for registration as a citizen of Ceylon fundamentally affects the civil status of the person concerned and therefore the parties to the appeal are parties to a civil suit or action in the Supreme Court within the meaning of the Appeals (Privy Councils) Ordinance.

Cases referred to : *Karuppanan's case* (1953) 54 N. L. R. 481 at 484.

M. Tiruchelvam, Deputy Solicitor-General with *V. Tennekone, C. C.*, for the respondent-petitioner.

Walter Jayawardene with *S. P. Amerasingham*, for the appellant-respondent.

Gratiaen, J.

At the conclusion of the argument, we overruled the objection that the order of this Court dated 18th February, 1955, under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 (as amended in 1950) had not been made in " a civil suit or action ". It was conceded that the question involved in the appeal was " of great general or public importance." Accordingly, we exercised our discretion in favour of the petitioner under Rule 1 (B), and granted conditional leave to appeal to Her Majesty in Council. I shall now set out my reasons for holding that the proceedings before this Court under the Act constituted a " civil suit or action " within the meaning of the Appeals (Privy Council) Ordinance.

The Deputy Commissioner had refused the respondent's application for the registration of himself, his wife and minor children as citizens of Ceylon under the Act. The respondent appealed to this Court against the Deputy Commissioner's order and the present petitioner (as Commissioner) was made a party to the appeal in accordance with established practice ; *vide Karuppanan's case* (1953) 54 N.L.R. 481 at 484. The appeal was in due course allowed by Sansoni, J. and myself, and the present petitioner was directed to take appropriate action under section 14 (7) on the basis that a *prima facie* case for registration had been established. This is the order (reported in 56 N.L.R. 313) against which the petitioner seeks leave to appeal to Her Majesty in Council.

In refusing the respondent's application for registration as a citizen of Ceylon, the Deputy Commissioner had performed a judicial function, but it may be conceded that the proceedings before him, as a statutory tribunal, did not at that stage constitute a " civil suit or action ". Nevertheless, a person aggrieved by a refusal of his application has a remedy by way of appeal to this Court, which is then empowered in an appropriate case to enter a mandatory decree directing the Commissioner (as respondent to

the appeal) to take further steps under the Act on the basis that the aggrieved person (as appellant) is *prima facie* entitled to the benefit of registration as a citizen of this country. This decree fundamentally affects the civil status of the person concerned and, with great respect to my Lord the Acting Chief Justice, I had no hesitation in reaching the conclusion that the parties to the appeal were parties to "a civil suit or action in the Supreme Court" within the meaning of the Appeals (Privy Council) Ordinance.

In this context, the words "*civil* suit or action" stand primarily in contradistinction to "*criminal*" proceedings. In addition, they exclude judgments and orders made by the Supreme Court in the exercise of a statutory jurisdiction which is merely of a consultative or administrative character or in proceedings which can be equated to arbitration proceedings. The present application related to an order for a mandatory decree affecting civil rights and therefore falls within the ambit of the Ordinance. There is no earlier ruling of this Court which compels us to refuse the remedy of an appeal to Her Majesty in Council.

Present : BASNAYAKE, A.C.J.

BABY NONA vs. WARNASURIYA (I. P.)

Application for Revision in M. M. C. Colombo No. 42934 (264)

Argued and Decided on : 5th September, 1955

Criminal Procedure Code, sections 325 *and* 326*—Accused convicted under the Brothels Ordinance, section* 2*—Keeping or managing a brothel—Binding over order—Condition that accused take up permanent residence outside the usual place of residence—Legality.*

Held : That a Magistrate has no power in making an order under sections 325 or 326 of the Criminal Procedure Code to impose a condition expelling a citizen from any part of the country for however short a time.

Dr. Colvin R. de Silva with *Sam P. C. Fernando*, for the accused-petitioner.
Shiva Pasupathi, C. C., for the Attorney-General.

BASNAYAKE, A.C.J.

In this case the accused was charged with having kept or managed a brothel in breach of section 2 of the Brothels Ordinance. She was found guilty and ordered to enter into a bond in a sum of Rs. 1,000/- with two sureties to be of good behaviour for a period of three years and to appear for conviction and sentence when required. The learned Magistrate further went on to impose the following further conditions :—

"(1) that during this period of three years she takes up a permanent residence anywhere outside Colombo subject however, with permission to be found in the city between 6 a.m. and 6 p.m. ;

"(2) that she is to report to this Court once in three months ;

"(3) that the accused to inform this Court and the Lady Probation Officer her permanent address so that the Lady Probation Officer might make quarterly reports to this Court as to the kind of life the accused is leading."

In dadition to all this the learned Magistrate ordered the accused to pay Rs. 500/- as Crown costs.

Objection is taken only against the order compelling the accused to take up permanent residence outside Colombo.

Learned Counsel contends that it is *ultra vires* of the Magistrate's powers. Section 325 and 326 of the Criminal Procedure Code do not confer on the Magistrate the power to order that the offender should take up residence outside Colombo for three years. Learned Counsel's contention is entitled to succeed. A Judge is not empowered under either of the abovementioned sections to make an order against a citizen expelling him from any part of the country for however short a time. I therefore set aside that part of the order which compels the accused to take up residence outside Colombo.

Appeal allowed.

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

SEENAWATTAGE SALISHAMY vs. WEERAKKODY SALISHAMY *et al*

S. C. 115*M*/1956 (*F*)—*D. C. Kalutara*, 27830.

Argued on : 11th May, 1956.
Decided on : 18th June, 1956.

Evidence Ordinance No. 14 *of* 1895 *Section* 115—*Mortgagee bidding at sale under Partition Ordinance—Subsequent action to enforce mortgage by sale of land—Does it amount to an estoppel?*

Where under a Partition decree a land is sold and a mortgagee of an undivided share of the same land bids at the sale, he is by that act alone not estopped from bringing an action to enforce his mortgage by the sale of the land. The mere act of bidding does not in any way operate as an inducement to the purchaser to buy the land or represent to him that it was free from any encumbrance. A mortgage is not a right or interest in the land that would be violated by the sale and hence section 115 of the Evidence Ordinance is not applicable in this instance.

Cases referred to : *Theadoris de Silva vs. Kalu Appu* (2 Matara Cases 183).
Tissahamy vs. Perera (43 N. L. R. 405).
Freeman vs. Cooke (1848 2 Exch. 654).
Caruppen Chetty vs. Wijesinghe (14 N. L. R. 152).
Tikiri vs. Belinda (19 N. L. R. 284).

E. Gunaratne for the appellant.

B. S. Dias for the respondent.

H. N. G. FERNANDO, J.

The plaintiff-appellant was the mortgagee of two lands under a Bond dated April 23rd, 1945, which according to the plaint was duly registered. In April, 1950, he instituted this action for the recovery of the principal and interest due on the bond as well as for a hypothecary decree in respect of the two lands, joining as parties the two mortgagors, and also (for reasons which will presently appear) two other persons as the 3rd and the 4th defendants. The mortgagors did not contest the action and a money decree was entered against them. This appeal is only against the refusal of the District Judge to grant a hypothecary decree.

The first of the two mortgaged lands was the subject of a partition action D. C. Kalutara No. 26367 instituted by one of the mortgagors after the execution of the mortgage bond. The present plaintiff was not made a party to that action and did not intervene. Decree was entered for the sale of the land, and, in pursuance of a commission issued by the Court on 20th July, 1948, the land was sold by the Commissioner on 23rd October in that year by public auction and purchased by the present 3rd defendant, who obtained a certificate of sale on 21st March, 1949. The 3rd defendant is joined in the hypothecary action in view of his purchase of the land.

At the trial (in the words of the learned District Judge) "the mortgage was admitted"; and since no issue was raised as to the validity of the mortgage or the amount due thereunder or its due registration in order to bind subsequent incumbrancers, it must be presumed that the admission covered all these matters. The only issue tried was the one suggested on behalf of the 3rd defendant :—"Is the plaintiff estopped from enforcing his mortgage bond No. 32932 dated 23rd April, 1945 by the sale of Wellawatte land No. 1 in the schedule to the amended plaint?"

It was clearly established by the evidence that the plaintiff was present at the sale and that he made the third bid (Rs. 450/-) at the auction. The 3rd defendant commenced to bid thereafter and ultimately became the purchaser at Rs. 770/-. Despite the evidence of the plaintiff and of the auctioneer that the plaintiff had informed persons present at the sale that the land was subject to the plaintiff's mortgage, the learned Judge has preferred to believe the evidence of the 3rd defendant to the effect, *firstly* that the mortgage was never mentioned, and *secondly* that the 3rd defendant would not have purchased the land if he had known of the plaintiff's mortgage. I should add that the plaintiff is the brother-in-law of the original mortgagor. Upon these facts, the learned Judge formed the conclusion that "any reasonable person would take such conduct (of the plaintiff) to mean that the plaintiff had no interest in the land" and held against the plaintiff on the issue of estoppel.

The question whether (to employ the language of section 115 of the Evidence Ordinance) "a person has by his declaration, act or omission intentionally caused or permitted another to

believe a thing to be true and to act upon such belief", can rarely receive a summary answer such as appears to have been given in this case; and the fine, though valid, distinctions which have been drawn in the decided cases show that difficult problems arise upon pleas of estoppel. For example *Theadoris de Silva vs. Kalu Appu et al* (2 Matara Cases 183) which decided that a person who was the highest bidder at a Fiscal's sale, though he did not comply with the terms for completing his purchase, was not estopped from asserting his title against the person who was ultimately declared the purchaser at the sale, cannot be readily reconciled with *Tissahamy vs. Perera* (43 N. L. R. 405) where the plaintiff was held estopped from asserting title to a land on the ground that he had been a bidder at a Fiscal's sale of the same land.

The provisions of section 115 of the Evidence Ordinance are in effect a codification of the English Law on the subject which is stated in general form as follows:—"Where one person ('the representor') has made a representation to another person ('the representee') in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto". (Spencer Bower on Estoppel by Representation p 10). In the first place it has to be established that the act or omission relied upon was intentional, and it has been held in one of the leading cases *Freeman vs. Cook* (1848 2 Exch 654) per Baron Parke, that "if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation will be equally precluded from contesting its truth; and conduct by negligence, where there is a duty cast upon a person, by custom of trade or otherwise, to disclose the truth, may often have the like effect". The learned District Judge in this case has not found, and indeed upon the evidence could scarcely have found, that the plaintiff actually intended the defendant to think that there was no mortgage in existence, so that the ingredient of intention would not be established unless it can be said that the plaintiff's conduct would necessarily lead a reasonable man to conclude that a mortgage was not subsisting.

In regard to the fact that the plaintiff was a bidder at the Fiscal's sale, what has now to be established in order to estop him from asserting his mortgage is that the making of bids by a mortgagee at a sale of the mortgaged lands constitutes an unequivocal representation that the land is not subject to a mortgage. Ceylon cases such as those of *Caruppen Chetty vs. Wijesinghe* (14 N. L. R. 152) and *Tissahamy vs. Perera* (*supra*) are not directly in point, because there the rule of estoppel was applied against persons who *asserted title* and not merely encumbrances against purchasers at Fiscal's sales. But even where a claim of title was subsequently set up, the mere fact that bids were made was not thought conclusive in *Theadoris de Silva vs. Kalu Appu* (*supra*). There, upon the facts it was held that the bids were made merely in order to buy up the land and avoid future litigation and that the ultimate purchaser at the Fiscal's sale was not proved to have been induced to purchase by reason of the bids made by the person who subsequently set up title.

More directly in point is the case of *Tikiri vs. Belinda* (19 N. L. R. 284) where the plaintiff was present at an execution sale held under his own writ of a 4/6th share of the land and himself made bids. Upon these facts he was held to be estopped from setting up a prior registered usufructuary mortgage of the entire land in his favour. A special feature of that case referred to by de Sampayo, J. was that "the plaintiff was himself a writ holder and was present at the sale in that capacity and as a bidder", and it was held (apparently for the reason that he was a writ holder) that a duty lay on him to speak and to disclose the mortgage. On those grounds de Sampayo, J. distinguished the case from that of *Caruppen Chetty vs. Wijesinghe* (*supra*) which he had earlier decided himself. In the decision last mentioned the same learned Judge observed that "in the case of a mortgagee or lessee the duty to notify his right is less apparent seeing that notwithstanding the mortgage or lease the land may still be sold". While therefore a person who himself has *title* may well have a duty either to warn or else not to mislead others to whom the land is being offered for sale, such a duty does not so clearly arise in the case of a person the existence of whose interests would not prevent the passage of title to another. In the present case the land was put up for sale under a partition decree and all the parties must be presumed to have been aware of the provisions of section 12

of the Partition Ordinance which expressly preserves the rights of a mortgagee of land which is the subject of the partition or sale. In view of the provisions of that section and of the fact that acquisition by mortgagees of lands subject to their own mortgages is not unusual (merger being a recognised legal form of the extinction of mortgages), it cannot in my opinion be said that the conduct of the plaintiff in bidding at the sale amounted to an unequivocal representation that there was no existing mortgage. If, as I think, the act of bidding does not work an estoppel, still less can the failure of the plaintiff to disclose his mortgage prevent him from now asserting his interest. But it would perhaps be useful to add a few observations on this matter as well.

Silence or inaction can only count as a representation if there is a legal duty (not merely moral or social) owed to a party to make the disclosure, the omission of which is relied on to create the estoppel, (Spencer Bower p 65 sec., 75). Baron Parke in *Freeman vs. Cooke* (*supra*) observed that the omission to disclose will only estop a person if " there is a duty cast on him by custom of trade or otherwise, to disclose the truth ". Many of the cases show that the rule of estoppel by silence or acquiescence is usually applicable when there is some dealing or transaction between the parties or where " a person stands by " and permits another to incur expenditure the benefit of which he subsequently seeks to keep for himself. Apart from such cases a person who has a title, right or claim, has a duty to disclose it to another who conducts himself with reference to the property in a manner inconsistent with that title right or claim. But where a land which is already subject to a mortgage is being sold to some third party, the acquisition of title by the third party is not inconsistent with the interests of the mortgagee and therefore does not involve any such violation of the mortgagee's rights as would render any disclosure necessary.

For these reasons the provisions of section 115 of the Evidence Ordinance are not in my opinion applicable in the circumstances of this case. The ordinary principle that the plaintiff's prior registered mortgage prevails over the subsequent Fiscal's conveyance must therefore be applied.

To turn now to the plaintiff's claim for a hypothecary decree in respect of the second land. According to the pleadings the 1st defendant who was the original mortgagee sold the second land to the 4th defendant. But it was also stated in the plaint that according to the Interlocutory decree entered in Case No. 26520 D. C. Kalutara, the interests of the 1st defendant in the second land are now described in the manner set out in the second schedule to the plaint. The learned Judge found however that the description in the plaint of the second land was confusing; and a hypothecary decree over the second land was denied to the plaintiff by the Judge on the ground that there was no evidence before him of the conversion of the second land described in the mortgage bond into the land as described in the Interlocutory decree in Case No. 26520. But it is by no means clear that any of the defendants contested the right of the plaintiff to the hypothecary decree. The 1st and 2nd defendants filed no answer and were not represented at the trial. The 4th defendant also filed no answer but he was represented, and the proceedings of 9th November, 1954 would seem to indicate that the mortgage was admitted by the parties who were represented at the trial and that the only issue actually raised was the one with which I have already dealt.

The question whether the second land was correctly described in the plaint or not, appears to have been raised for the first time by the learned District Judge in his judgment. In these circumstances I think the dismissal of the plaintiff's action in respect of the second land without his being given any opportunity either to identify the land in respect of which he claimed a decree or to lead evidence in support of his claim was quite unjustified.

In the result the plaintiff's appeal must succeed in regard to both lands. Hypothecary decree must be entered in his favour in respect of the land described in schedule No. 1 in the amended schedule to the plaint which is attached to the amended plaint marked " C ". As to the second land which is described in schedule No. 2 in the amended schedule to the plaint, the case is remitted to the District Court with a direction that the plaintiff be given an opportunity to identify the land so described with the land No. 2 described in the schedule to the mortgage bond P1, including an opportunity to lead any further evidence considered necessary. If he so identifies the land to the satisfaction of the District Judge, a hypothecary decree should be entered in the plaintiff's favour in respect of the second land as well. That part of the decree of the District Court which dismisses the plaintiff's action against the 3rd and 4th defendants is set aside. The 3rd defendant will pay to the plaintiff the costs of the proceedings in the District Court and of this appeal.

T. S. Fernando, J.
I agree.

Set aside.

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

MOHAMED vs. GOPALLAWA (MUNICIPAL COMMISSIONER) AND ANOTHER

Application No. 531.

In the matter of an Application for a Writ of Mandamus on William Gopallawa, Commissioner of the Colombo Municipal Council, under section 42 of the Courts Ordinance (Chap. 6).

Argued on : 19th, 20th, 24th, 25th, and 27th January, 1956.
Decided on : 8th February, 1956.

Writ of Mandamus—Municipal Commissioner—Compel him to hold meeting—Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment Act) No. 7 of 1954 sections 15 (2) and 19 (2) (a) and (b).

On a requisition made by the petitioner and other Councillors, a meeting was held and a resolution passed by the requisite majority for the removal of the Mayor of the Municipal Council. Thereafter the Municipal Commissioner in terms of section 19 (2) (*b*) of the Municipal Councils Ordinance summoned a second meeting to consider whether or not the resolution passed at the first meeting, (the full text of which he reproduced in his second notice) should be confirmed. At the second meeting when the petitioner who was also the mover of the resolution at the first meeting rose to move the confirmation of the resolution that had been passed at the first meeting, the Mayor rose to a point of order on the ground that no notice of the second resolution of the confirmation of the first resolution had been given and that the petitioner therefore was precluded from moving it. The Commissioner upheld the point of order and declared the meeting closed. The petitioner moved for a writ of mandamus to compel the Commissioner to continue the meeting.

Held : (1) That it was clear from the notice convening the second meeting that the members were required to attend a meeting at which the matter for consideration was whether or not the resolution referred to in the notice should be confirmed.

(2) The notice of the meeting specifies the business to be transacted thereat and satisfies in every way the requirements of section 20 (2).

H. V. Perera, Q.C., with *H. W. Jayawardene, Q.C.*, *Edmund Cooray*, and *Izadeen Mohamed*, for the petitioner.

S. Nadesan, Q.C., with *Walter Jayawardena*, and *T. Senathirajah*, for the first respondent.

Dr. Colvin R. de Silva, with *Walter Jayawardena*, and *A. B. Perera*, for the second respondent.

BASNAYAKE, C.J.

The petitioner is a member of the Municipal Council of Colombo. The first respondent is the Commissioner and the second respondent is the Mayor of that Council. The petitioner asks for a mandate in the nature of a writ of mandamus directing the first respondent—

(*a*) to continue the Special Meeting which commenced at 2-30 p.m. on Monday the 17th of October, 1955, till the business, notice of which he had given, is transacted and concluded ; and

(*b*) for the said purpose to summon all the Councillors to re-assemble on a date and at a time to be fixed by this Court by giving to each Councillor such notice as this Court might direct.

No relief is claimed against the second respondent.

The material facts relating to the application are as follows :—

On 23rd September, 1955, a requisition to convene a Special Meeting of the Municipal Council under section 19 (2) (*a*) of the Municipal Councils Ordinance, No. 29 of 1947, as amended by Act No. 7 of 1954, (hereinafter referred to as the Ordinance), was made to the first respondent in writing signed by sixteen Councillors. That requisition was as follows :—

" In terms of section 19 (2) (*a*) of the Municipal Councils Ordinance No. 29 of 1947 as amended by the Municipal Councils (Amendment) Act No. 7 of 1954. We the undersigned sixteen members of the Colombo Municipal Council do hereby request you to convene a special meeting of the Colombo Municipal Council to consider the resolution herein below set out for the removal of Dr. N. M. Perera from the office of Mayor of the said Municipal Council.

The resolution above referred to :—

" This council resolves that Dr. N. M. Perera be removed from the office of Mayor of the Colombo Municipal Council in terms of section 19 (2) (*a*), 19 (2) (*b*), and section 15 (2), of the Municipal Councils Ordi-

nance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954.

Proposer :—Mr. M. H. Mohamed,
Member for Maligawatte ".

On the same date the petitioner addressed a letter to the Municipal Commissioner in the following terms :—

" With reference to the requisition signed by me and fifteen other members of the Council and delivered to you this day requesting you to convene a Special Meeting of the Council to consider a resolution for the removal of Dr. N. M. Perera from the office of Mayor of the Colombo Municipal Council,

I do hereby give you notice that the resolution in the said requisition fully set out which is in the following terms, to wit,

" This council resolves that Dr. N. M. Perera be removed from the office of the Mayor of the Colombo Municipal Council, in terms of section 19 (2) (*a*), 19 (2) (*b*), and section 15 (2) of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954, will be moved by me at the said Special Meeting."

A Special Meeting was summoned for 1st October, 1955, by the first respondent in pursuance of the requisition, and notice of that meeting, dated the 24th of September, 1955, was sent by him to each of the members in the following terms :—

" Whereas a requisition for a Special Meeting of the Council in terms of section 19 of the Municipal Councils Ordinance No. 29 of 1947, as amended by Municipal Councils (Amendment) Act No. 7 of 1954, has been made to me, I, W. Gopallawa, Municipal Commissioner, Colombo, in terms of the provisions of section 20 of Ordinance No. 29 of 1947, as amended by the Municipal Councils (Amendment) Act No. 7 of 1954, do hereby summon you to a Special Meeting of the Council to be held at 9-30 a.m. on Saturday, the 1st October, 1955, at the Town Hall, Colombo, to consider the following motion :—

Mr. M. H. Mohamed, Member for Maligawatte, to move :—

" This Council resolves that Dr. N. M. Perera be removed from the office of the Mayor of the Colombo Municipal Council, in terms of section 19 (2) (*a*), 19 (2) (*b*), and section 15 (2) of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954 ".

At the meeting held on 1st October, 1955, the resolution tnat Dr. N. M. Perera be removed from the office of Mayor of the Colombo Municipal Council was passed by the requisite majority and the first respondent proceeded in terms of section 19 (2) (*b*) to summon a meeting (hereinafter referred to as the second meeting) to consider whether or not that resolution should be confirmed. The notice of that meeting dated the 5th of October, 1955, was as follows :—

" Whereas the Municipal Council of Colombo at its Special Meeting held on 1st October, 1955, in terms of the provisions of section 19 of Ordinance No. 29 of 1947, as amended by the Municipal Councils (Amendment) Act No. 7 of 1954, has passed the following resolution by not less than one half of the total number of Councillors :—

" This Council resolves that Dr. N. M. Perera be removed from the office of the Mayor of the Colombo Municipal Council, in terms of section 19 (2) (*a*), 19 (2) (*b*), and section 15 (2) of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954 ".

I, W. Gopallawa, Municipal Commissioner, Colombo, in terms of section 19 of the Municipal Councils Ordinance No. 29 of 1947, as amended by the Municipal Councils (Amendment) Act No. 7 of 1954, do hereby summon you to another Special Meeting of the Council to be held at 2-30 p.m. on Monday, the 17th October, 1955, at the Town Hall, Colombo, to consider whether or not that resolution should be confirmed."

On the date of the second meeting, the first respondent presided as required by section 19 (2) (*c*) of the Ordinance. At the commencement of the meeting he called upon the Secretary to read the notice convening the meeting. After it was read the first respondent addressed the assembled members thus :—

" Gentlemen, now you will consider whether or not that resolution should be confirmed ".

Then a member, Dr. W. D. de Silva, rose to a point of order that the meeting was irregular as only 16 had voted for the resolution for the removal of the Mayor. He contended that unless 17 members voted for the resolution the requirements of section 15 (2) would not be satisfied. The first respondent overruled the point of order.

The petitioner states in his affidavit that immediately after this ruling he rose from his seat to move the confirmation of the resolution passed at the previous Special Meeting " to remove the second respondent from the said office of Mayor ". The second respondent interrupted the petitioner with these words :—

" I do not know why the Hon. Member for Maligawatte has risen. But I want to ask one or two questions. I presume, Mr. Commissioner, what was just now read out by the Secretary of the Council is the agenda for this day.

Commissioner : That is so.

Dr. N. M. Perera : May I have that recorded, Sir, because that is very important.

Commissioner : Yes.

Dr. N. M. Perera : The second point, Sir, is, may I know whether any notice of a motion has been given ?

Commissioner : No notice has been given. This is the notice

Dr. N. M. Perera : I would like that also recorded.

I want to rise to a point of order and I would like your patient consideration because, if I may say so without any attempt to prejudice your mind, this is a matter over which I have had occasion to consult legal opinion, and I am submitting my point of order on that basis ".

The second respondent then proceeded to elaborate his point of order and the first respondent ruled as follows :—

" Dr. N. M. Perera rises to a point of order that there is no resolution before the House whether or not the following resolution passed on 1st October, 1955, be confirmed :—

" This Council resolves that Dr. N. M. Perera be removed from the office of the Mayor of the Colombo Municipal Council, in terms of section 19 (2) (*a*), 19 (2) (*b*), and section 15 (2) of the Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment) Act No. 7 of 1954 ".

In the absence of any notice of such a resolution it is not open to any Councillor at this meeting to move that the resolution passed at that meeting be confirmed or rejected.

Section 3 (2) of Act 7 of 1954, requires that a resolution for the removal of a Mayor or a Deputy Mayor from office be passed by not less than one-half the total number of Councillors and it be confirmed by *a resolution* similarly passed at another Special Meeting of the Council convened under paragraph (*b*) of that subsection. That section contemplates two resolutions : the first resolution as required by section 19 has been passed ; there is no notice of a similar resolution before the House. In the absence of such a resolution I uphold Dr. Perera's point of order ".

I declare the meeting closed ".

Learned Counsel for the petitioner submitted that once the resolution for the removal of the Mayor was passed the first respondent was bound by law to convene the second meeting within the time prescribed in section 19 (2) (*b*) and cause notice of that meeting and of the business to be transacted thereat to be served in terms of section 20 (2) of the Ordinance. He further submitted that the first respondent having complied with the requirements of both those provisions was under the legal obligation to permit the meeting which he convened to transact its business.

Learned Counsel for the respondents, while conceding that the first respondent had complied with the requirements of sections 19 (2) (*b*) and 20 (2) to the extent only of convening a meeting, contended that the notice does not set out the business to be transacted thereat. Counsel further submitted that the statement in the notice that the meeting was summoned for the purpose of considering whether or not the resolution passed at the earlier meeting should be confirmed was not a notice of the business to be transacted thereat. They argued that the notice served under section 20 (2) should set out the specific motion to be moved at the second meeting and that unless that were done there would be no notice of the business to be transacted at the meeting.

Counsel further contended that, as no notice of the business to be transacted at the meeting had been given, the petitioner was precluded by section 21 of the Ordinance from bringing up any business at that meeting without the permission of the Council. Counsel also argued that to enable the first respondent to specify in the notice the business to be transacted at the second meeting the petitioner should have, in terms of by-law 10 of the Council's by-laws regulating meetings, given, to the Secretary of the Council, notice of the motion he proposed to move. As the petitioner failed to comply with that by-law, the first respondent had no alternative but to serve the notice in the form in which it has been given. To this argument Counsel for the petitioner replied that the first respondent's notice specified the business that was to be transacted at the meeting, and that therefore there was no need to ask for the permission of the Council under section 21 of the Ordinance. In support of his argument he referred us to the practice and procedure in regard to the notice of meetings of shareholders of companies and of the Bank of Ceylon.

The only question for decision is whether the notice in the instant case set out the business to be transacted at the second meeting as required by section 20 (2) of the Ordinance.

In our opinion sections 15 (2), 19, (2) and 20 (2) of the Ordinance contain the entire machinery for the summoning of meetings which are to be presided over by the Commissioner.

By-law 10 which governs meetings of the Council convened under sections 19 (1) and 20 (1), and which are presided over by the Mayor, is a by-law made under a repealed Ordinance. It is continued in force by section 318 of the present Ordinance and is not designed for the case of Special Meetings presided over by the Commissioner.

There was therefore no obligation in law on the petitioner to give notice of the motion he proposed to move at the meeting convened under section 19 (2) (*b*) to consider whether the resolution for the removal of the Mayor should be confirmed or not.

It is clear from the notice convening the meeting that the members were required to attend a meeting at which the matter for consideration was whether or not the resolution referred to in the notice should be confirmed. In our opinion the notice of the meeting specifies the business to be transacted thereat and satisfies in every way the requirements of section 20 (2). The

business of the second meeting is indicated in section 19 (2) (*b*) and that was communicated to the members in the notice convening the meeting.

If the notice satisfies the requirements of section 20 (2) was the petitioner entitled in law to move at the second meeting a motion to the effect that the resolution passed at the previous meeting for the removal of the Mayor be confirmed? We think he undoubtedly was.

It is reasonable to infer that when the legislature clothed the Commissioner with the powers vested in him by sections 19 (2) and 20 (2) it impliedly granted him all such powers as are necessary for the proper and effectual execution of the powers expressly granted to him. In the exercise of those powers the Commissioner was free to regulate the meetings convened by him in accordance with the accepted rules of procedure at such meetings.

Learned Counsel for the second respondent also urged that the first respondent had performed the statutory duties imposed on him by sections 19 (2) (*b*) and 20 (2) of the Municipal Councils Ordinance and that a mandamus did not lie. He has undoubtedly discharged his functions under section 19 (2) (*b*) and 20 (2); but as presiding officer by virtue of section 19 (2) (*c*) he was under a duty to permit the meeting to transact the business for which it was convened. In view of his wrong decision on the point of order that was raised by the second respondent he failed to discharge his duty to give the meeting an opportunity of deciding whether or not the resolution passed by the Municipal Council on 1st October, 1955, should be confirmed. The first respondent by an erroneous decision on the point of order raised by the second respondent could not disable himself from performing the duty enjoined by law of transacting the business of the meeting at which he presided.

In our opinion the petitioner is entitled to the mandate he seeks. We accordingly direct the Commissioner to continue the Special Meeting which commenced at 2-30 p.m. on Monday, 17th October, 1955, till the business notice of which he has given is transacted and concluded, and for that purpose to summon all Councillors to re-assemble on a date and time to be notified by him by giving the Councillors at least four days' notice before the meeting. We also direct that the date so notified by him for the continuation of the meeting of Monday, 17th October, 1955, shall be a date not later than fourteen days from the date on which this order is served on him by the Fiscal.

The petitioner is entitled to the costs of this application as against the first respondent.

Pulle, J.

I agree.

Writ allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : Basnayake, A.C.J. (President), Pulle, J. and Fernando, J.

REGINA vs. WAIDYASEKERA

Appeal No. 46 *of* 1955 *with Application No.* 75 *of* 1955.
S. C. 36/*M. C. Colombo South Case No.* 60406.

Argued on : 25th, 26th, 29th, 30th and 31st August, 1955.
Decided on : 31st August, 1955.
Reasons delivered on : 17th October, 1955.

Penal Code (*Cap.* 15), *sections* 303 *and* 305—*Causing death of woman with child by doing an act with intent to cause miscarriage—section* 81—*General exception—Evidence Ordinance* (*Cap.* 11) *section* 15 *—Evidence of similar occurrences—Misdirection—Benefit of reasonable doubt.*

The accused, a registered medical practitioner, was convicted of an offence under section 305, Penal Code, viz., causing the death of a woman with child by doing an act with intent to cause miscarriage. It was argued in appeal :—

(1) That the words " cause the miscarriage " in section 305 should be read in the light of the definition of the offence in section 303.

Held : Section 305 is not controlled by section 303, and it is not necessary under the former for the prosecution to prove that the miscarriage was not caused in good faith for the purpose of saving the life of the woman.

(2) That, because of the general exception in section 81 Penal Code, the accused had committed no offence.

Held : Section 81 did not apply, because there was no evidence to show that the accused consented to suffer or take the risk of the harm which was actually caused to her.

(3) That inadmissible evidence of similar occurrences in which the accused had performed abortions had been led.

Held : That the evidence was admissible under section 15 Evidence Ordinance as it was relevant to the issue whether the accused had done the act with the *intention* of causing miscarriage.

(4) That there was no direction by the Commissioner that the appellant should be given the benefit of any reasonable doubt caused by the evidence.

Held : That there was in fact such a direction. That it is only necessary to clearly direct the jury as to the burden and standard of proof ; the use of a particular formula is unnecessary.

Cases referred to : (1) *Jarlis vs. The King* (1951) 52 N. L. R. 457 (C. C. A.).
Makin and Makin vs. The Attorney-General for N. S. W. (1894) A. C. 57 at 65.
Annie Lovegrove (1920) 15 Cr. App. Reps. 50 and 52.
William Richard Starkie (1921) 16 Cr. App. Reps. 61 and 69.
Arthur Thompson vs. D. P. P. (1917) 13 Cr. App. Reps. 61 and 78 ; (1918) A. C. 221 ; 87 L. J. K. B. 478 ; 34 T. L. R. 204 ; 118 L. T. 418.
Noor Mohammed vs. The King (1949) A. C. 182 ; 1 All. E. R. 365 ; 65 T. L. R. 134.
Frank Herbert Harris (1952) 36 Cr. App. Reps. 39 ; (1952) A. C. 694.
(2) *George Sims* (1946) 31 Cr. App. Reps. 158 and 163.
Noor Mohammed vs. The King (1949) A. C. 182 ; 1 All. E. R. 365 ; 65 T. L. R. 134.
Frank Herbert Harris (1952) 36 Cr. App. Reps. 39 ; (1952) A. C. 694.
John Thomas Straffen (1952) 36 Cr. App. Reps. 132.
(3) *R. vs. Sumeline*—London Times, August 17, 1955.
(4) *R. vs. Fritz* (1949) 2 All. E. R. 406.
(5) *R. vs. Alfred Summers* (1952) 36 Cr. App. Reps. 14.
(6) *R. vs. Hepworth and Fearnley* (1955) 3 W. L. R. 331.

Colvin R. de Silva with *Malcolm Pereira* and *U. B. Weerasekere*, for the accused-appellant.

Douglas Jansze, Acting Solicitor-General, with *A. C. M. Ameer, Crown Counsel*, and *V. S. A. Pullenayagam, Crown Counsel*, for the Attorney-General

Basnayake, A.C.J.

At the conclusion of the hearing of this appeal we made order dismissing it and reserved our reasons to be delivered on a later date. We accordingly do so now.

The appellant was indicted on the following charge :—

"That on or about the 2nd day of June, 1954, at Bambalapitiya in the District of Colombo within the jurisdiction of this Court you with intent to cause the miscarriage of one Mrs. Gladys Nugera of Moratuwa, a woman with child, did insert certain instruments into her vagina, which act caused the death of the said Mrs. Gladys Nugera, and that you have thereby committed an offence punishable under section 305 of the Penal code".

After a trial which lasted 14 days he was found guilty by a unanimous verdict of the jury and sentenced to 10 years' rigorous imprisonment.

The appellant is a registered medical practitioner, a licentiate of the Royal College of Physicians and Surgeons (Edinburgh) and a licentiate of the Royal Faculty of Physicians and Surgeons (Glasgow). He is 60 years of age and has practised his profession for 26 years. He ran a Nursing Home in Bambalapitiya in Colombo under the business name of "Ascot Nursing Home". The deceased Mrs. Gladys Nugera, a widow with five children (hereinafter referred to as the deceased), entered the appellant's Nursing Home on 29th May, 1954. A few days earlier she had consulted the appellant as she had missed her periods for about four months. On being asked by the appellant whether she desired to be treated as an indoor patient she expressed a desire to take such medicines as may be prescribed and take treatment as an outdoor patient. The appellant gave her a mixture and some capsules. It was after taking that treatment that she sought admission to the Nursing Home. On the 29th she came accompanied by one Terrence B. Fernando who falsely represented to the appellant that his name was C. Silva and that the deceased was his wife. After having entered the deceased to the Nursing Home, Fernando left the place, and except for two telephone conversations took no interest in the deceased and did not visit her till 2nd June, 1954, on which day the deceased died.

Between the date of the deceased's admission to the Nursing Home and the date of her death the appellant almost daily subjected her to the following treatment. She was removed to the consultation room and made to lie on a bed. All

the doors and windows were closed. Then the appellant performed the operations which are thus described by Nurse Kariyawasam.

" Then he took the speculum and inserted it into her vagina. (Speculum P1 shown to witness). After inserting that into the vagina it was withdrawn. Thereafter the doctor took the volsellum (shown P4) into his hand. After cutting the hair the doctor applied some dettol cream on his fingers and inserted his fingers into the vagina. He took the dettol cream from a jar similar to P2. I cannot remember how many fingers were inserted into the vagina. After introducing his fingers he withdrew them. Then he inserted the speculum. He removed the speculum and then inserted the volsellum into the vagina. There is a sort of a tube in the vagina and he held that with the volsellum. Having held at some part of the vagina with the volsellum he inserted a dilator. He used two or three dilators.

" After the accused held some part or portion inside the vagina with this instrument, the volsellum, he introduced these three dilators. They were each introduced in turn. The smallest one, that is P18, was introduced first. Then P3 was introduced—he introduced them according to their sizes—and then the last one he introduced was P19. Each time these introductions were taking place, he was holding some part of the vagina with this volsellum. At the time of these introductions I was by the patient as one had to hold her because she was struggling. I held her hands with one hand and her legs with the other. This was according to the manner in which the patient struggled. She screamed fairly at the time these instruments were introduced. One by one they were introduced and withdrawn. I noticed blood on each of them. The patient was not anaesthetized during this operation.

" After the last of the dilators was used and was withdrawn I noticed blood on it. After that, she was given a douche with condys water. It was washed inside. The condys water was poured into a can and there is a tube with a nozzle fixed on to that can and the end of the tube, that is, the nozzle is inserted into the vagina and water flowed into it. After that, some cotton wool was taken and condys water was taken into the kidney tray. I prepared that. The accused took the cotton wool and soaked it in the condys water and squeezed the water out. That was done on this occasion. Then he held this cotton wool with the volsellum and introduced it through the speculum into the vagina. After the douche, the speculum was introduced into the vagina and through the speculum the cotton wool was introduced with the aid of the volsellum. Then plugs were put in. About 5 or 6 such pieces of cotton was used for this plugging. Then the patient was taken back to the ward, to her room. She walked on this occasion. Then medicine was given to her.

On 2nd June the appellant removed from the deceased the body of a foetus minus the head. Nurse Kariyawasam describes what happened that day thus :

" The doors and windows were again closed and she was asked to lie on the bed and the plugs put in the previous day were removed as before. After the extraction of the cotton wool on this occasion, the speculum was removed by the accused. The accused wore his rubber gloves which were similar to P5 (which is shown) and he rubbed dettol cream, taking it from a jar like P2, on his gloved fingers and introduced his hand into the vagina. She was not anaesthetized on this day too but I was holding her. Besides me, the doctor and the patient, there was nobody else. A little later, we took another in. When the accused put his hand into the vagina, I was holding the patient's hands and legs as she was struggling violently. Then the accused withdrew his hand and I saw a part of the child's body in his hand. It was about this much in length—indicates from the tips of her fingers up to the wrist—about 6 inches. He dropped that into the pail which was left there for the blood to flow. He emptied his hand into that. He again introduced his hand into vagina and withdrew it and there was only blood in his hand at that time. I saw that part or portion of a child below the neck on the first occasion and I did not notice the head. On the second occasion, when he withdrew his hand I saw blood in his hand. Then he wanted me to take the two new forceps from the cupboard. I took them and handed them to him. They were these two (witness identifies P7 and P6). P7 is called the ovum forceps and P6 the weighted speculum. I did not see this accused use these two items together, that is the speculum and the weight. I know these two form one instrument. I took out all these three together. I call them forceps. When I handed these to the accused, he introduced the weighted speculum into the vagina. At this time there was nobody else in the room besides the three of us. When the weighted speculum was introduced into the vagina, there was nobody else in the room. This was introduced into the vagina in this manner (shows). The weight that was attached to the speculum was taken off as it was dropping off. These two were used together, but as the weight was dropping off, it was removed, and after that this was put into the vagina in this manner. At the time this was introduced into her vagina, she was not anaesthetized. She cried out and struggled violently. I was holding her at the time. I found it impossible to hold her down. The accused wanted me to call in the attendant, that is, Ariyawathy. I called her and she came in. The door was relocked. She also held the patient on the instructions of the accused. Both of us were holding her to prevent her struggling. Then the ovum forceps P7 was introduced by this accused. When this was introduced, the weighted speculum P6 was in the vagina held in position. He held this with one hand and introduced the ovum forceps with the other while the two of us were holding her down. She was crying out when P7 was introduced. These two instruments P6 and P7 were also immersed in hot water before they were used. When P7 was introduced and withdrawn, I only saw blood on it. I did not see any pieces on it. He introduced P7 several times and I did not see anything come out. I did not see the head of the child at any stage being taken out either with the hand or with the ovum forceps P7. At no stage did I see that. Thereafter, the vagina was douched in condys water by the accused. Then she was dressed in Kotex pad on the instructions of the accused and she was helped on to the ward. We practically carried her to the ward, that is, the three or four of us. Ariyawathy and I were among the four. The accused also helped, and she was taken to her room.

After the removal of the foetus the deceased became very ill and died between 9 and 10 that same night. Terrence Fernando who was present at the time of her death left in the appellant's car at about 11 p.m. promising to return the next morning with a coffin but never did

and it was with difficulty that his whereabouts were traced by the Police.

Nurse Kariyawasam, in addition to giving the names of four others who had similar operations performed on them, stated that during the ten months she was employed by the appellant she attended on about 150 to 175 cases in all of which the appellant extracted foetuses. She was present at every one of those operations. In each of those she saw the whole foetus or pieces of foetus being removed. In each of those cases the speculum, the dilators, and the volsellum were used. In each of those cases the same procedure was gone through by the appellant. The vagina was plugged with cotton wool soaked in condys water. In some instances the foetus dropped by itself and in others the accused introduced his hand into the vagina and brought out the foetus. In some cases the appellant introduced the weighted speculum in order to bring out the foetus.

The appellant disposed of the foetuses either by burning them in a gas incinerator which he had in his Nursing Home or by taking them in the form of parcels and throwing them into a river.

The post-mortem disclosed that the deceased was a well-nourished subject free from heart disease or any other disease. Her uterus was enlarged to about 4 months' pregnancy. The uterus was 8″ long, 4½″ broad and 3″ thick. There was a well marked placental site on the front wall of the fundus, and small pieces of decomposing placental tissues were adhering to it. There was also some clotted blood in the uterine cavity. The cervix was soft and swollen and admitted the index finger with ease. There was an irregular circular perforation of the posterior wall of the uterus at the junction of the body with the cervix about 1″ in diameter, and this opening corresponded with the tear in the pubic peritoneum, and there was infiltration of blood into the extra peritonial pelvic tissue in the neighbourhood of the tear. The vaginal passage contained the head of a foetus of about 4 months' gestation. The legs and trunk were missing. There was also placental tissue and clotted blood. Death was due to shock and haemorrhage following the perforation of the pregnant uterus.

Both the peritoneum and the uterus were injured. The injury was necessarily caused by the introduction of some instrument.

It is not necessary to refer in detail to the other items of evidence led by the prosecution because they have little bearing on the questions that arise on this appeal.

The appellant gave evidence on his behalf. He said that he admitted the deceased on 29th May as a case of heart disease and that later he discovered that she was pregnant for about 3½ months and showed signs of a threatened abortion. Later he saw signs of an inevitable abortion and performed an operation on the deceased on the day she died in order to evacuate her uterus as otherwise she might have died of haemorrhage. He dilated her cervix using three dilators and the volsellum and proceeded to evacuate the uterus with his finger. He managed to get two legs and the trunk of the foetus out, but the head got stuck in the uterus and after unsuccessfully trying to bring the head out with the smaller ovum forceps he let the head remain in the uterus as the deceased was showing signs of fatigue. He also expected that the head would come out after some time. The injury to the uterus according to the appellant was caused by the foetal head. He discounted the theory that the ovum forceps or any other instrument could have caused it.

There was sufficient evidence for the jury to return the verdict they did. Learned Counsel for the appellant therefore sought to attack the conviction on the ground of misdirection.

He referred us to a number of passages in the learned Commissioner's summing-up which he submitted contained misdirections. It is sufficient to set out here the passages to which learned Counsel gave particular attention in the course of his argument. They are as follows :—

> "I do not propose to explain the section dealing with that offence which is named foeticide, because there is no such charge against the accused. But his Counsel has put forward as a defence that the act done by the accused was done in good faith for the purpose of saving the life of the mother. You are, undoubtedly, entitled to consider that defence in all its bearings, and, if you believe the accused, there is no doubt that he is entitled to an acquittal.
>
> "But you will have to remember, gentlemen, that it is not sufficient for the evidence to point out that the act was done for the purpose of saving the life of the mother. It must also point to good faith. A mere statement that a person did something in good faith is not enough. I am sure that that would commend itself to you without any wealth of words from me.
>
> "You should consider this evidence in the light of the defence. If you believe the evidence of the accused, he is entitled to be acquitted. When you assess his evidence, you have to make a large allowance for the fact that he is charged with a grave offence and, unlike other witnesses, you cannot expect from him the same mental process, and you must make every allowance for his demeanour; he might have been nervous or hesitant, even though he is a qualified medical practitioner.
>
> "I should also remind you, gentlemen, that, when you consider his defence, you must keep in mind that

nothing is said to be done or believed in good faith which is done or believed without due care and attention.

" Learned Counsel for the defence, in the course of his interesting address to you, stated that it was the conscientious opinion of the accused that he had to evacuate the uterus to save the life of the woman. You have to consider carefully whether the circumstances arising from the performance of the operation alone would save the life of the mother. If there were such circumstances, the law allows the sacrifice of one rudimentary life to save another comparatively more valuable. That is the stated point of the law which is availed of in accord with common sense.

" But of course, you have to consider the matter in its practical administration. What steps did the accused take? Was the operation a life saving work he did, and was it done in good faith.

" The accused knew he was performing a voluntary illegal act, so far as the law lays it down. He also knew he would have to operate. You should consider his defence and be in a position to say whether his defence absolves him.

" What was of primary importance was to save the life of the mother, not the *foetus*.

" You must consider, gentlemen, whether this evidence supports his defence that he acted in good faith, for the purpose of saving the life of the woman ".

Learned Counsel's submissions on the ground of misdirection may be summarised thus :—

(*a*) The summing-up of the learned Commissioner might have created in the minds of the jury the impression that the appellant admitted that he caused the miscarriage.

(*b*) The appellant did not intend to cause a miscarriage but when he saw that a miscarriage was inevitable took steps to evacuate the uterus in order to save the life of the deceased.

(*c*) If the appellant's admitted acts establish that he intended to cause a miscarriage then the onus is on the prosecution to prove that the miscarriage was not caused in good faith in order to save the life of the deceased.

In making his submissions under heads (*a*) and (*b*) learned Counsel referred us to certain passages in the evidence of the medical witnesses called by the prosecution in support of his argument that the appellant did not intend to cause and did not cause a miscarriage. He also relied on the evidence of the appellant which he submitted should receive the same consideration as those of the prosecution medical witnesses.

The learned Solicitor-General contended that there was ample evidence that the appellant intended to and did in fact cause a miscarriage. He drew our attention to the passages in the evidence he relied on for the purpose of establishing his contention. They are too numerous and lengthy to admit of citation here. We are satisfied upon an examination of those passages that there was ample material before the jury to warrant the conclusion implicit in their verdict that the appellant did insert certain instruments into the vagina of the deceased with intent to cause a miscarriage. The learned Solicitor-General further submitted that the expression miscarriage in the context of section 305 should be given its ordinary meaning of the premature expulsion of the contents of the womb before the term of gestation is complete. He also cited the definition of the expression miscarriage in the Oxford Dictionary in support of his argument. He contended that the appellant's own evidence showed that he did the acts he described with intent to expel a foetus before its time.

Under head (*c*) learned Counsel submitted that section 303 defines the offence of " causing miscarriage " and that the words " cause the miscarriage " in section 305 must be read subject to the section which defines the offence of causing miscarriage. In a charge under section 305 he submitted that the prosecution must prove—

(*a*) that the accused did an act,
(*b*) which caused the death of a woman,
(*c*) with intent to cause a miscarriage, and
(*d*) that the miscarriage was not caused in good faith for the purpose of saving the life of the woman.

We are unable to uphold the interpretation learned Counsel sought to place on section 305. Unlike section 304, section 305 contains no pointer to section 303, nor is there any indication in that section that the Legislature intended that it should be controlled by section 303. It is not essential that, in a prosecution under section 305, it should be proved that the accused caused a miscarriage. What is material is the intent to cause a miscarriage. The essential elements of an offence under that section, are that—

(*a*) the accused did any act,
(*b*) which caused the death of a woman with child, and
(*c*) that the act was done with intent to cause the miscarriage to the woman.

An interpretation such as the one learned Counsel sought to place on section 305 involves the interpolation in that section of words which do not occur in it and the recasting of the entire section. Such an interpretation is not warranted by the rules of interpretation and does not commend itself to us.

In a charge under section 305 of the Penal Code, it is not necessary that the prosecution

should prove that the accused did not cause the miscarriage in good faith for the purpose of saving the life of the woman.

The learned Commissioner's direction that the appellant was entitled to an acquittal if he proved that he caused the miscarriage in good faith for the purpose of saving the life of the deceased appears to have been influenced by the defence indicated at the very outset of the trial by appellant's Counsel. It would appear from the transcript of the shorthand notes of the proceedings that learned defence Counsel held the view that, if the miscarriage had been caused in good faith for the purpose of saving the life of the deceased, the appellant was entitled to an acquittal. We are not satisfied that the appellant was in any way prejudiced by the learned Commissioner's direction. He did not fail to indicate clearly to the jury the onus that lay on the prosecution. The jury was at no time asked to assume that the appellant admitted that he caused the miscarriage.

The learned Commissioner's direction as to the appellant's defence is not unfavourable to him although it might have been better if it had been stated in terms of the relevant general exception. Learned Counsel for the appellant submitted that whether his argument based on section 303 succeeded or not he was entitled to the benefit of the relevant general exception. He did not indicate precisely under which general exception in Chapter IV of the Penal Code he sought to bring the appellant's case. We hold that a person indicted on a charge under section 305 is entitled to the benefit of any general exception within the ambit of which he could bring himself.

The appellant's case was that he did not intend to cause the death and that the deceased had impliedly consented to undergo his treatment and that whatever he did was done in good faith for her benefit.

The verdict shows that the jury did not accept the appellant's version for if they did they should have acquitted him in accordance with the direction of the learned Commissioner.

The exception in section 81 of the Code required the appellant to show that the deceased expressly or impliedly gave her consent to suffer the harm caused or to take the risk of that harm —in the present case death. While the jury might have held on the evidence adduced by the defence that the deceased consented *to be treated* medically and surgically by the appellant, there was in our own opinion scarcely any evidence to justify a finding that she consented *to suffer or to take the risk of the harm which was actually caused to her.*

Learned Counsel also submitted that inadmissible evidence had been admitted to the prejudice of the appellant although learned Counsel did not take exception to the admission under section 15 of the Evidence Ordinance of evidence of similar occurrences, he submitted that specific evidence of each of such occurrences must be given as in the case of those whose names were given by Nurse Kariyawasam and that it was not open to the prosecution to lead evidence generally that 150 to 175 similar operations were performed, while Nurse Kariyawasam was in the appellant's service. He therefore did not object to evidence of the cases of Jayanthi, Leilawati, Vimala Kumari, and Mrs. Mather, but objected to that part of Nurse Kariyawasam's evidence where she said that during the ten months of her service under the appellant 150 to 175 similar occurrences took place. Before we examine learned Counsel's submission it will be useful to set out the evidence objected to. Nurse Kariyawasam said—

> " I said that after the death of Mrs. Nugara there was another case of extraction of foetus, that is the case of Jayanthi on whom instruments were used.
> Q. How many other cases had you attended on where these instruments had been used by this accused?
> A. Many.
> Q. About how many roughly?
> A. Is it where whole foetus were removed or where parts were removed?
> Q. In all how many such cases did you attend on?
> A. About 150 to 175 cases during the months I was there. In all those cases these instruments were used and some other instruments were also employed.
> Q. In each of those cases where you saw whole foetus or pieces of foetus being removed the speculum, the dilators, and the volsellum were used?
> A. Yes.

To Court: I was present at every one of those cases.

> " I am the nurse who attended on all the women who were taken into the consulting room. In each of those cases I was there. P43 is supposed to be a steriliser. There was no other steriliser apart from this. I have never seen this steriliser being used for the purpose of sterilising instruments.

> " Yesterday I spoke about the 150 or 175 cases where instruments were used. In each of those cases, the speculum, volsellum and dilators were used. I also said that, in addition to these instruments, there were certain other instruments which were also used. I can pick them out here. (Witness picks out P37, the flushing curette, and P38 the catheter.) In each of these cases, the vagina was plugged with cotton wool soaked in condys water by the accused. In some instances, the foetus dropped by itself, in some instances the accused introduced his hand into the vagina and brought out the foetus; and in some instances he introduced the weighted speculum in order to bring out the foetus—not this one but what Dr. Ekanayake

brought with him. In each of these cases, the foetus either came out or was taken out, and in each of these cases, the foetus came out after the use of these instruments. In each of these 150 to 175 cases that I witnessed, it was the accused who used the instruments. All these instruments were used by him."

Before the learned Crown Counsel led this evidence at the trial he announced his intention to do so in the absence of the jury. Learned Counsel for the appellant submitted that the evidence of similar occurrences would be admissible only if the defence is that of accident. He submitted that his defence was not that it was an accident and objected to the evidence being led. Learned Crown Counsel then submitted that intention was an element of the offence and cited in support of his submission a number of cases 52 N. L. R. 457 ; (1894) A. C. 57 at 65 ; (1906) K. B. 389, 404, 405, 424, 425 ; 15 Cr. App. Reps. 50 and 52 ; 16 Cr. App. Reps. 61 and 69 ; 13 Cr. App. Reps. 78 ; (1949) A. C. 182 ; 36 Cr. App. Reps. 39. practically all of which are decisions of the English Courts.

The best approach to this question would be by a consideration of section 15 of the Evidence Ordinance in the first instance. That section reads :—

> " When *there is a question* whether an act was accidental or intentional, or done with a particular *knowledge* or *intention*, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned is relevant ".

Intention to cause miscarriage is an element of the offence with which the appellant was charged and in his defence he denied that he intended to cause a miscarriage. The issue of intention therefore became one of vital importance.

Here the question was whether the appellant did the act which caused the death of the deceased with the intention of causing a miscarriage. It was therefore relevant to show that the act done by the appellant in regard to the deceased was a part of a series of similar occurrences in each of which the appellant was the person who did the act which caused the miscarriage.

In resorting to English cases for the purpose of seeking an elucidation of section 15 of the Evidence Ordinance it should be borne in mind that the English principle and our section of the Evidence Ordinance are not the same. The English principle is thus stated in Stephen's Digest of the Law of Evidence (11th Edn., p. 20) :

> " Where there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant ".

It will be seen that section 15 of the Evidence Ordinance is wider than the English rule of evidence. Under our provision evidence of similar occurrences is relevant for the purpose of proving a particular intention or knowledge. Judicial opinion in England Sims 31 Cr. App. R. 161 (1946) ; Noormohamed (1949) A. C. 182 ; Frank Harris 36 Cr. App. R. 39 (1952) ; Straffen 36 Cr. App. R. 132 appears to be divided on the question of a proper approach to the English rule cited above. But the tendency seems to be towards admitting evidence which is relevant to the issue before the jury and not to regard the fact that the evidence is prejudicial to the accused as rendering relevant evidence inadmissible. The most recent decision on this point is the case of *Rex vs. Lumeline* London Times August 17, 1955.

It is sufficient to say that under our law too the prosecution may adduce all proper evidence tending to prove the charge against the accused including evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment without waiting for the accused to set up a specific defence calling for rebuttal. Counsel for the appellant correctly did not take the course adopted by Counsel for the defence at the trial.

The occurrence of which evidence is given must be one in a series of similar occurrences in each of which the accused was concerned. Nurse Kariyawasam's evidence quoted above satisfies the requirements of the section. The names of the persons on whom the operations were performed are not necessary to make her evidence relevant. In each of the 150 to 175 cases a miscarriage was caused and it was the appellant who caused the miscarriage. In each of those cases he used the same instruments and resorted to the same procedure.

There remains one more point raised by learned Counsel for the appellant. He contended that there was no direction by the learned Commissioner that the appellant should be given the benefit of any reasonable doubt caused by his evidence. The learned Commissioner has more than once indicated in the course of his summing-up that the prosecution must prove its case beyond reasonable doubt and that the appellant must be given the benefit of any reasonable doubt. What is more, when at the end of the summing-up, on being asked whether there was any matter he had omitted, learned Crown Counsel invited the learned Commissioner to direct the jury that if the evidence adduced by

the appellant created any reasonable doubt it was their duty to acquit him, the learned Commissioner once more directed the jury on the matter. The directions on the burden of proof are ample and we do not think that there is any substance in learned Counsel's submission.

There appears to be a mistaken notion that the jury should be reminded at every turn that they should give the benefit of every reasonable doubt to the accused. Once the jury are directed in unmistakable terms as to the burden of proof which lies on the prosecution, for it is in regard to it that the question of reasonable doubt is material, the Judge is under no duty to keep on repeating that the accused should be given the benefit of any reasonable doubt. The rule is that a case is never proved if the jury is left in doubt. It is sufficient if it is made clear to the jury that the burden of establishing the charge in the indictment is all the time on the prosecution and that they should return a verdict against the prisoner only if upon the evidence they are convinced of the accused's guilt. The Judge is not fettered in the use of the language which he may choose for the purpose of this direction. If the summing-up indicates that the jury have been clearly directed as to the burden and standard of proof, the accused cannot be heard to complain that a particular formula was not used.

The recent pronouncements of the British Court of Criminal Appeal in *R. vs. Kritz* (1949) 2 All E. R. 406 ; *R. vs. Alfred Summers* 36 Cr. App. Reps. 14 and *R. vs. Hepworth Fearnley* (1955) 3 W. L. R. 331 indicate that the tendency of the British Courts is to get away from the rigid formula of words of the past and not to expatiate on what is a " reasonable doubt " and seek to explain the difference between a " reasonable doubt " and a " fanciful doubt ".

Appeal dismissed.

Present : Gratiaen, J. and Sansoni, J.

CAFFOOR AND OTHERS vs. HAMZA AND OTHERS

S. C. 280—*L*/'55.—*D. C. Colombo* 5761/*P*

Argued on : 24th February, 1956.
Decided on : 8th March, 1956.

Donation—Gift of property subject to life-interest of donor and to fidei commissum *in favour of donee's children—Acceptance of gift by donee's aunt—Not authorised by donee to accept gift—Property dealt with by donee as absolute owner during donor's life-time and after death—No evidence of acceptance by donee either before or after donor's death—Validity of donation—onus of Proof of acceptance.*

By a deed of gift a Muslim lady donated property to her grandson M. U. reserving to herself a life-interest and subject to a fidei-commissum in favour of the donee's children. There was evidence to show that the donee had leased the property during the life-time of the donor and had mortgaged it after her death and that in 1907 after donor's death, the donee asserting absolute title had sold the property to a person from whom it ultimately passed to the appellant's father.

Although the donee was of age, the deed of gift was accepted by his aunt. There was no proof that the donee had authorized his aunt to accept this gift or that he was aware of the donor's intention to make it. There was also no evidence that the donee had accepted the gift either during the life-time of the donor or after her death.

The plaintiff claimed the property as a fidei commissary under the deed of gift.

Held : (1) That the gift was inoperative as there is no evidence of acceptance of the gift by the donee either during the life-time of the donor or after her death.

(2) That the burden was on the plaintiff to prove a valid acceptance of the gift and not on the defendant to disprove it.

Per Gratiaen, J.—"When A conveys his property to B. reserving a life-interest to himself, the title to the property passes immediately to B and the enjoyment of only one of the rights incidental to full ownership is postponed. I doubt if it can fairly be said that in such a situation there has been a postponement of the " fulfilment " of the donation. The law would therefore seem to require " a present acceptance of the dominium which the deed confers subject to the life-interest."

Authorities cited : Voet. 39 : 5 : 11 and 12.
39 : 5 : 13.
Lokuhamy vs. Juan (1875) Ram. Rep. 215.
Tissera vs. Tissera (1908) 2 Weera. 36.
Hendrick vs. Sudritarana (1912) 3 C. A. C. 80.
Nonai vs. Appuhamy (1919) 21 N. L. R. at 169.

H. V. Perera, Q.C., with *N. Dissanayake*, for the 9th-14th defendants-appellants.

H. W. Jayawardene, Q.C., with *S. Sharvananda*, for the plaintiff-respondent.

No appearance for the 2nd-9th respondents.

Gratiaen, J.

The plaintiff instituted this action on October 10th 1949 for the sale under the provisions of the Partition Ordinance of a narrow strip of land 9 1/4 perches in extent, depicted in the plan No. 1937 filed of record. The property which is situated in New Moor Street, Colombo, was at that time a "Takkiya" which was regularly attended by Muslims as a place of worship (except on Fridays). There was a shrine room on the site and two Muslims "saints" had been buried there with the permission of the Municipal authorities in 1930 and 1937 respectively. The 8th defendant, who claimed to be the trustee of the Takkiya, intervened in the action. After his death the 15th defendant, his successor in that office, was substituted in his place. The other intervenients are the appellants who claimed to be the legal owners of the property holding it in trust for the congregation.

The property had belonged several years ago to a Muslim lady called Natchi Umma. According to the plaintiff, she donated it (subject to a life-interest in herself and also to a fideicommissum in favour of the donee's children) to her grandson Mohamedo Usoof by P1 of 1891. No specific evidence was led as to when precisely the donor died. Mohamado Usoof himself died on 23rd April 1945. The plaintiff claims that the property then passed to him as fideicommissary under P1 and to his brother Noor Mahaliya whose interests have since passed to the 1st to 7th defendants. The learned Judge accepted this chain of title and ordered a sale of the property under section 8 of the Partition Ordinance on that basis.

The appellants conceded that the property originally belonged to Natchi Umma, but denied that P1 operated as a valid donation *inter vivos* because it had not been accepted either by Mohamedo Usoof personally or on his behalf by any person authorised by him. Their position was that Natchi Umma continued to be the owner until she died and that the property then passed to her daughter Kando Umma (the mother of Mohamedo Usoof). According to the oral evidence, Kando Umma died in 1898, but her death certificate was produced in this Court and proves that she in fact died on 11th June, 1902.

It has been clearly established that Mohamedo Usoof, asserting absolute title to her property, sold it on 1st February 1907 to Omar Lebbe Marikkar, from whom it ultimately passed in 1918 by a succession of transactions to the appellants' father. By that date the property had been dedicated (by one of the purchasers claiming absolute ownership through Mohamedo Usoof) for use as a Takkiya. The Municipal Assessment Register 9D2 proves that it has since 1918 been recognised as a Mosque.

I agree with the learned Judge's ruling that neither the purported dedication of the property for the purposes of a religious trust nor the fact that two pious Muslims have since been buried there would afford a defence to the action if in truth the legal title to the site including the shrine room and the graves now belongs to the plaintiff and his co-heirs. Indeed, the only ground on which Mr. H. V. Perera invited us to set aside the judgment under appeal was that the donation of the property to Mohamedo Usoof by P1 was inoperative for lack of acceptance. It is therefore unnecessary to discuss certain topics which seem to have excited much interest in the lower Court—for instance the question as to the particular processes by which a pious Muslim may be recognised as having attained the status of a "saint". In short, the case can be decided without causing offence to the religious feelings of the litigants. I therefore return to the point of law raised by Perera.

Mohamedo Usoof was admittedly of age at the time when the deed P1 was executed in his favour, but the deed of donation P1 purported on the face of the document to have been accepted on his behalf by this aunt Sotha Umma. There is no proof that he had authorised this lady to accept the gift or that he was even aware of the donor's intention to make it. *Prima facie* therefore the purported acceptance by Sotha Umma was insufficient to perfect the gift *Voet* 39 : 5 : 11 and 12. There is also no direct or convincing circumstantial evidence of any subsequent acceptance of the gift by Mohamedo Usoof on his own account during the life-time of the donor.

As a general rule, acceptance after the donor's death does not operate to perfect the gift. "For the will of the donor and the donee were not at one before the donor's death, and after the death

of the donor they could not be united to the prejudice of the heir, who had acquired a real right to the property concerning which the donation had not been affected." Voet 39 : 5 : 13. The plaintiff relies however, on an exception to the general rule, namely, that a gift may be perfected by acceptance after the donor's death " if the execution or fulfilment of the donation has been postponed till after the donor has died ". Voet (ibid.). It was argued that in the present case the donor had reserved to herself a life-interest in the property, so that the " fulfilment " of the donation was in truth postponed. It was suggested in *Lokuhamy vs. Juan* (1875) Ram. Rep. 215 that if a donor reserves to himself the right to possess the property till his death, *Voet* 39 : 5 : 13 is authority in support of a valid acceptance after death. But this decision appears to have been principally based on a prior acceptance by the natural guardian of the donees who were minors, and on " other circumstances from which acceptance may fairly and reasonably be implied."

The ruling in *Lokuhamy vs. Juan* (1875) Ram. Rep. 215 was followed in *Tissera vs. Tissera* (1908) 2 Weera. 36 but with respect, I think that the question calls for reconsideration in an appropriate case. When A conveys his property to B reserving a life-interest to himself, the title to the property passes immediately to B and the enjoyment of only one of the rights incidental to full ownership is postponed. I doubt if it can fairly be said that in such a situation there has been a postponement of the " fulfilment ' of the donation. The law would therefore seem to require a present acceptance of the dominium which the deed confers subject to the life-interest." Per Wood Renton, J. in *Hendrick vs. Sudhitarana* (1912) 3 C. A. C. 80. See also the observations of de Sampayo, J. in *Nonai vs. Appuhamy* (1919) 21 N. L. R. 165 at 169. I shall assume, however, that it was open to Mohamedo Usoof to perfect the gift in his favour by acceptance after his grandmother died. Even then I take the view that proof of such acceptance has not been satisfactorily established.

The evidence relied on by the plaintiff indicates at best that Mohamedo Usoof first dealt with the property by executing two leases in favour of third parties in 1899 and 1901 before his mother died) ", and that he later mortgaged it in 1903 (after her death). The indentures of lease and the mortgage bond have not been produced, and there is no material from which we may infer that he had expressly (or even by necessary implication) acknowledged that his title was derived from, and limited by the terms of, the deed P1. Indeed, P1 had expressly prohibited him, as fiduciary, from mortgaging the property, and it would be strange indeed if one were to regard the execution of a mortgage in violation of a prohibition as affording proof of acceptance of the gift subject to that very prohibition. Those transactions which took place after Mohamedo Usoof's mother had also died are not inconsistent with the hypothesis that he had leased or mortgaged the property by virtue of some other title asserted by him. Let it then be supposed that the leases executed in 1899 and 1901 took place before the death on Natchi Umma. In that event the transactions would *prima facie* contradict acceptance of the gift subject to the donor's life-interest.

The burden was on the plaintiff to establish a valid acceptance of the gift, and not on the defendant to disprove it. It must be emphasised in this connection that Mohamed Usoof sold the property in 1907 reciting a title which was quite inconsistent with his suggested acknowledgment of the status of mere fiduciary. In *Tissera vs. Tissera* (*Supra*) by way of contrast, the donee, when dealing with the property, had expressly recited that he had acquired title by virtue of the deed of gift, and Grenier, J. observed that " if there had been no acceptance of the gift on behalf of the donees or by the donees themselves there would not have been this recital in the bond."

A person seeking to establish a valid acceptance of a gift by circumstantial evidence must furnish proof from which it may fairly be inferred, on a balance of probability, that the donee was aware of the execution of the deed of gift and had accepted it subject to the terms and conditions of the grant. If, at the end of the case, the evidence on this issue is equivocal, the burden of proof is not discharged. I would therefore allow the appeal and dismiss the plaintiff's action with costs in both Courts.

SANSONI, J.
I agree.

Appeal allowed.

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

MARTHA IVALDY vs. (1) PHILIPPE IVALDY AND OTHERS

Petition No. 429—In the matter of an application for a Writ of Habeas Corpus.

Argued on : 30th, 31st May, and 2nd, 5th June, 1956.

Decided on : 8th June, 1956.

Habeas Corpus, *writ of—Application by father for custody of children—Parents married in America, resident in Ceylon—Father's claim for custody disputed by mother—Law applicable, whether English Law or Roman-Dutch Law—Marriage of parents not dissolved—Father's preferent right and limitations thereto—Courts Ordinance* (*Cap.* 6) *section* 45.

Held : (1) That a dispute as to the custody of children of parents who are non-nationals resident in Ceylon should be determined according to the law of Ceylon, viz. the Roman-Dutch Law.

(2) That where there has been no legal dissolution of the common home, the father's right to custody remains unaffected by the fact of the separation of the spouses and can only be interfered with in special circumstances.

(3) That special circumstances which justify the denial of the right of a father in such a situation to the custody of the children must relate to the prospective danger to the life, health or morals of the children or other circumstances positively establishing detriment to their interests.

Per H. N. G. FERNANDO, J.—" Parent " where father and mother are both alive, means of course, the father who is the natural guardian of his children, *Van Rooyen vs. Werner*, 9 S. C. 425."

Cases referred to : (Halsbury, 3rd Edition, pp. 126, 127 ; Dicey : Conflict of Laws, 6th Edition, p. 480).
Gooneratnayaka vs. Clayton, 31 N. L. R. 132 at 133.
Van Rooyen vs. Werner, 9 S. C. 425.
Calitz vs. Calitz, 1939 A. D. 56 at page 63.
Green vs. Green, S. A. L. R. 1948, (2) p. 1054.

G. E. Chitty with *Cecil Gunawardena* and *A. M. Kumarasamy*, for the petitioner.

S. J. Kadirgamar with *John de Saram*, for the 1st respondent.

H. N. G. FERNANDO, J.

The petitioner in this application for a writ of *habeas corpus* is the wife of the 1st respondent and the mother of the minor 3rd and 4th respondents, whose custody she seeks as against their father. The 2nd respondent is the principal of the Nuwara Eliya Convent at which institution the minor children were placed in February, 1954, by their father's authority. The minors are girls of the ages of thirteen and nine, having been born in France of parents who are respectively a Frenchman and American woman, and who married in America in 1938. There are also two male children of the marriage, one of whom is now in France and the other in America.

The husband and wife appear to have had frequent differences, particularly since the year 1948, when the wife and the children returned to America from France, and the wife had actual custody of the children until the end of 1953. Meanwhile she obtained a decree of divorce in 1952 in an American Court in an uncontested action on the ground of cruelty ; but the decree was set aside in June 1953, on the ground that the husband had not been served with summons in the action. In August, 1953, the husband met the wife in America and persuaded her to come out, with one of the boys and the two girls, to Ceylon, where the husband had been appointed to a post with the World Health Organisation ; and accordingly the wife and children arrived in Ceylon in November 1953. The wife alleged that she made the trip to Ceylon only on the understanding that her husband would deposit in advance the cost of return passages to America for herself and the children and that she would be free to return home with the children whenever she wished. Whether for good reason or not, the husband not only failed to honour this understanding, but also prevented the wife and the two girls from returning home even at her expense, and furthermore obtained an enjoining order from the District Court of Colombo restraining her from taking the children away from Ceylon. That order was by consent made applicable only pending the determination of the petitioner's present application to the Supreme

Court. (I should add that the male child who came to Ceylon with the mother was sent to France from Ceylon sometime before this application was filed).

At the inquiry held by the learned Magistrate of Nuwara Eliya, to whom the present petition was referred, a volume of evidence was led, much of which would have been irrelevant even in proceedings for divorce. Very much less evidence would, I think, have been adduced, if everyone concerned had appreciated the real issue which arises in a case where the wife of a marriage, which has not been the subject of a decree for divorce or judicial separation, challenges the husband's right to the custody of children of the marriage. Recent experience of the frequency of such applications makes me welcome the opportunity to consider the relevant authorities, and I appreciate the assistance which Mr. Kadirigamar has given me in this connection. The present case is fortunately not complicated by any question of the Conflict of Laws, counsel for both sides having conceded that I should apply the law of Ceylon. There is ample support for the view that a dispute as to the custody of the children may be determined by the law of the country of residence, particularly in the absence of any competing order made by a competent court of the country of domicile. (Halsbury—3rd Edition p. 126, 127; Dicey:—Conflict of Laws, 6th Edition p. 480).

The writ of *Habeas Corpus* was unknown to the Roman-Dutch Law, and as Schneider J. observed in the case reported in the twenty-ninth volume of the New Law Reports at page 52, section 45 (then section 49) of the Courts Ordinance is obviously founded on the English Law, resort to which must therefore be had in considering the purpose and scope of the jurisdiction of this Court to issue the writ. Clearly this question whether a mandate should issue under section 45 "to bring up before this Court the body of any person" must be determined in the same manner as it would be by a Court in England; and if such only was Fisher C.J's opinion, when he said "we should.....apply English law in considering the question which has been submitted" (*Gooneratnayaka vs. Clayton*, 31 N.L.R. 132 at 133), I would respectfully agree. But the ultimate order made in exercise of the special jurisdiction is "to remand or discharge any person so brought up, or otherwise deal with such person *according to law*", the section having in contemplation in my opinion, *the law of Ceylon* relevant to the question whether the person should be remanded, discharged or otherwise dealt with. It was probably with this aspect of the matter in mind that Drieberg J. in the same case saw the need to remark that Courts under the Roman-Dutch Law had the same power as the Courts in England in respect of the particular matter with which this Court was then concerned. There have been many decisions in Ceylon which purport to follow English precedents in disputes as to the custody of children, and which, by reason of the essential similarity of the English and Roman-Dutch principles, will in all probability be found to conform with the latter. But if, as I think, the Roman-Dutch law is applicable in determining whether the right of a parent to custody should be enforced or not, then there should be *direct* resort to the Roman-Dutch law.

Spiro (The Law of Parent and Child p. 170) points out that there are only two exceptions to the fundamental rule of the Roman law that the parental power of the parent does not allow of any interference. "Parent" where father and mother are both alive, means of course the father who is the natural guardian of his children (*Van Rooyen vs. Werner* 9 S.C. 425). The first exception to the rule is that a court, in authorizing the parents to have a separate home, is also competent to regulate the exercise of the parental power in accordance with the interests of the minor child concerned. This exception has received statutory force in Ceylon by sections 619 to 622 of the Civil Procedure Code, which empower a District Court to make orders for custody either pending a matrimonial action, or after a decree of divorce or judicial separation has been entered. The second exception, for a case where a separate home has not been authorized, is referred to in a recent judgment in South Africa, (*Calitz vs. Calitz* 1939 A.D. 56 at page 63) as follows:—'The Court has no jurisdiction, where no divorce or separation authorizing the separate home has been granted, to deprive the father of his custody except under the Court's powers as upper guardian of all minors to interfere with the father's custody on special grounds, such, for example, as danger to the child's life, health or morals.'

The distinction between the two exceptions is, I think with respect, well explained in the judgment to which I have just referred. When a common home no longer exists in law, by reason of a matrimonial decree, the natural right of the father to custody, which flows from the duty to maintain the common home, is interrupted and the question of custody can be raised by either spouse for decision by the Court. The general principle applicable in that event is that the innocent spouse is entitled to an order for custody of the children, unless the Court, with due regard

to the rights of that spouse and to the interests of the children, otherwise determines; and in this way, a father who is the guilty spouse will in ordinary circumstances, or even who is innocent *may* in extraordinary circumstances in the interests of the welfare of the children, be deprived of his natural right to custody. But where there has been no legal dissolution of the common home, the father's right to custody remains unaffected by the fact of the separation of the spouses, and can only be interfered with in *special circumstances.*

Spiro (idem pp. 171 and 172) refers to later decisions of the South African Courts which appear to have amplified the meaning of the expression " special grounds " in the principle as stated in the Calitz case. In particular, there was the observation made *obiter* in *Green vs. Green* (S.A.L.R. 1948, (2) p. 1054) that the Courts will not hesitate to deprive the father of custody where that custody is shown to be detrimental to the interests of the child. But even this observation underlines the distinction between the two exceptions to which I have referred. In applying the first, the Court will (with due regard to the preferent right of an innocent spouse) attempt to choose a course which will promote the interests and welfare of the child : in applying the second, the Courts will recognize the father's *prima facie* right, except when the element of danger or detriment is positively established.

The question I have to determine in this case, therefore, is not whether the estrangement of the petitioner from the respondent is attributable to the fault of the latter, nor whether it is in the interests of the happiness or welfare of the two daughters of the marriage that they be committed to the care of their mother. The sole question is whether the right of the father to custody is to be denied him owing to the prospective danger to the life health or morals of the children or owing to other circumstances establishing detriment to their interests. It is extremely difficult to cull from the recorded evidence the grounds upon which the petitioner relies, and I will deal with the principal grounds as stated by her counsel :—

I. The respondent assaulted his wife physically in the presence of the children.

This alleged assault, though (as far as I can gather) not directly spoken to by the petitioner in her evidence in this case, was admitted by the respondent. It took place in the attic of a house or flat in France in September 1948, when the petitioner was packing, apparently in preparation for her departure from that country for America. According to the evidence of the petitioner in the abortive divorce proceedings in America, this assault took place without any provocation and only for the reason that the defendant was " brooding " over his failure to obtain a house on which he had set his heart. The respondent, on the contrary, stated in cross-examination before the Magistrate that he had been gravely provoked by the petitioner's allegation that he had previously threatened to kill his children. While the gravity of this assault is not denied, I find it impossible to believe the version that it was unprovoked. Moreover this assault was not made the reason for the petitioner's departure for America in November 1948, which did not in the legal sense constitute a " separation " by mutual consent. Her evidence here is that she strongly objected to going to America, and only did so because her husband desired to take some medical training and suggested that she and the children should live in America with her parents in the *interim*. It is also significant that right from the time of her return to America, the petitioner regularly and even with great frequency wrote long and affectionate letters to her husband in France, in none of which (so far as I can gather from a quick reading of them) was there any direct reference to this assault; instead, in many of them, she regrets her own treatment of the respondent and expresses her intention to behave differently in the future. Whether the petitioner can rely upon this assault in 1948 for the purposes of divorce proceedings is doubtful; it is much more doubtful whether she can now urge it as a reason why his custody of the children should be a source of danger to the latter.

II. The second allegation is that the respondent " abandoned his family in a strange country " when they arrived in Ceylon in 1953.

Assuming it to be true that the father showed a marked preference for the son and at first disregarded the two daughters after one of them failed to greet him like a daughter should, there is nothing else in the evidence to warrant this serious allegation of desertion. On the petitioner's own evidence, the father provided Hotel accommodation for the family at Galle, where he was working at the time, and there is no allegation that he failed to pay the Hotel Bills. Quite soon after, and up to date, the two girls were placed by mutual agreement at the Convent in Nuwara Eliya, and much if not all of the cost of their board and education appears to have been met by the father. I do not doubt the petitioner's statement that she spent her own money in Ceylon, but, having regard to the amount of the respondent's own income, he appears to have incurred quite reasonable expenditure on the maintenance and education of his children while in Ceylon.

Connected with this allegation is the suggestion that the respondent failed to support his wife and family while in America between 1948 and 1953. Assuming that he contributed little to the family till during that period, the question is whether he was guilty of deliberate neglect. But it is admitted that he had then no regular or adequately remunerative employment and was trying to improve his qualifications; and the petitioner who appears to be an educated and capable woman, willingly undertook a large share of the family burden. Here again, the letters to which I have referred—there was a period during May 1950, when she wrote several pages nearly every day remembering the happiness of the past and voicing her hopes for the future—contain no complaint on the score of failure to maintain the home. The respondent was no doubt aware that the children would be adequately maintained through the mother's voluntary efforts during a period of financial stringency, but so soon as he himself obtained sufficiently remunerative employment he did again resume his normal financial obligations. I can see nothing in these circumstances to establish a case of deliberate neglect.

III. Thirdly it was alleged that the Respondent has contrived to evade the decision of this dispute in the American Courts by inducing the petitioner, through what was described as a trick, to bring the children to Ceylon. Connected with this is the allegation that he does not in truth desire to have charge of the two girls and is in fact utilising their presence in Ceylon in order to bargain with his wife for the custody of the eldest boy Phillippe who is now in America.

In outlining the facts, I have already stated that the respondent failed to honour the understanding that monies would be deposited in advance for the return passages to America from Ceylon of the petitioner and the children. His explanation has been that the petitioner has contrary to her own agreement prevented Phillippe from joining him in France. Of this there is certainly no clear evidence, the letters from Phillippe and from his relatives in America indicating on the contrary that Phillippe, who is now sixteen years old, is quite determined to remain in America and that owing to a serious fall from a window in May 1954, it would have been quite inadvisable for him at that time to have made the journey to France. It is impossible to set out here the various items of evidence which directly or indirectly affect the allegation of a trick, but upon a consideration of them I am of opinion that it was dishonourable on the part of the respondent to obstruct the return to America of his two daughters and has taken advantage of what he has been advised to be the Law of Ceylon on the subject of custody. One document is in this connection significant. In May 1955, while the present application was pending, a draft agreement was prepared by which the respondent agreed to permit the two daughters to be taken back to America but which also provided for several conditions concerning the right of the respondent to have custody and to visit the two male children. The petitioner states that she did not sign that agreement because she was not agreeable to all the terms, and there is in my opinion much substance in the suggestion that the agreement was something of a bargain. That circumstance does not however by itself establish that the respondent does not in good faith desire to have the custody of his two daughters; at most it would indicate that, if a choice were to be forced on him, he would prefer the custody of the male children.

IV. A fourth ground—which I express in milder terms than those Mr. Chitty employed—is that the respondent is neurotic, liable to violence and mentally unstable.

It is said that his behaviour in Court and his reaction to cross-examination establish this. It is unfortunately true that in proceedings of this nature, when domestic grievances and unhappiness are the subject of searching examination and dispute in a Court of Law, the character and temperament of each spouse do not often emerge without blemish. Neither the husband nor the wife in this case was an exception to the usual rule.

The respondent is supposed to have consulted five different psychiatrists and to be thus estopped from claiming to be sane and mentally stable. But his explanation that he was forced to do so owing to the importunities of his wife is borne out by at least one certificate from one of the psychiatrists concerned. I do not think that the mere fact that a husband and wife, particularly when faced with differences of race, temperament and religion, do not understand each other, would be a good ground for thinking that either of them is abnormal or a proper subject for psychiatric treatment. Much more reliable evidence than that which the petitioner has been able to produce would be required to justify a court in forming such an opinion of her husband.

V. The last allegation to which I propose to refer is that the respondent has been guilty of cruelty to the eldest daughter, Anne.

Some of the items of evidence relied on are trifling and even absurd, such as the statement that Anne was reluctant to go out riding because the respondent made the horse gallop too fast.

The principal fact established in this connection was that in December 1954, the respondent forcibly "held down Anne for about two hours and spanked her thereafter". Apparently the respondent had requested Anne to lay a cloth on the dining table which Anne had refused to do. Anne became violent when the respondent insisted on her obedience and he then seized hold of her, insisting that she would be not released unless she laid the cloth. The child was certainly the first and very much to blame; but even if the whole story as related by the petitioner be true, this one instance of physical interference with Anne surely cannot establish either habitual cruelty or even a tendency towards cruelty or hatred to the children on the part of the respondent.

There is, however, another aspect of this matter which has given me much anxiety. There is ample evidence on the record to show that Anne has often been disrespectful to her father even in the presence of third parties and that she undoubtedly shows a marked preference in affection for her mother. What concerns me is whether this antipathy to her father is so strong or so deep rooted that it will induce her to do violence to herself or will seriously affect her mental health if she is now compelled to return with her father to France.

This Court has previously applied the English principle that the wishes of a child under sixteen are not as a general rule to be consulted in determining a question of custody. (*Goonerat-nayaka vs. Clayton*, 31 N.L.R. at p. 132). But examination by the judge of a child and an indication of her own wishes in the matter can I think be of assistance in deciding whether custody by a particular parent would be detrimental to the child's interests. And in these circumstances I felt it necessary to summon and examine both children.

In the case of the younger child, Elaine, while it became clear to me that she would choose to be with her mother rather than with her father, she stated in answer to me that she was fond of the latter and I formed without hesitation the opinion that there would be no danger whatever in committing her to his custody even if it meant separation from the mother. The case of the elder child Anne is somewhat different. She is now thirteen years of age and appears to be thoughtful and mature for her years; between the ages of five and eleven she has been under the care and in the company of the mother (almost to the total exclusion of the father) at Nebraska, which she still describes as "home"; she is aware of the differences between her parents and is naturally concerned and affected by her mother's unhappiness over the family disputes; she complains also that her father makes "scenes" at table and has not been, generally speaking, "fair" to the family; far from entertaining the natural affection of a child for a father she appears to have a fairly strong dislike for him. One important cause of her distrust is that her father failed to keep his promise that they would be free to return from Ceylon to America whenever they wished; and she was quite unable to appreciate the suggestion I made to her that what might seem to have been a dishonourable trick in other circumstances might be viewed in a different light in the case of a parent who is anxious to recover the custody of his children. But despite this antagonism, which was I think due partly to the unfortunate separation from the father as well perhaps as to the faults of both parents, I cannot say that the committal of Anne to the custody of her father would involve reasonable risk of danger or detriments to herself. She readily agreed that the tablecloth incident (which she said was one of many but nevertheless the most serious) was a case where both she and her father behaved badly. She said, in answer to Mr. Chitty, that she was "afraid" of her father, but it was clear that this did not mean fear of physical violence or injury but rather an anticipation of "scenes", criticisms and disagreements. The distress and unhappiness which is often likely to arise in the course of her relations with her father would not, I feel sure, provoke her to violence or cause her to brood unduly over her misfortunes. The sister of the convent in Nuwara Eliya who has good opportunities of observation agreed that Anne is quite a normal child and that her relations with her father are not likely to be deleterious to her character. While, therefore, it is abundantly clear that Anne would very much prefer to live with her mother and that in America, it cannot be said that her antagonism to her father is so serious that her committal to his custody would be a source of danger to her life, health or morals or even that (if the principle should be more widely expressed) it would be detrimental to her interests. In the result the petitioner has failed to establish sufficient grounds upon which a court can exercise the power to deprive the father of his natural right of custody. She herself undoubtedly would be anxious to promote the happiness of the children, and Anne was confident that the mother would accompany the children to France in the event of their having to go with the father. As was remarked in the Calitz case, it still lies with the mother, at

least for the present, to return to her husband and thus avoid the disadvantage which the children might otherwise suffer in consequence of their separation from her. I trust that the advisers of both parties will attempt to secure such a solution to the present difficulties.

The petitioner's application is refused and the 1st respondent will be entitled to the custody of the two children. The order made on 11th March, 1955, by my brother Sansoni lapses with the determination of this application and the 1st respondent may, when he so desires, remove the children from the custody of the 2nd respondent and remove them from Ceylon. The order made by the Magistrate, Nuwara Eliya, on 26th March, 1955, will no longer apply against the 1st respondent.

Application refused.

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

SENEVIRATNE *et al* vs. PERERA

S.C. 243—*D.C.* (*F*) *Colombo* 362

Argued on : 26th, 27th and 28th September, 1955
Reasons delivered on : 26th April, 1956

Contract—Agreement to sell "all such portion or portions as may eventually be allotted to the vendors" in the final decree of a pending partition action—Vendors doubtful whether entitled to any share or extent of share—Final decree allotting larger shares than anticipated by vendors—Repudiation of agreement on the ground of false representation of share by vendee—Validity of contract.

By a written agreement, the defendants-appellants undertook to convey to the plaintiff-respondent for Rs. 1,000 " all such portion or portions as may eventually be allotted to them " in the final decree of a pending partition action. The final decree allotted to them an extent of the land much more than they expected. At the time the agreement was entered into, the defendants were doubtful of the extent of share in the land and even whether they were entitled to any share in the land subject to partition action. The plaintiff-respondent had suggested that the extent of the defendants-appellants' share might be a " quarter of an acre more or less ", but the defendants-appellants considered this as speculative. The defendants-appellants repudiated the agreement on the ground that the plaintiff-respondent had induced them to enter into the agreement on a false representation of the shares in the partition action.

Held : (1) That the representation by the plaintiff-respondent was merely an expression of opinion as to the probable extent of the interest of the defendants-appellants and was understood as such by them, and that the agreement was binding on the parties.

(2) That under Roman-Dutch Law where a party to a contract makes a representation to the other party that a certain set of facts exists and the latter contracts with the former on that basis, the contract can, if the representation turns out to be untrue, be repudiated at the instance of the latter even if the party who made it believed it to be true provided the representation was material. But a mere expression of opinion, or a statement which merely amounts to the judgment of a party, or which represents something probable or likely to happen will not avoid a contract.

Authority Referred to : Wessels; Law of Contract in South Africa (2nd Ed.) Vol. 1 sect. 1009 at p. 311.

H. W. Jayawardene, Q.C., with *P. Ranasinghe* for the defendants-appellants.
Sir L. Rajapakse, Q.C., with *C. V. Ranawake* for the plaintiff-respondent.

WEERASOORIYA, J.

After learned counsel for the defendants-appellants had concluded his submissions in this case we dismissed the appeal subject to a variation of the degree (to which learned counsel for the plaintiff-respondent consented) by deleting that part of it which related to the right of the respondent to recover from the appellants " the sum of Rs. 313/- by way of compensation awarded in D.C. Colombo Case No. 1156 ". The reasons for our order dismissing the appeal are now set out.

In this action the plaintiff-respondent sued the defendants-appellants for specific performances of an agreement No. 507 (P4) dated the 3rd June, 1948, under which the defendants-appellants undertook to convey to the plaintiff-respondent for the sum of Rs. 1,000/- " all such portion or portions as may eventually be allotted to them " in the final decree in partition action No. 1156 which was then pending in the District Court of Colombo.

Of the sixteen issues on which the case went to trial those material to this appeal are numbered 13, 14 and 15 which are as follows :—

" 13. Did the plaintiff prior to the agreement No. 507 of 3-6-48 represent to the defendants that at the partition of the said land defendants would be declared (entitled) to divided lots of about 20 perches each in the event of the defendants proving their title to their undivided shares.

" 14. Was the said representation made by the plaintiff false to the knowledge of the plaintiff and or made fraudulently with the object of concealing from the defendants—

(*a*) the true and correct share which they were entitled to ;

(*b*) the true value of the defendants' shares in the said land.

" 15. Did the defendants being deceived by the said representations enter into the said agreement No. 507."

The learned trial Judge seems to have dealt with issue No. 13 as meaning that the question involved was whether the plaintiff represented that the defendants were possessed of such undivided interests in the land as (in the event of their adducing evidence in proof of those interests) would have entitled each of them to divided lots of about 20 perches under the partition decree. In answering that issue he held that the plaintiff had represented to the defendants that they were entitled to about 1/4 acre of the land which was the subject matter of the partition action, but on issue No. 14 he held that the representation in question was neither false to the knowledge of the plaintiff nor fraudulent.

It is common ground that the only title derived by the defendants to the 1/4 acre of land was through Mrs. Lilian Rosalin Seneviratne who died intestate in 1933 leaving as her heirs the 1st defendant (her husband) and the 2nd defendant (her son). The estate of Mrs. Seneviratne was administered in D.C. Colombo (Testamentary) Case No. 6874, the administrator being the Public Trustee of Ceylon. In 1937, on an application (P1) made by him the District Court sanctioned the sale of an " undivided portion in extent three-quarter of an acre " of the land called Lunawatte situated at Lunawa as forming part of the estate of the deceased. The price approved by Court for the sale of this share as well as a share in another land (also said to form part of the deceased's estate) was only Rs. 415/-. In sanctioning the sale at this small figure the Court, apparently, accepted the statement of the administrator in his application that in respect of both lands there were " difficulties as regards the title and possession ". There was also a report (P1*a*) from Mr. Dias Abeysinghe, proctor and notary, who had examined the title of Mrs. Seneviratne to these lands, that a search of the registers in the Land Registry revealed only one deed in respect of Lunawatte registered in her favour (which was a deed of exchange No. 1693 of 1927 between her and her brother Mr. L. G. de Alwis by which Mr. de Alwis surrendered in her favour all his interest in " an undivided portion in extent three quarter of an acre " of that land) and that there were no other deeds for the same land from which it was possible to trace her share. The extent of an undivided three-quarter acre of Lunawatte the sale of which was sanctioned by Court seems to have been arrived at from this deed of exchange.

By deed P2 of 1937 the Public Trustee, purporting to act under the sanction granted by the District Court, conveyed to Albert Ernest Tillekeratne and Josalin Perera Jayawardene for the sum of Rs. 415/- all the right, title and interest of Mrs. Seneviratne to and in Lunawatte (also described as Lunabodawatte) and the other land. It would seem that if Mrs. Seneviratne was entitled to any share in Lunawatte in excess of " an undivided portion in extent three quarter of an acre " (the sale of which extent alone was sanctioned by Court) the deed did not convey to the vendors such excess share.

In 1938 the vendees on P2 filed in the District Court of Colombo action No. 1156 for the partition of the land Lunawatte (also described in the plaint as Lunabodawatte). The person named as the 1st defendant in this action was one A. H. Perera, who filed a statement of claim (D1) that the subject matter of the action was a divided block known as Lunabodawatte in extent A. 4 R. 3 P. 32 of a larger land bearing the same name which block devolved on one George Leonard Pieris who by deed No. 1161 of 1934 transferred the same to the 1st defendant. Accordingly the 1st defendant prayed that the action be dismissed. After trial on the contest raised in the statement of claim D1 the action was dismissed by the trial Judge on the ground that the land sought to be partitioned was Lunabodawatte, which was held to be a different land from Lunawatte, and that the deed P2 did not refer to Lunabodawatte, and also on the ground that even if P2 referred to that land Mrs. Seneviratne was possessed of no interest in it at the time of her death and therefore P2 conveyed no title to it. In appeal this Court reversed the finding of the lower Court on both grounds and remitted the case for a fresh trial. But while this Court held that certain interests in the land sought to be partitioned had devolved on Mrs. Seneviratne and had been conveyed to the plaintiffs on P2, no determination was given as to the extent of those interests.

On the 17th March, 1948, after the case had been remitted to the lower Court, an amended plaint (P3) was filed. According to the devolution of title pleaded in the amended plaint, the original owners of the land sought to be parti-

tioned were Louis de Saram and his wife Helena and their rights devolved on their two children Leonard and Deepatchi in equal shares. Leonard's half share came to his widow Susana who by a deed of 1893 gifted a one-eighth share to her grandsons George Leonard Pieris and Julius Edwin Pieris on the death of the latter of whom the entirety of this one-eighth share devolved on George Leonard Pieris who by a deed of 1934 conveyed it to A. H. Perera the 1st defendant in the partition action. (It is this identical share which according to the statement of claim D1 filed by A. H. Perera was possessed by George Leonard Pieris as a divided block of A. 4 R. 3 P. 32 and was said to represent the whole of the land sought to be partitioned). The remaining three-eighth share of Susana was said to have devolved on Leonard Godwin de Alwis and his sister Mrs. Lilian Rosalin Seneviratne the latter of whom became entitled to the entirety of this share by virtue of the deed of exchange No. 1693 of 1927 already referred to. The plaintiffs in the partition action claimed this share on deed P2 of 1937 on the basis that the Public Trustee as administrator of the estate of Mrs. Seneviratne had conveyed to them all the right, title and interest of Mrs. Seneviratne to and in the land.

Learned counsel for the defendants-appellants laid much stress on the fact that in the amended plaint P3 the share of Mrs. Seneviratne was disclosed as an undivided three-eights (representing approximately one and a half acres, if the land was about four acres in extent as stated in the plaint). But even though such a share was disclosed, there were various difficulties in the way of establishing in a partition action that in fact Mrs. Seneviratne was entitled to that share. It would seem that the joint last will of the original owners Louis de Saram and his wife Helena (which document is not a production in these proceedings) dealt with only a "half part" of the land called Lunabodawatte a circumstance which may well indicate that the original owners were entitled to only an undivided half share of the land. On this basis Leonard and Deepatchi, the two children of Louis de Saram and Helena, would each have got only an undivided one fourth share through their parents, and this would also represent the interest which devolved on Susana the widow of Leonard. Susana having by the deed of 1893 dealt with an undivided one-eighth share (which was claimed by A. H. Perera) she would have been left with only an undivided one-eighth share which would have devolved on Mrs. Seneviratne. Going on the basis that the entire land was about four acres in extent, Mrs. Seneviratne's one-eighth share would represent only about half an acre. The District Court having given its sanction to the share by the administrator of Mrs. Seneviratne's estate of an "undivided portion in extent three-quarter of an acre" of the land, the effect of the administrator's conveyance P2 would have been to transfer to the vendees the entirety of the half an acre which Mrs. Seneviratne was possessed of, and there would have been no residual interest in the land accruing to her heirs the defendants-appellants. Furthermore, there seems to be no evidence that Leonard and Deepatchi, the two children of the original owners, had ever dealt with the land on the basis that each of them became entitled to an undivided half share of it. On the contrary, in one of the deeds (P18) produced in the partition action Deepatchi had taken up the position that the share that devolved on her under the joint last will was a half of an undivided one-eighth share. These factors no lawyer who was called upon to advise on the defendants-appellants' title to any share of the land could well have ignored. It is relevant to note that the notary who attested the agreement P4 is the same gentleman who had previously examined the title of Mrs. Seneviratne to this land and furnished the report (P1*a*) in connection with the application P1 made to the District Court by the administrator of Mrs. Seneviratne's estate.

The position, therefore, at the time of the agreement P4 (which was shortly after the amended plaint in the partition action had been filed) was that the right of the defendants-appellants to any interest in the land as the heirs of Mrs. Seneviratne was involved in much doubt. The 1st defendant-appellant, who is himself an advocate, stated in evidence that after the conveyance P2 he thought that neither he nor his son the 2nd defendant-appellant was entitled to any share in the land. He also stated that the application (P1) of the administrator for the sanction of Court for the sale of the share of Mrs. Seneviratne specified therein was made with his approval. Under cross-examination he admitted that when A. H. Perera together with the plaintiff-respondent came to see him and suggested a sale of whatever residuary interests he and his son may have in the land (which interests, according to his version of the representation made by A. H. Perera as well as by the plaintiff-respondent, amounted to no more than title to an undivided "quarter of an acre more or less") he did not think it worth his while to inspect the land or probe into the question whether he and his son were in fact entitled to such a share. There can be no doubt that he refrained from making further enquiry because he regarded the proposal put to him by A. H. Perera

and the plaintiff-respondent as based on a highly speculative assumption and not for the reason that he believed in the truth of the statement involved in that proposal. The trial Judge has expressed the view that the plaintiff-respondent is merely a nominee of A. H. Perera in this transaction.

The agreement P4 provided, *inter alia*, for the defendants-appellants intervening in the partition action with a view to establishing their claim to such a share in the land as was " legally maintainable ". It also provided for the plaintiff-respondent undertaking to defray all expenses incurred by the defendants-appellants in establishing this claim and for the plaintiff-respondent to assume full control of the conduct of the case for the intervenients and for that purpose to retain such proctor and counsel as he may think fit. There was a further provision by which the plaintiff-respondent agreed to indemnify the defendants-appellants in respect of any costs that they may be condemned to pay in respect of their intervention.

In terms of the aforesaid provisions the defendants-appellants gave a proxy in favour of Proctor Jayaratne who, apparently, was retained for the purpose of the intervention by A. H. Perera, and on the 7th July, 1948, the statement of claim D5 of the defendants-appellants as the intervenients was filed in the partition action. In D5 the claim made on behalf of the intervenients was that they were entitled to an undivided three-eighth share which had devolved on Mrs. Seneviratne, less the extent of three-quarter acre, which it was represented was the interest of Mrs. Seneviratne which had been conveyed to the plaintiffs in the partition action by the deed P2. While, therefore, D5 adopted as correct the averment in the amended plaint P3 that an undivided three-eighth share had devolved on Mrs. Seneviratne, it repudiated the further averment in P3 that the whole of this share had accrued to the plaintiffs in the partition action by reason of P2.

As a result of this intervention the defendants-appellants were joined as the 10th and 11th defendants in the partition action. Under the final decree (P7) which was entered in that action on the 28th August, 1951, they were declared entitled to certain divided lots aggregating A. 1 R. 1 P. 33.2 of the entire land of A. 4 R. 3 P. 23 (being the extent ascertained on the survey made in the partition action).

It will thus be seen that the defendants-appellants have been declared entitled under the final decree to a share far in excess of a " quarter of an acre more or less " of the land. In the course of the judgment appealed from, the learned District Judge observes that the shares allotted to the defendants-appellants in the partition action includes certain " outstanding shares " which had devolved on the husband of Deepatchi de Saram (presumably by inheritance from the latter) and that no one could reasonably have anticipated " this windfall ". Mr. Jayawardene who appeared for the defendants-appellants did not seek to canvass the correctness of this observation of the learned District Judge. It is a matter for surmise, however, whether this " windfall " is only a negligible part of the difference between the aggregate extent of A. 1 R. 1 P. 33.2 and the " quarter of an acre more or less ". While the amended plaint P3 contained certain averments as regards the devolution of Deepatchi's share, no evidence at all was led at the trial in the present case on this important point, and it seems to me that the absence of such evidence greatly weakens the case for the defendants-appellants that there was a fraudulent misrepresentation. Even otherwise, the fact that there was allotted to them in the partition decree aggregate shares far in excess of the " quarter of an acre more or less " is by no means conclusive of the question whether at the time when they acted on the representation made to them by the plaintiff-respondent (which they did on the date of the execution of the agreement P4) there was a fraudulent, or even an innocent misrepresentation.

Under the Roman Dutch Law (which is the law governing the agreement under consideration) it is clear that where a party to a contract makes a representation to the other party that a certain set of facts exists and the latter contracts with the former on that basis, the contract can, if the representation turns out to be untrue, be repudiated at the instance of the latter even if the party who made it believed it to be true, provided, however, that the representation was material in the sense that the party to whom it was made would not have entered into the contract had he known the truth. But Wessels in dealing with such representations in his treatise on the Law of Contract in South Africa (2nd. Ed.) Vol. 1 sect. 1009; p. 311 says that a mere expression of opinion is not a representation which will avoid a contract if not true. So also, a statement which merely amounts to the judgment of a party or which represents *something probable or likely to happen* falls under the category of " *ea quae ex commendandi causa dicuntur* " and will not affect the validity of a contract.

Viewed in the light of the circumstances previously referred to by me as existing at the time that the agreement P4 was entered into, the representation which, on the finding of the learned trial Judge, was made by the plaintiff-respondent seems to be nothing more than an expression of opinion as to the probable extent of the interests of the defendants-appellants, and was understood as such by them. It is, thus, a representation falling into the category which, according to Wessels, will not affect the validity of the contract. In this view of the matter the defendants-appellants have failed to discharge the burden which was on them of proving not only a fraudulent misrepresentation, but even an innocent misrepresentation (in regard to which, although no issue was raised at the trial, learned counsel for the defendants addressed to us certain submissions).

We saw no reason, therefore, for interfering with the judgment of the Court below and we dismissed the appeal subject to the variation of the decree as already indicated.

BASNAYAKE, C.J.
I agree.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL.

Present : BASNAYAKE, A.C.J. (PRESIDENT), PULLE, J. AND FERNANDO, J.

REGINA vs. PINTHERIS AND OTHERS

Applications 93—95 *of* 1955. *S. C.* 12/*M. C. Matara C.* 1870.

Argued on : 23rd, 24th and 25th August, 1955.
Decided on : 25th August, 1955.
Reasons delivered on : 21st September, 1955.

Murder—Misdirection to jury about the defences of accused—Evidence of confession—Court of Criminal Appeal Ordinance 23 of 1938—*Sections* 4, 5 (1), 8 (1) *and* 16—*Form XXXIII, rule* 24 (*a*)—*Notices of appeal and grounds of appeal.*

To a charge of murder, the 1st and 3rd accused pleaded an *alibi*, the 2nd accused the right of private defence, incidentally confirming the plea of the 1st and 3rd accused. In summing up, the Commissioner, while stating that if the 2nd accused was believed the 1st and 3rd accused had to be acquitted, did not state that even if the evidence of the 2nd accused created a reasonable doubt as to the presence of the 1st and 3rd accused, they were yet entitled to acquittal.

Held : (1) This was a misdirection entitling 1st and 3rd accused to acquittal.

Further, at the hearing of the appeal grounds of appeal other than those set out in Form XXXIII of the rules made under the Ordinance were urged.

Held by a majority : When grounds of appeal are urged for the first time at the hearing, section 5 (1) does not compel a Court to set aside a verdict on those grounds, even though they may be valid. An " appeal " referred to in section 5 (1) is one that conforms to the Ordinance in regard to notices. The grounds of an appeal or application are an integral part of a proper notice under section 8 (1) and must be set out.

Per PULLE, J.—" Unfortunately it is still being assumed, especially in capital cases, that as a matter of course fresh grounds of appeal would be entertained after the expiration of the time limit laid down in section 8 (1). This Court will in future show no indulgence and strictly limit argument only to matters of law raised within the prescribed limit of 14 days."

Authorities referred to : *The King vs. Bello Singho et al* (1947) 48 N. L. R. 542 ; 35 C. L. W. 81.
Rex vs. Cairns (1927) 20 Cr. App. Reps. 44.
Rex vs. Wyman (1918) 13 Cr. App. Reps. 163, 165.
Rex vs. Benjamin Adler (1923) 17 Cr. App. Reps. 105.
Goldman vs. Eade (1945) 1 All. E. Reps. 154.
Cosmas vs. Commissioner of Income Tax (1938) 39 N. L. R. 457 ; 11 C. L. W. 75.
North-Western Blue Line vs. K. B. L. Perera (1943) 44 N. L. R. 523.
Re Shanoff vs. Glanzer (1949) 1 D. L. R. 414.
Twynham (1920) 15 Cr. App. Reps. 38.
Craies on Statute Law, 5 Ed., p. 246.

Dr. Colvin R. de Silva with *R. A. Kannangara* and *W. D. Thamotheram*, for the accused-appellants.
V. T. Thamotheram, Crown Counsel, for the Attorney-General.

PULLE, J.

The three prisoners, of whom the first is the father of the second and the third, were convicted on the charge that they did on the 7th November, 1954, commit murder by causing the death of one Ganhewage Samson and were sentenced to death. The case for the prosecution was that the death of the deceased was caused by a joint attack of the prisoners, of whom the first and second were armed with katties and the third with a mammoty. The defence of the first and the third was that they were not present at the scene of the offence and took no part in it, while the defence of the second was that he killed the deceased in the exercise of the right of private defence. The principal submission made on behalf of the first and third is that the learned Commissioner in his charge to the jury failed to differentiate their defence from that of the second thereby creating an impression on the minds of the jury that if they rejected the defence of the second they had perforce to convict the first and the third. In regard to the second prisoner it was urged that the manner in which a statement made by him to the Police was elicited in evidence was gravely prejudicial to his defence and amounted to a miscarriage of justice. At the close of the argument we set aside the convictions of the first and third prisoners and dismissed the appeal of the second and refused his application for leave to appeal and intimated to learned Counsel that we would deliver our reasons later.

To understand the submissions made on behalf of the prisoners it is necessary to state the evidence in greater detail. According to the prosecution the events which led to the death of the deceased happened in two stages. According to the witness G. H. Peter, the elder brother of the deceased, he was returning from a boutique with a bag of flour and sugar and some articles along a path running over a field when he met the second prisoner. The latter had a katty and some cassava. The witness taxed the prisoner with having behaved improperly towards his sister Sopihamy who was married to one Sumathipala Abeyagunawardena. Words passed between the two and a blow with the katty injured the right knee of Peter. The bag of sugar and flour fell down and then ensued a tussle for the katty. In response to the cries of Peter, Sumathipala ran up to the spot, wrenched the katty and threw it into the field. Thereupon the second prisoner ran across the field over a ridge towards the direction of his house where he was living with his father, the first prisoner. Sumathipala asked Peter to remain at the spot and set out to make a complaint to the Police.

About fifteen or twenty minutes afterwards Peter says he saw the deceased first at a distance of about 100 yards and also the three prisoners. The prisoners were converging towards the deceased from a route different to that taken by the latter. About thirty feet away from where Peter was lying the prisoners closed in on the deceased. The first blow was dealt by the father with a katty on the head of the deceased. He was felled to the ground whereupon the second prisoner attacked with a katty and the third with a mammoty. When the two sisters ran up to the deceased they were also set upon. Peter says he too went up with some difficulty. He was injured by blows struck by the second and third prisoners.

Of the prisoners only the second gave evidence. According to him there was only one incident in the course of which he clashed with both Peter and the deceased under circumstances different to what was deposed to by the prosecution witnesses. He says that in the course of the struggle with Peter he did not lose hold of the katty and succeeded in escaping with it and ran along the field for some distance and got on to the footpath. He continued his story as follows :

" Then I met a certain man whom I could not recognise. He said, ' Take this fellow to be eaten '. He came toward me. I jumped into the field. He had a katty in his hand. After I escaped from Peter, Sumathipala and Sopihamy went away. That man aimed a blow at me. Then I also struck him with the katty. I cannot say how many blows I dealt. I gave him more than one blow ".

He went on then to say that Peter and others came up to the spot and he attacked them as well. Then he threw the katty into the field and went home where he asked his father to accompany him to the Police. He next proceeded to Waralla Police Station and made a statement at about 7 p.m. The contents of this statement were elicited in the circumstances which will be referred to later.

When the charge to the jury is examined there are directions of a general character to the effect that the burden rested on the prosecution to prove its case against each accused beyond reasonable doubt. The Commissioner also stressed in a number of passages that if the jury accepted the evidence of the second prisoner that the first and the third were not present at the scene they had to acquit the first and third. The complaint is that, while it was obvious that if the jury thought that the version given by the second prisoner was probably true they had to acquit the first and the third, the Commissioner did not direct the jury that if the version of the

second prisoner raised a reasonable doubt as to the presence of the first and third these two had still to be acquitted and that the failure so to direct amounted to a misdirection resulting in a miscarriage of justice. It was submitted with considerable force that the frequency with which the jury were told that, if they considered the evidence of the second prisoner to be probably true, then the first and third were entitled to be acquitted may have created the impression that if they rejected the plea of self-defence set up by the second prisoner, then they had necessarily to convict all three prisoners of murder. It suffices to quote only two or three passages from the charge on which learned Counsel for the appellants based his submission :

> " You consider the whole case and see whether there is any truth in the second accused's story. If you do not accept his story then you reject it. If you accept it, on the other hand, then the first and third accused are not guilty ".

> " You will ask yourselves the question whether the prosecution story is true, that proof must be to a high degree of certainty, or whether the second accused's story is probably true. It is a matter for you to decide ".

> " It is now for you to decide whether he (the second prisoner) acted in the right of private defence. He had that right at that stage, if what he says is true, and if you accept that he acted in the right of private defence then the first and third accused will get off ".

After the second prisoner had given evidence and closed his defence, the prosecution had on his own admissions fully discharged its burden as far as he was concerned and his conviction for murder was inevitable, unless the jury were satisfied that he had proved the existence of either exculpatory or mitigatory circumstances. The first and third prisoners, however, were not in like peril. The burden was still on the prosecution to satisfy the jury that they were present in the company of the second prisoner and took part in a concerted attack on the deceased. Even if the jury had rejected out of hand the plea set up by the second prisoner, they had still to be satisfied that they could with confidence accept the evidence of the prosecution witnesses implicating the first and third prisoners. If the jury held that the burden resting on the second prisoner had not been discharged because they were left in a state of honest doubt whether or not to accept the material parts of his evidence, it becomes obvious that while his defence had in law to fail, he had nevertheless succeeded in raising a reasonable doubt as to the presence of his co-prisoners. In this view of the matter the first and third prisoners were entitled to succeed in this appeal on the ground of misdirection. There was nothing so very compelling in the evidence called for the prosecution to have justified us in applying the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance, No. 23 of 1938.

It is common ground that the first information connected with this case was given to the Police by the second prisoner. That fact was elicited by the prosecution from the police officer who recorded his statement. In the course of his evidence in cross-examination he stated :

> " The 2nd accused made a complaint to me. I recorded his statement. I did not take him into custody ".

At this point the record reads :

> " At this stage Court asks the jury to retire and they do so. Court explains the implications of that question to the defence Counsel, and asks whether he is going to call the accused and produce the statement. Defence Counsel gives an undertaking to put in the statement and call the accused. Jury returns. Court explains to the jury that a statement or confession made by an accused person cannot be put in evidence during the prosecution case. He states that the Defence Counsel has given an undertaking to call the accused and produce that statement ".

In our opinion the learned Commissioner should not have apprised the jury of what took place in their absence, for it defeated the very purpose for which they were asked to retire. The reference to a confession by an accused person would have had dangerous repercussions if, as fortunately it did not happen in this case, the jury were in ignorance of the statement which was definitely non-confessional. Again, there was nothing in the evidence given by the police officer which necessitated an undertaking by Counsel to produce that statement. Eventually he kept his undertaking and proved that statement through the same police officer. The procedure adopted to obtain evidence of that statement is irregular but having regard to the terms of that statement which was not challenged as being an incorrect record and which might legitimately have been used to contradict the evidence given by the second prisoner, we are of the opinion that no prejudice of any kind was caused to him. It is manifest that the jury rejected the plea of self defence and we have seen no reason to doubt the correctness of the verdict against him.

There remains to be considered the preliminary objection taken by learned Crown Counsel that the Court should not entertain the additional grounds of appeal on which it was sought to argue this case. The date of the convictions was the 2nd August, 1955, and a notice of appeal and applications for leave to appeal in Form XXXIII dated the same day were lodged with the clerk of assize. The prisoners were defended by Counsel and proctor whom they had retained and with them was associated the proctor who had been assigned to defend them. It would serve no purpose to pursue the question whether the lawyers whom he had retained should have advised them early in regard to the grounds of appeal. If the lawyer who is assigned certifies that he had drafted the grounds of appeal he is entitled to a fee but he is under no obligation by reason of the assignment to settle the grounds of appeal. The fact that learned Counsel for the prisoners did not rely on a single one of the grounds appearing in the notice suggests that they received no advice from any of the lawyers who took part in their defence, a situation which, whatever be the reason, is much to be deplored.

This appeal was set down for hearing on Monday the 22nd August. On that day learned senior Counsel stated he wished to urge fresh grounds of appeal and asked for an adjournment until the next sitting commencing on the 5th September. We intimated to him that we were not prepared to grant the adjournment but only the concession of placing the case at the bottom of the list. On the 23rd August when the case was reached at the point at which it was originally listed Counsel handed up to the Court the fresh grounds of appeal. Crown Counsel had been informed orally on the 22nd evening of the new points. We accept the statement of Counsel that the transcript of the evidence and the charge was not ready until late on Friday the 19th August but not as justifying an application to add fresh grounds.

The objection taken by the Crown that the Court should not entertain fresh grounds was supported on the authority of *The King vs. Bello Singho et al* (1947) 48 N. L. R. 542. In that case in which the appellants had been sentenced to death the notice of appeal was filed on the 25th September, 1947. A further ground of appeal was filed out of time on the 19th October, 1947, and at the hearing Counsel for the appellants sought to raise yet another point to which an objection was taken and upheld. In the judgment reference was made to *Rex vs. Cairns* 20 C. A. R. 44 in which Counsel for the prisoner in a capital case asked for leave to add at the hearing mis-direction to the grounds of appeal, though it was not mentioned in the notice. The Court granted leave as it was a capital case. At the conclusion of the judgment the Lord Chief Justice referred with approval to *Rex vs. Wyman* 13 C. A. R. 163, 165 in which Darling, J. said :

> " The Court wishes it to be understood that in future substantial particulars of misdirection, or of other objections to the summing-up must always be set out in the notice of appeal, even if the transcript of the shorthand note of the trial has not been obtained. Such particulars must not be kept back until within a few days of the hearing of the appeal. If Counsel has a genuine grievance regarding a summing-up, he knows substantially what it is as soon as the summing-up is finished, and can certainly specify his general objection when he settles the notice of appeal ".
>
> " This direction the Court has repeated in later cases. In future it will act upon it ".

Apparently one of the later cases was *Rex vs. Benjamin Adler* 17 C. A. R. 105. After referring to a number of cases decided by this Court the learned President (Jayetilleke, J.) said :

> " These decisions shew that the practice of raising points which are not set out in the notice, which, I regret to say, seems to be growing, has been condemned in no uncertain terms.....We think it is desirable that this Court should act upon the words of the Lord Chief Justice in *Rex vs. Cairns* 20 C. A. R. 44, and insist on a strict compliance with the provisions of the Ordinance ".

Dr. Colvin R. de Silva conceded that the case relied on by Crown Counsel was in point but argued that it was wrongly decided. The substance of his argument is that there is nothing in the Ordinance which ties an appellant down to the grounds set out in the notice of appeal and that once grounds for setting aside the verdict exist, even though they be raised for the first time at the hearing, the provisions in section 5 (1) of the Ordinance make it mandatory on the Court to set aside the verdict, the words being, " The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal ".

The majority of us are unable to accept this submission. It is elementary that there is no right of appeal from a decision of a judicial or other tribunal, unless such a right is conferred by statute. It flows from the bounty of the legislature and, therefore, the same legislature can impose any restrictions it pleases on the exercise of that right and hence no argument can be validly addressed to a Court to the effect that the restrictions might work harshly in any particular case.

The strictness with which procedural steps required by statute to constitute an appeal are insisted on is exemplified in the case of *Goldman vs. Eade* (1945) 1 All E. R. 154 in which a person who had been convicted before a bench of justices handed in their presence to the clerk of the Court an application signed by him requesting them to state a special case. The clerk handed the application to the justices who stated a case, even though the applicant did not conform to rule 52 of the Summary Jurisdiction Rules which required him to serve on each of the justices a copy of the application. The appeal came on for hearing before the King's Bench Division consisting of Viscount Caldecote, L.C.J., Humphreys and Birkett, JJ. The respondent took the preliminary point that the Court had no power to hear the appeal as the rule in question was mandatory in character and had to be strictly complied with. For the appellant it was contended that the procedure followed was sufficient, since the rule had been complied with in substance. In rejecting this argument the Lord Chief Justice said :

> " Counsel for the appellant raised the point that, though the rules have not been complied with in their literal sense, something has been done which is sufficient to satisfy the substance of the intention of those rules. Cases have been cited to us which show that the Court, including the Court of Appeal, have taken a stricter view than that of these provisions. We think that the objection taken by Counsel for the respondent is one that stands good on the strength of those decisions, *and that we have no power to hear this special case.*

The case of *Cosmas vs. Commissioner of Income Tax* (1938) 39 N. L. R. 457 followed in *North Western Blue Line vs. K. B. L. Perera* (1943) 44 N. L. R. 523 is illustrative of the same principle. In *Re Shanoff vs. Glanzer* (1949) 1 D. L. R. 414 it was laid down that a rule governing service of notice of appeal from a decision must be strictly complied with and that otherwise the Appeal Court has no jurisdiction to hear the appeal. One is also familiar with several decisions of the Court of Appeal in Ceylon to the effect that where a procedural step in the course of perfecting an appeal is not taken within the prescribed time it has no jurisdiction to extend the period. Craies on Statute Law 5th Ed. p. 246 states the position as follows :

> " When a statute confers jurisdiction upon a tribunal of limited authority and statutory origin, the conditions and qualifications annexed to the grant must be strictly complied with ".

Now the substantive right of appeal conferred by section 4 must be read with the procedure laid down in section 8 (1) which states :

> " Where a person convicted desires to appeal under this Ordinance to the Court of Criminal Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal, *in such a manner as may be directed by rules of Court*, within fourteen days of the date of conviction ".

In our opinion the " appeal " referred to in section 5 (1) is one which conforms to the requirements of the Ordinance. The Court of Criminal Appeal Rules, 1940, before the amendment published in Gazette No. 9, 130 of 4th June, 1943, provided for two separate forms,— Form IV giving notice of appeal on questions of law and Form VI for leave to appeal " on the grounds hereinafter set forth ". It is perfectly clear that in Form IV the questions of law had to be set out and in Form VI the grounds for applying for leave to appeal. Since the amendment referred to Forms IV and VI have been superseded by Form XXXIII modelled entirely on the English Form XXXIV which as a matter of practice is used in England in place of the statutory Forms IV and VI. Our Form XXXIII is now used whether the notice is one of appeal or of application for leave to appeal or both and space is provided for setting out the grounds of appeal or application.

It is clear from the rules and the forms that the grounds of an appeal or application are an integral part of a proper notice under section 8 (1) and there is nothing in the Ordinance to suggest the contrary section 16, on the other hand, indicates that a notice of appeal on law alone must contain the grounds. It provides that if it appears to the Registrar that any notice of an appeal against a conviction, purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the Registrar may refer the appeal to the Court for summary determination, and, where the case is so referred, the Court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily. This power has been conferred on the basis that the grounds of appeal must be set out in the notice, for otherwise neither the Registrar nor the Court would be able to act under the section.

Again, the Crown has a right of audience in every appeal. If a point of law is taken just before or during the hearing, a miscarriage of justice may result unless an adjournment is granted to the Crown to meet the new point. If the appellants' submission is correct he may take a new point as a matter of right at the

adjourned hearing as well and this process may go on indefinitely until every conceivable point of law has been exhausted. Such a procedure could not possibly have been contemplated by the Legislature.

If an appellant, as in this case, who has been convicted of murder is allowed by the Court to raise fresh grounds of appeal delivered after the appealable time it would in effect be granting an extension of time for giving notice of appeal. This is prohibited by section 8 (1) of the Ordinance the second paragraph of which reads :

> " Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given may be extended at any time by the Court of Criminal Appeal ".

On this point the observations of Lord Reading in the case of Twynham 15 C. A. R. 38 are apposite. The Lord Chief Justice said :

> " If it were possible to extend the time it would be open to a murderer, having failed in one appeal, to give notice asking for an extension of time in order to bring some other matter before the Court and not give the notice until the last moment, in order to provide for a further extension of time ".

The English Act and the rules thereunder are in all materials respects identical with ours. The English authorities especially *Rex vs. Cairns* (*Supra*) and our own are entirely inconsistent with the construction sought to be placed by learned Counsel for the appellant on section 5. A practice had grown up in England which we have followed of showing indulgence under exceptional circumstances. There is nothing in any of the cases to indicate that this indulgence was shown in the exercise of a judicial discretion to give relief to an appellant who has failed to give a notice of appeal conforming to the requirements of the statute. Unfortunately it is still being assumed, especially in capital cases, that as a matter of course fresh grounds of appeal would be entertained after the expiration of the time limit laid down in section 8 (1). This Court will in future show no indulgence and strictly limit argument only to matters of law raised within the prescribed limit of fourteen days.

Convictions of 1st and 2nd accused set aside.
Conviction of 3rd accused affirmed.

Present : GUNASEKARA, J.

KORALLAGE EDWIN SINGHO vs. P. S. NANAYAKKARA OF NORWOOD POLICE

S. C. No. 1571*P*/1955—*M. C. Hatton No.* 7096

Argued on : 29th February, 1956
Decided on : 21st August, 1956

Criminal Procedure Code, sections 190, 195—*Absence of prosecution witness—Discharge of accused—Is it an acquittal?—Effect of withdrawing a case.*

When a prosecution witness is absent on trial date and the accused is discharged, such discharge constitutes an acquittal under section 190 of the Criminal Procedure Code and a plea of *autrefois acquit* may be raised where proceedings are again instituted on the same charge.

Permitting a complainant to withdraw a case under section 195 of the Criminal Procedure Code must also be regarded as an acquittal.

Cases referred to : *Don Abraham vs. Christoffelsz* (1953) 55 N. L. R. 92.
Adrian Dias vs. Weerasingham (1953) 55 N. L. R. 135.
R. vs. William (1942) 44 N. L. R. 73.

M. M. Kumarakulasingham, for the accused-appellant.

Daya Perera, C. C., for the Attorney-General.

GUNASEKARA, J.

The appellant was convicted, after a summary trial under the provisions of section 152 (3) of the Criminal Procedure Code, on charges of housebreaking by night and theft, and was sentenced to rigorous imprisonment for 18 months. The conviction was based on the clearest possible evidence and the only ground on which the appeal was pressed was that a plea of *autrefois acquit* that the appellant had taken at the trial should have been upheld.

The proceedings in the present case began with the filing of a report in terms of section 148 (1) (b) of the Criminal Procedure Code on the 29th August, 1955, and the charge upon which the appellant has been convicted was framed by the magistrate on the 19th September, 1955. A charge alleging the same offences had been framed against him on the 31st January, 1955, in Case No. 5557 of the same court, in which too the magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code. The appellant pleaded not guilty to the charge and the trial was fixed for the 14th February, 1955. He did not appear on that day but submitted to the magistrate a certificate from the district medical officer to the effect that he was too ill to attend court, and the magistrate, being satisfied that his absence was due to illness, postponed the trial to the 28th March, 1955. The appellant appeared on that day but a witness for the prosecution was absent, having left for England, and the prosecuting officer stated to the court that he was "unable to proceed to trial" without that witness and he offered no evidence. The learned magistrate thereupon made an order purporting to "discharge" the appellant. It is contended for the appellant that in view of the provisions of section 190 of the Criminal Procedure Code this order amounted to an order acquitting him of the offences charged against him in that case and he was therefore not liable to be tried again for the same offences.

Section 190 of the Criminal Procedure Code, which occurs in the chapter prescribing the procedure for summary trials, provides that if the magistrate after taking the evidence for the prosecution and the defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty, he shall forthwith record a verdict of acquittal, and that if he finds the accused guilty he shall forthwith record a verdict of guilty; and section 191 provides that nothing thereinbefore contained shall be deemed to prevent a magistrate from discharging the accused at any previous stage of the case. It is contended that the provisions of section 190 require the magistrate to acquit the accused and not merely discharge him if the prosecution offers no evidence against him at the trial, and that therefore in the present case the magistrate must be taken to have intended to make an order of acquittal and not merely one of discharge. There is support for this view in the decisions of this court in *Don Abraham vs. Christoffelsz* (1953) 55 N.L.R. 92 and *Adrian Dias vs. Weerasingham* (1953) 55 N.L.R. 135. In each of these cases, too, the prosecution offered no evidence at the trial because the prosecuting police officer found that owing to the absence of a witness he could not proceed with the case, and the magistrate thereupon purported to "discharge" the accused. It was held by Nagalingam A.C.J. that the order made by the magistrate must be regarded as an order of acquittal made under section 190 of the Criminal Procedure Code.

It has been held by the Court of Criminal Appeal that "the wording of section 190 means that a Magistrate is precluded from making an order of acquittal under that section till the end of the case for the prosecution": *Rex vs. William* (1942) 44 N.L.R. 73. It appears to be implied in this view that such an order may be made even though evidence for the defence has not been taken. The reason why that can be done must be that the requirement in section 190 as regards the taking of evidence for the defence is subject to the unexpressed condition that such evidence is tendered. It seems to follow that the requirement as regards the taking of evidence for the prosecution must be understood as being subject to a similar condition. The "end of the case for the prosecution" may, then, be reached without any evidence being taken, in a case where the prosecution informs the court that it offers no evidence. It seems to me, therefore, that there is no conflict between the decision of the Court of Criminal Appeal and the view taken by Nagalingam A.C.J. I therefore hold, following the decisions in *Don Abraham vs. Christoffelsz* (supra) and *Adrian Dias vs. Weerasingham* (supra), that the plea of *autrefois acquit* should have been upheld.

A possible view of the effect of the proceedings of the 28th March, 1955, is that the complainant, who did not ask for a postponement of the trial but contended himself with stating that he was unable to proceed to trial without the absent witness and offering no evidence, had satisfied the magistrate that there were sufficient grounds for permitting him to withdraw the case and the magistrate virtually permitted him to withdraw it. In that view, too, the order must be regarded as an order of acquittal; for section 195 of the Code provides that when the magistrate permits a complainant to withdraw a case he shall acquit the accused.

I set aside the conviction of the appellant and the sentence passed on him.

Set aside.

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

MARIMUTTU AND TWO OTHERS vs. SINNATHAMBY AND OTHERS

S. C. 405 *of* 1955—*D. C. Batticaloa* 815/*L*

Argued on : 16th May, 1956
Decided on : 18th July, 1956

Rei vindicatio—*Mukkuwa Law—Thaiwaly Muthisam—Customary tenure—Effect of Matrimonial Rights and Ordinance No.* 15 *of* 1876—*Prescription.*

By Crown grant of 1898 the lands which form the subject-matter of this action were, along with some other lands, granted to the male representatives of 16 families or " kuddies " of the Kamala caste, who were governed by the Mukkuwa Law, the chief feature of which was that the legal ownership remained in the females of the families, the males being allowed to cultivate or manage them and for the purposes of such cultivation to enter on behalf of the owners into legal transactions with third parties.

Plaintiffs are the female heirs of one of the 16 families whose predecessors in title had held the lands in question in lieu of their undivided 1/16 share. Veerakutty was one of the males representing this family and was managing them on behalf of the female heirs. He had granted a lease and a usufructuary mortgage of these lands to the first defendant. 2—13 defendants are the heirs of Veerakutty.

Plaintiffs claimed title to the three lands on the basis (1) of succession under the customary Mukkuwa Law.

(2) Of prescriptive possession. The first defendant did not claim title. The 2—13 defendants claimed title through Veerakutty.

The learned District Judge held against the plaintiffs on both points and dismissed their action. On appeal—

Held : (1) That the oral evidence led with regard to the customary law was unreliable and inadequate and that such customary law seems to have been impliedly repealed by the Matrimonial Rights and Inheritance Ordinance of 1876.

(2) That the documents P2 and P3 clearly showed that Veerakutty entered into those bonds as representative of the female heirs and therefore the question of prescription should have been answered in favour of the plaintiffs, as Veerakutty's possession was in reality a possession on behalf of his sisters who are the predecessors in title of the plaintiffs.

Cases referred to : *Sathirapillai vs. Nagamuttu,* (1916) 2 C. W. R. 309.

C. Renganathan, for the plaintiffs-appellants.
E. R. S. R. Coomaraswamy, for the 2nd to the 13th defendants-respondents.

T. S. FERNANDO, J.

This is an appeal against the dismissal of an action instituted by the plaintiffs-appellants against one Murugapper Sinnathamby as the 1st defendant and twelve others, the 2nd to the 13th defendants, who are the heirs of one Veerakutty, for a declaration of title to three pieces of land described as lands A, B and C in the schedule to the plaint, for ejectment of the defendants therefrom and for damages for wrongful occupation thereof. The 1st defendant does not claim title to the land, but seeks to remain in possession thereof on the strength of (1) a lease granted to him and (2) the execution of a usufructuary mortgage bond in his favour by Veerakutty, the predecessor in title of the other defendants.

The three pieces of land, A, B and C, aggregating in extent about six and a half acres are said to be part of a stretch of land some 57 acres in extent granted by the Crown upon a Crown grant of the year 1898 to sixteen persons. The plaintiffs contended that this grant though made in favour of sixteen persons who were all males was in reality a grant to those persons as representing sixteen families or " kuddies " of the Kamala caste who had been cultivating the land even prior to the Crown grant under an ancient customary tenure known as " Thaiwaly Muthisam ", the principal feature of which was that the legal ownership of the land remained in the females of the families, their males being allowed to cultivate or manage them and for the purposes of such cultivation or management to enter on behalf of the owners into any legal transactions with third parties.

The parties are Mukkuwa Tamils. The 1st and 2nd plaintiffs are sisters, being the daughters of one Vairathai, and the 3rd plaintiff is their niece, being the daughter of their sister who had predeceased their mother. Vairathai belonged to the division or family of the Kamala caste known

as Kollakanthan-kuddy, and it is alleged that in lieu of the undivided one-sixteenth share of the land that passed on the Crown grant to the Kollakanthan-kuddy Vairathai and her predecessors in title were in possession of the three pieces of land which form the subject-matter of this case. Although the extent of land conveyed by the Crown grant in 1898 was 57 acres, it is claimed that at a later survey the land was found to be in excess of that extent by about 47 acres, making the total extent possessed approximately 104 acres. Thus it came about that the Kollakanthan-kuddy in lieu of its one-sixteenth share possessed and cultivated the three pieces of land A, B and C aggregating in extent about six and a half acres. Veerakutty, the lessor and mortgagor to the 1st defendant and through whom the 2nd to the 13th defendants claim title to these three pieces of land, was the uncle of the 1st and 2nd plaintiffs and the brother of their mother Vairathai. The 1st plaintiff stated in evidence that Veerakutty was looking after the lands for them during their mother's lifetime and used to bring to their house a share of the produce after spending from the proceeds of sale of the produce for the customary offerings to the temple and for the temple festivals.

The plaintiffs sought to establish the existence of the customary tenure alleged by them in their plaint but, as the learned District Judge has correctly observed, the oral evidence to support the existence of such a tenure was unreliable and inadequate. Moreover, as a result of the enactment in 1876 of the Matrimonial Rights and Inheritance Ordinance the rights of inheritance of persons who are known as the Mukkuwa Tamils also came to be regulated by that Ordinance and their customary laws relating to inheritance appear thereby to have been impliedly repealed. In the case of *Sathirapillai vs. Nagamuttu* (1916) 2 C.W.R. 309 decided in 1916, Ennis J. stated that the Mukkuwa custom referred to as "thaiwaly muttisam" was contrary to the law of the land. Sir Ivor Jennings and Dr. H. W. Tambiah in their work on "Ceylon" (The British Commonwealth Series, Volume 7) at page 279 also express the view that the Mukkuwa law of inheritance is now obsolete and cannot be invoked in opposition to the general law of intestate succession. In the state of the evidence led in the case before us and in the present state of the law relating to the legal enforceability of the custom alleged, I am of opinion that the plaintiff's title on the basis of succession under Mukkuwa customary law fails.

This does not however dispose of the claim made by the plaintiffs in this case because they had pleaded that they were entitled to the lands in question by right of prescriptive possession. In view of my opinion that the plaintiffs cannot call in aid the alleged rule of succession according to Mukkuwa customary law, it follows that the predecessors in title of the plaintiffs and Verakutty would be entitled to be regarded as co-owners of these three pieces of land. The prescriptive rights of the parties were put in issue in the case (*vide* issue 10) and the plaintiffs contended that Veerakutty never claimed to be in possession as a co-owner but always regarded himself as possessing only on behalf of his sisters. The answer given by the learned District Judge to this issue was that the land was held in common, and that the question of prescription did not therefore arise. In my opinion that question does arise and has to be answered.

The learned District Judge states that he was not impressed by the oral testimony of the 1st plaintiff and the other witnesses and, if the plaintiffs' case depended upon oral testimony alone, the learned Judge's findings could not have been assailed successfully in this Court. The plaintiffs however depended also upon certain documentary evidence to which I now propose to refer, the significance of which does not appear to have been properly appreciated by the learned Judge. An examination of this documentary evidence supports the contention of the plaintiffs that Veerakutty's possession was in reality a possession on behalf of his sisters.

In the year 1927, Veerakutty by usufructuary mortgage bond P2 mortgaged these same three pieces of land, and this bond contains the recitals (1) that these lands "were given by the Crown to the sixteen clans of the Kamala caste resident at Annamalai and out of these lands these shares were possessed as the one-sixteenth share belonging to the clan called 'Kollankudy'" and (2) that he (Veerakutty) "as leader and manager of the said kuddy", mortgages these shares. The learned District Judge fails to give full effect to these recitals in P2 for the reason that the same instrument contains a further recital by Veerakutty that he had the right to grant the mortgage. This last recital should, in my opinion, have received examination by the learned Judge in the context of the oral evidence in the case which was to the effect that the person appointed leader is recognized as having the right to enter into all transactions required for the purpose of the management of the property. When so examined it will be seen that Veerakutty must be taken to have entered into such transactions on behalf of the persons who appointed him. The plaintiffs were therefore entitled to rely on the bond P2 as containing admissions by Veerakutty that he was not the owner of the lands mortgaged in 1927 but only the leader and manager of the

" kuddy " to which they belonged. The plaintiffs relied also on another document P3 signed by Veerakutty ten years later, in October 1937, relating to the possession of the third land C described in the schedule to the plaint which contains an admission by Veerakutty pointing to the truthfulness of the claim of the plaintiffs. Veerakutty by P3 agreed to spend for the yearly " thiruvila " ceremonies at the Pathirakalyamman kovil all the income derived from this land, and in case there was no income he undertook to carry out the said " thiruvilas " at his own expense and he states that after his death " the heirs to this land will be my sisters Ramanader Vyrathie and Narany Ilayapillai, and after their death their daughters of their womb should carry out the said 'thiruvilas' ". The only comment the learned Judge makes about this document is that Veerakutty recites here that he has derived title to the land from his ancestors and that he does not state he had the right to deal with the income of the land by virtue of his election as leader. The learned Judge appears to have overlooked the significance of the statement in P3 by Veerakutty as to the identity of the persons who will perform the " thiruvilas " out of the income derived from the land C. There is, in my opinion, implicit in P3 an admission by Veerakutty that he himself regarded that the ownership of the land was in his sisters, the predecessors in title of the plaintiffs in this case and that he was merely possessing on their behalf.

The 1st plaintiff stated that on the death of the leader of a " kuddy " another male of that " kuddy " is appointed leader in the place of the dead man. Accordingly it is claimed that when Veerakutty died in November 1951, the 1st to the 3rd plaintiffs along with certain males of their " kuddy " in January 1952, by Document P5 appointed Murugappen, the brother of the plaintiffs, to be the leader with the right to lease out the lands and to expend the income or part of the income from the lands on the performance of temple ceremonies.

The 2nd to the 13th defendants claim title to these lands relying on (1) a lease by Veerakutty by deed 1 D1 of 1947 to the 1st defendant by which these lands were leased for the four years 1947 to 1950, (2) a second lease by Veerakutty by deed 1 D2 of 1950 by which the lands were leased again to the 1st defendant for the years 1951 to 1957, and (3) a usufructuary mortgage bond 1 D3 of 15th November 1951, by which Veerakutty mortgaged this land to the 1st defendant. In all three documents referred to above Veerakutty has recited that the lands were given to his ancestors by Government as caste land and that they belong to him by right of undisturbed and uninterrupted possession for over thirty-five years. It may be mentioned that Veerakutty died within a few days of the execution of the usufructuary mortgage bond 1 D3. As Veerakutty had admitted in P2 that he was only " leader and manager of the kuddy " and in P3 that the heirs to the land C would be his sisters, no value attaches to the recitals 1 D1 to 1 D3 referred to above or to a similar recital in lease 2 D1 granted by Veerakutty in respect of the lands A and B.

Veerakutty having been given the power to execute deeds by virtue of his appointment as leader and manager of the " kuddy " any knowledge imputed to the plaintiff or their predecessors in title of the fact of leasing and mortgaging cannot be considered as knowledge that Veerakutty was attempting to set up a title adverse to them. On the other hand, Veerakutty's possession of these lands must be considered as possession on behalf of the " kuddy " and as enuring to the benefit of the plaintiffs in this case. Moreover, the earliest of the deeds after the admission made in P3 of 1937 is 1 D1 executed so recently as 1947, and cannot be relied on as the commencement of a period of possession of these lands adverse to the title of the plaintiffs. The knowledge that deeds had been executed by Veerakutty in respect of the lands in question would by itself not be sufficient to impute to the plaintiffs a knowledge that a title adverse to them was being set up as Veerakutty admittedly had power to execute deeds by virtue of his appointment as manager.

For the reasons indicated above, although Veerakutty may have been entitled to possess these lands on the basis that he was a co-owner with his sisters I am of opinion that these lands were not possessed by him at any time on such a basis. On the other hand, as his own written declarations referred to above show, he has admitted that he possessed only on behalf of his sisters, an admission indicative of the fact that in spite of the non-enforceability of the customary law lands continue to be possessed among some of the Mukkuwas according to the old custom. It is true that in the year 1947 Veerakutty appears to have commenced an attempt at setting up a title adverse to his sisters, but apart from the question that such an attempt would not have been known to his sisters the period of possession after the commencement of such attempt is insufficient to establish a title by prescription. Issue 10 should have been answer-

ed in favour of the plaintiffs who, in my opinion, have succeeded in establishing their title to the three lands described as A, B and C in the schedule to the plaint and are entitled as against the 2nd to the 13th defendants to a declaration of the title so established. The 2nd to the 13th defendants are not in possession of the lands and no decree for their ejectment is therefore necessary. I would allow the appeal of the plaintiffs to the extent indicated above and order that their costs in this Court and in the District Court be paid by the 2nd to the 13th defendants-respondents.

As the 1st defendant-respondent holds a lease 1 D2 and a usufructuary mortgage bond 1 D3 binding on the plaintiffs-appellants, I do not grant the prayer of the appellants in regard to damages or in regard to the ejectment of the 1st defendant-respondent.

H. N. G. FERNANDO, J.

I agree.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : BASNAYAKE, C.J. (PRESIDENT), PULLE, J. AND FERNANDO, J.

REGINA vs. DHARMASENA *and Another*

Appeals Nos. 115 *and* 116 *of* 1955, *with Applications* 176 *and* 177 *of* 1955
S. C. 28/*M. C. Matara C.* 1810

Argued on : 9th, 10th, 11th and 12th January, 1956
Decided on : 2nd April, 1956

Court of Criminal Appeal—Charge of rape—Is corroboration of evidence of the prosecutrix necessary ?

Where an accused was charged with the offence of rape and the prosecution was not corroborated by independent evidence,

Held : That our Penal Code does not require that the evidence of the prosecutrix in a charge of rape should be corroborated. Except where corroboration is expressly required by statute our rule of evidence is that no particular number of witnesses shall in any case be required for the proof of any fact.

Per BASNAYAKE, C.J.—" For the guidance of counsel we should like to add that where in a summing up the Judge makes an erroneous statement as to the evidence he should be invited to correct it immediately."

Cases referred to : Evidence Ordinance, section 134.
William Crocker, 17 Cr. App. R. 45.
Thomas James Jones, 19 Cr. App. R. 40.
The King vs. Atukorale (1948) 50 N. L. R. 256.
The King vs. Radich (1952) N. Z. L. R. 193.
R. vs. Neal (1949) 2 All. E. R. 438.

G. E. Chitty, with *A. B. Perera*, *M. S. M. Nazeem* and *Daya Perera*, for 1st accused-appellant.
Dr. Colvin R. de Silva, with *M. L. de Silva*, for 2nd accused-appellant.
A. C. Alles, *Senior Crown Counsel*, for the Attorney-General.

BASNAYAKE, C.J.

The first appellant was convicted of the offence of rape and the second appellant of abetment of that offence. The first appellant was the Superintendent of his father's estate in Deniyaya and the second appellant was an English Schoolmaster and a friend of the first. The prosecutrix is the mistress of one Felix Fernando.

The story for the prosecution is that the witness Felix Fernando along with some others was arrested and remanded to the custody of the Fiscal in connexion with a charge of rape. In order to enlist his support for the defence of Felix Fernando, the prosecutrix went to the house of the first appellant accompanied by her younger brother Reuben about 11 a.m. on 3rd September, 1954. Apparently moved by her appeal he undertook to spend even a lakh of rupees in the defence of Fernando and said that he would go to Galle where Fernando was on remand to see him, and asked her to come the following day at about 3-30 p.m.

When she went the next day again accompanied by Reuben the second appellant was also there. The appellants were seated on two chairs and were engaged in conversation. The first appellant asked her to sit down. She sat on the step while her brother sat under a tree in the compound. Thereupon the first appellant moved his chair close to her and after telling her not to worry about the case and assuring her that somehow or other he would get Fernando released, he held her hand. The prosecutrix showed her resentment at his action by brushing aside his hand and escaping from his grasp. But he followed her and held her by her jacket which got torn when she struggled to free herself. Failing in her attempt to escape she raised cries but they were of no avail for he lifted her bodily and took her inside the house, placed her on a bed, threatened to kill her if she raised cries, gagged her and tied her chin. He then summoned the second appellant who tied her ankles together. Thereafter the first appellant tied her hands together and placed them against her chest. The second appellant then uttered these words of warning: "Kalu Nona, this Pangiriwatte Mahatmaya can spend even a lakh if he wants. He is the only ganankaraya in Deniyaya".

Then the first appellant having attempted to have intercourse with her got off her body and went out and fetched a gun which he showed her and said: "If you struggle I will shoot you with this and kill you". Thereafter he placed the gun against the bed, untied the hands and feet of the prosecutrix and had intercourse with her.

According to Reuben he was on the compound when he saw the first appellant hold his sister's hand. She pushed his hand and jumped out, but he held her by her jacket, which got torn, and she then fell down and raised cries. At this stage Reuben ran away.

The medical evidence of the injuries found on the prosecutrix three days afterwards strongly supported her story that she had been forced to submit to an act of sexual intercourse.

There was sufficient evidence for the jury, upon a proper direction, to hold that the first appellant committed rape. Hence the submission on his behalf that the verdict is unreasonable cannot be sustained.

The principal submission made on behalf of the first appellant was that the learned trial Judge failed to direct the jury that as against him there was in law no corroboration of the evidence of the prosecutrix. We are unable to uphold this submission as in our view the story of the prosecutrix was corroborated in several respects. Our Penal Code does not require that the evidence of the prosecutrix in a charge of rape should be corroborated although it does provide that in the case of charges of procuration under section 360A no person shall be convicted upon the evidence of one witness, unless such evidence be corroborated in some material particular by evidence implicating the accused. Another such provision is to be found in the Maintenance Ordinance. There is no presumption, as in the case of an accomplice, that a prosecutrix in a case of rape is unworthy of credit unless she is corroborated in material particulars. Except where corroboration is expressly required by statute, our rule of evidence, Evidence Ordinance, section 134 is that no particular number of witnesses shall in any case be required for the proof of any fact.

Counsel also complained that the evidence given by Reuben in the Magistrate's Court, which was elicited for the purpose of discrediting that witness, was put to the jury as corroboration of the prosecutrix.

The learned trial Judge rightly directed the jury that corroboration of the story of the prosecutrix was not in law necessary but that it was not safe to convict upon the uncorroborated testimony of the prosecutrix, and that nevertheless they were free to return a verdict against the prisoner if they were convinced of the truth of the story of the prosecutrix even though she was uncorroborated. Under the English common law too the testimony of a prosecutrix was alone sufficient evidence to support a conviction; neither a second witness nor corroborating circumstances were necessary. William Crocker, 17 Cr. App. R. 45. Thomas James Jones, 19 Cr. App. R. 40.

The law is thus stated in Hale's Pleas of the Crown, Volume I, page 633:—

> "Touching the evidence is an indictment of rape given to the grand jury or petit jury.
>
> "The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact, that concur in that testimony.
>
> "For instance, if the witness be of good fame, if she presently discovered the offence and made pursuit after the offender, showed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it, these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself".

Hale's statement of the law is reflected in the pronouncements of the Courts of England and of those American States whose statute law does not require that the evidence of the prosecutrix

in a charge of rape should be corroborated. The view of the Courts of England is quoted in our reports and need not be repeated here. The American view can be gathered from the following extracts from the judgments of Parker, J. and Brickell, C.J. :—

PARKER, J.—in *Ellison vs. State*, 19 N. M. 428, 144 Pac. 10.

" But in the absence of a statute a man may be convicted of rape on the uncorroborated testimony of a strumpet, or he may be convicted on the uncorroborated testimony of a girl below 10 years of age.....

" It is of course true that in a sense the testimony of a prosecutrix must be corroborated. That is, it must bring together a number of surrounding facts and circumstances which coincide with and tend to establish the truth of her testimony. Without such surrounding facts and circumstances, the bald statement and charge of a woman against a man would be so devoid of testimonial value as to render it unworthy of belief, and to cause it to fail to meet the requirements of the law, namely, evidence of a substantial character. In this sense there must, of course, be corroboration ".

BRICKELL, C.J.—in *Boddie vs. State*, 52 Ala. 395, 398.

" No principle of law forbids a conviction on her uncorroborated testimony, though she is wanting in chastity, if the jury are satisfied of its truth. Her testimony should be cautiously scrutinised, and Court and jury should diligently guard themselves from the undue influence of the sympathy in her behalf which the accusation is apt to excite. If she did not conceal but immediately discovered the offence, and the offender is known to her ; if the place of its commission was such that if she made outcry it would not probably be heard and bring her assistance and defence,—these and other circumstances should be considered by the jury. The manner in which she testifies, the consistency of her testimony, should also be carefully considered. If, viewed fairly and carefully, the jury are satisfied of the truth of her evidence, it needs no corroboration from other witnesses to support a conviction ".

Objection was also taken to the following passage in the learned trial Judge's summing up. But we are unable to hold that the direction is wrong in law or prejudicial to the prisoners.

" Gentlemen, in charges of sexual offences it is always the duty of the Judge to warn the jury that it is unsafe to act upon the uncorroborated testimony of the woman who makes the accusation. It is not a rule of law, but it is a rule of prudence and it is a rule of common sense to take up the view that is so often expressed and to which I have referred to on earlier occasions that these charges are very easy to make and very difficult to disprove. So that you must warn yourselves that it is generally and nearly always quite unsafe to act on the woman's uncorroborated evidence even if you think she is speaking the truth unless there is some independent evidence, that is evidence coming from an independent source which confirms in material detail not only there was intercourse between the parties but also that it took place without her free will and consent.

" Obviously you cannot expect this rule to mean that everything that the woman has said in regard to the crucial matters must be corroborated by independent evidence because then you see it really amounts to this. You may well keep the woman out of the witness-box and you get independent evidence to prove the essential elements of the crime. I can hardly imagine that there would ever be such a situation that there would be independent evidence to prove what happened within a secluded spot.

" The rule of common sense does not go to that extent. You must ask yourselves whether there is some independent evidence which you believe to be true, which tends to connect the accused with the crime, which tends to make her allegation which is more probable than not on a material important detail ".

Learned Counsel also criticised the following directions of the learned trial Judge in regard to the evidence of the boy Reuben :

" Now gentlemen, what is the corroborative evidence in the strict sense, namely, independent evidence on material points which tend to implicate the accused and convict him with the crime ? There is the evidence of the boy Reuben. Are you quite satisfied at least when he says that on the 4th September in the afternoon when he went there with Premawathie he saw the 1st accused carrying Premawathie into the house ? If you are convinced that is true that is corroborative evidence to the extent that it shows that the 1st accused was acting in a most suspicious manner in regard to a woman whose husband was away from the village at the time and if you are quite satisfied that Reuben is speaking the truth, there was certainly an opportunity afforded to the 1st accused to commit the crime. If you believe the evidence of Reuben, it is certainly a very suspicious piece of evidence against the 1st accused.

" Well, I shall refer to criticism of the evidence of Reuben as a witness in a few minutes ".

Later on in the charge he said :—

" Reuben's evidence has been criticised. You saw the boy himself. There was the controversy about the age. He was not quite 15 at the time of the alleged incident. You saw him as he appears 15 months later. He seems to be an extremely unintelligent young man, which I imagine if his intelligence quotient, if tested, would be extremely low which the experts call it. He cannot even sign his name, cannot read a clock, and he apparently had left school 6 or 7 years ago, a strange time to leave school. He is obviously an unsatisfactory witness where matters of recollection are concerned. He first said that he saw the 2nd accused there on both visits and then in answers to questions he was unable to reply at all. One knows these young children are easily tutored, but this was an unsuitable boy for tutoring at all. He could not remember the piece of recitation which apparently he was taught to recite before a jury, but it is for you, realising his lack of intelligence and his youth, to say whether you believe him when he says that he went with his elder sister on the 4th in the afternoon and that he saw her being carried away by the 1st accused. If you are convinced that is true, that is an item of evidence which you will consider as corroboration, for what it is worth, not obviously of the fact of intercourse, but corroboration that there was an opportunity for the commission of the crime, and that is evidence of a piece of conduct which was suspicious in nature because the superintendents and members of estates do not carry women forcibly into their houses on occasions particularly when the gentleman's wife and children were not there at all ".

Learned Counsel urged that the above direction contained a misdirection of fact on a very vital point. The defence proved through the Clerk of Assize the following passage from Reuben's deposition in the Magistrate's Court :—

" When she fell down the 1st accused lifted her bodily and took her to the room ".

But at the trial Reuben did not say that the first appellant lifted the prosecutrix and carried her away. His evidence was as follows :

" The 1st accused had a little chat with my sister and he held my sister's hand and my sister pushed aside his hand and jumped out. Then the 1st accused held her by the jacket. Then my sister raised the cry ' Budu Amme '. ..... When he held her by the jacket the jacket got torn and she fell down. At that moment she raised the cry ' Budu Amme ' and I ran away.

To Court :

1138. Q. At the time you ran away your sister was on the ground ? I did not see him move away from the compound.

Examination continued :

1139. Q. Where did you run ? I ran along the road in the direction of our house.

1140. Q. Did you get to your house ? No.

1141. Q. Why what stopped you ? I waited on the road to see whether my sister would return and after waiting there for some time I went again to see my sister and then I met her near the river.

1142. Q. At that time what was her condition ? Her jacket was torn and there was an injury on her lip and she was crying ".

It would appear from the evidence of Reuben quoted above that Reuben corroborated the prosecutrix in the main and that the obvious slip of the trial Judge in stating that she was corroborated in respect of her evidence that she was bodily lifted and taken inside the house, though it be incorrect, is not in view of the other evidence of Reuben such a mistake as would call for interference with the verdict.

But there is, however, the criticism that he failed to direct the jury in regard to the statement of Reuben before the Magistrate which was inconsistent with his evidence in the trial Court.

In the light of the other evidence of Reuben the inconsistency cannot be regarded as one which is so important as to call for specific mention as a statement which seriously affects the value of the boy's evidence, as the learned Judge had in his introductory remarks, sufficiently cautioned the jury as to the way in which his evidence should be approached.

Strong reliance was placed on the judgment of the Court of Criminal Appeal in *The King vs. Atukorale* (1948) 50 N. L. R. 256 in which a verdict of rape was set aside on the ground that complaints made by the prosecutrix shortly after the alleged offence were strongly presented to the jury as being corroboration of her evidence, but in the present case the charge except for the unfortunate slip in dealing with the boy's evidence is not open to objection.

As we have already held, the first appellant was rightly convicted by the jury. His conviction necessarily involved the complete acceptance of the evidence of the prosecutrix as to the circumstances in which she was raped by the first appellant. That evidence clearly implicated the second appellant as well, and having regard to the warning duly administered by the Judge that there was no corroborative evidence as against the second appellant, we are unable to hold that the verdict against him was in any way unreasonable.

As the question has arisen in this case we should like to add that it is important that both Counsel should follow the Judge's summing up and bring to his notice any erroneous statement as to the evidence. In the instant case the record shows that the learned trial Judge inquired from both the Counsel for the prosecution and the counsel for the defence whether there was anything more that he should tell the jury and both answered in the negative. The slip in question appears to have passed unnoticed by both counsel.

For the guidance of counsel we should like to add that where in a summing up the Judge makes an erroneous statement as to the evidence, he should be invited to correct it immediately. An appeal based on such error will not be encouraged where correction would obviously have been made if the Judge's attention had been drawn to the matter. *The King vs. Radich* (1952) N. Z. L. R. 193.

It has been held both in England and elsewhere that if some irregularity comes to the knowledge of counsel before the verdict is returned he should bring it to the attention of the Court at the earliest possible moment and that it ought not to be held in reserve with a view to taking it before the Court of Criminal Appeal.

Where counsel has failed to bring timeously to the attention of the Court of trial any such irregularity which would undoubtedly be corrected by the trial Judge if his attention were drawn to it, the Court of Criminal Appeal will not allow advantage to be taken of it when it is too late to remedy it except by quashing the conviction. *R. vs. Neal* (1949) 2 All. E. R. 438.

For the reasons given above the appeals are dismissed. The period between the final date of hearing of this appeal, 12th January, 1956, and the date of this judgment, should be deducted from the sentence which the prisoners have yet to undergo.

Appeal dismissed.

Present : De Silva, J. and Fernando, J.

EMIS ALWIS vs. PIERIS APPUHAMY

S. C. 341 *L*/1954 (*F*)—*D. C. Colombo* 6647

Argued on : 16th and 17th January, 1956
Decided on : 29th February, 1956

Co-owners—Possessory action by one co-owner against another co-owner—Is it necessary to join all co-owners—Evidence necessary to prove possession.

Where a possessory decree was granted to a co-owner who was stated to have been in possession some time earlier of a defined portion of the common land, without evidence of physical possession by the plaintiff during recent years against a co-owner who interfered with his possession and without joining the other co-owners.

Held : (1) That the plaintiff is entitled to the decree in his favour.

(2) That the general rule that disputes between co-owners should be settled in actions to which all the co-owners are parties is subject to the following exceptions :—

(*a*) Where a person in good faith possesses the whole land under the impression that it is not subject to co-ownership.

(*b*) Where one co-owner has grown and possessed a plantation whether on the whole or part of a common land in the exercise of his due right as a co-owner and then seeks recognition of his *jus retentionis* of the plantation until such time as co-ownership is terminated by partition.

(*c*) Where a co-owner erects a house on the common land and seeks to be protected in his possession of it.

(*d*) Where a co-owner whose crops are improperly taken by another co-owner asks for a declaration of title to a share of the land as incidental to his claim for damages for the unlawful removal of his crops.

Cases referred to: *Abeyratne vs. Seneviratne* 3 Bal. 22.
Cooray vs. Samaranayake 47 N. L. R. 322.
Sadirisa vs. Attadasi Thero 38 N. L. R. 308.
Heenhamy vs. Mohottihamy 19 N. L. R. 235.
Pieris vs. Appuhamy 48 N. L. R. 344.
Kathonis vs. Silva 21 N. L. R. 452.

H. W. Jayewardene, Q.C., with *D. R. P. Goonatilleke*, for the appellant.

S. B. Lekamge, with *W. P. N. de Silva*, for the respondent.

Fernando, J.

The plaintiff in this case has been granted a decree placing him in possession of Lot 1 of a land called Delgahawatte depicted in the plan filed of record. He had asked as an alternative for a declaration of title to the Lot in question, but that was refused by the learned Judge on the ground that the plaintiff and the defendant are co-owners of the land in question.

It has been argued in appeal that the plaintiff did not have possession sufficient to entitle him to a possessory decree, and that even if he did, the decree should not have been granted unless the other co-owners were joined as parties. The question for our decision is whether, in the circumstances of the case, the plaintiff has a right to a possessory decree against one set only of his co-owners.

The learned District Judge has relied on the case of *Abeyratne vs. Seneviratne* 3 Bal. 22 and that of *Cooray vs. Samaranayake* 47 N. L. R. 322. The first of those cases was considered subsequently in *Sadirisa vs. Attadasi Thero* 38 N. L. R. 308 where the effect of the case was summarised in the following terms :—

> "From the short judgment of Lascelles, C.J. it appears that the plaintiffs had a lease from Alexander for the entire land and that they had been in possession of the entire land ; when a lessee takes a lease for the whole land without being aware of the fact that his lessor was really entitled only to an undivided share and when he gets into possession of the whole land and holds it for a number of years, these facts are entirely corroborative of the fact that possession by the plaintiff was *ut dominus*, in other words, that he possessed it fully believing that the lessor was the owner of the whole land and that he was entitled to keep the possession of the whole land against anybody but his lessor".

That case then is only authority for the proposition that where a stranger occupies the whole of the land fully believing that his transferor was the owner of the whole, he has the *possessio civilis* necessary to enable him to maintain a possessory action even against a co-owner.

In *Cooray vs. Samaranayake* 47 N. L. R. 322 the plaintiff asked to be restored to the possession of a whole plantation from which he had been dispossessed by the defendants after a considerable period of possession. It was held that she was entitled to be restored to possession notwithstanding the fact that the defendants were co-owners and that all the co-owners had not been joined. The judgment chiefly relied on was that of *Heenhamy vs. Mohotihamy* 19 N. L. R. 235 which was the judgment of a Full Bench.

In the latter case the plaintiff claimed declaration of title to certain shares of land against the defendant, another co-owner, who contested his title. It was contended in appeal on the authority of certain earlier cases that such an action could not be maintained without joining all the other co-owners. The Full Bench held that having regard to sections 17, 18 and 22 of the Civil Procedure Code, the rule that all the co-owners must be joined cannot be regarded as absolute and invariable, and accordingly, on the footing that the other co-owners were not necessary parties and that the cause of action was that the defendant took the plaintiff's share of the crop presumably planted by the plaintiff, granted the declaration sought by him. It has to be noted however that in that case the declaration sought was a declaration of title to *certain shares of land* and not to the whole land, *and was only incidental to the claim for damages*. (19 N. L. R. p. 237).

It does not appear from the judgment in *Cooray vs. Samaranayake* 47 N. L. R. 322 that there was a full realisation of the point that the Full Bench in *Heenhamy vs. Mohotihamy* 19 N. L. R. 235 only decided that the plaintiff in that case was entitled to a declaration of title to certain shares, whereas in *Cooray vs. Samaranayake* 47 N. L. R. 322 the plaintiff asked for restoration of possession to the entire common property. But on the facts of the latter case it would appear that the rubber plantation had belonged to the plaintiff's husband and had been exclusively possessed by the husband and thereafter by herself and her children. That being so, the restoration of the plaintiff to possession of the plantation and the grant to her of damages for ouster was, if I may say so with respect, justified not so much on the earlier Full Bench decision, but on the principle recognised in a later case to which I shall immediately refer.

In *Pieris vs. Appuhamy* 48 N. L. R. 344 the plaintiff brought an action to be declared entitled to possess the rubber plantation on the land in question, which he held under a lease from one Bastian Pieris. The defendant who claimed title to a $\frac{1}{4}$th share of land, forcibly took possession of 30 rubber trees out of the plantation of 130 rubber trees. It was proved that Bastian Pieris had made the plantation in question with the acquiescence of the other co-owners. The principle stated by Lascelles, C. J. that "it is difficult to see on what principle an improving co-owner, who is entitled to compensation, can be excluded from the benefit of the *ius retentionis*" was cited with approval by Keuneman J., who observed that it must follow that, until common ownership is terminated by partition, the improving co-owner is entitled to retain possession of the improvement. On this footing Bastian Pieris and his lessee the plaintiff were entitled to possess the plantation as against the other co-owner defendant, and accordingly the lessee was granted his declaration.

In yet another case, *Kathonis vs. Silva* 21 N. L. R. 452 a co-owner who had erected a house on the common land asked for a declaration of title to the house, and for ejectment. It was held that the erection of a house was in exercise of the rights of a co-owner and that the right to build a house on the common land and to live in it must carry with it a right to keep the house private and to that extent to an order for ejectment. In the circumstances of that case this Court held that the plaintiffs were entitled to a declaration of their right to the improver's interest and to an order ejecting the defendant from the house.

In *Sadirisa vs. Attadasi Thero* 38 N. L. R. 308 Akbar, J. pointed out that the plaintiff was asking for a possessory decree not with regard to an undivided share, but with respect to the whole land, and that he was asking for a decree against two co-owners without making the other co-owners parties to the action. He therefore said that it was "very material to find out whether the possession alleged by the plaintiff was *possessio ut dominus* or whether it was possession by him with the full knowledge that he was a co-owner, and with the knowledge that the law presumes in such circumstances, namely, that his possession must enure to the benefit of his other co-owners also". On the facts, which were that the original owner, a priest Gunatissa,

dies in 1917, and that after his death all his pupils (*i.e.* the co-owners under deeds of donation) came to the understanding that the plaintiff should possess the field in question, Akbar, J. held that it was unreasonable to conclude that the possession was *ut dominus* or *animo domini* and he thought that the period from 1918 to the year 1934 was too short a period for prescription against the other co-owners. On these grounds he dismissed the plaintiff's action.

These authorities no doubt establish the proposition that all the co-owners of a common property need not necessarily be made parties to every action in which one of them (or a person claiming under him) seeks recognition of his title to, or possession of, the property as against another co-owner. The general rule as to joinder is subject to exceptions which are made in certain clear circumstances.

(*a*) Where, as in *Abeyratne vs. Seneviratne* 3 Bal. 22 a person in good faith possesses the whole land under the impression that it is not subject to co-ownership ;

(*b*) where, as in *Cooray vs. Samaranayake* 47 N. L. R. 322 and *Pieris vs. Appuhamy* 48 N. L. R. 344 one co-owner has grown and possessed a plantation whether on the whole or part of a common land in the exercise of his due right as a co-owner, and then seeks recognition of his *ius retentionis* of the plantation until such time as co-ownership is terminated by partition ;

(*c*) where, as in *Kathonis vs. Silva* 21 N. L. R. 452 a co-owner erects a house on the common land and seeks to be protected in his possession of it ; and

(*d*) where, as in *Heenhamy vs. Mohotihamy* 19 N. L. R. 235 a co-owner whose crops are improperly taken by another co-owner asks for a declaration of title to a share of the land as incidental to his claim for damages for the unlawful removal of his crops.

This last case is in reality not substantially different from the one secondly mentioned, in that the declaration is sought by way of protection for a right to retain a plantation and take the crops thereof. The above classification may not be exhaustive and there may be other instances which fall substantially within the principles recognised in the cases to which I have referred. But in cases which do not fall within these principles, disputes between co-owners should be settled either by partition or at least by an action to which all the co-owners are parties.

In the present case the learned Judge has held that the plaintiff and defendant are co-owners of the disputed Lot, and having regard to the evidence on which that finding was reached, it follows that there are other co-owners who are not parties. Hence, as in the case of *Sadirisa vs. Attadasi Thero* 38 N. L. R. 308 the question of importance is whether the plaintiff had possession *ut dominus*, or in the alternative whether he had made plantations or erected buildings in respect of which he is entitled to a possessory decree against an interfering co-owner. The evidence establishes nothing more than that the plaintiff had planted cinnamon and manoic on the land 20 years before the action and had at that stage built a small hut on the land. But it is admitted that all the cinnamon plants have since been destroyed and that there is now no cinnamon there. In addition it was alleged that the plaintiff had started cutting cabook on the land about 12 years before the action, but it would appear from the evidence of the Headman that this activity was not carried on during the 8 or 10 years preceding the action. Apart from the bare statement of the plaintiff that he possessed the land prior to the alleged ouster (which consisted merely of the erection of a hut on the land by the defendants) there is no evidence of physical possession by the plaintiff during recent years, and indeed on his own evidence that there is now no plantation nor erection on the land one cannot imagine that there was any possibility of acts of physical possession.

In these circumstances it is difficult to see how the plaintiff can be said to have had possession *ut dominus* or *animo domini*. Nor also would there be any question of a *ius retentionis* in the absence of plantations or erections made by the plaintiff in his capacity as a co-owner. He does not come within the *ratio decidendi* of *Heenhamy vs. Mohotihamy* 19 N. L. R. 235 because he never claimed a declaration to shares in the land, but a declaration to the whole land or in the alternative, a possessory decree in respect of the whole land. He made no attempt to establish the specific share to which he is entitled. Ultimately therefore, his cause of action is based on the fact merely that the defendants erected a hut on the land. This was a proper exercise by the defendants of his rights as a co-owner, and, in the absence of erections or plantations made by the plaintiff, cannot be construed to have been derogatory of any right which the plaintiff might properly claim as a co-owner. If, as it is alleged, the defendant is in possession of the Lot, and the plaintiff now seeks entry in his right as a co-owner and is resisted, he might be entitled to the assistance of the Court if the

circumstances bring him within the principle set out in *Heenhamy vs. Mohotihamy* 19 N. L. R. 235 or else, whether with or without an attempt to enter, it would be open to him to maintain a partition action. But there is for the present no circumstance which entitled him to either of the reliefs which he has claimed.

For these reasons I would allow the appeal and dismiss the plaintiff's action with costs in both Courts.

De Silva, J.

I agree.

Appeal allowed.

Present : Gratiaen, J.

MARTIN FERNANDO vs. ELIZABETH FERNANDO

S. C. 708/1955—*Workmen's Comp. Appn. C* 3/191/51

Argued on : 12th and 14th September, 1955
Decided on : 20th September, 1955

Workmen's Compensation Ordinance 19 *of* 1934 (*Cap.* 117)—*Section* 16 (1) *and* 16 (2)—*Time within which claim for compensation may be made*—" *Sufficient cause* " *for failure to institute claim within statutory period.*

The applicant-respondent, the widow of a deceased workman, instituted a claim for compensation in respect of the death of her husband in an accident, nearly three years after the date of the death. *Prima facie*, therefore, the widow's failure to make the claim within the period of six months fixed by section 16 (1)of the Ordinance would operate as a bar to the maintenance of the proceedings. The Commissioner, however, was satisfied that the delay of six months was due to ' sufficient cause ' within the meaning of section 16 (2), and that the proceedings were maintainable. But in appeal it was argued that the further delay of two years was unreasonable and barred the proceedings, even though the delay of six months was sufficiently excused.

Held : If the delay of six months was excused for ' sufficient cause ' under section 16 (2), no subsequent lapse of time without reasonable cause could operate as a bar to proceedings.

Held further : That the word ' may ' in section 16 (2) gave the Commissioner a discretion whether or not to admit a claim even where sufficient cause had been shown for the delay of six months in instituting the claim. However, even then, further delay in instituting a claim after expiry of the six months would not automatically bar the proceedings ; but the reasons for the further delay would be relevant to the Commissioner's decision whether or not he ought to exercise in favour of the claimant his discretion to admit the claim.

Per Gratiaen, J.—" I respectfully take the view that in Ceylon the Commissioner's jurisdiction under section 16 (2) of the Ordinance to admit and decide a claim for compensation after the expiry of the six month period is regulated by the question whether the failure to institute the claim *within that period* has been sufficiently excused; the section nowhere states that any subsequent delay ousts the Commissioner's jurisdiction under the Ordinance ".

Cases referred to : *Prophet vs. Roberts* (1919) 88, L. J. (K. B.) 975; 120 L. T. 239; 11 B. W. C. C. 301 ; (1919) W. C. & Ins. Rep. 5.
Hillman vs. London, Brighton and South Coast Rail Co. (1920) 1 K. B. 284; 122 L. T. 214 ; 64 S. J. 82 ; 12 B. W. C. C. 323 ; 89 L. J. (K.B.) 334 ; (1920) W. C. & Ins. Rep. 38.
Lingley vs. Thomas Firth & Sons Ltd. (1921) 1 K. B. 655 ; 37 T. L. R. 149; 13 B. W. C. C. 367.

L. G. Weeramantry, for the respondent-appellant.

C. V. Munasinghe, for the applicant-respondent.

Gratiaen, J.

This is an appeal against a decision under the Workmen's Compensation Ordinance ordering the appellant to pay to the widow or P. John Fernando (the deceased) a sum of Rs. 2,400/- as compensation ; the deceased had died in consequence of an accident arising out of, and in the course of his employment under the appellant. The appellant disputed liability on the ground, *inter alia*, that the claim for compensation was not preferred until the 13th September, 1954—that is to say, until very nearly three years after the date of death. *Prima facie*, therefore, the widow's failure to make her claim within the period of six months fixed by section 16 (1) would

operate as a bar to the maintenance of the proceedings. The Commissioner was satisfied however that she was protected by section 16 (2) the relevant provisions of which are as follows :—

> " The Commissioner may admit and decide any claim to compensation in any case notwithstanding that..... the claim has not been instituted in due time as required by sub-section (1) if he is satisfied that the failure so to institute the claim was.....due to *sufficient cause*."

The Commissioner accepted the widow's evidence to the effect that shortly after the death of the deceased, the appellant promised to convey to her a land by way of compensation, and that it was only after this promise, the implementation of which was postponed on various pretexts, proved to be completely lacking in sincerity, that she sought relief under the Ordinance. In these circumstances there is clearly " sufficient cause " for the delay in instituting her claim within the statutory period of six months specified by section 16 (1).

Learned counsel for the appellant conceded that, on the proved facts, the delay in instituting the claim in six months was sufficiently excused. He argued however, that the further delay of over two years was quite unreasonable and therefore operated as a statutory bar to the proceedings. In support of this argument he relied on certain *obiter dicta* of Duke, L. J. in *Prophet vs. Roberts* (1919) 88 L. J., K. B. 957 and of Eve, J. in *Hillman vs. London, Brighton and South Eastern Railway* (1920) 1 K. B. 284.

It is certainly correct to say that Duke, L. J. and Eve, J. suggested (although the particular cases referred to were decided on other grounds) that the length of time which has elapsed since the expiry of the six months period provided by the English Act was equally relevant to the issue whether there was reasonable cause for failure to make a claim within time. This suggested interpretation was, however, unanimously rejected by the Court of Appeal in *Lingley vs. Firth* (1921) 1 K. B. 655, where the meaning of the following words of proviso (*b*) to section 2 (1) of the English Act, which are analogous to section 16 (2) of our Ordinance, directly arose for consideration :—

> " Provided always that.....the failure to make a claim within the period above *specified shall not be a bar* to the maintenance of such proceedings if it is found that the failure was excused by mistake, absence from the United Kingdom, or other reasonable cause."

The Court decided that, if there was reasonable cause for not making a claim within six months, no subsequent lapse of time without reasonable cause could operate as a bar to proceedings for compensation unless the claim had become prescribed under some other provision of the law. Similarly, I respectfully take the view that in Ceylon the Commissioner's jurisdiction under section 16 (2) of the Ordinance to admit and decide a claim for compensation after the expiry of the six month period is regulated by the question whether the failure to institute the claim *within that period* has been sufficiently excused ; the section nowhere states that any subsequent delay ousts the Commissioner's jurisdiction under the Ordinance.

Learned counsel pointed out, alternatively, that under section 16 (2) the Commissioner " *may* admit and decide a claim " whereas the English Act unequivocally declares that the delay in making a claim within six months, if reasonably explained, " *shall not be a bar* to the maintenance of such proceedings ". I agree that the difference of language ought to be regarded as significant having regard to the circumstances that the English Act manifestly served as a model for the draftsman of our Ordinance. Accordingly I am prepared to assume that the word " may " is used in section 16 (2) in a discretionary rather than a compulsory sense. Even in that view, the delay in instituting a claim for compensation after expiry of the statutory period does not operate automatically as a bar to the claim ; but the reasons for the further delay would be relevant to the Commissioner's decision whether or not he ought to exercise in favour of the claimant his discretion to admit the claim. In this particular case the commissioner accepted the widow's explanation that the appellant continued, even after the six month period had expired, to hold out promises from time to time that he would compensate her without the necessity for invoking the machinery of the Ordinance. In these circumstances the Commissioner was perfectly justified in exercising his discretion in favour of the widow ; the appellant was himself responsible for the delay which he now calls to his aid.

Learned counsel concedes that, even if the Prescription Ordinance applies to proceedings under the Workmen's Compensation Ordinance, the present claim is not barred by limitation. I dismiss the appeal with costs.

Appeal dismissed.

Present : SANSONI, J.

EDWIN SINGO vs. SUB-INSPECTOR OF POLICE, KADAWATTA

S. C. No. 171*P*/56—*M. C. Gampaha No.* 24378

Argued on : 27th February, 1956
Decided on : 6th March, 1956

Charge—Duplicity—Want of particulars—Motor Traffic Act No. 14 *of* 1951—*Sections* 153 (2) *and* 219 (1)—*Illegality—Criminal Procedure Code, Sections* 169 *and* 178.

Where a person is charged on two counts each containing more than one alternative charge and the charges failed to set out particulars of each offence,

Held : (1) That the charges so framed in the alternative involving many different offences were bad on account of duplicity.
(2) That a charge should furnish particulars of the offence alleged to have been committed.

Cases referred to : *Police Sergeant, Lindula, vs. Stewart* (1923) 25 N. L. R. 166.
S. I., Police, Dehiowita, vs. K. M. Perera (1926) 27 N. L. R. 511.
Pakir Saibo vs. Nayer (1940) 42 N. L. R. 151.
Abeyasuriya vs. Jayasekera (1921) 22 N. L. R. 380.
R. vs. Wilmot (1933) 24 Cr. App. R. 63.
R. vs. Surrey Justices, ex parte *Witherick* (1932) 1 K. B. 450.
Lourensz vs. Vyramuttu (1941) 42 N. L. R. 472.

F. W. Obeysekera, for the accused-appellant.
L. H. de Alwis, C. C., for the Attorney-General.

SANSONI, J.

The accused-appellant was charged on two counts :

1. That he "did on 16th April, 1955, at Kadawatta, being the driver of bus Z 6730, on a highway, to wit, the Colombo-Kandy Road drive the said motor bus recklessly or in a dangerous manner or at a dangerous speed in breach of section 153 (2) of the Motor Traffic Act No. 14 of 1951, and thereby committed an offence punishable under section 219 (1) of the said Act.

2. At the same time and place aforesaid..... drive the said bus.....negligently or without reasonable consideration for other persons using the highway in breach of section 153 (3) of the said Act, and thereby committed an offence punishable under section 219 (2) of the said Act".

After trial the learned Magistrate convicted the accused on both counts and fined him Rs. 100/- on the first count and Rs. 50/- on the second count.

The chief witness for the prosecution said that when he had halted his car near the 14th milepost on the Colombo-Kandy Road behind another car, the accused's bus came from behind him, flashed past him, overtook both cars and proceeded: at that time a lorry came from the opposite direction and the lorry driver had to swerve to his left to avoid a collision with the accused's bus. The witness further said that he followed the bus, driving at about 40 to 45 m.p.h., and was just able to get close enough to note the number of the bus.

The next incident which the same witness spoke to seems to have happened about three miles from where the first incident took place. The accused's bus overtook another vehicle while a car was coming from the opposite direction. The driver of that car had to drive on to the grass verge in order to avoid a collision. The witness complained at the Kadawatta Police Station, which is between the 9th and 10th mileposts.

Another witness called for the prosecution spoke to a third incident. He said that when he was standing outside his house, which is about ¼ mile on the Colombo side of the Kadawatta Police Station, he saw this bus being driven very fast round a bend.

The accused gave evidence on his own behalf. He said that the 14th milepost is at Imbulgoda while Kadawatta is at the 10th milepost. He also said that he had been driving buses for eighteen years and had never been convicted of any offence. He was definitely of the view that this particular bus was so old that it could not be driven at more than 20 to 25 m.p.h., and if it was driven faster it "will come out in pieces"—to use his own words.

The learned Magistrate has accepted the evidence of the chief witness called for the prosecution, in preference to that given by the accused. He rejected the evidence of the other prosecution

witness. I see no reason to interfere with his findings on the questions of fact.

Mr. Obeyesekera raised certain legal objections to the charge itself. He submitted—

1. That the charges which were framed in the alternative were bad ;

2. that no particulars were furnished ;

3. that the place of the alleged offences was wrongly set out in the charge.

With regard to the first objection, it is clear that the charges framed in the alternative are bad for duplicity. The first count is in respect of three different offences, while the second count is in respect of two different offences. It was held in *Police Sergeant, Lindula vs. Stewart* (1923) 25 N. L. R. 166 and in *S. I., Police, Dehiowita vs. K. M. Perera* (1926) 27 N. L. R. 511 by Jayewardena, A.J., that charges similar to the one in question were bad for duplicity, but he held that the irregularity may be cured under section 425 of the Criminal Procedure Code if the accused has not been prejudiced. In the later case of *Pakir Saibo vs. Nayer* (1940) 42 N. L. R. 151, Wijewardena, J. also dealt with a case of duplicity, but did not say whether such duplicity was fatal. On the other hand, Schneider, A.J., in *Abeyasuriya vs. Jayasekera* (1921) 22 N. L. R. 380 seems to have been of the opinion that a charge which included several distinct offences was illegal.

In England the Court of Criminal Appeal has consistently quashed a conviction which followed upon a charge which was bad for duplicity. In *R. vs. Wilmot* (1933) 24 Cr. App. R. 63 the accused was convicted on a count in an indictment which charged him with having driven a motor vehicle " recklessly or at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case ". In appeal, the objection was taken that the count was bad for duplicity. In upholding the objection and quashing the conviction Lord Hewart, L.C.J., followed the decision in *R. vs. Surrey Justices*, ex parte *Witherick* (1932) 1 K. B. 450 where a conviction of an accused charged with having driven a motor vehicle " without due care and attention or without reasonable consideration for other persons using the road " was quashed. The *ratio decidendi* was set out in the judgment of Avory, J., who said : " It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading *autrefois convict* ". Lord Hewart in the later case said that there is a duty cast on the Court in the interests of justice to quash the conviction in such a case even though the point was not taken at the trial.

In my view the conviction of the accused in this case should be set aside on this objection alone, I think the matter goes beyond the question of the accused being prejudiced by having to face a count which involves many different offences framed in the alternative : the more important consideration is that it is not clear upon a conviction or an acquittal, of what offence he has been found guilty or acquitted.

With regard to the second objection taken by Mr. Obeyesekera, I think this is a case where particulars setting out the details of each offence should have been mentioned in the charge. The need for this was all the greater because the prosecution led evidence of three separate incidents at three different places on this highway, and in fairness to the accused he should have been given " particulars of the manner in which the alleged offences were committed " under section 169 of the Criminal Procedure Code. The failure to do so has, in my opinion, occasioned a failure of justice. As a matter of practice such particulars are always stated in indictments and I have no doubt they are often stated in charges framed in Magistrate's Courts ; see, for instance, *Lourensz vs. Vyramuttu* (1941) 42 N. L. R. 472.

The third objection taken on behalf of the accused is in a manner connected with the second objection. In both counts the place of offence is mentioned as Kadawatta. The evidence disclosed that the prosecution was relying on acts of bad driving at three different places, only the last of which appears to have been Kadawatta itself. No indication of this was given to the accused, who may well have been misled as to the case which the prosecution intended to present against him. He was entitled to sufficient notice of that case, and such particulars as to the place of the offence as were given were inadequate if not misleading.

For these reasons I set aside the conviction of the accused and acquit him.

Set aside.

Present : SINNETAMBY, J. AND L. W. DE SILVA, A.J.

FERNANDO vs. JOSSIE AND ANOTHER

S. C. (F) 302/55—D. C. Balapitiya L. 390

Argued on : 24th, 26th and 27th September, 1956
Decided on : 4th October, 1956

Deed—Interpretation of.

The plaintiff-appellant to the 1st defendant conveyed " boutique room No. 5 with the undivided soil covered thereby out of the five boutique rooms bearing Nos. 1, 2, 3, 4 and 5 built abutting the high road ", on a land within given boundaries. There was another boutique bearing No. 6 behind boutique No. 5 which appellant claimed in this action. The defendants contended that it was a part of boutique No. 5. This contention was upheld by District Judge on the ground that the reference to all the boutique rooms with the boundaries of the whole land and the transfer of an undivided share of the soil " indicated that the bare land and buildings behind were considered as part and parcel of all the rooms ".

Held : (1) That the interpretation given by the learned District Judge was wrong, as according to the plain meaning of the words used the transfer was of the boutique room No. 5 with the soil covered thereby.
(2) That in construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words they have used.

Cases referred to : *Maharaja Manindra Chandra Nandi vs. Raja Durga Prashad Singh*, A. I. R. (1917) Privy Council 23.

Sir Lalita Rajapakse, Q.C., with *V. C. Goonetilleke*, for plaintiff-appellant.
S. W. Jayasuriya, for defendants-respondents.

L. W. DE SILVA, A.J.

The plaintiff-appellant instituted this action in 1952 for a declaration of title to a boutique marked No. 6 and the soil covered by it as depicted in the Plan No. 2620 marked X and made for the purposes of this action. The plan shows a horizontal line of 5 boutiques. The disputed boutique No. 6 adjoins boutique No. 5 on its southern side. The appellant, who became the owner in 1942, conveyed on the deed 1D A. I. R. (1917) Privy Council 23 of 1948 the boutique No. 5 with the soil covered by it to the first defendant-respondent who is the wife of the second defendant-respondent.

The deed gives the boundaries for the entire land and is in the following terms which are entirely free from ambiguity :—

> " The boutique room bearing No. 5 with the undivided soil covered thereby out of the five boutique rooms bearing Nos. 1, 2, 3, 4 and 5 built abutting the high road on the land called one-third portion of Urugasmanhandiya Manana Kebella bearing lot No. 12 ", etc.

The respondents disputed the appellant's title to the boutique No. 6 and claimed it as a part of the boutique No. 5 on the allegation that Nos. 5 and 6 were one building. They thus contended that the deed 1D A. I. R. (1917) Privy Council 23 did not exclude the sale of No.6, the existence of which as a separate entity was denied by them.

The learned District Judge found as a matter of fact that the boutique No. 6 existed immediately behind No. 5. With that finding we are in entire agreement. But he dismissed the appellant's case and declared the first respondent the owner of the boutique No. 6 and allotted compensation to the appellant. The reason for the learned trial Judge's finding is stated in his judgment as follows :—

> " The mention of all the boutique rooms with the boundaries of the whole land and the transference of an undivided soil indicate that the bare land and buildings behind were considered as part and parcel of all the rooms. With this understanding between the plaintiff and the defendants, the soil that covered room No. 5 and all that appertained to it was transferred by 1D. A. I. R. (1917) Privy Council 23".

This interpretation of the deed of transfer by the appellant in the name of the first respondent is clearly wrong. According to the plain meaning of the words used, the transfer was of the boutique room No. 5 with the soil covered thereby. Neither the use of the word " undivided " nor the recital of boundaries for the whole land could in any way enlarge the specified corpus conveyed. In *Maharaja Manindra Chandra Nandi vs. Raja Durga Prashad Singh*, A. I. R. (1917) Privy Council 23, Lord Parmoor said :—

> " In construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used".

We have had no difficulty in coming to the same conclusion. We therefore allow the appeal with costs both here and in the Court below. In setting aside the judgment and decree of the District Court, we direct a decree to be entered in favour of the plaintiff-appellant in terms of the prayer in the plaint with damages at the agreed rate of Rs. 10/- per month from 12th October, 1951.

SINNETAMBY, J.,
I agree.

Appeal allowed.

Present : SANSONI, J.

STIVEN vs. PERERA, SUB-INSPECTOR OF POLICE

S. C. No. 123 *P*/56—*M. C. Colombo South No.* 68926.

Argued on : 29th February, 1956
Decided on : 2nd March, 1956

Joinder of charges—Four charges—Same offence against several persons—Two transactions—Criminal Procedure Code, Sections 178, 179 *and* 180.

Where an accused was charged on four counts of causing hurt to three persons on one day and one person on another day,

Held : That section 178 of the Criminal Procedure Code enables sections 179 and 180 to be applied in combination and therefore two transactions involving several offences of the same kind can be tried together.

Cases referred to : *The King vs. Iyer* (1936) 38 N. L. R. 169.

W. P. N. de Silva, for accused-appellant.
Ananda G. de Silva, for the Attorney-General.

SANSONI, J.

The accused-appellant was charged on four counts with having voluntarily caused hurt between 20th and 29th September, 1955, to four children. The first count was in respect of a child called Jean aged 4 years, the second count was in respect of a child called Terence aged 8 years, the third count was in respect of a child called Charles aged 6 years and the fourth count was in respect of a child called Desmond aged 2½ years. The learned Magistrate after trial found the accused guilty and sentenced him to four months' rigorous imprisonment on each count, the sentences to run concurrently.

The only point argued in appeal was that there was a misjoinder of charges under Section 180 of the Criminal Procedure Code. It was urged that on the evidence of the boy Terence the offence against him was committed the day after the offences were committed against the other three children, and therefore all four offences were not committed in the course of the same transaction. If the decision of the matter had depended on the acts of the accused forming one transaction the objection would, I think, have had to be upheld.

But the matter is not governed entirely by Section 180, for as learned Crown Counsel has pointed out, sections 178 and 179 also have a bearing on the case. Since all the offences are of the same kind and were committed within a year, it was open to the prosecution under Section 179 to charge the accused in respect of any three of the four offences. Thus the second count affecting Terence could have been joined with any two of the other counts. Under Section 180 the prosecution was entitled to charge the accused in respect of counts 1, 3 and 4 in one case. At this point Section 178 has also to be considered. It enables sections 179 and 180 to be applied in combination. The result is that the two transactions can be tried together because the offences in both transactions are of the same kind. I find support for this view in the judgment of Abrahams, C.J. in *The King vs. Iyer* (1936) 38 N. L. R. 169.

Although the charge was framed against the accused on the basis of all four offences having been committed in the course of the same transaction, it is not illegal for the reasons I have given. In the case cited too the offences were stated in the charge to have been committed in one transaction, but Abrahams, C.J. considered that the form of the charge contained words of surplusage and was a mere irregularity curable under the provisions of Section 425 of the Code.

The appellant has suffered no prejudice. I dismiss the appeal.

Appeal dismissed.

END OF VOLUME LIII