The

Ceylon Law Wee

containing Cases decided by the Supreme Court of Ceylon, and His Majesty the King in the Privy Council on appeal from the Supreme Court of Ceylon.

VOLUME XV

WITH A DIGEST

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(ii) That the fact that one mortgage was set up and the other not makes no difference.

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(ii) That where the subject-matter of an action or a matter in dispute is deliberately undervalued for the purpose of evading the revenue laws of the Island, the party concerned will not be allowed to alter the value afterwards so as to bring himself within Rule 1 (*a*) of the Privy Council Appeal Rules.

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(1) There must be a conflict of interest between the defendants concerned ;

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Present : SOERTSZ, A.C.J., KEUNEMAN, J. & DE KRETSER, J.

THE SOLICITOR-GENERAL vs COOKE

In the matter of a Rule issued on J. M. Tharmanayagam Cooke, a Proctor of the Honourable the Supreme Court.

Argued on 28th June, 1939.

Decided on 14th July, 1939.

Courts Ordinance (Chapter 6) section 17—Proctor convicted of criminal breach of trust of client's money—Restoration of money to client—What is the appropriate punishment in such a case—Suspension from practice for a period or removal from roll of proctors.

The respondent was convicted of criminal breach of trust of a sum of Rs. 300/- belonging to a client. Before the conviction he returned the money. Application was made under section 17 of the Courts Ordinance (Chapter 6) by the Solicitor-General asking that the name of the respondent be removed from the roll of proctors. The respondent did not say anything against his conviction but contended that he should not be removed from the roll of proctors but suspended from practice for a period.

Held : That in the circumstances the proper course was to remove the respondent from the roll of proctors.

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

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

SOERTSZ, A.C.J.

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

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

In this state of things, I was not a little surprised when the respondent appeared in answer to the notice issued on him to show cause, and submitted

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

The case of *Solicitor-General vs Chelvathamby*, (13 Ceylon Law Weekly p. 80) was cited to us. In that case, a concession was made to the respondent on the ground that the criminal breach of trust of which he was convicted was criminal breach of trust of property entrusted to him in his private and not in his professional capacity. This is a distinction which I am not disposed to make, but I do not think it necessary to say anything more on that point, for in the case before us it is admitted that the respondent was acting in his professional capacity.

It is impossible not to feel sorry for a professional man in a plight like that of the respondent, but it is not open to us to show a forbearance or practise a generosity that ignores the interests of the public and the prestige of the profession to which the respondent belongs. If I may respectfully say so, I share the view of Coutts-Trotter, C.J. in *re Narasimhachariar. High Court Vakil, Kumbakonum* (A.I.R. 1925 Madras 797)—

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

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

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

KEUNEMAN, J.

I agree.

DE KRETSER, J.

I agree.

Removed from the roll.

Proctors :—

R. R. Nalliah, for the respondent.

Present: KEUNEMAN, J. & DE KRETSER, J.

BARTLEET vs PERERA

S. C. No. 301 (*F*) 1935—*D. C. Kandy* 42227.
Argued on 4th and 5th July, 1939.
Decided on 14th July, 1939.

Stamp Ordinance—Failure to stamp petition of appeal correctly—Omission to supply the proper stamps for the decree or order of the Supreme Court and certificate in appeal.

Where the appellant had failed to affix the proper duty on the petition of appeal and had also omitted to supply to the Secretary of the District Court together with his petition of appeal the proper stamps for the decree or order of the Supreme Court and certificate in appeal. (*vide* proviso to Schedule F Miscellaneous (*d*) (ii) proviso (*b*) second proviso, Stamp Ordinance Chapter 89 (Vol. IV Legislative Enactments p. 749).

Held : That the Supreme Court was bound to reject the appeal, and was not free to entertain it.

PER KEUNEMAN, J. "At the same time, I wish to emphasise what my brother has already indicated, namely, that in a very large number of cases the penalty exacted is out of all proportion to the fault. I think that the legislature should provide some relief against the harshness of the law, as was done in the case of the Civil Procedure Code."

R. L. Pereira, K.C. and *H. V. Perera, K.C.* with *Ranawake* and *Dodwell Goonewardene*, for defendant-appellant.

N. Nadarajah with *H. W. Thambiah* and *P. S. W. Abeywardene*, for substituted plaintiff-respondent.

DE KRETSER, J.

A preliminary objection to the hearing of the appeal in this case, on the ground that the petition of appeal and related papers were not duly stamped, was raised by Counsel for the respondent. It arises in this way : The claim of the plaintiff was properly stamped as being in the 4th class. The final answer of the defendant after three amendments included certain

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claims in reconvention which clearly exceeded Rs. 10,000. The pleadings should therefore have been stamped as being in a case over Rs. 10,000 in value, though what the exact value of the aggregate claims would amount to and what exactly would be the stamp duty required has not been worked out and need not be worked out for the purposes of the argument.

The learned District Judge held against the defendant on these counterclaims and the defendant's petition of appeal expressly asks that he be given judgment on those counterclaims. Mr. H. V. Perera for the appellant sought to get over the difficulty by various ingenious arguments. He contended that the amendments in the last answer had not been initialled by the Judge and therefore there was no counterclaim, but he had to concede that this was at its best a highly technical objection which he invited us to uphold on the ground that a highly artificial bar was being raised to this Court hearing a party on an important matter. Much as we regret the bar, and much as we would welcome any escape from it, we cannot accede to his invitation. There could be no possible objection but for the extremely condensed form of the Judge's orders. When a certain issue was raised the plaintiff complained for want of notice as the matters raised by the issue had not been pleaded. Subsequently the Judge allowed the issue but granted a postponement. The proctors for the defendant then put in a motion asking for certain amendments to be made in the answer, and quite clearly the Judge intended to allow those amendments and ordered that a fair copy of the answer containing the amendments should be filed. This was done and the amended answer was accepted and the case not only went to trial on issues raised by these amendments but the learned Judge dealt with the claims raised by the amended answer, which clearly meant that he accepted it as correctly embodying the amendments, and the appeal is against his judgment rejecting those claims.

Mr. Perera then argued that this Court should not follow the earlier rulings of this Court on the ground that in those cases the class of the case had not been altered, and he further urged us to hold that as the lower Court had acted on those improperly stamped pleadings it should be taken to have ruled that they had been duly stamped and the matter was now beyond the region of objection.

The point taken by him are covered by authority and it is not within our power nor it is our desire to question the validity of those rulings. A short history of the legislation on the point and of the authorities makes the position clear.

When our Civil Procedure Code was enacted the Stamp Ordinance No. 11 of 1861 had been repealed by Ordinance No. 23 of 1871 and this in turn was repealed by Ordinance No. 3 of 1890 which came into operation on the 1st August, 1890 on which date our Code of Civil Procedure also came into operation.

Ordinance No. 3 of 1890 said:—"Instrument shall mean and include every written document." Section 34 expressly enacted that "if any pleading or other instrument specified in Part II of Schedule B hereto annexed shall not bear the proper amount of stamp duty, it shall be lawful for the Judge, should he see it fit to do so, to allow the person proving such pleading or other instrument to attach thereto the stamps necessary to supply such deficiency in duty, and when such stamp has been supplied, to proceed with the action as if such pleading or other instrument had been originally duly stamped." A similar provision existed in India from which we obtained the greater part of our Code of Civil Procedure.

There being the prohibition that the Court should not proceed till the pleading had been properly stamped and the Court being empowered to allow the deficiency to be supplied, our Code emphasised that the plaint and answer should be duly stamped (*vide* sections 39 and 73) and then empowered the Court to reject the plaint if the requisite stamps were not supplied within a time fixed by the Court (section 48) and in more general terms by section 77 provided for an answer being rejected for the same reason. No special provision was made regarding petitions of appeal being rectified as regards the stamp duty, probably because we did not follow the India Code in its provisions regarding appeals, but there existed the provision in section 34 of the Stamp Ordinance.

The only objection which could possibly be fatal was contained in the Schedule to the Stamp Ordinance where provision was made that in appeals to this Court the appellant should deliver to the Secretary of the District Court or the Clerk of the Court of Requests, *together with his petition of appeal*, the proper stamp for the decree or order of the Supreme Court and certificate in appeal which may be required by such appeal.

This provision was interpreted as fixing the time when such stamps should be supplied and accordingly where the stamps had not been supplied together with the petition of appeal, the petition was rejected. The later Stamp Ordinance re-enacted this provision and it exists today.

In *Don Mathes Bandara vs W. P. Baban Appu* (1 Matara Cases page 203) the Full Court of that day, in 1892, rejected an appeal because the stamps had been supplied a day late.

In *Noni vs Dingi Appuhamy* (1 Law Recorder 75) this Court came to a contrary conclusion but the facts of the case were peculiar.

Meanwhile, in *Sathasivam vs Cadiravel Chetty* (21 N.L.R. 93) this Court expressly followed the ruling in *Don Mathes Bandara vs Baban Appu* (*supra*).

All doubts were set at rest when a Divisional Bench of this Court reaffirmed the decision in *Don Mathes Bandara vs Baban Appu* in *Attorney-General vs Karunaratne* (37 N.L.R. 57).*

* 4 C. L. W. p. 23.

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Now, the enactment in question expressly requires that the appellant should supply the proper stamp, and the proper stamp must be the stamp required by law and not such stamp duty as a party or a Secretary of a Court or a subordinate Judge thought proper. The stamp is to be affixed to the decree of this Court, and this Court is specially responsible for its decree being properly stamped.

On this ground alone this appeal must be rejected.

But it must be rejected because the petition of appeal too, is not properly stamped. It too is a document preferred to this Court, though it may come through the channel of the lower Court and this Court cannot ignore the express provision of the law. No statutory enactment is required before one is called upon to observe the law and it is because one must do so that special provision was necessary to empower a Court to grant the indulgence on the deficiency being supplied. That power was expressly given by the earlier Ordinances and remained so long in force that it is only recently that the withdrawal of the power has been noticed. It has had the most unfortunate results and it is to be hoped that legislation will cure the omission. As the law stands at present the lower Courts have by implication the right to grant time but this Court has none. It is not clear that even the lower Courts have such power, but it makes little difference in their case, for a plaint if rejected, may be presented again with the proper stamp and only questions of limitation may be affected. Ordinarily all other pleadings in the case will easily follow the stamp duty on the plaint and difficulty may arise only where a plaint or a claim in reconvention is inadvertently accepted. Once accepted it may be difficult to argue that the Court had no jurisdiction to proceed *vide Jayawickreme vs Amarasooriya* (17 N.L.R. 174) but the Court's duty at the inception is quite plain.

Ordinance No. 3 of 1890 was repealed by Ordinance No. 22 of 1909. This Ordinance gave the word "instrument" a more restricted meaning which makes it inapplicable to pleadings. There can be little doubt that the earlier Ordinances, both when they defined the term and when they did not, used the expression very loosely. The change was not made without disaster, and in 1917 it was necessary to amend the charging section so as to make it apply to documents and not merely to instruments. But while the charging section was amended the other sections defining duties and the time of stamping and the provisions for curing omissions were not similarly amended and continued to apply only to instruments.

Provision was made for obtaining an adjudication as to stamps by the Commissioner of Stamps, and regarding instruments tendered in evidence which were not properly stamped. No provision was made for pleadings being subsequently stamped or as to adjudication as to stamps in such cases. Whether this was done out of respect for the Courts which would

be quite capable of adjudicating and which would set an example in following the law, or the omission was due to other causes one does not know; but it is quite clear that the power to grant time has been repealed.

The liability to stamp pleadings is clear; it is emphasised in different ways in the Code as well as in the Schedules to the Stamp Ordinance, e.g., where provision is made for oral pleadings. In these cases the stamp must first be supplied, and it is not likely the legislature meant to penalise the poor litigant and to indulge one who could retain a lawyer.

To allow pleadings to be stamped at any time would lead to confusion, would throw extra work on the staffs of Courts, might lead to serious evasions of duty, and it is possibly for this reason that the legislature took away the power to grant time and emphasised that a plaint must be duly stamped when presented and an answer when filed, and provided for a plaint being rejected even at a later stage.

It is asked why provision was made in the Code regarding the stamping of pleadings presented to a lower Court and none regarding petitions of appeal. It cannot be because petitions of appeal do not require to be stamped, and I have already given reasons for their being stamped before being received or rather for their not being received till they are stamped. It may be that it was thought enough to draw the attention of a proctor at the inception of his work on a case and thereafter he would know what stamps to affix; or it may be that it was due to the Code being fuller as a guide where a subordinate Court was concerned; but whatever the reason this Court has always insisted on a petition of appeal being properly stamped before it can be received, and there is no reason to depart from the procedure hitherto adopted.

It is not necessary to do more than give the cases. They are:

Salgado vs Peiris 12 N.L.R. 379

Sinnctamby vs Thangamma 1 C.A.C. 151

Hurst vs Attorney-General 4 C.W.R. 265

Saddananda Kurukkal vs The Saiva Paripalana Sabha 13 Law Weekly 141. and *Maitripala vs Koys* 14 Law Weekly 112.

Counsel for the appellant invited us to deal with the case by way of revision. There are no stamped papers for that purpose, and in any case I do not feel disposed to exercise our powers in order to help the appellant out of his difficulty.

The appeal is rejected, and the appellant will pay the respondent his costs.

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I have had the advantage of reading my brother's judgment, and I agree with the conclusions arrived at by him and have nothing to add to his reasons. I also agree that in any event we are now bound to follow the decisions which he has mentioned. At the same time, I wish to emphasise what my brother has already indicated, namely, that in a very large number of cases the penalty exacted is out of all proportion to the fault. I think that the legislature should provide some relief against the harshness of the law, as was done in the case of the Civil Procedure Code.

Appeal rejected.

Proctors :—

Beven and Beven, for defendant-appellant. (Perera)

N. Coomarasamy, for plaintiff-respondent. (Bartleet)

Present: WIJEYEWARDENE, J. & JAYATILAKE, A.J.

JANIS DE SILVA vs KANAKARATNE

S. C. No. 86—*D. C. Galle No.* 35558

Argued on July, 3rd 1939.

Decided on July, 14th 1939.

Crown lease—Prohibition against alienation without consent of Crown—Condition that land shall revert to Crown if the lessee's interests are sold in execution—Sale of lessee's interests in execution—Has the lessee a saleable interest—Section 284 *Civil Procedure Code* (*Chapter* 86).

The defendant was the lessee of a Crown land. The conditions of the lease *inter alia* were :

(*a*) that the lease was not to be assigned etc. without the consent of the Crown.

(*b*) that in case the lessee's interests were sold in execution the lease was to cease and the land was to revert forthwith to the possession of the Crown.

The appellant is the purchaser at the sale in execution. In the course of correspondence with the Crown after his purchase he learnt that the Crown did not recognise any right in him to the lease and thereupon moved to have the sale set aside, under section 284 of the Civil Procedure Code (Chapter 86).

The District Judge refused to set-aside the sale. He then appealed.

Held : (i) That the defendant had no "saleable interest" in the lease within the meaning of the expression in section 284 of the Civil Procedure Code (Chapter 86) and that the purchaser-appellant was entitled to have the sale set aside.

(ii). That immediately upon the sale in execution of the defendant's interests in the lease, the land reverted to the Crown.

Editorial Note.—The effect of similar clauses in a Crown lease is discussed in *Jayawardene vs Jayawardene and Others* 14 C.L.W. p. 13 (Privy Council). The questions

that arose for discussion in that case were mainly the effect of a donation in contravention of a prohibition in the lease and the effect of a disposition by will of leasehold rights without the consent of the Crown to such disposition.

H. V. Perera, K.C. with *V. F. Gunaratne*, for purchaser-appellant.

J. E. M. Obeyesekere, for plaintiff-respondent.

N. E. Weerasooriya, K.C. with *L. A. Rajapakse* and *Colvin R. de Silva*, for substituted defendants-respondents.

JAYATILAKE, A.J.

By an indenture of lease bearing No. 155 dated February, 23rd 1920, the Crown leased to the defendant an allotment of land called Uskekunagodakele containing in extent A.11 R.3 P.30 in perpetuity subject to the following conditions :

(*a*) The lessee and his heirs, executors, administrators and permitted assigns shall not sub-let, sell, donate, mortgage or otherwise dispose of or deal with his interest in this lease, or any portion thereof, without the written consent of the lessor, and every such sub-lease, sale, donation or mortgage without such consent shall be absolutely void.

(*b*) That if the interest of the lessee or his heirs, executors, administrators and permitted assigns be sold in execution of a decree against him or his aforewritten, then, this demise and the privileges hereby reserved, together with these presents, shall forthwith cease and determine, and the lessor, his agent, or agents, may thereupon enter into and upon the said land and premises, or any part thereof in the name of the whole, and the same have, re-possess, and enjoy as in his former estate, and the said land and premises shall forthwith revert to the Crown, without any claim on the part of the lessees or his aforewritten against the lessor for compensation on account of any improvements or otherwise howsoever.

The plaintiff sued the defendant in this action for the recovery of a sum of Rs. 2,000/– and interest due upon a promissory note, and obtained judgment. A writ was issued by the Fiscal in pursuance of the decree and the right, title and interest of the defendant in the lease was seized. On or about November, 4th 1937, the sale took place, and the appellant became the purchaser for the sum of Rs. 1,930/–. The appellant as purchaser paid 1/4 of the purchase price on the day of the sale and the balance 3/4 on November, 27th, 1937. On February, 26th, 1938, he made an application to Court that the sale be set aside on the ground that he discovered that the defendant had no saleable interest in the property. At the inquiry, he produced three letters, X2, X3 and X6 which indicated that the Crown took up the position that no title passed to him. The District Judge dismissed the appellant's application on the ground that the defendant had a saleable interest in the property ; and the appeal is from that order. The appellant

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bases his application on section 284 of the Civil Procedure Code. That section enables a purchaser to proceed by an application to set aside a sale on the ground that the person whose property purported to be sold had no saleable interest therein. The first point taken on behalf of the appellant was that the expression "saleable interest" means an interest which is capable of being sold by the judgment-debtor and not against him. I think this is too narrow a view to take of the meaning of this expression. I agree with the dictum of Straight, J. in *Munna Singh vs Gajadhar Singh* (1) that the expression must be interpreted in the widest and most general sense, and as meaning in plain terms "nothing to sell." In the course of his judgment, Straight, J. said "I cannot suppose it was ever intended that a purchaser at an auction-sale held under the authority of a Court, who buys a property as free from incumbrance, which subsequently turns out to be mortgaged up to its full value, can be said to have purchased what purported to be sold him, because it may be argued that he technically acquired the judgment-debtor's equity of redemption."

The alienation prohibited by condition (*a*) is restricted to voluntary alienations and not to necessary alienations. In *Wijemanne vs Schokman* (2) a condition somewhat similar to condition (*a*) was considered and it was held that the purchaser of the land at a sale in execution bought it subject to the condition as to inalienability. It follows from this judgment that if condition (*a*) stood alone, it could not be said that there was "nothing to sell." The next point taken on behalf of the appellant was that under condition (*b*) the property had to revert to the Crown the moment it was sold in execution, and that therefore it could not be said that the defendant had a saleable interest within the meaning of section 284. A stipulation is attached to the lease providing for the restitution of the property to the Crown if the interest of the defendant is sold in execution. Is that stipulation valid in law? The intention of the Crown in imposing that stipulation can be gathered from the terms of the indenture. An examination of the terms makes it clear that the Crown granted leases of this nature to persons who were able to clear and plant the land within a certain period and to pay the rent reserved in the indenture on the due dates. The object of the stipulation seems to be to prevent the property from passing into the hands of people who were not approved by the Crown. A stipulation of this nature must be regarded as one which adheres to the land and gives rise, not to a personal action, but to an *actio in rem.* Sande (3) says "that there has been considerable controversy on the point whether, if the owner on the sale of his property makes a pact that the purchaser shall not alienate it, such a pact is so far effective as to prevent the dominium from passing if the new owner does alienate the property. The most common view among the Doctors is that it will not have that effect.....They are chiefly influenced by the rule that it is the nature of such agreements that they do not bind the property but the person."

(1) I.L.R. 5 All. 577. (2) 13 N.L.R. 301.
(3) Restraints on Alienations pp. 306, 307, 314.

"From the different arguments that have been given on both sides, it appears that the more correct view is held by those who say that the passing of the dominium can be prevented by a pact, if only the owner imposes the pact at the time of the transfer of his property or makes a condition at the time of the alienation of the property, and not subsequently, as by the tradition the right can be acquired by another person....."

It must be noted Sande was dealing with a case where there was merely an agreement not to alienate. In the present case there is in addition a provision for the transfer of the dominium if in breach of the agreement there is an alienation. The lease under consideration is one which may be termed *in longum tempus*. It is virtually an alienation. See *Carron vs Fernando* (4). The stipulation is, in my opinion, a valid one. The result is, that upon the sale in execution of the defendant's interests in the lease, the land reverted to the Crown.

Mr. Obeyesekere contended that the property cannot revert to the Crown until there is a declaration by Court to that effect. He relied on *Perera vs Perera* (5) in which it was held that a clause of forfeiture in a lease for non-payment of rent cannot be enforced, except by appropriate judicial proceedings, in the course of which it would be competent for the lessee to set up against the lessor all equitable rights to compensation. Wood-Renton, J. in the course of his judgment said :

"The Court of Equity in England was from an early period accustomed to grant relief against the payment of the whole penalty on money bonds ; and the Statutes 4 and 5 Ann. c. 16, sections 12, 13, 8 and 9 Will. III. c. 11 conferred a similar jurisdiction was extended to forfeiture clauses for non-payment of rent. This extension proceeded on the theory that the forfeiture clause —like the penalty in the bond—was only a security for the recovery of money. The Statute 4 Geo. 2 c. 28 recognized this jurisdiction, but limited (section 3) the time within which the lessee in default might claim relief. An attempt was at one time made to extend the jurisdiction in equity to relieve against forfeiture for non-payment of rent to breaches of other conditions in leases, *e.g.* convenants to insure. But this was effectually checked by the decision of Lord Eldon in *Hill vs Barclay* (6) and of *Bowser vs Colby* (7) and *Barrow vs Isaacs* (8). Later on the Legislature interposed, and first the Court of Equity (22 and 23 Vict. c. 35 section 4–9) and afterwards Courts of Law (23 and 24 Vict. c. 126) were enabled to grant relief against breaches of covenants to insure if (*a*) no damage had resulted from the default, (*b*) the default was due to accident or mistake, or in any event not to gross negligence on the part of the lessee, and (*c*) there was an adequate insurance on foot at the time of the application to the Court." The *ratio decidendi* of that case is that the forfeiture clause is only a security for the recovery of money. That case does not help the respondent. It shows that a lessee is not entitled to claim relief agsinst every forfeiture clause in the

(4) 35 N.L.R. at 358. (5) 10 N.L.R. at 358. (6) (1811) 18 Ves. 56.
(7) (1841) 1 Hare 109. (8) (1891) 1 Q.B. 417.

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lease. To my mind there is no analogy between that case and the present case. Condition (*b*) has nothing to do with the performance by the defendant of his duties as a lessee. It provides that on the happening of a certain event, the land shall revert to the Crown, As soon as the interest of the defendant in the lease is sold in execution the property reverts to the Crown as a consequence imposed by condition (*b*). I am, therefore, of opinion that the penalty takes effect at once and there is no necessity for the Crown to obtain a judgment declaring its rights.

Mr. Obeyesekere also contended that the doctrine of *caveat emptor* applies to this case. I cannot see how that doctrine can be applied to an application under section 284 of the Civil Procedure Code. That section furnishes a statutory exception to the doctrine of *caveat emptor*. See *Ram Kumar vs Ram Gour*. (9) In my opinion, in view of the condition (*b*) the defendant had no saleable interest in the property sold. I would therefore allow the appeal with costs in both courts against the plaintiff.

Appeal allowed.

WIJEYEWARDENE, J.

I agree.

Proctors :—

P. B. de Silva, for purchaser-appellant. (Kanakaratne)

A. D. de Silva, for plaintiff-respondent. (Janis de Silva)

D. Velaratna, for substituted defendants-respondents.

(9) I.L.R. 37 Calcutta 67.

Present : SOERTSZ, A.C.J.

POLICE SERGEANT, (Hambantota) vs SIMON SILVA

S. C. No. 356/1939—*M. C. Hambantota No.* 5587.

Argued on 16th July, 1939.

Decided on 24th July, 1939.

Obstructing Public Servant—Penal Code—(Chapter 15) *section* 183—*What constitutes "voluntary obstruction"—Is interference by physical force or threats necessary.*

Held : (i) That the question, whether the conduct of an accused person amounts to "voluntary obstruction" within the meaning of section 183 of the Penal Code, is one that should be decided according to the circumstances of each case.

(ii) That there is "voluntary obstruction", irrespective of the use of force, when the interference complained of can reasonably be regarded as hindering or being likely to deter an officer from discharging his duty.

Cases referred to :—*Fernando vs Alim Marikar* 1 C.A.C. 173.
Hendrick vs Kirihamy 1 C.A.C. 105 ; 12 N.L.R. 28.
Lourensz vs Jayasinghe S.C.M. 20-7-1916. 355 P. C. Ratnapura 3948
Bastable vs Little (1907) 1 K.B. 59.
Betts vs Stevens (1910) 1 K.B. 1.
Borrow vs Hooland 74 L.T. 787.
Rasavasagram vs Siwandi 9 N.L.R. 88.
Davidson vs Rahiman Lebbe 2 Br. 281.

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

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

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The charge preferred against the accused-appellant was that he "did .....on the 11th April, 1939 voluntarily obstruct a public servant to wit.....examiner of weights and measures in the discharge of his duties and thereby committed an offence punishable under section 183 of Chapter 15 Vol. I of the Legislative Enactments. This charge was laid in the terms of the section referred to, which reads as follows: "Whoever voluntarily obstructs any public servant or any person acting under the lawful orders of such public servant in the discharge of his public functions shall be punished....."

The facts on which this charge was based are these : B. T. Jamion, an examiner of weights and measures whom, it is clear, the accused knew as such, visited the Green Market in Hambantota on the 11th of April, 1939, and detected some false measures in the provision stall of one D. C. Jayaweera. The accused came up and claimed one of those measures saying he had lent

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it to Jayaweera. The examiner took charge of it and sealed it in the presence of the Vidane Aratchi. Later in the day, the examiner went to the accused and intimated to him that he "wanted to search for the weights and measures," obviously meaning the weights and measures that accused kept in his boutique. The accused "said he has no weights and measures in his boutique." The examiner said he "did not believe him" and "must search." The Vidane Aratchi was with the examiner at the time. The accused threatened the examiner and the Vidane Aratchi saying "he would know what to do if he searched the boutique." The examiner says "we could not search as the man was *obstructive and boisterous. I anticipated trouble if I used force*" That is the evidence of the examiner. The Vidane Aratchi's evidence is to the same effect. "The accused said if the premises are searched you know what will happen." The Vidane Aratchi also says that the accused wanted to see "the authority," and would not allow a search until he saw it and that the accused said "if you want to search the house please bring the police." Another witness Nikulas corroborates the evidence of Jamion and the Vidane Aratchi. The accused gave no evidence himself. He called a witness, who was, by no means impressive. The learned Magistrate accepted the version given by the witnesses for the prosecution, and convicted the accused and sentenced him to pay a fine of Rs. 15/–, in default two weeks' simple imprisonment.

In view of the punishment imposed, the accused had no right of appeal on the facts, and the appeal is preferred on a question of law. The question submitted is whether assuming the facts to be as stated for the prosecution, there was "voluntary obstruction" in the meaning of those words in section 183. It was contended that there was no more than a "verbal refusal to allow the public servant to perform his duty," and that that "does not constitute voluntary obstruction within the meaning of the section under which this charge was laid." The words I have quoted occur in the judgment of Lascelles, C.J. in *Fernando vs Alim Marikar* (1 C.A.C. 173). In that case the facts were as follows :- A Sanitary Inspector in the course of his perambulations encountered the accused who "had onions in a box on the drain." He told "the accused to remove them. The accused refused." The Inspector "bent to take the box." The accused abused him in indecent language." Lascelles, C.J. commenting upon the evidence said "the evidence is that the accused did no more than refuse to allow the complainant to remove the box, and that there was an altercation between the two. A mere verbal refusal to allow a public servant to perform his duty does not constitute voluntarily obstructing withing the meaning of section 183. *There must be some overt act done or physical* means used." Now, in my opinion a proposition like that must not be taken at large, but with reference to the facts of the case. I agree with the conclusion to which Lascelles, C.J. came when he acquitted the accused. There was no evidence to show what right the Sanitary Inspector had to demand the removal of the box from where it was. If he had no such right, he was acting beyond the

scope of his public functions when "he bent to take the box," and the accused was justified in defending his property against an invasion of his right to it. In the circumstances he could not be said to have been resisting a public officer but defending his own property. I should have preferred to base the order for acquittal in that case on that view of the matter. Perhaps, Lascelles, C.J. was saying the same thing in a different way. But if he was not, and if he meant to say that "a mere verbal refusal to allow a public servant to perform his duty does not constitute 'voluntarily obstructing'" and that "there must be some overt act done or physical means used," is a legal proposition that applies universally regardless of the facts, I must say, with great respect, that I cannot agree. Lascelles, C.J. relied on the decision in *Hendrick vs Kirihamy* (1 C.A.C. 105 also 12 N.L.R. 28) in which Hutchinson, C.J. held that where a constable went with a search warrant to search the accused's house for fermented toddy, and the accused refused to allow such search, and went inside the house and picked up a pot of toddy and spilt it over the hearth, the conduct of the accused did not amount to obstruction within the meaning of section 183 of the Penal Code. There are two aspects of obstruction in that case, (1) the accused saying he will not allow a search without the village headman being present and (2) his spilling the contents of the pot over the hearth. Hutchinson, C.J. said "the mere saying that he would not allow him to search *without doing anything more* is not an obstruction; and the spilling of the toddy *was certainly not an obstruction.*" I am not concerned in this case with what Hutchinson, C.J. said in regard to the second aspect of the obstruction alleged done. But, if I may say so with respect, the acquittal of the accused in respect of the first aspect in that case was right on the facts as established because the accused merely said he would not allow a search and did nothing more than go inside the house. He did nothing to prevent a search. He only took steps to see that the search would prove abortive. That is a different matter and does not concern us in this case. When the accused said he would not allow the police constable to search without the village headman being present, and then went inside the house and spilt the toddy, he was doing nothing to deter the police constable from entering the house, but was really using an expedient for him to go inside the house himself and remove traces of guilty possession by spilling the toddy. So far as the spilling of the toddy is concerned, whether that amounts to an obstruction or not is another question. But I am not concerned with it in this case. On that point Hutchinson, C.J. and Wood Renton, C.J. have taken opposite views. The only question here is whether "a verbal refusal" to allow a search can never amount to an obstruction. In *Hendrick vs Kirihamy*, Hutchinson, C.J., as I have pointed out, took the view that it did not in the circumstances of that case, and as I have said on the facts of that case the verbal refusal there did not, in my opinion too, amount to an obstruction.

In *Lourenz vs Jayasinghe* (S.C. Min. 20th July, 1916—355 P. C. Ratnapura 3948) Wood Renton, C.J. said he agreed with that view of

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Hutchinson, C.J. as expressed in that case and acquitted the accused in the case before him because " the obstruction offered by the accused to the Sanitary Inspector was purely verbal." The facts as stated in the report of *Lourenz vs Jayasinghe* are too meagre to enable me to say in what circumstances Wood Renton, C.J. made the observation I have quoted, but I repeat again that I do not agree with that proposition if it is meant as a general statement of the law. In the very cases cited by Wood Renton, C.J. in *Lourenz vs Jayasinghe*; namely *Bastable vs Little* (1907, 1 K.B. 59) and *Betts vs Stevens* (1910, 1 K.B. 1), when Ridley, J. stated in the former case "I think that in order to constitute an offence under this section (i.e. wilful obstruction), *there must be some interference by physical force or threats*," Darling, J. said " I should desire to reserve my opinion whether the respondent had committed an offence under the section, although no physical obstruction of the police constables in the execution of their duty had taken place," and Alverstone, L.C.J. added as a note to his judgment " I also would wish to guard myself from saying that the only obstruction contemplated by this section is a physical obstruction." In the latter case Lord Alverstone, Lord Darling and Bucknill, J. acted on the footing that physical obstruction was not necessary.

In the case before me, the facts bring it even within Ridley, J's view that *threats used to prevent* an officer performing his duty would amount to voluntary obstruction. There is ample proof that the accused in this case used threats. He was clearly threatening when he said " you know what will happen if you search" and "that he knew what to do if the examiner searched the boutique." The evidence also establishes that the accused was "boisterous" at the time and that the examiner feared that force might be used and refrained from the proposed search. But, as I have pointed out the other Judges who took part in the two cases took the view that a verbal refusal to allow a person to perform his duty would suffice apart from threats, provided it was a refusal conveyed in terms that indicate that the officer would have to use force if he proceeded to put his intention to search into execution. That surely must be so if one regards the plain meaning of the word obstruct. In the Oxford Dictionary " obstruct " is stated to mean *inter alia* " to stand in the way of or persistently oppose the progress of or course of (proceedings or a person or thing in a purpose or action), to hinder, impede, retard, delay, withstand, stop," and by way of illustration there is this quotation from Froude " he had *obstructed* good subjects, who would have done their duty, had he allowed them." On the day in question, those were exactly the relations and reactions between the accused and the examiner of weights and measures. In *Borrow vs Hooland* (74 L.T. 787) a householder who refused to let the scavenger enter into his house to remove refuse—the scavenger acting under the orders of the County Council — was held "wilfully to obstruct" the scavenger. This is the view Wood Renton, J. himself took in *Rasavasagram vs Siwandi* (9 N.L.R. 88), and I cannot at all follow the distinction he sought to draw in the course of his comment

in *Lourenz vs Jayasinghe* by pointing out that in the earlier case the words he was interpreting were " obstruct and impede " and in the case before him, there was only the word " obstruct ". It seems to me that if the accused in *Rasavasagram vs Siwandi* was guilty of " obstructing and impeding " by doing what she did, she certainly would have been guilty of " obstructing " if that was the charge against her, for the greater includes the less. But in truth, there seems to be no difference so far as language is concerned between " obstruct " and " obstruct and impede " except perhaps that there is greater rhetorical quality in the tautology of the latter. In the quotation I have made from the Oxford Dictionary Vol. VII " obstruct " is stated to mean, " impede " *inter alia.*

I will refer to one more case *Davidson vs Rahiman Lebbe* (2 Br. 281). In that case Moncreiff, J. said " Mr. Bawa argued that something like force was necessary to meet the words of the section..... and that it was necessary to show something more than passive resistance. The case in 4 N.L.R. 151 is sufficient to show that force was not necessary..... For my part, I think that it is not possible to lay down any hard and fast rule upon the subject..... It seems to me that the question is one of circumstances and that there is voluntary obstruction, whether force is or is not used, when that is done which can reasonably be regarded as hindering or being likely to deter an officer from discharging his duty."

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

In my opinion, the accused acted very defiantly and the sentence imposed is, I think, out of proportion to his offence. At one stage, I contemplated a sentence of imprisonment, but as there is nothing against the accused, I refrain from sending him to prison. I alter the fine to one of Rs. 30/- in default one month's rigorous imprisonment.

Proctors :—

T. K. Burah, for accused-appellant.

Conviction affirmed.
Sentence enhanced.

Present: SOERTSZ, A.C.J.

JONES (Sub-Inspector) vs AMARAWEERA

S. C. No. 274/1939—*M. C. Tangalle* 7486

Argued on 19th July, 1939.
Decided on 21st July, 1939.

Criminal Procedure Code—(*Chapter* 16) *Section* 338—*Meaning of the term "lodging a petition of appeal"—Does the forwarding of a petition of appeal by registered post satisfy the requirements of the Code—Computation of time within which an appeal should be preferred.*

Held : (i) That the forwarding of a petition of appeal by post to a Magistrate's Court does not satisfy the requirements of section 338 of the Criminal Procedure Code.

(ii) That the term "lodging" in section 338 of the Criminal Procedure Code means "a manual act of lodging."

(iii) That the time within which an appeal should be preferred must be computed from the date on which the conviction and sentence were recorded, and not from the date on which the reasons for the decision were given.

L. A. Rajapakse for accused-appellant.
D. Jansze, Crown Counsel, for complainant-respondent.

SOERTSZ, A.C.J.

Crown Counsel invites my attention to a note made by the Magistrate that the petition of appeal was not "correctly tendered under section 338. It has been sent to the Chief Clerk of this Court by registered post....."

Crown Counsel also submits that the appeal is out of time.

In regard to the first question, there is the case of *The Queen vs Herat* (2 Ceylon Law Reports 118), in which Burnside, C.J. held a petition of appeal is not "lodged" unless there is "a manual act of lodging" and that forwarding a petition of appeal by post to the Judge of the Court, although it might be "a convenient practice," "does not satisfy the strict requirements of the Code." The Code referred to in Burnside, C.J's judgment is Ordinance No. 8 of 1883. But that does not affect the question because in our Code too the word used is "lodged." It says "a party may prefer an appeal..... by lodging within ten days.....with such Magistrate's Court.... a petition of appeal addressed to the Supreme Court....."

I can see no good reason for departing from this interpretation which, I understand, has been followed from the date of that judgment by the Attorney-General in appeals taken by him. In my view, although it is possible to give the word "lodge" a meaning which will include a deposit made through the post, in the context of section 338, I feel inclined to agree that "a manual act of lodging" appears to have been in contemplation,

I would, therefore, follow the ruling I have referred to and hold that the petition of appeal was not properly lodged. There should, I think, be some personal contact between an officer of the Court and the party lodging the petition, that is to say, the appellant himself or a party who is his lawfully authorised agent, to vouch for the fact that the petition is the petition of the appellant. It is true that in this case the petition of appeal purports to be signed by the appellant's proctor, but it cannot be assumed that in every case, the officer of the Court will know that the signature on the petition is the signature of the party whose signature it purports to be.

In my opinion, the second point too is entitled to succeed. Admittedly, verdict was entered and sentence passed on the 10th of March, 1939. The petition of appeal although dated the 21st of March, was not received in the Magistrate's Court till the 22nd of March, so that it is two days late, and not one day late as Crown Counsel submitted. Mr. Rajapakse however, contends that the statement of reasons which he submits constitute the 'judgment' were not given till the 13th of March. This point too is covered by authority. In *The King vs de Silva* (3 C.W.R. 235), Ennis, J. held that the computation of time within which an appeal should be preferred must be made from the date on which the conviction and sentence were recorded, and not from the date on which the reasons for the decision were given. Ennis, J. in so holding followed an earlier decision of his to which I might refer, *Kershaw vs Rodrigo and Others* (3 C.W.R. 44). I would follow these rulings and hold that the appeal is out of time, even if as stated reasons for the decision were given on the 13th of March. But the record shows that these reasons were given on the 10th of March and I can entertain no affidavit to contradict that fact.

Finally, Mr. Rajapakse asked me to deal with this case in revision. I have examined the evidence and have come to the conclusion that a clear case was established, and that the accused has been treated with great leniency.

I reject the appeal and refuse the application for revision.

Appeal rejected.

Proctors :—

E. M. Karunaratne, for accused-appellant.

Present: HEARNE, J. & KEUNEMAN, J.

DHAMMADARA THERO vs SEDARANHAMY AND OTHERS

S. C. No. 115—*D. C. Matara No.* 3898.

Argued on 19th and 20th July, 1939.

Decided on 27th July, 1939.

Buddhist Temporalities Ordinance (*Chapter* 222) *section* 23—*Policy of life assurance of a bhikkhu—Does death of bhikkhu without assigning policy vest the property in the Sangha.*

Held : That on the death of a bhikkhu whose life is covered by a policy of life assurance the money due under the policy goes by virtue of section 23 of the Buddhist Temporalities Ordinance (Chapter 222) to the temple to which the bhikkhu belonged in a case where he dies without alienating in his lifetime his rights under the policy.

N. E. Weerasooriya, K.C., with *E. B. Wikremanayake* and *C. E. S. Perera*, for respondents-appellants.

H. V. Perera, K.C., with *Ranawake, Koattegoda* and *Ranatunga*, for petitioner-respondent.

KEUNEMAN, J.

This is a testamentary proceeding in respect of the estate of Rev. Somananda Unnanse, deceased, who was the incumbent of the Arambegoda Temple. The deceased died on 9th May, 1935, leaving an Insurance Policy, P1, valued at Rs. 4,167/40. The original petitioner as incumbent of the said temple claimed letters of administration to the estate of the deceased. The 1st respondent (appellant) as *guardian-ad-litem* of the 2nd and 3rd respondents (appellants) objected to letters of administration being issued to the petitioner. The 2nd and 3rd respondents claim to be the lay heirs of the deceased.

At one stage, proceedings were stayed until the appointment of a trustee for the said temple had been made. Thereafter the respondent to this appeal was duly appointed as trustee. The original petitioner withdrew his application and the contest for the letters was continued between the appellants and the respondent, who was referred to as the petitioner.

At the inquiry the following issues were framed :

1. Is the Policy of Insurance which the deceased priest had taken acquired property within the meaning of section 23 of the Buddhist Temporalities Ordinance 19 of 1931 ?

(It is admitted by the parties that the deceased priest did not alienate the money that would have fallen due on the maturity of the policy).

2. As the priest died without alienating or otherwise encumbering the money due on the policy, is the money due on the policy the property of the temple to which the deceased priest belonged ?

3. If issues No. 1 and 2 are answered in the affirmative, who is entitled to letters of administration, is it Galahitiya Dhammadara Thero, Mr. G. M. de Silva's client or the respondents represented by Mr. Wijetunga ?

The learned District Judge held in favour of the respondent and held that he was entitled to letters of administration. The appellants appeal.

The claim of the respondent is based on section 23 of the Buddhist Temporalities Ordinance of 1931, which runs as follows :

> " 23. All *pudgalika* property that is acquired by any individual *bhikkhu* for his exclusive personal use, shall, if not alienated by such *bhikkhu* during his lifetime be deemed to be the property of the temple to which such *bhikkhu* belonged unless such property had been inherited by such *bhikkhu*."

In the court below it was established that the premiums in respect of the policy were paid by the deceased priest out of his inherited property, and it was argued that the section did not apply on that account. The District Judge rejected that argument, and it has not been revived before us, and I do not think that the argument is good.

Before us it was argued in the first place that the property involved was money due under the policy, and that this money could not be alienated during the lifetime of the deceased, and accordingly that it was not the class of property contemplated by the section. It was further urged that the right to claim this money only came into being on the death of the deceased.

If we examine the Policy P1, we find that the Insurance Company agreed, on receipt of satisfactory proofs of the death of the assured, to pay Rs. 5,000/– to his executors, administrators or assigns. Further, if the assured was living and the policy in force on 20th August, 1944, the Company agreed to pay to the assured or his assigns the sum of Rs. 5,000/– with any bonus then declared.

The policy accordingly was not one only to take effect on the death of the assured. Further, it was a contract between the Company and the assured, whereby the assured obtained rights in the policy, which were capable of being assigned. I think these rights may be described as the property of the assured, and that the executors or administrators, in the absence of assignment, are parties who can now enforce rights which accrued to the assured previously, when he entered into the contract.

I do not think we can accept the interpretation contended for by the appellants.

The next point urged for the appellants is that this was not property acquired by the deceased for his exclusive personal use. It was contended that the word " use " was equivalent to " user," and that the property referred to was such as was needed for his personal enjoyment, or to put it in another way, that it was property which the priest himself used or intended to use for himself. Counsel for the appellants suggested that it may mean " the necessaries of life," and argued that under Buddhist law a Buddhist priest can only possess four necessaries, namely, clothing, medicines, furniture and food. Reference was made to the case of *Ratnapala Unnanse vs Appuhamy* (4 N.L.R. 167). Though there is a reference to these four necessaries in the judgment of the District Judge in that case, the Supreme Court itself has not dealt with that point, but decided that case on other considerations.

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But whatever the position may be under the Buddhist law, our duty now is to construe the words of our Ordinance. The first point we have to consider is that section 23 excepts from the class of *pudgalika* property acquired by an individual *bhikkhu* for his exclusive personal use, property which has been inherited by that *bhikkhu*. It is clear therefore, that inherited property may be "property acquired for the exclusive personal use" of the *bhikkhu*. I think this exception cannot be reconciled with the argument for the appellants. It is difficult to understand how inherited property can be regarded as property intended for the personal enjoyment of the *bhikkhu*, in the sense contended for by the appellants. In fact inherited property comes to the *bhikkhu* apart from any intention on his own part to use it, or enjoy it. Nor do I think that we are driven to give to the word "use" the meaning of "user" or "enjoyment." The word "use" also bears the meaning of "benefit," and I think this is the more natural meaning to assign to it in this section.

The further argument is that we must give a meaning to every word in the section, and that the phrase "*pudgalika* property that is acquired by any *bhikkhu* for his exclusive personal use" must mean something more than property acquired by the priest for his own benefit, and that the words "exclusive" and "personal" are redundant. "*Pudgalika*," it is said, means "that which belongs to one person; personal property" (Clough's Dictionary), and the words "acquired for his exclusive personal use" must refer to user or enjoyment.

I note, however, that in Codrington's Glossary the word "*pudgalika*" is defined as follows: "Property belonging to individual monks, as opposed to *sanghika* or belonging to the priesthood." If we examined the words of section 20, we see a distinction drawn between offering for the use of the temple, and *pudgalika* offerings for the exclusive personal use of the individual *bhikkhu*. This appears to bring out the same point. It is possible that what the draftsman had in mind was a sharp difference between what was for the temple and what was for the individual monk, and that the phraseology "for his exclusive personal use" merely brought out that distinction emphatically. But even if that argument cannot be sustained, I think that the words "exclusive personal use." in section 23 cannot be regarded as tautology. In employing the words "personal use" I think the draftsman meant "for his own use." The further employment of the word "exclusive" brings in the meaning "and not for the benefit of someone else." I think it is not unreasonable to suppose that the draftsman had in his mind the fact that the *bhikkhu* may have property with which he is vested, but which he holds either as trustee or in some fiduciary capacity and not for himself alone, and intended that the temple should not succeed to such property. In that case the use of both words "exclusive" and "personal" was not unnecessary.

So far I have discussed this case apart from authorities, but I think some light is thrown on this by the case of *Reilly vs Booth* (Court of Appeal

1890; 44 Ch. D. 12; 62 Law Times 378). In that case by lease and release M and others conveyed to W a piece of freehold ground with a messuage thereon adjoining a covered gateway "together with the exclusive use of the said gateway." It was held that the conveyance to W passed the ownership of the gateway, and not merely an easement. Cotton, L.J. said "We must consider this as "intended to be not only 'exclusive,' that is excluding others, but a right to use this passage.....for any purpose which the law will allow, and which does not interfere with the rights of their neighbours. .....My view is that it is a conveyance really of the property in that passage which is as described." Lindley, L.J. said "It is said that we ought to construe the use of the gateway as the use of a way, and that it is a mere easement. That, to my mind, is to limit without sufficient warrant or justification the words used in the grant." Lopes, L.J. said "The exclusive use of the said gateway was given. The exclusive or unrestricted use of a piece of land, I take it, beyond all question passes the property or ownership in that land."

I think, in view of this judgment, it is only a small step for us to hold that, where the Ordinance employs the phrase "acquired for his exclusive personal use" in relationship to property, these words merely relate to the benefit and not for the benefit of any other person, and have no reference to the purpose for which the property is acquired, or to the manner in which the property is to be enjoyed, by the person acquiring it. "Use" may include "user" or "enjoyment," but it has a wider significance, namely, "benefit," and as I pointed out previously, the words "exclusive" and "personal" are not unnecessary or redundant. I think significance can be given to each word in the section.

I am of opinion that the argument for the appellants cannot be sustained. The appeal is dismissed with costs.

HEARNE, S.P.J.

I agree.

Appeal dismissed.

Proctors :—

E. P. Wijetunga, for respondents-appellants. (Sedaranhamy and Others)

N. Karunaratne, for petitioner-respondent. (Dhammadara Thero)

Present: SOERTSZ, A.C.J.

PELPOLA vs GOONESINHA

Application for revision of the bill of costs in S. C. No. 500 – Municipal Magistrate's Court No. 3.

Argued on 5th May, 1939.

Decided on 16th May, 1939.

Costs—Proceedings under sections 23 and 24 of the Colombo Municipal Council (Constitution) Ordinance (Chapter 194)—How should costs be taxed.

Held : That in the absence of any provision limiting costs in proceedings under sections 23 and 24 of the Colombo Municipal Council (Constitution) Ordinance the actual costs incurred by the successful party should be allowed.

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Soertsz, A.C.J.

Pelpola *vs* Goonesinha

N. Nadarajah with *S. Mahadeva*, for petitioner.

C. V. Ranawake with *D. D. Athulathmudali*, for respondent.

SOERTSZ, A.C.J.

This is a matter arising out of the taxation of the costs allowed by this court to an objector who successfully objected to the qualification of the respondent both in the Municipal Court and in this Court.

The order was that the respondent do pay to the petitioner the costs of the inquiry and of the appeal.

There is no special provision of law dealing with the taxation of costs in a matter of this kind, nor did the order of this Court fix costs or indicate any principle for their assessment. In this connection, I would venture to say that this is a matter for the attention of the legislature, and that in the meantime it is desirable that orders for costs in these matters should either fix a definite sum, or should, at least indicate some principle for their assessment. In this instance, the petitioner presented to the Registrar a bill for Rs. 1,132/01. The Registrar disallowed items aggregating Rs. 803/53 and taxed the bill at Rs. 328/48. He treated the matter as if it arose in the Court of Request class. This was quite an arbitrary method. The petitioner contends that it should have been treated as a matter falling within the highest District Court class, an equally arbitrary view.

Parties through Counsel appearing for them at the argument before me desired that I should examine the bill and fix such a sum for costs as I consider fair. Here again an element of arbitrariness is introduced, but there does not seem to be any other way out of the difficulty, and in view of the request made by Counsel, I address myself to this task.

In my opinion, the amounts shown to have been actually paid to Counsel in the Municipal Court and on appeal should have been allowed in their entirety. The certificates of the Counsel appearing in both courts are affixed to the bill and show that a sum of Rs. 220/50 and Rs. 338/50 were paid to Counsel in the Municipal and Appeal Courts respectively. The Registrar has nilled Rs. 147/– in one case and Rs. 304/50 in the other. Matters of this kind which involve the civic rights and duties of persons are matters of great importance to the parties concerned and also to the city, and I do not think it can be said that parties are acting extravagantly if they desire to be well represented by Counsel on occasions when those rights and duties are in question. There was nothing to debar them from being so represented. It would have been different if the legislature had fixed the costs recoverable. In such a contingency, if parties chose to incur heavier costs than those allowed by law, the excess expenditure was their affair. I, therefore, add Rs. 451/50 to the sum allowed by the Registrar.

I am also of opinion that the sum of Rs. 6/20 on account of stamps and for certified copies should not have been nilled. I add that sum too. That makes Rs. 457/70 which must be added to the sum of Rs. 328/48.

I, therefore, fix the costs payable in both courts at Rs. 786/18, and make no order for costs of this application.

Increased costs fixed.

Proctors :—

George A. Caldera, for petitioner. (Pelpola)

A. C. Abeywardene, for respondent. (Goonesinha)

Present: SOERTSZ, A.C.J. & KEUNEMAN, J.

DE SILVA vs NONA BABA AND OTHERS

S. C. No. 322/1939—*D. C. Galle No.* 36377.
Argued on 14th July, 1939.
Decided on 21st July, 1939.

Partition Ordinance (*Chapter* 56) *sections* 4 *and* 12—*Partition and sale of land subject to mortgage—Is the effect of section* 12 *to liberate the land and make the mortgage applicable to proceeds of sale—Is a mortgagee who intervenes in a partition action in respect of one of two mortgages of the same land barred from obtaining a hypothecary decree in respect of the other mortgage—Evidence Ordinance* (*Chapter* 11) *section* 115.

The plaintiff sought to recover a sum of Rs. 2,000/- due to him on a mortgage bond and to have the mortgaged premises sold in execution. The mortgaged land had before the plaintiff's action been partitioned and sold under section 4 of the Partition Ordinance (*Chapter* 56). The plaintiff had intervened as an interested party in the partition action, but in respect of another mortgage over the same land. He pleaded that he did not mention the mortgage in respect of which he brought the present action as he was then under the impression that it did not apply to the land sought to be partitioned.

The following objections, among others, were taken to the plaintiff's action by the purchasers at the partition sale who were made defendants to this action :

(*a*) that the plaintiff was barred from bringing this action as he made no mention of this mortgage when he intervened in the partition action;

(*b*) that the effect of section 12 of the Partition Ordinance (*Chapter* 56) was to make the mortgage applicable to the proceeds of sale and to liberate the land itself from the mortgage.

Held : (i) That the effect of sections 8 and 12 of the Partition Ordinance (*Chapter* 56) is to conserve a mortgage over the land whether it has been set up in the partition action or not.

(ii) That the fact that one mortgage was set up and the other not makes no difference.

(iii) That notwithstanding the sale of a land under partition decree, it is still to the land and not to the proceeds of sale that existing mortgages whether of the whole land or of shares of it attach.

H. V. Perera, K.C., with *P. A. Senaratne*, for the plaintiff-appellant.

L. A. Rajapakse, with *J. R. Jayewardene*, for the 5th to 9th, 11th to 13th, 16th and 18th defendants-respondents.

SOERTSZ, A.C.J.

In this case, the plaintiff sued the 1st to 4th defendants to recover a sum of Rs. 2,000/- due on a mortgage bond executed by them in his favour and he joined the 5th to the 19th defendants as parties to the action in order to obtain a hypothecary decree. Those defendants had purchased the mortgaged land, when it was sold in lots under a decree for sale entered under section 4 of the Partition Ordinance, subsequent to the mortgage.

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The 5th to the 19th defendants contended that: (1) because the plaintiff had intervened in the partition case and had claimed certain interests in respect of this land on another mortgage and had failed to set up a claim on this mortgage, he was barred from making the present claim for a hypothecary decree; (2) that the effect of section 12 of the Partition Ordinance in the case of a sale is to make the mortgage applicable to the proceeds of the sale and to liberate the land itself from the mortgage. It was further contended on their behalf that (3) there is no proof that the land sought to be made executable is the land mortgaged; (4) that there was no proof that the mortgage bond was properly registered. I mention (3) and (4) because they were advanced at the argument, but I do not think they merit serious consideration. The identity of the land is beyond question on the pleadings themselves, and so far as proper registration is concerned, I do not understand the case for the respondents. The appellant's deed is registered on the face of it. But Mr. Rajapakse argues that because there was an issue, " Has the plaintiff's bond been properly registered ? " the plaintiff was bound to prove that the deed was registered in the proper folio. Now, the question of proper folio is a comparative or relative matter and presupposes the existence of at least another folio, and in the absence of an allegation by the defendants-respondents that there is some other folio which is the right folio, I do not see how the question arises or how the appellant could have addressed himself to that issue.

In regard to the plea that the plaintiff is barred from setting up his present claim on the ground that he had failed to assert it when he intervened in the partition case and set up his other mortgage, the plaintiff's evidence is that he did not claim on this mortgage because he was under the impression that this mortgage did not affect the land sought to be partitioned. He was under a misapprehension as to the identity of the land sought to be partitioned in that case. But quite apart from his evidence on the point, I fail to see how it can be said that the matter was *res judicata* or that the plaintiff was estopped by virtue of section 115 of the Evidence Ordinance as it was argued he was.

For one thing, there was no adjudication on the question of this mortgage upon which a plea of *res judicata* could be based, and in regard to the argument that there was, in effect, a bar similar to the bar of *res judicata* because the plaintiff could have asserted his claim on this mortgage in the partition case and could have had the partition declared subject to the mortgage, the answer appears to be that he was under no legal obligation to set up the mortgage in the partition case. The effect of sections 8 and 12 of the Partition Ordinance is to conserve the mortgage, may be in a modified form, whether it had been set up or not. The fact that one mortgage was set up makes no difference as far as I can see. It might have been different if this mortgage had been asserted in the partition case and an adjudication obtained upon it that was adverse to the plaintiff.

In regard to the plea under section 115 of the Evidence Ordinance, I am afraid it was advanced in not too whole-hearted support of the finding of the trial Judge that the plaintiff was present at the sale under the Partition Ordinance and refrained from asserting his mortgage in the presence of the prospective purchasers. That finding is clearly not justified by the evidence. The plaintiff's uncontradicted testimony is that he was not present at that sale. The trial Judge appears to have gathered a wrong impression from the plaintiff's statement that *after the partition case* he took a mortgage of another lot of this land from a purchaser, and put that bond in suit and bought the lot himself. I do not know that it would have made a difference if the plaintiff had been present at the sale under the Partition Ordinance and has failed to notify his mortgage unless, of course, for some reason there was a legal obligation requiring him to speak. There is not one word of evidence on that point in the case nor is there any evidence that any of the defendants-respondents were misled by any " declaration, act or omission " on the part of the plaintiff, if indeed such evidence could have availed the defendants-respondents. Estoppel is a matter of evidence and cannot be established inferentially by means of large conjecture, and that was what the respondents' Counsel sought to do. It is on the grounds that the plaintiff was barred by the pleas of *res judicata* and estoppel that the trial Judge dismissed the action, but as I have pointed out both pleas fail.

The only matter left for consideration is what effect a sale under the Partition Ordinance has on existing mortgages. Counsel for the respondents sought to support the decree on the ground that by operation of section 12 the mortgage was extinguished. Some little difficulty is created by a certain divergence of views on this point. But after careful consideration, I am clearly of the opinion that, notwithstanding the sale, it is still to the land and not to the proceeds of sale that existing mortgages, whether of the whole land or of shares of it, attach. Section 12 of the Partition Ordinance makes that very clear. Counsel for the respondents conceded, as he had to concede, when he invoked in aid of his contention certain dicta in the case of *Silva vs Wijeyesinghe* (20 N.L.R. 147) that in the case of a mortgage of the entire land, the mortgage continued to attach to it, despite the partition or sale. In the case referred to, de Sampayo, J. with whom Wood Renton, C.J. was " disposed " to agree, said that " that main provision of this section (*i.e.* section 12 of the Partition Ordinance) *deals with a mortgage of the whole land* which is the subject of the action, and conserves the right of the mortgagee in such a case....." and that in the " *case of the mortgage of an undivided share* in the event of a sale in the partition action, the *right of the mortgagee will be confined to the proceeds of the sale.*" These were *obiter dicta* and were not necessary for the decision of that case, for the purchaser in execution under the mortgage was asking for a share of the proceeds of sale, and the only question submitted to the Court was whether the purchaser was entitled to be paid the value of the share allotted to the

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mortgagors under the decree or the value of the share mortgaged which was greater than the share allotted. Undoubtedly, the opinion of so eminent a Judge, although given *obiter*, must carry great weight, but if I may say so with the greatest possible respect, the reasoning by which de Sampayo, J. came to that opinion does not appear to me to be convincing. It is opposed to the view taken by Lawrie, A.C.J. and Withers, J. in *Fernando vs Silva* (2 Tamb. 111), when this question arose directly for decision. Lawrie, A.C.J. said "the purchaser appeals against a decree declaring the land bound and executable and urges that the mortgagee must look for payment from the price paid by the purchaser at the sale under the Ordinance for that, by that sale, he urged, he acquired the land free from encumbrance. I am of opinion that this plea cannot be sustained. The 12th section of the Partition Ordinance expressly provides that nothing in the Ordinance shall affect the right of any mortgagee, and I can see no good reason why the same share of the land mortgaged should not be sold in satisfaction of the mortgage." This case, although cited in the course of the argument in the case before Wood Renton, C.J. and de Sampayo, J., has not been noticed in the course of their judgments.

Again, in the case of *Abdul Hamidu vs Perera* (26 N.L.R. 433) Ennis, J. and Jayewardena, A.J. took a contrary view to that of de Sampayo, J. Ennis, A.C.J. said "it has been suggested in some cases that this rule (*i.e.* the rule in the substantive part of section 12 of the Partition Ordinance) applies only to mortgages of the whole land, and that it could not apply to preserve the rights of a mortgagee of a divided interest in the land. I am quite unable to entertain this argument because the section goes on with a proviso dealing with the rights of mortgagees of undivided shares." Ennis, A.C.J. added – and if I may say so, this additional argument concludes the question – "a proviso does not introduce new matter. It qualifies the substantive words of the enactment.....That being so, the very fact that the proviso in this section deals with the position of mortgagees of undivided shares shows conclusively that the rule itself covers *any* mortgagee of the land."

In a later case, that of *Godage vs Dias* (30 N.L.R. 100), Dalton, J. and Jayawardena, A.J. followed *Fernando vs Silva* and *Abdul Hamidu vs Perera*, and held that where land sold in partition proceedings was subject to a mortgage in respect of an undivided share, "the mortgagee can..... enforce his mortgage against 'the same share of the land mortgaged' or 'the share of the land.'" Dalton, J. added "these words I assume are intended to be an interpretation of the words 'the share in severalty allotted to the mortgagor.'"

An examination of section 12 of the Partition Ordinance satisfies me beyond any manner of doubt that both in the case of a mortgage of the whole land and in the case of a mortgage of an undivided share, on a sale in the partition action the mortgage attaches to the land or to some part

of it, and not to the proceeds of the sale. I cannot discover any sound principle on which a discrimination such as that suggested in *Silva vs Wijeyesinghe* can be justified. It would be to treat a mortgagee harshly indeed, to deprive him of his charge in the land and refer him to a fund which may disappear before he ever becomes aware of its existence. Sections 8 and 12 recognise this fact and leave mortgages substantially unaffected by proceedings under the Ordinance.

Mr. Rajapakse was obviously in difficulty and was driven to all sorts of expedients to support the judgment of the trial Judge and the view taken in *Silva vs Wijeyesinghe*. He suggested that the words ' or sale ' in the first line of the proviso should be struck out or ignored. He cited the comment made on page 255 of Jayewardena on *The Law of Partition* that " the inclusion of sales in the proviso is clearly a mistake." I fear that is too hasty an assumption. I always have great difficulty in accepting these cordial invitations to go tilting at legislative enactments, deeds and instruments, striking out a word here, putting in another there, in a happy-go-lucky manner. I have been too often told that every word must be assumed to have been used with a purpose, and must be given a meaning if it is at all possible to do so. When Counsel for the appellant in *Godage vs Dias* made a similar submission, Dalton, J. observed " Mr. Garvin argued that the words ' or sale ' where they appear can be given no meaning and that the section only applied to a partition, and the proviso had no application here. That is an easy solution which it seems to me it is impossible to adopt." I respectfully agree. I would add that, in my opinion, it will not avail the respondents in this case even if I strike out the words ' or sale ' from the proviso, for the substantive part of the section, with which Mr. Rajapakse confesses he has no quarrel at all, remains unimpaired and catches him up. As I have already pointed out, the main section applies to all mortgagees, the mortgagees of the whole land as well as to mortgagees of undivided shares. It provides that " nothing in this Ordinance contained shall affect the right of *any* mortgagee." The word ' any, ' occurring as it does, universalizes the category ' mortgagee, ' and if I may repeat myself in order to make clear what I wish to say, it is impossible with the word ' any ' placed as it is, to restrict that part of the section to mortgagees of the whole land as distinguished from mortgagees of shares of it.

The view I have formed is that this proviso is designed to modify the substantive part of the section and to adjust it to contingencies that must frequently arise in the course of proceedings under the Ordinance. The purpose of the Ordinance is to establish title finally and conclusively to the shares decreed to the parties. If this proviso had not been appended, the result would be that, in the event of a partition or sale, the mortgagee would be able to raise the question of what share his mortgagor is entitled to, despite the allotment under section 4, in order to give his mortgage as full an effect as possible, if in the allotment his mortgagor obtained less than he

had mortgaged. The proviso makes that impossible. It states that if at the time of a partition or sale, an undivided share only of the land shall be subject to a mortgage, the right of the mortgagee shall be limited to the share in severalty allotted to the mortgagor or his successor in title. The phrases 'share in severalty' and 'the owner of the share in severalty' need create no difficulty as it was suggested they did. They seem to recognise and emphasise the fact that on a decree being entered allotting shares to the parties with a view to ordering a partition or sale, the pre-existent co-ownership is at an end, and the shares thereafter are not shares in common but shares in severalty. From the time of the decree and order under section 4 of the Ordinance, the mortgagee may not look beyond the shares allotted to his mortgagor or to his mortgagor's successor in title. In other words, he is prevented from re-opening the decree for the purpose of his mortgage. The words 'limited to the share in severalty' appear to me to have been chosen with great care. They apply to cases in which a sale, as well as to cases in which a partition, is decreed. In either case, the mortgagee must realise his mortgage within the limits of the shares allotted in severalty to the mortgagor or his successor. If, for instance, in the event of a decree for partition, the mortgagor or his successor has been allotted a one-fourth and in respect of that one-fourth a definite lot is given to him, the mortgagee may sell only so much of that lot as his mortgagor had mortgaged. If the mortgagor had mortgaged a one-fourth and that share has been allotted to him in severalty, then the whole lot given to him in respect of that one-fourth is liable to be sold, but if the mortgagor had mortgaged only a one-eighth share and is allotted a one-fourth in the decree, the mortgagee may sell up only a half of the lot allotted to the mortgagor or his successor in respect of that one-fourth. If the mortgagor had mortgaged a fourth and he or his successor was allotted only an eighth, the mortgagee could obtain a hypothecary decree only in respect of the lot given to his mortgagor or his successor in respect of that one-eighth. For the rest, he has only a claim for money due on the bond. Similarly, in the case of a sale, the mortgagee will be able to assert against a purchaser his mortgage within the limits of the share allotted to the mortgagor or his successor. By way of illustration again, if the mortgagor had mortgaged a fourth, and in the decree ordering a sale he or his successor was allotted a fourth, then the mortgage would attach to a fourth of the whole land in the case of a purchaser of the whole land, or to a fourth of each lot if the land had been sold in lots to different purchasers. The position would be the same in the other cases considered by me in connection with a decree for partition. Difficulties such as arose in the case of *Godage vs Dias* can occur only in exceptional circumstances such as existed in that case where, in view of the fact that the mortgagor had mortgaged an undivided half-share of two lots of the land partitioned as well as of another land, an inquiry seemed necessary to ascertain what proportion of the whole land partitioned, an undivided half share of lots 2 and 3 represented, and the case was remitted for that purpose. But such

difficulties are susceptible of more or less easy solution. At any rate, they cannot affect the interpretation of section 12.

One other matter has been submitted for consideration, and that is the absence of the words ' or sale ' after the word ' partition ' in the last part of the proviso. Much stress was laid on this absence, but it is not at all clear to me how respondents' Counsel sought to profit by this ' omission ' which he said was significant. To say that this is an omission is, I think, to beg the question. As I read section 12, the words ' or sale ' after the word ' partition ' would be pure redundancy, or perhaps I should say quite out of place. The words ' after such partition ' connote the whole future measured from the point of time at which the decree or order under section 4 is entered. The words ' such partition ' refer to that order or decree by which the common ownership is terminated, and a partition into shares in severalty is effected for the purpose either of a partition or of a sale. The proviso enacts that from that time the mortgage holds good and attaches to the share in severalty till it is discharged – sale or no sale. The first part of the proviso appears to deal with an allottment in severalty to the mortgagor himself. The second part of the proviso brings within its scope the case of a successor in title as well as the case of a purchaser at the partition sale, and it provides that in each of those cases the mortgage attaches to the share in severalty after the severance under section 4 till it is discharged and that, in respect of that share in severalty, *the mortgagor* is bound by and under the same conditions, covenants, reservations as shall be stipulated in the *mortgage bond* so far as the same shall apply to a share in severalty ; and the *owner of the share* in severalty so subject to mortgage *shall*, without *a new deed* of mortgage, warrant and make good to the mortgagor the said several part. Examined in this way, section 12 is seen to be a complete and logical adjustment of existing mortgages to the scheme of the Ordinance, and I do not find in it one word too many or too few.

For these reasons, the appeal in this case is entitled to succeed. I set aside the judgment of the District Judge and direct that decree be entered as prayed for in the petition of appeal. The appellant will have costs here and below.

KEUNEMAN, J.

The plaintiff brought this action to recover from the 1st to the 4th defendants a sum of Rs. 2,000/– being principal and interest due on mortgage bond No. 972 of 15th November, 1927. The 5th to the 19th defendants were joined as parties to be bound by the hypothecary decree, which the plaintiff claimed *inter alia* over 5/192 of the property Wela Adderawatta alias Wetakeiyagahawatta which had been broken up into several blocks and sold to the 5th to the 19th defendants. The sale in blocks was under a decree for sale in partition action D.C. Galle No. 30989.

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At the trial the following issues were framed :—

1. Are the purchasers under the partition sale bound by the mortgage in plaintiff's favour ?
2. Is the plaintiff estopped from claiming hypothecary decree in regard to this land in view of the fact that he was a defendant in the partition case and did not disclose this mortgage bond in his answer ?
3. Has the plaintiff's bond been properly registered ?
4. Should the plaintiff be restricted to the proceeds of sale in any event ?

The learned District Judge entered judgment in favour of the plaintiff against the 1st to the 4th defendants, but held that the premises in question sold to the 5th to the 19th defendants were not subject to the mortgage, and ordered the plaintiff to pay the costs of these defendants. The plaintiff appeals.

The District Judge gave two reasons for his decision. He held that the present plaintiff had been a party (the 100th defendant) in the partition proceedings D.C. Galle No. 30989 and had filed answer disclosing another bond No. 32625 of 23rd September, 1930, whereby 9/20 of a certain house standing on the premises in question and the soil covered thereby had been mortgaged to him. He further held that the present plaintiff had appeared at the sale in the partition case and purchased some of the properties at that sale. The District Judge appears to have thought that these grounds constituted an estoppel.

I may say that the second ground mentioned is not in accordance with the facts as disclosed in the evidence, and appears to have been based on a misunderstanding. All that the present plaintiff admitted was that after the sale in the partition case he took a mortgage of another lot of the land in question from the purchaser at the partition sale, and subsequently put the bond in suit and purchased that lot himself. The plaintiff stated that he was not present at the sale in the partition case.

As regards the first ground mentioned by the District Judge, it is certainly the case that the present plaintiff was the 100th defendant in the partition case, and that he filed answer putting forward a claim based upon the bond No. 32625 above-mentioned, and did not claim under the bond now sued upon. The plaintiff has offered an explanation for doing so, but in any event is he precluded from suing on the bond now in question ?

It was not contended before us that section 34 of the Civil Procedure Code had any application to the present case, and I do not think that section applied here. No doubt it was open to the present plaintiff or to the other parties to that partition action to raise the question whether the present bond had any effect or not, and had such question been raised and decided, the matter may have been *res judicata*. I do not think, however, there was any obligation on the part of the present plaintiff to claim upon the bond now in question. Now, under section 8 of the Partition Ordinance, the Commissioner for sale is required to put the premises up for sale " subject

to any mortgage or other charges or incumbrances which may be on the same," and section 12 provides that " nothing in this Ordinance contained shall affect the right of any mortgage of the land which is the subject of the partition of sale." I think it follows from these sections that any mortgage, which has not been excluded in consequence of a finding in the partition case, must be regarded as having force and effect in spite of the partition or sale.

The further argument was addressed to us that in any event the mortgage now in question must be regarded as binding upon the proceeds of sale, and not upon the property in the hands of the purchasers. It is true that the decisions of this court are not all in accord. I am, however, with respect in agreement with the decisions in *Abdul Hamidu vs Perera* (26 N.L.R. 433) and *Godage vs Dias* (30 N.L.R. 100) that section 12 protects not only mortgages of the whole land but also mortgages of undivided interest in the land. There is no need to repeat the arguments in those cases. The real difficulty appears to arise in the application of the proviso, namely, " if.....an undivided share only of the land, and not the whole thereof, shall be subject to mortgage, the right of the mortgagee shall be limited to the share in severalty allotted to his mortgagor." At one time I thought that the phrase " share in severalty " could only apply to a divided portion of the land, but on consideration I do not think that the words " in severalty " are equivalent to " divided," and I agree with the suggestion of the Acting Chief Justice that in the case of a sale these words may be applied to the share allotted to the mortgagor under the preliminary decree. It is to be noted that under section 4 if the defendants make default, the Court will inquire into the extent of the " respective shares and interests," and when the defendants appear and raise disputes, the Court will inquire into their " several shares and interests." " Several " is not used here in the sense of " divided." It is also the case that although the provision to section 12 uses the words " undivided share " in connection with the mortgage, it limits the mortgagee to the " share in severalty " allotted to the mortgage. If the mortgagee is to be restricted to a " divided share," it would be natural to use the word " divided " and not " in severalty." Further, when the divided share is specifically referred to in the last words of the proviso, it is described as " the several part." The distinction between " several share " and " several part " is significant. I think therefore that the " share in severalty " may be, in the case of a sale, taken to mean the share allotted to the mortgagor in the preliminary decree under section 4, and that the mortgage is preserved by section 12 up to that extent, even as against the purchaser at the subsequent sale.

I agree with the order made by the Acting Chief Justice.

Appeal allowed.

Proctors :—

P. B. de Silva for plaintiff-appellant (De Silva.)

E. Abeywickrema for defendants-respondents (Nona Baba and Others.)

Present: SOERTSZ, A.C.J.

WIJESINGHE (Inspector, C.I.D.) vs MATHER

S. C. No. 354/1939—The Magistrate's Court, Colombo, No. 35947.
Argued on 21st and 24th July, 1939.
Decided on 28th July, 1939.

Courts Ordinance (Chapter 6) section 37—Criminal Procedure Code (Chapter 16) sections 347 and 348—Right of Appeal Court to hear the evidence for the defence in a case where it sets aside an order of the Magistrate discharging the accused at the close of the prosecution case.

Held : That the Appeal Court has the right under section 37 of the Courts Ordinance (*Chapter 6*) and sections 347 and 348 of the Criminal Procedure Code (*Chapter 16*) to hear the evidence that the defence may wish to lead in a case in which the Appeal Court sets aside the order of the Magistrate discharging the accused at the close of the prosecution case.

J. W. R. Ilangakoon, K.C., Attorney-General, with *D. Jansze, Crown Counsel,* for the complainant-appellant.

H. V. Perera, K.C., with *J. E. M. Obeyesekere, E. G. N. Gratiaen* and *H. W. Thambyah,* for the accused-respondent.

SOERTSZ, A.C.J.

I have examined the evidence in this case very carefully, and I have anxiously considered the submissions made to me on the law and on the facts by Counsel for the accused-respondent, and I have come to the conclusion that a *prima facie* case has been established by the complainant against the accused on the alternative charges 3 and/or 4 as amended on the 18th of April, 1939.

As the learned Magistrate acquitted the accused without calling for his defence, he had no opportunity of placing any evidence before the Court on his behalf.

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

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

I therefore set aside the order of acquittal and call upon the accused for his defence on charges 3 and/or 4.

Let this case be called at 11 a.m. on the 31st of July, 1939, for Counsel to inform me whether the accused proposes to lead evidence or/and make further submissions in regard to those charges, and for a date to be fixed for that purpose.

Argued on 8th August, 1939.
Decided on 10th August, 1939.

SOERTSZ, A.C.J.

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

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

Sections 347 and 348 of the Criminal Procedure Code provide the various orders that an Appeal Court may make in an appeal from an acquittal or conviction, and give it a wide discretion in regard to the calling for or procuring of any additional or supplementary evidence that it thinks to be necessary for disposing of the case. It may itself take the additional evidence it deems necessary, or it may direct some other judicial officer to take it and transmit it with his opinion on it, or it may remit the case for further inquiry with a view to committing it for trial or for a re-trial. As Wallace, J. observed in the case of *Narayana Menon* (Criminal Law Journal Report Vol. 25 p. 401) to which the learned Attorney-General referred me " whether the proper course is a re-trial or taking further evidence is a matter of discretion – the discretion of the Court apart from what the appellant or the prosecution may desire." Mr. Perera contended that there is inherent in these sections a limitation of the evidence that may be taken by virtue of them and he submits that it is only such evidence that an Appeal Court is entitled to *require* to be taken, that it may call for and take under these sections, and not such evidence as may be at the option of a party to tender or not. In the Indian case just referred to, Odgers, J. commented on a similar submission made in that case as follows, " it will be observed that in neither of the cases just mentioned is it stated or even suggested that section 428 (i.e. the Indian equivalent of our section 348) is confined to supplying proof of the prosecution case. On the other hand, the learned Prosecutor draws our attention to several recent cases of this

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

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

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

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

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

Order confirmed.

Present : SOERTSZ, A.C.J., HEARNE, S.P.J. & CANNON, J.

THE KING vs ABRAHAM APPUHAMY *alias* ASSON

In the matter of a case stated by the Attorney-General in terms of section 355 (3) *of the Criminal Procedure Code in S. C.* 89—*M. C. Avisawella No.* 17610.

Argued on 27th July, 1939.

Decided on 4th August, 1939.

Case stated—Criminal Procedure Code (*Chapter* 16) *section* 353 (3)—*Trial by jury—Indictment for murder—Plea of insanity—Burden of proving insanity—Nature and extent of proof necessary—Sufficiency of judge's directions to the jury.*

The prisoner was tried on the 5th of May, 1939 before the Honourable Mr. O. L. de Kretser and an English speaking jury on an indictment charging him with having committed murder by causing the death of one Heras Singho alias Entappu. The defence set up on behalf of the prisoner was one of insanity.

By a unanimous verdict the jury found the prisoner guilty of culpable homicide not amounting to murder, upon which he was convicted and senteneed to a term of ten years' rigorous imprisonment.

Thereupon Counsel for the prisoner (Mr. Chandrasena) made an application to the trial judge to state a case for the further consideration by the Supreme Court on the following grounds:

(i) That His Lordship was wrong in not permitting the defence to elicit from the Medical Officer in the witness-box (who had the prisoner under observation), certain expressions or statements made by the prisoner to the witness and which formed the foundation for the opinion expressed by him.

(ii) That His Lordship failed to give proper directions to the jury as to the nature and extent of the evidence necessary to support a plea of insanity.

His Lordship refused the application whereupon Counsel for the prisoner petitioned the Attorney-General to state a case under section 353 (3) of the Criminal Procedure Code for the further consideration of the aforesaid points by the Supreme Court.

The Attorney-General submitted for the determination of the Supreme Court the question whether the charge to the jury contained in the following passages amounted to a sufficient direction as to the burden which lay on the accused to establish his defence of insanity :—

(*a*) " It is therefore only if a person is proved not to know the nature of the act or not to know that it is wrong or contrary to law that he is treated as a lunatic, and the law states that although he did it, he is not responsible."

(*b*) " If you think he knew that the knife was open and deliberately caused the injury, whether he intended death or not, it would be *prima facie* murder. If you are satisfied on the medical evidence and other evidence that the accused did not know what he was doing, or that it was wrong or contrary to law, you will not find him guilty, but you will find that he committed the act."

(*c*) " The question is whether on that evidence you can hold that he was of unsound mind."

(*d*) " Do you think putting those things together he must have been mad at the time he committed this act, that he did not know what he was doing."

(*e*) " It is murder if you are satisfied that the man intentionally caused the injury and was not of unsound mind, or it is at least hurt if you think he

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intended and used his fist or closed knife and did not know that he was using an open knife. In either case if you think he was of unsound mind, then your verdict will be that he committed the act but not guilty by reason of unsoundness of mind."

(*f*) "If he was not of sound mind — if he did not know the nature of the act or that it was wrong or contrary to law, then you acquit him, but you will also bring in a finding that he committed the act. If you find that he was of sound mind, then your finding should be murder or culpable homicide not amounting to murder."

Finally, the learned Judge went on to say —

"Accused does not come before you innocent in the sense that he is not proved to have committed the offence. The only question is what is the actual offence he has committed if he was of sound mind and (2) was he of sound mind or not? As between those matters you will remember always that an accused person is always given the benefit of any reasonable doubt — as between any two situations, if there is a reasonable doubt — a doubt which appeals to your commonsense, you will give the benefit of the doubt to the accused."

Held : (i) That the charge on the whole was a correct and sufficient direction on what constitutes insanity in the eye of the law.

(ii) That the burden of proving insanity as a defence to a criminal charge is on the accused, who must prove to the satisfaction of the jury that he was of unsound mind.

(iii) That if the issue of insanity was left in doubt, the defence failed.

Per SOERTSZ, A.C.J. "So far as English Common Law offences are concerned, the general rule is that an accused need not prove his innocence. It is sufficient for him to create a reasonable doubt as to the truth of the case for the prosecution. But the defence of insanity occupies an exceptional position, and the prisoner must, in the words of Rolfe B. 'prove his innocence' by proving his insanity. If he only involves that issue in doubt, he fails. The position in our law is not different. Section 105 of the Evidence Ordinance makes that clear."

H. V. Perera, K.C., with *E. A. P. Wijeyeratne* and *H. A. Chandrasena*, for the prisoner.

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

SOERTSZ, A.C.J.

This is a case stated by the Attorney-General under section 353 (3) of the Criminal Procedure Code. The question submitted to us for decision is whether or not, the trial Judge's charge to the Jury empanelled in this case, contained a sufficient direction in regard to the nature and extent of the burden of proof which the law imposed on a prisoner on whose behalf the defence of insanity is set up.

Mr. H. V. Perera who appeared for the prisoner, submitted to us that there was misdirection because, at several stages of his charge, the learned Judge told the Jury that the prisoner must *prove* that he did not know the nature of the act or that it was wrong or contrary to law; that the Jury "must be *satisfied* on the medical evidence and the other evidence that the accused did not know what he was doing or that it was wrong or contrary to law."

Counsel contended that these and similar directions in the charge were calculated to create in the minds of the jurors the impression that the accused was bound to prove his insanity by establishing that he did not know the nature of his act or that it was wrong or contrary to law, whereas, he submitted, in point of fact, the burden imposed by law on the prisoner was no greater than to raise a reasonable doubt in the minds of the Jury as to his sanity. In other words, the contention was that in regard to the burden of proof, the position in a case of this kind, was not different from that in other criminal cases, and that if at the end of and on the whole of the case there is a reasonable doubt created by the evidence given by either the prosecution or the prisoner as to the guilt of the prisoner, the prosecution has not made out the case, and the prisoner is entitled to a verdict in his favour. That is, undoubtedly, the general principle of English Law, reaffirmed by the House of Lords in the remarkable case of *Woolmington vs The Director of Public Prosecutions* (1935 ; App. Cases 462). But, it is a question whether in view of Chapter IX of our Evidence Ordinance, particularly of section 105, our law is the same as the law of England. Section 105 of the Evidence Ordinance enacts that " when a person is accused of any offence, the burden of *proving* the existence of circumstances bringing the case within any of the *general exceptions* in the Ceylon Penal Code, or within any *special exception or provision* contained in any other part of the same Code, or in any law defining the offence, is upon him *and the Court shall presume the absence of such circumstances.*" These are very clear words, and can only mean that so far as our criminal law is concerned, the position is exactly the same whether the defence is "insanity" or "accident," to adduce two instances from among the general exceptions in the Penal Code, or "culpable homicide not amounting to murder" by virtue of the special exceptions created by section 294 of the Code, to take an instance from outside the general exceptions. In each of these cases, the accused must *prove* that he is within the exception or proviso. Section 3 of the Evidence Ordinance defines the word prove for the purpose of that Ordinance. It says that " a fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists." In that view of the matter, it would appear that where any of these exceptions or provisos are set up, the defence is not proved if "the circumstances bringing the case within" any of the exceptions are involved in doubt. Our Courts have, however, as a rule, guided themselves in accordance with the principle stated in *Woolmington vs The Director of Public Prosecutions*, and no occasion arises in this case, to pursue that matter any further.

In this case, we are only concerned with the question of the burden of proof and the extent of that burden where the defence is one of insanity. In regard to this defence, the English Law is very clear. When this question arose in 1843 in M'Naughten's case, and the Judges were asked to rule upon

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it, they declared that " in all cases every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their (the Jury's) *satisfaction*, and that to establish a defence on the *ground* of insanity, *it must be clearly proved* that at the time of committing the act.....the accused did not know the nature and quality of the act he was doing, or if he did know it, he did not know that he was doing what was wrong." That is the rule which the Courts in England have acted upon ever since. In *Rex vs Stokes* (1848 ; 3 C. & K. 185), Rolfe B. said in the course of his charge to the Jury " if a prisoner seeks to excuse himself upon the plea of insanity, *it is for him to make it clear* that he was insane at the time of committing the offence charged. The onus rests on him, and the Jury *must be satisfied* that he actually was insane. *If the matter be left in doubt, it will be their duty to convict him*, for every man must be presumed to be responsible for his acts till the contrary is *clearly shown*." The learned Baron referred to a case that came before Alderson B. where the Jury hesitated as to their verdict, on the ground that they were not satisfied whether the prisoner was or was not of unsound mind when he committed the crime, and that learned Judge told them that *unless they were satisfied* of his insanity, it would be their duty to find a verdict of guilty. In *Rex vs Townley* (1863 ; 3 F. & F. 839), Martin B. directed the Jury that " unless they were satisfied—and it was for them *to make it out*—that he did not know the consequences of his act, or that it was against the law of God and man, and would subject him to punishment, he was guilty of murder." Again in *Rex vs Layton* (1849 ; 4 Cox, 149), Rolfe B. reiterated the views he expressed in *Rex vs Stokes* and observed that in cases of this kind there was " one cardinal rule which should never be departed from, namely that *the burden* of proving innocence rested on the accused and that the question was not whether the prisoner was of sound mind, but *whether he had made out to their satisfaction* that he was not of sound mind." It is unnecessary to multiply instances. There is the very definite pronouncement by the House of Lords in *Woolmington vs The Director of Public Prosecutions*, that " M'Naughten's case stands by itself. It is the famous pronouncement of the law bearing on the question of insanity in cases of murder. *It is quite exceptional* .....In M'Naughten's case, the onus is definitely and exceptionally placed upon the accused to *establish* such a defence." Lord Sankey refers to the case of *Rex vs Oliver Smith* (1910 ; 6 Cr. App. 19), where it is said that " the only general rule that can be laid down as to the evidence in such a case is that insanity, if relied upon as a defence, *must be established by the defendant*." In the earlier case of Joseph Edward Flavell (1926 ; 19 Cr. App. 141), Sankey, J. as he then was, stated in the Court of Criminal Appeal that " the defence raised at the trial of the applicant was that of insanity *the burden of proving which lay on the defence*." Section 77 of the Ceylon Penal Code is a condensed reproduction of the rule in M'Naughten's case, and in view of section 105 of our Evidence Ordinance, there can be no doubt that the burden of proving insanity is on the prisoner.

So far as English decisions go, this principle has been enunciated in different ways, but the principle itself has never been called in question judicially. In the words of the Judges in M'Naughten's case, insanity must be "clearly proved," " proved to their satisfaction " (*i.e.* of the Jury), or as Rolfe B. stated it is for the prisoner " to make it clear," " the Jury must be satisfied," " the burden of proving innocence rested on the accused." Counsel for the prisoner.....relied on the recent case of *Rex vs Sodeman* (1936) 2 A.E.R. 1138 (P.C.) in which Hailsham L.C. put the matter in a different way. He said " the other point is that the trial Judge in directing the Jury as to the burden of proof.....went on to say that the burden of proof in a case of insanity rested upon the accused, and the suggestion made by the petitioner was that the Jury may have been misled by the Judge's language into the impression that the burden of proof resting on the accused to prove insanity is as heavy as the burden of proof resting upon the prosecution to prove the facts which they have to establish. In fact, there is no doubt that the burden of proof for the defence is not so onerous. It has not been very definitely defined.....It is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated to be no higher than the burden which rests upon a plaintiff or defendant in civil proceedings." This, no doubt, is less compendious, less direct language than the language used in the earlier cases, but it brings us in the end to the same point, and that is that if the issue is left in doubt, the prisoner must fail. In civil proceeding the burden remains throughout the entire case where the pleadings originally place it. It never shifts. The burden of adducing evidence constantly shifts. But in regard to the burden of proof, " the party whether plaintiff or defendant, who substantially asserts the affirmative of the issue has the burden of proof. It is on him at the beginning of the case, it continues on him throughout the case ; and when the evidence by whomsoever introduced is all in, if he has not by the preponderance of evidence required by law *established* his position or claim, the decision of the tribunal must be adverse." It is, I think clear, that the Lord Chancellor said what was said in the earlier cases but in a circumlocutory manner. If Counsel's suggestion was that this case is authority for saying that it is sufficient for a prisoner to throw doubt on his sanity, I cannot entertain that suggestion. In the case before him the Lord Chancellor was face to face with M'Naughten's case, for an attempt was made to obtain a reconsideration of the rules laid down there by pleading that " uncontrollable impulse " was a good ground for exculpation. He unhesitatingly rejected that contention, upheld the prevalent view, and went on to consider " the other point," that is the burden of proof. On that point, the Judges in M'Naughten's case had laid down, as I have already pointed out, that insanity *must be proved to the Jury's satisfaction*, that *it must be clearly proved*, and it cannot in my view, be supposed that Lord Hailsham meant to depart from that interpretation when he expressed himself as he did.

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The Attorney-General to whom we are indebted for such assistance in this case referred to *Cant vs Alexander Hailey & Sons Ltd.*, a note of which appears in the Criminal Law Journal of October 1838 at pages 555 *et seq.* (the report itself is not available here). In that case du Parcq, J. adverted to the difference between "proof beyond all reasonable doubt" and "proof," and he said the burden of proof on the prosecution in a criminal case was to prove beyond all reasonable doubt, while the burden of proof in a civil case was to prove. I cannot help feeling that some confusion of thought has been created by a not too precise use of words. Although the phrase " to prove beyond reasonable doubt " has become inveterate in the language of the Courts, logically this discrimination between "prove beyond reasonable doubt," and "prove" seems no more defensible than it would be to speak of a squarer square or a rounder circle, or in Rupert Brooke's phrase of "wetter water, similar slime." The word "prove" involves the idea of placing beyond reasonable doubt, and to speak of proving beyond reasonable doubt has the sound of tautology. The phrase is not intended to convey the idea that there is a difference of meaning between it and the word " prove " but to make it clear that so far as the case for the prosecution in a criminal trial is concerned, it will not suffice for it to make out a case of grave suspicion against an accused person ; it must establish its case by eliminating all reasonable doubts ; in other words it must prove its case, and so long as there is a reasonable doubt left, there is no proof. The phrase " to prove beyond reasonable doubt" is explanatory of the meaning of the word "prove". As du Parcq, J. went on to observe "prove" meant "prove, no more and no less, where the matter is left in a state of doubt the defence was not proved." It must, however, be borne in mind that du Parcq, J. was speaking with reference to a statutory offence in regard to which the prisoner had to exculpate himself. So far as English Common Law offences are concerned, the general rule is that an accused need not prove his innocence. It is sufficient for him to create a reasonable doubt as to the truth of the case for the prosecution. But the defence of insanity occupies an exceptional position, and the prisoner must, in the words of Rolfe B. "prove his innocence" by proving his insanity. If he only involves that issue in doubt, he fails. The position in our law is not different. Section 105 of the Evidence Ordinance makes that clear.

The question in regard to the test to be applied to determine insanity, namely whether the prisoner knew the nature of his act or that it was wrong or contrary to law, was not disputed at the argument before us. But the case stated appears to ask for our decision on the sufficiency of the charge as a whole. I would, therefore, rule that the learned trial Judge directed the Jury correctly and sufficiently on what constitutes insanity in the eye of the law.

I would also rule that it was an incorrect direction when the Judge said to the Jury " was he of unsound mind or not. As between these matters, you will remember always that an accused person is always given the benefit

of any reasonable doubt. As between any two situations, if there is a reasonable doubt, a doubt which appeals to your commonsense, you will give the benefit of the doubt to the accused." The correct direction would have been that if the issue of insanity was left in doubt, the defence failed. In earlier parts of his charge, the trial Judge had correctly stated that the prisoner must prove, must satisfy the Jury, but the passage I have quoted occurs in the concluding part of the charge and qualifies the whole of it. But, the misdirection I have referred to was unduly favourable to the prisoner, and it is of no consequence in this case in view of the verdict that was returned.

There is one other matter I would refer to, and I refer to it because Counsel for the prisoner repeatedly called our attention to it, and that is the observation made by the learned Judge in the course of his charge, that if the prisoner " is not guilty because of unsoundness of mind, the case will be reported to the Governor, and the man will be treated as a criminal lunatic and he stands the chance of ' being locked up for life' " Counsel for the prisoner submits that the Jury may have been influenced by this remark to return the verdict they did, rather than return a verdict of not guilty by reason of unsoundness of mind lest the prisoner " be locked up for life."

In my opinion, it is desirable that we should refrain from expressions as vivid and cogent as that, although in view of the nature of the verdict to be returned in cases of this kind—not guilty, but committed the act—there can be no objection to Juries being acquainted with the fact that such a verdict does not mean that the prisoner is set free.

HEARNE, S.P.J.

I agree.

CANNON, J.

I agree.

Present : SOERTSZ, A.C.J. & KEUNEMAN, J.

UPASAKAPPU vs DIAS & ANOTHER

S. C. No. 290/1938 (*Final*)—*D. C. Galle No.* 36634.

Argued on 12th July, 1939.

Decided on 20th July, 1939.

Fideicommissum inter vivos—*Gift to six persons—Death of four—Accrual—Conveyance in favour of her husband by one of the two surviving donees—Death of such donee without children—Does such conveyance pass title to the husband or does such interests pass to the last survivor and his heirs*—Jus accrescendi.

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Soertsz, A.C.J.

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A deed of gift contained the following declaration : " As I have adopted the late Daniel James Dias.....from his infancy as a beloved child of mine, I do hereby gift of my free will and pleasure unto the girl called Alice, the boy called Richard, the boy called Stewart, the girl called Ellen, the boy called Arthur, the boy called Victor, his six children by his married wife.....to have and to hold in equal rights (*ekka hateeata*) and to inherit by their descendants, children and grandchildren (*ohoogeng pevate.me dharoo munupuroo aadeenta*) for ever according to law, enacting that the said.....(*i.e.* Daniel's wife) do live there during her lifetime, and that the said interests shall not be mortgaged, alienated or transferred to any outsider."

Of the six aforesaid children four died unmarried and issueless. As admittedly the deed is one creating a *fideicommissum inter vivos* their rights accrued to the two surviving children, *viz :* Ellen and Stewart. Ellen too died issueless, but leaving a husband (the plaintiff) to whom she had conveyed her interests under this deed of gift. Stewart having died shortly after Ellen, his children disputed the plaintiff's title on the ground that, on the death of Ellen, Stewart succeeded to her interests and passed them to his children on the principle of *jus accrescendi.*

Held : (i) That claims to property based on the "*jus accrescendi*" would be accepted or rejected as would best give effect to the testator's intention.

(ii) That the terms of the deed indicated that the intention of the donor was to create one *fideicommissum* and not six *fideicommissa.*

(iii) That as the deed in question created one *fideicommissum,* on the death of Ellen, Stewart succeeded to her interests which he passed to his heirs.

H. V. Perera, K.C., with *E. B. Wickramanayake* and *H. A. Chandrasena* for the 2nd and 3rd defendants-appellants.

N. Nadarajah, for the plaintiff-respondent.

SOERTSZ, A.C.J.

In the year 1877, Angenetta Tenekoon made a deed of gift in which she declared as follows; " As I have adopted the late Daniel James Dias..... from his infancy as a beloved child of mine, I do hereby gift of my free will and pleasure unto the girl called Alice, the boy called Richard, the boy called Stewart, the girl called Ellen, the boy called Arthur, the boy called Victor, his six children by his married wife.....to have and to hold in equal rights (*ekka hateeata*) and to inherit by their descendants, children and grandchildren (*ohoongeng pevatenne dharoo munupuroo aadeenta*) for ever according to law, enacting that the said.....(*i.e.* Daniel's wife) do live there during her lifetime, and that the said interests shall not be mortgaged, alienated or transferred to any outsider." It is not disputed that this deed created a *fideicommissum inter vivos.* The only question is whether four of the six children having died without marriage or issue, and their rights having accrued to the surviving children, Ellen and Stewart, a conveyance by Ellen who died childless, to the plaintiff her husband, was a conveyance that passed title to him that endured to him after her death or whether on her death, Stewart, who survived her, succeeded to her interests and passed them to his children and the 2nd and 3rd defendants, when he himself died a short time after Ellen. The answer to that question depends

on whether the deed of gift created six different *fideicommissa*, or only one, for in the former case, there being no children born to Ellen, her share was unaffected by any substitution, while in the latter case, on her death, her share passed to the other donees and their children, grandchildren etc., in whose favour there was substitution.

In the case of *Tillekeratne vs Abeyesekere* (2 N.L.R. 313), the Privy Council examined a testamentary bequest couched in similar terms and Lord Watson who delivered the opinion of the Council said " the conflicting claims depend not upon any disputed principle of the Roman-Dutch Law (he was referring to the *jus accrescendi*), but upon the construction of that part of the will which regulates the destination " of the property. " If the will constitutes three *fideicommissa*," one result will follow ; if " on the other hand, the entire moiety was the subject of one *fideicommissum*," the result would be different. Their Lordships came to the conclusion that the case before them was the case of one single *fideicommissum* because " the bequest is not in the form of a disposition of one-third share of the whole to each of the institutes, *out of a gift of the whole to the three institutes jointly* with benefit of survivorship, and with substitution of their descendants."

When this question again arose in our Courts twenty years later in connection with a *fideicommissum* created by a deed *inter vivos*, Bertram, C.J. declared that he reserved his opinion " whether so far as relates to the *jus accrescendi* — that is how he expressed himself — there is any substantial difference between testamentary *fideicommissa* and *fideicommissa* constituted by instrument *inter vivos*," and Shaw, J. who sat with him said " In *Carry vs Carry* (4 C.W.R. 50) and *Ayamperumal vs Meeyan* (4 C.W.R. 182) this Court held the *jus accrescendi* to apply in cases of *fideicommissa* constituted by gifts *inter vivos* on the ground that the language used by the donor showed an intention to that effect. I was a party to the latter decision and expressed a doubt whether a similar rule of construction applied in the case of a donation *inter vivos* as applied in the case of a will ; but I did not, and do not now, doubt that *a right of accrual* may exist in either case, when the language of the donor or testator expresses such an intention." I should prefer not to express myself quite in that manner. It is not really a question of the *jus accrescendi* applying in these cases, but a similar result being achieved by an express declaration on the part of the testator or donor, or by an intention clearly to be inferred, that he desired the property to devolve in that manner. The *jus accrescendi* was a rule of the Roman Law by which among co-heirs in testamentary succession or among co-legatees there is a right of accretion, so that if one of them cannot or will not take his portion, it falls to other heirs to the exclusion of heirs at law. This rule was evolved in deference to the Roman horror of dying partly testate and partly intestate, but the Roman-Dutch Law adopted that rule to the extent of saying that in no case had it automatic operation, but that it would be accepted or

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rejected as would best give effect to the testator's intention. The point, however, is that in that case Bertram, C.J. and Shaw, J. inclined to the view that either a testator or a donor could provide for such a result.

Finally in the case of *Carlinahamy vs Juanis* (26 N.L.R. 129), the majority of a Divisional Bench held that the principle enunciated in *Tillekeratne vs Abeyesekere* was not confined to testamentary *fideicommissa* but applied equally to *fideicommissa* created by a deed *inter vivos*. Bertram, C.J. added that " it is undoubtedly the case that a stricter rule of construction applied to ' instruments *inter vivos* than to wills.' " He applied that rule to the deed before him and came to the conclusion that although the instrument was a deed of gift the intention of the donor was clearly to bring it within the scope of the principle of *Tillekeratne vs Abeyesekere* and that there was accretion. Garvin, J. agreed with him. The material parts of the deed in that case were as follows: " Whereas we do deem it fit and proper to set apart something separate unto our six children for their welfare and advancement, we have gifted unto our six children.....We shall have the right to possess the above property and do our pleasure therewith, and after the death of us both, our aforesaid six children shall be at liberty to own in equal shares, and possess peaceably for ever throughout their generations the property, and the six children and their heirs may by leasing out possess the property and not sell, mortgage " etc.

In my view the terms of the deed of gift in the case before us indicate more strongly the intention of the testator to create one *fideicommissum* by which the property was to devolve on the donees and their children grandchildren, etc., so long as there were any such in existence. It is quite a different matter that a local law stands in the way and curtails the line of such a devolution. Just as in the Divisional Bench case, so in this case, it was contended that the words by which the property was given " in equal *shares*," negatived an intention on the part of the donor to create one *fideicommissum*. That contention was rejected in the earlier case and I have no less hesitation in rejecting it in this. Indeed, in my view it can be urged with great force in this case that the words "*ekka hateeata*" are more consistent with an intention to create one *fideicommissum* than the words "*ekkakara*" in *Tillekeratne vs Silva* (10 N.L.R. 214), and "*akkakara kotas wasseng*" in *Carlinahamy vs Juanis*.

We were also pressed to hold that the fact that the deed by necessary implication allowed a mortgage, alienation or transfer to one who was not an outsider indicated a contemplation by the donor of the possibility of the property passing out of the family, for the result, it was said, of a mortgage to one within the family, might well be that an outsider purchased the property at an execution sale. But, in my opinion, the answer to that is the answer suggested by Mr. H. V. Perera during the argument, that at such an execution sale nothing more than the interest of the mortgaging donee could pass to the purchasing outsider, namely his life interest, and that on his death,

if he died without issue, his share would accrue to the surviving donees and their children etc. In other words the permission given to the donees to deal with the property in certain circumstances, operated only within the scope of the prohibition and could not transcend it. The result is that, in my view, the rules in *Tillekeratne vs Abeyesekere* and *Carlinahamy vs Juanis* apply in this case, and that, therefore, nothing passed to the plaintiff or to the 1st defendant. I set aside the judgment of the District Judge and dismiss the plaintiff's action with costs in both Courts.

KEUNEMAN, J.

I agree.

Judgment set aside.

Proctors :—

A. E. P. Jayatileke, for defendants-appellants (Dias and Another)

M. Abubucker Azeez, for plaintiff-respondent (Upasakappu)

Present : HEARNE, J. & DE KRETSER, J.

SINNAN CHETTIAR & OTHERS vs MOHIDEEN

S. C. No. 116—*D. C. Colombo* 549.

Argued on 24th August, 1939.

Decided on 30th August, 1939.

Preliminary objection—Appeal—Failure to join necessary parties—Possibility of inference from judgment and decree that parties in question not necessary—Relief under section 770 *of the Civil Procedure Code.*

The plaintiff sought a declaration that he and the 2nd — 4th defendants were entitled to a certain land as against the 1st defendant. The learned District Judge held that the property vested in the plaintiff and the 2nd — 4th defendants and that the 1st defendant had been in wrongful possession. Further, he expressly reserved to the 1st defendant the right to establish whatever claims he may be advised he has against the 2nd — 4th defendants. The decree was also silent as to the rights of these defendants.

The 1st defendant appealed making plaintiff the sole respondent. A preliminary objection was taken by the counsel for the respondent that the court could not entertain the appeal inasmuch as the 2nd — 4th defendants had not been joined.

Held : (i) That the 2nd — 4th defendants were necessary parties to the appeal.

(ii) That inasmuch as the appellant on reading the judgment as a whole could have understood it to mean that it did not affect the rights of the 2nd — 4th defendants, he was entitled to relief under section 770 of the Civil Procedure Code.

C. Thiagalingam with *Ismail* and *Curtis*, for defendants-appellants.

N. Nadarajah with *Kariapper*, for plaintiff-respondent.

HEARNE, J.

The plaintiff, in an action filed by him, sought a declaration that he and the 2nd to 4th defendants were entitled to certain land, the subject-matter in dispute, by virtue of a *fideicommissum* contained in the last will

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of one Lebbe Marikar and that the 1st defendant had no right or title thereto. It was averred that the 1st defendant claimed the land on a deed of transfer which it was stated had been granted in violation of the rights of the plaintiff and 2nd to 4th defendants and was of no avail in law against them.

In his judgment the Judge in answering issue 3 held that the property in question vested in the plaintiff and the 2nd to 4th defendants and in answering issue 4 held that the 1st defendant had been in wrongful possession of the property.

The 1st defendant has appealed from the judgment and decree passed by the Judge, making the plaintiff the sole respondent to the appeal. It is clear to my mind that the 2nd to 4th defendants were necessary parties to the appeal and that, as they have not been made respondents, the appeal is not properly constituted.

The only question is whether relief should be given under section 770 of the Civil Procedure Code.

The decree does not refer to the 2nd to 4th defendants at all. It orders and decrees that the plaintiff is entitled to a 2/5th share of the premises described in the Schedule and to damages in respect of that share. But not only is the decree silent on the question of the rights of the 2nd to 4th defendants. In his judgment the Judge appears to state that he expressly reserves to the 1st defendant the right to establish whatever claims he may be advised he has against the 2nd to 4th defendants.

> "As the 2nd to 4th defendants were merely added as parties who had interests in the land and as no question has been discussed as between them and the plaintiff in this case, I express no opinion as regards the prescriptive rights of the 1st defendant against them."

In another portion of his judgment he says "I can only enter judgment in favour of the plaintiff." Although the Judge had formally answered issue 3 (*supra*) in favour of the 2nd to 4th defendants, I feel that if the appellant on reading the judgment as a whole was left with the impression that it did not purport to make any pronouncement upon the rights vicariously advanced by the plaintiff on behalf of the 2nd to 4th defendants who did not appear, his position is understandable. I am of the opinion that "some good excuse" has been given for the non-joinder of these defendants.

Leave will be given to the appellant to take the necessary steps to join all the other parties in the trial Court as respondents to the appeal (I note that some of the defendants were minors and a guardian *ad litem* was appointed) subject to this being done within 7 days from the date of the delivery of this order and to the payment of Rs. 105/- costs to the plaintiff-respondent within the same time. If these conditions are not complied with, the appeal will be dismissed with costs.

DE KRETSER, J.

I agree.

Relief granted.

Proctors :—

S. Kandasamy, for defendants-appellants (Sinnan Chettiar and Others)

M. N. M. Salahudeen, for plaintiff-respondent (Mohideen)

Present : HEARNE, J. & WIJEYEWARDENE, J.

SIRIPALA vs URBAN DISTRICT COUNCIL, KALUTARA

S. C. No. 314—*D. C. Kalutara* 20097.

Argued on 4th August, 1939.

Decided on 24th August, 1939.

Local Government Ordinance (*Chapter* 195) *section* 230—*Scope of section—Refusal of vendor to confirm sale—Right of purchaser to a refund of the purchase price and auctioneer's charges paid by him.*

Held : (i) That section 230 of the Local Government Ordinance is not applicable to actions against an Urban District Council for the enforcement of contractual or quasi-contractual obligations.

(ii) That where the vendor refuses to confirm a sale of land on the ground that the price offered is below the upset price the purchaser is entitled to a refund of not only the purchase price paid by him but also such incidental charges as he has been called upon to pay.

H. V. Perera, K.C. with *C. E. S. Perera*, for plaintiff-appellant.

N. E. Weerasooriya, K.C. with *U. A. Jayasundera*, for defendant-respondent.

WIJEYEWARDENE, J.

This is an action arising out of the refusal of the Urban District Council, Kalutara to confirm a sale by public auction of a property belonging to it.

The Council authorised a licensed auctioneer to sell by public auction a piece of land called Dombagahawatte of the extent of 30 perches situated at Sea Beach Road, Kalutara North. The sale was to be held under the conditions of sale marked P1 and subject to an upset price of Rs. 937/–. The conditions of sale provided *inter alia*, that the sale should be subject to the approval of the Chairman of the Council and could be set aside at his discretion.

The property was sold by public auction on November 23, 1935 when it was purchased for Rs. 875/– by the plaintiff's agent M. P. Fernando who was the only bidder present at the sale. The Chairman refused to confirm the sale as the price realised was less than the upset price. The auctioneer then put up the property for sale on November 27, 1935 when there were two bidders one K. T. R. de Silva and the plaintiff's agent. K. T. R. de Silva was the highest bidder for Rs. 1,360/– the next highest bid being that of the plaintiff's agent for Rs. 1,350/–. As de Silva had no money to pay " immediately after the sale " the auctioneer's charges and one-tenth of the purchased amount, as required by clause 3 of the conditions of sale, the auctioneer rejected his bid and offered the property to the plaintiff's agent

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for Rs. 1,350/–. The evidence led in the case shows that the plaintiff's agent refused to buy the property for Rs. 1,350/– as he thought that de Silva was a puffer employed by the defendant Council to enhance the price. On the plaintiff's agent refusing to make the purchase at Rs. 1,350/– the auctioneer " immediately put up the property for sale afresh " in terms of clause 9 of the conditions of sale. At that sale the plaintiff became the purchaser for Rs. 950/–. The plaintiff paid into the hands of the auctioneer the full purchase price of Rs. 950/– and auctioneer's commission and other incidental charges amounting to Rs. 118/25 and signed the conditions of sale which were duly attested by a notary. As the defendant Council delayed to execute the necessary documents the plaintiff wrote letter P4 of January 19, 1936 asking for a conveyance in his favour and received in reply P6 of February 17, 1936 which stated that if he did not agree to buy the property for Rs. 1,350/– the sale in his favour for Rs. 950/– will be cancelled and the property re-advertised for sale. The plaintiff thereupon wrote P7 of March 18, 1936 saying that he was unwilling to purchase the property for Rs. 1,350/– and requesting the defendant Council to refund the amount paid by him if the Council was not prepared to implement the sale for Rs. 950/– in terms of the conditions of sale. By his letter P9 of May 25, 1936 the Chairman of the Council informed the plaintiff that the Council had decided to cancel the sale and the plaintiff was asked to " call over at the office and withdraw the sum of Rs. 950/– deposited by the auctioneer as purchase money." It will be noted that this letter makes no reference to the additional sum of Rs. 118/25 paid by the plaintiff as auctioneer's charges &c. In view of the attitude taken by the Council the plaintiff presumably thought it advisable at this stage to secure legal advice and his lawyer wrote P10 of May 29, 1936 asking the Council to refund Rs. 1,068/25 with legal interest in the event of the Council deciding not to sell the property to the plaintiff for Rs. 950/–. The Council did not delay replying to this letter as on previous occasions but sent P11 of June 5, 1936 stating that the plaintiff could withdraw the sum of Rs. 950/– deposited at the office of the Council.

The property was again put up for sale on June 5, 1936 by public auction and was purchased by de Silva for Rs. 940/–. The plaintiff thereupon sent P12 of June 5, 1936 and P13 of June 16, 1936 pointing to the Council that in the circumstances the Council would stand to gain by confirming the sale in his favour for Rs. 950/– instead of approving the sale in favour of de Silva for Rs. 940/–. In reply to this the Chairman sent P14 of August 1st, 1936 intimating that " the sale of the land has been confirmed by the Council on Mr. K. T. R. de Silva " and reiterating the willingness of the Council to return Rs. 950/– to the plaintiff.

There must, no doubt, have been very strong and cogent reasons for the action of the Council in confirming a sale to de Silva for Rs. 940/– when plaintiff was ready to purchase the property for Rs. 950/– under the conditions of sale already executed, especially when as a result of such action the Council was going to refuse to refund to the plaintiff the sum of Rs. 118/25

incurred by plaintiff as incidental expenses. Though the Chairman of the Council has given evidence in the case the reasons which guided the Council have not been made clear. I do not think it necessary for the purposes of the decision of this Court to make any further comment on this aspect of the case.

The plaintiff filed the present action on November 17, 1936. On March 9, 1937 the defendant Council through its proctor moved that the plaintiff should be called upon to give security for the payment of the costs of the defendant Council as the plaintiff was resident outside the jurisdiction of the court. The District Judge refused this application which seems to have been an extraordinary one to be made in view of the fact that the Council admittedly had with it a sum of Rs. 950/– belonging to the plaintiff. The answer of the Council was filed on April 26, 1937. The trial had to be postponed for a few months owing to the difficulties experienced by the Council at this stage in electing a Chairman.

The case came up for trial finally in August 1937. The District Judge decided against the plaintiff's claim for a conveyance in his favour in respect of the land but held that he was entitled to claim the entire sum of Rs. 1,068/25. The judge however upheld a plea of prescription raised by the defendant Council and therefore entered judgment only for the sum of Rs. 950/– brought by the defendant Council to court, and ordered the plaintiff to pay the costs of the action to the defendant Council. The plaintiff has preferred present appeal against that judgment.

At the hearing of the appeal, the appellant's Counsel did not question that part of the judgment of the District Judge refusing to order a conveyance in favour of the appellant or to give him damages. He however contended that the District Judge had erred in holding that the applicant's alternative claim for Rs. 1,068/25 was barred by prescription. The District Judge appears to have thought that the action was governed by section 230 of the Local Government Ordinance No. 11 of 1920 which enacted that an action against an Urban District Council " for anything done or intended to be done under the powers of the Ordinance " should be instituted within four months next after the accrual of the cause of action. The appellant's Counsel cited a number of decisions of this court—*Walker & Co. vs The Municipal Council of Kandy* * *Jayasundera vs The Municipal Council of Galle* † and *Sidambaram Chetty vs The Municipal Council, Colombo* ‡ where this Court construed the analogous provisions of the Municipal Council Ordinance then in operation and held that the corresponding section of the Municipal Council Ordinance No. 17 of 1865 applied only to obligations arising *ex delicto*. Apart from authority, the language of section 230 of the Local Government Ordinance leaves no doubt in my mind that the section is not applicable to actions against an Urban District Council for the enforcement of contractual or quasi-contractual obligations. The learned Counsel for the respondent did not seek to support the District Judge's decision on the question of prescription. He, however, contended:

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* (1881) 4 S.C.C. 140 † (1883) 5 S.C.C. 174 ‡ (1888) 8 S.C.C. 133

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1. That no cause of action accrued to the plaintiff to claim from the defendant Council the sum of Rs. 118/25 paid by him on account of auctioneer's charges.

2. That the order made by the District Judge with regard to the costs of the action was justifiable.

The conditions of sale P1 under which the various sales were held contain no provision stating what sum or sums paid by a purchaser should be refunded by the Council if the Council exercised its discretion under clause 15 and set aside the sale. It is difficult to believe that any person would have bid at the sale if he thought that as a result of the Council deciding to set aside the sale for no reason whatever he would forfeit a substantial sum paid by him to the auctioneer — an agent of the Council — on account of commission &c. If the Council chooses to exercise its rights under clause 15, it is fair and equitable that the purchaser whose purchase has been set aside should be refunded all the monies paid by him under the conditions of sale. In the absence of any specific authority compelling me to a contrary view, I do not see any reason in law or equity why the Council should not refund the sum of Rs. 118/25.

With regard to the question of costs it is necessary to examine the pleadings and some documents in detail.

The plaintiff gave notice of the action to the defendant Council in October 1936. Along with the written notice he sent a copy of the plaint which indicated clearly that the plaintiff was asking for a conveyance in his favour or in the alternative for the refund of the sum of Rs. 1,068/25 and a payment of an additional sum of Rs. 500/– as damages. In the plaint filed in court there was an obvious clerical error when the plaintiff asked in his prayer that the defendant Council should be ordered to confirm the sale or " that the plaintiff be declared entitled to the same." The latter clause has no doubt been inserted by mistake in place of a prayer that the plaintiff be declared entitled to a sum of money. This is made sufficiently clear by paragraph 9 of the plaint. The defendant Council filed answer in April 1937 and deposited in Court a sum of Rs. 950/–. The defendant Council by its answer denied any liability, raised the plea of prescription and prayed that the plaintiff's action should be dismissed with costs. When the case came up for trial in August 1937 the defendant Council resisted the application of the plaintiff to amend the plaint by correcting what is obviously a clerical error and the District Judge allowed the amendment subject to the condition that the defendant Council should be paid the costs of the day. In considering the offers made by the defendant Council in its letters to the plaintiff it should be noted that it is by no means clear that the sum of Rs. 950/– was not offered in full settlement of the plaintiff's claim. An acceptance of Rs. 950/– in these circumstances would have barred the plaintiff from making a further claim for the balance of Rs. 118/25. In any event there is no letter from the defendant Council, four months after the accrual of the cause of action, intimating to the plaintiff that the Council was willing to refund even Rs. 950/–. The absence of such a letter taken together

with the prayer in the answer for the dismissal of the plaintiff's claim seems to support strongly the contention of the appellant's Counsel that the defendant Council was not prepared to refund even the sum of Rs. 950/- on the expiry of the period of four months which the Council thought was the period of prescription. I am prepared however to take into consideration the fact urged by the respondent's Counsel that the plaintiff failed in his prayer for a confirmation of the sale and for payment of the damages.

I would set aside the judgment of the lower Court and direct judgment to be entered for the plaintiff for the sum of Rs. 1,068/25 and half the costs of the District Court. The appellant is entitled to the costs of this appeal.

HEARNE, J.

I agree.

Judgment set aside.

Proctors :—

Fernando & de Silva, for plaintiff-appellant. (Siripala)
A. R. Seneviratne, for defendant-respondent. (Urban District Council, Kalutara)

Present : HEARNE, S.P.J.

MEDHANKARA ISTAWEERA vs SUPPERAMANIAM CHETTIYAR AND LETCHIMAN CHETTIYAR

S. C. No. 88—*C. R. Kegalle No.* 11571.
Argued on 3rd August, 1939.
Decided on 23rd August, 1939.

Service Tenures Ordinance (*Chapter* 323)—*Claim for value of services due by* paraveni nilakarayas—*Is the claimant entitled only to the amount of money payment for which the services may fairly be commuted at the time the registry is made or is he entitled to the present value of the services.*

Held : The value of the services due by a *paraveni nilakaraya* should be determined as at the present time and that the amount of the money payment for which the services may be commuted as stated in the register is to be regarded as applying at the time the registry is made and not for all time.

E. A. P. Wijeyeratne, for plaintiff-appellant.
Cyril E. S. Perera with *S. C. E. Rodrigo*, for defendants-respondents.

HEARNE, J.

The plaintiff, as the incumbent of Bisowela Vihare sued the defendants as the *paraveni nilakarayas* for Rs. 151/50 being half share of the services due by them to the temple. Judgment was entered for Rs. 30/- and the plaintiff has appealed,

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Hearne, J.

Medhankara Istaweera *vs* Supperamaniam Chettiyar and Letchiman Chettiyar

In the argument addressed to me by Counsel for the appellant it was said that the Commissioner had before him evidence that the defendants received as income from the temple land Rs. 50/– to Rs. 60/– only as their half share, and that he accordingly related the money value of the services due by the defendants to the income derived by them. For these reasons this Court was pressed to send the case back to the Commissioner of Requests with directions that he should calculate the amount due only by assessing the actual cost of supplying meals to the incumbent and of repairing the Vihare.

This argument by Counsel is strangely at variance with the petition of appeal in which it is asserted that " according to the assessment placed by the learned Commissioner of Requests a sum of Rs. 60/– a year would suffice to provide the daily meals of the chief priest and for the annual repairs to the Vihare " but, the petition continues " the learned Commissioner has not taken into consideration that in the event of non-performance of the services, the appellant is compelled to engage the services of a servant to prepare his meals....."

It is to be noted in the first place that a fresh point was taken in the petition which was not taken in the Court of the Commissioner, *viz.* that in valuing the cost of meals not supplied, the wages of a servant are to be taken into account (it was not, I may add, mentioned in the argument on appeal) and in the second place that Counsel for appellant asked this Court to send the case back to the Commissioner of Requests in order that he might do what according to the petition he has already done.

I have read the judgment of the Commissioner with care. There are in it undoubtedly expressions which indicate that it would be inequitable to adjudge the defendants liable to pay a bigger sum than they receive as income, but it is also clear to me, as the petition itself asserts, that he attempted to place a money value on the services which the defendants were liable to perform. Taking into account the fact that " the cost of feeding a priest has gone up," and " viewing the matter in the light of present circumstances," he thought the claim of " the priest was highly exaggerated," and fixed Rs. 30/– as the equivalent of annual services in respect of a half share of the land in question. The appeal, as it was argued before me, appears to have proceeded on a misconception which was not, as I have indicated, shared by the proctor who drafted the petition.

In replying to the arguments of Counsel for the appellant, Counsel for the respondents referred to the word " perpetual " in section 25 of Ordinance No. 4 of 1870 (Vol. 6 Legislative Enactments, Cap. 323, page 666). He argued that the use of that word indicated that once the commutation of of services due under the Ordinance dealing with Service Tenures (4 of 1870) had been fixed in accordance with the provisions of the Ordinance, such commutation was a constant and was not liable to be charged ; that, as according to the Register of *Paraveni Pangus* relative to the property in question, the annual commutation was Rs. 28/–, the defendants' half share could not

amount to more than Rs. 14/–. This is clearly opposed to what is laid down by the Ordinance, *viz.* that the annual amount of money payment for which services may be commuted must be related to the time the registries are made. The registries are a guide and no more than a guide, though they may, in the absence of *evidence*, provide the only basis of assessment (16 N.L.R. 14).

The arguments addressed to me by Counsel for both the appellant and respondents are in my opinion alike misleading. The Commissioner of Requests took the proper view in calculating the value of the customary services at the present time. His conclusion involves a question of fact with which, on the evidence adduced, I would not interfere.

In the circumstances I dismiss the appeal and order that each party shall bear his or their own costs of the appeal.

Appeal dismissed.

Proctors :—

G. S. Suraweera, for plaintiff-appellant. (Medhankara Istaweera)

A. A. Wickramasinghe, for defendants-respondents. (Supperamaniam Chettiyar and Letchiman Chettiyar)

Present : SOERTSZ, A.C.J.

PERUMAL (Excise Inspector) vs ARUMUGAM

S. C. No. 50/1939—*The Magistrate's Court—Badulla-Haldummulla No.* 9990.

Argued on 29th June, 1939.

Decided on 25th July, 1939.

Poisons, Opium and Dangerous Drugs Ordinance (Chapter 172) *section* 28—*Is proof of* mens rea *necessary in a prosecution for breach of the section.*

Held : That *mens rea* need not be proved in a prosecution for a breach of section 28 of the Poisons, Opium and Dangerous Drugs Ordinance (Chapter 172).

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

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

SOERTSZ, A.C.J.

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

The Magistrate found that the accused was in possession of the impeached preparations. The analyst's report proves that " ganga " was identified in all the brands of the legium found in the possession of this

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accused. But he acquitted the accused because "on the facts it is clear that the *accused never knew that the preparation contained ganga.*"

The Magistrate took the view that *mens rea* is necessary for the constitution of this offence and that on a person being found in possession of such a preparation as this, there is a presumption of *mens rea* which he must rebut. He relied on the judgment of *Burah vs Mohamadu Sally* (2 Ceylon Law Weekly 381,), in which Garvin, J. concluded his judgment with the observation "upon proof of the fact of possession the onus lay on the appellant to show that his possession was innocent." The learned Magistrate seems to think that this view is in conflict with the view taken by de Sampayo, J. in *Casie Chetty vs Ahamadu* (18 N.L.R. 186), but, in reality, it is not, for when de Sampayo, J. said "I am of opinion that in respect of the acts made punishable by section 43 which involves no qualifying condition, the absence of knowledge is no ground of defence," he was speaking with reference to section 43 alone, and he went on to consider section 50 of the Ordinance in its bearing on section 43 and said "I think the circumstances give rise to the presumption created by section 50 "..... "I do not think that he as a medical practitioner *ought* to be heard to say, or to be believed when he says, that he did not know the nature of the drug with which he was dosing his *clients.*" Perhaps it was not quite correct to say that "in the circumstances" of that case the presumption under section 50 arose, the circumstances being the "suspicious and highly unsatisfactory" conduct of the accused when his house was searched. In my view, the presumption arose on the mere fact of possession being established, apart from and independent of the circumstances of that possession. The "circumstances" is something to consider when examining the question whether the presumption has been rebutted or not.

In the present case, the position is quite different from the cases that arose before de Sampayo, J. and Garvin, J. The position is what the position would have been in those cases if section 43 of the Excise Ordinance stood without the mitigation offered by section 50. Section 28 states that no person shall have in his possession any such preparation without a license, and section 76 penalises such a possession, without qualification, or reservation. This is one of those statutory crimes in which it is unnecessary to show anything more than that the accused committed the act forbidden by the statute under which he is charged. The legislature tends to create such offences when in its view, the damage caused to the public by the offence is great and the offence is such that there would usually be great difficulty in proving *mens rea*, if that degree of guilt was required. Halsbury (Vol. IX) of the Hailsham edition at pages 11 and 12 puts the matter thus: "In a limited class of offences, *mens rea* is not an essential element. This class consists, for the most part, of statutory offences of a minor and only quasi-criminal character and, in order to determine whether *mens rea* is an essential element of an offence, it is necessary to look at the object and terms of the statute which creates it." There are many English cases on this

point. For example, in *Reg. vs Bishop* (1879, 5 Q.B.D. 259), it was held that keeping two lunatics without a licence was an offence although the accused did not know that the two men were lunatics; in *Hobbs vs Corporation of Winchester* (1910, 2 K.B. 471), it was held that possessing unsound meat for sale was an offence despite the fact that the butcher was not aware that it was unsound; in *Betts vs Armstead* (1888, 20 Q.B.D. 771), *Goulder vs Rook* (1901, 2 K.B. 290) *and Laird vs Dobell* (1906, 1 K.B. 131), it was held that selling an adulterated article of food was an offence although the accused did not know it was adulterated. For other instances, see *Horton vs Gwynne* (1921, 2 K.B. 661). As pointed out by de Sampayo, J. on the authority of *Derbyshire vs Houliston* (1897, 1. Q.B. 772), if the Legislature in legislation of this character does not intend to create an absolute liability, it introduces such words as "knowingly," "intentionally" etc. The only defence in a case like this appears to be a successful denial of the fact of physical possession on the part of the accused.

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

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

Acquittal set aside.

Proctors :—

K. V. Nadarajah, for accused-respondent. (Arumugam)

Present: HEARNE, S.P.J.

ATTORNEY-GENERAL vs KUNJIPALU

S. C. No. 246—*M. C. Trincomalee* 5379.

Argued on 2nd August, 1939.

Decided on 22nd August, 1939.

Motor Car Ordinance Chapter 156 *Section* 51 (*b*), (*c*)—*Duty of driver of car involved in accident on highway to report to police.*

Held : That where the driver of a motor car involved in an accident on a highway resulting in injury to person, animal or property fails to furnish the particulars required by section 51 (*b*) of Chapter 156 of the Revised Edition, whether he was requested to do so or not, he is under a duty to report the accident to the officer in charge of the nearest police station or to the first police constable or officer whom he meets on his way thereto.

Per HEARNE, J.—" The law, as it appears to me, casts on the driver the three-fold duty to stop, to supply information on request, and to report to the police. In the case of bodily injury having been caused the duty of reporting to the police is an absolute one. It is necessary that it should be so as the person injured may not be in a condition to ask for particulars. Where, however, bodily injury has not been caused the driver is only absolved from his duty to report to the police if he has already supplied particulars under (*b*). Should the circumstances be such that the person entitled to particulars has not been placed in possession of those particulars, the driver is under an obligation to make a report to the police so that they may be available if and when required."

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

Colvin R. de Silva, for accused-respondent.

HEARNE, S.P.J.

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

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

The relevant law is this :

If, owing to the presence of a motor car on a highway, any accident occurs causing injury to any person, animal or property then :

*Section 51 of the Revised Edition

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

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

(*c*) where the driver of the car has not furnished the particulars mentioned in paragraph (*b*) to any person entitled to obtain such particulars from him, he shall forthwith proceed to the nearest police station and report the accident to the officer in charge thereof or to the first police constable or officer whom he meets on his way thereto;

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

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

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

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

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

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

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

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

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The law, as it appears to me, casts on the driver the three-fold duty to stop, to supply information on request, and to report to the police. In the case of bodily injury having been caused the duty of reporting to the police is an absolute one. It is necessary that it should be so as the person injured may not be in a condition to ask for particulars. Where, however, bodily injury has not been caused the driver is only absolved from his duty to report to the police if he has already supplied particulars under (*b*). Should the circumstances be such that the person entitled to particulars has not been placed in possession of those particulars, the driver is under an obligation to make a report to the police so that they may be available if and when required. It is only in this view of the matter that full effect can, in my opinion, be given to the purpose with which the law was framed.

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

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

In interpret our own law in the same way.

Appeal allowed.
Accused convicted.

Present: HEARNE, S.P.J. & DE KRETSER, J.

MOHAMED HASSEN vs ABDUL WAHID and MOHAMED MARIKAR

S. C. No. 347-348—*D. C. Colombo No.* 1030.
Argued on 22nd August, 1939.
Decided on 30th August, 1939.

Appeal—Joint petition by two defendants separately represented by proctors—Stamps affixed as one petition—Motion to withdraw petition—Fresh petition of appeal filed within appealable time with additional stamps to cover two appeals—Can appeal be entertained.

Judgment was entered on 18th October, 1938 against the 1st and 2nd defendants, who were separately represented by proctors. On the same day they filed a joint-petition of appeal with stamps sufficient to cover one petition of appeal. On 19th October, 1938 the proctors moved to withdraw this petition of appeal and filed a fresh one with stamps for Rs. 18/- which they moved the Court to accept together with the stamps tendered with the petition of 18th October, 1938 to make up the full amount required for two appeals. The Court allowed this motion.

Held : (i) That the appeal must be rejected inasmuch as the correct amount of stamps was not tendered together with the first petition of appeal.

(ii) That the subsequent petition of appeal should be regarded merely as a document which has improperly been accepted as a petition of appeal.

(iii) That the initiation of an appeal must be in strict compliance with the requirements of the law and nothing can be done later to cure such non-compliance at the time the petition of appeal was presented.

L. A. Rajapakse with *E. G. Wickremanaike*, for defendants-appellants.
N. Nadarajah with *H. W. Thambyah*, for plaintiff-respondent.

HEARNE, S.P.J.

After judgment was entered on 18th October, 1938 in favour of the plaintiff and against the 1st and 2nd defendants, the latter who were separately represented by proctors joined in stating their grounds of appeal in one document which was filed on the day judgment was delivered and to which stamps were affixed sufficient to cover one petition of appeal only. This was obnoxious to the rule in *James vs Karunaratna* (1935) 37 N.L.R.

On 19th October, 1938, well within the time limited for appeal, the proctors for the defendants moved to withdraw the petition of appeal filed on 18th October and filed a fresh petition of appeal. Stamps for Rs. 18/- were tendered and the Court was moved to accept the stamps tendered with the petition on 18th October in order to make up the full amount required for two appeals. The Court allowed the motion and the effect was that on the 19th October the petition of appeal then filed was stamped as for two appeals. In this way the appellants had, as is claimed, brought themselves within the rule laid down in 37 N.L.R.

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It is to be noted that while the proctors acting for the defendants gave as their sole reason for applying to withdraw the first petition of appeal and to substitute another in its place the fact that the former was improperly stamped, their application was in fact designed to serve another purpose. The grounds of appeal in the first petition were re-drafted and elaborated and an additional ground of appeal was raised. The second petition of appeal is a very different document from the first.

The ordinary consequence of withdrawing an appeal is an order of Court dismissing the appeal, and I know of no provision in our law which permits an appellant, in the circumstances of this case, to withdraw a petition of appeal and file another in its place. It would appear that in India, by reason of an enactment in the Indian Code, the provisions for the withdrawal of an action apply also to appeals, but there is no corresponding provision in our Code (Hutchinson, C.J. in 11 N.L.R. 110).

According to the interpretation placed by this Court on the provisions of the Code relating to appeals read with the Stamp Ordinance the initiation of an appeal must be in strict compliance with the requirements of the law and nothing can be done later to cure non-compliance with the law at the time the petition of appeal is presented.

In *Attorney General vs Karunaratna et al* (1935) 37 N.L.R. 57,* a Divisional Bench followed *Bandara vs Baban Appu* (1 Matara Cases 203) which decided that the stamps for the certificate of appeal and for the Supreme Court judgment must be supplied *along with the petition of appeal;* while in *Sinnappoo vs Theivanai et al.* (1937) 39 N.L.R. 121 † it was held that failure to tender the proper amount of stamps is a fatal irregularity. In this case the correct amount of stamps was tendered after the time limit and it was held that the defect could not be so cured.

It seems to me that following these decisions which bind us the petition of appeal filed on the 18th October must be rejected, and that as there is no provision whereby the petition of appeal filed on the 19th October could be substituted in its place the matter must be regarded merely as a document which has improperly been accepted as a petition of appeal.

In the result the appeal must be rejected with costs.

DE KRETSER, J.

I agree.

Appeal rejected.

Proctors :—

C. Vethecan & A. C. Mohamado, for defendants-appellants. (Abdul Wahid and Mohamed Marikar)

M. M. A. Raheeman for plaintiff-respondent. (Mohamed Hassen)

* 4 C.L.W. p. 23 † 9 C.L.W. 82 (Edd.)

Present: WIJEYEWARDENE, J. & NIHILL, J.

SELLAMMA ACHIE vs PALAVASAM

S. C. No. 80—*D. C. Colombo* 51695.
Argued on 6th September, 1939.
Decided on 13th September, 1939.

Abatement—Civil Procedure Code (*Chapter* 86) *Sections* 396, 401, 402 *and* 403—*Death of plaintiff within twelve months from date of last order—Can a court enter order of abatement under such circumstances.*

Held : That section 402 of the Civil Procedure Code does not empower a court to enter an order of abatement where the absence of any attempt to prosecute the action for twelve months from the date of the last order is due to the death of the plaintiff witain that period.

S. Nadesan, for petitioner-appellant.
E. B. Wickremanayake with *M. Thiruchelvam*, for respondent.

WIJEYEWARDENE, J.

This is an appeal against an order of the District Judge refusing to set aside an order of abatement made under section 402 of the Civil Procedure Code.

The plaintiff instituted this action on a promissory note on February 10th 1933. On March 2nd 1933 summons was issued returnable on March 25th 1933. The case was called on the latter date when the Court found that the summons had not been served on the defendant and ordered the summons to be reissued for June 5th 1933. On June 5th 1933 the Court made an entry " no order " as the plaintiff had failed to take steps to have the summons reissued. On May 1st 1935 the District Judge made the following order :

> " A period exceeding twelve months having elapsed since the date of the last order made in this case without the plaintiff taking steps to prosecute this action it is ordered that this action do abate."

On October 18th 1938, the present appellant filed papers and moved that the order of abatement be set aside and that she be allowed to continue the action as the legal representative of the plaintiff. The affidavit filed by the appellant shows that the plaintiff died in India in March, 1938 and that the probate of the last will of the plaintiff has been issued to the appellant.

The order of abatement appears to have been made under section 402 and the District Judge dealt with the present application on that footing.

The appellant has contended *inter alia* both here and in the District Court that the order of abatement was bad as the plaintiff was not alive during the period of twelve months contemplated by section 402. The learned District Judge held against this contention and stated in the course

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of his order, " Section 402 is a provision of Statute Law and the ordinary language of the legislature must be given effect to and considering section 402 in the light of section 403 of which it forms a part it is perfectly clear from section 403 that section 402 also contemplated a case where the plaintiff is dead because it says ' But the plaintiff or the person claiming to be the legal representative of a deceased or insolvent plaintiff etc.' Therefore it is perfectly clear that section 403 is sufficiently wide to include a case where the plaintiff dies and the action has abated."

Now section 402 enables a court to enter an order that an action shall abate if a period of twelve months elapses subsequently to the date of the last entry of an order or proceeding in the record " without the *plaintiff* taking any (necessary) steps to prosecute the action." This section seeks to penalise a plaintiff for his laches. This must necessarily imply that the plaintiff should have been alive during the period of twelve months in question. If the legislature intended to empower a court under this section to enter an order of abatement even where the absence of any attempt to prosecute the action for twelve months is due to the death of the plaintiff within that period, it appears to me that the legislature may have chosen its language more carefully to express its intention. The words " without the *plaintiff* taking any step " suggests to my mind that the section regards the plaintiff and not his legal representative as the person who had to take the necessary steps. If the view of the learned District Judge is to be accepted the word " plaintiff " in " without the plaintiff taking any step " should be construed to mean " the plaintiff or his legal representative." I do not feel justified in giving such an artificial interpretation to the meaning of the word " plaintiff." Moreover section 396 of the Code enables a court in certain circumstances to enter an order of abatement when the plaintiff in an action dies. There was, therefore, no necessity for the legislature to seek to make additional provision under section 402 when the action has lain dormant owing to the death of the plaintiff. I do not think that section 403 affords much help in the consideration of this question. It should be noted that section 402 is one of a number of sections grouped together under chapter 25 of the Code dealing with " the continuation of actions after alteration of a party's status." Section 396 provides for an order of abatement being entered where the legal representative of a deceased plaintiff does not make an application to court to have his name entered on record in place of the deceased plaintiff, while section 401 provides for the dismissal of an action in certain circumstances on the ground of plaintiff's insolvency and section 402 provides for the court making an order of abatement where the plaintiff fails to take a necessary step to prosecute the action. Section 403 then enacts that " when an action abates or is dismissed *under this chapter* no action shall be brought on the same cause of action " and further proceeds to set out the mode of obtaining relief against such orders of dismissal or abatement. The draftsman had, therefore, to employ in the second paragraph of section 403 appropriate language to make the section applicable to the

various earlier sections of the chapter under which orders of dismissal or abatement could be made. This appears to me to be the explanation for the draftsman using the words or "the person claiming to be a legal representative of a deceased" in section 403. In other words the clause in section 403 referred to by the District Judge has been inserted in order to enable applications to be made by "the plaintiff" against an order under section 402, by the "person claiming to be the legal representative of a deceased plaintiff" against an order under section 396, and by the legal representative of an insolvent plaintiff against an order under section 401. It is even possible to contemplate a case where the legal representative of a deceased plaintiff may seek relief against an order made under section 402, if the plaintiff died after the expiry of twelve months mentioned in the section.

I am therefore of opinion that the appeal should succeed on this ground.

I shall consider briefly two other points raised by the appellant's counsel in support of the appeal. He argues that no order of abatement could be made under section 402 against a plaintiff dead at the time of making such an order as a court should give notice of its intention to make such an order to all the parties interested and obviously no such notice could be given when the plaintiff is dead. I am unable to assent to this view as the decision of this Court in *Suppramaniam vs Symons* (1915) 18 New Law Reports 229, which lays down that an order under section 402 could be made without notice to parties, destroys the very foundation of the argument. I wish to add however that I think that the Judges of the original courts who desire to act *ex mero motu* under this section should not ignore the view expressed by the learned Judges who decided *Suppramaniam vs Symons* that it was "desirable that a court before making an order of abatement should notice the parties as far as it conveniently can to given them an opportunity of showing cause against the order."

The last point raised by the appellant's counsel was that as the last order made by the District Judge before entering the order of abatement was "no order" there was no failure on the part of the plaintiff to take any necessary step to prosecute the action. He relied on *The Associated Newspapers of Ceylon Limited vs Kadirgamar* (1934) 36 N.L.R. 108 and *Lorensu Appuhamy vs Paaris* (1908) 11 N.L.R. 202. I think this argument is based on a misconception of the nature of the order made by the District Judge on June 5th 1933. On March 25th 1933 the District Judge had ordered summons to reissue and when on June 5th 1933 he found that the plaintiff had taken no steps to carry out that order, the judge wrote "no order" meaning thereby that he was not making any further order and that the order of March, 25th 1933 should be acted upon. There was therefore the order of March, 25th 1933 which the plaintiff had to carry out and if the plaintiff failed to carry out such an order within a period of twelve months the District Judge could in an appropriate case order the action to abate under section 402. I hold that the appellant's third contention fails.

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In view of the decision I have reached with regard to the first contention raised by the appellant, I would allow the appeal with costs and direct the order of abatement to be set aside. The appellant will also be entitled to the costs of the inquiry in the District Court.

NIHILL, J.

I agree.

Appeal allowed.

Proctors :—

S. A. Nalliah, for petitioner-appellant. (Sellamma Achie)

Perumal & Chelliah, for respondent. (Palavasam)

Present: WIJEYEWARDENE, J.

HARRIS DOLE (Inspector of Police) vs SIMON APPU

S. C. No. 276—M. C. Chilaw 8587.

Argued on 29th August, 1939.

Decided on 6th September, 1939.

Motor Car Ordinance (Chapter 156)—Regulations governing the parking of cars—Meaning of expression "park" in the context "....shall not park his hiring car...."

Held : That stopping a car on a highway at a place other than a halting place or a public stand for the purpose of setting down or picking up a passenger does not constitute a breach of the regulation which prohibits the parking of a hiring car except at a public stand or at a halting place set apart for the purpose.

J. R. Jayawardene, for accused-appellant.

Douglas Jansze, Crown Counsel, for complainant-respondent.

WIJEYEWARDENE, J.

This is an appeal by the accused against his conviction by the Magistrate of Chilaw under section 84 of the Motor Ordinance 1927 (vide Legislative Enactments Volume IV Chapter 156 section 90) and a regulation made under the provisions of the Ordinance. The charge against the accused as set out in the summons served on him reads :

> "You did within the limits of the Sanitary Board area of Madampe being the driver of Bus No. X 6493 halt the same on the public road at a place other than a public bus stand or bus halting place for the purpose of taking up and setting down passengers in breach of regulation No. 10 framed under the Motor Ordinance No. 20 of 1927 appearing in Government Gazette No. 7858 of 4th June, 1931 and you thereby committed an offence punishable under section 84 of Ordinance No. 20 of 1927."

When the accused appeared in court on the summons served on him the Magistrate read and explained to him the statement of the particulars of the offence contained in the summons in terms of section 187 of the Criminal Procedure Code.

The accused pleaded not guilty and the prosecution called a Police constable who stated that the omnibus driven by the accused stopped at a place of 50 yards away from the bus stand provided by the Sanitary Board of Madampe and " dropped two passengers and picked up one passenger." He added " no buses are allowed to drop or pick up passengers at Madampe except at the bus stand."

The proctor appearing for the accused called no evidence but contended that on the evidence led by the prosecution the accused had not committed a breach of Regulation 10 referred to in the charge.

The Magistrate held against the contention of the accused's proctor and found that the accused had " infringed the provisions of section 10 of Gazette No. 7858 of 4th June, 1931." He convicted the accused and sentenced him to pay a fine of Rs. 5/–.

The Motor Regulation for the breach of which the accused has been found guilty is one of the regulations framed under sections 6, 53 and 70 of the Motor Car Ordinance 1927 (*vide* corresponding sections 6, 56, 61 and 74 of Chapter 156).

Regulation 1 defines a " public stand " and Regulation 2 empowers the Sanitary Board to establish public stands and halting places. Regulations 4 to 9 set out the conditions governing the parking of hiring cars in public stands.

Regulations 3 and 10 are as follows :

Regulation 3

" No hiring cars shall be parked within the limits of the Sanitary Board of Madampe except at a public stand so established and notified."

Regulation 10

" The driver of a hiring car plying for hire within the limits of the Sanitary Board of Madampe on the roads below mentioned shall not park his hiring car except (*a*) at a public stand or (*b*) at a halting place set apart for the purpose by the Chairman and then only for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods.

" Negombo-Chilaw road, Bazaar Street also known as Chetty Street, Kurunegala road including portion called Jayawardana Crescent, Galahitiyawa road including a portion called Collin Place, and Goods Shed road."

The question of law that arises for decision is whether on the evidence for the prosecution the accused could be said to have " parked " his hiring car within the meaning of Regulation No. 10. The word " park " is not defined either in the Motor Car Ordinance 1927 or in the Regulation. The Shorter Oxford English Dictionary gives the meaning of the verb " to park " as " to leave in a park " and defines the noun " park " as " a place where motor cars may be left unattended."

Webster's New International Dictionary (1936 2nd edition) gives a very interesting definition of the word which I reproduce below :

" To stop and keep (a vehicle especially a motor vehicle) standing for a time on a public way or to leave temporarily on a public way or in an open space especially in a space assigned for the occupancy of a number of automobiles. Statutes and Ordinances placing restrictions on parking define the terms variously,

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In some jurisdictions keeping a vehicle standing with a driver in his place is called live parking, without a driver dead parking. A vehicle halted while awaiting a traffic signal or while allowing an occupant to alight or awaiting passengers to get aboard is not usually regarded as a parked vehicle. A vehicle placed temporarily indoors as in a public garage, is usually said to be stored....."

If the word " park " in the Regulation is given the meaning assigned to it in the Dictionaries the conviction of the accused cannot stand as all that the accused did was to stop the omnibus to " drop two passengers and pick up one passenger." Is the word " park " then used in any other sense in the Regulation under consideration ?

Now the word " parked " in Regulation 3 cannot possibly mean also " halted " for in that case there will be no meaning in Regulation 2 providing for the establishment of halting places. Is there then any reason why the word " park " in Regulation 10 should be given a meaning different from what it has in Regulation 10 ? Regulation 3 prohibits the parking of hiring cars in Madampe except at a public stand. Regulation 10 has been framed to make some special provision with regard to the parking of a particular group of hiring cars namely cars plying for hire in Madampe on certain public roads. It prohibits the parking of such cars but creates two exceptions. They may be " parked " at a public stand as under Regulation 3 or they may be " parked" at a halting place but only for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods. According to this view what the framers of the regulations intended to do by Regulation 10 was to prohibit the parking of hiring cars plying on certain roads except in two groups of places and subject to certain conditions. Regulation 10 which then prohibits the parking of cars cannot be invoked to sustain a charge against a driver for halting a car. The driver of a hiring car charged under Regulation 10 could plead any one of the following defences :

(*a*) That his car did not ply for hire on certain roads.
(*b*) That he did not park his car anywhere.
(*c*) That the place he parked his car was a public stand.
(*d*) That the place he parked his car was a halting place and that he did not keep his car for a period of time longer than was reasonably necessary for the purpose of taking up or setting down passengers or goods.

The accused in this case pleads the defence set out in (*b*) above.

The question may also be considered in another way. If the word " to park " has the meaning " to halt " in Regulation No. 10 then the regulation prohibits the halting of a hiring car except (*a*) at a public stand (*b*) at a halting place for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods.

But the fourth schedule to the Motor Car Ordinance contains regulations applicable to hiring cars and Regulation 3 of these regulations enacts :

(*a*) In the event of a breakdown and then only for so long as may be necessary to enable reasonable repairs to be effected ; or

(*b*) On a public stand provided or allotted for that purpose and indicated as such by a notice exhibited by the licensing authority and then only on payment of such fees, and subject to such regulations for the use thereof as may be prescribed or made under the Motor Car Ordinance and subject to Regulation 4 of these regulations ; or

(*c*) At a stopping place indicated as such by a notice exhibited by the licensing authority and then only for so long as is reasonably necessary for the purpose of taking up or setting down passengers or goods and subject to Regulation 4 of these regulations ; or

(*d*) In a parking place provided or indicated by regulations or notice under section 56 of the Motor Car Ordinance.

These regulations could be altered or added to by regulations under section 71 of the Ordinance (vide Legislative Enactments Volume 4 Chapter 156 section 75). Regulation 10 published in the Government Gazette No. 7858 of 5th June 1931 is not a regulation made under section 71 of the Ordinance. Moreover, if the word "park" in Regulation 10 means "halt" the only effect of that regulation would be to replace Regulation 3 in the Fourth Schedule to the Ordinance as otherwise the two regulations will be overlapping. If the effect of Regulation 10 is to replace Regulation 3 in the Fourth Schedule then the framers of Regulation 10 must be taken to have intended to refuse the right to the driver of an omnibus to halt his car at any place in the event of a breakdown which right had been specifically given by Regulation 3 in the Fourth Schedule. It is not possible to say that the framers of Regulation No. 10 had such an intention.

In this connection it is interesting to refer to the definition of "parking" given in the new Motor Ordinance No. 45 of 1938 to which my attention has been drawn by the Crown Counsel. "Parking" is defined in that Ordinance as meaning "the bringing of a motor car to a stationery position or causing it to wait for any purpose other than that of immediately taking up or setting down persons or goods."

I am therefore of opinion that Regulation No. 10 does not enable a charge to be framed against a driver for "halting his hiring car for the purpose of taking up and setting down passengers."

The proctor who appeared for the accused in the lower Court contended that the charge could not be sustained under Regulation 10 but the prosecution did not move to amend the charge. I do not think that in the circumstances of the case I should alter the charge and send the case back for further proceedings.

I shall therefore quash the conviction and leave it to the proper authorities to take any other proceedings if they think it desirable to do so.

Conviction quashed.

Proctors :—

H. H. A. Jayawardene, for accused-appellant. (Simon Appu)

Present: HEARNE, S.P.J. & KEUNEMAN, J.

KARUPPEN CHETTIAR vs AMERASEKERA AND OTHERS

S. C. No. 334 (*Final*)—*D. C. Kurunegala No.* 18152.

Argued on 17th July, 1939.

Decided on 21st July, 1939.

Mortgage decree against several defendants—Application by one of the defendants to set aside such decree so far as it affects him—Order to file answer—Objection at trial by the same defendant that Judge had no power to set aside its own decree—Judgment against this defendant—Appeal—Legality of proceedings.

The plaintiff sued the 1st and 2nd defendants on a mortgage bond. The 3rd, 4th and 5th defendants who were their minor children were made parties as the land covered by the bond had been transferred to them. The 2nd defendant was appointed *guardian-ad-litem* of the minors and judgment for plaintiff was entered of consent.

Later the 3rd defendant filed an affidavit and petition on his behalf and moved that the judgment and decree be set aside and declared null and void so far as it affected him, on the ground that he was not a minor at the time the action was instituted. After inquiry the learned Judge ordered that the 3rd defendant should file answer.

On the trial date Counsel who appeared for the 3rd defendant raised the objection that the court had no power to vacate its own decree and that what he had moved the court to do could not be done. The learned Judge entered judgment against him and he appealed.

On appeal it was argued that the first judgment did not affect the appellant and that the judgment and decree passed against him subsequently could not stand as there could be only one decree in a mortgage action.

Held : (i) That the order made by the District Judge requiring the 3rd defendant to file answer was the correct order to make.

(ii) That if a judge, having jurisdiction over the subject-matter and a party to the action, exercises such jurisdiction in an irregular manner at the invitation of such party, the legality of the proceedings so initiated by him cannot be challenged by him later.

N. E. Weerasooriya, K.C. with *D. M. Weerasinghe,* for 3rd defendant-appellant.

H. V. Perera, K.C. with *S. J. V. Chelvanayagam,* for plaintiff-respondent.

HEARNE, S.P.J.

The plaintiff sued the 1st and 2nd defendants for the recovery of the principal sum and interest due on a mortgage bond No. 1562 dated 18th

April, 1931. In March, 1934 these defendants who are husband and wife purported to transfer the land covered by the bond to their minor children who were made parties to the action as puisne encumbrancers. They are the 3rd, 4th and 5th defendants. The 2nd defendant was appointed *guardian-ad-litem* (the date of this journal entry is 18th October, 1935) and on 8th June, 1936 the Judge noted " case settled. Of consent judgment for plaintiff for Rs. 9,500/- with interest at 7½% and costs." A decree was issued together with an order for sale. The caption of the decree recited the names of all the defendants, it was ordered that the 1st and 2nd defendants " do pay the plaintiff " the principal and interest, and in default of payment, it was ordered that " all right, title and interest and claim whatsoever of the said defendants.....be sold by an auctioneer."

This appeal is by the 3rd defendant. On 13th July, 1937 Mr. Markus filed an affidavit and petition on his behalf and moved that the judgment and decree be set aside and declared null and void so far as the same was against his client. It will be noted that Mr. Markus assumed that a decree had been passed against his client and moved to have it vacated.

Speaking to the motion on 30th July, 1937 Mr. Weerasooriya proceeded at once to demolish the grounds on which the 3rd defendant had come into Court. He argued that the 3rd defendant was not a minor at the time the action was instituted and that no judgment had in fact been passed against him.

The Judge made an order that the 3rd defendant should file an answer, and the case was again before the Court on 29th August, 1938. On this date Mr. Weerasinghe appeared, and raised the objection that the Court had no power to vacate its own decree. Mr. Weerasooriya's arguments were abandoned and Mr. Weerasinghe contended himself with saying that what he had moved the Court to do could not be done.

The 3rd defendant appears to have suffered from much over advice and was in a state of tottering indecision.

On appeal Counsel for the appellant has reverted to the position Mr. Weerasooriya took up in the trial Court. He has argued that the judgment passed on the 8th June, 1936 did not affect his client, and that the judgment and decree passed against him subsequently (September, 1938) cannot stand, as there can be only one decree in a mortgage action. I accept that as the appellant's last word.

In my opinion the order made by the Judge requiring the 3rd defendant to file an answer was the correct order to make. The 3rd defendant was a party of record, and the Judge decided to determine his liability after giving him an opportunity to file a defence. It is unnecessary to distinguish these facts from those in *Suppiah vs Croos* (1920) 22 N.L.R. 97, where the

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plaintiff sought to join a puisne encumbrancer as a party after decree. But even if it was a wrong order the Court, if it acted irregularly, was invited to do so by the 3rd defendant himself. The Judge assumed that he intended to contest the suit on its merits as he undoubtedly led the Court to believe. The order requiring an answer to be filed was acquiesced in and was acted upon. But on the day of trial when the plaintiff called evidence the 3rd defendant neither gave evidence himself nor adduced any, and judgment was passed against him.

In this case the Judge had jurisdiction over the subject-matter and over the 3rd defendant who was a party, and if he exercised such jurisdiction in an irregular manner—and this I am not prepared to hold—the appellant who invited him to act as he did, cannot now challenge the legality of the proceedings initiated by him (2 C.L.R. 202).

I would dismiss the appeal with costs.

KEUNEMAN, J.

I agree.

Appeal dismissed.

Proctors :—

Frank Marcus, for 3rd defendant-appellant. (Amerasekera and Others.)

P. Tambiraja & K. Kandiah, for plaintiff-respondent. (Karuppen Chettiar)

Present: DE KRETSER, J.

FERNANDO (Police Sergeant, Nanu Oya) vs LIYANAGE AND SEVENTEEN OTHERS

S. C. No. 384–389—*M. C. Nuwara Eliya No.* 489

Argued on 7th September, 1939.

Decided on 15th September, 1939.

Search warrant—Gaming Ordinance (Chapter 38) *sections* 5 *and* 7—*When may a search warrant be issued.*

On an application made by the Police, the Magistrate issued a warrant to search the premises known as the " Sinhala Jatika Hotel," Nanu Oya, on the following evidence :

" M. Sinniah Affd. 28 Kangany, Sanitary Board, Nanuoya.

I know the boutique of D. K. Liyanage. There is gambling carried on there. People of various races go there to gamble. I have not gambled there. I had seen gambling going on there, when I went there to collect rubbish. D. K. Liyanage collected *thon*. The name of the boutique is the " Sinhala Jatika Hotel". The gambling is carried on in the upstairs of the hotel."

With this warrant the Police raided the said premises and charged seventeen persons who were later convicted and sentenced to a fine of Rs. 20/– each or in default two weeks' rigorous imprisonment. Six of them appealed on points of law certified and it was *inter alia* contended on their behalf that the search warrant was issued by the Magistrate on insufficient material and consequently the presumption created by section 7 of the Ordinance did not arise.

Held : (i) That the material placed before the Magistrate was insufficient to justify the issue of the search warrant.

(ii) That before a search warrant is issued a Magistrate should satisfy himself and have not merely some reason to believe but " good reason to believe " that the place is kept or used as a common gaming place.

G. P. J. Kurukulasuriya with *A. C. Alles*, for accused-appellants.

D. Jansze, Crown Counsel, for complainant-respondent.

DE KRETSER, J.

It was urged in appeal that the Magistrate had issued a search warrant on insufficient material, and that consequently the presumption created by the Ordinance would not arise. In support of the appellants' contention I was referred to the following cases :

Police Officer of Beliatta vs. Babun Appu (23 N.L.R. 165).

Weerakoon vs. Cumara (24 N.L.R. 29).

Wittensleger vs. Appuhamy (39 N.L.R. 93).

Rajendram vs. Perera (2 C.L.W. 474).

Sub-Inspector of Police, Dandagamuwa vs. Gan Aratchy et al (1 Times L.R. 106).

Sub-Inspector of Police, Bandarawela vs Kandiah (8 Law Recorder 173).

Learned Crown Counsel argued that the Magistrate's discretion cannot be questioned, and referred me to the unreported case No. S.C. 348/M.C. Matara No. 23447 decided on the 24th July, 1939 by the Acting Chief Justice.

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de Kretser, J.

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The material in that case on which the Magistrate issued a search warrant was much fuller than the material in the present case. In view of the serious consequences which may arise from the issue of a search warrant, this Court has always insisted on Magistrates having ample material before them before they issue search warrants. The presumption created under the Ordinance takes the place of evidence which would ordinarily have to be led by the prosecution, and before a search warrant is issued a Magistrate should satisfy himself and have not merely some reason to believe but "*good reason* to believe" (as required by section 5) that the place is kept or used as a common gaming place. "*Common gaming place*" is defined in section 22 of the Ordinance.

In effect more than half the case must be proved before the search warrant issues. The Magistrate himself does not purport to act upon the presumption created by the Ordinance though he may have intended to do so. In this case the search warrant was issued on the evidence of a cooly employed by the Sanitary Board whose duty it was to collect rubbish. He himself had not gambled there but stated that he had seen gambling carried on there upstairs. He has not stated whether he saw the gambling on the day in question, which was the Sinhalese New Year's Day, or no more than one occasion. He says that the accused collected *thon* but he was not questioned as to how he saw all that while he was collecting rubbish. He has also stated that people of various races went there to gamble; but the place is a hotel or eating house, and presumably people of various races would go there for other purposes. The Police do not seem to have made any attempt to verify this information by keeping any watch on the premises themselves. I hold, therefore, that the search warrant was issued on insufficient material and that no presumption could be held to arise therefrom.

The place was raided on the Sinhalese New Year's Day when people of different communities who are friends might well assemble for their own amusement. The evidence as to what took place on the raid is not very satisfactory. According to the sergeant, they found the hotel closed, indicating presumably that the public had no access there; they stole in through the kitchen and proceeded to arrest four persons who were playing cards downstairs and who seemed to have been quite unperturbed by the entry of the Police; and when they went upstairs they found people there still playing cards in spite of the commotion there must have been downstairs.

I think the accused are entitled to an acquittal, and I therefore set aside the conviction and acquit them.

Conviction set aside.

Proctors:—

P. P. Sumanatilleke, for accused-appellants. (Liyanage and Seventeen Others.)

Present: KEUNEMAN, J. & DE KRETSER, J.

VELAN ALAN vs PONNY AND OTHERS

S. C. No. 343—*D. C. Jaffna No.* 11091.

Argued on 5th July, 1939.

Decided on 20th July, 1939.

Jaffna Matrimonial Rights and Inheritance Ordinance (*Chapter* 48) *section* 19—Thediathetam—*Sale of property by one spouse to the other—Does such property fall within section* 19 (*a*)—*Evidence Ordinance* (*Chapter* 11) *section* 92.

Held : (i) That section 19 (*a*) of the Jaffna Matrimonial Rights and Inheritance Ordinance covers the case of one spouse acquiring property from the other for valuable consideration.

(ii) That the words " decree or order relating thereto " in proviso (1) to section 92 of the Evidence Ordinance mean " decree or order relating to the document."

(iii) That the oral proof contemplated in proviso (1) to section 92 of the Evidence Ordinance is restricted to cases where it is sought to prove that the document is invalid, or to obtain a decree or order directly relating to the document.

(iv) That oral evidence is not allowable where the effect of a document incidentally comes up for determination.

N. E. Weerasooriya, K.C. with *Suppramaniam*, for plaintiff-appellant.
N. Nadarajah with *Abeywardena*, for defendants-respondents.

KEUNEMAN, J.

In this case the plaintiff brought action against the defendants (*a*) for a declaration that he was entitled to an undivided one-eighth share of certain premises. He further prayed (*b*) that deed P4, No. 5016, dated 1st June, 1936, executed by the 1st defendant in favour of the 2nd and 3rd defendants, be declared to have been executed secretly and collusively without notice to the plaintiff and that the same be declared not valid under the law of Thesawalamai, and (*c*) for an adjudication that the consideration mentioned in the said deed was fictitious consideration for the share conveyed and that the market value was only Rs. 540/–, and (*d*) for an order on the 2nd and 3rd defendants to convey the share in question to the plaintiff. In substance, the plaintiff as a co-owner claimed the right of pre-emption under the Thesawalamai.

The following issues were framed :

" 1. Is deed No. 841 of 23rd January, 1929 supported by valuable consideration ?

2. If not, is the property conveyed *thediathetam* within the meaning of Ordinance No. 1 of 1911 or is it separate property of the 1st defendant ?

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3. As deed No. 5016 of 1st June, 1936 purports to convey a divided northern half of the entire land, is the present action for pre-emption of an undivided half share or quarter share of the entire land maintainable ?

4. In case plaintiff succeeds in this action are the defendants entitled to compensation for improvements made ? If so, in what amount ?

5. Is deed No. 841 dated 23rd January, 1929 a deed of sale or a deed of donation ?

6. What is the market value of the share sold by the 1st defendant to 2nd and 3rd defendants ?

7. What is the share of the land, dealt with by deed No. 5016 of June, 1936 ? "

The learned District Judge dismissed the plaintiff's action with costs and the plaintiff appeals.

In his judgment the District Judge held that the 1st defendant acquired the premises in question from her husband for valuable consideration after her marriage by deed P2 of 23rd January, 1929, and that the property in question thus became *thediathetam* property of the wife, and in consequence of section 20 of Ordinance No. 1 of 1911, a half share of the property reverted to the husband. On the death of her husband his half share devolved upon his brothers and sisters, and the plaintiff thus became entitled to a one-eighth share of the property. The District Judge further held that it was not open to the defendants to lead oral evidence to prove that deed P2 was not given for valuable consideration, in view of the statement in the deed that it was a transfer for valuable consideration, namely, a sum of Rs. 1,000/–, being the dowry money of the 1st defendant. The District Judge held that the defendants were precluded by section 92 of the Evidence Ordinance from leading such oral evidence to change the character of the transaction. He held further that the 1st defendant's transfer P4 in favour of the 2nd and 3rd defendants purported to convey not the whole land but a divided northern block, and stated that the 1st defendant, who was only entitled to an undivided half share of the property, had no authority to mark out and sell a divided block. The District Judge held that the 1st defendant could not be held to have transferred an undivided share to the 2nd and 3rd defendants, and that the right of pre-emption only applied to the sale of undivided shares, and that the plaintiff's action accordingly failed.

I do not think the District Judge's argument on this last point can be supported. On an examination of the deed P4, I think the District Judge was right in holding that the 1st defendant purported to sell a divided northern block out of the property in question. If we presume that the 1st defendant was entitled in fact to an undivided half share of the whole property, it is no doubt strictly true to say that the 1st defendant had no title to sell the whole of a divided block, but this does not mean that the 1st defendant's deed was devoid of any legal effect. The result that would follow in law is that the 2nd and 3rd defendants would be entitled to an undivided half share of the northern block only, and not of the whole land. I think this must be regarded as a sale of the undivided share of the property, such as would support an action for pre-emption.

The ground on which the District Judge rested his judgment accordingly failed. Counsel for the respondents, however, argued that the District Judge's findings on the other aspects of the case were wrong. He contended in the first place that section 19 of Ordinance No. 1 of 1911 only applied to acquisitions for valuable consideration by either of the spouses from strangers, and not to acquisitions from each other. He pointed out that under section 9 of that Ordinance it was open to the spouses to make voluntary grants, gifts and settlements to and upon each other, and argued that the effect of such transactions was to vest the other spouse with title, although such title was made subject to the debts and engagements of the transferring spouse. He further argued that the interpretation given by the District Judge to section 19 would lead to an anomalous state of affairs. However clear may be the intention of the one spouse that the whole property should be vested in the other, if the transaction is for valuable consideration, half would automatically revert to the transferring spouse in view of the fact that it was *thediathetam* property. I think Counsel for the respondents is probably right in arguing that this case was not in the contemplation of the draftsman of the Ordinance. The question, however, we have to decide is whether the meaning of the words of section 19 is sufficient to cover the case of an acquisition by one spouse of the property of the other for valuable consideration. The language used is undoubtedly very wide, viz. " (*a*) property acquired for valuable consideration by either husband or wife during the subsistence of marriage." It was open to the draftsman to restrict that language to acquisitions from strangers, but he has not done so. I am of opinion, in view of the language used, that it is not possible for us to say that it does not cover the case of one spouse acquiring property from the other for valuable consideration, and however unfortunate the result may be, I think we must uphold the interpretation given by the District Judge. I may add that the language of sections 17 and 18 supports this interpretation. Under these sections property received for pecuniary consideration does not fall within the class of " property derived from the father's side " or " property derived from the mother's side." All such property if received during the subsistence of the marriage would, I think, be clearly *thediathetam* property. Again, the decision of the Divisional Court in *Avitchy Chettiar vs Rasamma* (35 N.L.R. 313) that property acquired by a wife during the subsistence of the marriage out of money which formed part of her separate estate is *thediathetam* property is in keeping with the view I have expressed. (See the argument of Garvin, A.C.J.)

Counsel for the respondents disputed on further findings of the District Judge, namely, his exclusion of the oral evidence to show that deed P2 was not given for valuable consideration. In the recitals of deed P2, the vendor-husband stated that he had previously appropriated and spent a sum of Rs. 1,000/–, being the dowry money of his wife, and in the operative clause the vendor made the conveyance " in consideration of the sum of Rs. 1,000/– already received " by him from his wife. The consideration

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stated in the deed was valuable consideration within the meaning of section 19. The wife, Ponny, in this case gave evidence to contradict this statement but the District Judge held that such evidence was not admissible, in view of section 92 of the Evidence Ordinance.

Counsel for the respondents argued that he was entitled to lead oral evidence under proviso (1) to section 92, and that what he was seeking to establish was " want or failure of consideration." He cited Woodroffe & Ameer Ali on Evidence, 9th Edition, p. 660 : " The section prevents the admission of oral evidence for the purpose of contradicting or varying the terms of a contract, but does not prevent a party to a contract from showing that there was no consideration, or that the consideration was different from that set out in the contract."

There are, however, other words in the proviso which we have to consider. What is provable under the proviso is any fact " which would invalidate any document, or which would entitle any person to any decree or order relating thereto." Now it is clear in this case that no attempt is being made to " invalidate " the document. On the contrary all parties are agreed that the document is valid, and the only question for determination is the effect of the document. Further, I am of opinion that the present action is not an action to obtain any decree or order " relating thereto." I think that these words mean " decree or order relating to the document." In the present case there is no claim relating to the document. The effect of the document only comes up for determination incidentally in connection with the proof of the plaintiff's title and of his right to claim pre-emption. I do not think that the words " relating thereto " apply to such a case. I think oral proof is restricted to cases where it is sought to prove that the document is invalid, or to obtain a decree or order directly relating to the document, *e.g.* a decree for rectification of a document, and that oral evidence is not allowable where the effect of a document incidentally comes up for determination.

No case has been cited to us where oral evidence has been admitted to prove that the consideration was different from that stated in the deed, except where validity of the document was in issue, or where relief was being sought in respect of the instrument itself. An instance of the latter kind is to be found in *Perera vs James Appuhamy* (3 C.W.R. 341), where the plaintiff sued the defendant for reconveyance of premises conveyed to the defendant on a deed. The deed on the face of it purported to be a sale, but the plaintiff was held entitled to lead evidence to show that no consideration passed, and that the conveyance was on trust. As I said before, an action for rectification of a deed would be another instance. I think we are driven to the same conclusion, when we take the words " want or failure of consideration " in their context, viz. " such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in law or fact." These are grounds on which a document can be declared invalid,

or on which relief can be granted in respect of the document. I cannot imagine proof, for instance, of fraud being admitted for a purely collateral purpose.

The nearest case to the present one which I have been able to find is *Lunaiha Umma vs Hameed* (1 C.W.R. 30). There a Moorish lady sued her husband for the sum of Rs. 7,000/–, being proceeds of a sale of property belonging to her. The defendant pleaded that this sum was by agreement between him and his wife to be taken as consideration of the transfer to her and to her child of certain other property belonging to him. The transfer in question purported to be " in consideration of love and affection .....and for divers other good causes and considerations." The last words were held to be merely a notarial flourish, and the Supreme Court held that there was only one answer, and that in the negative, to the application " to show by *viva voce* evidence, that what purports to be, on the face of it, an out-and-out deed of gift by her husband to her on the ground of natural love and affection, was in fact a transaction for other and valuable consideration." The Supreme Court, however, gave no reasons for this decision.

I am of opinion that the claim to lead oral evidence in this case for the purpose of showing that the deed P4 was given for a consideration different from that stated in the deed cannot be permitted.

The issues in the case will be answered as follows :

(1) Yes.

(2) Need not be answered, except to say that the property conveyed by P2 was the *thediathetam* property of the wife.

(3) Yes.

(5) Deed 841, P2, is a deed of sale.

(7) Deed 5016, P4, dealt with an undivided half of the northern block of the land in question.

The District Judge has not dealt with issues (4) and (6).

I allow the appeal, and order that the plaintiff be declared entitled to an undivided one-eighth share of the premises mentioned in paragraph (1) of the plaint. I also order that the case be remitted to the District Court for the determination of issues (4) and (6). The District Judge may decide these issues on the evidence already led, or if he thinks fit, may permit the parties to lead further evidence. The plaintiff-appellant is entitled to the costs of the appeal. The costs of the trial already held will be in the discretion of the District Judge.

DE KRETSER, J.

I agree.

Appeal allowed.

Proctors :—

P. Canapathypillai, for plaintiff-appellant. (Velan Alan)

V. Nagalingam, for defendants-respondents. (Ponny and Others)

Present : WIJEYEWARDENE, J. & NIHILL, J.

SOKKALAL RAN SAL vs NADER AND FOUR OTHERS

Application for conditional leave to appeal to the Privy Council in S. C. No. 116—*D. C. (Inty) Colombo* 6138.

Argued on 15th September, 1939.

Decided on 22nd September, 1939.

Privy Council Appeal—The Appeals (Privy Council) Ordinance (Chapter 85) *Rule* 1—*Undervaluing subject-matter of action for the purpose of evading stamp duty.*

The appellant sued the respondents in the District Court praying for :

i. an injunction restraining the respondents (*a*) from infringing his trade marks No. 4919 and No. 5929 and (*b*) from passing off goods not of the appellant's manufacture as and for the goods of the appellant.

ii. an account of the profits wrongfully made by the respondents.

iii. delivery to the appellant of all *beedies* in the respondents' possession marked with certain devices.

He valued the subject-matter of the action at Rs. 1,000/–.

In appeal the Supreme Court made order :

i. dismissing the appellant's action with costs of the District Court and costs of appeal.

ii. directing the Registrar of Trade Marks to proceed with the application for the registration of trade marks 6778, 6779 and 6780 in spite of the opposition of the appellant

iii. granting Rs. 300/– as damages to the respondents.

The appellant then asked for conditional leave to appeal to the Privy Council.

It was urged *inter alia* that the costs ordered against the appellant should be reckoned in valuing " the matter in dispute " for the purposes of Rule 1 (*a*) of the Privy Council Appeal Rules.

Held : (i) That the costs ordered by the Supreme Court cannot be taken into account in arriving at the value of the " matter in dispute " for the purposes of Rule 1 of the Privy Council Appeal Rules.

(ii) That where the subject-matter of an action or a matter in dispute is deliberately undervalued for the purpose of evading the revenue laws of the Island, the party concerned will not be allowed to alter the value afterwards so as to bring himself within Rule 1 (*a*) of the Privy Council Appeal rules.

N. E. Weerasooriya, K.C. with *N. Nadarajah* and *K. S. Aiyar*, for plaintiff-petitioner.

H. V. Perera, K.C. with *Choksy* and *Rasa Ratnam*, for defendants-respondents.

WIJEYEWARDENE, J.

This is an application for conditional leave to appeal to the Privy Council and in view of the objections raised by the respondents it is necessary to give a brief summary of some of the preliminary facts.

The appellant sued the respondents in the District Court of Colombo and asked for judgment against the respondents for:

i. an injunction restraining the respondents (*a*) from infringing his trade marks No. 4919 and No. 5929 and (*b*) from passing off goods not of the appellant's manufacture as and for the goods of the appellant.

ii. an account of the profits wrongfully made by the respondents.

iii. delivery to the appellant of all *beedies* in the respondents' possession marked with certain devices.

The appellant valued the subject-matter of the action at Rs. 1,000/–.

The appellant also made an application along with the plaint for an interim injunction. This injunction was granted by the District Judge but after a short interval of time the parties agreed to the suspension of the injunction pending the trial.

The respondents filed answer contesting the claim of the appellant and claiming a sum of Rs. 10,000/– as damages sustained by them in consequence of the interim injunction. At a later stage the respondents amended the prayer of their answer by asking that in addition to the relief already asked, they should be declared entitled to have their trade marks No. 6778, No. 6779 and No. 6780 registered in the Register of Trade Marks in spite of the opposition of the appellant.

During the pendency of the trial in the District Court the appellant made an additional claim for Rs. 10,000/– as damages sustained by him by reason of the respondents passing off goods not of his manufacture as his goods, as set out in paragraph 14 of the plaint.

The District Judge gave judgment granting an injunction to the appellant and ordering the respondents to deliver to the appellant *beedies* in their possession bearing certain labels. The appellant was however refused any damages.

The respondents appealed against the judgment of the District Judge while the appellant failed to appeal or file cross objections in appeal against that part of the judgment which dismissed his claim for damages.

In appeal the Supreme Court set aside the judgment of the District Court and ordered decree to be entered :

i. dismissing the appellant's action with costs of the District Court and costs of appeal.

ii. directing the Registrar of Trade Marks to proceed with the application for the registration of trade marks 6778, 6779 and 6780 in spite of the opposition of the appellant

iii. granting Rs. 300/– as damages to the respondents.

The present application is for conditional leave to appeal against the decree of the Supreme Court. The respondents contend that no appeal lies to the Privy Council as the value of the matter in dispute is less than Rs. 5,000/– and as no question of great general or public importance is involved in the appeal.

It was not seriously urged on behalf of the appellant that he was entitled to appeal under Rule 1 (*b*) of the rules in the Schedule to the Appeals (Privy Council) Ordinance. This is an action between two rival traders

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of *beedi* cigars and the points for adjudication depend largely on questions of fact as to the period during which the rival trade marks had been used. No question of general or public importance arises for determination in the case and I hold that the appellant is not entitled to appeal under Rule 1 (*b*).

The appellant has filed an affidavit in support of his plea that " the matter in dispute on the appeal " to the Privy Council exceeds the value of Rs. 5,000/–. The reasons set out in the affidavit and adopted by counsel in his argument before us may be briefly summarised as follows :

1. The action was valued at Rs. 1,000/– in the plaint " as the stamp duty payable in respect of proceedings under the Trade Marks Ordinance is the minimum chargeable in the District Court in civil proceedings and falls under class 1 up to and including Rs. 1,000/–."

2. The value of the appellant's trade marks and the loss of profit consequential on the refusal of an injunction to the appellant is Rs. 10,000/–.

3. The loss that would accrue to the appellant as a result of the setting aside of the judgment of the District Judge in regard to the delivery to the appellant of the *beedies* in respondents' possession amounts to Rs. 10,000/–.

4. The loss of profit which would accrue to the appellant in view of the direction given by the Supreme Court decree to the Registrar of Trade Marks to register marks Nos. 6778, 6779 and 6780 is Rs. 15,000/–.

5. The taxable costs payable by the appellant under the decree of the Supreme Court would exceed Rs. 6,000/– and should be regarded as a portion of the " matter in dispute on the appeal."

The first contention is clearly untenable. Section 49 of the Trade Marks Ordinance (Legislative Enactments Volume III Chapter 121) enacts that " every judgment or order by the District Court under this Ordinance should be subject to an appeal to the Supreme Court.....and the minimum duties chargeable in the *Supreme Court* under the provisions of the Ordinance for the time being in force relating to stamps shall, so far as the same may be applicable, be charged in all proceedings relating to or in connection with such appeal." That section therefore refers to stamp duties chargeable in the Supreme Court and the lowest class in the Stamp Ordinance (*vide* Legislative Enactments, Volume IV Chapter 189) with regard to proceedings in the Supreme Court is class 1 which includes claims up to and including Rs. 500. The appellant should, therefore, have valued his claim at Rs. 500/– and not Rs. 1,000/– if the valuation in the plaint was inserted merely in view of the provisions of section 49 of the Trade Marks Ordinance. It is difficult to believe that the lawyer who drafted the plaint would have thought that the action was an action to which section 49 of the Trade Marks Ordinance applied. This action was partly a " passing off " action and therefore was not an action under the Ordinance (*vide* section 44 of the Trade Marks Ordinance). Moreover, if the lawyers made the mistake of thinking that it was an action to which section 48 was applicable there was no reason why the subject-matter of the action should have been valued as the amount of the stamp duty would have been determined by the nature of the claim. I have no hesitation in rejecting this explanation for the valuation of the subject-matter of the action at Rs. 1,000/–. I hold that the

valuation was intended to be regarded as a correct and *bona fide* valuation of the claim.

It is convenient to discuss the second and third points together. The appellant valued the " subject-matter of the action " at Rs. 1,000/– in the plaint. The subject-matter of the action is indicated clearly in the prayer of the plaint which refers to an injunction, the taking of accounts in respect of profits made by the respondents, and an order for delivery for *beedies*. This shows that at the time of filing the plaint the appellant valued at Rs. 1,000/– what he now seeks to value in the aggregate sum of Rs. 20,000/– As stated by me earlier the explanation offered by the appellant for valuing the subject-matter at Rs. 1,000/– cannot be accepted. The affidavit moreover makes a bare statement that the real value is Rs. 20,000/– and does not give the grounds on which the valuation is made. There is no doubt that it is in the interest of the appellant to state now that the value of the subject-matter is Rs. 20,000/– in order to support his application for leave to appeal to the Privy Council.

It has not been suggested by the appellant that the claim had increased in value between the date of the plaint and the date of appeal. If the value given in the plaint is in fact an underestimate, it appears to me that the undervaluation was made deliberately for the purpose of avoiding payment of heavy stamp duty and thus evading the revenue laws of the Island. In these circumstances I am unable to accept and act upon the value now sought to be placed on the matter in dispute. (*vide Appuhamy vs Corea* (900, 1 Browns 165), *de Alwis vs Appuhamy* (1929, 30 New Law Reports 421).

I shall now deal with the fourth point raised by the appellant's counsel. The direction given to the Registrar of Trade Marks to proceed with the application of the respondents' trade marks in spite of the appellant's opposition, cannot in my opinion be given a separate and distinct valuation apart from the claim of the appellant. The claim of the appellant if successful would have automatically prevented the respondents from obtaining the registration of those particular trade marks. The dismissal of the appellant's action by the Supreme Court was on the ground that the respondents had a prior or at least an honest concurrent user of those particular trade marks. This necessarily involved a finding that the plaintiffs could not oppose the application of the respondents for the registration of those trade marks. The order of the Supreme Court did not state that the respondents were entitled to get their trade marks registered against all opposition but only that the respondents' application should be considered by the Registrar ignoring the opposition of the appellant whose claim has been found to be groundless by the Supreme Court. I hold that the direction given to the Registrar was a natural and logical sequel to the order dismissing the plaintiff's claim. Moreover the value placed on this part of the decree of the Supreme Court in the appellant's affidavit seems to me to be highly exaggerated in view of the fact that the whole claim of the appellant was valued at Rs. 1,000/–.

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The last point urged by the appellant's counsel is that the costs payable by the appellant under the Supreme Court decree should be regarded as a part of "matter in dispute on the appeal." This argument has certainly the merit of novelty as a similar argument does not appear to have been addressed to this Court in any previous case. The learned Counsel argues that in appealing to the Privy Council the appellant is seeking to obtain relief against the decree of the Supreme Court dismissing his claim and ordering him to pay the respondents' costs. The liability to pay costs should therefore, be regarded as a part of the matter in dispute. There is no doubt that the appellant is aggrieved in having to pay a large sum of money as costs in addition to having his claim dismissed. But do facts constituting a grievance necessarily constitute a matter in dispute within the meaning of Rule 1 (*a*)? The dismissal of the appellant's claim necessarily resulted in the appellant becoming liable to pay costs to the respondents. If the appellant succeeds in his appeal to the Privy Council and gets the decree of this Court dismissing this action vacated, the appellant will not only be relieved from the necessity of paying the costs of the respondents but will also be declared entitled to an order for costs against the respondents. If the contention of the appellant's counsel is sound, it may even be argued that in order to ascertain the value of the matter in dispute the value of the plaintiff's claim should be enhanced by double the amount of costs he is now ordered to pay. But I do not think that the language of Rule 1 (*a*) forces us to such a position. If the amount of costs should be reckoned as forming a part of "the matter in dispute" mentioned in the earlier part of Rule 1 (*a*) it must also be reckoned in the case of appeals mentioned in the latter part of the Rule as appeals involving "directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of Rs. 5,000 or upwards." It is difficult to see how an order on an unsuccessful party to pay costs could be regarded as forming part of "a claim or question to or respecting property of some civil right." If the costs payable by an unsuccessful party cannot be considered in the case of appeals falling under the second portion of Rule 1 (*a*) it is difficult to hold that such costs should be regarded as forming part of a matter in dispute mentioned in the earlier part of the Rule. There may no doubt be cases where the order to pay costs may by itself give a right of appeal to the Privy Council. In the present case however, the order to pay costs is subsidiary to the order dismissing the appellant's claim and ordering him to pay Rs. 300 as damages.

In *Doorga Doss Chowdry vs Rama Nanth Chowdry* (1860, 8 Moore's Indian Appeals) the Privy Council held that costs of suit should not be added to the principal sum and interest to arrive at the value of the claim for the purposes of an appeal to the Privy Council. That decision was given on an interpretation of the Order-in-Council of April 10, 1838 which is not available to me. Mulla in his "Commentary" on the Indian Code of Civil Procedure (eighth edition) states at page 294 that the Order-in-Council referred to "the amount or value of the subject-matter in dispute in appeal to Her Majesty in Council." If the statement of Mulla is correct, then the decision of the Privy Council is an authority in support of the view I have expressed.

I would dismiss the appellant's application with costs.

NIHILL, J.

I agree.

Application dismissed.

Proctors :—

S. Ratnakaram, for plaintiff-petitioner. (Sokkalal Ram Sal)

W. D. N. Selvadurai, for defendants-respondents. (Nader and Others)

Present: DE KRETSER, J. & NIHILL, J.

KIRI BANDA vs DINGIRI BANDA

S. C. No. 85 (1)—*D. C. Kurunegala* 4167.

Argued on 19th September, 1939.

Decided on 2nd October, 1939.

Kandyan Law—Inheritance—Person dying unmarried and issueless—Right of deega *married daughters of deceased's father's brother to inherit.*

One Ukku Banda died unmarried and issueless leaving as his next of kin five children of his father's brother, Kapuruhamy. Of these five children two were sons and three were daughters married in *deega*. It was successfully contended in the District Court that the three daughters being married in *deega* forfeited their rights to inherit Ukku Banda's property.

Held : (i) That the three females were entitled to succeed to the deceased's property notwithstanding their marriages in *deega*.

(ii) That where cousins are called to an inheritance there is no distinction between males and females.

(iii) The provision of the customary law that a *deega* married female forfeits her rights to her parents' property should not be extended to property to be inherited from others.

C. V. Ranawake, for appellants (2nd, 4th to 7th appellants).

E. A. P. Wijeyeratne, for respondents (1st respondent).

DE KRETSER, J.

One Ukku Banda died unmarried and issueless leaving as his next of kin the children of his father's brother Kapuruhamy. The children of two brothers or of two sisters are called brothers and sisters although in reality they are cousins, and these five children of Kapuruhamy, two sons and three daughters, made a close approach therefore to the position Ukku Banda's brothers and sisters would have held.

The three females were married in *deega*, and the question is whether they therefore had no right to inherit from Ukku Banda. If Ukku Banda had sisters of his own married in *deega* they would not have inherited from him save in exceptional circumstances which need not now be considered. It is urged that his cousins should be similarly disqualified because they ought to be treated as Ukku Banda's sisters.

The strongest emphasis is laid, however, on the argument that a *deega* married female abandons for all time every claim to any property to which is attached the quality of inherited ancestral property, and that the disqualification is not limited to her own parents' property. It is urged that it is not a case of forfeiture, in which case one would hesitate to extend the disqualification, but a case of voluntary abandonment, the *deega* married

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daughter loses her status, her identity as a member of her father's clan, and becomes a member of her husband's clan ; and there can be no complaint since she takes her portion with her in the form of dowry.

It seems to me that it is rather a fiction to term the loss she sustains a voluntary abandonment. She usually has no voice in the matter of her marriage, and one requires some strong reason before one can accept the position that a person has abandoned something which would be to her advantage. Besides, abandonment surely depends on intention. If one can assume that a daughter marrying in *deega* abandons her claim to her parents' estates, a portion of which she knows would be hers but for marriage, why must one assume that she means to abandon even claims to a cousin's estate, which may only come into existence much later ? There can be no doubt that it is a case of forfeiture which we are faced with. All the authorities hitherto have gone on that footing.

It is not of much use to seek to know the reason for this customary law. A custom like this merely means a repetition of a large number of cases, and the origin of a custom is usually difficult to trace. It is interesting from the point of historical and scientific research to attempt to ascertain the reason for the existence of the custom, but from a legal point of view all we are concerned with is the proof of the custom. That proof is gathered from writers, who may be trusted to know what they are writing about, from the evidence of well-informed witnesses, and of course from the trend of judicial decisions. If the custom is not proved one must fall back on the common law, which is the Roman-Dutch Law. I deprecate the attempt to evolve principles ; it is a snare the attractions of which one would do well to avoid. What we are asked, is the reason underlying the forfeiture which a *deega* marriage involves ? Is it that the female just loses her identity ? that "what the husband is the wife is ?" that his people become her people ? It may be so. It is a theory not without its attraction for the anthropologist, the biologist, the sentimentalist, who may find some evidence of his theory in the fact that in the days when communication was difficult and a woman married and left for some distant village she was really cut off from her people. But on the other hand we find her not only naturally looking back on her old home but custom favouring a marriage between her children and her brothers' children, a custom which, of course, never received judicial recognition.

We find that if she had occasion to come back her family did not regard her as a stranger but were under a natural obligation to maintain her, and they might even go the length of restoring her to her previous position in the family. She might even marry in *deega* and yet keep in touch with her family, so that both parties might indicate that she was not losing any rights by her marriage.

Sawer, a recognised authority on the subject, says at page 2 of his Digest that on the failure of issue of the sons and of the daughters married

in *binna*, the *deega* married daughters succeed to their father's property; *i.e.* they are not cut off for ever. But if the *deega* married daughters are dead, then the brothers of the father succeed in preference to the children of such daughters, but if the father's brothers are dead then the children of the *deega* married daughters succeed in preference to their cousins, the children of the father's brothers.

A better reason would be that at her marriage the daughter marrying in *deega* is given her portion in advance by her father, or out of the father's estate by the brothers, if her father be dead. It was not fair therefore for her to expect more, and it was left to them to decide whether she should have more or not. It was a matter of arrangement really.

The provision is always with regard to her parents' property, the property on which she obviously had a natural claim. Nowhere do we find the forfeiture carried any further, and in the absence of authority I am not inclined to extend it. But as a matter of fact there are authorities to the contrary, and they are of such antiquity that they are not only more likely to express the customary rights as they existed at the time when the promise was made by the British Government to preserve the customary rights of the people, but they have never been challenged and must have been acted on quite frequently

The earliest authority is to be found in Austin's Reports at page 149. Mr. Wijeyeratne's diligence furnished us with a copy of the record, which is annexed hereto. The Supreme Court was assisted by assessors, who were Kandyans and took the evidence of two chieftains on the point. These witnesses presumably were recognised as competent to express an opinion, and there is no indication that their authority was challenged or other evidence offered. The lawyers appearing in the case were themselves well qualified in the subject. In fact the question whether a *deega* married cousin would succeed does not seem to have been considered so much as the question whether she forfeited her rights because her uncle had given her in marriage. The argument rather seems to have been that she succeeds through her uncle and her uncle having given her in marriage might she not be taken to forfeit her claims to any rights arising indirectly through that uncle ? The rights coming to her father, himself an uncle of the deceased, do not seem to have been challenged. The opinion was that she would not forfeit her rights, and this Court adopted that view.

The taking of similar evidence has been common, even in recent times; *vide Dewandra Unnanse vs Sumangala Terunnanse* (29 N.L.R. 415) and *Saranankara Unnanse vs Indajoti Unnanse* (20 N.L.R. 385.)

The case reported by Austin was decided as far back as 1851. Then in 1902 came the decision in *Dinga vs Hapuwa* (7 N.L.R. 100) where this Court held that a *deega* married daughter does not forfeit her right to inherit land which had been acquired by her mother or to which her mother had succeeded collaterally *or otherwise than by inheritance from her father*. These

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last are the important words. This decision followed a decision by Lawrie, J. in an unreported case. Lawrie, J. had been District Judge of Kandy for many years and his opinion always received the greatest consideration. In *Kiriwânte vs Ganetirala* (2 N.L.R. 92) he said that in a case where a matter was uncertain a daughter ought not to be deprived of a share of her inheritance ; " unless the law be clear, and unless the forfeiture be certain, it should not be decreed." Withers, J. agreed. It is a statement which commends itself to me. In *Dingiri Menika vs Appuhamy* (6 N.L.R. 133) where the question related to acquired property, Lawrie, J. said ".....I doubt whether the forfeiture created by a *deega* marriage extends further than to the father's estate, and even with regard to his estate the tendancy ever was to relax the law and to admit the *deega* married daughter."

There is therefore authority which covers this point and I see no reason why the rights of the deceased's female-cousins should be affected by their marriages in *deega*. There is no reason to interpret the statement at page 584 of Modder as an authority to the contrary. All he says is that when the direct line of descent is broken, inherited property goes over to the next nearest line which issues from the common ancestral roof-tree. That is the rule under a number of systems of law including the Roman-Dutch Law. In this case one goes back to Ukku Banda's grandfather before one begins to come down. That does not mean that Ukku Banda's grandfather is artificially revived and that the property passes to him and then he dies and it passes to Kapuruhamy who is also artificially revived ; and it being Kapuruhamy's inherited property his daughters married in *deega* take nothing. Such a way of looking at the matter is most unnatural.

There was an attempt to suggest that Ukku Banda left acquired property as well, and that in the case of such property the male cousins should be treated as brothers and therefore exclude their sisters. To begin with while there was some suggestion at an early stage of the trial that Ukku Banda owned acquired property, this position seems to have been abandoned during the course of the trial, and the District Judge clearly goes on the footing that the property in question was inherited property. It is too late to go back again. But I do not see how the position would be any better for the respondents were it otherwise. Their strongest arguments are based on the assumption that this property is parental property.

The position that the brothers take all the acquired property of a deceased parent to the exclusion of the sisters is now established, but not without considerable challenge in more recent years. There is no reason to extend the forfeiture. It has been supposed that the reason why the sisters were disqualified was that they contributed no effort to the acquisition, whereas the labourers of the family ought to be rewarded, and the brothers were the toilers and earners. The claim was even greater when, as often happened, two brothers took one woman to wife. No such consideration if that be the true one, applies to the case of cousins, none of whom contributed to any acquisition by Ukku Banda.

Sawer, at page 13 deals with the rights of inheritance to both ancestral and acquired property. Dealing with the case of *sisters*, he says that they have " only the same degree of interest in their deceased brother's acquired property that they have in their deceased parents' estate." And it has now been settled that the sisters are excluded by the brothers. But the sisters do come in if the brothers and their sons fail.

Proceeding further he at length arrives at the statement that the property goes to cousins (called brothers and sisters) on the mother's side, that is to say the mother's sisters' children, and then says that, failing them, it goes to the mother's brothers and their children, and failing them to the father's brothers and their children, and failing them to the father's sisters and their children. Where cousins are called to the inheritance there is no distinction between males and females. He makes this quite plain at page 14 when he says. " When a person dies intestate, leaving no nearer relations than first-cousins called brothers and sisters, his or her acquired property shall go equally to such cousins by the father's and mother's side, that is to say, to the children of the father's brother or brothers, and to the children of the mother's sister or sisters, share and share alike." The last words are most important and can admit of no doubt.

There is nothing in the case of *Menikhamy vs Suddana* (28 N.L.R. 266) to the contrary. According to Modder at page 617 of his work, " In regard to acquired property there is no definite system laid down by the jurists, but the tendency is to give preference to the maternal over the paternal line, and to elect males before females in the same degree." He is summarising the law very generally and even then he speaks only of a " tendency." While this statement may be true in general we have the authority of Sawer for the very situation we are now dealing with.

The order made in the lower Court is set aside and the appellants are declared entitled to the rights they claim with costs both in this Court and in the Court below.

NIHILL, J.

I agree.

Appeal allowed.

Proctors :—

E. F. C. Modder, for appellant. (Kiri Banda)

Present: WIJEYEWARDENE, J. & NIHILL, J.

NADARAJAN CHETTIAR vs SATHANATHAN AND ANOTHER

S. C. No. 296 (*F*)—*D. C. Colombo* 940.
Argued on 7th, 8th, 11th & 12th September, 1939.
Decided on 29th September, 1939.

Fideicommissum—Gift of immovable property subject to certain conditions—Prohibition against leasing the premises for a term of more than five years—Lease of premises for a term of seven years—Is the lease valid.

One Ratnasabapathy gifted certain premises in St. Paul's Ward in Colombo to his three sons, Nagasen, Sathanathan and Muttusamy on the following among other conditions:

1. "That each donee shall possess the share or interest hereby gifted to him in the said several premises during the term of his natural life and take and enjoy the issues rents and profits thereof but shall not be at liberty to sell or mortgage his said share or interest or in any other manner alienate or encumber the same or lease the same for a term of more than five years at any one time or execute a lease thereof before the expiry of any lease already existing."

2. "That it shall be lawful for any of the donees to tender the share or interest hereby gifted to him in the said several premises or any of them as security by him upon his appointment to any situation under the Crown or otherwise for the faithful performance of his duties therein notwithstanding the prohibition against alienation or encumbrance hereinbefore contained."

3. "That on the death of each donee or in the event of his share or interest in the said several premises being seized in execution by any Fiscal for his debts as aforesaid the same shall devolve absolutely on the children of the said donee in equal shares and the share that shall or may have devolved on any deceased child of the said donee alive shall devolve on his or her issue and failing issue of the said donee his share or interest shall devolve equally on the two other donees or their issues per stirpes."

Nagasen entered the service of a firm called Hull Blyth & Co. (Colombo) Ltd. and finding some difficulty in tendering the property as good security for the performance of his duties requested his father to revoke the deed and re-gift the property to him "subject to the necessary conditions as will enable him to effect a valid tender and hypothecation of the said properties to the said Hull Blyth & Co. (Colombo) Ltd." The donor thereupon executed another deed granting to Nagasen the undivided 1/3 shares of the premises gifted to him under the earlier deed by way of an irrevocable gift subject to the following conditions:

1. "That the donee shall only possess the properties hereby gifted to him during the term of his natural life and take and enjoy the issues rents and profits thereof but shall not be at liberty to sell or mortgage (except as is hereinafter provided) or in any other manner alienate or encumber the same or lease the same for a term of more than five years at any one time or execute a lease thereof before the expiry of any lease already existing."

2. "That the properties hereby gifted to the said donee shall in no event be liable (save as is hereinafter accepted) for his debts or for seizure on account of any debts and in the event of any such seizure the donee shall cease thereafter to have any right to or claim whatsoever in the said properties and the

same shall immediately devolve absolutely on his heirs in reversion (hereinafter referred to) provided however and it is hereby expressly declared that it shall be lawful for the donee to mortgage hypothecate and tender the said properties or any of them or part thereof as security by him for all and each or any of the following purposes.....'

3. " That on the death of the donee or in the event of his share or interest in the said premises being seized in execution for his debts other than those hereinbefore provided for the same shall devolve subject to any existing mortgage hypothecation tender or charge as hereinbefore provided for on the children of the said donee in equal shares and the share that shall or may have devolved on any deceased child of the said donee if alive shall devolve on his or her issue or failing issue then in equal shares on his brothers Ratnasabapathy Sathanathan and Ratnasabapathy Muttusamy or their issues per stirpes."

Thereafter Nagasen, his wife and one Charavanamuttu gave a lease of Nagasen's undivided 1/3 of the premises for seven years. About six months after the execution of the lease Nagasen died leaving no issue. Thereupon Nagasen's brothers claimed his share. The lessee resisted this claim.

It was urged on behalf of the lessee that :

(*a*) the deed did not create a *fideicommissum* and that the lease for a period above the term specified in the deed of gift was good against Nagasen's brothers, the plaintiffs.

(*b*) even if the deed created a *fideicommissum* the lease was good for five years being the period for which leases were permitted by it.

Held : (i) That the deed created a *fideicommissum*.

(ii) That the lessee was not entitled to claim any rights against the plaintiffs by virtue of the lease which was executed in contravention of the donee's express intention.

C. Thiagalingam with *J. A. L. Cooray*, for 1st defendant-appellant.

H. V. Perera, K.C. with *E. B. Wickremenayake* and *Mahadeva*, for plaintiffs-respondents.

H. W. Thambiah, for 2nd defendant-respondent.

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The plaintiffs instituted this action for declaration of title to an undivided one-third of a property in St. Paul's Ward within the Municipality of Colombo.

By deed P2 of June 1917, Namasivaya Modeliar Ratnasabapathy gifted the property in question and other properties to his three sons, Nagasen, Sathanathan, (1st plaintiff) and Muttusamy (2nd plaintiff) in equal shares, reserving to himself the right to revoke the gift, and subject *inter alia* to the following conditions :

1. " That each donee shall possess the share or interest hereby gifted to him in the said several premises during the term of his natural life and take and enjoy the issues rents and profits thereof but shall not be at liberty to sell or mortgage his said share or interest or in any other manner alienate or encumber the same or lease the same for a term of more than five years at any one time or execute a lease thereof before the expiry of any lease already existing."

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2. " That it shall be lawful for any of the donees to tender the share or interest hereby gifted to him in the said several premises or any of them as security by him upon his appointment to any situation under the Crown or otherwise for the faithful performance of his duties therein notwithstanding the prohibition against alienation or encumbrance hereinbefore contained."

3. " That on the death of each donee or in the event of his share or interest in the said several premises being seized in execution by any Fiscal for his debts as aforesaid the same shall devolve absolutely on the children of the said donee in equal shares and the share that shall or may have devolved on any deceased child of the said donee alive shall devolve on his or her issue and failing issue of the said donee his share or interest shall devolve equally on the two other donees or their issues per stirpes."

Nagasen entered the service of Hull Blyth & Co. (Colombo) Limited and experienced some difficulty in persuading the lawyers of the Company to accept the properties donated to him under P2, as good security for the performance of his duties in view of the conditions set out in the deed. Nagasen, requested his father to revoke P2 and re-gift the property to him, " subject to the necessary conditions as will enable him to effect a valid tender and hypothecation of the said properties to the said Hull Blyth & Co. (Colombo) Ltd." and the donor thereupon revoked P2 and executed P1 of June 29th 1928 in compliance with the request made to him. (*vide* recitals in P1).

By P1 the donor gave to Nagasen the undivided 1/3rd share of the properties gifted to him under P2, by way of an irrevocable gift subject to certain conditions :

1. " That the donee shall only possess the properties hereby gifted to him during the term of his natural life and take and enjoy the issues rents and profits thereof but shall not be at liberty to sell or mortgage (except as is hereinafter provided) or in any other manner alienate or encumber the same or lease the same for a term of more than five years at any one time or execute a lease thereof before the expiry of any lease already existing."

2. " That the properties hereby gifted to the said donee shall in no event be liable (save as is hereinafter accepted) for his debts or for seizure on account of any debts and in the event of any such seizure the donee shall cease thereafter to have any right to or claim whatsoever in the said properties and the same shall immediately devolve absolutely on his heirs in reversion (hereinafter referred to) provided however and it is hereby expressly declared that it shall be lawful for the donee to mortgage hypothecate and tender the said properties or any of them or part thereof as security by him for all and each or any of the following purposes....."

3. " That on the death of the donee or in the event of his share or interest in the said premises being seized in execution for his debts other than those hereinbefore provided for the same shall devolve subject to any existing mortgage hypothecation tender or charge as hereinbefore provided for on the children of the said donee in equal shares and the share that shall or may have devolved on any deceased child of the said donee if alive shall devolve on his or her issue or failing issue then in equal shares on his brothers Ratnasabapathy Sathanathan and Ratnasabapathy Muttusamy or their issues per stirpes,"

In 1936 Nagasen, his wife and one Charavanamuttu calling themselves "lessors" executed the indenture 1D1 in favour of the 1st defendant who is described as the "lessee." By the indenture the "lessors" let to the "lessee" an undivided 1/3rd of the St. Paul's Ward property for 7 years from July 1st 1936 in consideration of a sum of Rs. 3,100/-. Some of the terms and covenants of the indenture are :

i. That the lessors shall " see that the monthly rent is duly and promptly paid to the lessee by the tenant for the time being " of the leased premises.

ii. That in the event of the tenant failing to pay to the lessee the monthly rent of Rs. 80/- the lessors jointly and severally agree to pay the said sum of Rs. 80/- or any portion thereof as may remain unpaid by the tenant with interest thereon at 15% per annum.

iii. That in the event of the said leased premises being vacant the period of the lease is to be extended to enable the lessee to make good the consequential loss.

iv. That if the monthly rent is over Rs. 80/- the excess shall be credited to the lessors.

Nagasen died on January 21st 1937 without any issue.

The question that has to be decided is whether the 1st defendant is entitled to possess the premises under the lease 1 D1 against the plaintiffs who claim under P1. The District Judge held in favour of the plaintiffs and the 1st defendant has appealed from this judgment. The 2nd defendant who is made a respondent to the appeal claims to be a monthly tenant under the first defendant.

The Counsel for the 1st defendant-appellant argued before this Court:

i. That the deed did not create a *fideicommissum* and that the lease for seven years was good against the plaintiffs.

ii. That even if the deed created a *fideicommissum* the *fideicommissum* was more or less of the nature of a residuary *fideicommissum* and that the property would devolve on the plaintiff subject to the " charge of a lease of 5 years," that being the period for which Nagasen was permitted to lease the property.

The first point does not appear to present much difficulty. The deed P1 designates the persons on whom the property should devolve and states that such devolution should take place either on the death of the donee or the seizure of the property by the Fiscal. If the property is seized by the Fiscal during the life-time of the donee for any debts save those specifically mentioned, the property that would devolve would be the property mentioned in the deed, subject to such transactions as have been specifically provided for. I hold that the deed creates a good *fideicommissum.*

The second point is not free from difficulty. The Counsel for the appellant argues that even if the deed creates a *fideicommissum* the plaintiffs can claim according to condition 3 of P1 only the undivided 1/3rd share of the property subject to any existing " mortgage hypothecation tender

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or charge " as provided for under that condition. He contends that the words " mortgage ", " hypothecation " and " tender " in condition 3 refer to the transactions contemplated by condition 2, which are expressly referred to by these terms and that therefore the word " charge " could only have been intended to refer to the leases mentioned in condition 1. He concedes that 1 D1 which he calls a lease for 7 years has been executed in contravention of condition 2, but states that 1 D1 should be regarded as a valid lease for 5 years and that therefore the 1st defendant could under the joint operation of 1 and 3 of P1 claim to possess the property against the plaintiffs for 5 years from July 1st 1936. This is a very attractive argument and should be examined in detail.

It is best to examine at the very outset the terms " hypothecate ", " mortgage ", " tender " and " charge." Under the Roman Law the term *Pignus* was used to signify " a right created over a thing in favour of a creditor by which he was allowed to possess the thing and to sell it in order to recover the debt from the price." The *jus pignoris* of the Roman Dutch Law embraced two divisions *Pignus* and *Hypotheca*. In the case of *Pignus* the subject-matter of the transaction was delivered into the possession of the creditor while in the case of *Hypotheca* the debtor remained in possession of the property and the creditor had only a *jus in re* for the satisfaction of his claim. The real distinction between the two classes of transactions lay in the fact that in the former the creditor got possession of the property while in the latter the possession remained with the debtor (Voet 20. 1.1.). The term " mortgage " was not known to the Civil Law but was an invention of the Middle Ages. This term " mortgage " used in a comprehensive sense applied equally to " *Pignus* " and " *Hypotheca* " (Berwick's Translation of Voet page 269 note). It is difficult to ascertain the special significance of the word " tender " in the context in which it occurs. It may be that the donor and donee of P1 contemplated the possibility of an agreement under which the employer of Nagasen would be given the properties to possess during the term of his employment or it may that they were thinking of a usage in mercantile circles in pursuance of which a debtor deposited his title deeds with a creditor though of course under our law such a deposit would not create a legal obligation in respect of immovable property (Vanderstraaten's Reports 267). It is perhaps more probable that the draftsman of P1, was influenced by the use of the word " tender " in condition 2 of P2 — " It shall be lawful for each of the donees to *tender* the share .....hereby gifted ...as security by him upon his appointment....." and adopted the word without attaching any special meaning to it when he drafted P1. It appears to me that the draftsman of P1 could have conveniently embraced all the transactions intended to be permitted by condition 2 by the use of the term " mortgage.." He seems to have used the words " mortgage " , " hypothecation " and " tender " without a clear appreciation of the different transactions which these terms describe in strict law and the use of these words merely reveals an attempt on his part to describe by certain

terms that occurred to him the transactions known to our law as mortgages. This view makes it highly probable that when the draftsman proceeded to use the terms "mortgage", "hypothecation", "tender" and "charge" in condition 3 he was not intending thereby to refer to separate and distinct transactions but only to the transactions known to our law as "mortgages." In other words he used in condition 3 a group of four words to describe one kind of transaction just as he used a group of three words to describe the same kind of transaction in condition 2, though in fact, he could have very well described these transactions by the single term "mortgage." If on the other hand he selected his words in condition 3 carefully and intended that the terms "mortgage", "hypothecation" and "tender" should refer only to the transaction previously described by him in condition 2 one would have expected him to exercise the same amount of care and use in condition 3 the terms "lease" instead of "charge" in referring to the transaction already described by him as a lease in condition 1, if he intended to provide by condition 3 that the property devolving on the reversioners should be subject to the "mortgage", "tender" and "hypothecation" in condition 2 and "lease" in condition 1. Though perhaps it may not be quite possible to say that the term "charge" cannot be used in reference to a lease it is undoubtedly an unusual word to be so used. I have therefore, come to the conclusion, though not without some hesitation, that by using the term "charge" in condition 3 the donor never intended to refer to leases and that the whole group of words "mortgage", "hypothecation", "tender" or "charge" was used by him to refer to transactions commonly known as "mortgages" and mentioned in condition 2. A comparison of P2 with P1 with which it is clearly connected seems to support this view. Condition 3 of P2 provided that the property gifted should on the death of a donee or a seizure by the Fiscal devolve absolutely on the reversionary heirs and thereby rendered somewhat precarious the position of the mortgagees in whose favour the donee might have executed a mortgage bond under condition 2. It was no doubt the difficulty created by condition 3 that made the employers of Nagasen refuse to accept the security tendered by him unless P2 was revoked. The revocation of P2 was accordingly effected by P1 which aimed at securing the position of the employers of Nagasen by providing that the property devolving on the reversioners should be subject to such mortgages. Is it possible to credit the donor further with an intention to safeguard the lessee whom he had not protected by P2 and about whose interests no question appears to have arisen at the time of the execution of P1 ?

It is not sufficient for the appellant's Counsel to argue that "charge" in condition 2 means "lease" but he should go further and establish that 1 D1 is a lease as contemplated by condition 1.

A study of the covenants of 1 D1, which I have set out earlier, shows that 1 D1 is a most unusual kind of document. It appears to me to partake more of the nature of a mortgage bond than an indenture of lease. I think

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that the appellant who wanted some security for the repayment of his money found that he could not obtain a valid mortgage from Nagasen and thought that by making the document 1 D1 appear as a lease he could safeguard his interests. If 1 D1 is in fact a mortgage, then it is a mortgage prohibited by P1 and the property in that case, would devolve on the plaintiffs independent of the obligations created by 1 D1. Moreover, even if 1 D1 could be considered as a lease, is it a lease which the donor authorised the donee to execute by P1 ? By condition 1 the donor prohibited the donee from leasing the property for a term of more than 5 years. It was an express prohibition against leases subject to the exception that the donee could lease the property for 5 years or less. I do not think the word " charge " should in any event be given such an extensive interpretation as to include any leases other than those covered by the restricted authority given by condition 1 and should not be made applicable to a lease, which is in fact a lease for 7 years and which could only be regarded as a lease for 5 years by a process of special reasoning adopted to meet the exigencies of the present case. The prohibition against a lease for more than 5 years was, I think, inserted in P1 primarily for the benefit of the donee when the donor wanted to protect against the consequences of an improvident lease for a long term which would result in the donee getting a reduced income during his lifetime. It is difficult to gather from P1 any intention on the part of the donor to protect against the reversionary heirs a lessee who has taken a lease prohibited by him. I hold, therefore, that the appellant is not entitled to claim any rights under 1 D1 against the plaintiffs.

I would dismiss the appeal and order the appellant to pay the costs of the first respondent. The second respondent will not be entitled to any costs.

Appeal dismissed.

NIHILL, J.

I agree.

Proctors :—

S. Somasundaram, for defendant-appellant. (Nadarajan Chettiar)

P. F. Mendis, for plaintiffs-respondents. (Sathanathan and Another)

Present : SOERTSZ, A.C.J., DE KRETSER, J. & NIHILL, J.

IN RE WICKREMESINGHE

Argued on 18th September, 1939.
Decided on 26th September, 1939.

Courts Ordinance (Chapter 6) section 17—Removal from office of proctor found guilty of any deceit, malpractice, crime or offence.

The respondent who was a proctor of the Supreme Court practising at Matara was convicted of making certain false representations to the District Judge, Matara, with a view to obtain fraudulently his sanction for a loan of Rs. 5,000/– lying to the credit of one A. K. W. Perera in curator case No. 26 D. C. Matara.

He was sentenced (1) to imprisonment till the rising of the court and to pay a fine of Rs. 1,000/– in default six months' rigorous imprisonment on the 1st count.

(ii) to imprisonment till the rising of the court on the 2nd count.

(iii) to pay a fine of Rs. 50/– in default six weeks' rigorous imprisonment on the 3rd count.

On appeal the convictions were affirmed.

The Supreme Court issued a notice under section 17 of the Courts Ordinance to show cause why he should not be removed from the roll of Proctors.

Held : That the respondent was guilty of deceit and that he should be removed from office.

E. G. P. Jayatileke, K.C. Solicitor-General with *M. F. S. Pulle, Crown Counsel*, for the Crown.

Colvin R. de Silva, for the respondent.

SOERTSZ, A.C.J.

I think the trial Judge took a very charitable view when, in the opening sentence of his judgment, he held that the respondent " had no intention of defrauding the minor or anybody else." It seems clear that what the learned Judge meant when he said that, is that the respondent had no intention to cause *material or pecuniary loss* to the minor or anybody else, for later in the judgment he holds that the respondent deceived the District Judge who was dealing with this matter and " fraudulently induced the District Judge to allow his application for the sanction of a loan of Rs. 5,000/– " ; in other words, that he " defrauded " the District Judge.

I am unable to share the view of the trial Judge that it was not the intention of the respondent to cause pecuniary loss to the minor. The evidence shows that the respondent was in very desperate financial straits at this time, and it seems to me that he was bent upon getting into his hands the money lying to the credit of the minor in the curatorship case regardless of whether the minor's interests would be prejudiced or not. If he could serve his purpose without loss to the minor, well and good ; but if he could not, then his interests must prevail over those of the minor. It is now clear that the result of the respondent's operations is that the minor has suffered

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substantial loss. It is true the minor came to terms with the respondent, but it is obvious that he was making the best of a bad bargain. For these reasons it is my view that the offences of the respondent are more serious than they appeared to be to the trial Judge.

But, for the purpose of this rule it is sufficient to proceed upon the footing that the respondent has been found to have misrepresented some facts and concealed other facts in his dealings with the District Judge and so induced him to allow his application and sanction the loan which the District Judge says he would not have sanctioned if all the true facts were before him. On appeal the convictions entered by the trial Judge were affirmed. Hearne, J. said " all the proved facts *point clearly to a scheme of deceit which* was intended to induce the District Judge to make an order....."

There can be no question, therefore, that the offences are very serious ones, especially in the case of a man whose profession brings him frequently in contact with members of the public, and puts them in his power. The maximum punishment provided by law for the offences of which the respondent was convicted are (*a*) seven years and a fine on count 1, (*b*) seven years and a fine on count 2, (*c*) one year and a fine on count 3. The trial Judge, however, took into consideration the fact that but for these offences, the respondent's record appeared to be a good one, and he dealt with him leniently when he sentenced him (*a*) to imprisonment till the rising of the court and to a fine of Rs. 1,000/–, (*b*) to imprisonment till the rising of the court, (*c*) to a fine of Rs. 50/–.

Counsel appearing for the respondent relies upon what the trial Judge has said about the respondent's record of work and how he was impressed by him, and asks that the respondent's name be not removed entirely from the roll of Proctors. I find myself quite unable to accede to that request. The record of work of the respondent has already been counted in his favour. The trial Judge took that into account in passing sentence on him. To Judge from the leniency of some of the sentences imposed recently in cases in which professional men have been convicted of grave offences, it would appear that trial Judges in assessing punishment assume that disciplinary action such as this will inevitably follow on the convictions. I do not think, therefore, that the respondent is entitled to ask that his record of work be taken into account a second time. Moreover, the matters that arise for consideration when a court is measuring out punishment for an offence, and when it is considering whether a professional man should remain on the rolls of his profession are very different. On the latter occasion, the interests of the public and the good name of the profession are of paramount importance, and I fail to see how a professional man who has been convicted of can be allowed to remain in the profession consistently with either the interests of the public or the good name of the profession. I would, therefore, direct that the respondent's name be removed from the roll of Proctors.

DE KRETSER, J. *Struck off the rolls.*

I agree.

NIHILL, J.

I agree.

Proctor:—

J. W. Wickremasinghe, for respondent. (Wickremesinghe)

Present: NIHILL, J.

JINORIS FONSEKA vs MENDIS FERNANDO

S. C. No. 468—*M. C. Panadura* 50962.

Argued on 29th September, 1939.

Decided on 3rd October, 1939.

Criminal Procedure Code (*Chapter* 16) *section* 191—*Discharge of accused after issue of summons without reasons for discharge.*

The appellant charged the accused-respondent with criminal trespass in that the latter had damaged the fencing of his land and had erected another fence encroaching on his land. The Magistrate issued summons but before hearing evidence on the summons he directed the appellant to get the land surveyed. The survey confirmed the appellant's allegation against the respondent and the Magistrate directed the appellant to go with the Police Vidane and erect a fence according to the survey. When the case came up for hearing the Magistrate discharged the respondent without hearing any further evidence or giving any reasons.

Held : (i) That the order of discharge should be set aside.

(ii) That the appellant was entitled to appeal without the sanction of the Attorney-General.

L. A. Rajapakse, for complainant-appellant.

No appearance for accused-respondent.

NIHILL, J.

In this case the respondent was charged on the complaint of the appellant with criminal trespass. The complainant in applying for the summons alleged that the accused had damaged the fencing of his land and had erected another fence encroaching on his land.

The Magistrate issued summons but before hearing evidence on the summons he directed the complainant to get the land surveyed. The report of the survey showed that the lot in question was part and parcel of the complainant's land, and the Magistrate then directed the complainant to go with the Police Vidane and erect a fence according to the survey. When the summons was ultimately called for hearing the Magistrate discharged the accused without hearing any evidence whatsoever or giving any reasons.

Presumably the learned Magistrate regarded the matter as a civil dispute which he had settled by out of court activities, but having issued summons on the appellant's sworn information he was wrong in discharging the accused without recording his reasons for doing so. (Section 191 Criminal Procedure Code.)

Furthermore, on the face of it, the result of the survey appeared to corroborate the appellant's *prima facie* case. The matter cannot thus be left as it is.

Sanction for this appeal was not sought from the Attorney-General, but there is ample authority for the proposition that an order of discharge under section 191 of the Criminal Procedure Code is not the same as an

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acquittal and does not therefore require the written sanction of the Attorney-General. (Section 336 Criminal Procedure Code). *Suppiah vs Loku Banda**, *Schokman vs John†*, *Silva vs Rahiman*** and *Inspector of Police, Avisawella vs Fernando††*.

I accordingly set aside the order of discharge and direct that the case be remitted back for a hearing of the summons before another Magistrate.

Order set aside and sent back.

Present: WIJEYEWARDENE, J. & NIHILL, J.

KHAN vs SALLY AND ANOTHER

S. C. No. 69—D. C. Colombo 3026.

Argued on 9th September, 1939.
Decided on 29th September, 1939.

Civil Procedure Code (Chapter 86) section 707—Scope of.

The plaintiff-appellant instituted this action under Chapter 53 of the Civil Procedure Code to recover a sum of Rs. 200/–. The defendants-respondents obtained leave to defend the action. Leave was granted in the following terms: "Allowed to file answer on giving security in Rs. 200/– by January, 16th 1939." The defendants failed to deposit security on the appointed date and the Judge entered judgment for the plaintiff on January, 17th 1939. On the same day but after judgment was entered the defendants' proctor filed an affidavit and a Kachcheri receipt for Rs. 200/– dated the day of judgment and moved to set aside the decree. It was urged in the affidavit *inter alia*:

i. that it was only on January, 13th that Mr. Cassim "tried to get an order to deposit."

ii. that the order of the case "was not available to Mr. Cassim on January, 13th.

iii. that on January, 16th Mr. Cassim "offered to hand over Rs. 200/– to the plaintiff's proctor" but the latter refused to accept it.

iv. that the order to deposit was not given to Mr. Cassim's clerk by the court clerk before 4.30 p.m. on January, 16th.

v. that the sum of Rs. 200/– together with the order to deposit was sent to the Kachcheri on January, 17th.

The District Judge set aside the decree under section 707 of the Civil Procedure Code and the plaintiff appealed against that order.

Held : That the defendants did not prove such special circumstances as are contemplated in section 707 of the Civil Procedure Code and that therefore the appeal should be allowed.

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*3 C.W.R. 127 †4 C.W.R. 93 **26 N.L.R. 463 ††30 N.L.R. 482.

N. E. Weerasooriya, *K.C.* with *Molligoda*, for plaintiff-appellant.
Tiyagarajah with *S. A. Marikar*, for defendants-respondents.

WIJEYEWARDENE, J.

The plaintiff instituted this action under chapter 53 of the Civil Procedure Code for the recovery of a sum of money on a promissory note. The Judge accepted the plaintiff and issued summons with a direction to the defendants to appear in court within ten days of its service and obtain leave to defend the action. Service was effected on the first defendant on December, 5th 1938 and on the second defendant on December, 3rd 1938. Mr. Kammer Cassim filed a proxy from both the defendants and their affidavit on December 14th and moved for leave to appear and defend the action. The District Judge thereupon made the following order :

> " Allowed to file answer on giving security in Rs. 200/- by January, 16th 1939."

The journal entry dated January, 16th 1939 is as follows :

> Answer of the defendant filed.
> Proctor will deposit Rs. 200/- today.
> Call 17.1.

When the case was called on January, 17th it was found that the money was not deposited and the Judge entered judgment for the plaintiff. On the same day, but after judgment was entered, Mr. Kammer Cassim filed an affidavit and a Kachcheri receipt for Rs. 200/- dated January 17th 1939 and moved to set aside the decree.

The relevant statements of fact made by Mr. Cassim in his affidavit are not disputed by the defendants. These statements shew :

i. that it was only on January, 13th that Mr. Cassim " tried to get an order to deposit."
ii. that the record of the case "was not available to Mr. Cassim on January, 13th.
iii. that on January, 16th Mr. Cassim " offered to hand over Rs. 200/- to the plaintiff's proctor " but the latter refused to accept it.
iv. that the order to deposit was not given to Mr. Cassim's clerk by the court clerk before 4.30 p.m. on January 16th.
v. that the sum of Rs. 200/- together with the order to deposit was sent to the Kachcheri on January, 17th.

On these facts the District Judge made an order under section 707 of the Civil Procedure Code setting aside the decree, and against that order the present appeal has been filed.

The scope of section 707 has been considered by this court in a number of cases. In *Silva vs Goonesekera* (1907, 1 Appeal Courts Reports 100) Wendt, J. and Middleton, J. held that the failure on the part of the defendant's proctor to inform the defendant of the order of court to furnish security before a certain date was not a " special circumstance " within the meaning of section 707. In *Latiff et al vs Saibu* (1926, 8 Ceylon Law

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Recorder 10) the plaintiff, while filing the plaint under chapter 53 of the Code, applied to the court and obtained a warrant of arrest and a mandate of sequestration of the defendant's property before judgment. The defendant had to appear in court within five days of the service of summons on him and obtain leave to defend the action. The summons was served on the defendant on March, 19th 1926 and on the same day he was brought under arrest before the court. The defendant thereupon filed an affidavit through his proctor who then applied for his release and the withdrawal of the mandate for sequestration. The court granted the application on the defendant depositing a sum of Rs. 750/– as security. As no application was made to court for leave to appeal and defend the action, the plaintiff's proctor moved for judgment on March, 25th and the court entered decree in favour of the plaintiff on March, 30th. The defendant and his proctor filed a joint affidavit stating that the defendant had given the necessary instructions to the proctor to obtain leave to appeal and defend and that the proctor drew the affidavit for the express purpose of basing such an application upon it but by pure oversight failed to make the necessary application. On an appeal from the order of the District Judge setting aside the decree Garvin, A.C.J. (with whom Dalton, J. agreed) said " This is not a case in which the defendant has established the existence of special circumstances within the meaning of section 707. It is a hard case particularly when it is borne in mind that there has already been deposited in court a sum of money sufficient to meet any judgment which might be entered in favour of the plaintiff. However that may be if the defendant is to succeed he must bring himself within the provisions of section 707 to show that he is entitled to the relief which he claims. This he has failed to do."

In the present case the failure to deposit the money by January, 16th 1938 was undoubtedly occasioned by the defendant's proctor failing to take any steps until January, 13th. The defendant's proctor who has been practising his profession in Colombo for a number of years should have known the difficulty of obtaining a record and securing an order to deposit at short notice at the beginning of the year when there is a considerable congestion of work owing to the closing of the offices of the court for the Christmas vacation. He must also have been aware that the office of the District Court would not be open on January, 14th which was a public holiday and on January, 15th which was a Sunday. He should have realised that he was taking a serious risk in delaying so long to take the preliminary steps for the deposit of the money. If he chose to take such a risk he cannot plead for relief against the consequences of his own dilatoriness which resulted in his inability to comply with an order of court within the time fixed by the court.

In this connection reference may be made to certain observations by Judges of this Court in considering applications for relief made by parties

to regular actions in respect of decrees passed against them upon a breach of their undertaking to pay costs on a particular date.

In *Punchi Nona vs Peiris* (1924, 26 N.L.R. 411) the case was fixed for trial on October, 16th 1923 but as the defendants were not ready, the trial was refixed for December, 20th 1923 on the defendants agreeing to judgment being entered against them in the event of their failing to pay a certain sum by way of costs before December, 20th. The defendants made default and when the case was called on December, 20th the defendant's proctor offered to pay the costs that day pleading that his clients were prevented by floods from making payment before that date. The District Judge held that the defendants had committed a breach of their undertaking and entered judgment for the plaintiff. In appeal Bertram, C.J. and Jayawardene, A.J. affirmed the order of the District Judge and refused to entertain a plea for equitable relief. In the course of his judgment Jayawardene, A.J. cited with approval the following extract from the judgment of West, J. in *Balprasad vs Dharnidhar Sakharam* (*vide* 10 Bombay 435)

> " the admission of a power to vary the requirements of a decree once passed would introduce uncertainty and confusion.....and the courts would be overwhelmed with applications for the modification, on equitable principles of orders made on a full consideration of the cases which they were meant to terminate. It is obvious that such a state of things would not be far removed from a judicial chaos."

Dealing with the facts of the particular case before him Jayawardene, A.J. said :

> " the defendant says he was prevented by floods from paying the sum fixed as costs ; but he had more than two months within which to pay the amount, and it could not be said that he was prevented by floods from paying the sum he agreed to pay during the whole of that period. Parties no doubt wait till the last moment to make these payments, but that is not a circumstance the court can take into consideration, and if at the last moment they are prevented by accident or otherwise from doing so, they must be prepared to take the consequences."

In *Siman Sinno vs William Appuhamy* (1925, 6 Ceylon Law Recorder 99) the defendant was granted a postponement upon a consent order that he should pay the costs of the day on or before a certain day which was subsequently found to be a Sunday. Bertram, C.J. and Schneider, J. held that the payment by the defendant on the following Monday was not a payment in compliance with the order of court and stated that impossibility of performance " whether through circumstances outside the control of the party affected or otherwise did not extend the time within which the payment may have been made."

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The present case is admittedly a hard case. I do not think however that courts should encourage any laxity in the due compliance with an order of court unless of course the defendants can shew that they are entitled to claim the benefit of such special circumstances as are contemplated by section 707. The defendants in this action failed to prove the existence of such circumstances.

I would therefore set aside the order appealed against and allow the appeal with costs. The plaintiff will also be entitled to the costs of the enquiry in the District Court.

Order set aside.

NIHILL, J.

I agree.

Proctors :—

A. L. M. Thassim, for plaintiff-appellant (Khan)
M. K. Cassim, for defendants-respondents (Sally and Another)

Present: NIHILL, J.

NANDIRIS SILVA vs ARTHUR DE ZOYSA AND ANOTHER

S. C. No. 40—*C. R. Balapitiya* 21239.

Argued on 29th September, 1939.
Decided on 6th October, 1939.

Court of Requests—Appeal upon a matter of law—Can the Supreme Court hear arguments on matters of law not raised in the petition of appeal.

Held : That in an appeal from a Court of Requests upon a matter of law the Supreme Court cannot hear arguments on matters of law not directly and succinctly stated in the petition of appeal.

M. C. Abeyewardene, for plaintiff-respondent.

J. E. M. Obeyesekere with *P. H. K. Goonetilleke*, for defendants-appellants.

NIHILL, J.

I have considered the preliminary objection taken by respondent's counsel that at the hearing of the appeal, appellants' counsel must confine himself to the point of law raised in the appeal petition. This appeal has had a somewhat chequered career, this being the second preliminary objection taken before this Court.

Mr. Obeyesekere for the appellants has now intimated that he wishes to raise also a question concerning an alleged wrongful rejection of evidence which, had it been admitted by the learned Commissioner, would have shown that the debt alleged to be due from the first defendant-appellant had been settled. From the facts quoted to me, it appears that certain account

books kept by the second defendant could not be produced at the trial as objection was taken to his being called on the ground that his name had not been listed as a witness. The learned Commissioner upheld this objection.

Mr. Obeyesekere argued that in doing so, the learned Commissioner must have overlooked the second proviso to section 175 of the Civil Procedure Code where it is stated that any party to an action may be called as a witness without his name having been included in the list of witnesses.

In this case it should be noted that it was the second defendant's counsel that took the objection to his client being called, nevertheless the point made by Mr. Obeyesekere may be a good one, and it is unfortunate that it was not raised in the appeal petition. The question for my determination now is, it not having been so raised, can it be argued in these proceedings ? In *Gordon Brooke vs Peera Veda* * Layard, C.J. held that in an appeal from a Court of Requests, the court could only hear arguments on the matter of law stated in the petition of appeal.

Mr. Obeyesekere asks me to distinguish between that case and this on the grounds that here it is a question which arises from the admission or rejection of evidence and that as all the facts are before me as completely as they were at the trial, the principle enunciated by Lord Herschell in the House of Lords case of *The Tasmania* †, tell in his favour.

With regard to the first of these submissions, it is true that the wording of section 833 A of the Civil Procedure Code suggests that there may be a distinction between " a matter of law " and a question arising upon the admission or rejection of evidence, but if there is, it is a distinction with very little difference. Questions concerning the admissibility or inadmissibility of evidence are surely questions of law and as such could be raised under section 833 A even if the words " or upon the admission or rejection of evidence " were not there and if that be so, the principle enunciated in *Gordon Brooke vs Peera Veda* (*supra*) has equal applicability.

With regard to *The Tasmania* (*supra*) it may well be that this is a matter which an Appeal Court might properly consider in deciding an appeal even although it is not stated in the petition of appeal (Section 758 (2) of the Civil Procedure Code) but Chapter LXVL provides special rules as to procedure in Courts of Requests and section 801 gives precedence to the special rules where there is inconsistency.

It is one of these special rules that there shall be no right of appeal from any final judgment unless upon a matter of law, and judicial decision has determined that this Court cannot hear arguments on matters of law not directly and succinctly stated in the petition of appeal, and I am not prepared to go beyond that. I therefore uphold the objection.

Let the case be relisted for argument on the point of law raised in the petition.

Objection upheld.

Proctors :—

E. S. Gunaratne, for defendants-appellants (Arthur de Zoysa and Another)
T. C. P. Fernando, for plaintiff-respondent (Nandiris Silva)

* 9 N.L.R. p. 302 † 1890 15 App. Cases p. 223.

Present: NIHILL, J.

APONSU vs MALALSEKERE

Application in revision M.C. Panadura No. 789—(S. C. No. 382).

Argued on 2nd October, 1939.
Decided on 5th October, 1939.

Revision—Acquittal of accused under sections 433 and 346—Sanction for appeal refused by Attorney-General—When may the Supreme Court exercise its powers of revision after such refusal.

Held : That although the Supreme Court has full powers of revision in all criminal cases where the Attorney-General has refused his sanction for appeal, a heavy onus rests upon the appellant to satisfy the court that there has been a positive miscarriage of justice.

Stanley de Zoysa, for complainant-petitioner.

Athulathmudali, for accused-respondent.

NIHILL, J.

This is an application for revision in a case of acquittal under sections 433 and 346 of the Ceylon Penal Code. Sanction was sought for an appeal from the Attorney-General and was refused. Although this Court has full powers of revision in all criminal cases, in such a case a heavy *onus* rests upon the appellant to satisfy this Court that there has been a positive miscarriage of justice.

I am far from being satisfied that that position has been reached in this case. Although the respondent was charged with high sounding offences, namely criminal trespass and assault with intent to dishonour, the evidence shows that the incident that led to the charges was in fact a trivial one. Bad feeling existed between the parties, two school masters, and it was alleged that the respondent slapped the appellant at the gate of his premises one morning.

It looks as if the appellant might have been successful in establishing a case of simple assault against the respondent in the Village Tribunal but, no doubt with a view of rehabilitating his injured pride, he chose to bring heavier artillery to bear and his attack has failed.

In my opinion I should be performing no service either to justice or to the parties themselves were I to send this case back for further investigation on the matter of the assault.

Both the parties are members of a profession that demands a high standard of behaviour as an example to their pupils, and I trust that they will both realize that the time has now come for them to shake hands and to agree to let bye-gones be bye-gones.

Although I think the learned Magistrate was justified on the evidence led in court in dismissing the charges, it is unfortunate that he made an inspection of the scene under conditions which, so far as the record shows,

were not satisfactory, for there is nothing to show that the parties were present or as to how the Magistrate found the scene of the offence or as to how the inspection proceeded.

An inspection of the *locus*, if undertaken at all by a Magistrate, must be done with due care and caution, otherwise, this practice however helpful it may seem to the Magistrate who has doubts as to his decision, is open to grave objection.

I would invite the learned Magistrate's attention to the recent case of *Jayawickreme vs Siriwardene* (18 C. L. R. p. 182)*, in which the matter is discussed.

I dismiss the application.

Application dismissed.

Proctors :—

Jacob Fernando for complainant-petitioner. (Aponsu)
M. H. Jayatilleke, for accused-respondent. (Malalsekere)

Present: NIHILL, J.

SCHOKMAN vs BABY NONA

S. C. No. 477—*M. C. Kandy* 62448
Argued and Decided on 25th September, 1939.

Brothels Ordinance section 2 (*a*) (*Chapter* 25)—*What is a brothel.*

The evidence disclosed that two men, one a hotel waiter and the other a tailor (hereinafter referred to as the witnesses) went to the house of the accused and negotiated with her for the procuring of two women who were then in the house for the purposes of prostitution. The accused at first demanded a price which the witnesses were not prepared to pay, eventually they agreed on the price and the witnesses were admitted. The Police raided the house while the witnesses were still inside it. One of the women admitted that she had had intercourse with men in that house before.

Held : That the evidence was sufficient to establish that the accused committed an offence under section 2 (*a*) of the Brothels Ordinance.

Editorial Note : Besides the case cited in the judgment the following cases were cited at the argument :

*14 C.L.W. 83. (Edd.)

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Schokman *vs* Baby Nona

Morris vs Cornelis 3 Bal. Notes of Case 48
Silva vs Suppu 21 N.L.R. 119
Wickramasuriya vs Mary Nona 24 N.L.R. 26
Eliyathamby vs Wijeylath Menika 36 N.L.R. 300

H. H. Basnayake, Crown Counsel, for complainant-respondent.
C. E. S. Perera with *S. C. E. Rodrigo,* for accused-appellant.

NIHILL, J.

The appellant in this case was convicted of an offence under section 2 (*a*) of the Brothels Ordinance. It has been argued for the appellant that the evidence in this case was not sufficient to establish that the premises were, in fact, being run as a brothel and cases have been cited to me to show that a single act of prostitution is insufficient to render a place a brothel.

I consider, however, that in this case there was evidence which, if believed, sufficiently established that this house was a place to which men resorted for purposes of prostitution with women. *Toussaint vs Cecilia* (37 N.L.R. p. 308.)

> "A brothel is a house of ill-fame to which men resort for purposes of prostitution with women who are to be found in the place or with women who resort to or are introduced to the house."

The evidence of the two male visitors which the learned Magistrate believed, established that it was the accused who admitted them to the house and negotiated with them for the procuring of two women who were then in the house for the purposes of prostitution. One of these two women also in her evidence stated that she had had intercourse previously with men in that house. The Magistrate believed this evidence and as I have already indicated, if he believed it, it is in my opinion sufficient to establish the offence with which the appellant was charged. I therefore dismiss the appeal as against the conviction.

The learned counsel for the appellant has also urged that in the circumstances of the case the sentence of four months' rigorous imprisonment in the case of an elderly woman convicted for the first time of this offence is excessive. I am unable to agree with him. The offence is a serious one and difficult to detect and I consider that the sentence imposed in this case was a proper one.

Appeal dismissed.

Present: MOSELEY, A.C.J. & WIJEYEWARDENE, J.

SINNAN CHETTIAR vs MOHIDEEN AND OTHERS

S. C. No. 116 (*Final*)—*D. C. Colombo No.* 549.

Argued on 5th & 6th October, 1939.

Decided on 16th October, 1939.

Fidei commissum—Prohibition against alienation—Absence of provision that on alienation contrary to the prohibition the property should go to a designated person—Effect of alienation in such circumstances.

One Isubu Lebbe Idroos Lebbe Marikar left a last will containing *inter alia* the following terms :

(*a*) " I hereby will and desire that my wife....and my children...and my father..who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie Sect to which I belong, but they nor their issues or heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens...and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses, only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities and out of such income, produce and rents after defraying expenses for their subsistence and maintenance of their families, the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus, lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated."

(*b*) " I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors hereinnamed three competent and respectable persons of my class and get the movable and immovable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

In pursuance of the direction in the will the executor transferred to the testator's daughter Amsa Natchia the subject-matter of this action. Amsa Natchia gifted the property to her daughter Majida Umma who sold her interests to the first defendant and one Suppiah Chetty. The latter conveyed his share to the first defendant. The plaintiff who is a child of Majida Umma brought this to assert his right to the property on the ground that Isubu Lebbe's will created a *fidei commissum* and that the first defendant was not entitled to the property as against him. At the time of the action Amsa Natchia had died but Majida Umma was alive. The District Judge held in favour of the plaintiff. The first defendant appealed. It was urged in appeal that the will created a trust and not a *fidei commissum* and that the plaintiff had no interest in the property which entitled him to maintain the present action.

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Wijeyewardene, J.

Sinnan Chettiar *vs* Mohideen and Others

Held : (i) That the will created a *fidei commissum*.

(ii) That though the property had been sold in violation of the prohibition against alienation the plaintiff had no right to maintain the action during the lifetime of the person on whose death the property would vest in him.

Per WIJEYEWARDENE, J.—" The position is clearly set out in the following passage from Walter Pereira's Laws of Ceylon, Volume 2 (1904 edition) pages 320, 321.*

> ' When anything is alienated against the express prohibition of the testator, those persons in whose interest the prohibition has been made are immediately called to the *fidei commissum* (Sande de Proh. al 3 6. 1).
>
> ' This proposition is liable to be misunderstood. The *fidei commissum* here referred to is a *fidei commissum* induced by a prohibition against alienation coupled with an indication of a person to benefit in the event of such prohibition being disregarded. Ordinarily there need be no prohibition against alienation for the purpose of constituting a *fidei commissum*, although in the creation of a *fidei commissum* in Ceylon such prohibitions are usually inserted. I give my property to A subject to the condition that it is to become B's property after the death of A. I create a complete and effectual *fidei commissum*. In such a case a prohibition against alienation is a mere superfluity, because A cannot interfere with B's right, and he cannot therefore alienate the property. All that he can alienate is his own interests in it which terminates at his death. In such a case if A executes a deed purporting to alienate the property, B may recover it from the purchaser as soon as his right accrues, that is, after the death of A whatever length of time may elapse since the alienation, no prescription beginning to run against him until the accrual of such right (Voet 36.1.64 : Marsh 192. See proviso to section 3 of Ordinance No. 22 of 1871). If however I give my property to A prohibiting him from alienating it, and providing that in the event of alienation the property is to go to B, here too a *fidei commissum* will be created, but the event on the happening of which the property is to vest in B is not the death of A but the alienation of the property by A. *If A does no act in contravention of the prohibition against alienation, the property will never vest in B. It will go to A's heirs after his death;* but the moment A does such an act, B would *ipso facto* become the owner of the property. The reference in the passage cited above from Sande is to such a *fidei commissum*.' "

C. Thiagalingam with *T. H. Curtis*, for 1st defendant-appellant.

N. Nadarajah with *M. M. I. Kariapper*, for the plaintiff-respondent.

Cyril E. S. Perera with *Dodwell Goonewardene*, for the 2–5th defendants-respondents.

WIJEYEWARDENE, J.

The questions that arise for determination on this appeal depend on the construction of the last will of Isubu Lebbe Idroos Lebbe Marikar dated December, 12th 1872.

The relevant provisions of the last will P1 are as follows :

> (*a*) " I hereby will and desire that my wife....and my children...and my father..who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie Sect

* p 431 in the 1913 Edition (Edd.)

to which I belong, but they nor their issues or heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens...and they shall be held in trust for the grandchildren of my children and the grandchildren of my heirs and heiresses, only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities and out of such income, produce and rents after defraying expenses for their subsistence and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus, lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated."

(*b*) "I further desire and request that after my death the said heirs and heiresses or major part of them shall appoint along with the executors hereinnamed three competent and respectable persons of my class and get the movable and immovable properties of my estate divided and apportioned to each of the heirs and heiresses according to their respective shares, and get deeds executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

The last will P1 was duly proved in Testamentary Case No. 3909 of the District Court of Colombo and probate P2 was issued to the surviving executor on May, 29th 1876. Acting in terms of the provisions of clause (*b*) of the last will P1, the executor conveyed the property forming the subject-matter of the present action to the testator's daughter Amsa Natchia by deed P3 of February, 19th 1878 subject to the terms and conditions contained in the last will. By deed P4 of November 22nd 1912 Amsa Natchia purported to gift the property to her daughter, Majida Umma who by deed P5 of January 3rd 1925, conveyed her interests under P4 to the first defendant and one Suppiah Chetty. By deed 1D1 of June 3rd 1932, Suppiah Chetty conveyed his interests to the first defendant.

Amsa Natchia died leaving three children, one of whom is Majida Umma who is still alive. The plaintiff and the second, third and fourth defendants are the children of Majida Umma.

The plaintiff contends that the last will P1 created a *fidei commissum* and that the first defendant is not, therefore, entitled to the property as against him.

The District Judge held that the last will P1 created a *fidei commissum* and entered judgment in favour of the plaintiff for an undivided share of the property and for damages from January, 3rd 1925, and costs. The present appeal is preferred by the first defendant against that judgment.

The appellant's contention is that the last will created a trust and not a *fidei commissum*, that the trust so created is void as it offends the rule against perpetuities and that, therefore, he became entitled to the property under deed P5 and 1D1.

The last will P1 was executed before the Entail and Settlement Ordinance 1876 (Legislative Enactments Volume 2 Chapter 54) came into operation on June 15th 1877. The question whether a *fidei commissum* is created by the last will has therefore to be determined according to the principles of Roman-Dutch Law.

There are no particular words necessary for the creation of a *fidei commissum* (Vander Linden 1, 9.8). It matters not what words are used provided they express the legally valid intention of the testator who desires to create a *fidei commissum*. In a *fidei commissum* the only thing that is taken into account is the intention of the testator and it is not only his verbally expressed intention that is looked to but also that intention which is tacit and may be deduced from the words used as a necessary or manifest consequence (Censura Forensis 1.3.7.7.8). Our courts have adopted the principle that the document should be looked at as a whole in order to ascertain whether a *fidei commissum* was created and that, where the intention to create a *fidei commissum* was clear, effect should be given to such intention though the document might contain expressions inconsistent with a *fidei commissum* (*vide* 1912, *Wijetunge vs Wijetunge* 15 New Law Reports 493) and (1916, *Mirando vs Coudert* 19 New Law Reports 90). This principle should be followed all the more readily when the document which has to be construed is a last will.

Now clause (*a*) of the last will set out by me earlier in the judgment shows that the testator intended that his estate should in the first instance devolve on his heirs according to the Muslim Law to which he was subject but that such heirs should not get the estate absolutely. This limitation of the rights of the immediate devisees is evidenced by the provision that they shall not sell, mortgage or alienate the properties and could only receive the rents, income and produce of the properties for their maintenance. The last will further indicates the persons who, according to the testator, should succeed the immediate devisees in the enjoyment of the property. The persons prohibited from alienating the property are not only the immediate devisees but " their issues or heirs " and in the penultimate paragraph of clause (*a*) the position is made all the clearer when the testator provides that out of the surplus income derived from his estate the immediate devisees should buy lands for the benefit of " their children and grandchildren as hereinbefore stated. The last will, moreover indicates in unambiguous language that the grandchildren of the immediate devisees should be regarded as the ultimate beneficiaries. I have no doubt that the testator intended that the property should devolve on the immediate devisees and their children subject to a *fidei commissum* ultimately in favour of the grandchildren of the immediate devisees. The children of the immediate devisees would not of course be regarded as being called to the inheritance along with the immediate devisees but would succeed them in the same order as observed in intestate succession (Censura Forensis 1.3.7.19). I think the last will sets out the position with sufficient clearness, though perhaps the intention of the Muslim testator was expressed rather clumsily by the Sinhalese Notary in a language that was foreign to both of them. It was pointed out by de Sampayo, J. in *Craib vs Loku Appu* (1918, 20 New Law Reports 449) that in construing documents of this nature it was necessary to bear in mind that the draftsman was a Sinhalese Notary who was

endeavouring to imitate conveyancing phraseology without duly considering its relevancy to the matter in hand and that it would not be wrong to attribute any apparent incoherence to the notary's want of care and skill rather than to any uncertainty on the part of the person executing the instrument.

I am not prepared to attach any importance to the use of the words "shall be held in trust" and regard the words as indicative of an intention on the part of the testator to create a trust as known to the English Law. In Henry's translation of Vander Linden among the different kinds of *fidei commissa* are mentioned (*a*) a reciprocal trust when two persons are each mutually affected with a trust for the other and (*b*) a trust of the residue as when the heir is charged, in case he died without issue, to suffer the residue of the property at his death, to pass to a third person. Again in discussing the difference between a *fidei commissum* and a usufruct we find the following passage in Walter Pereira's Laws of Ceylon Volume 2 (1904 edition) page 340 :

> "An heir affected with a trust has a real though burdened right of property and this differs from him who has a mere usufruct in the subject of which the naked right of property is in the meantime left to another."

Our local reports themselves contain decisions of this Court where the judges have used the terms "*fidei commissa*" and "trusts" as interchangeable terms.

It is no doubt true that in the ordinary course of development of our law to meet the requirements of modern life the English Law of Trusts was received into the law of the country, equally true to say that the people of this country showed little or no inclination to have recourse to the system of trusts as known to the English Law when they proceeded to execute instruments, which were generally of a testamentary nature, to regulate the devolution of their estates. It would be taking an unreal view of the circumstances under which P1 was executed if we were to assume on the slender ground furnished by the use of some terms in the last will, that the notary who was perhaps less ignorant of the law of *fidei commissa* than of the law of trusts brought his mind to bear on the special significance of the terms of conveyancing he used and deliberately selected the word "trust" with the idea of creating a trust as defined in our Trusts Ordinance No. 9 of 1917 in order to give legal effect to the instructions given to him by the testator. Moreover, if there is a need to justify the use of the term "trust," it is perhaps not difficult to discover a reason in the fact that the immediate devisees under the last will and their children were required by the testator to accumulate the surplus income from the lands and invest such surplus in the purchase of property to be held on the terms and conditions set out in the last will.

The last will P1 has been construed by this Court in two earlier cases *Sabapathy vs Mohamed Yusoof et al* (1935, 37 New Law Reports 70) and in 293 D.C. Colombo No. 50221 (Supreme Court Minutes, June 29th 1938)*

* See page 115.

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and if I may say so, I respectfully agree with the learned Judges who expressed the view in these cases that the last will P1 created a valid *fidei commissum*.

There remain, however, further questions to be considered. Has the first defendant obtained no interest whatever in the property by virtue of P5 and 1D1 even though the last will created a *fidei commissum* as decided by me ? Has the plaintiff any such interest in the property as will enable him to maintain the present action ? The answers to these questions involve the determination of the question as to the time when the *fidei commissary* interest created by the joint operation of the last will P1 and the executor's conveyance P3 would devolve on the plaintiff.

The last will P1, as I have already stated, operates to give the properties first to the immediate devisees, then their children and ultimately the grandchildren who would get the properties absolutely. In terms of the last will, deed P3 was executed giving the particular property in question to Amsa Natchia subject to the terms and conditions set out in the last will. Therefore Amsa Natchia and her daughter Majida Umma would during different periods be the fiduciaries while the plaintiff and others claiming on the same footing as himself would be the ultimate beneficiaries of the property. Now the last will provides that Amsa Natchia and her issue and heirs shall not alienate the property but that out of the income she and her issues or heirs shall " defray expenses for their subsistence and maintenance of their families " and the property shall be held in trust for the grandchildren of Amsa Natchia. The event on the happening of which the property devolves on each succeeding set of *fidei commissary* heirs is the death of the immediate previous fiduciary heirs who last entered into possession of the property. The prohibition against alienation contained in the last will does not operate to make the alienation of the property in spite of such prohibition, the event which determine the time of vesting of the property. If the alienation of the property was the event on which the *fidei commissum* was to take effect, then, if in fact there was no alienation, the property would not have vested in the ultimate beneficiaries but would have formed a part of the estate of the fiduciary on the death of the fiduciary. The plaintiff himself would not say that such a result flows from the absence of any alienation by the fiduciary in the present case.

The position is clearly set out in the following passage from Walter Pereira's Laws of Ceylon Volume 2 (1904 edition) pages 320, 321. *

> " When anything is alienated against the express prohibition of the testator, those persons in whose interest the prohibition has been made are immediately called to the *fidei commissum* (Sande de Proh. al 3 6. 1).
>
> " This proposition is liable to be misunderstood. The *fidei commissum* here referred to is a *fidei commissum* induced by a prohibition against alienation coupled with an indication of a person to benefit in the event of such prohibition being

* See page 431 in the 1913 edition (Edd.)

disregarded. Ordinarily there need be no prohibition against alienation for the purpose of constituting a *fidei commissum*, although in the creation of a *fidei commissum* in Ceylon such prohibitions are usually inserted. I give my property to A subject to the condition that it is to become B's property after the death of A. I create a complete and effectual *fidei commissum*. In such a case a prohibition against alienation is a mere superfluity, because A cannot interfere with B's right, and he cannot therefore alienate the property. All that he can alienate is his own interests in it which terminates at his death. In such a case if A executes a deed purporting to alienate the property, B may recover it from the purchaser as soon as his right accrues, that is, after the death of A whatever length of time may elapse since the alienation, no prescription beginning to run against him until the accrual of such right (Voet 36.1.64 : March 192. See proviso to section 3 of Ordinance No. 22 of 1871). If however I give my property to A prohibiting him from alienating it, and providing that in the event of alienation the property is to go to B, here too a *fidei commissum* will be created, but the event on the happening of which the property is to vest in B is not the death of A but the alienation of the property by A. *If A does no act in contravention of the prohibition against alienation, the property will never vest in B. It will go to A's heirs after his death;* but the moment A does such an act, B would *ipso facto* become the owner of the property. The reference in the passage cited above from Sande is to such a *fidei commissum.*"

Though, therefore, the deeds P5 and 1D1 have been executed in violation of the condition which prohibited the alienation of the property, during the life time of Majida Umma no right to the property vests in the plaintiff until the death of Majida Umma. The plaintiff therefore cannot maintain the action.

I would therefore allow the appeal, dismiss the plaintiff's action and order the plaintiff to pay the first defendant the costs of the appeal and the costs of the proceedings in the District Court.

Appeal allowed.

MOSELEY, A.C.J.
I agree.

Proctors :—

N. M. N. Salahadeen, for plaintiff-respondent. (Mohideen and Others.)
S. Kandasamy, for 1st defendant-appellant. (Sinnan Chettiar.)

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* *Present :* MAARTENSZ, J. & MOSELEY, J.

SALEEM vs MUTTURAMEN CHETTIAR

S. C. No. 293—*D. C.* (*Final*) *Colombo* 50221.
Argued on 6th & 7th June, 1938.
Decided on 28th June, 1938.

H. V. Perera, K.C. with *Chelvanayagam*, for 1st defendant-appellant.
N. Nadarajah with *Cyril Perera* and *Mahroof*, for plaintiff-respondent.

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MAARTENSZ, J.

The premises described in the schedule to the plaint, which are the subject of this action, belonged to the estate of Isloe Lebbe Idroos Lebbe Marikar (hereinafter referred to as "the testator"). The testator died leaving a will No. 7130 (P1) dated 12th December, 1872, which was proved in case No. 3909 of the District Court of Colombo and probate thereof issued to Idroos Lebbe Mohamedo Mohideen on the 29th of May, 1876.

The executor, by deed No. 241 (P3) dated 19th February, 1878, conveyed the premises to the testator's daughter Idroos Lebbe Marikar Amsa Natchia subject to the trusts and conditions contained in the last will, which are fully set out in the deed.

Amsa Natchia and her husband by deed No. 2718 (P4) dated 5th July, 1904, conveyed her possessory interests in the premises to her daughter Oduma Lebbe Marikar Aysha Umma and her husband Mohideen Usoof. The property *simpliciter* was conveyed to the grantees by deed No. 2912 (1D1) dated 10th November, 1910.

Aysha Umma and her husband by bond No. 2954 (1D8) dated 28th September, 1930, mortgaged the premises to Arunachalam Chetty, and the 1st defendant purchased the premises upon deed No. 504 dated 1st September, 1932, when they were sold in execution of the mortgage decree.

The case for the plaintiff, shortly stated, is that the will created a *fidei commissum* and the 1st defendant has therefore no title to the premises in dispute.

The District Judge held that he was bound by the decision of this Court in case No. 50490 of the District Court of Colombo reported *sub nom. Sabapathy vs Mohamed Yoosoof et al.* (1935, 37 N.L.R. 70) and found in favour of the plaintiff on the 16th issue which is as follows :—(16) Does the last will No. 7130 create a *fidei commissum* ?

The first defendant was a party defendant in the reported case and the District Judge answered the 4th issue ("Is D. C. Colombo No. 50490 *res judicata* of the rights of the parties") in the affirmative.

The 1st defendant appeals from the judgment and decree entered in terms of these findings.

The appellant's counsel contended that the will in question created a trust and not a *fidei commissum* and that the trust was bad as it violated the rule against perpetuities created by section 110 of the Trusts Ordinance of 1917 which is as follows :—

> (1) No trust shall operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of the constitution of the trust, and the minority of some persons who shall be in existence at the expiration of that period and to whom, if he attains full age, the interest created is to belong.
>
> (2) If owing to any trust an interest is created for the benefit of a class of persons with regard to some of whom such interest fails by reason of the provisions of this section, such interest fails as regards the whole class.
>
> (3) Where an interest fails by reason of the provisions of this section, any interest created in the same transaction and intended to take effect after or upon failure of such prior interest also fails.
>
> (4) In any case in which any interest intended to be created fails by reason of the provisions of this section the Court shall have power to give effect to the trust in such a manner as to carry out as nearly as practicable the intentions of the author of the trust, subject to the limits imposed by this section, and may make any order necessary for the purpose.

(5) The restrictions of this section shall not apply to charitable trusts as defined by section 99."

This construction of the will was rejected by this Court in the case of *Sabapathy vs Mohamed Yoosoof* (*supra*). Appellant's counsel submitted that the interpretation placed upon the will in that case was erroneous and that we were not bound to adopt it. He urged in the alternative that we should, if we did not agree with that construction of the will, refer the question for decision by a fuller bench as was done in the case of *de Silva vs de Alwis et al.* (1937, 10 Ceylon Law Weekly 65).

The relevant passage of the will runs as follows :—" I do hereby will and desire that my wife Assena Natchia daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Abdul Rahiman, Mohamadoe Lebbe, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Safie sect to which I belong, but they nor their issues or heirs shall not sell, mortgage or alienate any of the lands, houses estates or gardens belonging to me at present or which I might acquire hereafter, *and they shall be held in trust for the grandchildren of my heirs and heiresses*, only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized, attached or taken for any of their debts or liabilities, and out of such income, produce and rents, after defraying expenses for their subsistence, and maintenance of their families, the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus, lands should be purchased by them for the benefit and use of their children and grandchildren as hereinbefore stated, but neither the executors hereinnamed or any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy."

According to my reading of this disposition the testator's intention was to devise his estate to the persons who would be his heirs according to his religion and sect if he had died intestate in the proportions each would be entitled to as intestate heir subject to certain conditions, namely, that they should not sell, mortgage or alienate the properties devised, but hold them in trust for the persons mentioned in the underlined part of the passage cited, and receive only the rents, income and produce.

The word " trust " is not in my opinion used in this passage in the sense in which it is defined in the Trusts Ordinance 9 of 1917,— so as to vest the persons described as heirs with no more than nominal ownership ; but to emphasise the fact that they are not to sell, mortgage or alienate the property and only receive the rents, income and produce.

The will does not expressly state when the properties are to devolve on the *fidei commissaries*. In the absence of such words it must be deemed to pass on the death of the fiduciary heirs. Up to this point there are all the factors of a *fidei commissum*, namely, the devise to the fiduciary heirs coupled with the prohibition against alienation for the benefit of the *fidei commissaries* designated in the will.

If the will stopped here, I would have no difficulty in holding that it created a valid *fidei commissum*.

It was contended that the latter part of the clause cited deprived the devisees of any beneficial interest in the property devised and left them in the position of trustees who were entitled to retain a certain sum out of the income derived from the estate for their maintenance. I do not think the clause can have any legal effect as the heirs and heiresses cannot be called upon to account for the surplus which the testator desired should be invested in the purchase of lands for the benefit of their children and grandchildren. Again the provision that the heirs and heiresses should not be liable to account for the surplus is not consistent with the intention to deprive the heirs and heiresses of any bene-

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ficial interest in the property beyond what is for their subsistence and maintenance. I am of opinion therefore, that the provision regarding the disposal of the surplus had not the effect which the appellant's counsel contended it had.

The next clause of the will directed that the moveable and immovable properties of the estate should be " divided and apportioned to each of the heirs and heiresses according to their respective shares " and that deeds should be " executed by the executors at the expense of my estate in the name of each of them subject to the aforesaid conditions."

It was in pursuance of a division effected under the clause of the will that the executor conveyed the premises in dispute to Idroos Lebbe Marikar Amsa Natchia subject to the trusts and conditions contained in the last will of the testator which are expressed by reproducing the clause of the will which I have set out earlier in my judgment.

I respectfully agree with the opinions of Akbar, J. and Koch, J. in the case of *Sabapathy vs Mohamed Yoosoof et al.* (*supra*) that this clause had the effect of creating separate *fidei commissa* and that the beneficiaries as regards the property in dispute are the grandchildren of Amsa Natchia.

According to my reading of the will, if the *fidei commissum* failed, the fiduciaries would have become absolute owners of the property devised to them. In the case of the property in question Amsa Natchia would have become entitled to the property or rather her estate if she died without grandchildren.

In Walter Pereira's Laws of Ceylon (2nd Edition) page 458 it is laid down that " an important difference between trusts and *fidei commissa* consists in the benefit which the fiduciary derives from the failure of the *fidei commissum*. In English Law, where property is given in trust, the rule is that the trustee is excluded from taking beneficially in case of failure of the whole or part of the purpose to which the trust is directed ; while, if a *fidei commissum* fails, the fiduciary reaps the benefit. The latter becomes absolute owner of the property. As Sir Henry de Villiers says " it is a rule of law, in the absence of clear provisions to the contrary, that where a *fidei commissary* dies before the fiduciary, the latter takes the inheritance."

But even if the heirs or heiresses had no beneficial interest and in that respect differed from a fiduciary under a *fidei commissum*, it would not necessarily follow that the will did not create a *fidei commissum*. It is laid down in Walter Pereira's Laws of Ceylon, page 457, that " a *fidei commissum* may be so purely in the nature of what the English Law terms a trust as not to interfere with the vesting of a *fidei commissary* legatee's interest even before the arrival of the time for the payment of the legacy. An instance in point is mentioned by Voet, where a testator bequeathed a sum of money to his foster child, and directed the money to be transferred to another person as fiduciary, who was to pay interest to the child until he reached his twenty-fifth year, when the capital was to be paid to him. It was here held that upon the death of the child before reaching that age he transmitted his *fidei commissary* right to his heir. The obvious ground on which this decision rested was that the expression used by the testator pointed merely to the deferred enjoyment of the capital sum, and were not inserted for the purpose of deferring the interest."

The case mentioned by Voet is referred to by Innes, C.J., in the case of *Estate Kemp and Others vs Madonel's Trustee*, S.A.L.R. A.D. (1915) 491, an authority for the proposition that a *fidei commissum* may " be so constituted as to separate the legal ownership from the beneficial enjoyment of the bequest, vesting the first in the fiduciary and a right to the second in the *fidei commissary* "—I quote from page 500.

In that case " a testator by his will devised the residue of his estate to trustees upon certain trusts and directed the trustees, subject to certain prior trusts, to sell certain freehold property and to stand possessed of the share of his granddaughter S in the purchase price upon trust to pay the rents and profits to her for life, and after her death for her children who should attain majority or if the girls should marry before majority. A similar

trust was imposed in respect of certain leasehold property. S survived the testator and married out of community of property. In 1905 her estate was sequestered as insolvent and in 1903 she died without issue and without having been discharged from insolvency."

The respondent, the trustee of Susannah's (the testator's granddaughter S) insolvent estate, contended that the interest of Susannah was a fiduciary and not a usufructuary one and that upon the failure of the *fidei commissary* heirs, her children, she became absolutely entitled to the proceeds of sale in the one case and the rents and profits in the other. The appellant contended that Susannah's interest under the clause of the will ceased with her death.

It was held that "the share of Susannah upon her death without issue vested in her trustee in insolvency and not in the trustees or residuary legatees under the will."

This is an authority for the contention of the respondent that the fact that the fiduciary heir has only the legal right does not necessarily render the grant a trust as defined by the Trusts Ordinance No. 9 of 1917 but that the nature of the grant must be determined by the terms in which it is expressed.

I am of opinion that the appellant's contention that the will creates a trust and not a *fidei commissum* fails. It is not necessary to discuss the other questions argued at the hearing of the appeal.

The appeal is dismissed with costs.

MOSELEY, J.

I agree.

Appeal dismissed.

Present: NIHILL, J.

THURAIYA vs PATHAIMANY

S. C. No. 543—*M. C. Mallakam* 18666.

Argued on 6th October, 1939.

Decided on 11th October, 1939.

Criminal Procedure Code (*Chapter* 16) *section* 306 (1)—*What is sufficient compliance with the section.*

Held : That a mere outline of the case for the prosecution and the defence embellished by such phrases as "I accept the evidence for the prosecution", "I disbelieve the defence" is by itself an insufficient discharge of the duty cast upon a Magistrate by section 306 (1) of the Criminal Procedure Code (Chapter 16).

S. Nadesan, for accused-appellant.

Douglas Jansze, Crown Counsel for Crown, respondent.

NIHILL, J.

Such difficulties as arise in determining this appeal are, I am bound to say, due to an imperfect statement of the reasons for the conviction entered on the record by the learned Magistrate. A mere outline of the case for the

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prosecution and the defence embellished by such phrases, as " I accept the evidence for the prosecution," " I disbelieve the defence," is by itself an insufficient discharge of the duty cast upon a Magistrate by section 306 (1) of the Criminal Procedure Code.

In the present case the learned Magistrate concludes his reasons with the following sentence: " I disbelieve the defence—the version of the defence is false and the case for the prosecution true," but nowhere has he indicated the reasons which led him to this conclusion. A definite allegation was made by the defence that the charge was a false one and an explanation put forward supported by witnesses as to how the complainant got his injury. The learned Magistrate should therefore have shown why it was impossible for him to credit the defence.

Certainly such reasons may have existed. The defence story of a self inflicted wound done in the presence of witnesses seems inherently improbable, but there was evidence that the complainant had been drinking toddy and had made a threat earlier in the day that he would get the accused into trouble.

Furthermore, there was just as much motive for the complainant to wish ill to the accused as there was for the latter to be angry with the complainant. There were also certain discrepancies in the evidence for the prosecution to which also no reference has been made.

Mr. Jansze for the Crown has pointed out that I could send the case back to the Magistrate for an amplication of his reasons, but I do not think that such a course is practicable. It would be a highly artificial proceeding to ask a busy Magistrate to recall the workings of his mind on a case which came before him over three months ago. In the absence of any indication that the learned Magistrate really addressed his mind to the material points in the defence that called for determination I am forced, though with some reluctance, to come to the conclusion that there has not been a satisfactory hearing of this case, and I accordingly set aside the conviction and remit the case back for trial before another Magistrate.

Conviction set aside.
Sent back for retrial.

Present: WIJEYEWARDENE, J.

DISSANAYAKE (Superintendent of Excise) vs MARIMUTTU

S. C. No. 535—M. C. Chavakachcheri 16616.

Argued on 5th October, 1939.

Decided on 16th October, 1939.

Penal Code (*Chapter* 15) *sections* 344, 183, 314 *and* 484—*Search for excisable article—Obstructing Public Officer in the discharge of his functions—When may such search be unlawful—Assault on Public Servant—Right of private defence.*

The accused was a passenger in an omnibus. Excise Inspector de Mel who was in his uniform was on duty at the Elephant Pass. He stopped the vehicle and with his guards searched the passengers. The accused refused to allow the Inspector to search for any excisable article and further pushed him and abused him in foul language. When the Inspector held him by the hand, the accused struck him on the face. Then the accused tried to get into the omnibus and go away but the Inspector held him and told him that he was under arrest for obstruction and assault. No excisable article was found on the person of the accused or of any of the other passengers.

The accused was charged under sections 344, 183, 314 and 484 of the Penal Code.

The Magistrate convicted the accused on all the counts and sentenced him to six months' rigorous imprisonment on each count, sentences to run concurrently.

Held : (i) That in the absence of any evidence to suggest that the Inspector had cause to suspect that there was an excisable article on the person of the accused the search of the accused by the Inspector was unlawful and therefore the accused could not be convicted for voluntarily obstructing a public servant in the discharge of his public functions.

(ii) That in the circumstances, the plea of private defence was not available to the accused.

S. Nadesan, for accused-appellant.

D. Jansze, Crown Counsel, for respondent.

WIJEYEWARDENE, J.

The accused-appellant was charged on the following counts punishable under sections 344, 183, 314 and 484 of the Penal Code.

(*a*) Assaulting or using criminal force on Excise Inspector de Mel in the execution of his duties as a Public Servant.

(*b*) Voluntarily obstructing Excise Inspector de Mel in the discharge of his public functions.

(*c*) Voluntarily causing hurt to Excise Inspector de Mel.

(*d*) Voluntarily insulting Excise Inspector de Mel and thereby giving provocation to him intending or knowing it to be likely that such provocation will cause him to break the public peace.

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The Magistrate convicted the accused on all the counts and passed on each count a sentence of six months' rigorous imprisonment, but ordered that the sentences should run concurrently. The learned Magistrate has overlooked the fact that the maximum term of imprisonment under section 183 of the Penal Code is three months.

According to the prosecution the Excise Inspector who was in uniform was on duty at Elephant Pass when he saw the accused travelling in an omnibus from Jaffna towards Trincomalie. The Inspector stopped the vehicle and all the passengers about 15 in number got down. The Inspector and his guards then proceeded to search the passengers before searching the vehicle. The accused alone " did not allow (the Inspector) to search him for any excisable article." The accused pushed the Inspector away abusing him in foul language and when the Inspector held him by the hand, the accused struck him on the face. The accused then tried to get into the omnibus and go away when the Inspector " held him and told him that he was under arrest for obstruction and assault." The accused attempted to strike the Inspector again but the latter warded off the blow and struck the accused on his face. No excisable article was in fact found on the person of the accused or any of the other passengers or in the vehicle itself.

The accused denied that he assaulted or abused the Inspector and stated that he was the victim of an unprovoked assault by the Inspector who, he alleged, was displeased with him owing to an earlier excise case.

In appeal, the counsel for the accused contended that on the evidence for the prosecution the search of the accused was illegal and he should not therefore be convicted on the first three counts. Under section 34 of the Excise Ordinance (*vide* Legislative Enactments Vol. 1 Chap. 42) an Excise Inspector " may search any person who he has reasonable cause to suspect carries any excisable or other article which he has reason to believe to be liable to confiscation under the Excise Ordinance or any other law relating to excise revenue. In the present case the Inspector has stated in express terms that he searched the accused for an excisable article. Now an excisable article is defined in the Ordinance to mean and include " any liquor as defined by the Ordinance." The liquor for which a search was made must have been arrack or toddy and it is difficult in the absence of any evidence on the point, to appreciate the reasons which led the Excise Inspector to search the person of the accused for bottles of arrack and toddy. The Inspector has not stated or even suggested in his evidence that he had cause to suspect that there was an excisable article on the person of the accused. I hold that the search of the accused by the Inspector was unlawful and that the accused cannot be convicted on the second count for voluntarily obstructing a public servant in the discharge of his public functions.

With regard to the first count the only defence open to the accused is that he acted in the exercise of the right of private defence. Such a plea has to be considered, however, in the light of section 92 of the Penal Code which enacts :

> " There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith and under colour of his office, though that act may not be strictly justifiable by law."

The Excise Inspector was in uniform. Nothing that was done by the Inspector when he began to search the accused could have caused him any apprehension of death or grievous hurt. The accused himself did not question the Inspector whether the Inspector had any reasonable suspicion that he carried any excisable article. It appears to have been taken for granted at the time and even in the Police Court that the Inspector acted lawfully in searching the passengers. In view of these facts I do not think the accused was justified in assaulting the Inspector.

There are certain *dicta* in the judgments of Burnside, C.J. and Clarence, J. in *Canthapillai Odyiar vs Murugesu* (1891, 1 Ceylon Law Reports 90) which support the view that a person charged with assaulting a public servant in circumstances similar to those arising in the present case cannot plead the right of private defence. The same view has been taken by Akbar, J. in *Van Cuylenburg vs Fernando* (1930, 32 New Law Reports 45). In that case a constable stopped an omnibus for committing an offence under the Motor Car Ordinance. After taking down the number of the vehicle, the constable insisting on taking the omnibus to the Police Station, got on to the front seat and asked the driver to drive to the Police Station. The driver did not drive to the Police Station but took the omnibus to some other place and pulled the constable off the seat. Akbar, J. held that the constable acted wrongfully in insisting on the vehicle being driven to the Police Station but held that it was not open to the driver to plead the right of private defence and convicted the driver under section 343 of the Ceylon Penal Code.

With regard to the 4th count I am not prepared to hold that a case has been made against the accused. I do not think the accused intended or knew that the abuse was likely to provoke the Excise Inspector to commit a breach of the peace. (*vide Sub-Inspector of Police vs Wijesekere* (1935, 4 Ceylon Law Weekly 103). Moreover the charge against the accused did not set out the insulting words.

I acquit the accused on the second and fourth counts. I alter the conviction on the first count to a conviction under section 343 of the Penal Code and sentence him to one month's rigorous imprisonment. I affirm the conviction on the third count and sentence the accused to two weeks' rigorous imprisonment to run concurrently with the sentence of one month's rigorous imprisonment.

Acquitted on the 2nd and 4th counts.
Sentences altered on 1st and 3rd counts.

Proctors :—

R. Kannadurai, for accused-appellant. (Marimuttu.)

Present: MOSELEY, A.C.J., SOERTSZ, S.P.J. & NIHILL, J.

RAMALINGAM CHETTIAR vs MOHAMED ADJOOWAD & ANOTHER

S. C. No. 317—*D. C.* (*F*) *Colombo* 4458.
Argued on 2nd October, 1939.
Decided on 23rd October, 1939.

Warranty of title—Difference between express warranty of title and a covenant to warrant and defend title—Nature of the notice that should be given before an action on a covenant to warrant and defend title—How may minors be noticed—Extent of the liability of minor heirs of a deceased vendor for the breach of a covenant to warrant and defend title.

The plaintiff sued the defendants who were the minor heirs of his vendor for damages for failure to warrant and defend his title to an extent of 12½ acres of land out of an extent of 37 acres 2 roods and 3 perches purchased by him. The deed of sale contained both an express warranty of title and a covenant to warrant and defend the title conveyed.

Held : (i) That notice to warrant and defend title given to the mother of the minor heirs of a deceased vendor who was also co-executrix of his will and to the other executor was sufficient notice to the minor heirs.

(ii) That the natural guardian of a minor is entitled to enter into a compromise on his behalf and that the minor would be liable on such a compromise subject to his right to claim *restitutio in integrum* within a certain period if he has been prejudiced by the compromise.

(iii) That an action for damages for breach of a covenant to warrant and defend title lies against the heirs of a vendor only if administration of the estate has been completed by the executors and property belonging to the estate of the deceased testator has passed into the hands of the heirs and then only to the extent of the property that has so passed.

Per SOERTSZ, S.P.J.—"The deed of conveyance to Ramalingam Chettiar contained both an express warranty of title and a covenant to warrant and defend the title conveyed, and it was open to the plaintiff to frame his action on one or other or both of these. If he chose to proceed on the express warranty of title, all he had to prove in order to sustain his claim for damages was that the vendor had not good title. He was under no obligation to wait till that title was disputed or challenged, or till he was evicted, nor was he under any obligation to give his vendor or those liable on the express warranty, notice of the defect in the title or of any threat to it. If, however, he was basing himself on the covenant to warrant and defend title, he would have no cause of action against his vendor or against any others liable on the covenant, till he had suffered judicial eviction in consequence of litigation of which he had duly apprised them."

H. V. Perera, K.C. with *Chelvanayagam* and *E. B. Wickremenayake*, for defendants-appellants.

N. E. Weerasooriya, K.C. with *N. Nadarajah*, for plaintiff-respondent.

SOERTSZ, S.P.J.

By deed No. 593 dated the 13th October, 1926, Tambiraja Sinne Lebbe Marikar sold a block of land 37 acres 2 roods and 23 perches in extent to Ramalingam Chettiar, and the vendor for himself, his heirs, executors

and administrators declared, covenanted and agreed with his vendee (1) that he had good and legal right and title to the land conveyed and (2) undertook that he and " his aforewritten shall and will at all times hereafter warrant and defend the same and every part thereof unto the said vendee and his aforewritten against any person or persons whomsoever."

On the 5th of May, 1927, the incumbent of a Buddhist Vihare sued Ramalingam Chettiar for declaration of title to this land. The trial Judge found in his favour, but awarded Ramalingam Chettiar compensation for certain improvements. There was an appeal. The decree entered was set aside and the case was remitted for trial *de novo*.

While the retrial was pending, Ramalingam Chettiar through his proctor, moved for a notice on four respondents " to show cause why the 1st respondent should not be appointed *guardian-ad-litem* over the second and the third minor respondents, and to warrant and defend the petitioner's (*i.e.* Ramalingam Chettiar's) title." Notice was allowed for the 30th of June, 1932. The journal entry of that date is as follows : " notice served on respondents pointed out. Mr. C files proxy of the 1st and 4th respondents. He has cause to show. 2nd and 3rd minors." The 1st respondent is the widow of Tambirajah Sinne Lebbe Marikar the vendor, and she is co-executrix with the 4th respondent of her husband's last will and testament. The 2nd and 3rd respondents are her children by Sinne Lebbe Marikar. It is to her and her children that Sinne Lebbe Marikar bequeathed and devised his estate. It will be noticed that although the motion of the 15th November, 1932 asked that the 1st respondent be appointed *guardian-ad-litem* of the 2nd and 3rd respondents, that was not done. But, there was really no occasion for such an appointment, for all Ramalingam Chettiar had in view at that stage was to notify the respondents of the action brought against him, so that they might take such steps as they thought fit to warrant and defend his title. The necessity for a *guardian-ad-litem* for the minors would have arisen only in the event of their becoming parties to the litigation. This they never became, for when on the 23rd March, 1933, Ramalingam Chettiar's counsel inquired whether respondents would " take charge of the defence " the 1st and the 4th respondents said they would afford him every assistance, that is without becoming added parties to the litigation.

On the 12th of May, 1933, the case came up for trial, and the proceedings of that day are recorded in these terms. " Parties noticed present. Substituted added plaintiff present. Mr. B for the plaintiff. Mr. P and Mr. A for 1st defendant. Mr. P for parties noticed by 1st defendant to warrant and defend title. With the consent of the parties noticed, plaintiff and defendant have settled the case as follows — judgment for trustees for 12½ acres..... " This settlement resulted in Ramalingam Chettiar losing 12½ acres of the land sold to him, and he instituted the present action against the defendants-appellants who were the minor respondents referred to in the journal entries I have quoted, to recover Rs. 15,000/– at which sum

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he assessed the damages sustained by him. His cause of action was that the defendants-appellants being liable to warrant and defend the title conveyed to him, and having been duly noticed to do so, had failed to fulfil this obligation in respect of the 12½ acres which had gone to the temple in consequence of the settlement to which they consented.

The defendants-appellants filed answer, and the defences they put forward were: (*a*) that they are not liable because they had not been properly noticed to warrant and defend title; (*b*) that at the date of the settlement they were minors and proper steps had not been taken to secure their valid participation in the settlement, and that, therefore, any loss occasioned by that settlement could not be imputed to them; (*c*) that, in any event, they were not liable because the plaintiff's claim, if he had any, was against the executors of Sinne Lebbe Marikar.

Issues were framed to cover these defences and after trial, the learned trial Judge entered judgment for the plaintiff for Rs. 11,954/17 and costs.

In regard to plea (*a*) in one part of his judgment the learned Judge held that this was an action on an express warranty of title and that, therefore, notice and eviction were not conditions precedent to a claim for damages such as this. In a later part of his judgment he found that the defendants had been given sufficient notice. As for plea (*b*) it is difficult to gather the view of the trial Judge in regard to it. I can only say that he found against the defendants but I cannot follow the reasoning which led him to that view. So far as plea (*c*) is concerned, he held that "the defendants *as heirs of the vendors* are liable to warrant and defend the title conveyed by the deed in view of the express warranty of title."

I understand from counsel who appeared before us that these were the matters discussed when this appeal was before my brothers Wijeyewardene, J. and Cannon, J. and in view of the general terms of the reference to us, I assume that these are the questions we have been called upon to decide.

I will deal with these pleas in the order in which I have set them forth. The deed of conveyance to Ramalingam Chettiar contained both an express warranty of title and a covenant to warrant and defend the title conveyed, and it was open to the plaintiff to frame his action on one or other or both of these. If he chose to proceed on the express warranty of title, all he had to prove in order to sustain his claim for damages was that the vendor had not good title. He was under no obligation to wait till that title was disputed or challenged, or till he was evicted, nor was he under any obligation to give his vendor or those liable on the express warranty, notice of the defect in the title or of any threat to it. If, however, he was basing himself on the covenant to warrant and defend title, he would have no cause of action against his vendor or against any others liable on the covenant, till he had suffered judicial eviction in consequence of litigation of which he had duly apprised them. In this instance, the plaintiff appears to have failed to

appreciate this difference. This failure on the part of the plaintiff seems to be shared by the learned Judge himself, and the view taken is that the covenant to warrant and defend title is dependent on the express warranty of title. In other words, that the two things are counterparts of one single obligation. That, of course, is not correct, and Mr. Weerasooriya sought to escape from the difficulty created by this confusion of thought by submitting that this action is based on both the express warranty of title and on the covenant to warrant and defend title. It is impossible to accede to this submission. Paragraphs 3, 5, 8, 9 and 10 of the plaint show unequivocally that the cause of action is based on the covenant to warrant and defend title. There is no reference whatever to the express warranty of title.

This action, then, being on the covenant, the question is whether the defendants, if they are ultimately liable on this covenant, had proper notice of the action in which Ramalingam Chettiar's title was challenged. It was contended before us that the notice alleged to have been served on the defendants was ineffective when the service be regarded as effected on the mother of the defendants for and on their behalf, or on the defendants themselves. It is urged that in view of their admitted minority at that date, the proper course would have been to serve the notice on a duly appointed *guardian-ad-litem*. I am unable to agree with this contention. As I have already pointed out, a *guardian-ad-litem* is required only in cases in which it is sought to sue minor defendants. The plaintiff was not seeking to sue these defendants. Indeed, at that stage, he had no cause of action against them. He was taking steps to arm himself with a cause of action by giving them notice of the action brought against him. It was at their option whether they would take steps to have themselves added as defendants so that they might take control of the litigation. The journal entry of the 23rd of March, 1933 shows that they did not choose that course. In those circumstances, my view is that the service of notice effected in this case is sufficient to bind the defendants for two reasons, firstly, because there was service on their mother who was their natural guardian and secondly because there was, in effect, service on the executors of the estate of Sinne Lebbe Marikar. Vander Linden in his Institutes of the Laws of Holland, chapter 4 section 1, says " this parental power with us is possessed not only by the father but also by the mother, and after the death of the father, by the mother alone. In consists of the entire direction of the maintenance and education of their children *and the management of their estates*." But, over and above that service, there was in this case service of the notice of the earlier action on the executors of the last will and testament of the testator whose estate was sought to be charged with liability for the plaintiff's claim. It is true that in the petition filed for the purpose of giving notice, the executor and executrix were not described in the caption as such, nor did they so describe themselves in the proxy they gave to their proctor. But it seems clear that the petitioner when he sought to give them notice, envisaged them as executor and executrix. Paragraph 4 makes that quite clear. It

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says " the said Thamby Rasa Sinne Lebbe Marikar died leaving a last will and appointing Sitti Nabisa and Ahamadu Lebbe Marikar Mohamed Ameen as executors and giving and devising his properties to the said Sitti Mohamed Ajwad and Sitti Pathumma both of whom are minors and his estate was administered in D.C. Colombo No. 3368." Moreover, Ameen's liability to warrant and defend title is ascribable only to his executorship. There was no other reason for making him a respondent. In these circumstances we must, I think, pay attention to the substance of the proceeding more than to its form and hold that, in this case, there was service of notice on the executor and the executrix. Such a service clearly binds those beneficially interested in the estate. The fact that the plaintiff sought to give notice to the minors themselves makes no difference. It is surplusage and can be ignored.

In regard to (*b*) the authorities indicate that the natural guardian of the minor is entitled to enter into a compromise on his behalf and that the minor would be liable on such a compromise subject to his right to claim *restitutio in integrum* within a certain period if he has been prejudiced by the compromise. In this instance no prejudice is alleged. On the face of it, the compromise appears to be beneficial to those liable on the deed on the express warranty and on the covenant to warrant and defend title. The temple sought to be declared entitled to the whole land and by the compromise obtained only one-third of it. In the first trial they had judgment for the whole land. That is one view of the matter. The defendants are bound by the compromise in that way. But, as I have already indicated, there is another view according to which they must be held to be bound. The record shows that their mother and the other executor consented to the compromise. I need only add that this is not a case to which section 500 of the Civil Procedure Code, to which reference was made, applies because Nabisa Umma and her children were not parties to the action.

The only question left for consideration is (1) whether although the defendants were properly noticed and must be held to have consented to the compromise or to be bound by the consent given on their behalf, they are liable in damages for the loss sustained by the plaintiff in consequence of that compromise, on the action as it is framed at present. The learned trial Judge held " that the defendants *as heirs of the vendor* are liable in law to warrant and defend the title conveyed by the deed." This, in my view is much too wide a proposition and cannot be supported. It saddles devisees and legatees or those who would have been heirs in the event of an intestacy with absolute liability for all the debts and obligations of their testator or intestate. The defendants are two of the three heirs of the plaintiff's vendor. They are intended to take under his will. But, there is no allegation in the plaint, nor is there any evidence that there is in their hands property of the testator sufficient to cover the claim made by the plaintiff or any part thereof, and in these circumstances, I fail to understand the legal basis on

which this liability is founded. To seek to fix the defendants with liability by a bare allegation that they are heirs is to relegate them to the position occupied by the *heres suus et necessarius*, and the *heres necessarius* of the early Roman Law, as the universal successor of his testator or intestate. In the later Roman Law, the position of an accepting heir, was that he was liable only to the extent of the assets in his hands. Maasdorp in his Institute of Cape Law, volume 1 page 106 *et seq* (2nd edition) says that the later Roman system was adopted in the United Provinces and became the common law of the Cape Colony till it was swept away by statute law. He says "at the present day the administration of the estate of a deceased person devolved no longer upon his heir but is vested in testamentary executors whose duty it is to liquidate the estate under their care, to pay the debts of the deceased and the legacies left by them, and to hand over the nett balance of the estate to the heir who is only liable for the payment of such legacies as may have been imposed upon him by will.....The inheritance is the net balance of the estate of a deceased person which is left after debts and legacies have been paid.....The heir, therefore, is only a residuary legatee and is in no worse position as regards the debts of the deceased testator than any other legatee with this exception that he will before all other legatees be liable, *at the suit of the executor*, to a *condictio indebiti* or action for refund for any money paid to him in settlement of his inheritance before the debts of the testator were fully paid, *and also to a direct action for such refund at the suit of the creditors of the deceased; but beyond what he has actually received out of the estate he will not be liable.*" This is the position in our law too. Section 540 of the Civil Procedure Code provides that "if no limitation is expressed in the order making the grant (*i.e.* of probate) then the power of administration which is authenticated by the issue of probate.....extends to every portion of the deceased person's property .....and ensures for the life of the executor.....or until the whole of the said property is administered, according as the death of the executor .....or the completion of the administration first occurs." In this instance, both the executor and executrix appointed by the will are alive and it is not at all clear to me why the plaintiff singled out these defendants who were the minor heirs, and one of whom is still a minor to make his claim against. Be that as it might, a direct action will lie against the heirs only if the administration of the estate has been completed by the executors and property belonging to the estate of the deceased testator has passed into the hands of the heirs and they would be liable only to the extent of the property that has so passed. But as I have observed there is no material on the record to show that the executors have completed their administration and that property belonging to the deceased vendor has devolved on these defendants, while this claim against his estate is outstanding. In that state of things, no case has been made out against these defendants, and the judgment entered against them cannot be sustained.

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I have considered carefully the question of what the order should be on this appeal and I have come to the conclusion that, in all the circumstances the fairest course would be to set aside the decree entered in the court below and to remit the case to enable the plaintiff if so advised to allege and prove the facts upon which he fixes the defendants directly with liability on his claim. For this purpose an amendment of the pleadings will be necessary. The plaintiff must, however, as a condition precedent, pay to the defendants all the taxable costs incurred by them up to date. If the plaintiff does this and files an amended plaint within two months of this record being received back in the trial court, the case will proceed to trial in due course. If he fails to comply with these conditions the District Judge will, on the expiry of the two month period send the case back for decree to be entered here, allowing the appeal and dismissing the plaintiff's action with costs in both courts.

I need hardly add that this order does not preclude the parties from coming to a settlement if they so desire.

Set aside and sent back.

MOSELEY, A.C.J.
I agree.

NIHILL, J.
I agree.

Proctors :—

D. I. Paul Perera, for defendants-appellants. (Mohamed Adjoowad & Another)
K. T. Chittambalam, for plaintiff-respondent. (Ramalingam Chettiar)

Present : MOSELEY, A.C.J. & SOERTSZ, S.P.J.

ANA FERNANDO vs FERNANDO

S. C. No. 12—*D. C.* (*Final*) *Avisawella No.* 2486.

Argued on 9th October, 1939.

Decided on 19th October, 1939.

Res judicata—*Criterion where it is sought to apply the rule as between co-defendants.*

Held : That the correct criterion in cases where it is sought to apply the rule of *res judicata* as between co-defendants is as follows :—

(1) There must be a conflict of interest between the defendants concerned;

(2) It must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; and

(3) the question between the defendants must have been finally decided.

H. V. Perera, K.C. with *C. V. Ranawake*, for the plaintiff-appellant.

Cassius Jansz, for the defendant-respondent.

MOSELEY, A.C.J.

This was an action in which the plaintiff asked for the cancellation of a lease which she had granted to the defendant of certain property in which she had a life interest. The defendant pleaded in his answer *inter alia* that the plaintiff was estopped from bringing this action by reason of a consent decree in another case, namely D. C. Avisawella No. 2360, to which she was a party. A number of issues were framed, all of which were answered in the plaintiff's favour with the exception of that dealing with the question of estoppel. That issue was answered in the defendant's favour and the plaintiff's action was dismissed. The appeal is confined to the question whether or not the consent decree in D. C. Avisawella No. 2360 amounted to *res judicata*.

The land in question had belonged to the plaintiff's deceased husband and was half of an entire block, the other half of which belonged to some people named Wickremaratne. In his last will the late husband devised his share, subject to a life interest in favour of the plaintiff. After the death of the deceased the executor and the devisee sold the deceased's share to the Wickremaratnes who thus became the owners of the whole property subject to the plaintiff's life interest in half. The Wickremaratnes then brought the action No. 2360 to which reference has been made. They sued the defendant and the plaintiff in this action together with the executor and the devisee of the plaintiff's husband's estate. The defendants in case No. 2360 filed a joint answer. The case was settled and it is this settlement which the defendant pleaded as a bar to the present action. The learned District Judge held that all the rights as between the parties to the lease and arising out of it were merged in the consent order, and that the parties ought to be allowed to re-agitate the same matter. The plaintiff's action was accordingly dismissed and she now appeals.

In the replication of the plaintiff she alleged that the defendant had appropriated to himself certain rubber coupons which he had obtained in respect of the property and she prayed that he should be directed to render an account in respect thereof. This matter, I may say at once, is not one covered by the terms of the consent order.

It must be conceded that a judgment which would amount to *res judicata* between plaintiff and defendant is not necessarily so between defendants *inter se*. In *Senaratna vs Perera* (26 N.L.R. 225) Jayawardene, A.J., expressed himself as follows :

> " In my opinion, formed after careful examination of the authorities on the subject, the principle that a decision is not *res judicata* between co-defendants is subject to two exceptions :

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(*a*) When a plaintiff cannot obtain the relief he claims without an adjudication between the defendants, and such an adjudication is made, the adjudication so made is *res judicata* not only between the plaintiff and the defendants, but also between the defendants

(*b*) When adverse claims are set up by the defendants to an action, the court may adjudicate upon the claims of such defendants among themselves, and such adjudication will be *res judicata* between the adversary defendants as well as between the plaintiff and the defendants.

Provided that in either case the real rights and obligations of the defendants *inter se* have been defined in the judgment."

Mr. Perera referred me to several Indian cases which affirm the principle as set out by Jayawardene, A.J. All are decisions of the Privy Council and it is only useful to refer to one, since in the others the same principle was adopted. In *Mt. Munni Bibi & Another vs Tirloki Nath & Others* (A.I.R. 1931 P.C. 114), Sir George Lowndes set out the three conditions which the Board adopted as the correct criterion in cases where it is sought to apply the rule of *res judicata* as between co-defendants. They are set out concisely in terms similar to those used by Jayawardene, A.J. and are as follows :

(1) There must be a conflict of interest between the defendants concerned;

(2) It must be necessary to decide this conflict in order to give the plaintiff the relief he claims ; and

(3) the question between the defendants must have been finally decided.

It would seem that in the present case the learned District Judge overlooked the plaintiff's claim for an accounting in respect of the coupons, a matter which, as I have observed, was not touched upon by the consent order. In my opinion therefore he erred in holding that the defendant's plea of *res judicata* was entitled to prevail.

I would allow the appeal with costs and direct that the case be returned to the District Court in order that an account may be rendered by the defendant of the rubber coupons obtained by him in respect of the property. The defendant must be credited with expenses incurred by him in obtaining the coupons and with any other expenses which he has been authorised by the plaintiff to incur. The costs in the District Court will depend upon the result of the account.

Appeal allowed and sent back.

Soertsz, J.

I agree.

Proctors :—

L. V. B. de Jacolyn Seneviratne, for plaintiff-appellant. (Ana Fernando)

B. L. Drieberg, for defendant-respondent. (Fernando).

Present: MOSELEY, A.C.J. & WIJEYEWARDENE, J.

KUDHOOS vs JOONOOS

S. C. No. 7—D. C. Colombo 47499.

Argued on 11th, 12th & 13th October, 1939.

Decided on 23rd October, 1939.

Civil Procedure Code (*Chapter* 86) *section* 17—*Misjoinder of parties—Muslim gift—Gift* inter vivos *reserving life interest and creating a fidei commissum—Action instituted by administrator before obtaining letters of administration—Letters of administration obtained subsequently but before decree—Is decree in favour of administrator good—Courts Ordinance* (*Chapter* 6) *section* 36.

One Ummukuludu Umma gifted a certain property to one Mahamood Natchia reserving a life interest in her favour and subject to a *fidei commissum*. Mahamood Natchia conveyed certain interests in the property to the defendant. Ummukuludu Umma died intestate about 1897 and letters of administration were granted to the first plaintiff. Mahamood Natchia died intestate in June, 1924 and letters of administration in respect of her intestate estate were granted to the second plaintiff on April 23rd 1934.

This action was instituted in January, 1932 asking for judgment declaring the first plaintiff entitled to the property as administrator of the estate of Ummukuludu Umma or in the alternative declaring the second plaintiff entitled to the property in his own behalf or as belonging to the estate of Mahamood Natchia. The plaint alleged that the second plaintiff was the husband and sole heir of Mahamood Natchia and that he had applied for letters of administration to her estate in D. C. Colombo (Testamentary) 5967.

The defendant filed answer pleading *inter alia* that there was a misjoinder of parties and causes of action and that the plaintiffs were therefore not entitled to maintain the action. The following preliminary issue was tried on March, 1934, namely : Is there a misjoinder of plaintiffs and of causes of action ? The answer was in the affirmative and on the motion of plaintiff's counsel the name of the first plaintiff was deleted and his action dismissed. Several issues were framed on the suggestion of the counsel for the second plaintiff and the defendant and the case was put off as the second plaintiff had not yet obtained letters of administration. The trial eventually took place and judgment was entered in favour of the second plaintiff in November, 1937. The defendant appealed.

In appeal the defendant's counsel raised the following questions :

1. The action should have been dismissed as there was a misjoinder of parties and causes of action.

2. As the second plaintiff had not obtained letters of administration at the time he filed the plaint, the action should have been dismissed in view of the District Judge's finding that the second plaintiff was not an heir of the estate of Mahamood Natchia.

3. The deed of gift P1 was invalid and the property did not therefore belong to the estate of Mahamood Natchia.

4. That the defendant became the absolute owner of the property under P2.

Held : (i) That section 17 of the Civil Procedure Code (Chapter 86) does not compel a court to dismiss an action for misjoinder of parties and of causes of action.

(ii) That the decree obtained in an action brought by a person who had not obtained letters of administration at the time of its institution is nevertheless good if he had obtained letters before the date of decree.

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(iii) That a Muslim deed of gift reserving a life interest in favour of the donor is not governed by Muslim Law and is valid according to Roman-Dutch Law, and effect must be given to a *fidei commissum* created by it.

Cases referred to :— *Jayamaha et al vs Singappu et al* (1910) 13 New Law Reports 348.
London & Lancashire Fire Insurance Co. vs P. & O. Company et al (1914) 18 New Law Reports 15.
Alagamma vs Mohamadu (1917) 4 Ceylon Weekly Reporter 73.
Menika vs Menika (1923) 25 New Law Reports 6.
Kanagasabapathy vs Kanagasaby (1933) 25 New Law Reports 173.
Fernando vs Fernando (1937) 39 New Law Reports 145.
Behari Lal and Another vs Kodu Ram (1893) 15 Allahabad 381.
Steward vs North Metropolitan Tramways Co. (1886) 16 Queens Bench Division 556.
Silva vs Weerasuriya (1906) 10 New Law Reports 73.
Kanappa Chetty vs Kanappa Chetty (1902) 2 Supreme Court Decisions 40.
Sethna vs Hemingway (1914) 38 Bombay 618.
Weerasekera vs Peiris (1932) 34 New Law Reports 281.
Sultan vs Peiris (1933) 35 New Law Reports 57.
Ponniah vs Jamal (1936) 38 New Law Reports 96.
Kalendarumma vs Marikkar (1936) 38 New Law Reports 271.

Dissented from :— *Abraham Singho vs Jayaneris Singho* (1935) 3 Ceylon Law Weekly 53.

C. Thiagalingam with *T. K. Curtis*, for defendant-appellant.
S. J. V. Chelvanayagam, for 2nd plaintiff-respondent.

WIJEYEWARDENE, J.

This is an action for declaration of title to a property bearing assessment No. 64 at Hultsdorp Street. By deed P1 of December 8th 1894 one Ummukuludu Umma gifted the property to Mahamood Natchia, reserving a life interest in her favour and subject to a *fidei commissum*. By deed P2 of September 30th 1902 Mahamood Natchia conveyed certain interests in the property to the defendant.

Ummukuludu Umma died intestate about 1897 and letters of administration were granted to the first plaintiff. Mahamood Natchia died intestate in June, 1924 and letters of administration in respect of her intestate estate were granted to the second plaintiff on April 23rd 1934.

The present action was instituted in January, 1932 asking for judgment declaring the first plaintiff entitled to the property as administrator of the estate of Ummukuludu Umma or " in the alternative declaring the second plaintiff entitled to the property in his own behalf or as belonging to the estate of Mahamood Natchia. The plaint alleged that the second plaintiff was the husband and sole heir of Mahamood Natchia and that he has applied for letters of administration to her estate in D.C. Colombo (Testamentary) 5967. The action was presumably instituted by the

plaintiffs claiming an alternative title in either of them owing to the uncertainty which prevailed at least at the time of the institution of the action regarding the validity of Mohammedan deeds of gift subject to certain conditions and limitations.

The defendant filed answer pleading *inter alia* that there was a misjoinder of parties and causes of action and that the plaintiffs could not therefore "maintain this action."

On March 16th 1934 the case came up for trial before the then District Judge of Colombo, Mr. O. L. de Kretser, when the defendant's counsel suggested the following issue for decision as a preliminary issue :

Is there a misjoinder of plaintiffs and of causes of action ?

The District Judge answered the issue in the affirmative and the plaintiff's counsel moved to delete the name of the first plaintiff and to proceed with the action as at the instance of the second plaintiff. The Judge thereupon dismissed the first plaintiff's action and framed a number of issues suggested by the counsel for the second plaintiff and the defendant. The case was however postponed as the second plaintiff had not obtained at that time the letters of administration to the estate of Mahamood Natchia.

The case came up for hearing ultimately before another District Judge of Colombo who delivered his judgment in November, 1937 in fav ur of the second plaintiff. The present appeal is preferred by the defendant against that judgment.

In arguing the appeal before us the appellant's counsel raised the following points :

1. The action should have been dismissed as there was a misjoinder of parties and of causes of action.
2. As the second plaintiff had not obtained letters of administration at the time he filed the plaint, the action should have been dismissed in view of the District Judge's finding that the second plaintiff was not an heir of the estate of Mahamood Natchia.
3. The deed of gift P1 was invalid and the property did not therefore belong to the estate of Mahamood Natchia.
4. The defendant became the absolute owner of the property under P2.

In support of his first contention the appellant's counsel argued that the order of the District Judge dated March 16th 1934 was bad in so far as it allowed the second plaintiff to proceed with the action and there was no provision in the Code which enabled the Judge to strike out the name of one plaintiff and permit the action to proceed in the name of the second plaintiff as in this case there was not only a misjoinder of parties but also a misjoinder of causes of action. He relied strongly on section 17 of the Civil Procedure Code and a decision of this Court in *Abraham Singho vs Jayaneris Singho* S. C. Minutes March 6th 1930 reported in (1935) 3 Ceylon Law Weekly 53.

Now section 17 of the Civil Procedure Code enacts :

" Nothing in this Ordinance shall be deemed to enable plaintiffs to join in respect of distinct causes of action."

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I am unable to agree that this enactment compels a court to dismiss an action for misjoinder of parties and of causes of action. I do not think we are compelled by any other provision of the Civil Procedure Code to read into this particular enactment anything more than it states. All that the section states is that the plaintiffs should not join in respect of distinct causes of action. I do not see any reason why a court should not, on an application made to it exercise its discretion and strike out one or more of the plaintiffs so as to make the plaint conform to the provisions of section 17. In *Jayamaha et al vs Singappu et al* (1910) 13 New Law Reports, 348, Hutchinson, C.J. said : " The first plaintiff's cause of action is for trespass on portions of his land A and he has nothing to do with B. The second plaintiff's is for trespass on his land B, and he has nothing to do with A. It is true that all the defendants who filed answer claim ultimately from the *sannas;* but the claims of the plaintiffs are for distinct causes of action, and ought not to have been joined.

See section 17 of the Civil Procedure Code. Their counsel says that he is willing that the second plaintiff and his claim should be struck out. But there was no application by either party to strike him out ; and section 18 does not empower the District Court to do so without an application ; and I think that we have no power to do it now. The order made by Hutchinson, C.J. with the concurrence of Van Langenburg, A.J. was to the effect that the case should be sent back to the District Court for the consideration of an application to strike out one of the plaintiffs and that the District Judge should deal with it on such terms as to costs, amendment of pleadings, if necessary, and otherwise as he thought fit and if he acceded to it, he should proceed with the trial of the other issues.

In *London & Lancashire Fire Insurance Co. vs P. & O. Company et al.* (1914) 18 New Law Reports 15, de Sampayo, J. who was of opinion that there was a misjoinder of parties and of causes of action said that he would send the case back for trial of the first cause of action excluding the second cause of action. In *Alagamma vs Mohamadu* (1917) 4 Ceylon Weekly Reporter 73, Shaw, J. and de Sampayo, J. held that neither section 17 nor any other provision of the Civil Procedure Code necessitated the dismissal of an action in all cases where there has been a misjoinder of parties and causes of action. De Sampayo, J. further observed in the course of his judgment: "Section 17 of the Code is one of a number of sections concerned with the framing of an action, and it is obvious from the whole set of provisions that the intention of the Code is not to make technical defects wholly to defeat an action but to facilitate the correcting of such defects in order that the court may once and for all adjudicate on the merits of the case.

"Section 93 gives to the court wide powers of amendment, and I think the District Judge should have exercised those powers in this case. It is not as if the plaintiff had not moved him to do so, for it appears that the legal issues on the objection in question was discussed by both sides, counsel

for the plaintiff intimated to the court that he was prepared to strike off from the record the first, second and third plaintiffs and their particular claims."

In this connection reference may also be made to *Menika vs Menika* (1923) 25 New Law Reports 6, *Kanagasabapathy vs Kanagasabay* (1933) 25 New Law Reports 173 and *Fernando vs Fernando* (1937) 39 New Law Reports 145.

Section 17 of our Code corresponds to section 31 of the Indian Code of Civil Procedure, 1882, and under that section it was held in *Behari Lal and Another vs Kodu Ram* (1893) 15 Allahabad 381 that where a suit was bad for misjoinder of plaintiffs and causes of action it was not proper to dismiss the suit without giving the plaintiffs an opportunity of amendment.

I regret I am unable to assent to the view expressed in 3 Ceylon Law Weekly 53 and I hold that the first point raised by the applicant fails.

The second point urged on behalf of the appellant is that the claim of the second plaintiff is preferred as an heir and as administrator of the estate of Mahamood Natchia and that as the District Judge had found against the second plaintiff's claim as heir there remained only this claim as administrator which should have been dismissed as he obtained the letters of administration about two years after the institution of the action. If the appellant intended to urge this argument in the lower court, no explanation is forthcoming as to his failure to make his position clear at least on March 16th 1934 when the District Judge decided the preliminary issue regarding the misjoinder of plaintiffs and of causes of action. Had he done so, it would have been open to the second plaintiff to withdraw his action and file a fresh action immediately after he obtained the letters of administration on April 23rd 1934 and before the expiry of ten years from the death of Mahamood Natchia in June 1924. If the applicant's contention is now upheld and the plaintiff is compelled to file a fresh action it will be open to the defendant to plead against him that he has obtained title by prescriptive possession. There appears to be some ground for the complaint of the counsel for the respondent that this point has been taken for the first time at the hearing before us and if the point is now upheld his client will be seriously prejudiced. Though the learned District Judge has dealt with the various matters in dispute argued before him in a very full and well considered judgment he has made no reference whatever to this point. It is no doubt just possible that the District Judge may have forgotten to consider this argument though it was urged before him but in that case I should have expected the appellant to raise this point in the petition of appeal in which he raised specifically various other points of law. The petition of appeal, in fact, makes no reference whatever to this point. The learned counsel for the respondent has referred us to *Steward vs North Metropolitan Tramways Co.* (1886) 16 Queens Bench Division 556 and pleaded that the appellant should not be allowed to urge this objection at this stage of the proceedings.

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There is no direct authority in our Law Reports on the question whether the plaintiff, who was not an administrator at the time of filing the plaint but obtained the letters of administration pending the action, could obtain a decree in his favour. But there are decisions which tend to show that a Court of Law should refuse to dismiss an action in circumstances similar to those which have arisen in this case. In *Silva vs Weerasuriya* (1906) 10 New Law Reports 73, an administrator instituted an action in respect of a property which was not mentioned in the inventory and the value of which had not been included in the sum on which stamp duty had been paid in the testamentary proceedings. Hutchinson, C.J. said that if an application was made even in the appeal court, the case would not have been dismissed but remitted to the lower court to enable the plaintiff to get the letters of administration duly stamped. Wendt, J. went further and expressed his view that the Judge of the lower court should not have dismissed the action in any event but adjourned the trial in order to enable the plaintiff to get his letters duly stamped. In *Kanappa Chetty vs Kanappa Chetty* (1902) 2 Supreme Court Decisions 40, the plaintiff appears to have claimed as an adopted heir of a deceased person whose estate was not administered and this Court sent the case back to the District Court with a direction that further proceedings should be stayed to enable the plaintiff to get the letters of administration within a reasonable time and that on the plaintiff being appointed as administrator he should *in that capacity* be substituted as plaintiff and allowed to proceed with the action. Section 42 of our Code of Civil Procedure corresponds to section 50 (4) of the Indian Code of Civil Procedure 1882, and Order 7 Rule 4 of the Indian Code of Civil Procedure 1908, while section 547 of our Code so far as it is material for the consideration of the present question is somewhat similar to section 190 of the Succession Act.

In *Sethna vs Hemingway* (1914) 38 Bombay 618, Scott, C.J. while holding that the plaintiff who sued as administratrix before obtaining the letters of administration should be allowed to retain the benefit of a decree entered in her favour after obtaining the letters of administration, said : " The plaint was defective in that it did not show that the plaintiff had obtained letters of administration and it should on that account have been rejected on presentation. The plaintiff however obtained letters of administration on the 31st October, 1913 a fortnight before the hearing and the hearing was allowed to proceed. A decree was passed for the plaintiff declaring that the Rs. 10,000/– in question formed part of the estate of the deceased and that the plaintiff was entitled to the same. This was not contrary to section 190 of the Succession Act as remarked by the learned Judge. The only tenable technical objections was to the institution of the suit before the plaintiff has an existing interest in the subject-matter. That point, however, if it had been taken and had resulted in the rejection of the suit at the hearing, would have only led to a waste of time and costs without benefiting the defendants, for fresh suit would immediately have been brought by the administratrix."

Moreover, I think that in all the circumstances of this case the respondent is entitled to claim with regard to this contention the benefit of the provisions of section 36 of the Courts Ordinance which enacts that " no judgment or order pronounced by any court shall on appeal or revision be reversed, altered or amended on account of any error, defect or irregularity which shall not have prejudiced the substantial rights of either party."

I hold, therefore, that the decree obtained by the plaintiff cannot be attacked on the ground that he was not a duly appointed administrator at the time of institution of the action.

The third point involves a determination of the law which governs Muslim deeds of gift. The ruling authority on this question is *Weerasekera vs Peiris* (1932) 34 N. L. R. 281 in which the Privy Council considered the validity of a deed of gift executed by one Muslim in favour of another. The deed purported to transfer the property as " a gift *inter vivos* absolute and irrevocable " subject to :

(*a*) a reservation to the donor of the right of taking and enjoying the rents and income of the property

(*b*) a burden of *fidei commissum*

(*c*) a right in the donor to revoke the gift.

In view of the elaborate arguments addressed to us by the appellant's counsel based on the alleged difficulty of seeing clearly the principles of law enunciated by the Privy Council, I think it is best to reproduce *in extenso* the relevant passage from that judgment :

"The conditions and restrictions mentioned in the deed are quite inconsistent with a valid gift *inter vivos* according to the Mohammedan law, for by the deed, the father reserved to himself the right to cancel and revoke the so-called gift, as if the deed had not been executed and to deal with the premises as he thought fit ; he reserved to himself the rents and profits of the premises during his lifetime and it was only after his death that the premises were to go to and be possessed by the son.

In their Lordships' opinion all the terms of the deed must be taken into consideration when construing the deed, and it seems clear to their Lordships that it was never intended that the father should part with the property in or the possession of the premises during his lifetime, or that the son should have any control over or possession of the premises during his father's lifetime. In other words it was not intended that there should be a valid gift as understood in the Mohammedan law.

The deed further provided (among other things) that after the father's death the son should not sell, mortgage or alienate the premises or any part thereof.....

It was not disputed that the last-mentioned provisions constituted a *fidei commissum* according to Roman-Dutch Law but, as already stated, it was contended on behalf of the respondent, that inasmuch as the terms of the first part of the deed purported to constitute a gift *inter vivos* between Muslims, the Mohammedan law must be applied thereto and as possession of the premises was not taken by the son during the father's life the gift was invalid and the *fidei commissum* which was based on it, also failed.

Their Lordships are not able to adopt this contention of the respondent and upon the true construction of the deed, having regard to all its terms, they are

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of opinion that the father did not intend to make the son such a gift *inter vivos* as is recognised in Mohammedan law as necessitating the donee taking possession of the subject-matter during the lifetime of the donor but that the father intended to create and that he did create a valid *fidei commissum* such as is recognised by the Roman-Dutch Law."

If I may say so, I do not see any difficulty in ascertaining the principles of law laid down in that judgment. Nor am I able to hold in view of that decision, that deed P1 which has to be construed in this case should not be regarded as governed by the Roman-Dutch Law. The deed P1 is a deed of gift between Muslims subject to a reservation of a life interest in favour of the donor and creating a *fidei commissum* in favour of the children of the donee. I am unable to see any indication in the deed of the donor's intention to make a gift *inter vivos* as known to the Muslim Law and I have no doubt that the donee intended to create and did in fact create a valid *fidei commissum* as known to the Roman-Dutch Law. The argument of the appellant's counsel appeared to me to be an invitation to us to whittle away the effect of the Privy Council decision by endeavouring to ignore the plain meaning of that judgment and decide the present case according to the view of law expressed in the decision reported in 32 N.L.R. 176 which was the very judgment overruled by the Privy Council There are three reported cases in which this Court had to consider the validity of Muslim deeds of gift subsequent to the Privy Council decision. In *Sultan vs Peiris* (1933) 35 N.L.R. 57 and *Ponniah vs Jamal* (1936) 38 N.L.R. 96, this Court held that the validity of deeds of gift in those cases should be decided according to the Muslim Law and not the Roman-Dutch Law. It is possible to distinguish these cases from the Privy Council case as the learned Judges who decided those cases pointed out that the deeds themselves gave a clear indication of the donor's intention that the deed should have "the character of a deed of gift under the Muslim Law." It is however not possible to reconcile some of the views expressed in the two subsequent decisions of this Court mentioned above with the ruling of the Privy Council but in spite of these views I am bound to follow the decision of the Privy Council. In *Kalendarumma vs Marikkar* (1936) 38 N.L.R. 271 this Court followed the Privy Council decision and held that a Muslim deed of gift reserving a life interest in favour of the donor was not governed by the Muslim Law and the deed was valid according to the Roman-Dutch Law.

I hold that the deed P1 is a valid deed of gift and that effect should be given to the *fidei commissum* created by it.

With regard to the fourth point the appellant's counsel argues that by deed P2 Mahamood Natchia purported to convey the entire property and that even if Mahamood Natchia held the property subject to a *fidei commissum* the defendant became the absolute owner of the property on her death without leaving any fiduciary heirs. An examination of P2 shows that there is no foundation whatever for this argument as by that

deed Mahamood Natchia conveyed for a sum of Rs. 250/- only her "life rent or possessory interest" in the property.

I would therefore dismiss the appeal with costs.

MOSELEY, A.C.J.

I agree.

Appeal dismissed.

Proctors :—

N. M. Zaheed, for defendant-appellant. (Kudhoos)
T. Canagaraja, for 2nd plaintiff-respondent. (Joonoos)

Present: NIHILL, J.

JAYASURIYA vs URAPOLA RATANAJOTI

Application for revision in M. C. Colombo No. 36133.

(*S. C. No.* 346)

Argued on 20th October. 1939.

Decided on 25th October, 1939.

Buddhist Temporalities Ordinance (*Chapter* 222) *section* 42.

Held : The register that has to be looked at for the purposes of section 42 of the Buddhist Temporalities Ordinance (Chapter 222) is the register kept by the Registrar-General under section 41.

H. V. Perera, K.C. with *J. R. Jayawardene* and *V. F. Gooneratne*, for complainant-petitioner.

R. L. Pereira, K.C. with *L. A. Rajapakse*, for accused-respondent.

NIHILL, J.

This is an application for revision in a case in which the accused-respondent was acquitted in the Magistrate's Court of Colombo on a summons alleging him to be guilty of an offence under section 42 of the Buddhist Temporalities Ordinance (chapter 222). The sanction of the Attorney-General for an appeal against the acquittal was sought and was refused.

The short point for my consideration is whether the register referred to in section 42 is the register of Buddhist priests kept by the Registrar-General pursuant to the provisions of the Ordinance, or the registers kept by certain ecclesiastical heads also pursuant to the Ordinance. If it be the former, then the decision of the learned Magistrate was right, for on the date of the hearing of the summons the accused's name was on the Registrar-General's register, but if it be the latter, then the grounds for the acquittal were wrong because on the relevant date the accused's name was not on the register kept by the *Mahanayaka Thero* of the accused's *Nikaya* or sect.

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Now the learned Magistrate was fortified in the view he took by the judgment of Soertsz, J. in the case of *Mahanayaka Thero, Malwatta Vihare vs The Registrar-General* (39 N.L.R. p. 186)*.

That was an application for a writ of Mandamus against the Registrar-General and the intervenient was the present accused-respondent. The application was for a writ requiring the Registrar-General to remove the intervenient's name from the register on the grounds that his name had been removed from the register kept by the *Mahanayaka Thero* and that he was no longer an *Upasampada Bhikku.*

I need not go over in detail the various points argued before my brother, it is sufficient to note that in the result whilst my brother held that the Registrar-General was under a legal duty to remove a name from his register on receiving notice from the *Mahanayaka* that the priest in question had been expelled from the Order he refused to issue the writ because he was not convinced of the propriety of the motives of the applicant.

Now it is clear from the concluding passages of my brother's judgment that he had in his mind that if he made the writ absolute he would be exposing the intervenient to a risk of a prosecution under section 42, and conversely that so long as the name remained on the Registrar-General's register the intervenient was safe.

Under the special circumstances which were referred to fully in the judgment, my brother was loathe to place the intervenient in a position "of great disadvantage even of great danger." It occurs to me that the disadvantage and danger would have been as imminent had the Registrar-General changed his mind, and in view of my brother's judgment, fulfilled his legal duty.

However, for what reason I know not, the Registrar-General did not remove the name, hence the present proceedings.

Now in the light of the abovementioned case, it is clear, and I think it is conceded, that the learned Magistrate had no option but to find as he did and to acquit the accused. Nevertheless, as the view taken by my brother was *obiter* and not a ruling on a matter expressly argued before him, I am invited to say that the view is wrong and to hold that "register" in section 42 means the ecclesiastical and not the Registrar-General's register.

It has been impressed upon me and I can well believe it that the matter is of great moment to the Buddhist hierarchy and priesthood and certainly if I felt in any real doubt as to the soundness of my brother's *obiter*, I would submit the point to fuller authority. But can there be a real doubt ? I do not think so.

In considering the question it may be helpful to examine in detail the competent parts of the machinery of registration set up by the Ordinance. The aim of this machinery is clearly the protection of the public against the imposter ; the rogue, who under cover of the yellow robe, might fatten on the good will and charity of the pious laity. So, therefore, after the

* 8 C.L.W. p 50 (Edd. C.L.W.)

coming into force of the Ordinance every priest whether he was a fully ordained *Upasampada* or a *Samanera* was required to take certain steps.

In the case of the former he had to obtain Form A in the Schedule, fill it up and send it to the Registrar-General. In the case of the latter a like procedure on Form B had to be followed by the *Viharadhipati* of the temple in which the *Samanera* was resident.

Now the Registrar-General on receiving the forms which were sent to him in duplicate had to retain one copy and send the other to the *Mahanayaka Thero* or *Nikaya Thero* of the *Nikaya* or sect concerned whose name appeared on the form. This being done, it was the duty of the Registrar-General and the ecclesiastical heads to file their respective copies and make registers.

Thus on the completion of all this there had come into existence a central register kept by the Registrar-General, and a number of sectional or sectarian registers scattered about in the various places, where the heads of sects and communities have their habitation.

It is true that after this, corrections, additions, and alterations to the registers flow from the sectional registers to the central register and that the latter should mirror the former.

But what is the position of the public ? That becomes apparent in the sixth sub-section of section 41 which is as follows :

> " Such registers kept by the Registrar-General shall for the purposes of this Ordinance be *prima facie* evidence of the facts contained therein in all courts and for all purposes ; and subject to the prescribed regulations, every such register may be searched and examined by any person claiming to be interested therein, and certified copies of or extracts from such registers may be obtained on payment of the prescribed fee."

It is the central register which is the public's protection. It would be no use for a person who might suspect the *bona fide* of an over importunate priest to hunt for a sectional register for he might never find it, and his suspicions could not be finally allayed or confirmed until he had inspected every sectional register in existence. No, his proper course must be to go to the central register and, there if the machinery has functioned, he will find the true position.

It may be urged that in the present case the machinery did not function because the Registrar-General did not do his duty, but a failure to co-ordinate in one instance cannot alter the essential character of the central register which is clearly indicated in sub-section (6).

I regard it as significant, also that the last sub-section of section 41 is penal and that this is followed immediately by section 42. The effect is surely this ; the sixth sub-section of section 41 makes the Registrar-General's registers " for the purposes of this Ordinance " and those words are important, *prima facie* evidence in all courts and for all purposes and gives the public a right of search. Sub-section (7) then makes it incumbent on every section of the priesthood, under pain of penalty to take the steps with-

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out which the Registrar-General's registers could never be initiated or maintained.

Finally comes section 42 which makes it an offence for any *Upasampada Bhikku* or *Samanera* to hold himself out as such if his name does not appear on " the register " — what can this mean but the register kept in the place where the public have the right to go and see for themselves?

Mr. Perera has argued that if the register in section 42 be the Registrar-General's register, then the anomalous position is reached that if there is a failure on the part of the Registrar-General to do his duty, then a name may appear on his register of a person who in fact has been disrobed by properly constituted ecclesiastical authority. That must be conceded, but I do not consider it a reason for altering the character of the offence set out in section 42. The purpose of this part of the Ordinance is clearly the protection of the public, not the maintenance of ecclesiastical discipline and as I have attempted to show, it is the Registrar-General's register which is the central cog of the machinery set up by the Ordinance for this purpose. This does not mean that the absence of a name from a sectional register could never be of any value as evidence in any proceedings.

There are a number of facts stated in Forms A and B and the Registrar-General's register is but *prima facie* evidence of these facts.

Thus where the fact of expulsion from a *Nikaya* was the matter in issue, evidence that a name was no longer on the register of the *Mahanayaka Thero* might be conclusive in demonstrating that the name given in Item 14 of Form A was no longer correct. But holding as I do that the register in section 42 is the Registrar-General's register and none other, then a charge alleging an offence under section 42, the probative value of the *Mahanayaka Thero's* register is nil, for the court need not look beyond the register of the Registrar-General.

True it is, if my view is correct, that it is possible for a priest who is no longer a priest (or is no longer permitted to function as a priest) to hold himself out as such and still not be guilty of an offence, but in such a case the ecclesiastical authorities are not without their remedy, for it does not follow that because this Court has refused a writ of Mandamus on the Registrar-General in one case on the ground of improper motive, that it would not grant it in another case where such motive was not present.

Having reached the above conclusion on the meaning of the word " register " in section 42, there is nothing further for me to consider in this matter and I accordingly refuse the application for revision.

Application refused.

Present: MOSELEY, A.C.J. & SOERTSZ, J.

CANNANGARA vs AMERASEKERA

S. C. No. 95—D. C. Colombo 4686.

Argued on 10th October, 1939.

Decided on 2nd November, 1939.

Evidence on commission—Can a commission for examination of defendant be issued—Civil Procedure Code (Chapter 86) section 422.

Held : (i) That the words in section 422 of the Civil Procedure Code are very wide and make it possible for the parties themselves to be examined on commission.

(ii) That applications for commissions to examine the parties themselves ought not to be lightly entertained.

(iii) That such an application should not be granted unless it were supported by affidavits clearly stating that the commission would, under the circumstances, be conducive to the administration of justice.

C. Thiagalingam, for defendant-appellant.

N. E. Weerasooriya, K.C. with *D. M. Weeresinghe*, for plaintiff-respondent.

SOERTSZ, J.

This is an appeal from an order made by the District Judge of Colombo refusing to issue a commission for the examination of the defendant, and of certain witnesses, all of them resident in England.

The circumstances in which the application for a commission was made, are these. The plaintiff who is the step-son of the defendant sued him, in this case, on several causes of action to recover large sums of money. One of the claims was for a sum of Rs. 12,698 which the plaintiff alleged was the amount of rents collected by the defendant in respect of certain houses and premises belonging to the plaintiff, and not accounted for to him. The defendant's defence is that he collected a sum of Rs. 12,418 and not Rs. 12,698 as stated in the plaint, and that that amount and a sum of Rs. 809 over and above that amount, were expended by him in maintaining, feeding and clothing the plaintiff during his stay in England and the defendant claims in reconvention the additional sum I have referred to. The defendant's attorney has submitted an affidavit in support of the allegations in the answer that a large sum of money was spent "on account of clothing, food, light, heating, house rent and medical attention to the plaintiff." It is in regard to these matters that the defendant asked that his evidence, the evidence of Dr. Low and the evidence of Mr. and Mrs. Ramsden be taken on commission. Dr. Low's and the Ramsdens' evidence, it is said, will show that the plaintiff was suffering from a highly contagious disease, and that he had to be segregated and put in charge of attendants.

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The learned trial Judge refused the application because he thought that in view of the claim in reconvention the court should have the defendant and his witnesses before it so that their evidence might be assessed properly with reference to the kind of witnesses they appeared to be and to the manner of their giving evidence. The Judge also thought that the statement made in the affidavit that the defendant's state of health made it inadvisable for him to embark on a voyage to Ceylon was belatedly made and that there was no direct evidence to show that Mr. and Mrs. Ramsden were unwilling to come to Ceylon. There was only the attorney's statement to vouch for that.

Now applications such as this are left in the discretion of the court for it to allow or refuse according as the facts and circumstances of each case seem to require. There are no hard and fast rules, and where a trial court has exercised the discretion vested in it substantially in a manner conducive to justice, a court of appeal will not interfere merely because if it had been the original court it would have exercised this discretion differently. Mr. Weerasooriya stood on that principle. But after careful consideration I have reached the conclusion that the trial Judge has misdirected himself and has exercised his discretion wrongly. One of the reasons given by him is that there is a claim in reconvention and that, therefore, it is necessary that he should have the defendant and his witnesses in front of him. It is, of course desirable, that in every case which has to be tried, the parties and their witnesses should during the pendency of the trial, live and move and have their being, so to speak, in the presence of the Judge who has to adjudicate between them, but obviously there must arise cases in which what is desirable is not attainable conveniently. Hence our section 422 of the Civil Procedure Code, and kindred provisions in other systems of law. Section 422 provides that " any court may *in any action* issue a commission for the examination of *any person* resident beyond the local limits of its jurisdiction." These are very wide words and make it possible for the parties themselves to be examined on commission. But as Taylor says in his work on Evidence " motions for this purpose (*i.e.* for examination on commission of the parties themselves) ought not to be lightly entertained especially when made on behalf of the party who is sought to be examined.....The application should not be granted unless it were supported by affidavits clearly stating that the commission would, under the circumstances, be conducive to the administration of justice.....A less stringent rule would inevitably lead to the pernicious practice of parties going abroad to avoid the risk of cross examination in open court."

In the case of *Mohideen vs Mohamadu* (1 B 2234), a commission was refused where the witnesses sought to be examined in that way were witnesses to nine promissory notes which were being impugned as forgeries. That is quite understandable. In *Moorhouse vs Caffoor* (1 Tamb. 10), a commission issued to examine the plaintiff where it was apparent that the plaintiff's duties prevented him from returning to Ceylon except at a large sacrifice of time and money, and he was not wilfully avoiding the Ceylon courts.

In the case before us, so far as the defendant is concerned, he has been resident in England continuously from 1926. He says it is his intention to continue to reside there, and that seems probable. The claim with which we are concerned is a claim brought against the defendant not by him and it cannot be said that he desires to remain abroad to avoid the risk of cross examination in open court. What is more there is material before us to show that the defendant has been advised medically that it will be prejudicial to his health to voyage to Ceylon and back. I cannot help feeling that the trial Judge took too technical a view of the matter when he remarked that this fact had not been brought properly to his notice and that it was so brought belatedly. In cases where a court is exercising a discretion vested in it, it may well, I think, take a more liberal view. It seems to me that the affidavit of the attorney, who is the local representative of the defendant, and the medical certificate show that the defendant's health is as it is said to be. In my opinion, therefore, it cannot be said that if we entertain this application for the defendant's evidence to be taken on commission we shall be entertaining an application for a commission lightly.

The position in regard to Dr. Low and Mr. and Mrs. Ramsden is even stronger. One is a professional gentleman, and the others are working people, and it is unlikely that they will agree to come to Ceylon to give evidence in this case. I cannot pay serious attention to the objection made that these witnesses have not themselves said that they will not come to Ceylon for the purpose of this case. The attorney says they are unwilling, and he must be understood to be speaking on instructions he has received from the defendant. On the probabilities of the matter too, one may assume that they have refused to come to Ceylon. But even if they should be willing to come the expenditure that would be incurred in getting them out is such, that it is out of proportion to the nature and amount of the claim. The sole question involved is whether the defendant has incurred all the expenditure he says he has. It seems clear that he must have incurred some expenditure. My view in a case like this is that the interests of justice will not suffer by the evidence referred to being taken on commission. The Judge will, no doubt, in adjudicating upon the claims, bear in mind that the evidence for the defence was placed before him in this manner, and that the plaintiff has not had the advantage of subjecting those witnesses to cross examination in open court in the presence of the trial Judge. We were referred to certain English and local cases in support of the contentions put forward on the two sides, but case law is not of much assistance in a matter of this kind where the exercise of a discretion vested in a court must depend on the peculiar facts and circumstances of each case. On a broad view of the circumstances of this case, and of the nature of the evidence sought to be procured by means of a commission, I am of opinion that the defendant's application should be allowed.

I would therefore set aside the order dismissing the application and send the case back with the direction that a commission do issue at the

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expense of the defendant to such a court or person as the trial Judge may deem fit for this evidence to be taken on commission. The appellant will have the costs of this appeal and of the argument on the point in the court below, but whatever the ultimate result of this case, the defendant must bear the cost of the commission including such additional costs as the plaintiff will have to incur in procuring representation for himself before the commission appointed to take the evidence the defendant desires to adduce.

Appeal allowed.

MOSELEY, A.C.J.

I agree.

Proctors :—

A. H. Seneviratne, for plaintiff-respondent. (Cannangara)
John Wilson, for defendant-appellant. (Amerasekera)

Present: HEARNE, J. & WIJEYEWARDENE, J.

SENANAYAKE AND OTHERS vs DE CROOS AND ANOTHER

S. C. No. 63—*D. C. Negombo* (*I*) 10531 *with application to advance the appeal.*

Argued on 25th August, 1939.

Decided on 30th August, 1939.

Civil Procedure Code section 416—*Principles that should govern the exercise of the discretion conferred by the section.*

Held : (i) That a plaintiff should not be compelled to give security under section 416 of the Civil Procedure Code merely because he is a pauper.

(ii) That the court in making an order under section 416 of the Civil Procedure Code should consider:

(*a*) Whether the plaintiff has solicited a particular forum in order to harrass the defendant or to render the recovery of costs by him difficult,

(*b*) Whether the provisions of the section have been oppressively invoked by the defendant.

1st petitioner for himself and on behalf of others appears in person.

Croos Da Brera with *C. T. Olegasegeram*, for defendants-respondents.

HEARNE, J.

The 1st, 2nd, 3rd and 4th plaintiffs, who are here the appellants, filed an action in the District Court of Negombo claiming declaration of title, ejectment and damages in respect of certain landed property situated within the jurisdiction of that court.

On an application being made by the defendants under section 416 of the Civil Procedure Code the plaintiffs were ordered to deposit security for costs on the ground that they lived outside the jurisdiction of the court. Against this order the plaintiffs have appealed and permission has been given to them by this court to prosecute their appeal as pauper appellants. The Judge found that the plaintiffs were without means, that the 4th plaintiff lived outside the jurisdiction of the court and that the 1st to 3rd plaintiffs had moved to Negombo "for the purpose of avoiding security in this action or on account of the convenience of residence in Negombo for the purpose of this case."

Section 416 is general in its terms, and it is desirable that in applying it the court should proceed in the exercise of its discretion on definite principles. Litigants would otherwise be encouraged to make applications of this nature in the great majority of cases.

In making his order the Judge appears to have been influenced by the poverty of the plaintiffs which he stresses. But the poverty of a plaintiff is a misfortune, not a fault; and he will not be compelled to give security merely because he is a pauper. That, at any rate, is a principle on which courts in England act. *Cowell vs Taylor* (31 Ch. D. 34.) *Cook vs Whellock* (24 Q.B.D. 658.) *Rhodes vs Dawson* (16 Q.B.D. 548.)

The relevant section has been judicially interpreted by this court. It has been held that an order for security should not be made as a matter of course and that one of the considerations to which the court should direct its attention is whether the plaintiff has selected a particular forum in order to harrass the defendant or to render the recovery of costs by him difficult. *Scott vs Mohamadu* (1914) 18 N.L.R. 53. In the present case the plaint was filed in the District Court of Negombo because the subject-matter in dispute is situated within the jurisdiction of the court, and according to the finding of the Judge three of the four plaintiffs who normally live outside the jurisdiction of the court took up residence within its jurisdiction. These are not good reasons for an order requiring security to be given.

Another matter which should be most carefully considered is whether the provisions of section 416 have been oppressively invoked by a defendant. To this the Judge does not appear to have directed his attention at all.

I am satisfied that the Judge has wrongly exercised his discretion and that the order he has made cannot stand.

Objection was taken by counsel for the respondents that as only one of the appellants appeared before the court, that as the petition of appeal was signed by the appellants, but was not taken down by the Secretary of the court in terms of section 755 of the Civil Procedure Code and as application had not been made for typed copies within 20 days, the appeal should be rejected with costs. We intimated that the matter appeared to be one which would appropriately be dealt with in revision, and although counsel for the respondents stated he did not ask that notice be given to him, he pressed that the appeal should be dismissed with the right reserved to the appellants to move in revision if so advised.

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That is the tenor of the order that has usually been made by this court in cases where the appellant is not a pauper. In the circumstances of this case, however, I feel that it would be both appropriate and just to make an order in revision at once setting aside the order of the District Judge. The case will be returned to the lower court for further proceedings to be taken in due course.

Order set aside.

WIJEYEWARDENE, J.

I agree.

Proctor :—

A. E. Rosa, for defendants-respondents (De Croos and Another)

Present: NIHILL, J.

ABDUL MAJEED vs CASSIM

S. C. No. 520 of 1939—M. C. Badulla No. 28845.

Argued on 12th October, 1939.

Decided on 19th October, 1939.

Criminal Procedure Code—Proceedings on written report by Headman in terms of section 148 Accused discharged as Headman not proceeding—Can Magistrate reopen proceedings when complainant appears.

Proceedings were started on a written report dated 7th November, 1938 by a Headman in terms of section 148 (1) (*b*) of the Criminal Procedure Code. On the same day the Magistrate discharged the accused as the Headman stated that he was not proceeding with the case. Thereupon the Magistrate cited the complainant to appear and on whose appearance the Magistrate proceeded with the case and convicted the accused.

Held : That the order of discharge was one under section 191 of the Criminal Procedure Code and the Magistrate had no power to reopen the proceedings.

W. E. Abeykoon, for accused-appellant.

No appearance for respondent.

NIHILL, J.

In this case proceedings started on a written report dated 7th November, 1938 by a Headman in terms of section 148 (1) (*b*) of the Criminal Procedure Code. On the same day the Magistrate recorded as follows : "Arachchi not proceeding. Accused discharged. Cite complainant for 21-11-38."

I do not follow why the learned Magistrate thought it necessary to cite the complainant to appear. Since these proceedings did not begin by way of summons issued on a complaint, the Magistrate's discharge order was not an acquittal under section 194 of the Code, that is to say pursuant to section 148 (1) (*a*), but in its legal effect was an order under section 191. This being so, the Magistrate had no power to reopen the proceedings when the complainant, on whose complaint the Headman's report had been based, had put in an appearance.

On this ground alone the conviction cannot stand, for there is ample authority to show that whilst an order of discharge cannot be availed of for the plea of *autrefois acquit* in the event of a fresh prosecution, a Magistrate has no power to reopen proceedings in a case where the accused has been discharged under section 191 of the Criminal Procedure Code, or by an order which in its legal effect is an order under that section. *Sethu Caruppen vs Odaiyar**.

I have also been urged by counsel for the appellant to acquit the accused on the grounds that the facts put before the Magistrate for the prosecution, even if taken at their highest, fail to prove a charge of theft. It is submitted that even if the rice was taken by the accused out of the complainant's possession, it was not taken "dishonestly" within the meaning of section 366 of the Penal Code, since it was taken to satisfy a debt admittedly due to the accused from the complainant.

I do not think however that the facts in this case entitle me to reach this conclusion. It was clearly established that the complainant did owe Rs. 12/– odd to the accused, and that the accused warned him that if he did not pay at once he was going to his store to remove the paddy. But if the prosecution evidence is true, the accused took advantage of the complainant's absence from town to go to his store and remove twenty bushels of paddy which at the then current price of Rs. 1/50 per bushel was a quantity much in excess of the debt due to him.

Putting this at its best, this was a most high handed exercise of a mistaken right to enforce payment and in view of the quantity alleged to have been taken, I do not think it is possible to conclude that there was clearly no dishonest intent in the accused's mind. He may have seized the occasion to inflict a wrongful loss on the complainant and a wrongful gain to himself. Furthermore the accused's defence does nothing to allay this suspicion.

The facts are clearly distinguishable from the case of *Ponnu vs Sinnatambi*†, which was cited to me, for there the accused removed the complainant's cattle from the grazing ground of which they were the renters because the complainant owed them grazing fees. The cattle were not even in the complainant's possession at the time . Indeed in that case it appears to me that it might have been shown that the accused merely removed the animals from a place they had no right to be in.

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* 11 Ceylon Law Weekly p. 10 † 24 N.L.R. p. 248

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For these reasons although I allow the appeal and set aside the conviction, I make no order which would put the accused beyond the jeopardy of another trial. At the same time I do not go so far as to say that the ends of justice demand a further prosecution in this case. In its origin the matter arose over the matter of a debt between two traders and certainly justice will not be outraged if the two now come together and make an amicable settlement. In the event, however, of a fresh prosecution being instituted the case should go before another Magistrate.

Conviction set aside.

Proctor :—

J. Horadagoda, for accused-appellant. (Abdul Majeed)

Present: ABRAHAMS, C.J.

SIRIWARDENE vs PUNCHI HAMY AND ANOTHER

S. C. No. 487—*P. C. Matale No.* 239.

Argued on 2nd February, 1939.

Decided on 6th February, 1939.

Penal Code (*Chapter* 15) *section* 409—*Mischief—Cutting down a boundary fence—State of mind of accused how far material—Compounding—When does a settlement in court amount to a composition—Section* 290—*Criminal Procedure Code.*

Held : (i) That a settlement in court between the parties does not amount to a compounding of the offences unless there is an order by the Magistrate to that effect or anything to show that the parties intended it to be a composition.

(ii) That in a prosecution under section 409 of the Penal Code (Chapter 15) the state of mind of the accused is an element for consideration.

Per ABRAHAMS, C.J.—" Now there is no doubt that in this offence the state of mind of the accused is an element for consideration, but I do not think that there need be a specific finding that the accused in a case of mischief acted wantonly and maliciously and without any reasonable belief in his rights, provided only the nature of the finding obviously excludes an innocent mind. The learned Magistrate found that the appellants' claim to be entitled to the land on the other side of the fence was without foundation. The appellants had, as I have said before, claimed a very large portion of the land on the other side of the fence which the learned Magistrate held was the property of the complainant."

Distinguished :—13 C.L.W. p. 37

J. E. M. Obeyesekere, for the accused-appellant.

N. E. Weerasooriya, K.C. with *S. W. Jayasuriya*, for the complainant-respondent.

ABRAHAMS, C.J.

This appeal has been very ably argued and contains at least one interesting point of law. The appellants were convicted on the offence of mischief under section 409 of the Ceylon Penal Code. It was alleged against

them, and found proved by the trial court, that they had cut down a fence belonging to the complainant, and caused damage to the amount of Rs. 30/–. The complainant alleged that the fence formed the boundary between his land and that of the 1st appellant who was the sister of the 2nd appellant. The appellants on the other hand contended that the fence was not a boundary fence but had actually stood on the 1st appellant's land which they claim extended so far as to include a great portion of the land which the complainant said was his. They said that the fence had been constructed by the 1st appellant to keep cattle which she was grazing on one part of her land from moving on to another portion near her house which was in a state of cultivation, and that having ceased to keep cattle there the appellants then thought fit to cut the fence down. The learned Magistrate found against the appellants. He held that the fence was a boundary fence and that the claim that the appellants put forward as regards the extent of the 1st appellant's holding was unwarranted.

The appellants attack the finding of guilty on three grounds and claim that they are entitled to an acquittal. The first ground is this. It is argued that the offence was compounded at an early stage and the subsequent proceedings were void. The offence is a compoundable one, and if it was actually compounded the appellants should have been acquitted. These are the facts. On the strength of the complaint the accused were charged, and pleaded not guilty. On the 14th of March the parties appeared before the court. All three were represented. The following appears upon the record, written by the Magistrate :

> " At this stage the 1st accused undertakes to deposit Rs. 100/– as security on or before 4-4-38. If the security is deposited the 1st accused is to remain in possession and the complainant will bring a civil case to establish his rights within one month of date of deposit of security. If security is not deposited the complainant will get into possession. If no civil case is brought by the complainant as agreed the accused will be entitled to a refund of the Rs. 100/–. Call case 4-4-38."
>
> (Sgd.) R. de Zoysa,
> Police Magistrate.

Mr. Obeyesekere has argued that this *pro tanto* amounts to compounding the offence, and that the Magistrate ought at that stage to have acquitted. The case was called on the 4th of April as directed, and the advocate for the complainant stated that his client wished to have the case fixed for trial. The trial was then fixed for the 21st of April. On the 21st of April the Additional Police Magistrate made the following order, " *vide* joint motion filed for a postponement. Trial re-fixed for 4.5." On the 4th of May the Additional Police Magistrate saw no reason why the Police Magistrate should not try it, and later in the day the Police Magistrate fixed the 18th of May for the trial, and on that date the trial was fixed for the 6th of June on which proceedings were resumed.

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Mr. Weerasooriya for the complainant argues that what the appellants claimed to be a composition amounted in point of fact to negotiations only which apparently proved abortive. He points out that there is no specific order made by the Magistrate that the offence was compounded nor was there anything to indicate that the complainant desired to withdraw the charge. He points out further that under section 290 (1) of the Criminal Procedure Code the offence could not be compounded without the consent of the Police Magistrate, and if such consent is given, the Magistrate, under the same provision of law, must record his reasons.

Mr. Obeyesekere cites the case of *Hamy and Another vs Hamy and Another* (13 C.L.W. p. 37) decided by Poyser, J. which he contends is indistinguishable from this case. I may say that in that case the settlement between the parties was very similar in terms to the settlement in this case, but in that case the Magistrate distinctly entered in the record, " This case is compounded," and therefore, although he directed the case to be called again on the date on or before which the terms of the settlement were to be implemented, the fact remains that the offence was compounded and I respectfully agree with the learned Judge that the accused should have been acquitted, but in this case there is no indication that the case was compounded or that the parties intended it to be. I must assume that the parties intended to see whether the terms of the agreement would be implemented and in that way. Moreover, the subsequent conduct of the accused parties in raising no objection on the 4th of April to the application on behalf of the complainant to have the case fixed for trial, and further the joint motion for a postponement on the 21st of April clearly indicate that nobody regarded the arrangement made on the 14th of March as a composition. To give a final touch to the insincerity of the appellants' submission, I observe that in the petition of appeal there is no claim that the offence was compounded and that the appellants should have been acquitted, though there is a statement indeed to the effect that the complainant at one stage of the case agreed to bring a civil action to establish his title and the trial was postponed for that purpose. But that is a different thing from a contention that the offence was compounded, and it seems to me to amount to nothing more than an argument that the complainant had admitted that the appellants may have been acting *bona fide*. I am of opinion that the submission on this point cannot be accepted.

The next ground of appeal is that the learned Magistrate wrongly admitted certain evidence and that as a result of that his mind was adversely affected. The Korale was called for the prosecution. He testified that he had endeavoured to settle the matter and he said that he had questioned the accused who gave an undertaking with which the complainant was satisfied. The advocate for the appellants however objected to the admission of this evidence. The evidence was allowed, and it is now argued that that amounted to a confession or at least an inculpatory admission to the Korale as a Police Officer. It is argued that the proof that an undertaking on the part

of the appellants was given amounts to a confession or an admission on their part that they were in the wrong, and that the mind of the Magistrate must have been affected. Whatever interpretation one can place on this evidence, no reference is made to it in the judgment of the learned Police Magistrate nor can I infer from the judgment that he was in any way influenced by it. But I am quite unable to construe such vague and uncertain evidence as any sort of inculpatory admission.

The final ground of appeal is this, that the learned Magistrate did not hold that all the elements of the offence were proved, in that he did not examine the question as to whether the action of the appellants was wanton and malicious or was, in fact, founded upon a *bona fide* belief that they had a right to demolish this fence because if the land on which the fence stood was not theirs they really believed that it was.

Now there is no doubt that in this offence the state of mind of the accused is an element for consideration, but I do not think that there need be a specific finding that the accused in a case of mischief acted wantonly and maliciously and without any reasonable belief in his rights, provided only the nature of the finding obviously excludes an innocent mind. The learned Magistrate found that the appellants' claim to be entitled to the land on the other side of the fence was without foundation. The appellants had, as I have said before, claimed a very large portion of the land on the other side of the fence which the learned Magistrate held was the property of the complainant.

I think that his finding of fact is amply justified. This is not the sort of case where a man might make a *bona fide* error as to the exact line of his boundary. His claim to a very large portion of the complainant's land cannot be founded on error. It is either founded on truth or falsehood. The learned Magistrate's finding implies that it is founded on falsehood.

There is this further point which is rather a simple one. The appellants' claim that they have put the fence up themselves because it was standing on their land. The Magistrate has found that the fence was a boundary fence and that the appellants did not put it up ; therefore they cut it down knowing that it was not theirs.

I dismiss the appeals.

Appeals dismissed.

Proctor:—

Edward de Silva, for the complainant-respondent. (Siriwardene)

Present: NIHILL, J.

JOHN vs RICHARD PEIRIS

S. C. No. 496—*M. C. Colombo* 27253.
Argued and decided on 25th September, 1939.

Criminal Procedure Code (*Chapter* 16) *Section* 418—*What constitutes criminal force within the meaning of the section.*

Held : That threats of violence and murder which cause people to go away from their lands could rightly be said to amount to a show of criminal force within the meaning of section 418 of the Criminal Procedure Code.

R. C. Fonseka, for accused-appellant.
H. V. Perera, K.C. with *Colvin R. de Silva*, for complainant-respondent.

NIHILL, J.

In this case, the appellant was convicted of offences under sections 433 and 410 of the Penal Code. He was sentenced to pay a fine of Rs. 30/- and Rs. 50/- respectively. The learned Magistrate also made order under section 418 of the Criminal Procedure Code, putting complainant into possession of a certain land from which he had lost possession by reason of the acts for which the accused was convicted under the above section.

The only point taken in this appeal, which is of any consequence, is that the evidence does not disclose that the trespass upon the complainant's land was accompanied by criminal force and that, therefore, the order of the learned Magistrate is wrong. It is true that there is no evidence of any actual blows being exchanged between the accused's party and the complainant's servants, but there is evidence that the accused arrived on the land with 8 others and that violent threats were made to the complainant's servants which caused them to leave their work and run away and in consequence the accused then entered into possession of the land. There was also evidence that the accused himself had a club. The facts in this case are very similar to the unreported case quoted by Mr. Perera for the respondent *D. P. S. de Alvis vs Don Mudiyanse and Don Gunasekera* (June 13th 1934).* In that case, Dalton, J. emphasized that threats of violence and murder which cause people to go away from their lands could rightly be said to amount to a show of criminal force. That is the position in this case and the Magistrate's order restoring to the complainant possession of his property is, therefore, in my opinion in order, and I dismiss the appeal.

Appeal dismissed.

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Present: DALTON, J.

MUDIYANSE AND ANOTHER vs DE ALWIS

S. C. No. 209 – 210.—*P. C. Ratnapura No.* 2395.

Argued and Decided on 13th June, 1934.

N. E. Weerasooriya, for accused-appellants.

H. V. Perera with *Sri Nissanka*, for complainant-respondent.

DALTON, J.

The 1st and 2nd accused who are the appellants have been convicted with others on charges of criminal trespass and criminal intimidation under sections 433 and 486 respectively of the Penal Code.

The evidence which has been accepted by the Magistrate, shows beyond doubt that the complainant Alwis who gave evidence was in possession of this block of 16 acres forming the Dikdeniya Estate on behalf of Mr. John and that he had been in possession for some considerable time. On the day set out in the charge, January, 23rd, the two appellants and others came armed with iron clubs and other clubs threatening Alwis with violence as a result of which Alwis ran away. The 1st accused states, when he got into possession on the 23rd, the estate was vacant and nobody was there, but his evidence has been rejected. I see no reason why the Magistrate was not entitled to accept the evidence of Alwis corroborated as it is as regards his possession on behalf of Mr. John by the Superintendent of a neighbouring estate, Mr. Reily, who was acting as a Visiting Agent over Dikdeniya Estate. Mr. Weerasooriya has not satisfied me that the conviction could not be supported by the evidence.

In addition to convicting the accused the Magistrate has under the provisions of section 418 of the Criminal Procedure Code directed that Alwis be restored to the possession of Dikdeniya Estate. It has been urged that this is not a case in which such an order can be made under section 418 inasmuch as the accused has not been convicted of an offence attended by criminal force. Force and criminal force are defined in sections 340 and 341 of the Penal Code. The evidence establishes that Alwis was caused to leave the estate by the show of violence, the use of iron clubs and the threats made by the 1st and 2nd accused and the body of people accompanying them. At the end of his argument Mr. Weerasooriya called my attention to paragraph 3567 of Gour's Penal Code, third edition, in which the learned author points out that force is the exercise of one's energy upon another human being and it may be exercised directly or indirectly as by threats. This view is supported by what is stated by Jayawardene, J. in the case of *Sheriff vs Pitche Umma* (26 N.L.R. p. 353). At page 359 he states that " where an accused is convicted of criminal trespass, unless such trespass was attended by criminal force or the complainant was dispossessed by such force, an order under section 418 cannot be made." He then calls attention to a case where no force or violence was used to any individual, but the complainant was dispossessed by having the padlock on a gate broken.

In my opinion on the facts in the case before me, the accused has been convicted of an offence attended by criminal force, the bodily power of the accused being exemplified here by the threats of violence and murder made, accompanied as they were by the show of clubs in his hands and the hands of the persons accompanying him. In those circumstances the Magistrate was empowered to make an order under section 418 of the Criminal Procedure Code directing that the complainant be restored to the possession of this property, from which he was ejected by accused.

The appeal will, therefore, be dismissed.

Appeal dismissed.

Present: MOSELEY, A.C.J. & NIHILL, J.

CASSIM vs SUPPIAH PILLAI

S. C. No. 11—*D. C. Colombo* (*Inty.*) 4669.
Argued on 4th & 5th October, 1939.
Decided on 23rd October, 1939.

Insolvency Ordinance (*Chapter* 82) *section* 51—*Prescription Ordinance* (*Chapter* 55) *section* 10—*Proceedings to set aside transfer of property made by insolvent.*

Held : (i) That proceedings under section 51 of the Insolvency Ordinance are proceedings distinct from the certificate proceedings.

(ii) That in proceedings under section 51 of the Insolvency Ordinance it is not permissible merely to read the evidence given in the course of the certificate proceedings.

(iii) That in an application under section 51 of the Insolvency Ordinance to sell property transferred by the insolvent it must be proved that the insolvent was in fact insolvent at the time of the transfer.

(iv) That an application under section 51 of the Insolvency Ordinance is an action within the ambit of section 10 of the Prescription Ordinance and is prescribed within three years of the adjudication of insolvency.

H. V. Perera, K.C. with *S. J. V. Chelvanayagam*, for the 1st respondent-appellant.

N. E. Weerasooriya, K.C. with *C. Ranganathan*, for the assignee-respondent.

MOSELEY, A.C.J.

This appeal arises out of a proceeding under section 51 of the Insolvency Ordinance (Cap. 82 of the Laws). The insolvent was so adjudged on 19th June, 1933. The certificate sitting closed on 31st August, 1937, when a certificate of the 3rd class was granted but suspended for four years. On 9th December, 1937, the assignee initiated proceedings under the above-mentioned section for the sale of certain property for the benefit of the creditors.

The appellant, together with the insolvent, was made respondent to those proceedings and was served with notice to show cause why the property should not be sold, since it appeared that the appellant, who was the father-in-law of the insolvent, had purchased the property from the latter on 7th August 1931. The deed of sale, C 7, set out that the consideration of Rs. 10,000/- had been paid at the time of execution.

The insolvent did not appear at the hearing and there was evidence that he was in hiding. The appellant was represented by counsel who applied for an adjournment on the ground of the illness of his client. The request appears to have been refused and the inquiry proceeded. In the absence of the insolvent and the appellant, counsel for the assignee moved

that their evidence given in the course of the certificate proceedings should be read. Counsel for the appellant objected to this course and further pointed out that it would be improper for the court to take notice of the finding of the Judge on those proceedings in which he had expressed the opinion that the transaction in question was of a fraudulent nature. The District Judge appears to have over-ruled the objection as the evidence of both the insolvent and the appellant was referred to, as was the finding of the Judge on the certificate proceedings.

The application, which was by way of petition was allowed and it was ordered that the property be sold for the benefit of the creditors.

The grounds of appeal are, in short, that the petitioner, that is the assignee, has failed to prove the facts necessary to support an order for sale under section 51 of the Insolvency Ordinance, and further that the claim is prescribed by section 10 of the Prescription Ordinance.

Section 51 of chapter 82 applies only to the case of a person who has been adjudged insolvent, and is aimed at transactions effected at a time when such person is insolvent. Obviously that is not to say that the person must have been, at the time of the transaction, adjudged insolvent, but that he must have been in fact insolvent. That he was so in fact appears to be the first fact which must be proved, that he was subsequently adjudged so being a matter of record.

As to the onus of proof we were referred to the case of *Kandapper vs Moses* (8 C.T.L.R. 69) in which an insolvent prior to his adjudication assigned certain mortgage bonds. It was open to the assignee to claim the proceeds either under section 51 or section 56. " If " said Macdonell, C.J. " he makes it under section 51 he must prove that the assignor, that is the insolvent, was actually insolvent at the time of making this assignment, and that the assignment was voluntary, or not for valuable consideration."

In the present case the onus of proof of these facts being upon the petitioner, was it open to him to invite the court to read the evidence of the insolvent and the appellant, and to rely very largely upon that evidence in support of his application ? Counsel for the appellant objected to such evidence being read. There is no ruling by the District Judge apparent from the record, beyond a note that counsel for the assignee referred to the evidence of the insolvent and the admissions of the 1st respondent, that is the present appellant.

In my view the propriety of admitting this evidence in the way in which it was admitted depends in the first place upon the character of the proceeding. Is an application for an order of sale under section 51 merely an incident in the insolvency proceedings, or is it a proceeding arising out of the insolvency proceedings but independent thereof ? It must be borne in mind that the certificate sittings began in March, 1936 and closed, as far as the taking of evidence is concerned, in June, 1937. The insolvent was of course examined and the appellant also gave evidence. His character at that time was merely that of a witness. He no doubt was aware that the

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genuineness of the transaction of 7th August, 1931 was being attached, but he was not represented by counsel and could hardly know that the financial position of the insolvent at that date, some two years before the petition in insolvency was filed, was a matter which could in any way affect him personally. Some months later he is served with the petition in the present proceedings and for the first time becomes a party. The learned District Judge appears to have held the view that this application is merely a stop in the insolvency proceedings as a whole, for he says—" When the court made its order (*i.e.* suspending the certificate) in August, 1937, it was perhaps open to the court under section 51 of the Insolvency Ordinance to order that this property should be sold for the benefit of the creditors."

Here we are faced with a difficulty which arises from the statute under which the proceedings are brought—an antiquated and unsatisfactory piece of legislation. The difficulty is in no way lessened by the fact that no rules have been framed to regulate the practice and the forms of proceedings under the Ordinance. There is something to be said therefore for the view taken by the District Judge, since the wording of section 51 does not suggest that any particular procedure is a condition precedent to the making of the order for sale. But there can be no doubt that to make such an order in the manner suggested by the District Judge, that is at the certificate sitting, would in many cases inflict an injustice upon third, and in some cases no doubt, innocent parties. In cases such as this, it is the rights of third parties that are being attacked and it is inconceivable that the law should permit an absolute order prejudicial to their interests to be made without giving them an opportunity of being heard. Such an opportunity was given to the insolvent in this case, and I hold the view that the motion by way of petition is a proceeding arising out of the insolvency but independent thereof.

In *Kandappa vs Ramasamy Chetty* (6 C.L.R. 37) it was held that, where in an enquiry under section 56 of this Ordinance no evidence was offered, and the District Judge relied on the judgment in earlier proceedings between the insolvent and other parties and held the transaction in question to be a fraudulent assignment, the earlier judgment should not have been admitted.

In the order now appealed from, the following passage occurs—" At the certificate meeting, after a good deal of evidence was gone into, the court held there was no consideration for the transfer to the father-in-law and practically the transfer itself was fictitious." There is some indication that the District Judge had in mind the earlier proceedings and the evidence upon which the certificate of conformity was suspended.

Now, holding the view that these proceedings are distinct from the certificate proceedings, I know of no authority for the admission in the former of the evidence of the insolvent. In the District Court, counsel for the assignee referred to section 33 of the Evidence Ordinance (chapter 11) but the first condition, *viz.* that the proceeding was between the same parties or their representative in interest, appears to me to be absent and I cannot see how

the section is in any way useful in these circumstances. At a later stage counsel for the assignee sought to have the evidence of the appellant treated as admissions by him and therefore admissible. But if his evidence is to be so treated, it should have been proved in proper manner, such as formal production by an officer of the court of the record in the previous proceedings, or the evidence of a witness who was in a position to testify that certain admissions had been made. But all that the record shows is that counsel "refers to the evidence of the insolvent and the admissions of the 1st respondent" (*i.e.* the appellant).

Now, although in my view the evidence was improperly admitted, I do not know that it was of any great use to the case for the assignee. Counsel for the respondent before us contended that the District Judge did not act on the previous evidence or judgment but that he had before him ample evidence of insolvency. He relied largely upon a balance sheet which purported to show the position of the insolvent's affairs at May, 1932 on the ground that it was prepared from the insolvent's books which were closed in 1931. But the assignee in the course of his evidence said—"I do not know what his (the insolvent's) liabilities were at the time of the execution of the transfer.....I found that the liabilities were about one lakh of rupees.....Insolvent said that he had *stock* to the extent of Rs. 10,000/– at the time.....I cannot find out from the books what the debts due to the insolvent were and *vice versa* at the time of transfer .....I have not prepared a balance sheet of the insolvent's state of affairs at the time of the transfer of the property for the purpose of this enquiry.....*I cannot say what his state of affairs were at the time of the transfer.*"

The extracts which I have just quoted are a fair sample of the evidence upon which, in my view, the District Judge should have considered the application. To me the evidence falls considerably short of the standard of proof desirable in such proceedings. The case no doubt is full of suspicious circumstances in regard not only to the financial position of the insolvent at the relevant date, but to the genuineness of the alleged consideration for the transaction. But suspicion is not a ground upon which to base an order such as this. I have already said that in my opinion the evidence which I have held to have been improperly admitted does not help the assignee's case. I would merely refer to one extract from his evidence, which is as follows—"At the time I sold my share in the properties I had creditors to the extent of Rs. 100,000/–. I had book debts and stock in trade worth more than Rs. 100,000/–.....Most of the book debts are irrecoverable." There is nothing to show that the debts were irrecoverable at the time of the impugned transaction. The insolvent's statement was not contradicted and, if believed, is an answer to the allegation of insolvency.

In my view the assignee has failed to prove the necessary fact of insolvency, and on this ground the appeal must be allowed with costs, here and in the court below.

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This is an appeal from an order of the District Judge directing a sale of certain properties in favour of an insolvent's estate. The properties were purchased by the appellant from the insolvent in August, 1931. The adjudication of the insolvent took place in June, 1933. On the 31st August, 1937 the insolvent was granted a certificate of the third class which was suspended for a period of four years. The grant of a certificate was opposed by the largest creditor on the grounds, *inter alia*, that the sale above referred to was fraudulent and had been executed to defraud the creditors. The sale was to the insolvent's father-in-law who is the present appellant.

The District Judge in the course of his certificate order stated that he was " inclined to think that no consideration in fact was paid for the transfer of these immovable properties " and reached the conclusion that the transfer was merely intended to put the property beyond the reach of the creditors of the insolvent.

I have detailed these facts in order to assist in determining the exact nature of the proceedings which led to the order which is now appealed against. The order was on an application made by way of petition by the assignee of the insolvent, and the learned District Judge in dismissing the plea of prescription did so on the grounds that the application was " more in the nature of execution proceedings " by which I take him to mean that the court could have ordered the sale of the properties at any time under section 51 of the Insolvency Ordinance, once it was satisfied that the transfer was fraudulent, which was the view of the court when the certificate order was made.

But before an order can be made under section 51, it must be proved that at the time of the transfer the insolvent was insolvent, and that the exceptions named in the section were not present. If there has been a *bona fide* purchase for valuable consideration by an innocent purchaser, he must be given his chance to demonstrate this to the court and he cannot do this until he is brought in as a party to the proceedings.

In the present matter the appellant was no party to the proceedings which led to the certificate order being made, he comes in for the first time when the attempt is made to sell his properties.

Was not therefore the real nature of the proceedings now appealed against, however different in form they may have been, more in the nature of an action in which the appellant was an interested party than a mere inevitable, almost routine step in the insolvency proceedings ?

It is hardly likely that this preliminary difficulty would arise but for the absence of Insolvency Rules. The archaic character of the Law relating to the Insolvency has often been the subject for comment of this court, and the difficulty is increased by the absence of rules. Without rules it is impossible to say with certainty how a proceeding under section 51 should be started. In the English Bankruptcy Rules, 1915, as given in Williams' on Bankruptcy,

(15th edition) it is provided for that every application to the court (unless otherwise provided for) shall be made by motion supported by affidavit, and it has been held that a motion made under section 105 of the Bankruptcy Acts, 1914 and 1926, which is a section dealing with the general powers of Bankruptcy Courts is equivalent to an action, and that accordingly the Statute of Limitations would be an answer to a motion by the trustee if it would have been an answer to an action by the bankrupt. (In re Mansel 9 Mor. 198) Williams' 15th edition page 438.

Now if the application upon which the order appealed against was in truth "an action," would section 10 of the Prescription Ordinance (chapter 55) apply? In *Silindu vs Akura* (10 N.L.R. p. 193), an application for *restitutio in integrum* was held to be an action within the meaning of this section of the Prescription Ordinance. In his judgment Grenier, J. commented on the section's comprehensive and far reaching character. Wood Renton, J. in the same case concluded that " action " in the terms of the section must be construed as embracing any proceedings by which a legal right to redress is asserted.

According to section 2 of the Courts Ordinance (chapter 6) an "action" is a proceeding for the prevention or redress of a wrong, and the jurisdiction of a District Court by section 62 of the same Ordinance includes insolvency matters. It cannot be said therefore, that the definition of an " action " in the Courts Ordinance can have no applicability to a matter which comes before a District Court under the Insolvency Ordinance in the exercise of the court's insolvency jurisdiction.

Now the essence of the application by the assignee in this matter was that he was seeking to redress a wrong alleged to have been committed against the creditors, but to succeed he had to bring in and defeat a party who was not a party in any way to the insolvency. How then can this be said to be a mere step in the insolvency proceedings ? There are certain steps in insolvency in which the persons who make up an insolvency each plays his part—insolvent, assignee, creditors, but when it becomes necessary consequential on something that comes to light during the course of the insolvency to go outside and attack the rights of a third party to retain property which he has acquired, it seems to me that such proceedings must take on the character of an action, whatever they may be called in fact for if they do not the third party is prejudiced.

It is significant that in this case the difficulties with regard to the admissibility of evidence arose because there was no clear distinction made by the learned District Judge between the insolvency proceedings as a whole and the application before him in which a stranger to these proceedings was a party.

It should also be remembered that it would seem that the assignee could have pursued the same remedy in this case by instituting a Paulian action which is what was done in the well known case of *Fernando vs Peiris* (33 N.L.R. p. 1). Although that case was decided on the facts, Garvin, J,

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was prepared to hold that a Paulian action was prescribed in three years from the time when the cause of action arose which in the absence of concealed fraud he placed at the time when the alienation sought to be impeached took place.

If that be so, it seems to me illogical that the position of the purchaser-defendant should be worsened because the assignee moved the court by way of petition to which the purchaser had to be made respondent.

I would therefore hold that the application was an " action " and as such came within the ambit of section 10 of chapter 55.

If that view is correct, the application is prescribed because it was not taken by the assignee within three years of the adjudication for there is no question here of concealed fraud. I agree however with my Lord the acting Chief Justice, that apart from all other considerations, this appeal should be entitled to succeed because the assignee failed to prove that the insolvent was in fact insolvent at the time he conveyed these properties.

Appeal allowed.

Proctors :—

T. Canagarayer, for 1st respondent-appellant. (Cassim)
K. T. Chittampalam, for assignee-respondent. (Suppiah Pillai)

Present: HEARNE, J. & DE KRETSER, J.

THE COMMISSIONER OF INCOME TAX vs SIR MOHAMED MACAN MARKAR

S. C. No. 12—*D. C.* (*Inty.*) *Colombo, Income Tax Case*
Argued on 7th & 8th November, 1939.
Decided on 20th November, 1939.

Income Tax—Bonus shares issued out of reserve for depreciation of buildings—Is the recipient of such shares liable to pay income tax on their capital value—Definition of dividend—Is it wide enough to include bonus shares issued out of reserve.

The facts are fully set out in the Case Stated. Shortly stated they are as follows :

"In February, 1936 the Company resolved that 'the sum of Rs. 235,929/96 forming part of the existing Reserve for depreciation of buildings and further the sum of Rs. 14,070/04 lying to the credit of Permanent Reserve shall be applied towards payment of a bonus to shareholders as nearly as may be in proportion to the amounts paid up on the shares held by them and that the Directors be authorised to allot and issue to the shareholders entitled thereto in like proportions 2,500 shares of Rs. 100/– each credited as fully paid up in satisfaction of such bonus.'

The resolution was carried into effect and the respondent received 793 shares. The question for determination is whether the shares received by him constituted a dividend within the meaning of section 2 of the Income Tax Ordinance so as to render him liable to be taxed on their value. The Board of Review held that he was not."

Held : That the assessee was not liable to pay income tax.

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CASE STATED

S. C. No. 12 (I)

UNDER THE PROVISIONS OF SECTION 74 OF THE INCOME TAX ORDINANCE, 1932, ON THE APPLICATION OF THE COMMISSIONER OF INCOME TAX

Appellant.

1. Sir H. M. Macan Markar was notified in September, 1938 of an Additional Assessment of Rs. 68,712/–, in respect of the Year of Assessment 1936/37, and was called upon to pay a tax of Rs. 3,280/05 on this Additional Assessment. The sum assessed was said to be a " dividend " received from the Galle Face Land & Buildings Company Limited.

2. The Company is a private company and, except for 5 shareholders holding one share each, the entire capital is owned by 4 members of the assessee's family. In February, 1936, the Company resolved to use Rs. 250,000/– out of its Reserve Funds for the payment of a bonus to shareholders, in proportion to the amount paid up on their shares, by the issue of 2,500 fully paid up shares of the Company of Rs. 100/– each.

3. These 2,500 fully paid shares were duly issued to the 4 principal shareholders (except for 48 shares which were held for charity). The assessee received 793 shares.

4. The Income Tax assessor was of the view that this distribution was a " dividend " as defined in section 2 of the Ordinance and as such was taxable in the hands of the recipient (except as to so many of the shares as represented profits arising in the accounting periods ended before 1st April, 1936). The assessee was accordingly assessed to pay a tax on Rs. 68,712/– in addition to the tax he had already been assessed for the Year of Assessment 1936/37.

5. The assessee appealed to the Commissioner against the assessment on the ground that the distribution of shares was not a " dividend " within the meaning of the Income Tax Ordinance, and was accordingly not taxable.

6. The Commissioner referred the appeal to the Board of Review, under the provisions of section 72 of the Income Tax Ordinance. The Appeal was heard by the Board of Review on the 14th November, 1938.

7. At the hearing it was agreed between the parties, that the undistributed profits of the Company had been capitalised and that as a result of the issue of all these bonus shares the capital of the Company had been increased by Rs. 194,958/– ; that the resolutions of the Company and of its Directors relative to the distribution of the Reserves by the issue of shares were *intra vires* the Company ; and that these shares had been issued as fully paid shares. There is also no dispute on the amount of tax payable, if liability to tax attaches.

8. The assessee produced the Balance Sheet of the Company to the year ending 30th June, 1935 (marked A 1) and to the year ending 30th June, 1936 (marked A 2) and a series of letters between him and the assessor (marked A 3 to A 9). Copies of all these documents are annexed to this Case Stated. It was contended on his behalf that it was lawful for a company to capitalise its profits and that once they were effectually capitalised, the distribution of them in the shape of shares was a distribution not of profits or income but of capital. Counsel argued that the shares distributed did not fall within the meaning of " dividend " in section 2 of the Income Tax Ordinance as that section only professed to tax any *profit* distributed in the form of shares, and that once the character of profits was taken away by effective capitalisation, no tax could be levied.

9. The assessor contended that the shares received by the assessee fell within the definition of " dividend " in section 2 ; that no shares could be issued which were not part of the capital of the Company, and that if the contention of the assessee was correct, in no case would shares distributed as dividend be liable to tax despite the definition of " dividend", as in every case a distribution of shares would be said to be an issue of capital and not a distribution of " profits". It was urged that the manner in which the Company

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chose to treat its income could not take away from that income the character of " profits"; that any dealings with it by the Company could not affect its taxability as " profits". He relied upon the provisions of clause 147 of the Articles of Association of the Company (which is annexed hereto marked R 1) which he argued, showed that the Company's Articles themselves treated the Reserves as undistributed profits.

10. The Board upheld the contention of the assessee and annulled the Additional Assessment. A copy of the decision of the Board is annexed hereto marked " D".

11. The appellant has requested that a case be stated to the Hon'ble the Supreme Court for the opinion of the court on a question of law. The question for the determination of the court is whether the 793 shares received by the assessee constituted a " dividend" within the definition of that term in section 2 of the Ordinance so as to render the assessee liable to be taxed on their value. We have accordingly stated and signed this case.

Colombo, 16th January, 1939.

1. (Sgd.) J. A. Tarbat
2. (Sgd.) D. T. Richards
3. (Sgd.) A. G. Tillekeratne

Members of the Board of Review.

J. W. R. Ilangakoon, K.C. Attorney-General with *S. J. C. Schokman, Crown Counsel*, for the appellant.

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

HEARNE, J.

This is an appeal by the Commissioner of Income Tax on a Case Stated by the Board of Review under section 74 of the Income Tax Ordinance.

The assessee-respondent who is a shareholder of the Galle Face Land & Building Co., Ltd. was called upon to pay a tax of Rs. 3,280/05 on an additional assessment in respect of certain shares he had received from the Company in the following circumstances.

In February, 1936 the Company resolved that " the sum of Rs. 235,929/96 forming part of the existing Reserve for depreciation of buildings and further the sum of Rs. 14,070/04 lying to the credit of Permanent Reserve shall be applied towards payment of a bonus to shareholders as nearly as may be in proportion to the amounts paid up on the shares held by them and that the Directors be authorised to allot and issue to the shareholders entitled thereto in like proportions 2,500 shares of Rs. 100/– each credited as fully paid up in satisfaction of such bonus."

The resolution was carried into effect and the respondent received 793 shares. The question for determination is whether the shares received by him constituted a dividend within the meaning of section 2 of the Income Tax Ordinance so as to render him liable to be taxed on their value. The Board of Review held that he was not.

In the past difficult questions have arisen as to whether distributions purporting to be by way of bonus shares constituted distributions of income or of capital.

The leading case is *Commissioners of Inland Revenue vs Blott* (1921 – 2 A.C. 171). It decided that where shares credited as fully paid up were issued in satisfaction of a bonus the distribution was a distribution of capital and not of income, for the reason that the profits were not paid away to the shareholders. On the contrary they were retained by the company and applied in paying up capital sums which shareholders would otherwise have had to contribute.

In England income is quite simply " total income from all sources," and if the question in this appeal was whether the shares were income in the ordinary sense, and independently of any statutory extension of the definition of income, it would have unhesitatingly to be answered in favour of the respondent.

In Ceylon income includes dividends and a dividend is defined " as including any distribution of profit by a company to its shareholders in the form of money or an order to pay money, or in the form of shares....."

Dealing with the term " dividend," as it has been defined in the Income Tax Ordinance, the Attorney-General thought it probable that the draftsman had Blott's case in mind and had sought, by including the words " in the form of shares " in the definition, to provide against the implications of the decision in that case.

It is, on the other hand, possible that he fell into the error of thinking, as was thought by the Commissioners of Inland Revenue in Pool's case (8 Tax Cases 167) that " where a bonus is paid in the shares of another company the value of those shares, following Blott's case, is not assessable for the purposes of tax " and if he so thought it is probable that he used the word " shares " in the sense of " shares of another company."

Apart, however, from mere speculation, the point at issue is shortly this—is the definition of dividend wide enough to enable the Commissioner of Income Tax to insist upon the inclusion by a tax payer, in his return of income of an amount equal to the value of shares that may have been received by such tax payer by way of capitalising the profits of a company of which he is a shareholder ?

If it is wide enough, then the controversy of whether he is being taxed on income or capital becomes merely academic.

It has for instance become academic in Australia (Victoria) where the Income Tax Act, 1935, defined income as including " profits or bonuses paid *credited* or distributed from the profits of a company." The courts there held that by the word " credited " the legislature had reached cases where, though a shareholder has not been " paid " the dividend or bonus, there has been *credit* in the company's books imputed to the shares issued to him.

All difficulty as it appears to me, would have been avoided if what are profits in the ordinary acceptation of that word and what is in essence capital had been dealt with separately. If for instance dividend had been

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defined as meaning any distribution of profit made by a company in money or other property *and* as including " the paid up value of shares distributed by a company to its shareholders to the extent to which the paid up value represents the capitalisation of the whole or any part of the profits of the company."

(Income Tax Assessment Act, Australia, 1922-1933).

In our Ordinance, however, this has not been done. On the contrary the definition clause so far from not saying that shares issued in consequence of capitalisation of profits which would ordinarily be regarded as receipts of a capital nature are, for the purposes of the Ordinance, to be regarded as income, expressly states that a dividend is a distribution not of capital but of profit.

The definition deals with two matters—the essential character of a dividend, namely, distribution of profit and the form it might take for instance shares. Looking then at what may be called both limbs of the clause, that is to say to substance on the one hand and to form on the other, shares issued to a tax payer could be a dividend but only if they come to his hands as profit, and this was clearly not so in the present case. The Company had decided to do no more than to increase its paid up capital and to this end to capitalise its depreciation reserves and to distribute the relative shares as a bonus among shareholders. The issue of shares in these circumstances could never be a distribution of profit.

Sub-section (*b*) following the definition of dividend is a pointer perhaps to what the draftsman *intended* but what, in my opinion he succeeded in doing by drawing no distinction between profit and capital (as in the Australian Act to which I have referred), by making " a distribution of profit " govern the whole conception of what is a dividend, and by including in the Ordinance (section 52) provisions similar to section 21 of the Finance Act 1922 as amended by the Finance Act 1927 was to have brought our law into line with the law of England.

I think the Board of Review was right and I would dismiss the appeal with costs.

Appeal dismissed.

DE KRETSER, J.

I agree.

Proctors :—

Messrs. F. J. & G. de Saram, for assessee-respondent.