The

# Ceylon Law Weekly

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

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## VOLUME XVI

WITH A DIGEST

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**1940**

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Subscription payable in advance. Rs. 5/- per Volume.

Printed at the H. & C. Press, Colombo, and published by G. P. J. Silva, No. 7, Campbell Terrace, Colombo.

# INDEX OF NAMES

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## ERRATA

On page 1 head-note (ii), "That the word" should be read as "That the words."

On page 65 head-note, "That the Supreme Court has the power" should be read as "That our Courts have the power."

On page 122 6th line, "Cut and dry" should be read as "Cut and dried."

# DIGEST

## Alimony

*See Civil Procedure.*



## Appeal

*See Preliminary Objection.*



## Buddhist Ecclesiastical Law

*Buddhist Ecclesiastical Law—Sisyanu Sisya Paramparawa—When may a pupil who is not the senior pupil succeed to an incumbency.*

The plaintiff though not the senior pupil of his tutor, claimed to be entitled to the incumbency of a temple according to the *Sisyanu Sisya Paramparawa* rule of succession. Upon the death of plaintiff's tutor all the pupils including the senior pupil agreed that the plaintiff should succeed to the incumbency.

**Held :** That the pupils of a deceased incumbent have a right to elect one of their own number, other than the senior pupil, as incumbent, when the senior pupil consents to or acquiesces in such election.



## Buddhist Temporalities

*Buddhist Temporalities Ordinance (Chapter 222) section 8 (2) (a)—Interpretation Ordinance (Chapter 2) section 11 (e)—Writ of* Quo Warranto *to question the right of a Basnayake Nilame to hold office—Objection to election on the ground of admission of ballot paper put aside at first count.*

**Held :** (i) That the ballot paper was rightly admitted.

(ii) That the words " execution of the functions of an office " in section 11 (*e*) of the Interpretation Ordinance must be interpreted as meaning " lawfully executing the functions of an office."



## Cause of Action

*Right of action of purchaser to recover purchase price on subsequent discovery that deed of transfer is void.*

*See Transfer of land*



## Civil Law Ordinance

*Section 3. See Partition.*



## Civil Procedure

*Civil Procedure Code section 84—Decree* nisi *unless set aside within 14 days becomes absolute.*

**Held :** That a decree *nisi* entered under section 84 of the Civil Procedure Code becomes absolute automatically at the expiration of fourteen days, and once that period elapses, a plaintiff can obtain no relief under that section of the Code.



*Civil Procedure Code (Chapter 86) sections 214, 833 and Second Schedule Part III—Charges in bill of costs in respect of expert witness—Right of Commissioner of Requests to determine witness' expenses.*

**Held :** (i) That a Commissioner of Requests is bound to examine the charges claimed in a bill of costs in respect of witnesses and to express his decision thereon.

(ii) That the Commissioner of Requests may at the time of judgment or thereafter determine any of the matters in Part III of the Second Schedule of the Civil Procedure Code reserved for his determination.



*Civil Procedure Code (Chapter 86) section 281—Transfer of land reserving the right to a reconveyance within a stipulated time—Transferor's rights sold in execution—Transferee bidder at execution sale—Assigns expressly excluded by deed of transfer from right to reconveyance—Is sale in execution bad—Is the transferee estopped from questioning execution sale by participating in it and bidding at it.*

**Held :** (i) That the purchaser was entitled to maintain the action without an order under section 281 of the Civil Procedure Code.

(ii) That the defendant by his conduct in bidding at the execution sale was estopped from denying the purchaser's right to purchase the transferor's right to a reconveyance on the ground that the transfer deed excluded assigns.



*Civil Procedure Code section 337—Use of due diligence to procure complete satisfaction of decree—When may subsequent application to execute the same decree be refused.*

**Held :** That the mere fact that the judgment-creditor has failed to take action under section 219 of the Civil Procedure Code cannot, apart from the circumstances of the case, be regarded as showing lack of due diligence entitling the judge to refuse under section 337 of the Civil Procedure Code a subsequent application to execute a decree.



*Civil Procedure Code section 615—Decree for separation obtained by the husband—Can an order for alimony under section 615 of the Civil Procedure Code be made.*

**Held :** That where a decree for separation is obtained by the husband the Court has no power to order alimony to the wife under section 615 of the Civil Procedure Code.



*Civil Procedure Code section 756—Notice of security for respondent's costs of appeal—Two respondents to appeal—Notice given at the same time but served on one of them within the period of twenty days, and on the other after the period of twenty days—Delay*

*in service of notice due to absence of respondent outside jurisdiction of court—Delay not due to any fault of appellants—Can relief under section 756 (3) be granted in such a case.*

**Held :** (i) That notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the court.

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

(iii) That security must be tendered and perfected and the deposit made within twenty days of the giving of the notice of security.

(iv) That relief under section 756 (3) of the Civil Procedure Code cannot be granted where an appellant fails to comply with (i) and (ii) or with (i) or (ii).

(v) That omission to tender and perfect security and to make the deposit within twenty days, and other omissions, mistakes and defects occurring in the course of tendering security and in the course of perfecting the appeal generally, may be condoned by virtue of section 756 (3) of the Civil Procedure Code in proper cases, if the respondent has not been materially prejudiced by such omission, mistake or defect.



*Civil Procedure Code (Chapter 86) section 839—Inherent power of a court to lay by an action pending the decision of another action affecting the same subject-matter.*

**Held :** That a court has inherent power to lay by a case pending the decision of an action in another court affecting the question at issue.



*Section 84. See Partition.*



*Sections 224 and 347. See Mortgage.*



*Civil Procedure Code section 839. See Court.*



*Civil Procedure Code section 756 (3). See Preliminary Objection.*



## Companies

*Winding-up of company incorporated abroad—Sections 67 and 68 of the Joint Stock Companies Ordinance No. 4 of 1861.*

*See Courts Ordinance.*



## Conditional Transfer

*Sale of transferor's rights in execution—Validity of sale. See Civil Procedure.*



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## Confession

*Confession to Magistrate made after commencement of non-summary inquiry—Confession to Superintendent of Prisons. See Criminal Procedure.*



## Contract

*Wagering contracts—Forward contracts for the purchase and sale of rubber on the understanding that there should be no delivery or acceptance of the rubber—Contract performed by the payment of the difference between the contract price and the market price on the due date—Bond granted in respect of payment of differences—Is bond enforceable—No evidence that the defendant intended the contract to be a wagering contract.*

**Held :** (i) That where the plaintiff entered into a contract to buy and sell rubber forward, the mere fact that the plaintiff performed the contract by the payment of the difference between the contract price and the market price on the due date does not make the contract a wagering contract in the absence of proof that it was a term of the arrangement between the plaintiff and the defendant that no rubber was to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of the differences.

(ii) That a bond granted for the purpose of securing the payment to the plaintiff of a sum owing to him by the defendant in respect of some of such differences was enforceable.



## Costs

*Right of Commissioner of Requests to examine charges claimed in bill of costs. See Civil Procedure.*



## Court

*Power to stay proceedings in action in Ceylon pending final decision in case in a foreign court—Same parties and matters in dispute substantially same—Principles that should guide court in considering such application.*



## Courts Ordinance

*Courts Ordinance (Chapter 6) section 42—Power of Supreme Court to transfer a case from one place to another place in the same circuit—Revised Edition of the Legislative Enactments Ordinance (Chapter 1)—Effect of repealed provision appearing in the Revised Edition of the Legislative Enactments.*

**Held :** That the repealed portion of section 42 of the Courts Ordinance appearing in the Revised Edition of the Legislative Enactments was law by virtue of section 10 of the Revised Edition of the Legislative Enactments Ordinance.



*Courts Ordinance (Chapter 6) section 62—Winding-up of company incorporated abroad—Does section 62 of the Courts Ordinance confer jurisdiction on the District Court—Writ of prohibition to prohibit District Court from exercising jurisdiction in a winding-up on the ground that it has no jurisdiction at all—Section 42 of the Courts Ordinance—Sections 67 and 68 of the Joint Stock Companies Ordinance No. 4 of 1861.*

**Held :** That jurisdiction to wind-up companies ( whether incorporated in Ceylon or abroad ) is conferred on District Courts by section 62 of the Courts Ordinance (Chapter 6), and that sections 67 and 68 of the Joint Stock Companies Ordinance No. 4 of 1861 do no more than provide the test for ascertaining the particular District Court for any given winding-up proceeding.



## Criminal Procedure

*Enhancement of sentence—Circumstances in which the Supreme Court will allow enhancement of sentence—Section 325 of the Criminal Procedure Code (Chapter 16).*

**Held :** (i) That on an application for enhancement of sentence a revisional court will interfere only when the sentence passed is manifestly inadequate and not merely on the ground that it would itself have passed a heavier sentence.

(ii) That in dealing with an accused person under section 325 of the Criminal Procedure Code the Magistrate should look at the matter primarily in the interests of the accused.



*Criminal Procedure Code section 134—Confession to Magistrate made after commencement of non-summary inquiry—Can it be admitted in evidence—Confession to Superintendent of Prisons—When may it be admitted in evidence.*

**Held :** (i) That a confession recorded by a Magistrate under section 134 of the Criminal Procedure Code is not inadmissible in evidence merely because it is recorded after the arrest of the accused and after investigation by the police.

(ii) That where an accused person when addressed under section 155 of the Criminal Procedure Code states " I abide by the voluntary statement I have already made to the Magistrate " the voluntary statement becomes incorporated in the statutory statement and is admissible in evidence regardless of whether the voluntary statement has been recorded in the manner prescribed by the Criminal Procedure Code.

(iii) That a confession made to the Superintendent of a prison is admissible in evidence so long as it does not offend against the provisions of section 24 of the Evidence Ordinance.



*Criminal Procedure Code (Chapter 16) section 335 (1) (d)—Interpretation Ordinance (Chapter 2) section 2 (i)—Meaning of " imprisonment " in section 335 of the Criminal Procedure Code.*

**Held :** That the context of section 335 (1) (*d*) of the Criminal Procedure Code will not permit the application to the word " imprisonment " therein of the definition in section (2) (*i*) of the Interpretation Ordinance.



*Criminal Procedure Code—Sections 167 (2), 172 and 347—Charge—Powers of court as regards amendment—Omission to state proper particulars—Powers of Supreme Court to convict accused in appeal under the right offence.*

**Held :** (i) That where a charge did not contain the proper particulars, a Magistrate under section 172 of the Criminal Procedure Code has the power to amend the charge so as to make it fit into the evidence led in the case.

(ii) That, in view of the provisions of section 167 (2) of the Criminal Procedure Code, a reference in the charge to the name of the offence as specified in the Penal Code is sufficient to give an accused notice of the matter with which he is charged.

(iii) That where a Magistrate has convicted an accused person under a wrong section the Supreme Court in appeal has the power under section 347 of the Criminal Procedure Code to convict him of the right offence.



*Criminal Procedure Code (Chapter 16) section 297—Prosecution against two accused—One accused absent—Evidence affecting absent accused recorded in the presence of one of the accused—Evidence recorded in his absence read over to absent accused on his appearing on warrant—Should the witnesses who gave evidence in the absence of the accused have given their evidence* de novo *in his presence upon his appearance or is it sufficient if the depositions are read to the accused in the presence of the witnesses and an opportunity afforded of cross-examining the witnesses.*

**Held :** (i) That the evidence was improperly recorded as against the first accused in his absence, and that, therefore, there was no compliance with the law in merely reading it to him.

(ii) That the witnesses should have been required to give their evidence afresh in the presence of the first accused.

(iii) That the use at a trial of evidence improperly recorded against an accused is an illegality and a conviction founded upon such evidence cannot be sustained.



*Criminal Procedure Code section* 122 (3). *See Malicious arrest.*



## Criminal Trespass

*Criminal Trespass—Failure to specify intention in the charge—Estate Labour (Indian) Ordinance (Chapter 112) section 5—Notice to terminate contract of service—Computation of time—Is tenancy of free room separate from contract of service—Can a superintendent of an estate be said to be in occupation of the rooms in the lines to enable him to maintain a charge of criminal trespass.*

**Held :** (i) That in a charge of criminal trespass the mere omission to use the words " with intent to cause annoyance " cannot be said to prejudice an accused person if all the facts from which such an intention could be inferred are set out in the charge.

(ii) That under section 5 of the Estate Labour (Indian) Ordinance (Chapter 112) an employer can give on any day of the month notice of his intention to terminate a labourer's services at the expiry of a month from that date.

(iii) That where a tenant is given a free room as part of his contract of service when the contract is terminated everything that flows from it also ends.

(iv) That a superintendent of an estate is by virtue of his office in occupation of the whole estate which is under his control and may therefore prosecute for criminal trespass a person who remains in possession of a room after whose right of occupation has been lawfully determined.

**Held :** That in the circumstances, such evidence of similar transactions was inadmissible.



*Evidence affecting absent accused recorded in the presence of one of the accused—Such evidence read over to absent accused on his appearing on warrant.*

*See Criminal Procedure.*



*Evidence Ordinance—Sections 123, 124 & 125.*

*See Malicious Arrest.*



*Evidence discovered by reason of arrest of offender by private person.*

*See Excise.*



*Can conviction in an excise case be based on circumstantial evidence.*

*See Excise.*



## Excise

*Arrest by private person of offender under Excise Ordinance—Evidence discovered by reason of arrest—Can conviction be based on such evidence.*

The accused was arrested by one David Silva who had no special powers under the Excise Ordinance, for illicit possession and transport of fermented toddy. When he was charged in the Police Court by an Excise Inspector objection was taken on the ground that the person arresting had no authority to arrest the accused. The Magistrate discharged on this ground.

**Held :** That the Magistrate was wrong in discharging the accused.



*Excise Ordinance—Illicit sale of arrack—Absence of direct evidence of sale—Denial of sale by decoy—Can conviction be based on circumstantial evidence—Principles governing punishment of young first offenders.*

The Magistrate convicted the accused on the following evidence : That the decoy was standing in the boutique near the accused with a glass in his hand which was wet and smelling of arrack. In a drawer of a table the marked one rupee note was found in a tin receptacle. The decoy's mouth smelt of arrack. On the table was found an open bottle of arrack.

**Held :** That the evidence was sufficient to justify the conviction of the accused.

**Held :** That the fact that the defendant maintained the applicant after the discovery of her condition and dismissal from service by the defendant's wife, is sufficient corroboration of the applicant's evidence of paternity.



## Malicious Arrest

*Malicious arrest—Proof necessary to succeed in an action for malicious arrest—Police Information Book—Can a statement made to the Police by the defendant and recorded in the information book be admitted in evidence—Evidence Ordinance sections* 123, 124 *and* 125—*Criminal Procedure Code section* 122 (3).

**Held :** (i) That in an action for malicious arrest the plaintiff must show :

(*a*) that his arrest on a criminal charge was instigated, authorised or effected by the defendant,

(*b*) that the defendant acted maliciously and

(*c*) that the defendant acted without reasonable and probable cause.

(ii) That the police information book is not a document in respect of which privilege can be claimed under sections 123 and 125 of the Evidence Ordinance.

(iii) That the provisions of section 122 (3) of the Criminal Procedure Code does not preclude the admission of a statement in the information book in a civil proceeding.

(iv) That statements recorded in the information book can be used under section 155 (*c*) of the Evidence Ordinance in civil proceedings to impeach the credit of a witness.



## Mandamus

*Mandamus on the Mayor of the Municipal Council—Colombo Municipal Council (Constitution) Ordinance section* 11—*Can the Mayor refuse to permit the discussion by the Municipal Council of a report made under section* 11.

**Held :** That the Mayor of the Municipal Council has no power to prevent the discussion by the Council of a report made by a special committee appointed under section 11 of the Colombo Municipal Council (Constitution) Ordinance, and properly placed before a meeting of the Council.



## Mischief

*See Penal Code.*



## Mortgage

*Mortgage bond by two persons—Joint and several liability—Payment by one debtor of his share of liability—Assignment of the bond—Bond put in suit by assignee against the other debtor—Sale in execution—Merger—Assignment of decree in favour of purchaser—Can such purchaser bring a hypothecary action against the other debtor.*

In 1929 J and A bound themselves jointly and severally with W to pay Rs. 75/– with interest. To secure payment they hypothecated property. In 1935 J paid half of the debt viz. Rs. 75/–. Later W assigned the bond and the sum of Rs. 150/– due upon the bond to K. K sued A on the bond and obtained decree and at the sale in execution the present plaintiff bought the rights of A. Then on an order of Court K executed a conveyance of the decree and all his rights on the bond in favour of the present plaintiff,

Thereafter the present action was brought against J for Rs. 150/- praying for a hypothecary decree over the share of J.

**Held :** That the plaintiff had no cause of action against J.



*Mortgage Ordinance (Chapter 74)—Hypothecary decree—Commission issued to licensed auctioneer to sell the property—Application for execution in the form prescribed by section 224 of the Civil Procedure Code (Chapter 86)—Does section 347 of the Civil Procedure Code apply in a case in which a hypothecary decree has been entered and direction given that an auctioneer should carry out a sale in execution of a decree under the Mortgage Ordinance.*

**Held :** (i) That section 347 of the Civil Procedure Code (Chapter 86) does not apply in a case in which a hypothecary decree has been entered and direction given that an auctioneer shall carry out the sale, when the judgment-creditors are moving for a commission for the sale of the mortgaged property by an auctioneer.

(ii) That the mere fact that a judgment-creditor seeking to execute a hypothecary decree makes an application for execution in the form prescribed by section 224 of the Civil Procedure Code, when he is not obliged so to do, does not make him bound by all the other provisions in Chapter XXII of the Code, which are connected with section 224 in cases in which section 224 applies.



## Motor Car

*Motor Car Ordinance No. 45 of 1938—Regulation 3 of First Schedule—Meaning of the expression "rear of the body" in the definition of the word "overhang" in regulation 30 of the First Schedule—Should the length of the rear flap door of a motor lorry when opened be taken into account in measuring its "overhang."*

**Held :** That the length of the rear flap door of a motor lorry when opened should not be taken into account in measuring its overhang.

Per DE KRETSER, J.—"In my opinion the body of a car must be measured with its doors closed, because otherwise whenever a car or lorry door is left open an offence may be committed."



## Municipal Councils

*Municipal Councils Ordinance (Chapter 193) sections 208, 222 and 229—Is non-compliance with a notice given under section 208 an offence.*

**Held :** That a non-compliance with a notice given under section 208 of the Municipal Councils Ordinance (Chapter 193) is not an offence.



*Colombo Municipal Council (Constitution) Ordinance section 11. See Mandamus.*



## Partition

*Partition of land—Land purchased as partnership property—Partnership formed with express power to purchase and sell land—Section 3 Civil Law Ordinance (Chapter 66)—Section 29 (1) of the Partnership Act, 1890—Section 2 of the Prevention of Frauds Ordinance (Chapter 57).*

**Held :** (i) That where it is sought to partition land bought in the names of the members of a partnership, and the partition is opposed on the ground that the land is partnership property, the onus is on the plaintiffs to show that each party's share in the land was for his personal use and that the land was not partnership property.

(ii) That parties to a partition action must make clear title to the land they seek to partition and must identify what land it is that they claim.



*Partition action—Application of section 84 of the Civil Procedure Code (Chapter 86).*

**Held :** (i) That section 84 of the Civil Procedure Code (Chapter 86) applies to actions under the Partition Ordinance (Chapter 56).

(ii) That a court has no power to enlarge the period prescribed by section 84 of the Civil Procedure Code.

(iii) That a decree *nisi* in a partition action which fixed the period for showing cause at a month from the date of decree had not the effect of extending the period prescribed in section 84 of the Civil Procedure Code.

(iv) That a decree *nisi* entered under section 84 of the Civil Procedure Code need not be served on the plaintiff.



*Partition—Final decree—Order that final decree be entered on a future date—Subsequent order that final decree be not entered—Right to intervene after such order.*

**Held :** That in the circumstances, the order of 20th July, 1937 did not amount to a final decree and therefore the appellants were in time when they sought to intervene.



## Partnership

*See Partition.*



## Penal Code

*Penal Code sections 408 and 409—Mischief—Does the blocking of a roadway amount to mischief within the meaning of section 409 of the Penal Code.*

**Held :** (i) That it is the essence of the offence of mischief that the perpetrator must cause the destruction of property or such change in it as destroys or diminishes its value or utility.

(ii) That the mere blocking of a pathway by placing flower pots on it does not amount to mischief within the meaning of section 408 of the Ceylon Penal Code.



*Penal Code section 427. See Criminal Trespass.*



## Planter's Share

*Planter's share—Can a right to a planter's share be acquired by prescription—Prescription Ordinance (Chapter 55) section 2.*

**Held :** (i) That a right to a planter's share can be acquired by prescription.
(ii) That a planter's share is an interest in land within the meaning of section 2 of the Prescription Ordinance.



## Power of Attorney

*Power of attorney to act in respect of a particular business—Power registered—Cessation of the business—Registration not cancelled—Has attorney authority to execute deeds after cessation of such business.*

The plaintiff had appointed the second defendant as his attorney for the management of his business as a timber merchant. The power of attorney was registered. After the plaintiff ceased to carry on the business of a timber merchant the second defendant transferred two of the plaintiff's lands to the first defendant purporting to act under the registered power of attorney which had not been cancelled. It was sought to justify the second defendant's action on the ground that it was taken to settle some debts of the business.

**Held :** That as the power of attorney had been given for the limited purpose of managing the plaintiff's timber business the agent had no power to bind the principal after the cessation of the business.



## Preliminary Objection

*Preliminary Objection—Appeal—Failure to give notice of security or to tender security to some respondents against whom no relief is claimed—Should the appeal be rejected—Is the appellant entitled to relief under sub-section 3 of section 756 of the Civil Procedure Code.*

**Held :** (i) That even where parties against whom no relief is claimed are made respondents to an appeal notice of security should be given to them.
(ii) That failure to give such notice and security disentitles the appellant to relief available under sub-section 3 of section 756 of the Civil Procedure Code.



*See Civil Procedure.*



## Prescription

*Prescription Ordinance sections 6, 7 and 10. See Transfer of land.*



*Prescription Ordinance section 2. See Planter's Share.*



*Prevention of Frauds Ordinance section 2. See Partition.*



## Prohibition Writ of

*See Courts Ordinance.*

## Public Trustee

*Entail and Settlement Ordinance—Public Trustee Ordinance section 15—In what circumstances may money in court be transferred to the Public Trustee.*

**Held :** That section 15 of the Public Trustee Ordinance (Chapter 73) is not intended to serve as a hard and fast rule to be applied to all cases under the Entail and Settlement Ordinance. It provides for cases in which the interests of the parties concerned will best be served by a transfer of money to the Public Trustee.



## Punishment

*Principles of. See Excise.*



## Res Judicata

Res Judicata—*Two cases instituted on different dates—Same parties—Same points in dispute—Case instituted later decided earlier—Does the decision operate as* res judicata *as against the earlier case.*

**Held :** (i) That the plea of *res judicata* was entitled to prevail.

(ii) That the doctrine of *res judicata*, so far as it relates to prohibiting the retrial of an issue, refers not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue.



## Revised Edition of the Legislative Enactments

*Effect of repealed provision appearing in the Revised Edition. See Courts Ordinance.*



## Sentence

*See Criminal Procedure.*



## Sisyanu Sisya Paramparawa

*See Buddhist Ecclesiastical Law.*



## Stamps

*Stamp Ordinance (Chapter 189)—Payment of poundage on the value of property sold by the Fiscal in execution of a mortgage decree—Meaning of the word "value" in schedule A part II head F (miscellaneous) item (a) of the Stamp Ordinance.*

The highest bid at the auction sale was a bid of Rs. 49,500/– from the mortgagee. The amount due to him in the suit was Rs. 99,827/–.

**Held :** That the value of the property for the purposes of poundage payable under item (*a*) head F of part II of schedule A to the Stamp Ordinance (Chapter 189) was Rs. 99,827/–.

*Stamp Ordinance (Chapter 189)—Appeal under section 31—Should Attorney-General be made a party.*

**Held :** That an appeal under section 31 of the Stamp Ordinance to which the Attorney-General is not made a party is not properly constituted.



## Stay Proceedings

*Court—Power to stay proceedings in action in Ceylon pending final decision in case in a foreign court—Same parties and matters in dispute substantially same—Principles that should guide court in such application—Section 839 of the Civil Procedure Code.*

**Held :** That our courts have the power to make an order staying an action in a court in Ceylon pending the final decision in another action filed in a foreign court between the same parties where the matters in dispute in the first case are directly and substantially in issue in the second case.



## Transfer of Case

*Transfer of case. See Courts Ordinance.*



## Transfer of Land

*Vendor and Purchaser—Transfer of land—Subsequent discovery that deed of transfer was pending partition action—Purchaser put in possession—Right of purchaser to bring action for recovery of purchase price—When cause of action arises—Prescription Ordinance—Sections 6, 7 and 10—Is such action barred in six years.*

**Held :** (i) That the plaintiff's right of action, if any, became prescribed in three years.

(ii) That plaintiff's cause of action, if any, arose on the date P1 was executed inasmuch as P1 being void, the purchase money was given without consideration.

(iii) That, in the circumstances, a right of action could accrue to the plaintiff only after he had been ousted by a third party with a superior title.



*See Deed.*



## Vendor and Purchaser

*Right of purchaser to bring action for recovery of purchase price.*

*See Transfer of land.*



## Wagering Contract

*See Contract.*

## Weights and Measures Ordinance

*Weights and Measures Ordinance (Chapter 127) section 16—Using false weights—Is a conviction for using false weights bad merely because it does not proceed upon the evidence of a duly authorised examiner of weights and measures.*

**Held :** That a conviction under section 16 of the Weights and Measures Ordinance is not bad merely because it proceeds on the evidence of persons not authorised under the Ordinance to examine weights and measures.



## Words and Phrases

*" Imprisonment " in section 335 of the Criminal Procedure Code.*

*See Criminal Procedure.*



*" Rear of the body " in the definition of the word " overhang " in regulation 3 of the 1st schedule to Motor Car Ordinance (45 of 1938.)*

*See Motor Car.*



## Workmen's Compensation

*Workmen's Compensation Ordinance (Chapter 117) section 3—Fatal attack on a workman by a fellow workman—Attack made outside the work place and outside working hours—Was the injury caused by an accident arising out of and in the course of the injured workman's employment.*

**Held :** That the injury to the deceased was caused by an accident not arising out nor in the course of the deceased's employment.



## Writ of Prohibition

*See Courts Ordinance.*

*Present:* HEARNE, J.

## WICKREMESINGHE vs ABEYGUNAWARDENE

*Application by A. A. Wickremesinghe for a Writ of Quo Warranto against E. Y. D. Abeygunawardene, Basnayake Nilame of Dewundara Devale.*

Argued on 17th November, 1939.

Decided on 23rd November, 1939.

*Buddhist Temporalities Ordinance (Chapter 222) Section 8 (2) (a) Interpretation Ordinance (Chapter 2) section 11 (e) Writ of Quo Warranto to question the right of a Basnayake Nilame to hold office Objection to election on the ground of admission of ballot paper put aside at first count.*

The presiding officer at the election of a Basnayake Nilame had put aside a ballot paper at the first count for consideration later. After the counting he declared that the successful candidate and another had equal number of votes. He then admitted for the successful candidate the ballot paper he had put aside. This step did not result in the infraction of a rule of law, nor a disregard of any rules of procedure nor a disregard of the principles of justice and fairplay and no protest had been made by any member of the meeting.

**Held :** (i) That the ballot paper was rightly admitted.

(ii) That the word "execution of the functions of an office" in section 11 (e) of the Interpretation Ordinance must be interpreted as meaning "lawfully executing the functions of an office."

*Colvin R. de Silva*, for the petitioner.

*H. V. Perera, K.C.* with *N. E. Weerasooriya, K.C. and C. J. Ranatunge*, for the respondent.

*D. W. Fernando, Crown Counsel*, for the Public Trustee.

HEARNE, J.

On May 6th, 1939 a meeting was held under section 8 of the Buddhist Temporalities Ordinance (Chapter 222) to appoint a Basnayake Nilame for the Sri Vishnu Maha Devale, Dondra. The Public Trustee was in the chair. At the conclusion of the meeting he declared that the respondent "had received the majority of votes and had been duly appointed to be the Basnayake Nilame for the Devale."

The applicant prayed for the issue of a Writ of Quo Warranto on the respondent who entered an appearance through counsel to show cause why the application should not be allowed. Notice was ordered to be given to the Public Trustee who was also represented by counsel. The Public Trustee filed a record of the proceedings at the meeting held under his direction, and for the purposes of his arguments counsel for the applicant accepted it as a true record of those proceedings.

1939

Hearne, J.

Wickremesinghe *vs* Abeygunawardene

The objections originally taken were twofold. The first is contained in paragraphs 7 to 14 of the affidavit filed in support of the application which read as follows :

7. After the votes were cast the Public Trustee opened the ballot box in the presence of the candidates, the voters and members of the general public, and proceeded to place in separate heaps the votes cast in favour of each candidate.

8. In the course of thus sorting the votes the Public Trustee rejected one ballot paper and did not allot it to any of the candidates.

9. Having scrutinised and sorted out the votes in this manner, the Public Trustee proceeded to count the votes cast in respect of each candidate, beginning with the ballot papers cast in favour of the respondent who had been allotted the No. 1.

10. He declared, and his clerk under his direction so noted immediately, that 21 votes had been cast in favour of the respondent.

11. He then counted the ballot papers relating to candidate No. 2 and declared, and his clerk so noted immediately, that 21 votes had been cast in favour of the said candidate.

12. Similarly he declared that 6 votes had been cast in favour of No. 3.

13. Having thus declared that an equal number of votes had been received by candidates Nos. 1 and 2 the Public Trustee took up again the ballot paper that he had previously rejected.

14. I understand and verily believe that the said ballot paper bore no figure whatsoever in that blank portion in which the voters had been expressly directed to place the number allotted to the candidate whom they favoured ; but the Public Trustee pointed to an alleged figure in another part of the ballot paper where printed instructions appeared along with the seal of the Public Trustee, and declared that the said figure indicated that the voter using the said ballot paper had cast his vote in favour of candidate No. 1.

It will be noted that the affidavit alleges that the Public Trustee had rejected one of the ballot papers and that he later acted on " the ballot paper he had previously rejected." In the argument before this Court that allegation of fact was abandoned, and the position was accepted, as the Public Trustee averred, that he announced that with the exception of one doubtful vote (this as I understand from counsel for the applicant the Public Trustee had put aside in the course of making the count) the result was that the respondent had received 21 votes, Mr. Goonesekere 21 votes and Mr. Dissanayake 6 votes. He then proceeded to say that subject to objections that might be raised he proposed giving the vote he had described as doubtful to the respondent, as it had on it the number " 1 " which was the number which had been assigned to the respondent. Mr. Goonesekere

said it looked like " 1." No objection having been taken to the course the Public Trustee proposed to adopt he declared the voting as being 22 votes in favour of the respondent and 21, as he had previously announced, in favour of Mr. Goonesekere.

If it is correct, as counsel for the applicant was instructed to say, that the Public Trustee had put aside one of the ballot papers in the course of his count, it would undoubtedly, as matters have transpired, have been better if at that time he had decided whether or not he proposed to admit or reject the ballot paper in question. This course would at least have prevented a reckless allegation being made against him that he had acted so improperly as to have rejected a vote and then admitted it when he found there was an equality of votes.

But, as Mr. Perera for the respondent has pointed out, there was in what the Public Trustee did no infraction of a rule of law, no disregard of any rules of procedure that have been laid down (the Ordinance prescribes no particular form of procedure) no departure from principles of justice and fairplay and no protest from any member of the meeting. In fact the meeting acquiesced in what the Public Trustee proposed to do and in my opinion the objection is completely without merit.

The second objection is that the Public Trustee had improperly refused to allow Mr. G. L. Ranasinghe, described in the affidavit as an Acting Mudaliyar, the right to vote. The relevant portion of the proceedings, accepted by the appellant as correct, is as follows :

*Public Trustee:* Anybody acting for the Four Gravets Mudaliyar ?

*Acting Mudaliyar:* Present.

*Public Trustee:* Have you received a summons ?

*Acting Mudaliyar:* No Sir.

*Public Trustee:* When were you appointed ?

*Acting Mudaliyar:* On 17th March. The permanent Mudaliyar is ill in Hospital. I am merely acting for him temporarily.

*Public Trustee:* Not appointed ?

*Acting Mudaliyar:* No Sir.

*Public Trustee:* Then I will not accept you.

It has been argued that by reason of the provisions of section 8 (2) (*a*) of the Buddhist Temporalities Ordinance (Chapter 222) read with section 11 (*e*) of the Interpretation Ordinance (Chapter 2) Mr. Ranasinghe should have been accorded the right to vote.

> Section 11 (*e*) reads – " In all Ordinances for the purpose of indicating the application of a law to every person or number of persons for the time being executing the functions of an office, it shall be deemed to have been and to be sufficient to mention the official title of the officer executing such functions at the time of the passing of the Ordinance."

Clearly the words " executing the functions of an office " must be interpreted as meaning " lawfully executing the functions of an office." If they were not so interpreted they would include, as Mr. Perera pointed out, a person who had usurped the functions of a particular office.

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I asked counsel for the applicant, who would ordinarily appoint an Acting Mudaliyar to execute the functions of the office of Mudaliyar in the event of the person substantively appointed to such office being unable, by reason of illness or otherwise, to execute the functions of his office. I was told the appointment would rest with the Assistant Government Agent. I take it that Mr. Ranasinghe had not been appointed to act by the Assistant Government Agent. If it had been so an affidavit even at this late stage would have been forthcoming.

Now what this court has in effect been asked to rule is that a person who had received no summons to attend the meeting and who had not been appointed to act as Mudaliyar by the Government Officer entitled so to do should have been allowed to vote on his verbal representation, which may or may not be the truth, that he was acting as Mudaliyar. To do justice to Mr. Ranasinghe he appeared to claim no more, and the Public Trustee understood him to claim no more than that as the Mudaliyar was ill (this does not mean he had ceased to exercise the functions of his office) he was acting as his agent in attending to matters which fell within the province of a Mudaliyar. Whatever authority he had, he had apparently derived from the permanent Mudaliyar, in other words the permanent Mudaliyar, if he had in fact appointed him to act in the fullest sense, had exercised a power of appointment which is exercisable, not by him, but by the Assistant Government Agent. It is unlikely he would have done this—if he had, he would probably have sent to Mr. Ranasinghe the summons addressed to "The Mudaliyar, Four Gravets"—but even if he had, it would have been ineffectual in the absence of a legal right to do so and Mr. Ranasinghe could not be said to have been lawfully exercising the functions of Mudaliyar.

In my opinion Mr. Ranasinghe was rightly excluded from the meeting. He would appear to have thought so too.

Other questions were discussed in the argument of counsel—whether the Public Trustee was exercising a judicial discretion, whether an information in the nature of Quo Warranto lies against a person holding an office not created by Charter from the Crown or by Statute, and whether the Buddhist Temporalities Ordinance merely recognises but does not create the office of Basnayake Nilame. The last mentioned, counsel for the applicant stated, is a historical question which would involve a consideration of ancient correspondence between the Secretary of State and the Ceylon Government. Fortunately, in the view of the facts which I have taken, it does not arise for determination. Nor do the others.

I discharge the rule against the respondent with costs.

*Rule discharged.*

**Proctors:—**

*S. Samarasinghe*, for petitioner (Wickremesinghe)

*D. Weeratunga*, for respondent (Abeygunawardene)

*Present:* DE KRETSER, J.

## ARULAMPALAM AND TWO OTHERS vs KANDAVANAM

*S. C. No.* 136—*C. R. Jaffna No.* 4656.

Argued on 24th November, 1939.

Decided on 30th November, 1939.

*Res Judicata—Two cases instituted on different dates—Same parties—Same points in dispute—Case instituted later decided earlier—Does the decision operate as* res judicata *as against the earlier case.*

The plaintiff preferred claims in respect of two lands which were seized in execution of a money decree. The claims were investigated in different courts and were dismissed on different dates. Thereupon two actions were instituted under section 247 of the Civil Procedure Code by the present plaintiff, the present case in the Court of Requests, Jaffna and the other in the District Court of Jaffna. The Court of Requests case though instituted earlier was laid by until the decision in the District Court case. Admittedly the points in dispute were the same in both cases and the evidence required was the same. When the present case was relisted and came up for trial the decision in the District Court case was pleaded as *res judicata* and the Commissioner upheld the plea.

It was contended in appeal that because the present case was instituted before the decision of the District Court case, the plea of *res judicata* was not available.

**Held :** (i) That the plea of *res judicata* was entitled to prevail.

(ii) That the doctrine of *res judicata*, so far as it relates to prohibiting the retrial of an issue, refers not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue.

*S. J. V. Chelvanayagam*, for 3rd defendant-appellant.

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

DE KRETSER, J.

The 3rd defendant-appellant in this case had obtained a money decree against the 1st and 2nd defendants, and in execution thereof had caused the Fiscal to seize two lands on the 20th May, 1936. The present plaintiff preferred claims thereto based upon a transfer in his favour dated the 7th of May, 1936, from the 1st and 2nd defendants. His claims were both dismissed, and as they were made in different courts they were dismissed on different dates. He then brought these two actions, *viz.* the present case on the 3rd November, 1936, and the other case (No. 11319) in the District Court of Jaffna on the 15th March, 1937. In each case the appellant took up the same position, that the transfer had been executed in fraud of creditors.

On the 21st of March, 1938 counsel stated to the court that the decision in the District Court case would settle this case, and accordingly this case was laid by and later relisted for trial. The decision in the District Court case was then pleaded as *res judicata* and that plea was upheld.

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It is admitted that it is exactly the same point now in dispute as was raised in the District Court case, and that the issues are the same in both cases and the evidence would be the same. But it is contended that because this case was instituted before the decision of the District Court case therefore the plea of *res judicata* was not available.

Neither counsel has drawn my attention to what was in effect agreed to between the parties in the lower court, namely, that the decision in the District Court case should govern this case.

It seems to me that the learned Commissioner would have been justified in making his order on this ground alone.

Now, the doctrine of *res judicata* is based primarily on the policy that it is in the interest of the State to have an end of litigation, *interest reipublicae ut sit finis litium.* It also takes into cognisance the maxim *nemo debet bis vexari pro eadem causa.* As stated in Halsbury (Vol. 13 page 332, para. 464)." The true view seems to be that the legal rights of the parties are such as they have been determined to be by the judgment of a competent court. But the conclusiveness of the determination rests upon the same principles in each case. The doctrine of *res judicata* is not a technical doctrine applicable only to records ; it is a fundamental doctrine of all courts that there must be an end of litigation."

In *Balkishan vs Kishan Lal* (11 All. 149) the decision pleaded as *res judicata* was given in a case which had been instituted later in point of time. The case was referred to a Divisional Bench, and Justice Mahmood (with whom Edge, C.J. and Straight, J. agreed) said: "The question relates to the scope of the maxim *pendente lite nihil innovetur.* That the maxim governs alienations *pendente lite* cannot be doubted. Does it also relate to adjudications which have taken place during the pendency of one litigation in another litigation which, though commenced *before* had not *terminated* when the present litigation was begun ? So far as I am aware this exact question has not been settled by any definitely authoritative decision in England or in India. I am therefore not hampered by any case law on the subject, and feel myself free to adopt such views as I consider most consonant with legal principles.

" It seems to me that the main object of the doctrine of *res judicata* is to prevent multiplicity of suits and interminable disputes between litigants *ne autem lites immortales essent, dum litigantes mortales sunt.* This saying of Voet is in accord with the maxims *nemo debet bis vexari pro una et eadem causa* and the broader maxim *interest republicae ut sit finis litium.*

" This being so, the doctrine, so far as it relates to prohibiting the retrial of an *issue*, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. For even in cases where the Judge has commenced the trial of an issue which is also an issue in a pending litigation, a *final* judgment pronounced meanwhile in such previous litigation by a competent court (the identity of parties

and other conditions being satisfied) should operate as *res judicata* preventing the Judge dealing with the later litigation from adjudicating differently. If this is not done, it seems to me that the evil against which *res judicata* aims would not be removed and the doctrine itself would be defeated."

In the case of *Gururajamah vs Venkatakrishnama Chetti* (24 Mad. 350) the same point came up for decision before White, C.J. and Davies, J. It was held that the first suit was barred by the decision in the second suit, the Judges approving of the statement of law in the Allahabad case, that "the doctrine so far as it relates to prohibiting the retrial of an issue must refer not to the date of the commencement of the litigation but to the time when the Judge is called upon to decide the issue." In the Madras case too the earlier suit had been laid by pending the decision in the later suit, and the Judges began their judgment by expressing the opinion that it was not open to one of the parties to go behind the judgment in the later suit.

Nathan (Volume IV page 2153) refers to the case of *Bertram vs Wood* (10 S. C. 177) in which De Villiers, C.J. said "It is laid down in the Digest as a rule of law that a matter once adjudged is accepted as the truth—*res judicata pro veritate accipitur*. The meaning of the rule is that the authority of *res judicata* induces the presumption that the judgment upon any claim submitted to a competent court is correct, and this presumption, being *juris et de jure*, excludes every proof to the contrary. The presumption is founded upon public policy which requires that litigation should not be endless....."

In fact the very terms *res judicata* means that the matter in dispute has been adjudicated upon previously. The rule that the rights of parties ought to be decided as at the date when an action was instituted cannot apply to every circumstance. Once the 3rd defendant-appellant's claim to have the plaintiff's deed set aside as fraudulent was adjudicated upon, that claim no longer existed or was available to him.

One might arrive at a most ridiculous situation otherwise; for it is conceivable that contrary decrees might be passed in the two cases, and that a third claim may lead to a third case. Which of the two earlier cases could then be pleaded as *res judicata*? All considerations therefore point to the correctness of the decision in the lower court.

But it is said that a contrary view should be taken because of the case of *The Delta* (1 Probate Division 1875-6, page 393). To begin with, that was a case where a decision given in a foreign court was invoked and a number of witnesses had to be examined with regard to the foreign law. The English court held that their evidence left it at least doubtful whether the judgment of the foreign court would be regarded as *res judicata* in the foreign country. The court also found that the foreign judgment had not been given on the merits of the case but on matters of form and therefore could not be relied upon as a bar. It did express the opinion that at the time when the suit

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was begun in England there was no *res judicata* but only a *lis alibi pendens.* But they used that fact to emphasise that one party might have put the other to the election of going on with one of the cases, and not having done so he ought not to be allowed to plead the decision in the other case as a bar.

The case of *Houston vs Marquis of Sligo* (29 Chancery Division 1885, page 448) was also relied on. In that case Pearson, J. doubted that the decision in *The Delta* would apply in view of the existing practice and decided the case on other grounds, Pearson, J. confessing that he was attracted by the argument that a plea of *res judicata* was a plea in bar to the *institution* of an action and that consequently it would not succeed in a case brought before the later judgment was delivered. It is merely a passing opinion and it makes no appeal to me. It is a fact that the plea is generally based on a decision given prior to the institution of an action, but that fact must not be allowed to cloud the question nor in my opinion is it correct to say that the plea bars only the institution of a fresh action.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

**Proctors :—**

*S. V. Chinniah*, for the defendant-appellant. (Arulampalam and Two Others)
*M. S. Subramaniam*, for the plaintiff-respondent (Kandavanam)

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*Present:* HEARNE, J.

## THE SOLICITOR-GENERAL vs JOHANNES ALWIS

*Application for Revision in M. C. Colombo No.* 38390.
Argued on 17th November, 1939.
Decided on 22nd November, 1939.

*Enhancement of sentence—Circumstances in which the Supreme Court will allow enhancement of sentence—Section* 325 *of the Criminal Procedure Code* (*Chapter* 16).

**Held :** (i) That on an application for enhancement of sentence a revisional court will interfere only when the sentence passed is manifestly inadequate and not merely on the ground that it would itself have passed a heavier sentence.

(ii) That in dealing with an accused person under section 325 of the Criminal Procedure Code the Magistrate should look at the matter primarily in the interests of the accused.

Per HEARNE, J.—" Having regard to the object of the section this appears to be only common sense. The benefit of the section should not be indiscriminately applied, but when it is proposed to be applied regard must be had to considerations, if I may put it in this way, personal to the accused. As I read the section it does not mean that it is essential that the accused must be young or the offence must be trivial, it merely indicates the lines on which the discretion of a court is to be exercised and those lines, it is important to note, relate to the accused and the circumstances and nature of his crime."

*D. Jansze, Crown Counsel*, in support.

*Colvin R. de Silva* with *M. M. Kumarakulasingham*, for the accused-respondent.

HEARNE, J.

The 1st accused and the 2nd accused, the former of whom is here the respondent, were convicted of cheating Mr. A. A. Raymond by dishonestly inducing him to deliver property valued at Rs. 216/84 and of using as genuine a document known to be forged.

The 1st accused was dealt with under the provisions of section 325 of the Criminal Procedure Code. He was bound over in a sum of Rs. 250/– to be of good behaviour for a period of one year and to come up for judgment when called upon.

The Solicitor-General has moved this court to pass a sentence of imprisonment on the respondent. The Magistrate acted under section 325 (2) of the Code instead of section 325 (1), but this technicality would not lead me to accede to the application if it otherwise appears to be an inappropriate one.

No cases have been brought to my notice indicating the principle upon which this court has acted in dealing with similar applications. It has, however, been held that on an application for enhancement of sentence a revisional court will interfere only when the sentence passed was manifestly inadequate and not merely on the ground that it would itself have passed a heavier sentence. Analogously this court would not interfere with the discretion vested in a Magistrate by law if it would itself not have exercised but only if it appears that it was improperly exercised.

The only argument addressed to me was that the order of that Magistrate was not sufficiently deterrent, not of further, similar, criminal activities on the part of the respondent but on the part of other members of the public.

If this argument were sound it could be urged in almost every case in which a Magistrate decides to use his discretion, certainly in every case where, but for the provisions of section 325, a Magistrate would be obliged to pass a sentence of imprisonment.

I have consulted Indian decisions on the corresponding section of the Criminal Code of India, and the principle I extract from those decisions is that the Magistrate is required to look at the matter primarily in the interests of the accused.

Having regard to the object of the section this appears to be only common sense. The benefit of the section should not be indiscriminately applied, but when it is proposed to be applied regard must be had to considerations, if I may put it in this way, personal to the accused. As I read the section it does not mean that it is essential that the accused must be young or the offence must be trivial, it merely indicates the lines on which the discretion of a court is to be exercised, and those lines, it is important to note, relate to the accused and the circumstances and nature of his crime

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In the present case the Magistrate addressed his mind to the youth of the respondent, to the fact that he is a first offender, and he took the view that his partner in crime, a reconvicted criminal much older than he, had probably persuaded him to participate in an undertaking which the former had planned.

I am not prepared to say the exercise by the Magistrate of his discretion was so improper that interference by this court is desirable.

I dismiss the application.

*Application dismissed.*

**Proctors:—**

*N. J. V. Cooray*, for accused-respondent (Johannes Alwis)

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*Present:* SOERTSZ, J.

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## REX vs FERNANDO

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*S. C. 22/M.C. Panadura* 1937

*4th Western Circuit*, 1939. *Holden at Kalutara.*

Argued and Decided on 29th November, 1939.

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*Evidence Ordinance (Chapter 11) section 25—In what circumstances may statement made by the accused to the Police be elicited in cross-examination (of the accused) to prove that he made a statement to the Police different to that given in the witness-box.*

The accused giving evidence said that he shot in the direction of one Peduru, a witness, taking care not to hurt him when he was on a *suriya* tree, with a katty in his hand, and about to leap on to the land of the accused. In his statement to the Police having admitted that he fired a shot the accused said "I do not know where it went. I had proceeded about 4 or 5 yards from the latrine towards my house when I fired. I fired as I was running into my house. After firing I got into my house and slept. Later a Police constable came and told me that I had killed a man. Till then I did not know that I had shot any one."

Crown Counsel sought to elicit in his cross-examination of the accused the statement he had made to the Police in order to prove the inconsistency of his statement with his evidence. The counsel for the accused objected on the ground that the statement was in the nature of a confession which was inadmissible under section 25 of the Evidence Ordinance.

**Held:** That in the circumstances Crown Counsel was not entitled to cross-examine the accused regarding his statement to the Police.

*E. H. T. Gunasekera, Crown Counsel*, for the Attorney-General.

*R. L. Pereira, K.C.* with *D. D. Athulathmudali* and *A. C. Gunaratne*, for the accused.

SOERTSZ, J.

Crown Counsel proposes to question the accused on a statement he is said to have made to the Police and in which he does not appear to have said what he now says in the witness-box, namely, that he shot in the direction of Peduru, the witness, taking care not to hurt him when he was on a *suriya* tree, with a katty in his hand, and about to leap on to the land of the accused. Crown Counsel has shown me the statement said to have been made by the accused, and there can be no doubt but that in that statement the accused has given a different version of how he came to fire the gun.

Counsel for the accused objects to his client being questioned on the statement made or said to have been made by him, on the ground that questioning him in the manner proposed is obnoxious, if not to the latter, certainly to the spirit of section 25 of the Evidence Act.

Crown Counsel however submits that section 25 of the Evidence Act applies to a confession made by an accused person to a Police Officer, and he contends that the statement he proposed to question the accused upon is not a confession but an exculpatory statement. He relies on the ruling of Akbar, J. in the case of *The King vs Attygalle* (37 N.L.R. page 60). In that case Akbar, J. ruled that the statement relied upon in that case was not a confession within the meaning of section 25 of the Evidence Ordinance as it was exculpatory in effect. I have read the statement made by the accused Attygalle in that case and if I may say so with respect, Akbar, J. rightly described it as an exculpatory statement. As such it falls within the Privy Council ruling in *Dal Singh vs King Emperor* (1917) 86 L.J. page 140 that a statement which " is in no sense a confession " is admissible against the accused who made it to the Police. Similarly in *The King vs Cooray* (28 N.L.R. page 74), a Divisional Bench admitted a statement made by an accused to the effect, " there your Inspector is killed." That statement does not imply that the accused was present at the killing nor does it suggest the complicity of the accused in any way at all. It is certainly not a confession.

Now, I have carefully examined and considered the statement said to have been made by the accused in this instance and I cannot agree that it is an exculpatory statement, because in the course of the statement the accused admits having fired a shot. He says " I do not know where it went. I had proceeded about 4 or 5 yards from the latrine towards my house when I fired. I fired as I was running into my house. After firing I got into my house and slept. Later a Police constable came and told me that I had killed a man. Till then I did not know that I had shot anyone." This, as far as I can make out, is an admission by the accused that as a result

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of his firing the gun a man was shot and that he died in consequence. Such a statement is capable of being construed as establishing a *prima facie* case against the accused, because the offence of murder is constituted *inter alia* by a man doing an act which is so imminently dangerous that it must in all probability cause death. I must regard the statement from that point of view and looking at it in that way to say the least, I am doubtful that it can be properly described as an exculpatory statement.

There is also the Divisional Bench case of *The King vs Kalu Banda* (15 N.L.R. page 422), which I think has a bearing on the point involved in this matter. In that case it was sought to prove that the accused who, at his trial set up the plea of defence, had not set up such a defence in the statement he had made to the Police, and Lascelles, C.J. in the course of his judgment said, "after hearing the arguments of counsel and referring to the cases which were cited in argument, I am of opinion that when the headmen were allowed to prove the facts that the accused had made statements to them and that he had not in these statements set up the plea of self-defence the headmen were allowed to give evidence of what was in substance a confession by the accused. They were allowed indirectly to disclose a part at least of the substance of the accused's statement, the effect of this disclosure being such as to suggest the inference that the defence on which the accused relied was not set up by him at the time when, if true, it would naturally have been set up, and that it was therefore, false.

"If regard be had to the intention and object of the Legislature in enacting section 25 of the Evidence Ordinance, I think the conclusion must be the same."

In this instance too Crown Counsel declares that his object in eliciting the statement said to have been made by the accused to the Police is to show that the accused did not set up his present defence. The case of *The King vs Kalu Banda* rules that that may not be done where an inference of guilt is likely to be drawn from this divergence of pleas. In the case before us now the position is worse, in that, as I have pointed out, it is possible to regard the statement as a confession.

Although it is possible for a different view to be taken of the question that arose in *The King vs Kalu Banda* from that taken by the Divisional Bench that decided it, we are at present, bound by that decision. In India there is a great divergence of judicial opinion on the point and to say the least, if the question, whether a statement made by an accused to a Police Officer should or should not be admitted cannot be answered clearly against the accused, it is safer and proper to reject it. I, therefore, refuse to allow the accused to be questioned in the manner proposed.

**Proctors :—**

*E. C. S. Karunaratna*, for the accused (Fernando)

*Present:* SOERTSZ, S. P. J.

## FERNANDO vs REX

*Application for the transfer of S. C. No. 22/M. C. Panadure 1937, from the Kalutara Assizes to the Colombo Assizes.*

Argued on 22nd November, 1939.

Decided on 23rd November, 1939.

*Courts Ordinance (Chapter 6) section 42—Power of Supreme Court to transfer a case from one place to another place in the same circuit—Revised Edition of the Legislative Enactments Ordinance (Chapter 1)—Effect of repealed provision appearing in the Revised Edition of the Legislative Enactments.*

Where a portion of section 42 of the Courts Ordinance, which had been repealed, appeared in the Revised Edition of the Legislative Enactments, and where the repealed portion of that section had not been expressly re-enacted by the legislature by a separate Ordinance.

**Held :** That the repealed portion of section 42 of the Courts Ordinance appearing in the Revised Edition of the Legislative Enactments was law by virtue of section 10 of the Revised Edition of the Legislative Enactments Ordinance.

*D. D. Athulathmudali* with *A. C. Gooneratne*, for the accused-petitioner.

*C. S. Barr Kumarakulasingham, Crown Counsel*, for the Attorney-General.

SOERTSZ, S. P. J.

This is an application by an accused person for the transfer of the case pending against him in the Assize Court presently sitting at Kalutara, to the Assize Court in Colombo in the same circuit.

The application is based on the allegation made by the petitioner that he fears that he will not have a fair trial " before a Jury selected from the residents of Kalutara " because, " the Kalutara District is predominantly Buddhist and seventy-five per cent of the Jurors are Buddhists," and because the " witnesses for the prosecution allege " that the accused " cut down a Bo-tree on the evening prior to the date of the incident."

Mr. Athulathmudali while appearing in support of this application, submitted that in view of the ruling by de Kretser, J. in the case of *The King vs Thenis Silva* (38 N.L.R. page 332), he had to concede that the Supreme Court has no power to transfer a criminal case pending before it from one Court to another on the ground that a fair and impartial trial cannot be had in any particular court or place, and that, for that reason, he had nothing more to say in regard to the application. He referred to the case of *The King vs Grenier*, but he seemed to suggest that in view of the ruling in the case of *The King vs Thenis Silva* I acted without jurisdiction when a few days

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ago I allowed a transfer on this ground on an pplication made by the accused in the case of *The King vs Grenier* on the Attorney-General consenting to the transfer of that case.

Now, the case of *The King vs Thenis Silva* and others came before de Kretser, J. in the year 1936 and in refusing the application he pointed out that section 46 of the Courts Ordinance was repealed by Ordinance No. 1 of 1900 in so far as it related to the transfer of cases. Section 46 enacted that, "whenever it shall appear to the Supreme Court or to a judge thereof, at Colombo or elsewhere that a fair and impartial trial cannot be had in any particular court or place....., the said court or such judge thereof as aforesaid may make order upon such terms as to payment of costs or otherwise.....for the transfer of any prosecution, matter or thing depending before the Supreme Court in its original jurisdiction from any circuit to any other circuit, or to any other place in the same circuit....."

As pointed out by de Kretser, J. once that section was repealed there was no express provision authorising the Supreme Court upon an application made by a person other than the Attorney-General to transfer a case on the ground that a fair and impartial trial could not be had in any particular court or place, and if I may respectfully say so, de Kretser, J. rightly refused the application made to him by the accused in that case. Section 422 (1) (*a*) of the Criminal Procedure Code is of no avail because that section is limited to enquiries or trials pending before any Criminal Court subordinate to the Supreme Court.

But, we are now in the year 1939, and it seems to me that the position has altered, although in a strange and unexpected manner, and the Supreme Court is once again vested with the power that section 46 of the Courts Ordinance gave it. In the Legislative Enactments of Ceylon (Revised Edition, 1938), I find chapter 6 volume 1 is an Ordinance "to amend and consolidate the Laws relating to courts and their powers and Jurisdiction," and section 42 of this Ordinance is identical with section 46 of Ordinance 1 of 1889 which Ordinance 1 of 1900 repealed to the extent I have indicated.

So far as I have been able to discover there is no legislative enactment between the year 1900 and the issue of the Revised Edition of Legislative Enactments 1938, which re-enacts the repealed section 46 of Ordinance 1 of 1889. The re-introduction of section 46 into the Statute Book as section 42 of chapter 6 of the Revised Edition appears to be the act of the Commissioner appointed for the purpose of preparing the new and revised edition of the Legislative Enactments.

The Commissioner is given certain powers by Ordinance No. 19 of 1937 (chapter 1 of the Revised Edition of the Legislative Enactments). I have examined these powers carefully but I do not find any power or authority conferred on the Commissioner to re-introduce a repealed law. Nevertheless, it seems to me that section 42 although put upon the Statute Book without any apparent authority, must be regarded as an existing part of our

Statute Law. The requirements of section 10 (1) and 10 (2) have been complied with and by virtue of section 10 (3) this Revised Edition must now "be deemed to be and shall be without any question whatsoever in our courts of justice and for all purposes whatsoever, the sole and only proper Statute Book of Ceylon in respect of the Legislative Enactments therein contained....." When the State Council passed the resolution referred to in section 10 (2) and the Governor in accordance with that resolution made this proclamation, section 42 of chapter 6 of the Revised Edition became part and parcel of the Statute Law of this Island.

In my view, therefore, the Supreme Court has at present authority to order a transfer of a case pending before it in the manner the accused in this case asks for it to be transferred, and the application by the accused in *The King vs Grenier* was properly allowed. But I refuse the application in this case now before me, because, I am not at all satisfied that the reasons given by the accused for alleging that he fears that a fair and impartial trial cannot be had in Kalutara, are good or sufficient reasons for ordering the transfer of this case.

*P.S.*—It has been pointed out to me after I made this order that section 10 (3) of the Revised Edition of the Legislative Enactments Ordinance has been replaced by a new sub-section (3) the effect of which is to substitute for the words "the sole and only proper Statute Book of Ceylon.....," the words "the sole authentic Edition of the Legislative Enactments in this Island, so far as therein contained."

*Application refused.*

**Proctors :—**

*E. C. S. Karunaratne*, for the accused-petitioner. (Fernando)

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*Present:* DE KRETSER, J.

## PERIANEN KANGANY vs EBBELS

*S. C. No.* 393—*M. C. Hatton* 9272

Argued and decided on 8th December, 1939.

*Criminal Trespass—Failure to specify intention in the charge—Estate Labour (Indian) Ordinance (Chapter* 112) *Section* 5*—Notice to terminate contract of service—Computation of time—Is tenancy of free room separate from contract of service—Can a Superintendent of an estate be said to be in occupation of the rooms in the lines to enable him to maintain a charge of criminal trespass.*

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**Held :** (i) That in a charge of criminal trespass the mere omission to use the words " with intent to cause annoyance " cannot be said to prejudice an accused person if all the facts from which such an intention could be inferred are set out in the charge.

(ii) That under section 5 of the Estate Labour (Indian) Ordinance (Chapter 112) an employer can give on any day of the month notice of his intention to terminate a labourer's services at the expiry of a month from that date.

(iii) That where a tenant is given a free room as part of his contract of service when the contract is terminated everything that flows from it also ends.

(iv) That a Superintendent of an estate is by virtue of his office in occupation of the whole estate which is under his control and may therefore prosecute for criminal trespass a person who remains in possession of a room after whose right of occupation has been lawfully determined.

*S. Aiyar* with *M. Balasunderam*, for accused-appellant.

*H. V. Perera, K.C.* with *V. F. Gunaratne*, for complainant-respondent.

DE KRETSER, J.

This is an appeal on points of law which have been elaborated in view of the concession given by my brother Wijeyewardene. Mr. Perera objected to the points of law now raised as not complying with my brother's order, but I think most of them do and the only one to which exception may be taken is the third, which states in very general terms that the notice to quit is not valid in law. I think the point of law when certified should have stated for what reason it was alleged that a notice was not valid. However, the whole matter has been argued. I have not called upon the respondent because it seems to me that the points of law do not require very serious consideration. The first is that the charge is defective inasmuch as it does not mention specifically the intention with which the accused remained on the premises. It is true the charge does not use the words " with intent to cause annoyance," but it does more. It sets out all the facts from which the inference would be that the intention was to cause annoyance. One ordinarily judges of a person's intention from the facts and circumstances proved, and I do not think the accused could have been prejudiced merely because the charge, instead of saying that he remained on the estate with intent to cause annoyance, proceeded to state the facts from which that annoyance might be inferred. As a matter of fact the charge does say that he remained there to the annoyance of the Superintendent ; so that the fact that annoyance to the Superintendent and not insult or intimidation was the ingredient in the charge would have been known to his lawyers, and I do not think the technical defect in the charge either misled the accused in his defence or entitles him to claim an acquittal on that ground.

The second point taken is that the intention has not been proved and cannot be inferred, but I am afraid there is no way of proving intention except by proving facts and circumstances from which one can infer it. I believe the contention is that the Superintendent ought to have stated that the accused did what he did, with intention to cause annoyance. But it was not for the Superintendent to state what the accused's intention was. It was within his province to state the facts and it was within the province

of the Magistrate to find whether there was the intention or not, otherwise the Magistrate would merely be surrendering his judgment to the Superintendent.

The third point taken is that the notice which was given was insufficient inasmuch as it was given and was expected to begin on the 7th day of April and not from the 1st day of May. The argument is that because section 5 of chapter 112 of the Ordinance states that a labourer's contract shall be taken in law to have been entered into as a contract of service for a period of one month to be renewed from month to month, and as he is paid at the end of each month and is given food sufficient for the month, therefore the notice must also begin with the month. But the provision regarding notice, which is contained in the latter part of the same section, expressly states that it is sufficient to give notice to determine the contract at the expiry of one month from the day of giving such notice. This clearly means that notice can be given on any day in the month and that the contract will be terminated at the expiry of a month from that date. It is a provision as much in the interests of the labourer as of the employer. In the case of *Burne vs Munisamy* (21 N.L.R. p. 193) a similar decision was given on a corresponding provision in Ordinance No. 11 of 1865 by a Bench of two Judges to whom the matter had been referred. The reasoning in that judgment is binding upon me and, if I may say so, I am in complete agreement with it.

The fourth point taken is that the labourer is entitled to have free quarters, and that therefore he is a tenant of a room in the lines and that his tenancy of that room must be separated from his service and must be separately determined. If the tenant is given a free room as part of his contract of service, it follows that when that contract is terminated everything that flows from it also ends.

The accused was under no illusion as to the nature of his obligations, for all he could do was to deny that he ever received notice, and I should be very surprised if a sub-kangany on an estate did not know the law affecting himself and the coolies he employs.

The next argument is that the complainant is not the occupier of the room and therefore cannot initiate these proceedings. The complainant is the Superintendent of the estate and is by virtue of his office in occupation of the whole estate which is under his control. He may allow different people to occupy different parts of the estate for various purposes, but so long as their right of occupation has been lawfully determined he has a right to resume possession and if he is prevented from doing so he has a right to prosecute the person who remains in possession, provided he has one of the intentions provided for in section 427.

The last point taken is that the evidence does not prove that the accused intended to annoy the Superintendent. A man is taken to intend the natural consequences of his act, and when a person is given notice to quit and does not quit and persists in staying in spite of being advised by a person

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who attends to his interests, I think it is idle to contend that he did not intend to annoy.

In my view therefore, every one of the points of law taken fails.

Another point which was not taken but was merely touched upon was that his wife had a right to remain on the estate. That is a matter which does not arise in this appeal, and if his wife had a right to remain on the estate no one has sought to interfere with that right. Besides, the accused was signally silent on the point in the lower court and in the papers which he has filed for revision. In the lower court he stated that his wife was expecting to be confined within the course of the month and that he was willing to leave after that event. There is nothing to indicate at what time he did leave, and his affidavit which he has filed indicates that he waited until he was able to find other employment. In other words, he remained on the estate as long as he pleased to remain notwithstanding the notice which was given to him. I see no reason, therefore, to interfere by way of revision.

The appeal is dismissed.

*Appeal dismissed.*

**Proctors :—**

*Messrs. F. J. & G. de Saram*, for complainant-respondent. (Ebbels)

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*Present:* DE KRETSER, J.

## HARAMANIS APPUHAMY vs WICKREMASINGHE AND ANOTHER

*S. C. No.* 125—*C. R. Galle* 18785.

Argued on 30th November, 1939.

Decided on 7th December, 1939.

*Civil Procedure Code* (*Chapter* 86) *section* 214, 833 *and Second Schedule Part III—Charges in bill of costs in respect of expert witness—Right of Commissioner of Requests to determine witness' expenses.*

**Held :** (i) That a Commissioner of Requests is bound to examine the charges claimed in a bill of costs in respect of witnesses and to express his decision thereon.

(ii) That the Commissioner of Requests may at the time of judgment or thereafter determine any of the matters in Part III of the Second Schedule of the Civil Procedure Code reserved for his determination.

Per DE KRETSER, J.—" Section 833 assumes an *ex parte* taxation of a bill of costs and expenses and as such expenses must be determined by the Commissioner, the most appropriate time for him to do so would be at the conclusion of his judgment. If it is done thereafter, the party moving should move with notice to the opposite party and only include the item in his bill after the decision of the court has been given."

*J. E. M. Obeyesekere*, for plaintiff-appellant.

*H. V. Perera, K.C.* with *E. A. P. Wijeyeratne* and *Senanayake*, for defendants-respondents.

DE KRETSER, J.

This is an appeal from an order made by the learned Commissioner regarding charges in a bill of costs with respect to an expert witness, an Engineer in the Irrigation Department. Many points have been taken, all of them connected with the procedure to be adopted.

Most of the reported cases deal with bills of costs in a District Court, and none of them has considered the effect of section 833 which deals specially with Courts of Requests.

I shall briefly review the legislation on this point.

Courts of Requests were established by Ordinance No. 14 of 1843 which limited their jurisdiction to £5 and enacted that there were to be no written pleadings. The Supreme Court was empowered to make rules and did so in 1844. Most of the steps in a case were controlled by a "Clerk of Court" and he was required by rule 23 to "tax the necessary costs and expenses of the suit against the party to be charged therewith." There was no schedule of costs.

Ordinance No. 9 of 1859 made further provision and new rules came into force in 1860. Rule 35 with regard to costs is substantially the same as section 833 of the existing Code. We now get a schedule and definite amounts are fixed according to the value of the action. No additional costs were provided for advocates and "batta of witnesses was at the discretion of the Commissioner and according to the circumstances of each witness."

When the existing Code came into operation there existed a schedule of costs for Courts of Requests, and this schedule provided for review and appeal with regard to charges for surveys and plans and also gave the Commissioner power to allow a further sum of costs on special application, his order being subject to appeal. Then came the present schedule.

The above summary indicates that taxation of costs in Courts of Requests was in a class distinct and separate from taxation of costs in the District Courts; and while section 214 is of general application and specifically mentions Courts of Requests, section 801 expressly enacts that the following special rules of procedure shall be taken as limiting and controlling the general provisions. The general rules may apply when they are not inconsistent with the special rules. It seems to me that section 833 taken with the present schedule makes ample provision and that section 214 will have no application to the taxation of costs in a Court of Requests except in very rare cases. Section 833 requires the chief clerk to tax costs according to the rates *specified* in the schedule. Those rates are specified with respect to the charges to be allowed for proctors and advocates. There is no multiplicity of items and no difficulty in applying the schedule and

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really there is very little for the clerk to do. It should not be necessary to bring up such a bill in review before the court unless the clerk were utterly incompetent or dishonest and legislation cannot proceed upon such assumptions. There may, however, be such a case as was dealt with in *Samarasinghe vs Babunhamy* (1 C.W.R. 131).

The schedule then proceeds to make provisions for certain other items, and two of these, *viz.* the costs of surveys and plans and the costs of incidental proceedings, are placed solely within the discretion of the Commissioner and a right of appeal is given from his ruling. With regard to " witnesses' expenses " these were left to be determined by the Commissioner and no right of appeal is allowed. Obviously the Commissioner is not expected to review his own decision in these matters, and where a right of appeal is given it is to be inferred that he will have both parties before him so that the party dissatisfied may appeal from his order. Section 833 assumes an *ex parte* taxation of a bill of costs and expenses, and as such expenses must be determined by the Commissioner, the most appropriate time for him to do so would be at the conclusion of his judgment. If it is done thereafter, the party moving should move with notice to the opposite party and only include the item in his bill after the decision of the court has been given.

With regard to witnesses' expenses, there can be no objection to a scale being adopted for general use, and this is usually done. In such cases the items are predetermined by the Commissioner. But what of a special type of witness ? Here again the Commissioner must decide, and he must use his discretion in a judicial manner. With regard to the items where an appeal is given, he is expressly required to allow only reasonable charges. Section 208 defines " costs " and the whole of the expenses necessarily incurred are allowed. In illustrating what is meant certain items are specified, and the section originally had " charges of witnesses " but by section 2 of Ordinance No. 39 of 1921 these words made way for " such just and reasonable charges as appear to have been properly incurred in procuring evidence and the attendance of witnesses." The Commissioner therefore has guidance for the exercise of his discretion. No doubt he would ordinarily hear both parties on any special matter. He is required to determine the expenses, and that seems to imply hearing both parties first ; but when he acts *ex parte* I can see no reason why any dissatisfied party should not apply to him to reconsider his decision. That procedure would be justified by the ordinary rule that when an order is made *ex parte* the party dissatisfied should in the first instance apply to the person who made the order. In the present case the Commissioner had nothing to do with fixing the amount of Mr. Webb's charges. These appear to have been fixed by Mr. Webb himself. But eventually the matter did come up before the Commissioner and if I were satisfied that he did exercise his discretion properly I should not be inclined to interfere. I do not think for the reasons I have already given, that the question had first to be raised before the chief clerk and to

be referred by him to the Commissioner and that this defect in procedure is fatal in view of the decision in *Mohamed vs Deen* (8 Law Recorder 174). I do not think the clerk's action was so irregular as to render all proceedings and in fact the bill itself, a nullity, nor do I think the Commissioner's decision must necessarily be given at the time he gives judgment or at least before the bill is presented for taxation. I do think that if the matter came up before him and he decided it there is no right of appeal but there is always a right in this court to revise proceedings when discretion has not been properly exercised.

In the present case the matter came before the Commissioner by way of review when conceivably his attitude towards the bill may have been different to what it would have been had the matter come before him originally. In the next place he says the item is excessive but seems to indicate that his hands were tied because Mr. Webb's evidence was very useful and therefore the expenditure was necessarily incurred. This is a *non sequitur*. Behind this reasoning is the idea that Mr. Webb's bill has been prepared in accordance with regulations by which he is bound. The financial regulation quoted by the Commissioner does not imply that the officer is obliged to follow any scale of fees, nor does the circumstance that the bill was sent through the Head of Mr. Webb's Department indicate either approval of the bill or that it has been prepared in accordance with regulations. These are matters regarding which there ought to be evidence. There is no evidence of what the agreement between defendant and Mr. Webb was when he engaged his services. Mr. Webb's letter indicates that he sent in his bill on 23rd September 1938 and that defendant accepted it by his letter dated 30th September [illegible] *i.e.* the date of the trial. Why everything was left to the last moment [illegible]plained. Mr. Webb presumably had to get permission to do privat[illegible] and would be approached much earlier ordinarily.

In view of the Financial Regulation quoted by the Commissioner the statement in the letter that the fees are due to Government requires to be read with some qualification. As I am sending the case back I shall not say anything about the items in the bill. It will be best perhaps if the matter is put before another Commissioner.

With regard to the order made regarding the batta bills presented by the 1st defendant in his capacity as a witness I am unable to say the Commissioner's decision is wrong. There is every reason to believe that the 1st defendant attended court and gave evidence in his own interests and that there was no obligation on his part to do so. It seems to me that our Code makes special provisions on this point and throughout draws a distinction between a party and a witness. Section 141 deals with the position of a party who is required to give evidence. Section 122 *et seq.* only provide for witnesses' costs being paid and deposited or secured in advance, and do not provide for their attending voluntarily and then charging.

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The Commissioner says it has not been the practice for a party who gives evidence to charge for expenses, and my own experience corroborates him on this point. It would be unfortunate to depart from so inveterate a practice, especially in a Court of Requests where the policy has been to keep down costs.

The case of *Howes vs Barber* (18 Q.B. 1852 page 588) quoted by Mr. Perera was decided in 1852, and dealt with the facts of that particular case. Lord Campbell, C.J. said : " No doubt the practice of allowing costs to the successful party in respect of his having been a witness for himself may lead to inconvenient consequences, but we do not think we can lay down a rule that such costs can never be allowed..... We must trust to the intelligence and the vigilance of the taxing-officers to defeat and to frustrate attempts that may be made to swell costs unnecessarily under the pretext that the parties were material and necessary witnesses. The simple fact of their being examined as witnesses must by no means be considered sufficient to establish a claim for their expenses as witnesses ; and if it appears that their attendance was unnecessary, or that they attended to superintend the conduct of the cause, the claim ought to be rejected."

It is to be noted that 15 & 16 Vict. c. 86 was not then in existence and that in 1858 when the case of a party claiming expenses did arise it was decided on the provisions in the Act which provided that a party requiring to cross-examine a witness on his affidavit should pay the expenses. The case was *Davey vs Durrant* (24 Beav. 493). In that case the party refused to be sworn or cross-examined until his expenses were paid by the party who had required his attendance and the c[illegible] held that he was in the same position as a witness and was covered [illegible]ct.

But while the principles recognise[illegible] in t[illegible]ese cases might possibly be applied in appropriate cases, I think that our Code has made ample provision on the subject. In any case it is impossible to say that the Commissioner exercised his discretion wrongly.

The order with regard to Mr. Webb's charges is set aside and the case sent back for fresh consideration of this point.

There will be no costs of this appeal, and the costs of further proceedings will be in the discretion of the learned Commissioner.

*Order set aside.*

*Present:* DE KRETSER, J.

## PERERA vs RAJAKARIYA

*S. C. No.* 590—*M. C. Negombo* 25567.

Argued and decided on 8th December, 1939.

*Motor Car Ordinance No. 45 of* 1938—*Regulation 2 of First Schedule—Meaning of the expression "rear of the body" in the definition of the word "overhang" in regulation* 30 *of the First Schedule—Should the length of the rear flap door of a motor lorry when opened be taken into account in measuring its "overhang."*

**Held :** That the length of the rear flap door of a motor lorry when opened should not be taken into account in measuring its overhang.

Per DE KRETSER, J—"In my opinion the body of a car must be measured with its doors closed, because otherwise whenever a car or lorry door is left open an offence may be committed."

*S. W. Jayasuriya*, for accused-appellant.

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

DE KRETSER, J.

Section 2 of the first schedule of the Motor Car Ordinance No. 45 of 1938 makes provision regulating the dimensions of motor cars used on a highway outside Colombo. It provides for the width of a car including the load. It provides for the height including the load. It provides for a wheel-base, and wheel-base is defined in section 30 of the schedule. Then it also provides that the overhang of any motor car must not exceed a certain space, and in a proviso the Commissioner is authorised to permit the use of motor cars with overhangs in excess of the above limits.

If the Ordinance had ended there, there might have been some doubt as to the interpretation of the word "overhang," but the word was defined in the repealed Ordinance in exactly the same way as it is defined in section 30 of the schedule; and that definition makes it "the horizontal distance between a vertical line drawn through the centre of the rear axle and a vertical line drawn at the extreme end of the rear of the body." Even if the expression had been "rear of the car" I do not think there could have been any doubt as to the meaning of the words; but the expression here used is "rear of the body" and quite obviously the word "body" is used in its ordinary significance. The Ordinance is one which is meant to regulate everyday affairs, and which quite simple people will have to comply with, and the ordinary rule of interpretation that the popular meaning must be

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given to a word must be adhered to. I do not think any ordinary person would imagine that the flap door of a car formed an extension of its body when that flap door was opened.

What the accused in this case seems to have done was to let down the flap door of the lorry and to have loaded goods on the flap door so lowered. That may or may not be an offence regarding the loading of lorries, but I do not think it can be taken as constituting an offence against section 2 which only regulates the dimensions of a motor car.

The section made provision for loads which might be included in the width or height. It made no provision for including a load in an overhang. In section 11 (6) there is provision made for the load of a motor car projecting behind the car, so that apparently the legislature did not object to the load of a car projecting behind the back of the car when it was defining in section 2 the dimensions of a car.

In my opinion the body of a car must be measured with its doors closed, because otherwise whenever a car or lorry door is left open an offence may be committed.

I set aside the conviction and acquit the accused.

*Conviction set aside.*

**Proctors :—**

*C. B. Dias*, for accused-appellant. (Perera)

*Present :* LORD RUSSELL OF KILLOWEN, LORD ROMER AND SIR GEORGE RANKIN.

## EBRAHIM LEBBE MARIKAR vs ARULAPPA PILLAI

*Privy Council Appeal No. 22 of 1938.*

Decided on 19th May, 1939.

*Wagering contracts—Forward contracts for the purchase and sale of rubber on the understanding that there should be no delivery or acceptance of the rubber—Contract performed by the payment of the difference between the contract price and the market price on the due date—Bond granted in respect of payment of differences—Is bond enforceable—No evidence that the defendant intended the contract to be a wagering contract.*

**Held :** (i) That where the plaintiff entered into a contract to buy and sell rubber forward, the mere fact that the plaintiff performed the contract by the payment of the difference between the contract price and the market price on the due date does not make the contract a wagering contract in the absence of proof that it was a term of the arrangement between the plaintiff and the defendant that no rubber was to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of the differences.

(ii) That a bond granted for the purpose of securing the payment to the plaintiff of a sum owing to him by the defendant in respect of some of such differences was enforceable.

*L. M. D. de Silva, K. C.* and *R. K. Handoo,* for the appellant.
*Stephen Chapman,* for the respondent.

LORD ROMER

This is an appeal from a decree of the Supreme Court of the Island of Ceylon dated the 27th September, 1937, affirming a decree of the District Court of Colombo dated the 6th February, 1936, in an action brought by the respondent against the appellant. The action was founded upon a mortgage bond dated the 21st March, 1930, executed by the appellant in favour of one H. B. Phillips and assigned by Phillips to the respondent on the 16th April, 1930. By his answer to the respondent's plaint the appellant raised various defences of which the only one now material to be considered is as follows. He alleged that he and Phillips, who is a broker, entered into certain forward contracts for the sale and purchase of rubber on the understanding that there should be no delivery or acceptance of the rubber purported to be sold or bought but that the contract should in each case be performed by the payment of the difference between the contract price and the market price on the due date, and that the bond in question was granted for the purpose of securing the payment to Phillips of a sum then owing to him by the appellant in respect of some of such differences. The appellant, in other words, was alleging that the bond in question was given for the purpose of

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securing money due from him to Phillips under a wagering contract and was in consequence unenforceable. This defence was rejected by the District Judge, and on appeal by the Supreme Court.

It is not contended by the appellant that any misdirection as to the law applicable to the case is to be found either in the judgment of the District Judge or in that of the Supreme Court. All that he alleges is that both Courts arrived at an erroneous conclusion of fact in finding, as they did, that no such wagering contract was ever entered into between Phillips and the appellant. But in the face of such concurrent findings of fact in the Courts below it is incumbent upon the appellant to satisfy their Lordships without any shadow of doubt that such findings were erroneous. This in their Lordships' opinion the appellant has failed to do.

It is true that the appellant from time to time entered into forward contracts for the purchase of rubber from or through Phillips in such large quantities as to suggest that he did not intend that all of it or even the larger portion of it would ever be taken up by him. His intention no doubt was to resell the rubber before the date of delivery, hoping of course to resell at a profit. His hopes in this respect were seldom realised, but in the large majority of cases the resales were effected although at a loss. When therefore he had in his evidence before the District Judge that he never intended to take or deliver the rubber his evidence may be accepted. But it takes two to make a wagering contract, and if the appellant is to succeed he must show that it was a term of the arrangement between him and Phillips that no rubber was to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of differences. The answer to the question whether there was such an arrangement or not must obviously depend upon the oral evidence given by the appellant and Phillips. Certainly there was none in writing. As to the oral evidence the learned District Judge said this :

> " The Defendant states that it was not intended that there should be any delivery of rubber but that he had arranged with Mr. Phillips that it was only the difference in price that was to be accounted for. Mr. Phillips denies this. I cannot for a moment believe that Mr. Phillips himself entered into any wagering contract. He was merely concerned to earn his brokerage...."

Then a little later he said this :

> " It is quite conceivable that a rubber dealer may buy a quantity of rubber under a forward contract and if before the date of delivery he finds it advantageous to himself to sell he would sell, so that in the result he does not actually handle the rubber. Mr. Phillips has stated that in all these contracts there was the rubber actually in existence, delivery being ultimately made to the final purchaser who chose to take delivery instead of in his turn selling beforehand."

And again :

> " This is not a case of buying and selling without the actual article being available. The article was always available for delivery."

The same view of the evidence was taken by the Supreme Court. Hearne, J. in whose judgment Maartensz, J. concurred, after pointing out

that the District Judge had expressly rejected the evidence of the appellant upon the matter, said :

> " Of the two witnesses Mr. Phillips and the Defendant the judge has believed the former, that the contracts were not wagering contracts and that therefore the transactions between them did involve the obligation to take up or deliver rubber contracted to be bought or sold."

He then referred to certain parts of the evidence given by Phillips and the appellant and summed it up by saying that in his opinion the Judge was justified in rejecting the defence set up. The appeal was accordingly dismissed with costs.

The District Judge had the great advantage of hearing the evidence of these two witnesses at first hand and of observing their demeanour in the witness box. Having done so he unhesitatingly accepted the evidence of Phillips in preference to that of the appellant whom he was unable to regard as a witness of truth. In these circumstances it would be quite impossible for their Lordships to differ from the conclusions at which he arrived, even if, and this is very far from being the case, they felt inclined so to do on an examination of the printed evidence before them. In these circumstances their Lordships are of opinion, and will humbly advise His Majesty, that the appeal should be dismissed.

The appellant must pay the respondent's costs of the appeal.

*Appeal dismissed.*

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

## THE FISCAL (C. P.) vs NALLIAPPA CHETTIAR

*S. C. No.* 173—*D. C. (I) Kandy* 43957

Argued on 15th November, 1939.

Decided on 23rd November, 1939.

*Stamp Ordinance (Chapter* 189)—*Payment of poundage on the value of property sold by the Fiscal in execution of a mortgage decree—Meaning of the word " value " in schedule A part II head F (miscellaneous) item (a) of the Stamp Ordinance.*

The judgment-creditor in a mortgage action had been given permission to bid for and purchase the mortgaged property subject to the condition that " in the event of his becoming the purchaser thereof which shall be for not less than his claim and interest or in full satisfaction of his claim and interest he shall be given credit to the extent of his claim and costs."

The highest bid at the auction sale was a bid of Rs. 49,500/– from the mortgagee. The amount due to him in the suit was Rs. 99,827/–.

**Held :** That the value of the property for the purposes of poundage payable under item (*a*) head F of part II of schedule A to the Stamp Ordinance (Chapter 189) was Rs. 99,827/–.

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Hearne, J.

The Fiscal (C.P.) *vs* Nalliappa Chettiar

*E. F. N. Gratiaen*, for the appellant (Fiscal, Central Province).

*N. Nadarajah*, for the plaintiff-respondent.

*S. J. C. Schokman*, *Crown Counsel*, on behalf of the Attorney-General as *amicus curiae*.

HEARNE, J.

The mortgagee (judgment-creditor) had been given permission to bid for and purchase the mortgaged property subject to the condition that " in the event of his becoming the purchaser thereof, which shall be for not less than his claim and interest or in full satisfaction of his claim and interest, he shall be given credit to the extent of his claim and costs."

The highest bid at the auction sale was that of the mortgagee *viz.* Rs. 49,500/–. The amount due to him in the suit was Rs. 99,827/–. The point in the appeal is whether the value of the property sold for the purpose of levying fees and poundage is Rs. 49,500/– or Rs. 99,827/–.

The value of a property is the price which the purchaser pays for it when sold. What was the price paid by the mortgagee. It shall not, according to the condition imposed, be *less* than Rs. 99,827/– *or* it shall be for a sum which satisfies the full claim and interest of the mortgagee.

In other words it may be more than Rs. 99,827/– if it was necessary for him to bid so high, or if it was not necessary to go up to Rs. 99,827/–, it must be that sum. Less it cannot be. The wording of the condition is unhappy but this is the sense I make of it.

In my opinion, fees and poundage should be levied on Rs. 99,827/–.

I also think the plaintiff-respondent's remedy, if any, was not by motion in the lower court but by separate action.

I would allow the appeal with costs.

DE KRETSER, J.

I agree that the appeal should be allowed with costs. I prefer to rest my decision on the second ground taken by my brother. In my opinion section 344 of the Civil Procedure Code has no application to the circumstances disclosed in this case. This does not mean that I disagree on the first point.

*Appeal allowed.*

**Proctors :—**

*Leichung & Lee* for appellant.

*Beven & Beven* for respondent.

*Present:* DE KRETSER, J.

## DEONIS APPU vs GUNAWARDENE

*S. C. No.* 25—*C. R. Galle* 18783
Argued on 9th November, 1939.
Decided on 15th November, 1939.

*Mortgage bond by two persons—Joint and several liability—Payment by one debtor of his share of liability—Assignment of the bond—Bond put in suit by assignee against the other debtor—Sale in execution—Merger—Assignment of decree in favour of purchaser—Can such purchaser bring a hypothecary action against the other debtor.*

In 1929 J and A bound themselves jointly and severally with W to pay Rs. 75/– with interest. To secure payment they hypothecated property. In 1935 J paid half of the debt *viz.* Rs. 75/–. Later W assigned the bond and "the sum of Rs. 150/– due upon the bond" to K. K sued A on the bond and obtained decree and at the sale in execution the present plaintiff bought the rights of A. Then on an order of court K executed a conveyance of the decree and all his rights on the bond in favour of the present plaintiff.

Thereafter the present action was brought against J for Rs. 150/– praying for a hypothecary decree over the share of J.

Held : That the plaintiff had no cause of action against J.

*S. W. Jayasuriya*, for plaintiff-appellant.

*C. V. Ranawake* with *Kottegoda*, for defendant-respondent.

DE KRETSER, J.

The facts of this case are these :

Don Johanis Gunawardene and Don Andris Gunawardene, on the 8th July, 1929, bound themselves jointly and severally with one Wilmon to pay the sum of Rs. 75/– with interest thereon at the rate of 18 per centum per annum. They hypothecated property.

Don Johanis Gunawardene on the 1st July, 1935, paid Wilmon half of the debt (*viz.* Rs. 75/–) and transferred the property he had hypothecated to one Nikulas Gunawardene for Rs. 100/– the same day.

There was still due and recoverable on the bond Rs. 75/–.

On the 18th of August, 1935, Wilmon assigned to one Karnelis *alias* Podiappuhamy Gunawardene "the bond and the sum of Rs. 150/– now due upon the said bond" — though the recitals state that he had arranged to assign his rights on the said bond. All he could assign were his rights on the said bond, *viz.* the right to recover Rs. 75/–. It will be noted that all the parties except Wilmon bear the same family name — Karnelis was the brother of Nikulas, who had bought Don Johanis' rights.

Karnelis next sued Don Andris in C. R. Galle 17128, and it would appear that he obtained a decree, the date of which is stated in P4 to be 28th October, 1936,

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de Kretser, J.

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Meanwhile the present plaintiff bought in execution the rights of Don Andris in the property hypothecated. He then moved the court in C.R. 17128 stating that the plaintiff in that case had sued only one mortgagor and had thereby waived the other, thereby releasing the entire debt, and that at best he could recover was only half. He asked for an inquiry.

The plaintiff had not at that date obtained a Fiscal's transfer.

On 27th January, 1937, the court ordered Karnelis to execute a conveyance of the decree and of all his rights on the bond, and accordingly a conveyance was executed. The present plaintiff then moved to be substituted as plaintiff and his application was allowed, the court expressly limiting his rights on the decree to the terms in which the decree had been executed. He therefore now had a decree against Andris for Rs. 150/– with a hypothecation over the property he had purchased. Quite clearly the hypothecation was extinguished by merger. He had by his own act converted the mortgage decree into a money decree against Andris.

He then brought the present action against Don Johanis Gunawardene for Rs. 150/– and sought a hypothecary decree for that amount over the share Don Johanis had owned. The defendant denied that any money was due on the bond and claimed that plaintiff was barred from bringing this action. He also questioned the validity of the court's order and of the assignment.

The only issue was whether plaintiff was entitled to enforce his claim on the conveyance in his favour. The learned Commissioner held against the plaintiff.

At the hearing in this court, counsel were unable to refer to any precedent in point and argued the case rather on general lines. The case of a joint contract is quite different; so is the case of joint tort feasors. The writers on Roman-Dutch Law do not seem to have contemplated joint and several liability; with them liability was joint or it was several, *i.e. in solidum*. In the present case the liability was both joint and several. What did that mean? It meant that the creditor might enforce his claim against the debtors either jointly or severally, not jointly as well as severally. He did not sue on the joint liability. There remained the several liability, and he could enforce his claim against either debtor; he had a sufficient cause of action against each. But he could not sue both of them at the same time in separate actions for the full sum; he had to elect. As Nathen puts it — (Volume II page 563):

> "Two persons are said to bind themselves or become joint-debtors (or co-principal debtors) on a contract or agreement when they promise *singuli in solidum* at one and the same time, the same thing, as principals, with the intention that they shall be separately liable for the whole of the same, but that they shall not be liable jointly for more than the same thing. .....but, as one thing is the subject of the contract, payment by one co-principal debtor puts an end to the obligation..... A creditor may elect whom of several co-principal debtors for the same thing he shall call upon for payment of the same amount.....If one co-principal debtor has been called upon for payment of the whole amount and fails to satisfy the claim, the other co-principal debtors may be proceeded

against for that which the first co-principal debtor is unable to pay. If there are several joint-principal debtors and the creditor accepts from one of them who offers it, a certain portion of the debt in satisfaction of his liability, the creditor is not bound to divide his claim against the others, but may proceed against any one of them for the balance. But if the creditor has already called upon one or more of the co-principal debtors for his or their proportionate share of the debt, he cannot call upon the remaining co-principal debtors for a larger portion .....for in this case the creditor by dividing the debt into shares has renounced his right to proceed against one *in solidum*.....There is, however, one case where a renunciation of the benefit *de duobus vel pluribus reis debendi* will not absolve the creditor from suing all the principal co-debtors together, — that is, where it is sought to make mortgaged property executable, in which case the joint owners of the property must all be summoned."

Applying these principles, what have we got in this case ? Don Johanis paid his half of the debt and the creditor, Wilmon, accepted it. He did not expressly say he accepted it in full satisfaction of Johanis' liability and he later assigned the whole debt. He gave evidence, which was accepted, that he received the payment in full satisfaction of Johanis' liability. The position was that he could not sue for more than the balance nor assign greater rights than he owned, and he could sue only Don Andris. The assignee sued Don Andris for the full amount but he had no right to do so, and he certainly could not recover more than half from Don Johanis. At the best he had a choice as to whether he would sue both Don Johanis and Don Andris together or one of them. He elected to sue Don Andris. Once he elected to sue Don Andris he had no cause of action against Don Johanis until he had failed to recover from Don Andris. That he cannot recover from Don Andris has not been established and the circumstance that the present plaintiff had himself substituted as plaintiff and almost simultaneously brought this action indicates the contrary.

There is then no cause of action against Don Johanis and this action fails. But the case for the respondent can be put much higher. In the first place Wilmon had discharged Don Johanis ; in the next place Karnelis sought to have declared bound and executable only Andris' rights in the mortgaged property. The present plaintiff in his application to court stated that Karnelis had waived his rights against Don Johanis, but whether he waived his claim against Don Johanis or not he clearly divided the claim. The present plaintiff cannot go back to the original position.

Again, the rule with regard to mortgagors applied. Both mortgagors' property was liable even if each was liable to be sued, but you cannot make liable the property of a person whom you have not sued. Therefore both should have been sued together or each for his share only and once the separation had been made you cannot go back to the original position.

The appeal fails and is dismissed with costs.

*Appeal dismissed.*

**Proctors :—**

*F. W. J. de Vos*, for plaintiff-appellant.

*Sahied & Thair*, for defendant-respondent.

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

## MAARTENSZ vs MAARTENSZ

*S. C. No.* 310—*D. C.* (*F*) *Colombo* 201.
Argued and Decided on 14th December, 1939.

*Civil Procedure Code section* 615—*Decree for separation obtained by the husband—Can an order for alimony under section* 615 *of the Civil Procedure Code be made.*

**Held :** That where a decree for separation is obtained by the husband the Court has no power to order alimony to the wife under section 615 of the Civil Procedure Code.

*J. E. M. Obeyesekere* with *M. M. I. Kariapper*, for the plaintiff-appellant.

*J. E. A. Alles*, for the defendant-respondent.

HEARNE, J.

The plaintiff-appellant sued the respondent for divorce on the ground of desertion and alternatively for a judicial separation on the ground of cruelty. In his judgment the District Judge said: " As regards the claim put forward by the plaintiff that he was turned out of the house by the defendant on the 28th of December, 1936, I am not satisfied that his leaving the house was due to the fact he was chased away from the house by his wife. On the other hand, it seems to be more likely that as a result of a quarrel that took place that day the plaintiff made up his mind to end this unhappy life in the company of the defendant and left the house of his own accord." It is claimed on behalf of the appellant that on that finding he was entitled to a decree directing a divorce. With this I do not agree and so much of the appeal as asked for a decree for divorce must, therefore, be dismissed.

Another point was raised on appeal. The Judge has ordered the appellant to pay a consolidated sum of Rs. 40/- as alimony to his wife and as maintenance to his daughter and it is argued that an order for alimony cannot be made as the decree for separation was obtained not by the respondent but by the appellant. Section 615 of the Civil Procedure Code was referred to. The Judge's finding is that the appellant was entitled to a decree of separation on the ground of cruelty by the defendant-respondent and in my view it was therefore not possible for him in accordance with the provisions of section 615, harsh as those provisions appear to be, to have made an order for alimony in favour of the respondent To this extent, therefore, the appeal must be allowed. The view I have expressed flows as a corollary from the view taken of section 615, in so far as that section refers to a decree of dissolution of marriage, in a judgment of this court in *Ebert vs Ebert* (40 N.L.R. p. 388).†

† 13 C.L.W. 91

The appellant remains liable to pay maintenance to his daughter which I would fix at Rs. 20/- a month till she is 21 years of age. On her attaining 21 years of age, he may, of course, apply to the court and that portion of the decree will therefore be of no further effect.

There will be no order as to costs.

DE KRETSER, J.

I agree.

*Order varied.*

**Proctors :—**

*S. R. Ariyanayagam*, for plaintiff-appellant.
*E. A. de Silva*, for defendant-respondent.

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*Present:* DE KRETSER, J.

## ARIYANAYAGAM vs THANGAMMA

*S. C. No.* 494—*M. C. Jaffna* 6205

Argued on 6th December, 1939.

Decided on 13th December, 1939.

*Maintenance Ordinance—Order made by District Court in the exercise of its matrimonial jurisdiction making provision for the maintenance of the children of the marriage who were committed to the custody of the aggrieved spouse—Is the order a bar to proceedings under the Maintenance Ordinance.*

**Held :** That the order of a District Court made in the exercise of its matrimonial jurisdiction making provision for the maintenance of the children of the marriage is a bar to separate proceedings for their maintenance under the Maintenance Ordinance.

*S. Nadesan*, for defendant-appellant.
*H. W. Thambyah* with *A. C. Nadarajah*, for applicant-respondent.

DE KRETSER, J.

The question in this case is whether an order made by a District Court in the exercise of its matrimonial jurisdiction, making provision for the maintenance of the children of the marriage who are committed to the custody of the aggrieved spouse, operates as a bar to proceedings under the Maintenance Ordinance by the mother of the children against their father.

The Magistrate held that it did not, relying on the case of *Lamehamy vs Karunaratne* (22 N.L.R. 289) which he interpreted as meaning that all applications for maintenance must be made under the Ordinance and under the Ordinance alone. The Magistrate seems to have been of opinion that the order made in the District Court was of no value as having been made

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Hearne, J.

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without jurisdiction. This is not so. All that was decided in that case was that the Roman-Dutch Law on the subject had been superseded by the Maintenance Ordinance.

In matrimonial proceedings the District Court deals with all matters arising out of the marriage, and may provide not only for the maintenance of the children but also for their education and their custody.

It is not subject to some of the restrictions which exist in the Maintenance Ordinance. The District Court need not make provision for maintenance, nor is the wife obliged to ask for an order for maintenance. The court may make an order not in favour of the wife but in favour of some other person who is more likely to look after the interests of the children. An order therefore made by the District Court is much more advantageous to the children than one made under the Maintenance Ordinance. There is only one advantage which the Ordinance gives, and that is that pressure by way of imprisonment may be brought to bear on the father in the event of default of payment of the maintenance ordered. That is a matter which the person applying to the District court should consider, but so long as the order of the District Court remains it is the order of a court of competent jurisdiction, and on general principles it ought to be a bar to separate proceedings on the same subject-matter.

Arguments and decisions based on the Poor Law in England have no application, for quite different considerations apply. Our Maintenance Ordinance follows very closely the provisions of the Indian Criminal Procedure Code on the same subject ; and Sohoni at page 1034 (Section 21) states that a woman is not entitled to an order from a Magistrate when a decree for maintenance obtained by her in a Civil Court is in force. He quotes a case reported in 2 Weir 615 which is not available to me. There appears to have been a decision of the Bombay Court that when the decree of the Civil Court cannot be executed on account of insolvency proceedings the Magistrate may then act under the provisions in the Code.

If it were merely a matter of applying one of two alternative procedures for the execution there could be no objection to the applicant choosing either of them. But in proceedings under the Maintenance Ordinance the court has to consider matters which have already been dealt with by the Civil Court, and the procedure cannot therefore be applied as if it were purely ancillary.

The appeal is allowed and the order made in this case is set aside. No costs are awarded.

*Appeal allowed.*

**Proctors :—**

*R. Emerson*, for defendant-appellant. (Ariyanayagam)

*K. V. Sinnathurai*, for applicant-respondent (Thangamma)

*Present:* HEARNE, J.

## DE SILVA vs SCHOKMAN

*Application for a Writ of Mandamus on the Mayor of Colombo and Chairman, Municipal Council, Colombo.* (512).

Argued on 15th December, 1939.

Decided on 20th December, 1939.

*Mandamus on the Mayor of the Municipal Council—Colombo Municipal Council (Constitution) Ordinance section* 11 *—Can the Mayor refuse to permit the discussion by the Municipal Council of a report made under section* 11.

**Held :** That the Mayor of the Municipal Council has no power to prevent the discussion by the Council of a report made by a special committee appointed under section 11 of the Colombo Municipal Council (Constitution) Ordinance, and properly placed before a meeting of the Council.

*H. V. Perera, K.C.* with *Colvin R. de Silva* and *S. Alles,* for the petitioner.

*N. E. Weerasooriya, K.C.* with *E. B. Wickremanayake* and *V. F. Gunaratne,* for the respondent.

HEARNE, J.

This is an application for a Writ of Mandamus on Dr. V. R. Schokman directing him to place for consideration by the Municipal Council of Colombo the report of a Special Committee appointed under section 11 of the Colombo Municipal Council Ordinance to enquire into the " circumstances which led to the transfer of the Municipal Workshop Foreman." The respondent was described in the caption as the Mayor of Colombo and Chairman of the Municipal Council but it appears from an examination of the relevant Ordinance that this is a misdescription. He is the Mayor of the Municipal Council and as such is entitled, subject to the provisions of sections 60 and 61, to preside over all meetings of the Council at which he is present.

The report of the Special Committee was set down for consideration at a meeting of the Council on 1st November, 1939, and when that item of the agenda was reached the respondent stated that he had decided to reject the report as it was not in conformity with the terms of reference. After certain members had expressed their views he made it clear that he refused to allow it to be discussed.

The signatories of the majority report purported to deal with the circumstances which preceded the transfer of the Workshop Foreman but they went much further. They dealt with the conduct of certain officers concerned in the transfer and also with their " unsuitability " for their

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respective posts. Further, adverse comment was made on the qualifications of another officer who does not appear to have had anything to do with the subject-matter of the enquiry (paragraph 14).

In the argument before this court it was, no doubt correctly assumed that the respondent did not seek to exercise powers he knew he did not possess but that, on the contrary he thought he was entitled by reason of the extraneous matter in the report to forbid any discussion of it. It is clear that the legal advice he has since taken has confirmed him in this view.

In my opinion however, he has been wrongly advised. As Chairman he undoubtedly had control over the conduct of business at the meeting and to his ruling on points of procedure members would be bound to bow. But he had no right to prevent discussion of a matter that was properly before the meeting. On the contrary it was his duty to see that due and sufficient opportunity to express their views on any such matter was given to those who wished to do so.

The report of the Special Committee was properly before the meeting. It had been authorised by and made to the Council, it had been listed in the " orders of the day " for discussion by the Council, and it was not within the authority of the respondent to deprive the Council of the right to consider it. If the report went beyond the terms of reference it would be for the Council to decide upon the steps it would be advisable to take. If in the course of a discussion on the report it was considered desirable to do so the provisions of Bye-law 2 (Chapter 2) relative to the exclusion of strangers could be invoked. But all these are matters within the competence of the Council and not an individual member of it.

In his affidavit the respondent said that " in the exercise of the discretion I had as Chairman of the meeting.....I did not permit the report to be discussed." The fact is that he had no discretion. It is not vested in him by the Colombo Municipal Council Ordinance and his counsel could not say whence he had derived it. Apart from Statute he could only have derived it from the meeting itself. " Public meetings " as Jervis, C.J. said in *Taylor vs Nesfield* must be regulated somehow, and where a number of persons assemble and put a man in the chair they devolve on him, by agreement, the conduct of that body. They attorn to him, as it were, and give him the whole power of regulating themselves individually. This is within reasonable bounds. The Chairman collects, as it were, his authority from the meeting." The meeting of the Municipal Council certainly did not vest in the Chairman the right to decide which items of the agenda should and which should not be taken up. So far from doing so those who spoke protested against the assumption of any such right.

Counsel for the respondent argued that there was nothing to show that the action taken by the applicant meets with the approval of a majority of the Council and that, therefore, the writ must be refused. I know of no authority for this proposition.

It is suggested by the respondent that the application is not *bona fide*, that the applicant is a candidate for the office of Mayor in 1940, and that the object of the application is to throw doubt on the propriety of the respondent's conduct as Mayor. I would stress that no suggestion has been made that he acted with any improper motive. On the other hand it would, I think, be generally conceded that had the Special Committee not taken such a liberal view of the task entrusted to them, the respondent in the ordinary way would have submitted their report for discussion. It is not the propriety but the legality of his conduct that is at issue. The applicant in his counter affidavit states that his application was made *bona fide*. He also says that the respondent is mistaken in thinking that he is a candidate for the office of Mayor. This must be taken to be conclusive of the matter.

The rule will be made absolute with costs.

*Rule made absolute.*

**Proctors :—**

*N. Saravanamuttu*, for the petitioner. (de Silva)

*Wilson A. Kadirgamar*, for the respondent. (Schokman)

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*Present:* MOSELEY, J.

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## REX vs KARALY MUTTIAH AND OTHERS

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*S. C. No.* 1—*M. C. Mallakam* 19107.

(1*st Midland circuit*)

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Argued and Decided on 8th January, 1940.

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*Criminal Procedure Code section* 134—*Confession to Magistrate made after commencement of non-summary inquiry—Can it be admitted in evidence—Confession to Superintendent of Prisons—When may it be admitted in evidence.*

**Held :** (i) That a confession recorded by a Magistrate under section 134 of the Criminal Procedure Code is not inadmissible in evidence merely because it is recorded after the arrest of the accused and after investigation by the police.

(ii) That where an accused person when addressed under section 155 of the Criminal Procedure Code states "I abide by the voluntary statement I have already made to the Magistrate" the voluntary statement becomes incorporated in the statutory statement and is admissible in evidence regardless of whether the voluntary statement has been recorded in the manner prescribed by the Criminal Procedure Code.

(iii) That a confession made to the Superintendent of a prison is admissible in evidence so long as it does not offend against the provisions of section 24 of the Evidence Ordinance.

*F. C. Loos, Crown Counsel*, for the Attorney-General.

*S. N. Rajaratnam*, for the 1st accused.

*A. D. J. Gunawardena*, for the 2nd accused.

*F. W. Obeyasekera*, for the 3rd accused.

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Moseley, J.

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Karaly Muttiah and Others

MOSELEY, J.

After the jury had been empanelled Mr. Rajaratnam, counsel for the 1st accused, asked that they should be allowed to retire as he wished to make submissions relating to the admissibility of certain evidence which appear in the record of the case.

His first objection was to the admissibility of confessions said to have been made by the 2nd and 3rd accused to the Police Magistrate of Mallakam on the 18th and 20th December respectively. These confessions purport to have been made under section 134 of the Criminal Procedure Code, sub-section 1 of which provides that " any Magistrate may record any statement made to him at any time before the commencement of an inquiry or trial." Counsel's contention was that the inquiry had actually commenced on the 16th November and that at the time when the 2nd accused made his confession to the Police Magistrate he had already been in custody for some 24 hours, and he relied upon the wording of the sub-section which provides that the statement may be recorded before the commencement of the inquiry or trial.

Crown Counsel contended that the inquiry contemplated by section 134 was the preliminary inquiry for which section 155 of the Criminal Procedure Code makes provision. With that view I am inclined to agree. On this point, however, I was referred to the case of *King vs Mudiyanse* *. In that case the statement of an accused person was improperly taken on oath and it was held for that reason to be inadmissible against the accused at his trial, but the accused who had made that statement, when subsequently addressed under section 135 of the Criminal Procedure Code, adopted the statement which he had previously made in irregular circumstances. In that case the statement was read out to him and was attached to the statement made under section 155. Shaw, J. in that case expressed the opinion that the previous statement had become incorporated with the statutory statement under section 155 and was therefore, not merely admissible, but *must* be put in at the trial under the provisions of section 233 of the Code.

Now, in the present case the confessions made by the 2nd and 3rd accused were not read over to them in order that they might adopt them, but they were in fact read to counsel who appeared for all the three accused at his request, and were in fact adopted by each of the 2nd and 3rd accused. The 2nd accused when addressed in accordance with section 155 said: " Not guilty. I abide by the voluntary statement I have already made to the Magistrate." and the 3rd accused replied in like terms.

It seems to me, therefore, that even if the contention of the Crown Counsel be not accepted, namely, that the inquiry referred to in section 134 is the preliminary inquiry provided by section 155, that I am entitled to follow the decision in 21 New Law Reports p. 45 and hold that the alleged confessions by the statutory statements of the 2nd and 3rd accused are incorporated therein. I would also refer to a case reported in 2 Ceylon Law

* 21 New Law Reports, page 48

Journal * in which Abrahams, C.J. held that a confession was inadmissible on the ground, *inter alia*, that the Magistrate had not probed sufficiently into the motives of the accused for making the confession. I was invited to follow the decision of Sir Sydney Abrahams for similar reasons, but on a perusal of the record made by the Magistrate of the manner in which these confessions came to be made I am satisfied that all that should have been done in that direction was in fact done.

Counsel further objected to the admissibility of the confession made by the 1st accused to the Superintendent of Prisons. The Superintendent, he said, was not authorised to record such confessions and the proper course should have been to inform the Magistrate who would then have proceeded in the way laid down. It may be that the Superintendent is not expressly authorised by the Legislature to act in this way, but I know of no provision of law which prohibits him from so doing any more than any member of the public would be precluded from acting in such a way if requested by an accused person to do so.

The confession in my view is admissible so long as it does not offend against the provisions of section 24 of the Evidence Ordinance. It is quite clear from the depositions by the Superintendent of Prisons and by the jailor who made known to the Superintendent the desire of the accused to make a confession, that no inducement, threat or promise was made to the accused which might have provided a motive for the confession.

Another ground of objection was that the confession was made in Tamil to the Superintendent who claims to have a knowledge of that language. It was, however, recorded in English and was read over by the Superintendent to the accused in Tamil. It does not seem to me that that procedure offends in any way against any provision in law. It may be open to counsel to submit to the jury that mistakes may have been made in translating the confession from Tamil into English and that further mistakes may have been made by the translation back into Tamil for the benefit of the accused. That is a submission which counsel is clearly entitled to make, and it may be that such a confession recorded in such circumstances will be treated somewhat carefully, but as I have already said I can see no reason for holding a confession made in such circumstances to be inadmissible.

Objection was then taken by counsel for the 1st accused to certain evidence which was given in the lower court by Mr. Storer who was proctor for the 1st accused in another case. It may well be that that evidence if given in this court will offend the provisions of section 126 of the Evidence Ordinance. Crown Counsel, however, has undertaken to lead only such evidence as refers to the payment of a certain sum of money or sums of money by the 1st accused to Mr. Storer and that evidence in my view is unobjectionable.

Counsel for the 2nd accused supported the objections of Mr. Rajaratnam, and in particular urged that in the case of the 1st accused's confession there should be definite proof that no inducement had been offered

* 2 Ceylon Law Journal, page 104

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to him. There is in my opinion definite evidence that no inducement was offered to the 1st accused.

Mr. Obeyesekera, counsel for the 3rd accused, also associated himself with the submissions of Mr. Rajaratnam and of Mr. Gunawardena, and drew my attention to the fact that the 3rd accused, for the purpose of making his confession, was taken to the Magistrate's bungalow by a police officer, and that a constable was actually present in the room at the time the confession was made. He cited a case reported in 27 New Law Reports * in which Jayawardena, J. referred to a provision in the Indian Criminal Procedure Code similar to section 134 in the Ceylon Criminal Procedure Code, and he referred particularly to certain instructions issued under the Indian Act to the effect that no police officer should be present when such a confession was made by an accused person. He thought that such a rule might with advantage be adopted in this country. Such a rule has in fact not been adopted in this country, and in that particular case the confession was held to be inadmissible on the ground that the presence of the constable in close proximity to the accused person might have had some influence upon the accused person while he was in the act of making his confession. In the case before me the police constable who was present at the time at which the confession was made was the motor driver, and it is not easy to imagine that the presence of such a person would influence an accused person in one way or another. However desirable it may be that an accused person should be protected from any police influence at the moment when he is making a confession, it does not seem to me that in this case any provision of the law was infringed or any harm done.

There was further objection to the evidence of two witnesses, Subramaniampillai and one Nannithamby, who in the lower court had given evidence in regard to certain statements made to them by the deceased. Crown Counsel gave his assurance that he would not lead this evidence and counsel's objection was withdrawn.

*Overruled.*

**Proctors :—**

*K. R. Navaratnam*, for the 1st accused. (Karaly Muttiah)
*M. A. M. Naheem*, for the 2nd accused.

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* 27 New Law Reports, page 391

*Present:* DE KRETSER, J.

## SUPPRAMANIAM CHETTIAR vs SENANAYAKE AND OTHERS

*S. C. No.* 173—*C. R. Colombo No.* 45706.

Argued and Decided on 1st December, 1939.

*Preliminary Objection—Appeal—Failure to give notice of security or to tender security to some respondents against whom no relief is claimed—Should the appeal be rejected—Is the appellant entitled to relief under sub-section* 3 *of section* 756 *of the Civil Procedure Code.*

**Held :** (i) That even where parties against whom no relief is claimed are made respondents to an appeal notice of security should be given to them.

(ii) That failure to give such notice and security disentitles the appellant to relief available under sub-section 3 of section 756 of the Civil Procedure Code.

*L. A. Rajapakse* with *M. M. I. Kariapper* and *J. E. A. Alles*, for plaintiff-appellant.

*J. R. Jayewardene*, for defendants-respondents.

DE KRETSER, J.

The appellant sued three persons on a promissory note. A proxy was filed which purported to come from the 1st and 2nd defendants but was in fact signed by the 2nd defendant alone. The court required a proxy to be filed from the 1st defendant and several dates were given, but before the proxy was filed a minute of consent was placed before the court by which the 1st and 2nd defendants consented to judgment and asked to be allowed to pay by instalments. The court was then only concerned, apparently, with the recovery of the stamp duty on the proxy which should have been filed, and that was duly recovered. The proxy remained unsigned by the 1st defendant. At a late stage the 1st defendant took objection to the issue of writ against him on the ground that he was a public servant at the time when the note was made and decree entered against him. This objection was upheld. The plaintiff then appealed, making all three defendants respondents to his appeal, and he stated that though the 2nd and 3rd defendants were made respondents no relief was claimed against them. He then purported to deposit in court, by a motion dated 31st July, a sum of Rs. 26/- as security for costs of appeal of the 1st defendant-respondent, which seems to have been received in court on the 2nd August and to have been minuted against the date 3rd August. The proctor, who still had no proxy from the 1st defendant, received notice and had no cause to show.

The order appealed from had been made on the 31st July and notice had been given not to the respondent but to a person who purported to be his proctor.

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de Kretser, J.

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No objection to the constitution of the appeal has been taken on this ground, but it is argued that no notice of the tendering of security and no security had been given to the 2nd and 3rd defendants although they had been made respondents.

Now, in terms of section 756, every person made a respondent is entitled to notice and to such security as the court orders. In this case the appellant, probably thinking that no security was required for those against whom no relief was claimed, did not serve any notice on them nor tender security, but he has made them respondents, apparently feeling for some reason that their presence was necessary to constitute a proper appeal, and it is impossible to say at this juncture whether the mere fact that he claimed no relief against them on his appeal necessarily meant that they might not be prejudiced by the appeal or by their absence at the hearing of the appeal. It is contended that their liability remained the same, whether the appeal succeeded or not, and in fact their position might conceivably be better if the appeal succeeded since it is conceivable that the plaintiff might levy against the 1st defendant alone, and in any case each of the other parties would have a right of contribution from the 1st defendant. This may or may not be so. It may be that the respondents desired to be present in court so as to give whatever support they could to the appellant's case ; or it may be, as suggested by the respondent's counsel, that one of them is a public servant himself and therefore interested in the result. It is impossible to canvass these questions at this stage. It is enough that they were made respondents and that having been made respondents they should have been given notice of whatever security was being tendered. It is quite conceivable that eventually the court might not have ordered any security in their case. There is therefore a non-compliance with the provisions of the first sub-section of section 756, and the only question is whether relief should be given under sub-section 3.

A number of authorities have been cited, some prior to the Divisional Bench judgment in *Zahira Umma vs Abeysinghe* ( 39 N.L.R. 84 )* some subsequent thereto. Those prior to that case are necessarily not of much assistance now, but I might state that the decisions in *Nadarajah vs H. Don Carolis & Sons* ( 38 N.L.R. 162 )†, *Mendis vs Jinadasa* ( 24 N.L.R. 188 ) and *Martin Singho vs Paulis Singho* ( 13 C.L.R. 238 ) are very like the unreported case decided by my brother Nihill and myself ( 24 D. C. Kandy 70, S. C. Minutes of 18th September, 1939 )‡. In all those cases as a matter of fact security had been deposited with due notice but there was only the formal defect that the sum of money deposited had not been hypothecated. Such a defect would be covered probably by the second condition imposed in the Divisional Bench judgment.

In *Katonis Appu vs Charles* ( 12 C.L.W. 162 ), a case which was very similar to the present one, Abrahams, C.J. rejected the appeal because security had been given only for one of many respondents although it was not clear that the other respondents would in any way be affected by the appeal.

* 8 C.L.W. 26 † 5 C.L.W. 83 ‡ See page 43

In *Siyadoris Appu vs Abeyenayake* ( 18 C.L.R. 120 ) an appeal was rejected because security was not given for one of the respondents. That case, however, was a partition case and the party for whom no security had been given seems to have made common cause with the respondents, but that does not appear to be the ground upon which relief was refused. It was refused on the ground stated in the Divisional Bench judgment, namely, that there had been a non-compliance with the terms of the section without any excuse.

In the unreported case (S. C. 218/D. C. Ratnapura No. 6263)† decided by my brothers Soertsz and Hearne on the 20th February, 1939, an appeal was rejectcd for the same reason in very emphatic language. There is also the case (92 D. C. Kalutara 16775)‡ decided on the 14th February, 1939. There is therefore quite an abundance of authority that in circumstances such as the present, the appeal must be rejected. It is therefore rejected with costs.

*Appeal rejected.*

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

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PUNCHI BANDA vs GUNARATNE MENIKA

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*S. C. No.* 24—*D. C.* (*F*) *Kandy No.* 70.

Argued & Decided on 18th September, 1939.

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*L. A. Rajapakse*, for the plaintiff-appellant.

*Cyril E. S. Perera* with *Dodwell Gunawardene*, for the 1st defendant-respondent.

DE KRETSER, J.

In his plaint the plaintiff expressly stated that he had put up a building on the land and had improved the land. In his prayer he asked that his share should include his plantations and the three houses. The defendant in his answer did not dispute this claim and made no claim to having made any plantations or to having put up any houses. All he did say was that he had possessed the southern portion of lot B. There was no contest as to title at the trial, but some attempt seems to have been made to draw the court into giving directions to the Commissioner as to how he should partition the land. The mode of partition comes to be considered at a much later stage. As a result of this manoeuvre, the ownership of the houses and plantations suddenly became of more importance than they had hitherto been, and the Judge eventually decided that they should remain in common. The trouble seems to have been that more than one person lost his bearings. In the plaint the plaintiff is alleged to state that he had improved and possessed a half share towards the north and east. If, as the evidence shows, the plaintiff is not good at giving the points of the compass, he might well have made an error in describing the position of his plantations to the proctor's clerk who probably took down the instructions in the first instance. Anyway, when a man does not know the points of the compass according to a test in court, then it is useless saying that he must know the points of the compass. But the main point is that the points of the compass are quite irrelevant. The plaintiff and every

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† See page 44 ‡ See page 45

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other witness in evidence stated that the plaintiff and his predecessor in title, Ukku Banda, had between them put up the houses and the plaintiff alone had made the plantations. The 1st defendant attempted to deny this claim, but he blundered quite badly for he made the 2nd defendant the builder of one of the houses and the 2nd defendant, who was called by the court and apparently impressed the court least unfavourably, if not most favourably, stated that the house had been put up by Ukku Banda.

The decree entered in this case will be amended by decreeing the plaintiff entitled to compensation for the buildings and plantations on the land. The mode of partition will be considered at a much later stage. The appellant is entitled to the costs of appeal.

I might add that a preliminary objection was taken to the hearing of this appeal on the ground that the added defendant had not been given security for costs. We found, however, that security had actually been deposited but not hypothecated. We decided to grant relief under the proviso to section 756 of the Civil Procedure Code.

NIHILL, J.

I agree.

*Relief granted.*

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*Present :* SOERTSZ, J & HEARNE, J.

PUNCHIMAHATMAYA vs JOTIHAMY AND OTHERS

*S. C. No.* 218—*D. C.* (*F*) *Ratnapura No.* 6263.

Argued and Decided on 20th February, 1939.

*S. Nadesan* with *V. Manickavasagar*, for the 1st, 2nd & 3rd defendants-appellants.

*N. E. Weerasooriya* with *E. S. Dassanaike* and *A. E. R. Corea*, for the plaintiff-respondent.

SOERTSZ, J.

Counsel for the respondent on this appeal takes the preliminary objection that the appeal has not been properly constituted in that the 4th to the 7th defendants who were made respondents by the appellant to his appeal, have not been given security for their costs of appeal. I think this objection is entitled to succeed. The requirements of section 756 are imperative. That section lays down that once a petition of a appeal has been filed notice should issue forthwith to the respondent that on a day to be specified in such notice the appellant will tender security for the respondent's costs of appeal. That requirement has not been complied with. Mr. Manickavasagar for the appellant contends that these parties were really not necessary parties to the appeal. But I do not think it lies in his mouth to make this submission because when he filed the petition of appeal he advisedly made the 4th to the 7th defendants respondents to the appeal.

We have no alternative but to uphold the objection and dismiss this appeal with costs.

HEARNE, J.

I agree.

*Appeal rejected.*

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*Present:* ABRAHAMS, C.J. & SOERTSZ, J.

## SETAN SINGHO AND OTHERS vs SETAN APPU AND OTHERS

*S. C. No.* 92—*D. C. (Inty.) Kalutara No.* 16775.
*( With application in Revision No.* 344 )

Argued and Decided on 14th February, 1939.

*C. S. Barr Kumarakulasingham* with *F. C. de Saram*, for the 16th & 17th defendants-appellants.

*A. C. Z. Wijeratne*, for the plaintiff-respondent.

*J. R. Jayawardene* with *C. J. Ranatunga*, for the 2nd & 3rd defendants-respondents.

*D. S. L. P. Abeysekera*, for the 15th defendant-respondent.

ABRAHAMS, C.J.

The practice in this court with respect to the principles under which it will grant relief under section 756 of the Civil Procedure Code has been laid down in *Zahira Umma vs Abeysinghe et al* ( 39 N.L.R. p. 84 ). I think it desirable to state for the benefit of Proctors and others that in our opinion this court should follow that case. So far as this particular case is concerned, we find it indistinguishable from *Siyadoris Appu vs Abeyenayake* ( 13 Ceylon Law Weekly p. 22 ), in which *Zahira Umma vs Abeysinghe et al* (*supra*) was followed without any question. Incidentally that appeal was preferred from the District Court of Kalutara.

This application will be dismissed with costs. The costs will be one set of costs.

SOERTSZ, J.

I agree.

*Appeal dismissd.*

*Present:* VISCOUNT SANKEY, SIR LANCELOT SANDERSON AND SIR PHILIP MACDONELL

## SEYYADO IBRAHIM SAIBO AND OTHERS vs JAINAMBEEBEE AMMAL AND OTHERS

*Privy Council Appeal No.* 27 *of* 1938.

Decided on 30th November, 1939.

*Partition of land—Land purchased as partnership property—Partnership formed with express power to purchase and sell land—Section* 3 *Civil Law Ordinance* (*Chapter* 66)*—Section* 29 (1) *of the Partnership Act*, 1890—*Section* 2 *of the Prevention of Frauds Ordinance* (*Chapter* 57).

**Held :** That where it is sought to partition land bought in the names of the members of a partnership, and the partition is opposed on the ground that the land is partnership property, the onus is on the plaintiffs to show that each party's share in the land was for his personal use and that the land was not partnership property.

(ii) That parties to a partition action must make clear title to the land they seek to partition and must identify what land it is that they claim.

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*D. N. Pritt, K. C.* with *R. K. Handoo,* for the appellants.

*Stephen Chapman,* for the respondents.

SIR PHILIP MACDONELL

This is an appeal from a judgment and decree of the Supreme Court of Ceylon setting aside a judgment and decree of the District Court of Nuwara Eliya and sending the case back to that District Court for an order of partition of certain land to be entered in an action wherein the respondents, plaintiffs in the action, sued the appellants, defendants in the action, for a partition of that land.

The land, an extent of two acres, one rood and twenty-two perches, situate within named boundaries at Nuwara Eliya in Ceylon and known as "Fountain Store" or "Fountain House" was on the 7th May, 1902, conveyed on a notarial deed, P3, to certain seven co-partners who had by notarial deed P27 entered into a trading partnership on the 4th April, 1902. This, the first partnership of seven members, was succeeded on the 17th September, 1906, by a second partnership of six, five of them of the first partnership and one new member, and that on the 7th March, 1912, by a third partnership of nine, three members of the first partnership, the one brought into the second partnership, and five new ones. These three deeds of partnership, P27, P28 and P29, were, each of them, notarial and similar in their main provisions. Each deed recites the total capital of the firm, the amount brought in by each partner and his share of profits, provides a time limit for the duration of the partnership and that the death of a partner is not to dissolve it, appoints by name one or more of the partners to be "principal partners" with express power to purchase and sell land for the partnership and to mortgage such land, and provides for the dissolution of the partnership and distribution of the assets, with an option to the principal partner or partners to take over the assets and continue the business. Each of the two latter partnership deeds, P28, P29, refers by number and date to the deed preceding it, making the second partnership a successor to the first, and the third a successor to the second, and reciting that the accounts of the immediately preceding partnership have been gone into and agreed to. The second and third partnership deeds recite that the firm has landed properties—there is evidence that it had such, besides the land the subject of this case—but does not state their locality or extent. The third partnership deed while, like the others, giving to the principal partners full power to sell land the property of the partnership, also provides that on dissolution of the partnership "none of the said partners shall at any time be entitled to or ask to be given any lands or buildings or any shares in the lands and buildings of the said partnership wheresoever situated," and gives power on such dissolution to the principal partners to obtain from the other partners conveyance of "their respective shares right title and interest in all the landed property and buildings of the said partnership" to them the principal partners, the other partners being "hereby bound to convey their

respective shares right title and interest in all the said landed property of the said partnership to the said principal partners " and their heirs or other legal representatives.

No. 5 of the original partners, by name Pavanna Ibrahim Saibo, was also a member of each of the two succeeding partnerships and executed each of the three partnership deeds. The three plaintiffs, respondents, claim under him as his intestate heirs, being his widow and his two sons. He himself died intestate on the 16th February, 1915, during the currency of the third partnership. His estate was not administered until 1931, this action being commenced in 1933. Owing to absence from the jurisdiction and minority, an issue of prescription does not arise.

The third partnership had occasion to mortgage portions of the land in question by three several notarial deeds executed on the 7th October, 1915—after, that is, the death of partner No. 5—and eventually on the 12th February, 1916, sold it by notarial deed P9 to some of the defendants and a predecessor in title of other defendants, appellants. This deed, P9, gives the numbers and dates of the three partnership deeds and of that by which the land had originally been conveyed to the partnership. It recites the mortgages on this land, the fact that No. 3 is the only one of the original partners still alive, also that the third partnership had bought in their respective shares in this land from a retired partner, No. 6, and the heirs of a deceased partner, No. 2, also that partner No. 5, under whom the plaintiffs claim, had died. It recites further that " although the premises " ( *i.e.*, this land ) " were acquired in the names of the seven persons of whom the said partnership was originally composed and of whom the only person now alive is " the original partner No. 3, " the said premises have always been regarded as property of the said firm and have been possessed as such up to date without any disturbance or interference whatsoever on the part of the heirs, executors or administrators of such of the original partners " as are dead, the said No. 3 " himself having always allowed the rents and profits of the said premises to be included in the accounts of the said partnership and to be distributed amongst the partners for the time being of the said firm according to their respective shares in the said business, " also that " on the same principle the said premises have always been considered as part of the assets of the said partnership, and its value at the time of the taking of a general account has accordingly been included in estimating the amount available for distribution among the different partners," and that " on that footing each deceased or retiring partner has actually been paid the price of his interest in the said premises." This deed P9, selling to the defendants, or to their predecessors in title, gives in the schedule a description by extent and boundaries of the land sold, showing that it is identical with the land acquired by the first partnership on deed P3. At different times, not material, the defendants and their predecessors in title bought in the outstanding interests of all the partners in this land, save that of No. 5 under whom the plaintiffs claim.

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On the 17th July, 1917, the third partnership dissolved itself by notarial deed D5.

The plaintiffs claim that under the deed P3 conveying the land to the partners, No. 5 acquired in his personal capacity and without reference to the partnership, the legal and beneficial right to a one-seventh share therein. They also claim two sixty-third shares in it as follows. The retired partner No. 6 and the heirs of deceased partner No. 2 on the 14th May, 1912, sold to the third partnership, consisting as will be remembered of nine persons, of whom No. 5 was one, their two one-seventh shares. Of these two-sevenths, No. 5 would be entitled to a one-ninth or two sixth-thirds. These must be added to No. 5's original one-seventh, making eleven sixty-thirds in all.

The notarial deed P3 of the 7th May, 1902, which conveyed the land to the first partnership, recites that the vendor has contracted for the sale and conveyance of the land "for the exclusive use and benefit.....of the said co-partnership business," also that the seven partners, naming them, pay the purchase price "out of partnership funds" and "as co-partners," and it conveys to the seven partners, *nominatim*, "as co-partners," habendum "for ever for the use and benefit.....of the said co-partnership." The law of Ceylon as to partnership is to be found in section 1 of Ordinance 2 of 1866,* as follows :—

> In all questions or issues which may hereafter arise or which may have to be decided in this Colony with respect to the law of partnerships.....the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any Ordinance now in force in this Colony or hereafter to be enacted : provided that nothing herein contained shall be taken to introduce into this Colony any part of the law of England relating to the tenure or conveyance or assurance of, or succession to, any land or other immovable property, or any estate, right, or interest therein.

The portion of the law of England relevant to the present matter is section 20 (1) of the Partnership Act, 1890 :—

> All property and rights and interests originally brought into the partnership stock or acquired whether by purchase or otherwise on account of the firm or for the purposes and in the course of partnership business are called in this Act partnership property and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement.

This land was "brought into the partnership stock" and "acquired .....by purchase.....on account of the firm and.....in the course of partnership business" since it was conveyed to the seven partners "as co-partners," and the price for the purchase of the land was to be paid "out of partnership funds." It was acquired "for the purposes of the partnership business," one of these by the first partnership deed being the purchase of landed properties. The deed conveying it recites, as has been said, that the vendor has contracted to sell the land "for the exclusive benefit.....of the partnership," and the habendum is to the partners, their heirs, executors, administrators and assigns "for ever for the use and benefit" of the partnership. Thus by this deed it became partnership

* Now section 3 of the Civil Law Ordinance (Chap. 66) (Edd. C.L.W.)

property under the provisions of section 20 (1) of the Partnership Act, 1890. As the law to be applied, that of England, does not recognize a partnership firm as a legal *persona*, it was conveyed, as is a usual method under that law, to the seven partners of the firm *nominatim*, and by the instrument conveying it each of them acquired a one-seventh share in the legal title to the land and, since he would be entitled to share in any profits the land produced, in the beneficial interest also, but so that each of them used his share exclusively for the purposes of the partnership. At the trial of this action the District Judge was satisfied that the land thus became partnership property, but on appeal the Supreme Court dissented from this. In its view the Ceylon Statute of Frauds, Ordinance No. 7 of 1840, section 2, created, against holding this land to be partnership property, difficulties which might not have seemed so great had it been kept in mind that the onus was on the plaintiffs to show that each partner's one-seventh share in the land was his for his personal use, and that therefore the land was not partnership property.

Much of the argument for the plaintiffs on this appeal was accordingly based on this Ceylon Ordinance, No. 7 of 1840, section 2 * of which provides that :—

> No sale, purchase, transfer, assignment, or mortgage of land or other immovable property and no promise, bargain, contract or agreement for effecting any such object, or for establishing any security, interest or incumbrance affecting land or other immovable property.....shall be of force or avail in law

unless in writing and by notarial deed. The second and third partnership deeds do not refer specifically to this land, or state that the partnership succeeding to the first one took or held it as partnership property, hence, it was argued, the members of the second and third partnerships, No. 5 being one of these, took it for their own benefit and not as partnership property ; conversely, to enable the partnership to claim it as such property, the second and third partnership deeds should have contained words definitely stating it to be so. Various Ceylon cases were cited in support of this line of argument, and their Lordships were also invited to ascertain the intention of the deed P3, conveying this land, by examining the subsequent conduct of the persons who executed it, a method of interpretation applied also by the Supreme Court in its judgment : thus when the retired partner No. 6 filed in August, 1909, the inventory of the estate of the deceased partner No. 2, he included therein a one-seventh share of " Fountain Store and premises," valuing that share at Rs. 8,000, and inserted an item " Rents due Rs. 4,420," and it was argued that these " rents " would be the deceased partner's share of rents due to the individual partners from the partnership for its occupation of the land, but this overlooks the fact that the partnership owned other lands in which this inventory also claimed shares, likewise that deed P9 by which the third partnership sold this land, recites that its " rents and profits " were included in the accounts of the partnership, consequently these " rents " may have been due from tenants to the partnership, not from the partnership to individual partners.

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* Now section 2 of the Prevention of Frauds Ordinance (Chap. 57) (Edd. C.L.W.)

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An argument from the subsequent conduct of the parties to deed P3, stronger at least *prima facie*, is the fact that in May, 1912, the third partnership bought, on notarial deed P6, from this same retired partner No. 6 and from the heirs of the same deceased partner No. 2, the two one-seventh shares of those two partners in this land and in other partnership lands, for Rs. 10,000 to each of them, and this sale and purchase for such a substantial consideration was claimed by the plaintiffs as an admission by the members of the third partnership, that this land was not partnership property but that of individual partners. The notary's attestation to the deed P6 is however that in his presence No. 6 received, by cheque, only Rs. 3,055/58 out of the consideration of Rs. 10,000, and the heirs of No. 2, only Rs. 8,871/41 out of a similar consideration, also by cheque. At the trial of the action in the District Court, a witness, Ena Sheik Davood, who had been in the employ of all three partnerships, produced for the defendants document D7, being extracts from the firm's ledger account for 1911 and 1912, which showed that at the date when the third partnership bought these one-seventh shares, these sums Rs. 3,055/58 and Rs. 8,871/41 were the amounts standing in the firm's books to the respective credits of these former partners, and that cheques for these sums were put through the firm's bank account on their behalf about a fortnight later. Thus the notarial attestation and the document D7 confirm each other. The recital to the conveyance P6 describes the land, shares in which the third partnership was purchasing, as " part of the property and assets " of the first partnership. The evidence in this case does not entirely explain why the third partnership bought these land shares for an ostensible consideration greater than the amount then standing in its books to the credit of the vendors, but the deed forming the third partnership executed about two months before, had provided that no retiring partner was to be entitled to any lands or shares in lands belonging to the partnership, also that on the dissolution of the partnership the partners were each to convey to the principal partners their several shares in such lands, and the conveyancers who inserted these provisions in the third partnership deed may have advised it to get in the outstanding legal titles of the retired partner No. 6 and of the deceased partner No. 2. On the administration in 1914 of the estate of partner No. 1, the inventory duly mentioned his one-seventh share of " Fountain Store," as well as of other partnership lands, but in the same proceedings the administrators of that estate moved the testamentary court to transfer to the firm those one-seventh shares, as being " property which forms part of the assets of the said firm," receiving in exchange " the sum of Rs. 81,563 which represents the deceased's interest in the said firm." The same witness who had produced the ledger extracts, produced also the accounts of the second partnership for the year 1911, D1, signed in two places by partner No. 5, which accounts showed the amounts then due to certain of the partners, including No. 5, as their respective shares in the profits, but by setting out the lands owned by the firm as an asset valued together at Rs. 96,200, these accounts tended to negative the idea that any partner had a separate interest in them. This sale to the firm of

partners' shares in this land does not, therefore, give an unequivocal support to the plaintiffs' case, and the same seems true of the purchases by the defendants, after they had acquired this land from the third partnership on P9, of other outstanding partners' shares. That these things lack complete explanation may well be due to lapse of time. If the estate of a man dying in 1915 is only administered in 1931, and action only taken for what is claimed thereunder in 1933, evidence may have become unavailable which was available in 1915 and following years.

But generally this line of argument for the plaintiffs namely, interpretation of the deed of conveyance, P3, by the subsequent conduct of the parties to it, overlooks the fact that in this case the onus is on the plaintiffs ; it is not for the defendants to show that this land was partnership property but for the plaintiffs to show that it was the property of the individual partners. Parties to a partition action must make clear title to the land they seek to partition and must identify what land it is that they claim. If plaintiffs here begin with the deed P9 by which the third partnership sold the land in derogation, as they claim, of their rights, it will be noticed that that deed describes the land fully by boundaries and extent but also asserts in clear terms—set out above—that the land had always been treated as partnership property, and recites the power of the partners to sell it. If the plaintiffs rely on the deed P29 establishing the third partnership, it will be noticed that that deed, while it states that the partnership owns lands, and while it gives the principal partners power to sell them and on dissolution of the partnership to call for conveyances from the several partners of their interests therein, yet does not specify what those lands are or where. The deed creating the second partnership, P28, describes the partners as " of the shop.....Fountain Store " but again does not specify the lands of the partnership while stating that it does own " properties," and while giving the principal partner power to sell them. The plaintiffs must go then to the deed P3 by which the first partnership obtained a conveyance of this land. This deed specifies the land by boundaries and extent but also makes it partnership property within section 20 (1) of the Partnership Act, 1890. The plaintiffs' action then fails. The only two deeds executed by the partnership which identify this land or mention it specifically, are the notarial deed P9, the sale of the land under a power given by *inter alios* partner No. 5, which deed states the land always to have been treated as partnership property, and the notarial deed P3, the purchase of the land by the partnership which, executed under a power given by *inter alios* partner No. 5, makes it partnership property. On this view of the case, the failure of the plaintiffs to make out the partners' personal claim to this land, the onus being on them to do so, it becomes unnecessary to consider how far Ordinance No. 7 of 1840, section 2, and the cases cited thereon in argument, are applicable in the present matter.

The interest in the land of partner No. 5, Pavanna Ibrahim Saibo, is outstanding as a dry legal title which by their counterclaim the defendants

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ask the plaintiffs to transfer to them. They must, however, pay to the plaintiffs the share of the partnership assets due to partner No. 5. One of the defendants in his evidence in the District Court, said that the share of this partner had been deposited with " the Katugastota firm," and the defendants' answer in a connected case gave the name of that firm, and said that the amount so due to No. 5 was originally Rs. 2,766/82 but had now increased to Rs. 6,090/53, and was available to his heirs, but there is no evidence to show whether the plaintiffs admit or deny these figures. It is to be hoped that the parties will agree as to the sum due to the plaintiffs for partner No. 5's share in the assets of the firm, and so avoid further litigation, but failing agreement there must be an inquiry which should be carried out in accordance with such directions as the Supreme Court may give.

Their Lordships are of opinion by reason of the foregoing considerations that this appeal must be allowed, the judgment and decree of the Supreme Court set aside and the judgment and decree of the District Court of 24th May, 1935, restored, the defendants to have their costs in each court. On the counterclaim, the plaintiffs on receiving the amount agreed to as being, or found on inquiry to be, the share of the partnership assets due to No. 5, Pavanna Ibrahim Saibo, must execute to the defendants a conveyance of the shares of the land which they claim in this action.

Their Lordships will humbly advise His Majesty accordingly. The appellants will have the costs of this appeal.

*Appeal allowed.*

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*Present:* HEARNE, J.

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DE SILVA (Excise Inspector) vs LIYORIS SINGHO

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*S. C. No.* 308—*M. C. Panadura No.* 51783.

Argued and Decided on 2nd August, 1939.

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*Arrest by private person of offender under Excise Ordinance—Evidence discovered by reason of arrest—Can conviction be based on such evidence.*

The accused was arrested by one David Silva, who had no special powers under the Excise Ordinance, for illicit possession and transport of fermented toddy. When he was charged in the Police Court by an Excise Inspector objection was taken on the ground that the person arresting had no authority to arrest the accused.

The Magistrate discharged the accused on this ground.

**Held :** That the Magistrate was wrong in discharging the accused.

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

*No appearance* for the accused-respondent.

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The complainant, an Excise Inspector, charged the accused with the offence of illicit possession and transport of fermented toddy in excess of the quantity allowed by law. At the hearing the accused pleaded not guilty and without hearing any evidence the learned Magistrate made the following order : " This detection is neither by the Police, nor the Excise, nor the Police Vidane. Witness David Silva *alias* Mudalaly seized the accused transporting toddy and then sent for the Police Vidane. What right had he to detain the accused as regards an Excise offence. This will be a dangerous state of affairs to be allowed to continue. Any person can, without the least difficulty, implicate his enemy in a false Excise case by getting a friend or two to support him." It is correct to say that David Silva *alias* Mudalaly was a person not appointed to exercise powers under the Excise Ordinance and that therefore his arrest of the accused was illegal, but this does not render evidence discovered by reason of the action taken by David Silva *alias* Mudalaly inadmissible against the accused in a case sponsored by the Excise Inspector. In these circumstances the appeal will be allowed and the case will be remitted to the Magistrate so that he may proceed with it according to law.

*Appeal allowed.*

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*Present:* HOWARD, C.J. & WIJEYEWARDENE, J.

## KING vs JOSEPH

*S. C. No.* 97—*D. C.* (*Criminal*) *Colombo* 12505.

Argued and Decided on 25th January, 1940.

*Criminal Procedure Code* (*Chapter* 16) *section* 335 (1) (*d*)—*Interpretation Ordinance* (*Chapter* 2) *section* 2 (*i*)—*Meaning of* " *imprisonment* " *in section* 335 *of the Criminal Procedure Code.*

**Held :** That the context of section 335 (1) (*d*) of the Criminal Procedure Code will not permit the application to the word " imprisonment " therein of the definition in section (2) (*i*) of the Interpretation Ordinance.

*S. W. Jayasuriya*, with *C. J. Ranatunge*, for the accused-appellant.

*S. J. C. Schokman, Crown Counsel*, for the Crown-respondent.

HOWARD, C.J.

This is an appeal from a finding and sentence of the Additional District Judge of Colombo given on the 11th of July, 1939, sentencing the appellant to 3 months' rigorous imprisonment on each of two counts, the

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sentences to run concurrently. A preliminary objection is taken by Mr. Schokman on behalf of the Crown that such an appeal on the facts will not lie under the provisions of section 335 (1) (*d*) of the Criminal Procedure Code without the leave of the District Judge. In regard to this contention it has been argued by Mr. Jayasuriya that the interpretation to be given to the word " imprisonment " is to be gathered from section 2 (*i*) of the Interpretation Ordinance. This provision reads as follows : " rigorous imprisonment," " simple imprisonment " and " imprisonment of either description " shall have the same meaning as in the Penal Code, and " imprisonment " shall mean " simple imprisonment." He therefore argues that in section 335 of the Criminal Procedure Code the word " imprisonment " means simple imprisonment and therefore, the leave of the District Judge is not required.

We have given careful consideration to the provision of the Interpretation Ordinance and we think that that provision refers to penal sections of various Ordinances. Furthermore, Mr. Schokman has referred us to the opening words of section 2 of the Interpretation Ordinance which provides that these definitions shall not apply if there is something repugnant in the subject or context. In this connection he invites attention to sections 90, 91, 311 and 312 (*f*) and (*g*) of the Criminal Procedure Code, the contexts of which he contends are repugnant to the definition of imprisonment as interpreted by the Interpretation Ordinance. I agree that to apply the definition provided by the Interpretation Ordinance to these sections would be repugnant and also that section 335 (1) (*d*) is on a similar footing and to apply the expression " simple imprisonment " to that provision would also be repugnant. We also think that the use of the expression " term of imprisonment " indicates that the section is referring not so much to the nature of the imprisonment but to the term for which it is imposed.

In these circumstances the preliminary objection is upheld and the appeal is dismissed.

WIJEYEWARDENE, J.

I agree.

*Appeal dismissed.*

**Proctor :—**

*H. E. Wijetunga*, for accused-appellant. (Joseph)

*Present:* HOWARD, C.J. & WIJEYEWARDENE, J.

## MUTTUKARUPPEN CHETTIAR vs PATHIRANA

*S. C. No. 47 (I)—D. C. Colombo 52352.*
Argued on 22nd January, 1940.
Decided on 29th January, 1940.

*Civil Procedure Code section 337—Use of due diligence to procure complete satisfaction of decree—When may subsequent application to execute the same decree be refused.*

**Held :** That the mere fact that the judgment-creditor has failed to take action under section 219 of the Civil Procedure Code cannot, apart from the circumstances of the case, be regarded as showing lack of due diligence entitling the judge to refuse under section 337 of the Civil Procedure Code a subsequent application to execute a decree.

*C. Thiagalingam*, for the substituted plaintiff-appellant.

*H. V. Perera, K.C.* with *W. W. Mutturaja*, for the defendant-respondent.

HOWARD, C.J.

This is an appeal from an order made by the District Judge of Colombo on the 22nd February, 1939, refusing an application made on the 1st October, 1938, for the re-issue of a writ issued on the 15th February, 1935, for the recovery of a sum of Rs. 1,750/–, interest and costs, less a sum of Rs. 900/– being an amount due on a decree entered by consent on the 31st January, 1934. The facts so far as material are as follows: On the 31st January, 1934, judgment was by consent entered for the plaintiff for the abovementioned sum and it was further ordered that the 1st defendant should pay the decreed amount by monthly instalments of Rs. 100/– commencing from the 10th February, 1934, on his giving security in immovable properties. In pursuance of the decree the 1st defendant hypothecated his undivided shares in five lands in the Kurunegala District and paid a sum of Rs. 900/– as instalments due up to the 10th October, 1934. Thereafter the 1st defendant defaulted. On the 15th February, 1935, writ was issued for the recovery of the amount of the decree less Rs. 900/–, and the said properties were seized. Before the sale could be carried out the plaintiff died. On the 9th December, 1936, the appellant who was appointed administrator of the plaintiff's estate was substituted in this action for the original plaintiff and the claim against the 2nd to 4th defendants was waived. On the 15th March, 1937, the court allowed the writ to issue against the 1st defendant the returnable date being the 13th June, 1938. On the 9th August, 1937, the hypothecated properties were sold, but the sale was by consent set aside on the 12th November, 1937. The properties were again

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sold on the 12th January, 1938, such sale being confirmed by order of court on the 25th of March, 1938. The application to draw the proceeds of sale amounting to Rs. 404/61 made by the appellant on the 28th March, 1938, was allowed by the court on the 31st May, 1938. The application of the appellant of the 1st October, 1938, for the re-issue of the writ was refused by the Judge on the ground that the appellant had failed to show due diligence in procuring complete satisfaction of the decree, was prescribed by section 337 of the Civil Procedure Code.

It is not contended that there was any lack of diligence on the part of the appellant up to the 15th March, 1937. In these circumstances the lack of diligence occurred between that date and the returnable date of the writ, that is to say, the 13th June, 1938. Following the decision in *Sinnatamby vs Patumah* (5 Appeal Court Reports, 143) the learned Judge has held that the onus is on the appellant affirmatively to show that he exercised due diligence. In coming to the conclusion that such onus has not been discharged by the appellant the learned Judge does not specify what steps might have been taken by the appellant beyond stating that no application to examine the debtor appears to have been made under section 219 of the Civil Procedure Code. It is true that it was held in *Eliyapillai et al vs Murukesu* (10 N.L.R. 249) that failure to apply for the examination of the debtor under section 219 created a presumption of the want of due diligence; a presumption, however, that may be rebutted by other evidence. On the other hand in this connection the following passage from the judgment of Shaw, J. in *P. L. K. N. M. K. Chetty vs Perera* (19 N.L.R. 140) is very much in point:

> "The provisions contained in section 337 of the Civil Procedure Code, that where an application to execute a decree has been granted no subsequent application to execute the same decree shall be granted unless the Court is satisfied that on the last preceding application due diligence was used to procure complete satisfaction of the decree, is a highly penal one against the judgment-creditor and one which prevents him altogether from thereafter recovering a sum of money that the Court has decided to be his due, should he be found not to have exercised due diligence on his former application. I think the Court, should, therefore, not construe it unnecessarily strictly against the judgment-creditor, or search about for possible steps that he might possibly have taken had he exercised great diligence in enforcing his first decree. I agree entirely with the decision in *Ramen Chetty vs Jayawardene*, (18 N.L.R. 392) that it is not in all cases necessary that the creditor should have taken proceedings for the examination of the debtor under the provisions of section 219, and that it is a question of fact in each particular case whether, under the circumstances, due diligence was exercised."

The question, therefore, as to whether failure to have the debtor examined under section 219 amounts to showing lack of diligence is one depending on the facts of each particular case. I have been referred to *G. H. Raymond vs K. A. A. P. Wijeyewardene and Another* (1 C.L.J. 246). In that case the writ holder allowed five years to elapse before he made application for a notice on the 2nd defendant to show cause why a writ should not issue for the seizure of his properties.

The explanation of this long delay was that the writ holder had only recently become aware of the fact that the 2nd defendant was possessed of property. As pointed out by Soertsz, J. this information could have been obtained if the writ holder had chosen to have the 2nd defendant examined under section 219. The facts as disclosed in the case indicated clearly a lack of diligence on the part of the writ holder.

In this case it is not suggested that apart from action under section 219 of the Civil Procedure Code any action was open to the appellant. I do not think it can be contended that failure to take such action in this particular case amounted to showing lack of diligence. Specified properties had been hypothecated to meet the judgment debt. It was therefore reasonable for the appellant to have awaited the result arising from the sale of those properties before proceeding to attach other property of the judgment-creditor. The sale was not confirmed by the court until the 25th March, 1938. The returnable date of the writ was the 13th June, 1938. Hence it was the failure to take further action between these two dates, that is to say, during a period of two and a half months that is regarded by the District Judge as indicative of lack of diligence. I am unable to agree with this view, particularly having regard to the incidence of the Easter vacation during this period and the speed at which legal business normally proceeds in this country. It has been urged by counsel for the respondent that we should bear in mind that we are not acting in this matter as a court of original jurisdiction and should not, therefore, interfere with the discretion of the learned Judge unless such discretion has been wrongly exercised. I am not unmindful of our duty in this respect, but am of opinion that on the facts of this particular case the discretion of the learned Judge depriving the appellant of the fruits of his judgment has been wrongly exercised. In these circumstances the order dismissing the application for re-issue of the writ is set aside, and the appellant's application for re-issue of writ against the property of the respondent is allowed with costs in this court and the court below.

WIJEYEWARDENE, J.

I agree.

*Appeal allowed.*

*Present:* HOWARD, C.J. & DE KRETSER, J.

## PEIRIS vs CHITTY AND OTHERS

*S. C. No.* 360—*D. C. Colombo (F) No.* 8390.

Argued on 18th & 19th December, 1939.

Decided on 17th January, 1940.

*Malicious arrest—Proof necessary to succeed in an action for malicious arrest—Police Information Book—Can a statement made to the Police by the defendant and recorded in the information book be admitted in evidence—Evidence Ordinance sections* 123, 124 *&* 125—*Criminal Procedure Code section* 122 (3).

**Held :** (i) That in an action for malicious arrest the plaintiff must show :

(*a*) that his arrest on a criminal charge was instigated, authorised or effected by the defendant,

(*b*) that the defendant acted maliciously and

(*c*) that the defendant acted without reasonable and probable cause.

(ii) That the police information book is not a document in respect of which privilege can be claimed under sections 123 and 125 of the Evidence Ordinance.

(iii) That the provisions of section 122 (3) of the Criminal Procedure Code does not preclude the admission of a statement in the information book in a civil proceeding.

(iv) That statements recorded in the information book can be used under section 155 (*c*) of the Evidence Ordinance in civil proceedings to impeach the credit of a witness.

Per HOWARD, C.J.—"At the close of the plaintiff's evidence counsel for the defence pressed his request for the production of the plaintiff's statement recorded in the Information Book. On the following day Crown Counsel appeared on behalf of the Attorney-General and objected to the production of the Information Book entry on the ground that it is privileged and that the law refuses inspection except in accordance with section 122 (3) of the Criminal Procedure Code. The learned Judge held that this evidence was inadmissible on the ground of privilege. In my opinion there has been considerable confusion of thought both in the mind of the Judge and counsel appearing for the parties in dealing with this matter. Privilege can be claimed in respect of official communications under section 124 of the Evidence Ordinance. In order to sustain such a claim it is necessary that there should be some evidence that the public officer who is being compelled to disclose the communication considers that the public interests would suffer by the disclosure. There was no such evidence in this case. Nor is it conceivable that a public officer could in respect of this particular evidence go into the witness-box and tender such evidence. For obvious reasons the claim of privilege could not be sustained under sections 123 and 125 of the Evidence Ordinance. In my opinion, therefore, the decision of the learned Judge in excluding this evidence on the ground of privilege was wrong."

*J. E. M. Obeyesekere* with *S. Nadesan* and *N. Kumarasingham*, for the defendants-appellants.

*L. A. Rajapakse* with *F. A. Tisseverasinghe* and *H. W. Thambyah*, for the plaintiff-respondent.

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The plaintiff-respondent in her plaint alleged that on or about the 14th April, 1938, the defendants wrongfully, maliciously and without reasonable or probable cause caused the Police of Colombo to arrest her on a charge

of alleged theft or criminal breach of trust and misappropriation and thereby caused her much pain of body and mind and loss of reputation and honour amounting to damages which for the purposes of this action she restricted to Rs. 1,000/–.

The first issue framed at the trial was, " did the defendants on 14th April, 1938, falsely and maliciously without reasonable or probable cause, cause the arrest of the plaintiff ? " This issue was answered by the learned District Judge in the affirmative. The facts with regard to the arrest of the plaintiff so far as relevant to this appeal are as follows: On the 14th April a complaint was made to Police Sergeant No. 162, P. J. Fernando, by the 3rd defendant against the plaintiff. The charge was one of criminal breach of trust of two pairs of ear-studs and a saree. As the result of this complaint Sergeant Fernando visited the house of the four defendants and recorded the statements of all four defendants. The police then visited the plaintiff's house at Armour Street and whilst recording her statement she ran away. She was overtaken by the Sergeant, placed in a car and taken to Kotahena Police Station about 4 p.m. where after being searched by a female officer, she was locked up until released on bail about 9 p.m. the same day.

The law with regard to actions for malicious arrest has been laid down in Nathan, 1906 Edition paragraph 1650 on page 1695, as follows : " In an action for malicious criminal arrest, then, the plaintiff must show (1) that his arrest on a criminal charge was instigated, authorised or effected by the defendant, (2) that the defendant acted maliciously and (3) that the defendant acted without reasonable and probable cause." The cases of *Wijegunatileke vs Joni Appu* ( 22 N.L.R. 231 ) and *Kotalawala vs Perera* ( 39 N.L.R. 10)* were cited by counsel in support of the argument that no action would lie against the appellants in the circumstances of this case. Although those cases related to actions for malicious prosecution and not for malicious arrest, I am of opinion that they provide useful analogies with regard to the law that should be applied in this case.

So far as the application of the principle laid down by Nathan in the passage I have cited is concerned, the learned District Judge has held that the arrest of the plaintiff was the direct result of the false complaint made by the 3rd defendant and supported by the other defendants. It is contended by counsel that there is not a shred of evidence on the record that any of the defendants either requested or directed the police to arrest the plaintiff and in the absence of such evidence the defendants cannot be held liable in damages. The learned Judge distinguished the case from that of *Wijegunatileke vs Joni Appu* in which the statement to the police by the defendant on which the action for malicious prosecution was based was made in answer to an inquiry by the police under the provisions of Chapter XII of the Criminal Procedure Code. I do not think that there is any doubt on the evidence that the arrest of the plaintiff was the direct result of the complaint made by the 3rd defendant and that the learned Judge was right in distinguishing the case from that of *Wijegunatileke vs Joni Appu.* Similarly this case

* 6 C.L.W. p. 81 (Edd. C.L.W.)

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can be distinguished from that of *Kotalawala vs Perera*. In the latter case the judgment of Fernando, J. makes it clear that the defendant merely gave some information when questioned by the Muhandiram and by the Inspector of Police, and that he did not either direct or request the prosecution of the plaintiff or anyone else. In the present case the 3rd defendant made a definite charge against the plaintiff to the police. It was not merely as the result of the information furnished by the 3rd defendant to the police that the arrest of the plaintiff was effected. By making a criminal charge against her, the 3rd defendant must be held to have instigated her arrest, and hence so far as he is concerned, the first condition formulated by Nathan as necessary for the maintenance of an action for malicious arrest, has been satisfied.

I am also of opinion that the learned District Judge has come to a proper conclusion in holding on the evidence, that the 1st and 2nd defendants were parties to the making of the charge against the plaintiff. The defendants are all related to each other and live in the same house. They were represented at the trial by the same counsel. The complaint was made by the 3rd defendant with regard to articles borrowed from the 1st and 2nd defendants. In his evidence the 3rd defendant states that the 1st defendant asked him to see about it. On which he went to the Police Station and made a complaint. He further states that his complaint was substantiated by the 1st and 2nd defendants. Sergeant Fernando also states that on the statements of the 1st and 2nd and 4th defendants he decided to arrest the plaintiff. The 3rd defendant states, moreover, that he wrote on behalf of the 1st and 2nd defendants asking that the charge be withdrawn. The 1st defendant admits that it was on something she told the 3rd defendant that he went to the police. The 2nd defendant failed to give evidence rebutting the suggestion that he was a party to the making of the charge. In my opinion there is an overwhelming inference to be deduced from the evidence that the 1st and 2nd defendants were parties to the making of this charge. In view of the nebulous character of the evidence, particularly that of Sergeant Fernando against the 4th defendant, I am of opinion that the case against him has not been established and should be dismissed.

In addition to proving that her arrest on a criminal charge was instigated, authorised or effected by the three defendants, the plaintiff in order to succeed in this action must also prove that they acted (1) maliciously and (2) without reasonable and probable cause. The learned Judge after a review of the evidence has held that the charge was a false one in the making of which the defendants were actuated by an improper motive and was made without reasonable and probable cause. Therefore, in the view of the Judge the other ingredients necessary for the successful institution of an action for malicious arrest are present. On page 1687 Nathan expresses the opinion that malice need not be express, but may be inferred from the circumstances. A defendant will be regarded as having acted maliciously if he has acted negligently or without the care which a person might reasonably be expected to exercise or without such definite information as would justify him making

a criminal charge. Whether the defendants made a false charge against the plaintiff and were actuated by improper motives are questions of fact, the answers to which must depend to a large extent on the manner in which the witnesses tendered their evidence. As pointed out by the Judge there was a conflict of evidence. After carefully considering this evidence he has come to the conclusion that the case put forward by the defendants was a false one. It is not for this court to disturb the trial Judge's finding of fact unless it is unsupported by the evidence. I am of opinion that the finding of the Judge derives ample support from the evidence and that malice may not only be implied but has been proved to be express.

With regard to the second issue there is no dispute. This issue is material only as to the amount of damages.

There is, however, one further matter requiring consideration. The appellants contend that they have been materially prejudiced by the order of the learned Judge during the trial, that information given to the police by the defendants and the plaintiff on the day of her arrest could not be admitted in evidence on the ground that such information was privileged. The appellants contend that such evidence is material to test the veracity of witnesses, and the statement of the plaintiff made to the police on the day of her arrest would contradict the case set up by her in support of her claim. The facts with regard to this ruling, as they appear from the record of the proceedings, are as follows : Whilst the plaintiff was tendering her evidence a representative of the Superintendent of Police, Crimes, in reply to an inquiry by the Judge stated that he was claiming privilege for the Information Book. No order was made by the Judge at this stage. At the close of the plaintiff's evidence counsel for the defence pressed his request for the production of the plaintiff's statement recorded in the Information Book. On the following day Crown Counsel appeared on behalf of the Attorney-General and objected to the production of the Information Book entry on the ground that it is privileged and that the law refuses inspection except in accordance with section 122 (3) of the Criminal Procedure Code. The learned Judge held that this evidence was inadmissible on the ground of privilege. In my opinion there has been considerable confusion of thought both in the mind of the Judge and counsel appearing for the parties in dealing with this matter. Privilege can be claimed in respect of official communications under section 124 of the Evidence Ordinance. In order to sustain such a claim it is necessary that there should be some evidence that the public officer who is being compelled to disclose the communication considers that the public interests would suffer by the disclosure. There was no such evidence in this case. Nor is it conceivable that a public officer could in respect of this particular evidence go into the witness-box and tender such evidence. For obvious reasons the claim of privilege could not be sustained under sections 123 and 125 of the Evidence Ordinance. In my opinion, therefore, the decision of the learned Judge in excluding this evidence on the ground of privilege was wrong.

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In addition to the contention that the entry in the Information Book was inadmissible on the ground of privilege, it was also sought to exclude it as a statement made under section 122 of the Criminal Procedure Code. It was argued that such a statement was admissible only in the circumstances mentioned in section 122 (3) and in a Criminal Court. It may be argued and Sohoni's commentary on the corresponding provision of the Indian Criminal Procedure Code is authority for the proposition that this section applies only to witnesses in criminal proceedings and not to persons in the position of the plaintiff who was accused of committing a crime. If the section did not apply to the plaintiff it was, in my opinion, open to the defendants in civil proceedings under section 155 (*c*) of the Evidence Ordinance to impeach her credit by proving former statements made by her to the police. If on the other hand, the section does apply to the plaintiff as a person examined by a police officer under sub-section (1) there is, in my opinion, nothing in sub-section (3) to exclude a statement made by her in such circumstances from being given in evidence under the provisions of section 155 (*c*) of the Evidence Ordinance. I am, therefore, of opinion that the entry of the plaintiff's statement in the Information Book was not rendered inadmissible on either of the grounds put forward by Crown Counsel. In view of the fact that counsel for the plaintiff and not counsel for the defendants pleaded for the admission of the first complaint in evidence and that the verdict was in favour of the plaintiff the question of its rejection by the Judge does not arise.

Although the Information Book entry was improperly excluded as evidence in the case, I am of opinion that this in itself is not a sufficient reason for setting aside the verdict of the learned Judge or in the alternative sending the case back for retrial. Objection was taken to the production of the Information Book and such objection was upheld by the Judge. Counsel for the defendants was, however, in possession of a copy of the statement made by the plaintiff to the police officer and was in a position to cross-examine her on its contents. Moreover, he could have called such police officer as a witness and asked him in the witness-box what the plaintiff had told him. In this connection I would refer to Sohoni's commentary on section 162 of the Indian Criminal Procedure Code. This section corresponds with section 122 (3) of the Ceylon Code. Defendants' counsel did not adopt such procedure which is not, in my opinion, precluded by the provisions of section 91 of the Evidence Ordinance. In these circumstances I do not think that it can now be contended that the defendants have been prejudiced by the exclusion in evidence of the entry in the Information Book.

The question of the amount of damages being excessive was not seriously contested by counsel for the defendants. In these circumstances I consider that this amount should stand.

Except as regards the 4th defendant the judgment and order of the learned District Judge is therefore confirmed and the appeal is dismissed with costs.

The case against the 4th defendant is dismissed with costs both in this court and the court below.

DE KRETSER, J.

I agree.

**Proctors :—**

*T. F. Paulickpulle*, for the defendants-appellants. (Chitty and Others)

*S. Ratnasamy*, for the plaintiff-respondent. (Peiris)

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*Present:* NIHILL, J.

## EDEMA vs BABUN NONA

*S. C. No.* 495—*M. C. Colombo No.* 16287.

Argued on 24th January, 1940.

Decided on 31st January, 1940.

*Maintenance—Paternity—Maintenance of applicant after discovery of her condition and dismissal from service by defendant's wife—Is this sufficient corroboration of paternity.*

**Held :** That the fact that the defendant maintained the applicant after the discovery of her condition and dismissal from service by the defendant's wife, is sufficient corroboration of the applicant's evidence of paternity.

*J. E. M. Obeyesekere*, for the defendant-appellant.

*Stanley de Zoysa* with *Kumarakulasingham*, for the applicant-respondent.

NIHILL, J.

This is an appeal from a maintenance order in respect of an illegitimate child. Paternity is denied by the appellant. The main ground of the appeal is that the evidence of the mother has not been corroborated in some material particular. (See Section 6 of the Maintenance Ordinance). In order to determine the point it is not necessary for me to relate all the facts. It will be sufficient to note that the respondent was employed as a domestic servant in the household of the appellant who is a married man living with his wife and children in Colombo.

According to the respondent's story, which was believed by the Magistrate, intimacy occurred between her and the appellant when the appellant's wife and children were away on a visit to Galle. The respondent conceived, and subsequently her condition having become known to the wife, she was turned out of the house.

The evidence in regard to dates is somewhat vague and unsatisfactory, but it would appear that the dismissal from service took place in June or July, 1938, when the respondent was four or five months advanced in pregnancy. The child was born on the 22nd of November, 1938. Subsequently, statements were made by the respondent to third parties involving the appellant, but these were not relied upon by the Magistrate as corroboration, since they were made some time after intimacy had ceased.

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For the purpose of this appeal they can be disregarded. *Ponnammah vs Seenitamby**.

The evidence on which the Magistrate relied for corroboration are the documents A1 and A2 and the evidence of the witness Arthur. A1 and A2 are Post Office Savings Bank withdrawal forms upon which the appellant has certified that the holder of the Pass Book is the respondent. The dates of these withdrawals were in June and July, 1938 respectively, at a time when the Magistrate has found that the respondent was still in the appellant's service. These documents of themselves could not possibly supply corroborations.

An innocent employer might naturally perform this service for his employee if asked to do so, even although she was pregnant at the time. A fact, which on the face of it is capable of an innocent interpretation, and which could not, even to the most suspicious mind suggest guilt, cannot be said to point to probable paternity.

When the evidence of Arthur is reached, however, converse considerations apply. Not all the evidence of Arthur was accepted by the Magistrate but he does find as a fact, that Arthur was used as an intermediary between the appellant and the respondent after her dismissal and that on two occasions he was given money by the appellant to give to her.

Now Mr. Obeyesekere has urged that this fact is also capable of an innocent interpretation. That is true the payments might have been arrears of wages, they might even have been charitable donations from a soft hearted employer saddened by the plight of an unfortunate girl. But the appellant takes up neither position and offers no explanation of these payments. Indeed he denies that he has ever employed Arthur or that he even knows him. That being so, if the fact of these payments is accepted, they are suggestive of something quite other than innocence, for they establish that after the respondent had been turned out of the house by a, no doubt, righteously indignant wife, the appellant continued surreptitiously, to supply her with money.

The respondent in her evidence stated that she was maintained by the appellant right up to the birth of the child and that maintenance ceased only when she refused to surrender her child. Now Arthur's evidence corroborates this part of the respondent's evidence in what I hold to be a material particular, because the fact of maintenance by the appellant after discovery of the respondent's condition and dismissal by the wife is, in my opinion, to quote once more the words of Atkin, L.J. in *Thomas vs Jones*, so often cited in these courts, (*Bandara Menika vs Dingiri Banda*)† "evidence implicating the man and making it more probable than not that he is the father of the child."

I dismiss the appeal.

*Appeal dismissed.*

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* 22 N.L.R. 395 † 27 N.L.R. 284

*Present:* HOWARD, C.J. & WIJEYEWARDENE, J.

## RAMAN CHETTIAR vs VYRAVAN CHETTIAR

*S. C. No. 37 (I)—D. C. Ratnapura 6472.*
Argued on 24th & 25th January, 1940.
Decided on 1st February, 1940.

*Supreme Court—Power to stay proceedings in action in Ceylon pending final decision in case in a foreign court—Same parties and matters in dispute substantially same—Principles that should guide court in such application—Section 839 of the Civil Procedure Code.*

**Held :** That the Supreme Court has the power to make an order staying an action in a court in Ceylon pending the final decision in another action filed in a foreign court between the same parties where the matters in dispute in the first case are directly and substantially in issue in the second case.

Per WIJEYEWARDENE, J.—" In the absence however of any definite authority on the question of the court's jurisdiction in respect of an application to stay proceedings pending an action in a court outside Ceylon, I think it desirable to be guided to some extent by the principles that may be deduced from the English cases to which I have referred. The principles deducible from the authorities cited in the course of the argument before us may be summarised as follows :

1. The burden is on the party asking for the interference of court to prove that he is doubly vexed by reason of two actions being brought against him.
2. Where the two actions are brought in the same country there is a *prima facie* presumption of an intent to cause vexation.
3. Where the party is sued in one country and also in a foreign country or where a party is sued in two countries subject to the same paramount power a court will not presume an intent to cause vexation :
   (*a*) in the absence of evidence that the plaintiff cannot obtain an additional advantage in continuing both his actions or
   (*b*) from the mere fact of inconvenience or additional expense caused to a party or,
   (*c*) from the fact that by staying one action less evidence would have to be ultimately led in the first action."

*N. E. Weerasooriya, K.C.* with *J. A. T. Perera*, for the plaintiff-appellant.

*H. V. Perera, K. C.* with *N. Nadarajah* and *Renganathan*, for the defendant-respondent.

WIJEYEWARDENE, J.

This is an appeal against the order of the District Judge directing the proceedings in the present action to be stayed pending the final decisions in cases bearing Nos. O.S. 1624 of 1933 and O.S. 547 of 1937 in the Chief Court of Pudukottai State. The plaintiff instituted the present action on July 10th, 1937, against the defendant to have it declared that the defendant held

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three-eighth shares of an estate called "Morning Site" in trust for the plaintiff and for an order against the defendant to render an account of the profits and income of the estate from January 11th, 1931, until the execution of a conveyance in favour of the plaintiff in respect of the three-eighth shares. It is stated in the plaint that the defendant entered into a notarial agreement No. 1636 of January 15th, 1931, with the then owner of the property and that in pursuance of the agreement the defendant purchased the property by deed No. 1091 of December 22nd, 1938. The plaintiff pleads that the defendant held the deed of agreement in respect of the three-eighth shares in trust for the plaintiff and that it was intended that the deed of conveyance should operate in favour of and for the benefit of the plaintiff with regard to those shares which the plaintiff says are held and possessed by the defendant in trust for him.

The defendant filed his answer on December 13th, 1937, stating that it

(*a*) was agreed to purchase the property "in the proportions of one-fourth share each to the plaintiff and one Muttiah Chettiar and the remaining share to the defendant."

(*b*) that the deed of conveyance "was taken in the name of the defendant pending the payment by the plaintiff and Muttiah Chettiar of their shares and on payment of their shares of the purchase price the defendant had to convey to the plaintiff and Muttiah Chettiar their shares in the said estate."

(*c*) that in March, 1933, the plaintiff wanted to be released from his liability to pay his share of the purchase price and agreed to Muttiah Chettiar taking over his share.

(*d*) that the plaintiff thereafter executed the deed of release of March, 18th 1933, "renouncing *inter alia* his rights in and to the said estate."

It is somewhat difficult to understand the plea in paragraph (*b*) above if by the deed of release the plaintiff intended to renounce his rights to the estate. The deed of release was executed in March, 1933, and the defendant had not made it clear in his pleadings why in December, 1933, the conveyance was taken "pending the payment by the plaintiff and Muttiah Chettiar of their shares of the purchase price."

The plaintiff instituted action O.S. No. 1624 in the Chief Court of Pudukottai State on October 5th, 1933 against the present defendant and Muttiah Chettiar asking for a "cancellation" of the deed of release of March 18th, 1933, on the following grounds as set out in the issues framed in that action.

(*a*) "Is the release deed void because it was bought in fraud of plaintiff's right when he was not of sound mind and body by the exercise of undue influence?"

(*b*) Is the release deed void because it was subject to the condition that it was not to be enforced if the plaintiff recovered ?".

The defendants filed answer in that action referring to a partnership V. E. R. M. of which the plaintiff and the defendants were partners, denying the allegations of the plaintiff with regard to the deed of release and pleading that "the plaintiff can only bring an action for the dissolution of the partnership and the action brought only to cancel the release deed is not proper." In this answer too there is an averment to the following effect ; "the estate

called "Morning Site" was purchased from the partnership business V.E.R.M. In that too first defendant (Muttiah Chettiar) is entitled to 1/4 share. The other partners too are entitled to shares in that according to their respective shares. It is again difficult to reconcile this allegation with the statement made in the present action that before the execution of the deed of conveyance, it was agreed about March, 1933, that the property should be held in equal shares by the plaintiff and Muttiah Chettiar.

The issues were framed in the Pudukottai action No. 1624 on December 11th 1933, and judgment was delivered on January 3rd, 1937 dismissing the plaintiff's action with costs. It appears from an affidavit filed by the plaintiff that he has appealed against the judgment of the Chief Court of Pudukottai State, that the appeal has not been heard, and that a party dissatisfied with the decision of that appellate court has right of appeal to another court of appeal. During the pendency of that action the defendant appears to have given to the plaintiff a writing dated August 22nd, 1938, agreeing to render an account to the plaintiff of the income derived from the 3/8th shares claimed by the plaintiff and to execute a transfer of those shares of the estate in favour of the plaintiff. There is a dispute between the plaintiff and the defendant on the question whether that writing was given subject to certain conditions on the occurrence of which alone the writing was to have legal effect.

I shall now proceed to consider the action No. 547 instituted by the plaintiff against the defendant and Muttiah Chettiar in the Chief Court of Pudukottai State on April 13th, 1937. That action has been brought to establish the rights of the plaintiff as based on the agreement of August 22nd, 1928, referred to by me earlier in the judgment. The plaintiff asks for judgment, declaring him entitled to a one-fourth share in the business carried under the *vilasam* of V.E.R.M. and R.M.V.E. and three-eighth shares of "Morning Site."

According to an affidavit filed by the defendant in the present action answers have been filed in action No. 547 and that case has now been set down for trial. There is evidence on record to show whether the trial of that action has commenced.

The application on which the learned District Judge made the order appealed against was filed in the District Court of Ratnapura in October, 1938. The grounds on which the application is made are set out in the defendant's petition as follows :

(*a*) The plaintiff has instituted the action in the District Court of Ratnapura to harass and oppress the defendant.

(*b*) It is convenient and necessary to have all the issues raised by the plaintiff tried in the High Court of Pudukottai as all parties are permanent residents of Pudukottai State.

(*c*) The defendant will be put to unnecessary expense and great deal of hardship in getting ready for two trials on the same subject-matter in Pudukottai and in Ceylon.

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The plaintiff has filed a counter affidavit stating that in filing the present action he acted *bona fide* in the exercise of his legal rights and without any intention of harassing the defendant.

At the inquiry before the District Judge the counsel for the defendant tendered in evidence certified copies of (*a*) the plaint in case No. 547 of the Chief Court of Pudukottai (*b*) the plaint, answer and issues in case No. 1624 of the Chief Court of Pudukottai and (*c*) the judgment in case No. 1624 of the Chief Court of Pudukottai " for the limited purpose of showing what the findings were on the issues framed." No other evidence was led before the District Judge.

I have no doubt that this court has the power to make an order staying an action in a court in Ceylon pending the final decision in another action between the parties where the matters in dispute in the first case are directly and substantially in issue in the second case (*vide* Civil Procedure Code section 839). But as these inherent powers are very wide and indefinable a court has to guard against an arbitrary exercise of such powers. While conceding the existence of such powers the learned counsel for the appellant cited certain authorities as indicating the limits within which such powers should be exercised. He referred us to *Mc Henry vs Lewis* (1882) 52 Law Journal (Ch.) 325, *Peruvian Guano Co. vs Bockwoldt* (1883) 23 Chancery Division 225, *Cohen vs Rothfield* (1918) 120 Law Times 434 and *Hyman vs Helm* (1883) 49 Law Times 376, in which the courts had to consider applications for restraining parties from proceeding in connected actions. In *Mc Henry vs Lewis* the court dealt with the application of a defendant sued in the English court to stay the proceedings in view of an action pending in the United States of America. Jessel M.R. pointed out that very different considerations arose where both the actions were brought in England and where one of them was brought in a foreign country. He said :

> " In this country where the actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies, it is *prima facie* vexatious to bring two actions where one will do.... .....It is by no means to be assumed, in the absence of evidence, that the mere fact of suing in a foreign country as well as in this country is vexatious."

In *Peruvian Guano Co. vs Bockwoldt* an English Company sued a firm of French Merchants in the English courts for the delivery of cargoes of seven ships or in the alternative for damages. Shortly after the institution of the action, the ships which were in British waters were removed by the direction of the defendants to ports in France and the cargoes were taken possession of by the defendants. The plaintiffs thereupon commenced proceedings in France for the recovery of the cargoes of six of the ships. Refusing an application by the defendant that the plaintiff should be ordered to elect between the two actions, Jessel M.R. gave as one of the reasons the fact that matters in dispute were not identically the same. He said :

> " Supposing the plaintiff elected to go on with his French action for the six (ships) and in England for one.....what good would that be to anybody ? The two actions would go on, and all that is suggested is that a witness or two less

would be required possibly, not necessarily, in carrying on the litigation. That is not a ground for putting a man to his election.....It is no sufficient reason to stop a plaintiff to say that you can have a little less evidence in one action or try it in a less expensive mode."

In the same case Lindley, L.J. said :

"The court here is not and cannot be alive to all the advantages which a person may expect to derive from suing in a foreign court. The court does not know with accuracy, unless the matter is brought to its attention what reasons there may be for preferring one court to another."

Bowen, L.J. expressed his view as follows :

"We have no sort of right, moral or legal to take away from the plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries why should this court interfere and deprive him of it."

In *Cohen vs Rothfield* there were cross suits between the parties in England and Scotland and the court laid down the principle that the burden was on the party making the application for stay of proceedings to satisfy the court of the existence of a state of things justifying the court's exercise of its powers. In the course of his judgment Scrutton, L.J. said :

"It is obvious, for instance that an action in South Africa where the Dutch procedure prevails, Mauritius or Quebec, where French procedure exists, Malta with its peculiar law or Scotland with its Roman procedure may produce quite different results from an English action. It appears to me that unless the applicant satisfied the court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's Dominions, the court should not stop him from proceeding with the only proceedings which he as plaintiff can control."

In *Hyman vs Helm*, Bowen, L.J. said :

"A man may wish to sue abroad as well as in England both because he has superior facility of execution abroad and also because of superior facility of procedure before execution and before judgment.....I think it lies on the persons who wish to put an end to concurrent litigation here and abroad to make out a case of oppression. It does not do simply to say "why should the action go on in two places at the same time ?"

There remains also the case of *Carter vs Hungerford* (1915) 59 Solicitor's Journal 428 to which the attention of counsel was drawn by My Lord the Chief Justice. A full report of the case is not available to me but from a brief note given in the Annual Practice I find that it decided that a court should not ordinarily stay an action where there is an action in a foreign court dealing with the same subject-matter in which the English plaintiff is defendant.

No doubt the application in the present action is not for an absolute, but conditional stay of the proceedings and to that extent the present application differs from the applications made in the cases considered by me. In the absence, however, of any definite authority on the question of the court's jurisdiction in respect of an application to stay proceedings pending an action in a court outside Ceylon, I think it desirable to be guided to some extent by the principles that may be deduced from the English cases to which I have referred. The principles deducible from the authorities cited in the course of the argument before us may be summarised as follows :

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1. The burden is on the party asking for the interference of court to prove that he is doubly vexed by reason of two actions being brought against him.

2. Where the two actions are brought in the same country there is a *prima facie* presumption of an intent to cause vexation.

3. Where the party is sued in one country and also in a foreign country or where a party is sued in two countries subject to the same paramount power a court will not presume an intent to cause vexation:

(*a*) in the absence of evidence that the plaintiff cannot obtain an additional advantage in continuing both his actions or

(*b*) from the mere fact of inconvenience or additional expense caused to a party or,

(*c*) from the fact that by staying one action less evidence would have to be ultimately led in the first action.

The present application is made by the defendant in view of two cases pending in the High Court of Pudukottai. Now Pudukottai is a native State outside British India. It is not clear whether the whole Code (Indian) of Civil Procedure 1908 is in force in that State. section 1 of the Code shows that some of the sections do not extend even to what are known as Scheduled Districts in British India. The pleadings filed in the High Court of Pudukottai certainly differ so largely from the pleadings that are normally filed in our courts that one is left in doubt whether there are any provisions there similar to sections 46 (*a*) and 77 of our Code of Civil Procedure. Moreover, there is the fact that the Indian Code of Procedure differs in many particulars from our Code. I may also add that The Reciprocal Enforcement of Judgments Ordinance (Chapter 79 of Volume 2 of the Legislative Enactments) has not been extended to the State of Pudukottai. The defendant has failed not only to lead definite evidence of the procedure obtainable in the State of Pudukottai but also to furnish any material on which the court could form an opinion as to the law and the legal remedies in that State.

It is clear from a perusal of the pleadings in the various cases that the decisions in the Pudukottai cases will not do away with the necessity of continuing the proceedings in the present action. Assuming that the finding of the High Court of Pudukottai with regard to the validity of the deed of release may be pleaded as *res judicata* it will still be open to the plaintiff to prove a trust relying on circumstances arising after the deed of release. It is not conceded by the plaintiff that the High Court of Pudukottai had jurisdiction in case No. 1624 to give a decision as to the scope of that deed and the plaintiff may contend that the deed of release has no bearing on the matters in dispute in the present action. In this connection I may refer to what I observed earlier that some of the allegations in the defendant's answer do not appear to be reconcilable with the plea that by the deed of release the plaintiff renounced his rights to "Morning Site."

We do not know anything about the state of the cause lists in Pudukottai, but we know that the action 1624 which was instituted in 1933 was decided by the Chief Court in 1937 and that before finality could be reached the proceedings would have to go before two appeal courts. In these circumstances there is no material before us to justify our holding that by

proceeding with the present action the plaintiff will not get a decision more expeditiously.

The defendant has stated that if his application is not granted, it would cause him inconvenience and expense. That is hardly a ground to justify a court in exercising its inherent powers where the two actions are not both in Ceylon. Besides making a mere statement that the intention of the plaintiff in instituting the present action was to harass him, the defendant has made no effort to satisfy the court that the plaintiff cannot obtain any advantage from the present action which he would not obtain in the Pudukottai cases.

I do not think in the present action it is desirable that we should exercise the powers vested in this court and support an order staying the proceedings pending the final decision of the cases in the Pudukottai court.

I would, therefore, allow the appeal and set aside the order of the learned District Judge. The appellant is entitled to the costs of the appeal and the costs of the inquiry in the lower court.

*Appeal allowed.*

HOWARD, C.J.

I agree.

**Proctors :—**

*J. A. Perera*, for plaintiff-appellant (Raman Chettiar)

*Fred Wiresekera*, for defendant-respondent (Vyravan Chettiar)

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*Present:* HOWARD, C.J.

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## AGIE NONA AND ANOTHER vs PEREIRA

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*S. C. No.* 750–51—*M. C. Colombo No.* 37951 *with Application No.* 463.

Argued on 26th January, 1940.

Decided on 30th January, 1940.

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*Penal Code sections* 408 *and* 409—*Mischief—Does the blocking of a roadway amount to mischief within the meaning of section* 409 *of the Penal Code.*

**Held :** (i) That it is the essence of the offence of mischief that the perpetrator must cause the destruction of property or such change in it as destroys or diminishes its value or utility.

(ii) that the mere blocking of a pathway by placing flower pots on it does not amount to mischief within the meaning of section 408 of the Ceylon Penal Code.

*Colvin R. de Silva* with *A. H. C. de Silva*, for the accused-appellants and the 2nd accused-petitioner in the Application for Revision.

*R. L. Pereira, K.C.* with *R. C. Fonseka*, for the complainant-respondent.

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Agie Nona and Another *vs* Pereira

HOWARD, C.J.

This is an appeal by the 1st accused who was convicted by the Colombo Magistrate on the 29th September, 1939, of committing the offence of mischief under section 409 of the Penal Code and sentenced to pay a fine of Rs. 50/– or in default one month's imprisonment. The 2nd accused who was found guilty at the same time of the same offence and warned and discharged asks the court to allow her appeal by way of revision. Both accused were at the same time acquitted by the Magistrate of a further charge of insult under section 484 of the Penal Code.

The proceedings arose out of an obstruction consisting of four flower pots, alleged by the complainant to have been placed by the appellants in a roadway leading to his house No. 12/10 Vajira Road. The learned Magistrate has by his decision found that the blocking of the roadway in this manner amounted to mischief within the meaning of section 409 of the Penal Code. For the purposes of this appeal it is only necessary to consider one of the points taken on behalf of the appellants. Counsel contends that even if the facts with regard to the placing of the flower pots as alleged by the complainant are admitted, the offence of "mischief" has not been committed. In this connection he has referred me to the Law of Crimes by Ratanlal, 1936 Edition, and in particular the commentary on section 425 of the Indian Penal Code. The wording of this section is exactly similar to that of section 408 of our Code which defines the offence of "mischief." In a commentary on section 425 on page 1058 *et. seq.* Ratanlal formulates the ingredients that must be present in order to establish the offence of mischief. It is of the essence of the offence that the perpetrator must cause the destruction of property or such change in it as destroys or diminishes its value or utility. On a perusal of Gour's Penal Law of India and Mayne's Criminal Law of India I find that a similar principle is expounded. It is also laid down by these authorities that the offence cannot be maintained with regard to an "easement." Moreover examination of the "Illustrations" that are appended to section 408 of the Ceylon Penal Code gives rise to a similar interpretation as to the requirements necessary to establish the offence of "mischief." In this case it has not yet been proved that the complainant had anything more than a right of way over the pathway in question. On the assumption that the pathway has been blocked by the placing of flower pots by the accused, as alleged by the complainant, it is impossible to contend that property has been destroyed or such change in it has been made as to destroy its value or utility. The charge of mischief must, therefore, fail. In the circumstances it is not necessary to consider the other points raised by counsel for the appellants.

The appeal is allowed and the conviction of both accused set aside.

*Appeal allowed.*

**Proctors :—**

*J. N. C. Thiruchelvam*, for accused-appellants (Agie Nona & Another)
*Merrill W. Pereira*, for complainant-respondent (Pereira)

*Present:* DE KRETSER, J.

## SHEDDON (Inspector of Police) vs NATCHIAPPA PILLAI

*S. C. No. 723—M. C. Colombo 38262.*

Argued and Decided on 19th January, 1940.

*Evidence Ordinance sections 14 and 15—Charges of cheating two different persons on two different dates. Proof of similar transactions—Admissibility.*

The accused was convicted on two charges *viz.* that he did on the 19th March, 1939 deceive P. by inducing him to deliver a sum of Rs. 6/– as advance interest for a loan which the accused had promised to give him, and for acting similarly on 29th March, 1939 in regard to one R.

The prosecution led evidence of similar transactions which the Magistrate accepted as corroborative of the case for the prosecution.

**Held :** That in the circumstances, such evidence of similar transactions was inadmissible.

*L. A. Rajapakse*, for accused-appellant.

*Nihal Gunasekere, Crown Counsel*, for complainant-respondent.

DE KRETSER, J.

The accused has been convicted on two charges namely, that he did on the 19th of March, 1939 deceive one Peter Fernando by inducing Peter Fernando to deliver a sum of Rs. 6/– as advance interest for a loan which the accused was going to give him, and for acting similarly on the 29th March, 1939 in regard to one Walter de Rosairo. The accused admitted the receipt of the money and in fact had given I.O.U.'S for them, but stated that he did not promise to give any loans himself but had merely offered his services for procuring loans, the sums taken in advance being not by way of advance interest but to meet the trouble he took to procure the loans. A simple question of fact is therefore involved in this case. In each instance there was no corroboration of the evidence of the persons said to have been deceived.

The accused gave evidence and he called some witnesses to prove that he did attempt to raise loans. Unfortunately the defence was heard after a considerable lapse of time and the judgment delivered after a still further length of time ; and after consideration the learned Magistrate held that the accused did receive the sums of money towards the expenses for raising loans but thought that the accused was guilty because he had not returned those sums of money. That was quite another matter.

On the learned Magistrate's finding the case set up for the prosecution had failed. In the latter part of his judgment the Magistrate rather discredits the defence, but if he had intended to do so it is inconsistent with the earlier part of the judgment. The charge against the accused therefore fails for lack of corroboration of the case for the prosecution and also upon the finding of the learned Magistrate.

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de Kretser, J.

Sheddon (Inspt. of Police) *vs* Natchiappa Pillai

The prosecution endeavoured to support their case by proving instances of similar transactions, and the Magistrate accepts that evidence as corroborating the case for the prosecution. But that evidence is inadmissible whether one looks at section 14 or section 15 of the Evidence Ordinance. It might have been admissible if the charge against the accused had been that he offered to raise loans, took money for his expenses systen atically and never raised a loan. But that was not the charge against the accused. The conviction is, therefore, set aside and the accused will be acquitted.

*Conviction set aside.*

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*Present:* HOWARD, C.J. & WIJEYEWARDENE, J.

## PUNCHIMAHATMAYA vs THE COMMISSIONER OF STAMPS

*S. C. No. 35—D. C. (Inty.) Colombo.*
Argued and Decided on 17th January, 1940.

*Stamp Ordinance (Chapter 189)—Appeal under section 31—Should Attorney-General be made a party.*

**Held :** That an appeal under section 31 of the Stamp Ordinance to which the Attorney-General is not made a party is not properly constituted.

*J. E. M. Obeyesekere* with *Gilbert Perera*, for the appellant.
*S. J. C. Schokman, Crown Counsel*, for the respondent.

HOWARD, C.J.

The practice in the past has been that in appeals of this nature the Attorney-General should be made respondent so that he may appear on behalf of the Crown. We think that this practice follows as a matter of course from section 456 of the Civil Procedure Code read in conjunction with section 31 of the Stamp Ordinance Chapter 189. We, therefore, think that the appeal is not properly constituted but in view of the fact that section 31 of the Stamp Ordinance is not altogether clear we grant the appellant this indulgence that we will allow the appeal to continue on the Attorney-General being made a party within 10 days from today and on proper notice being given to him in accordance with section 31 within a further 7 days and on the appellant paying the costs of today's hearing.

WIJEYEWARDENE, J.

I agree.

*Appeal allowed.*

*Present:* HOWARD, C.J. & WIJEYEWARDENE, J.

## DIAS vs SILVA

*S. C. No.* 234/1938—*D. C. Galle No.* 36097.

Argued on 30th & 31st January, 1940.

Decided on 12th February, 1940.

*Civil Procedure Code* (*Chapter* 86) *section* 281—*Transfer of land reserving the right to a reconveyance within a stipulated time—Transferor's rights sold in execution—Transferee bidder at execution sale—Assigns expressly excluded by deed of transfer from right to reconveyance—Is sale in execution bad—Is the transferee estopped from questioning execution sale by participating in it and bidding at it.*

One Alahakoon transferred to the defendant a land with a condition for reconveyance on payment of the sum of Rs. 750/– by him or by his heirs, executors and administrators but not his assigns. In execution of a decree against Alahakoon his rights under the deed were sold by the Fiscal and purchased by the plaintiff who paid the purchase price at the sale. The defendant was one of the bidders at the execution sale. Alahakoon thereupon moved to set aside the sale, but his application was dismissed and the sale was confirmed on 9th August, 1937. Thereafter the plaintiff-purchaser called upon the defendant to reconvey the land and tendered the price. The defendant failed to reconvey the land and this action was brought to compel him. The District Judge dismissed the action on the ground that an order under section 281 of the Civil Procedure Code vesting the property in the purchaser was necessary before he could bring such an action and that no such order had been made. The purchaser appealed.

**Held :** (i) That the purchaser was entitled to maintain the action without an order under section 281 of the Civil Procedure Code.

(ii) That the defendant by his conduct in bidding at the execution sale was estopped from denying the purchaser's right to purchase the transferor's right to a reconveyance on the ground that the transfer deed excluded assigns.

**Cases referred to :**—*Caruppen Chetty vs Wijesinghe* 14 N.L.R. 152.
*Fernando vs Fernando* 14 N.L.R. 155.
*Saparamadu vs Saparamadu* 20 N.L.R. 369.
*Rodrigo vs Karunaratne* 21 N.L.R. 360.

*H. V. Perera, K.C.* with *E. B. Wickremanayake* and *H. A. Chandrasena*, for the plaintiff-appellant.

*N. E. Weerasooriya, K.C.* with *N. Nadarajah*, *U. A. Jayasundera* and *V. F. Guneratne*, for the defendant-respondent.

HOWARD, C.J.

This is an appeal by the plaintiff-appellant from an order made by the District Judge of Galle on the 29th July, 1938, dismissing the plaintiff's action with costs. The case has arisen out of a deed of conditional transfer No. 630 dated the 8th October, 1934, by which one E. W. Alahakoon, for the sum of Rs. 750/–, transferred certain property to the defendant. This deed contained a provision whereby the defendant agreed with the said Alahakoon that the latter, his heirs, executors and administrators, but not his assigns, should be entitled to a transfer of the said property on or before the 10th

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August, 1937, on the payment of the said sum of Rs. 750/- and interest at 16 per centum per annum. In execution of a decree against Alahakoon in D. C. Galle case No. 33457 his rights under the deed were duly seized and sold by the Fiscal and purchased by the appellant on the 13th May, 1937, for the sum of Rs. 315/- paid at the said sale at which the defendant himself was a bidder. E. W. Alahakoon thereupon filed papers to set aside the sale, but his application was dismissed and the sale confirmed by the court on the 9th August, 1937. E. W. Alahakoon appealed to the Supreme Court against the dismissal of this application and on the 17th November, 1937, the appeal was allowed, and the case sent back for further inquiry. At the further inquiry the sale was set aside but on appeal this order was reversed and the sale confirmed on the 1st July, 1938, by a Supreme Court Bench constituted by Maartensz, J. and Keuneman, J.* who held that the interest of Alahakoon in the deed was rightly sold by the Fiscal as movable property. Meanwhile on the 14th July, 1937, the appellant's proctor wrote a letter to the respondent tendering the full amount due on the deed. On the 7th August, 1937, the appellant instituted this action claiming a re-transfer as provided in the deed and deposited in court the amount due under its terms.

The decision of the learned District Judge in dismissing this action was based on his interpretation of sections 274 to 281 of the Civil Procedure Code. In this connection he held that an order from the court vesting the property in the purchaser is necessary under section 281 and that, at the date when the action was filed no such order had been made. In these circumstances, at this time, the plaintiff had no right to ask for a re-transfer and his action was dismissed without prejudice to his right to bring any subsequent action. Before embarking on a consideration of the various other matters that arise in this case, I propose to deal with the question as to whether the decision of the District Judge on this point is correct. Counsel for the appellant contends that the right to a re-transfer under the deed vested in the latter under the provisions of section 275 on payment by him of the purchase money when the sale became absolute. Neither by Roman-Dutch Law nor by statutory provisions was any further document or action required to vest this right in the appellant. I have found singularly little authority either in the decisions of the courts or from the authorities on the Code on the interpretation to be placed on those sections to which I have referred. I am, therefore, of opinion that the words of section 281 must be given their ordinary meaning when read with the context, that is to say, the other provision dealing with the sale and disposition of property seized. It is apparent that the provisions with regard to sales of movable and immovable property differ in respect of one very material particular. By virtue of section 275 the sales of movable property become absolute on payment of the purchase money at the sale. Sales of immovable property by virtue of section 282 on the contrary do not become absolute until after thirty days. Such sales, moreover, require confirmation by the court. So far as the sale of movable property is concerned, the provisions of section 275 fixing the time when the

* *Vide* 11 C.L.W. 155.

sale becomes absolute are supplemented by sections 277, 278, 279, 280 and 281. These sections do not to my mind limit the title to the property granted by section 275 but supply machinery necessary to confer full possession and ownership in the purchaser, when such machinery is required by reason of the particular type of property. Thus section 277 provides that in regard to certain classes of movable property the title conferred by the receipt given under section 275 in respect of the absolute sale shall be completed by delivery. Section 278 provides for delivery in respect of another class of property. Section 279 is intended to override difficulties that may be experienced by purchasers in obtaining possession of debts not secured by negotiable instruments and shares in public companies or corporations. Section 280 gives a permissive power to a Judge to endorse negotiable instruments and shares when such endorsement is necessary to complete the transfer. These provisions seem to me to provide for special cases when the vesting of full ownership and possession cannot be effected by the receipt given for the purchase money at the sale. Section 281 in my opinion must be regarded from a similar aspect and is intended to make provisions for any case, not dealt with under the preceding provisions, when further action is required. Like section 280 the power vested in the court is permissive and to my mind it is intended that a document is only to be executed when necessary. Similarly, a court order will be made if such action is required. In the present case it seems to me that there is no provision of the law requiring either an order of the court or a document. If the view is taken that an order of court is required, the orders of the court made on the 9th August, 1937, and subsequently on the 1st July, 1938, confirming the sale of the 13th May, 1937, must be regarded as compliance with the section. These orders vest the property in the appellant as from the 13th May, 1937. For the reasons I have given, I am therefore of opinion that the decision of the District Judge was wrong and the plaintiff when he filed the action was entitled to ask for a re-transfer.

At the trial before the District Judge the respondent took the further point that in view of the words " but not assigns " in the deed, the plaintiff who is a purchaser at the Fiscal's sale is not entitled to ask for a re-transfer and that the only persons who can do so are the defendant, his heirs, executors and administrators. It was contended by the appellant both in this court and the court below that the respondent by reason of his conduct at the sale when he was himself a bidder for the right sold, is estopped from denying the right of the appellant to reconveyance. This issue was found by the District Judge in favour of the appellant. I have been referred by counsel for the latter to a statement of the English law with regard to Estoppel as formulated by Spencer Bower on "Estoppel by Representation," 1923 Edition page 46 paragraph 55, and also page 195 paragraph 229. The law of " Estoppel by Representation " has also been considered by this court on various occasions, particularly with regard to the conduct of persons at sales. In *Caruppen Chetty vs Wijesinghe* (14 N.L.R. 152) it was held that a man

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who having a charge or encumbrance upon a property stands by and allows another to advance money on it, or for that matter, to buy it under the impression that it is unencumbered, knowing that the latter is going to advance money, is estopped from setting up that interest against the title of the person whom he has deceived. In *Fernando vs Fernando* (14 N.L.R. 155) it was held by Lascelles, A.C.J. that in order to create an estoppel by acquiescence, it is essential to show that the plaintiffs knowing that a violation of their rights was in progress stood by and so misled the 1st and 2nd defendants. In *Saparamadu vs Saparamadu* (20 N.L.R. 369) the 1st defendant took a conveyance from the 2nd defendant of the land in question and registered the same. Thereafter the land was sold in execution against the 2nd defendant. The 1st defendant was present at the sale but did not notify to the bidders at the sale that he had purchased the same. On an action by the purchaser for declaration of title it was held that the 1st defendant was estopped from setting up title to the same. In *Rodrigo vs Karunaratne* (21 N.L.R. 360) it was held that to establish an estoppel it must be proved that the action taken by the party seeking to establish the estoppel was directly connected with the false impression caused by the representation or conduct of the party sought to be estopped. The representation or the conduct producing the impression must be in effect, an invitation to the person effected by it to do a particular act. But it need not be proved that the party sought to be estopped knew the truth about the facts which he by his statement or his conduct misrepresented. Applying the principles laid down by these decisions to the present case it would appear that the defendant by bidding at the Fiscal's sale has by his conduct represented that the interest put up for auction was one that could be the subject of a valid sale. It was an invitation to the plaintiff to bid. Moreover the plaintiff has given evidence to the effect that he would not have bidden at the Fiscal's sale if the defendant had raised an objection. In my opinion the defendant is estopped from denying the right of the plaintiff to purchase at the Fiscal's sale Alahakoon's right to ask for a reconveyance of the property. The District Judge's finding on this point is, therefore, affirmed. In view of my ruling on this point the question of the exact interpretation to be placed on the expression " but not assigns " in the deed of the 8th October 1934, is not material.

In the circumstances the judgment and decree of the District Judge must be set aside and judgement entered in appellant's favour as claimed together with costs both in this court and the court below.

WIJEYEWARDENE, J.

I agree.

*Appeal allowed.*

**Proctors :—**

*A. E. P. Jayatilake*, for the plaintiff-appellant. (Dias)

*D.* and *R. Amarasuriya*, for the defendant-respondent. (Silva)

*Present:* HOWARD, C.J.

## MEERA NATCHIA vs MARIKAR

*S. C. No.* 638—*M. C. Puttalam No.* 26736.
Argued on 7th February, 1940.
Decided on 13th February, 1940.

*Criminal Procedure Code—Sections* 167 (2), 172 *and* 347—*Charge—Powers of court as regards amendment—Omission to state proper particulars—Powers of Supreme Court to convict accused in appeal under the right offence.*

**Held :** (i) That where a charge did not contain the proper particulars, a Magistrate under section 172 of the Criminal Procedure Code has the power to amend the charge so as to make it fit into the evidence led in the case.

(ii) That, in view of the provisions of section 167 (2) of the Criminal Procedure Code, a reference in the charge to the name of the offence as specified in the Penal Code is sufficient to give an accused notice of the matter with which he is charged.

(iii) That where a Magistrate has convicted an accused person under a wrong section the Supreme Court in appeal has the power under section 347 of the Criminal Procedure Code to convict him of the right offence.

*H. V. Perera, K.C.* with *C. X. Martyn*, for the accused-appellant.
*L. A. Rajapakse*, for the complainant-respondent.

HOWARD, C.J.

This is an appeal by the accused from his conviction and sentence of six weeks' rigorous imprisonment by the Magistrate of Puttalam on the 6th September, 1939, on a charge of using criminal force otherwise than on grave and sudden provocation under section 343 of the Penal Code. The appellant was originally charged with (1) criminal trespass (2) voluntarily causing hurt under section 314 of the Penal Code (3) insulting the complainant. The learned Magistrate after revising the evidence acquitted the appellant of the 1st and 3rd charges. The 2nd charge was framed as follows :

> "At the same time and place aforesaid did voluntarily cause hurt to the complainant Sego Meera Natchiya by striking her with a wooden sandal."

The Magistrate has found that the act of striking the complainant with a wooden sandal has not been established but on the other hand there is adequate evidence to prove that the appellant assaulted the complainant by kicking and with hands and a stick. The Magistrate holds that, owing to the omission to mention explicitly in the summons the assault by kicking and with hands and a stick, he is unable to convict the appellant on the charge under section 314. He considers, however, that there is sufficient evidence to maintain a charge of using criminal force otherwise than on grave and sudden provocation, and in these circumstances convicts the appellant under section 343.

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The judgment of the learned Magistrate who is a civil servant and not a professional lawyer reveals great confusion of thought. If the evidence with regard to the kicking and assault by hands and a stick was to be accepted an offence under section 314 had been committed. If the Magistrate considered that a conviction under section 314 was not possible by reason of the failure to give the proper particulars in the charge, the same objection could be taken to a conviction under section 343. The particulars in the charge could have been made to fit in into the evidence, if the Magistrate had amended the charge under the powers vested in him by section 172 of the Criminal Procedure Code. In view, however, of the provisions of section 167 (2) of the Criminal Procedure Code, I think a reference in the charge to the name of the offence as specified in the Code was sufficient to give the appellant notice of the matter with which he was charged. In the circumstances of this case, moreover, the omission to state the proper particulars was not material inasmuch as the accused could not be said to have been misled by such omission. In these circumstances the Magistrate should have convicted the appellant under section 314 and I, therefore propose to employ the powers vested in the Supreme Court under section 347 of the Criminal Procedure Code as to convict the accused of the right offence. It is clear from the commentary on the corresponding section of the Indian Criminal Procedure Code at pages 471–471 of Woodroffe's Criminal Procedure in British India that the facts of this case warrant the employment of such powers. In view of this decision it becomes unnecessary for me to consider whether the Magistrate had under the Criminal Procedure Code any power to convict the appellant of an offence under section 343 of the Penal Code.

Counsel for the appellant has, in addition to various submissions with regard to the finding, contended that in the circumstances of this case which was in the nature of a family quarrel a sentence of six weeks' rigorous imprisonment was too severe a penalty. Counsel for the complainant has not maintained that this assault merited a term of imprisonment. I am of opinion that justice can be met without sending the appellant to prison.

The conviction of the appellant under section 343 of the Penal Code and the sentence of six weeks' rigorous imprisonment are set aside and I convict him under section 314 and sentence him to a fine of Rs. 50/– or one month's rigorous imprisonment in default.

*Conviction and sentence varied.*

**Proctors :—**

*W. M. Muthukumaru*, for the accused-appellant. (Marikar)
*David*, for the complainant-respondent. (Meera Natchia)

*Present:* NIHILL, J.

## DHARMARATNE (Excise Inspector) vs DAVITH SINGHO

*S. C. No. 677 of 1939—M. C. Tangalle No. 9251.*
Argued on 24th January, 1940.
Decided on 7th February, 1940.

*Excise Ordinance—Illicit sale of arrack—Absence of direct evidence of sale—Denial of sale by decoy—Can conviction be based on circumstantial evidence—Principles governing punishment of young first offenders.*

The accused was charged with selling arrack without a licence. The decoy denied there ever was a sale. The other evidence as accepted by the Magistrate was to this effect: A decoy who was not smelling of liquor was sent to the accused's boutique with a marked rupee note to buy arrack. He was not kept under observation whilst he was on his way but the inspectors followed him in a car five minutes later. The decoy was found standing in the boutique near the accused with a glass in his hand which was wet and smelling of arrack. In a drawer of a table that was by the accused the marked one rupee note was found in a tin receptacle. The decoy's mouth smelt of arrack. On the table was found an open bottle of arrack.

**Held :** That the evidence was sufficient to justify the conviction of the accused.

Per NIHILL, J. "It is a good general principle to keep the young first offender out of prison unless circumstances make it evident that it is better both for himself and society that he should go there. I doubt if this class of offence falls into that stern category."

**Cases referred to :**—*Dharmaratne vs Kandasamy* 35 N.L.R. 206.
*Jayatilake vs Dona Ana* 36 N.L.R. 27.

*J. E. M. Obeyesekere*, for the accused-appellant.
*Nihal Goonesekere, Crown Counsel*, for the complainant-respondent.

NIHILL, J.

The appellant who was the first accused was convicted for selling an excisable article, to wit arrack. He is a boy of seventeen and a servant of the second accused who was acquitted.

The decoy in his evidence denied that there ever was a sale and the point for my consideration is whether the other evidence sufficiently establishes beyond all reasonable doubt that a sale in fact took place. *Dharmaratne vs Kandasamy.**

The evidence of the Excise Inspectors which was believed by the Magistrate amounts to this : The decoy was handed a one rupee note bearing the number P/46 68815 and told to go to the boutique and buy arrack. At that time he had nothing on him and was not smelling of liquor. He was not kept under observation whilst he was on his way but the inspectors followed him in a car five minutes later. He was found standing in the boutique near the first accused with a glass in his hand which was wet and

* 35 N.L.R. 206

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Dharmaratne (Excise Inspector) *vs* Davith Singho

smelt of arrack. In a drawer of a table that was by the first accused there was found the one rupee note in a tin receptacle. Nothing was found on the decoy. His mouth smelt of arrack. On the table there was found an open bottle of arrack.

The second accused, the owner of the boutique, was not present when the inspector arrived. The decoy said he never bought the arrack because he found the boutique shut and that he waited about outside until the inspectors came. His evidence does not explain how he came to part with the one rupee note. He said he was drunk at the time.

The first accused gave evidence in which he admitted taking the rupee note from the decoy which says was tendered to him to pay for the purchase of two cigarettes and that he returned the change. No change or cigarettes were found on the person of the decoy.

It is apparent on the above facts that whilst there is no direct evidence of the sale, circumstances have been proved which point strongly to the conclusion that a sale did in fact take place.

In *Jayatileke vs Dona Ana*,* Drieberg, J. discussed the value of circumstantial evidence in a like case where the decoy failed to support the charge. The facts in that case were somewhat similar to this. Here too, " pretty stringent proof has been given of circumstances tending to support the charge, " and the explanation of the accused has not relieved the suspicion because no change and no cigarettes were found on the decoy. Furthermore, the evidence of the decoy is patently false unless both the inspectors and the accused have committed perjury.

I cannot, therefore, conclude that the Magistrate was not justified in making the inference that the sale did take place and that the first accused who was the salesman in charge of the boutique at the time was the man who effected it.

With regard to the sentence I feel in some difficulty. The appellant has no previous convictions. He is a seventeen year old shop assistant, lucky, I suppose to have employment at three rupees a month and his food. Now the Magistrate in refusing the option of a fine has given reasons which are entitled to consideration. He has appreciated that the real culprit is the employer but he hopes by sharp sentences of imprisonment to discourage recruits from entering the trade, so that employers bereft of salesmen will have to take risks themselves and so increase the chances of catching the real offenders.

This strikes me as an ingenious but somewhat devious method of approach to the problem and I doubt if it justifies the adoption of a principle akin to vicarious punishment. I think it might, if there was evidence, that the trade held out alluring conditions of service to young men prepared to take risks. In the present case the appellant is clearly nothing but a drudge and I do not imagine that such part of his duties as has involved him in unlawful acts has added anything to his emoluments.

* 36 N.L.R. 27

It is a good general principle to keep the young first offender out of prison unless circumstances make it evident that it is better both for himself and society that he should go there. I doubt if this class of offence falls into that stern category.

In confirming this conviction, therefore, I vary the sentence of four months' rigorous imprisonment to one of a fine of seventy five rupees or in default two months' rigorous imprisonment.

*Conviction affirmed.*
*Sentence varied.*

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*Present:* HOWARD, C.J.

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## BABUN SINGHO vs SEMANERIS SINGHO ET AL

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*S. C. No.* 210/39—*C. R. Panadura No.* 7366.
Argued on 5th February, 1940.
Decided on 8th February, 1940.

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*Deed—Transfer of land reserving right to repurchase within a limited period—Deed not signed by vendees—Can the vendor's right so reserved be enforced.*

The plaintiff sold a land to the defendants on a notarial deed wherein he reserved to himself the right of repurchasing the same within a period of four years. The words used were " reserving to myself the right of repurchase." The deed was executed by the plaintiff only. The defendants had not signed it. The plaintiff brought this action to enforce the right so reserved. The learned Commissioner dismissed the action on the ground that the deed contained no agreement or promise by the vendees to re-transfer the land.

**Held :** (i) That the plaintiff was entitled to maintain the action.
(ii) That the words " reserving to myself the right of repurchase " by implication created an obligation on the part of the defendants to reconvey.

**Cases referred to :**—*May vs Belville* (1905) 2 Ch. 605.
*Sardiya vs Ranasinghe Hamine* 14 C.L.W. 97.

*N. E. Weerasooriya, K.C.* with *A. C. Z. Wijeratne*, for the plaintiff-appellant.

*H. A. Wijemanne*, for the defendants-respondents.

HOWARD, C.J.

This is an appeal by the plaintiff from a decision of the Commissioner of Requests, Panadura, made on the 11th October, 1939, dismissing the action with costs. The case arose out of a deed No. 8972 dated the 11th January,

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1935, whereby the plaintiff sold to the first two defendants certain property reserving to himself the right of purchasing for the sum of rupees sixty-six within a period of four years from the date thereof. The deed was executed by the plaintiff and notarially witnessed. It was not executed by the other parties. By deed No. 12605 of the 8th December, 1938, the added defendant purchased the first and second defendants' rights in deed No. 8972 of the 11th January, 1935. The Commissioner of Requests held that this deed contains no promise or agreement to re-transfer the land when called upon to do so on the repayment of the sum of sixty-six rupees. In these circumstances he dismissed the action with costs.

The only real point in this case is the interpretation to be placed on the expression " reserving to myself the right of repurchase " occurring in the deed. Other points have been argued by counsel for the respondents. He contends that by virtue of section 2 of the Prevention of Frauds Ordinance there should be a written document signed by the defendants and that as the defendants have not executed deed No. 8972 the covenant to re-transfer is not enforceable against them or their purchaser. This contention is in my opinion untenable. In Norton on Deeds, Second Edition page 26, the following principle is evolved from a series of judicial decisions :

> " Though execution of a deed is necessary to bind the grantor, yet a party who takes the benefit of a deed is bound by it though he does not execute it."

The case of *May vs Belleville* (1905 – 2 Ch. 605) supports the principle as formulated by Norton in the passage I have cited. In the present case the first and second defendants and the added defendant who has merely purchased their rights, having taken the benefit of the deed, cannot repudiate its obligations.

Counsel for the respondents also argues that the plaintiff cannot maintain this action as he has not paid into court the purchase money for the re-transfer of the property. In this connection he has referred me to Walter Pereira's "Laws of Ceylon," page 774. I do not consider there is any substance in this argument. Moreover, such a defence if relied upon, should have been raised in the defendant's pleading.

I am therefore of opinion that, if there was a covenant in the deed to reconvey the property, the defendants are bound by it. The words "reserving to himself a right to re-purchase " by implication raise an obligation on the part of the defendants to reconvey. I am unable to distinguish the case from that of *Sardiya vs Ranasinghe Hamine* (14 C.L.W. 97).

In these circumstances the judgment of the Commissioner is reversed, and judgment entered for the plaintiff as claimed, with costs in this court and in the court below.

*Appeal allowed.*

**Proctors :—**

*D. R. de Silva*, for the plaintiff-appellant. (Babun Singho)

*Thrimane* and *Meegama*, for the defendants-respondents. (Semaneris Singho et al)

*Present:* KEUNEMAN, J.

## NADAR vs THE ATTORNEY-GENERAL

*S. C. No.* 143/1939—*C. R. Colombo No.* 51583.
Argued on 16th February, 1940.
Decided on 21st February, 1940.

*Income Tax Ordinance (chapter* 188) *section* 84—*Double tax relief—Sections* 45 *and* 46—*Can relief be given when claim s not made within three years of the end of the year of assessment in respect of which the relief is claimed.*

**Held :** That double tax relief cannot be given unless it is claimed within the time mentioned in section 84 of the Income Tax Ordinance (chapter 188).

**Cases referred to :**—*King vs The Kensington Income Tax Commissioner* (6 Tax Cases 613 at 622).

*N. Nadarajah* with *Aiyer* and *Koattegoda*, for plaintiffs-appellants.
*H. H. Basnayake, Crown Counsel*, for defendant-respondent.

KEUNEMAN, J.

The plaintiffs, who were partners of the firm of Kana Gnavenna Ena & Co., brought this action alleging that they had paid to the Commissioner of Income Tax the sums of Rs. 297/40 and Rs. 342/10 as income tax for the years ending 31st March, 1934, and 31st March, 1935, and that they were entitled to a refund of the sum of Rs. 154/80 under section 46 of the Income Tax Ordinance. The action was instituted on the 23rd of February, 1939. At the trial it was agreed that if the plaintiffs were entitled to a refund, the sum to be refunded was Rs. 136/01. The only issue framed ran as follows :

" Is the plaintiffs' claim for a refund barred by section 84 of the Income Tax Ordinance ? "

The plaintiffs' action was dismissed with costs, and the plaintiffs appeal.

It is clear that, if section 84 applies, the plaintiff's claim is out of time, as it was not made within three years of the end of the year of assessment.

It was argued that section 84 did not apply. Under that section, where any person has paid, by deduction or otherwise, in excess of the amount with which he is properly chargeable for any year, he is entitled to a refund of the amount so paid in excess.

In this case the plaintiffs who were non-resident partners have undoubtedly paid the sums mentioned in the plaint as income tax. They claim that they are entitled to relief from Ceylon Tax to the extent of Rs. 136/01 in virtue of the fact that they have paid income tax in India in respect of the corresponding period.

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It was argued that section 84 only applied to claims for refunds made in respect of assessments made under section 20 of the Income Tax Ordinance, and did not apply to a refund claimed under section 46. In other words, it was contended that the plaintiffs were "properly chargeable" for the full sums paid by them, but the claim for refund was made in consequence of the special case created by section 46.

Great stress was laid by the counsel for the appellants on the words "charge" and "chargeable" which occur in section 20 of the Ordinance. If we look at the Ordinance, we find, under section 5, that income tax, subject to the provisions of this Ordinance, shall be charged at specified rates in respect of the income of every person. Under section 6, "profits" and "income" are defined, and sections 7 and 8 contain certain exemptions.

Chapter III deals with the "ascertainment of profits and income." Section 9 deals with certain deductions which are allowed and section 10 with deductions which are not allowed.

Chapter IV deals with the "ascertainment of statutory income." Section 11 sets out what the "statutory income" of a person from each source of his profits and income in respect of which tax is charged shall be.

Chapter V sets out in section 13 that the "assessable income" of a person shall be "the statutory income" subject to certain deductions which are set out.

Chapter VI, in section 14, sets out that the "taxable income" of the person shall be his assessable income, except as provided by the subsequent sections, 15 to 19. These latter sections deal with certain exemptions, allowances, etc.

Chapter VII deals with the charge and rates of tax. Section 20 provides that the tax shall be charged upon taxable income at certain rates for resident and non-resident persons. This section contains several phrases such as, "an individual is chargeable," "no tax is chargeable under section (1)," "tax charged," "tax payable," etc.

Chapter VIII refers to special cases, and items A to L—sections 21 to 53—related to such special cases. The section with which we are concerned, namely, section 46, relates to relief in respect of Empire Income Tax, and falls within item K, namely, relief in cases of double taxation.

A later chapter, XII, deals with payment of tax. Chapter XIV deals with repayment and contains section 84.

The argument addressed to me on behalf of the appellants amounted to this, namely, that the words in section 84, "in excess of the amount with which he was properly chargeable for the year," referred only to the charges made under section 20 and had no relation to the special case under section 46.

In the first place, I find it difficult to understand how the special cases in chapter VIII can be regarded otherwise than as supplementary to section 20, and as amplifying the terms of that section.

Further, where this Ordinance has gone out of its way to provide machinery for repayment, I do not think I am justified in placing any

unduly restrictive construction on the words of the section so as to make it apply only to certain classes of repayment.

Again, taking account of the scheme of the Ordinance and the position in which section 84 appears in that Ordinance, I am of opinion that the words, "amount.....properly chargeable" cover the circumstances of this case. It may be remembered that the word "chargeable" is used in several senses even in section 20. As pointed out by Lord Wrenbury with regard to a similar case relating to the Income Tax Acts in England. "In these Acts it is not possible to rest any conclusion upon a particular word. The same word is in one section used in one sense and in another in a different sense"— *King vs The Kensington Income Tax Commissioner* (6 Tax Cases 613 at 622).

On examination of section 46 itself, it will be found that where the person establishes to the satisfaction of the Commissioner that he has paid or is liable to pay both Ceylon Tax and Empire Tax in respect of the same period of time he "shall be entitled to relief from Ceylon Tax for one half of the Ceylon Tax or Empire Tax whichever is less, subject to certain provisions. It follows that when the person has established his claim to the satisfaction of the Commissioner, and he has a statutory right to relief and that the amount of the tax payable by him must be diminished to that extent. Where he has paid the full amount without the diminution, I think it follows that he has paid "in excess of the amount with which he was properly chargeable." I do not think the word "chargeable" is used in section 84 in any other sense than "liable." No technical significance should be attached to the word "chargeable" so as to restrict the term only to "charges" mentioned in section 20.

Counsel for the appellants conceded that in at any rate one of the "special cases," namely, section 43 relating to dividends (item I), where the tax had been deducted at the source in regard to the dividend, and tax has by inadvertence been paid on the dividend by the individual, a claim for a refund would fall under section 84. Now, under section 43, where the tax has been deducted at the source, what the person is entitled to is "set-off against the tax" *vide* section 43 (3) and (4).

If a person who is entitled to a set-off and has failed to claim it can be regarded as having made a payment "in excess of the amount with which he is properly chargeable," I fail to understand how a person who has a statutory right to relief and has failed to claim it can be regarded as falling into any other category. I think the argument for the appellants fails, and that section 84 applies to the present case and that the time limit mentioned therein is operative.

Counsel for the respondent further argued that if section 84 did not apply, the subject was devoid of any remedy. I do not think it is necessary for me to consider this argument, nor is it possible for me to do so in view of the single issue which was framed in this case.

The appeal is dismissed with costs. *Appeal dismissed.*

**Proctors** :—*A. P. de Zilva*, for the plaintiff-appellant. (Nadar)

*Present:* MOSELEY, J.

## PERERA (P. C. 1541) vs NADAR

*S. C. No.* 852—*M. C. Galle No.* 2010.

Argued on 14th February, 1940.

Decided on 20th February, 1940.

*Weights and Measures Ordinance (chapter* 127) *section* 16—*Using false weights—Is a conviction for using false weights bad merely because it does not proceed upon the evidence of a duly authorised examiner of weights and measures.*

The attention of a police constable was attracted by the dispute between the accused, a trader, and a customer as to the correctness of the trader's weights. The constable intervened and took the impugned weights to the Mudaliyar at the Kachcheri and the latter compared them with the standard weights at the Kachcheri and found the accused's weights wanting. The accused was thereupon prosecuted under section 16 of the Weights and Measures Ordinance. Objection was taken to the prosecution on the ground that the Mudaliyar had no authority under the Ordinance to test the weights and that therefore his evidence should not be acted on.

**Held :** That a conviction under section 16 of the Weights and Measures Ordinance is not bad merely because it proceeds on the evidence of persons not authorised under the Ordinance to examine weights and measures.

**Cases referred to :**—*Altendorf vs Kaduruwel Chetty* (5 S.C.C. 201)
*Sub-Inspector of Police, Moratuwa vs Naina Mohamed* (29 N.L.R. 351)
*Wickramasinghe vs Ferdinandus* (5 Balasingham, Notes of Cases p. 17)

*V. T. Pandita Gunewardene*, for accused-appellant.
*Nihal Gunesekera, Crown Counsel*, for complainant-respondent.

MOSELEY, J.

The appellant was charged under section 16 of chapter 127 of the laws of Ceylon ( Weights and Measures Ordinance ) with having in his possession and using two unstamped weights *viz.* one " 1 lb. weight " less in weight than the standard weight by ½ oz. and one " 2 oz. weight " less in weight than the standard weight by the weight of a ten cent coin. He was convicted and fined Rs. 10/–, in default one week's simple imprisonment.

It is not an offence against any provision of the Ordinance, as far as I am aware, to " have in possession " such weights. It may be that the words crept into the charge as an embellishment of the somewhat bald charge of " using." It must be assumed, therefore, that the accused was convicted of using the weights. The learned Magistrate in his judgement was unable to hold that the weights were not stamped ; that element of the charge was accordingly eliminated.

The facts shortly are these : The shop of the accused was entered by a police constable to whom it had been reported that some troubles had

occurred. He took the parties and the impugned weights to the police station. The weights were then taken to the Kachcheri where they were compared by the Mudaliyar with the copies of the standard weights preserved in Kachcheries in accordance with the provisions of section 3 (*d*) of the Ordinance. The Mudaliyar gave evidence that the accused's weights respectively were short to the extent set out in the charge.

The facts are not disputed and at the trial the accused confined his defence to the contention that neither the constable nor the Mudaliyar, upon whose evidence the case for the prosecution rests, was an " authorised person." By that, I take it, was meant that neither was an examiner of weights and measures appointed under the provisions of section 10 of the Ordinance.

On appeal the argument of counsel was confined to this point.

Sections 12 and 14 of the Ordinance impose certain duties upon examiners, one of which is periodically to enter shops in their area, examine all weights, and seize such as are not according to standard and produce them at the trial of the offender. These, no doubt, are the circumstances contemplated in section 16 which defines the offence of a person in whose shop is found any weight not in conformity with standard.

Counsel for the appellant referred me to the case of *Altendorf vs Kaduruwel Chetty* (5 S.C.C. 201) in which the opinion was expressed that the finding contemplated by the Ordinance was the " finding by a person authorized to search for false weights, and not a mere finding by some other individual." A practical reason for this is not hard to find as it would be obviously inconvenient, to put it mildly, if any member of the public were at liberty to enter a shop with a view to initiating proceedings of this nature and to give evidence as to the inaccuracy of the weights.

The case of *Sub-Inspector of Police, Moratuwa vs Naina Mohamed* (29 N.L.R. 351) was also cited. The head notes to this case would seem to be somewhat misleading inasmuch as the two distinct offences of " selling " and " finding " are confused. This authority, however, goes no further than to affirm the proposition that when a person is prosecuted on a charge that false weights have been found in his shop there must be proof that the impugned weight was found by a person authorized under the Ordinance.

The charge in the case, when the meaningless portion referring to possession is eliminated, is that of user. It seems to me that a charge for using false weights would be difficult of proof if the person who suspected that he was being defrauded had to await the intervention of an examiner duly appointed under the Ordinance. The examiner, upon being informed, would visit the shop but it would be impossible to prove that any weights that he found on the premises had in fact been used. Only a conviction on a charge that false weights were found could result.

In the present case the attention of a police constable was attracted by the dispute between trader and customer. He took the impugned

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weights to the Mudaliyar at the Kachcheri where the standard weights are preserved. The Mudaliyar compared the impugned weights with the standard and found the former wanting. Later he gave evidence to that effect.

In *Wickramasinghe vs Ferdinandus* (5 Balasingham, Notes of Cases, Page 17) de Sampayo, J. expressed the opinion that the court should be satisfied by evidence laid before it that any impeached weights were tested by comparison with standards. In the present case the evidence of the Mudaliyar was not challenged. Only his status was queried. It seems to me that it was for the court to say whether or not it was satisfied that the weights were false and, as far as I can see, there was no reason why it should not have been so satisfied.

There is, however, no evidence that the 2 oz. weight was used and the conviction must in that respect be modified. I therefore affirm the conviction and the sentence on the charge of using a 1 lb. weight not in conformity with the standard weight.

The appeal is dismissed.

*Appeal dismissed.*

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*Present:* HOWARD, C.J. & WIJEYEWARDENE, J.

SELVADURAI vs RAJAH AND ANOTHER

*S. C. No.* 139—*D. C. Jaffna No.* 11503 (*Inty*)

Argued on 18th January, 1940.

Decided on 24th January, 1940.

*Civil Procedure Code* (*chapter* 86) *section* 839—*Inherent power of a court to lay by an action pending the decision of another action affecting the same subject-matter.*

**Held :** That a court has inherent power to lay by a case pending the decision of an action in another court affecting the question at issue.

Per WIJEYEWARDENE, J.—" I do not think that the powers of a court are strictly confined within the narrow limits of the express provisions of the Code. A court has, and it is necessary that it should have, inherent powers to make orders which are absolutely essential in the interests of justice. A court, no doubt, should guard against the exercise of such powers in an arbitrary and capricious manner and should invoke such powers only in matters for which no express provisions is made by the Code. Even where a court has recourse to such inherent powers it must be careful to see that its decision is in harmony with sound general legal principles and it is not inconsistent with the intentions of the legislature."

**Cases referred to :**—*Hukam Chand Boid vs Kamala Nand Singh* (1905-33 Calcutta 927)

*N. Nadarajah* with *H. W. Thambyah*, for plaintiff-appellant.

No appearance for defendants-respondents.

WIJEYEWARDENE, J.

The plaintiff-appellant filed this action in July, 1937 in order to obtain a declaration of title to a property in Kandy and to have a deed No. 78 of 27th April, 1927, executed by the second defendant in favour of the 1st defendant, set aside as having been executed in collusion, with intent to defraud the plaintiff and other creditors of the second defendant.

The plaintiff did not take out summons on the defendants for some time and ultimately the summons was served on the defendants in October, 1938. The defendants filed answer in January, 1939, and the case was fixed for trial before the District Judge of Jaffna.

The first defendant in the meantime filed action L. 141 in the District Court of Kandy in September, 1938 against the plaintiff and a tenant under the plaintiff in order to obtain a declaration of title in respect of the same property. The present plaintiff filed answer in that case and claimed that the deed on which the 1st defendant (the plaintiff in the Kandy case) based his title should be set aside. The second defendant in the present action has been made a party to that action. The issues in that case were framed in February, 1939 and the trial commenced in August, 1939. An examination of the record of the Kandy case shows that the plaintiff in that action (1st defendant in this case) and two witnesses have given evidence and that the trial has been adjourned for 30th January, 1940 for further hearing.

In July, 1939 the plaintiff in this action filed a petition and an affidavit and moved in the District Court of Jaffna that the present action be laid over pending the final decision of the Kandy case. The defendants opposed the application and the District Judge made order dismissing the application of the plaintiff as he thought he had no power under the Civil Procedure Code to grant the application of the plaintiff except with the consent of the defendants. The present appeal is preferred against that order.

The trial of this action has not commenced as yet in the District Court of Jaffna in view of the present appeal.

The question of law that arises on this appeal is whether a court has no powers in matters of procedure other than those expressly provided for by the Code. There can be no doubt as to the answer to that question especially in view of section 839 of the Civil Procedure Code which correspond to section 151 of the Indian Code of Procedure. Section 839 provides :

> " Nothing in this Ordinance shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the courts."

I do not think that the powers of a court are strictly confined within the narrow limits of the express provisions of the Code. A court has, and it

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is necessary that it should have, inherent powers to make orders which are absolutely essential in the interests of justice. A court, no doubt, should guard against the exercise of such powers in an arbitrary and capricious manner and should invoke such powers only in matters for which no express provision is made by the Code. Even where a court has recourse to such inherent powers it must be careful to see that its decision is in harmony with sound general legal principles and it is not inconsistent with the intentions of the legislature.

In *Hukam Chand Boid vs Kamala Nand Singh* (1905-33 Calcutta 927) Woodroffe, J. said :

> " The court has in many cases where the circumstances require it acted upon the assumption of the possession of an inherent power to act *ex debito justitiae* and to do real and substantial justice for the administration of which it alone exists. It has been held that although the Code contains no express provision on the matters hereinafter mentioned the court has an inherent power *ex debito justitiae* to consolidate ; postpone pending the decision of a selected action ; to advance the hearing of suits ; to stay on the ground of convenience cross suits .....to decide one question and to reserve another for investigation, the Privy Council pointing out that it did not require any provision of the Code to authorise a judge to do what in this matter was justice and for the advantage of the parties.....These instances (and there are others) are sufficient to show firstly that the Code is not exhaustive and secondly that in matters with which it does not deal the court will exercise an inherent jurisdiction to do justice between the parties, which is warranted under the circumstances and which the necessities of the case require."

It appears to me that the present appeal is one in which the court should exercise its inherent powers. If the plaintiff's application is refused there will be two District Courts of the Island each trying simultaneously a case between the same parties with regard to matters in dispute which are identically the same. The trial in the Kandy case has now reached its final stage and I think it necessary in the interests of justice that the case in the District Court of Jaffna, which has not come up for trial, should be laid by pending the final decision in the Kandy case.

I would allow the appeal with costs and order that the trial in this action be not taken up pending the final decision in D. C. Kandy L. 141.

HOWARD, C.J.

I agree.

*Appeal allowed.*

*Present :* SOERTSZ, J. & NIHILL, J.

## MOHIDEEN AND OTHERS vs MARIKAR

*S. C. No.* 133—*D. C. Colombo* 9042 (m)
*With application for* restitutio-in-integrum *No.* 566
Argued on 8th February, 1940.
Decided on 19th February, 1940.

*Civil Procedure Code section* 84—*Decree* nisi *unless set aside within* 14 *days becomes absolute.*

**Held :** That a decree *nisi* entered under section 84 of the Civil Procedure Code becomes absolute automatically at the expiration of fourteen days, and once that period elapses, a plaintiff can obtain no relief under that section of the Code.

**Followed:**—*Annamalay Chetty vs Carron* (3 C.L.R. 48)

*Chelvanayagam*, for plaintiffs-appellants and for petitioners.
*N. Nadarajah* with *Renganathan*, for defendant-respondent.

SOERTSZ, J.

In this action the plaintiffs sued the defendant to recover a sum of Rs. 534/90 and interest. The defendant filed answer stating that only a sum of Rs. 89/89 was due, and he prayed that the plaintiffs' action in excess of this sum be dismissed with costs. Trial was fixed for the 5th of April, 1939. On that day, the plaintiffs were absent when the case was called. The defendant was present and admitted that Rs. 89/89 was due and the learned Judge entered decree *nisi* dismissing the plaintiffs' action in excess of that amount with costs.

On the 6th April 1939, the plaintiffs' proctor swore an affidavit explaining how it came about that neither he nor any one of his clients was present when the case was called on the 5th April, and moved to have the decree *nisi* vacated. On that motion, the trial Judge made order on the 13th of April, 1939, " Notice defendant for 22-5-39 and move." The journal entry of the 22nd of May, 1939, shows that the notice ordered on the defendant had been served. The matter was fixed for inquiry and when the plaintiffs' proctor's motion came up for discussion on the 25th July, counsel appearing for the defendant took the objection that by operation of section 84 of the Civil Procedure Code, the decree had become absolute and that there was no longer any question of vacating the decree *nisi*. He relied on the case of *Annamalay Chetty vs Carron* (3 C.L.R. 48.) Plaintiffs' counsel asked for time to meet this objection and to furnish authorities in regard to it. He was given this opportunity and he was heard on a later day, and the learned Judge made order upholding the objection and refusing the plaintiffs' application. The appeal is from that order.

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When, at the hearing of the appeal, I was informed of the decision which compelled the trial Judge to refuse the application, my immediate reaction was a feeling of surprise, for it seemed to me that a great burden was imposed on the plaintiffs in this case and on plaintiffs generally if they are required by law to give notice to the defendants and to show cause for the decree *nisi* being vacated, all within fourteen days of its being entered. But a careful examination of section 84 convinces me that the ruling in the case I have referred to contains a correct interpretation of section 84 of the Code if I may say so with great respect. As pointed out in that case the decree *nisi* becomes absolute automatically at the expiration of fourteen days and once that period elapses a plaintiff can obtain no relief under that section of the Code. The word " previously " occurring where it does, makes that quite clear. At one stage of the argument I inclined to the view that what a plaintiff was required to do within fourteen days was to begin proceedings to have the decree set aside, that is to say, I felt that " show good cause " must be understood to mean to make out a good *prima facie* case for setting aside the decree *nisi* by submitting an affidavit, for instance, as was done in this case. But the latter part of section 84 which reads " in case of such cause being shown the court shall set aside the decree " debars me from construing the same words when they occur in the earlier part of the section in the manner I suggested. It seems quite clear that the setting aside of the decree must be obtained if at all by good cause being shown not merely by good cause being attempted to be shown within fourteen days. In that view of the matter the appeal fails and must be dismissed with costs.

In regard to the application for *restitutio-in-integrum* I find it impossible to entertain it, for to do so would be to set at nought a clear requirement of the law of Civil Procedure.

Nihill, J.

I agree.

*Appeal dismissed.*

**Proctors :—**

***L. G. Motha*, for the defendant-respondent.** (Marikar)

*Present:* HOWARD, C.J.

## THAMOTHERAM PILLAI vs KANAPATHIPILLAI

*S. C. No.* 162/39—*C. R. Point Pedro No.* 30577.

Argued on 7th and 9th February, 1940.

Decided on 21st February, 1940.

*Vendor and purchaser—Transfer of land—Subsequent discovery that deed of transfer was pending partition action—Purchaser put in possession—Right of purchaser to bring action for recovery of purchase price—When cause of action arises—Prescription—Sections* 6, 7 *and* 10—*Is such action barred in six years.*

On deed No. 2193 dated 14th February, 1934 (P1) the defendant, his wife and another sold to the plaintiff for the sum of Rs. 750/– certain undivided shares of a land belonging to them. After entering into possession of the said shares the plaintiff discovered that the land sold to him was the subject-matter of a partition case. Having failed to secure his interests in the said partition case the plaintiff brought this action in November, 1938 against the defendant claiming Rs. 300/–, being the price of the share conveyed by the defendant.

The defendant contested the claim on two grounds, *viz* :

(1) The plaintiff could not maintain this action inasmuch as he has not been judicially evicted from the said land.

(2) Even if the action was maintainable, it was prescribed.

The learned Commissioner gave judgment for plaintiff on both these issues and the defendant appealed. It was contended for the plaintiff :

(1) that this claim arose out of deed P1 and was therefore based on a written agreement within section 6 of the Prescription Ordinance.

(2) that his cause of action arose only in January 1937 when he came to know that P1 was of no use to him as it was void.

For the appellant it was argued :

(1) that the claim was not based on P1 and therefore fell within section 9 of the Prescription Ordinance and became prescribed in three years.

(2) that even if the action was not based the action was premature and could not arise until the plaintiff had been ousted by a third party with a superior title.

**Held :** (i) That the plaintiff's right of action, if any, became prescribed in three years.

(ii) That plaintiff's cause of action, if any, arose on the date P1 was executed inasmuch as P1 being void, the purchase money was given without consideration.

(iii) That, in the circumstances, a right of action could accrue to the plaintiff only after he had been ousted by a third party with a superior title.

**Cases referred to :—** *Thommassie vs Kanavathipillai Murugasoe and Another* (1883-5 S.C.C. 174).
*Bandara vs Punchi Banda* (34 N.L.R. 262).
*Lamatena vs Rahaman Doole* (26 N.L.R. 406).
*Dawbarn vs Ryall* (17 N.L.R. 372).
*Ratwatte vs Dullewe* (10 N.L.R. 304).
*Jamis vs Suppa Umma et al* (17 N.L.R. 33).
*Misso vs Hadjear* (19 N.L.R. 277).

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Thamotheram Pillai *vs* Kanapathipillai

*L. A. Rajapakse*, for the defendant-appellant.

*N. Nadarajah* with *H. W. Thambyah* and *V. F. Gunaratne*, for the plaintiff-respondent.

HOWARD, C.J.

This is an appeal by the defendant from a judgment of the Commissioner of Requests, Point Pedro, of the 17th April, 1939, ordering that the defendant pay to the plaintiff the sum of Rs. 300/– with interest and costs. The action arose out of deed No. 2193 dated the 14th February, 1934, by which the defendant and his wife and one other sold to the plaintiff for the sum of Rs. 750/– certain undivided shares of land belonging to the vendors. Subsequently after entering into possession of the said shares the plaintiff discovered that the land sold to him was the subject of a partition action No. 13199. On the defendant and other parties undertaking to execute a valid transfer in favour of the plaintiff, the latter applied in the said action No. 13199 of 1909 to have the said land partitioned. The application was dismissed by the court and the plaintiff was referred to his remedy by separate action. The plaintiff maintains that he has a cause of action against the defendant from whom he claims a sum of Rs. 300/– made up of a sum of Rs. 325/–, being the price of the share conveyed by the defendant to the plaintiff less Rs. 25/– waived to bring the action within the jurisdiction of the Court of Requests.

In the Court of Requests two points were made on behalf of the defendant. It was contended that the plaintiff could not maintain this action inasmuch as he had not been judicially evicted from the said land. It was further contended that even if the action was maintainable, it was prescribed. The Commissioner of Requests has held that the plaintiff's claim is based on a written agreement and therefore not prescribed as made within a period of six years. Moreover, as the plaintiff came to know that the deed P1 was of no use to him only in January, 1937, his cause of action can be considered to have arisen from then only. With regard to the first point, the learned Commissioner has held that the deed P1 being proved to be invalid the plaintiff is entitled to sue the defendant for the recovery of the money without judicial eviction.

In this court the defendant relies on the contentions submitted to the Commissioner. I propose to deal first with the question of prescription. The plaintiff contends that his claim arises out of P1 and is, therefore, based on a written agreement and comes within section 6 of the Prescription Ordinance and not prescribed as the claim is made within six years. The defendant on the other hand argues that the claim is not based on P1 and hence the action, not having been commenced within three years from the time when the cause of action arose, is in accordance with the provisions of section 9 of the Ordinance not maintainable. Various authorities have been brought to my notice. In *Thommassie vs Kanavathipillai Murugasoe and Another* (1883-5 S.C.C. 174), the owner of the land in 1879 conveyed

the land to a purchaser, the conveyance purporting to be made for a pecuniary consideration recited as previously paid. More than three years after the date of the conveyance the vendor sued the purchaser for the purchase money, averring that it had not been paid. It was held that the plaintiff's action was a simple action of debt and was consequently barred by the lapse of three years before action brought. The decision in *Thommassie vs Kanavathipillai Murugasoe* was followed in *Bandara vs Punchi Banda* (34 N.L.R. 262), where it was held by Macdonell, C.J. that an action to recover purchase money which was expressed in the conveyance to have been previously paid, is prescribed in three years. In that case the Chief Justice held that the plaintiff so far from suing on a written document was suing against one. Moreover, that his claim was rather upon an executed consideration inasmuch as he had conveyed the land, now seeks payment for it and to ascertain what the amount of that payment must be, he refers to a written contract but does not claim under it but against it. I have been referred by counsel for the respondent to the case of *Lamatena vs Rahaman Doole* (26 N.L.R. 406) and *Dawbarn vs Ryall* (17 N.L.R. 372) both of which were cited in *Bandara vs Punchi Banda.* In *Lamatena vs Rahaman Doole* it was held that a claim to recover the unpaid balance of the purchase price of land transferred by a deed of sale grows directly out of the deed of sale, is dependent on it and derives its vital force from it. It is, therefore, a claim arising from an agreement in writing and prescribed in six years. In *Dawbara vs Ryall* the vendee sued the vendor to recover compensation for a deficiency in the extent of the land sold to him by a notarial conveyance and it was held that the claim was based on a written agreement and would be prescribed after the expiration of six years. In that case the obligation was contractual and the claim was based on the written contract of sale between the parties. To my mind the present case falls within the principle laid down in *Bandara vs Punchi Banda* and *Thommassie vs Kanavathipillai Murugasoe* and is distinguishable from *Lamatena vs Rahaman Doole* and *Dawbarn vs Ryall.* The obligation arises as in those cases not out of the written agreement, but in spite of it. It is not dependent on it nor does it derive any force from it. Reference is made to it merely to ascertain for what sum the property was conveyed. The action, therefore, falls within either section 7 or section 10 of the Prescription Ordinance and is not maintainable if not commenced within three years from the time after the cause of action shall have arisen. The Commissioner has also held that the plaintiff's cause of action can be considered to have arisen only in January, 1937, when he came to know that the deed P1 was of no use to him. On this point also I am of opinion that the Commissioner has come to a wrong conclusion. The claim for the recovery of the purchase money is based on the ground that the transfer of the property being prohibited by law was invalid and hence the purchase money was given without consideration. The cause of action, therefore, arose as from the 14th February, 1934, the date on which the conveyance was made and the purchase money paid. The plaintiff was not suffering from any of the

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disabilities referred to in section 13 and 14 of the Prescription Ordinance. The fact that he became aware in January, 1937 that P1 was of no use to him is immaterial and cannot be regarded as prolonging the period allowed for bringing his claim. The cause of action, therefore, arose on the 14th of February, 1934, and having been instituted only on the 16th November, 1938, is barred. Counsel for the defendant also contended that this cause of action, even if not barred under the provisions of the Prescription Ordinance, was premature and could not arise until the plaintiff had been ousted by a third party with a superior title. In this connection my attention was invited to the terms of P1 which contained no warranty of title. In *Ratwatte vs Dullewe* (10 N.L.R. 304) it was held that a vendor of immovable property was bound to deliver vacant possession and on his failure to do so the vendee is entitled to a recission of the sale and a refund of the purchase money. Mr Rajapakse has contended that, apart from the obligation to give vacant possession, no other obligation either express or implied arises from P1. In *Jamis vs Suppa Umma et al* (17 N.L.R. 33), it was held by Wood Renton, A.C.J. that, in the absence of fraud or of an express warranty of title, the only primary obligations resting on the vendor of immovable property are to give the purchaser "vacant possession," that is to say, possession unmolested by the claim of any other person in possession of the property, and to warrant and defend the title which he conveys, after the purchaser, once placed in possession, has been judicially evicted. In *Misso vs Hadjear* (19 N.L.R. 277), it was held that in Roman-Dutch Law there is no implied obligation on the part of the vendor to convey good title. His obligation in to give vacant possession and to warrant against eviction. The principle that a purchaser has his remedy only after judicial eviction receives support also from Berwick's Voet, page 173. Counsel for the plaintiff has contended that there can be no contract in respect of something the sale of which is prohibited by law. In this case the sale by virtue of section 17 of the Partition Ordinance was unlawful, null and void. The transfer was, therefore, void and the purchase money handed over to perform an impossibility. The sale price was, therefore, recoverable even though the plaintiff had assumed undisturbed possession and had not been evicted. No authority was cited in favour of this proposition. I was, however, referred to certain passages on pages 18 and 19 of Berwick's Voet relating to the sale of such things as are excluded from commerce by nature, by the *jus gentium* or by the usages of the State. I do not think these passages assist the plaintiff in his presentation of this case. No warranty of title was given in nor can it be implied from P1. The plaintiff has been given vacant possession and has not been judicially evicted. The action, therefore, even if maintainable is premature.

For the various reasons I have given in this judgment the plaintiff's action must fail. The judgment of the Commissioner is set aside and there must be judgment for the defendant with costs in this court and the court below.

*Set aside.*

*Present:* MOSELEY, J.

NESADURAI (Municipal Inspector) vs PERERA

*S. C. No.* 780—*M.M.C. Colombo No.* 1827.
Argued on 13th February, 1940.
Decided on 19th February, 1940.

*Municipal Councils Ordinance* (*chapter* 193) *sections* 208, 222 *and* 229—*Is non-compliance with a notice given under section* 208 *an offence.*

**Held :** That a non-compliance with a notice given under section 208 of the Municipal Councils Ordinance (chapter 193) is not an offence.

Per MOSELEY, J.—" A reference to section 229, which declares that a contravention of any provisions of this part of the Ordinance is an offence, shows that penalties are provided in respect of nineteen sections. Of these sections, seven, in so many words, create offences, six, by imposing liabilities or prohibitions, do so in effect ; five merely give the Chairman power to require certain things to be done, and, if they are not done by the owner, to have them done at his expense. As to the remaining section *viz.* 206, a penalty for contravention is provided by section 229, and while it may be possible to guess at the intention of the legislature there is not even a vague hint as to the offence which it is intended to penalize. It would seem, then, that the provision of penalties for the contravention of certain sections has been made without much thought regarding the offences which those sections might be supposed to define. If the legislature intends to create an offence it should do so in unequivocal terms. It is not, in my opinion, sufficient merely to frame a table setting out a penalty for breach of a section. In case *Tuck & Sons vs Priester* (19 Q.B.D. 48) Lindley, L.J. observed " It is a well settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it, is so clear that the case must necessarily be within it."

**Cases referred to :**—*Tuck & Sons vs Priester* (19 Q.B.D. 48.)

*U. A. Jayasundere*, for the accused-appellant.
*No appearance* for the complainant-respondent.

MOSELEY, J.

The appellant was convicted on a charge of failure to carry out certain works which he had been required to execute by written notice issued by the Commissioner of the Municipal Council of Colombo under section 208 of chapter 193 of the laws of Ceylon. Section 229 of the Ordinance contains a table of penalties which may be imposed in respect of offences, and in pursuance, presumably, of the provision of a penalty prescribed for an offence against the provision of section 208, the appellant was fined Rs. 30/–, in default 30 days' simple imprisonment. He was further given time to start and finish the work by October 10th.

The grounds of appeal, as set out in the petition, are that the appellant has done nothing in contravention of the section. At the hearing, however,

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counsel for the appellant limited his argument to the contention that section 208 does not create an offence. That it does not do so in so many words must be conceded. Moreover, section 222 makes express provision for the case where an owner or occupier neglects to comply with the requirements of any notice served upon him in pursuance of any section of this part of the Ordinance by permitting the Chairman to cause the required works to be executed and to recover the cost from the owner or occupier. Such a provision, of course, does not necessarily negative the power of the legislature to create an offence out of the neglect to comply with the requirements of such a notice. It may well be in the interests of public health that works of the description contemplated should be carried out with expedition. In such a case it would not be unreasonable to provide for the execution of the works by the Council and, in addition, to make the neglect of the owner punishable. For example, section 213 of the Ordinance, while it does not expressly create an offence, imposes upon an owner a requirement, non-compliance with which, would, in my view, constitute an offence for which a penalty is prescribed by section 229. The section goes to invest the Chairman with power to carry out the required works and recover the cost from the owner.

It would not, therefore, be safe to assume that the legislature, having in mind the provisions of section 222, did not *intend* to create an offence in the case of neglect on the part of an owner, to comply with the requirements of a notice issued by the Chairman in pursuance of the provisions of section 208.

The point for decision is whether or not section 208 creates an offence.

A reference to section 229, which declares that a contravention of any provision of this part of the Ordinance is an offence, shows that penalties are provided in respect of nineteen sections. Of these sections, seven, in so many words, create offences, six, by imposing liabilities or prohibitions, do so in effect; five merely give the Chairman power to require certain things to be done, and, if they are not done by the owner, to have them done at his expense. As to the remaining section, *viz.* 206, a penalty for contravention is provided by section 229, and while it may be possible to guess at the intention of the legislature, there is not even a vague hint as to the offence which it is intended to penalize. It would seem, then, that the provision of penalties for the contravention of certain sections has been made without much thought regarding the offences which those sections might be supposed to define. If the legislature intends to create an offence it should do so in unequivocal terms. It is not, in my opinion, sufficient merely to frame a table setting out a penalty for breach of a section In case *Tuck & Sons vs Priester* (19 Q.B.D. 48) Lindley, L.J. observed " It is a well settled rule that the court will not hold that a penalty has been incurred, unless the language of the clause which is said to impose it, is so clear that the case must necessarily be within it."

Now, is the language of section 208 so clear that it is beyond doubt that a person who omits to comply with the requirements of the Chairman, set out in a notice, has committed an offence? Section 229 which prescribes the penalty begins with these words: "Whoever contravenes any provision of this part of the Ordinance shall be guilty of an offence." It does not proceed to say "or whoever fails to comply with any notice issued under any provision of this part." Compare the language of section 208 with that of section 213. In the latter case we have ".....the owners *shall*, within thirty days after notice....cause...." Non-compliance with the requirements of the notice would seem, beyond all doubt, to be an offence, notwithstanding the fact that the section goes on to empower the Chairman to carry on with the work and charge the cost to the owner. Section 208, however, merely provides for the issue by the Chairman of a notice requiring the owner to execute certain works within a reasonable time. Nowhere in the section is any obligation placed upon the owner to carry out those requirements. For the consequence of non-compliance one has to refer to section 222, which seems to indicate clearly that no more is expected from the owner than that he shall bear the expenses of any works carried out by the Chairman in consequence of the owner's neglect to comply with a notice.

If it was the intention of the legislature that non-compliance with such a notice should be an offence, it has not, in my opinion, declared its intention with the clarity which Lindley, L.J. thought necessary. Moreover, considering this part of the Ordinance as a whole, and the number of instances, *e.g.* section 218, in which an offence is explicitly created, there is no reason for thinking that it was intended that non-compliance in this particular case should be an offence.

I would allow the appeal.

*Appeal allowed.*

*Present:* SOERTSZ, J. & NIHILL, J.

## DE SARAM vs DE SILVA AND ANOTHER

*Application for Revision No.* (141) *in D. C. Matara* 11253.

Argued on 8th February, 1940.

Decided on 21st February, 1940.

*Partition action—Application of section* 84 *of the Civil Procedure Code* (*chapter* 86).

**Held :** (i) That section 84 of the Civil Procedure Code (chapter 86) applies to actions under the Partition Ordinance (chapter 56).

(ii) That a court has no power to enlarge the period prescribed by section 84 of the Civil Procedure Code.

(iii) That a decree *nisi* in a partition action which fixed the period for showing cause at a month from the date of decree had not the effect of extending the period prescribed in section 84 of the Civil Procedure Code.

(iv) That a decree *nisi* entered under section 84 of the Civil Procedure Code need not be served on the plaintiff.

**Cases referred to :—** *Annamaly Chetty vs Carron* (3 C.L. Rec. 48).

*Chandrasena*, for the plaintiff-petitioner.

*S. W. Jayasuriya*, for the 3rd and 8th defendants-respondents.

SOERTSZ, J.

I agree with the petitioner's counsel that his client is in a hard case here, and I would give him some relief if I could, but I am bound hand and foot by the law.

There can be no doubt whatever that section 84 of the Civil Procedure Code applies to all the actions in District Courts, including actions for the partition of lands, *mutatis mutandis* of course, for the purpose of giving effect to the provisions of the Partition Ordinance. When, therefore, the plaintiff-petitioner failed to appear in court on the day fixed for the trial of the action, and many of the defendants were present, the District Judge acted rightly, when he entered decree *nisi*. But when it came to the drawing up of the decree *nisi*, a printed form was used which reads: "this action coming on for disposal.....on the 30th day of August, 1938 being the day fixed for the hearing of this action, and the 10 defendants being present, and the plaintiff not appearing either in person or by proctor, it is decreed that the action be dismissed....unless sufficient cause is known to the court to the contrary within *one month* of date hereof." This decree was served on the plaintiff, and it is quite clear that it misled him into the belief that he had one month's time within which to show cause against the dismissal of his

action. In that view of the matter Mr. Buhari, for the plaintiff, filed affidavit from plaintiff together with a medical certificate.....and moved to notice defendants to show cause why the decree entered should not be vacated, and the case fixed for trial. But, in the interval between the 30th of August and the 22nd of September, 1940, the decree entered on the 30th of August had been made absolute on the motion of the proctor appearing for the 3rd and 8th defendants who submitted to the court that fourteen days having elapsed, the decree of the 30th of August should be made absolute. The court, under section 84, made the decree absolute. That was done on the 14th of September, 1938. Notwithstanding the fact that decree absolute had been entered and had swallowed up the decree *nisi*, the plaintiff's application to have the decree *nisi* entered on the 30th of August, 1938 took its course, and inquiry into that application was held on the 19th of December, 1938 and on the 12th of January, 1939, and order was made by the District Judge on the 23rd of January, 1939, refusing the plaintiff's application. It is this order that the plaintiff now asks us to deal within the exercise of our powers of revision.

There are insurmountable difficulties besetting this application. Section 84 provides for the entering up of a decree *nisi* due to become absolute by the mere effluxion of time, by the lapse of fourteen days, unless *previously* the plaintiff has succeeded, with notice to the defendants, in showing cause for it to be set aside. If fourteen days run without the plaintiff doing this, the decree becomes absolute without anyone moving so much as a finger in the matter. It does not seem necessary to enter decree absolute. The fact that the decree *nisi* served on the plaintiff gave him thirty days' time to have the decree set aside is of no legal consequence. No court had the power to override the law. In point of fact, section 84 does not require the decree *nisi* entered under it to be served on the plaintiff. The plaintiff is the '*dominus litis*.' He is supposed to know the date of the trial, and to know that in his absence, the law will take its course, and he is left to come in himself and obtain relief if he could within fourteen days. The position is different in the case of a defendant's absence. Section 85 requires notice to be given to him that a decree *nisi* has been entered and he is given time to show cause. There is no statutory period fixed for the decree passing from a decree *nisi* into a decree absolute. This is the view taken in the case of *Annamaly Chetty vs Carron* (3 C.L.Rec. 48) and with that view I find myself in complete and respectful agreement.

The next point to be noticed is that section 87 of the Civil Procedure Code does not give a plaintiff, in whose case decree has become absolute by the operation of section 84, a right of appeal.

It is in view of that disability that the plaintiff now comes before us as a petitioner asking for revision. But our powers in revision though large, are not unlimited. Section 753 of the Civil Procedure Code enacts that the

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Supreme Court may in revision do what it might have done, if there had been an appeal, if it is dissatisfied "as to the legality or propriety of any judgment or order." Now there can be no question of the legality or propriety of a decree entered by the law itself, so to speak, and that fact ousts the revisionary jurisdcition of this court. In this case there are other circumstances that must deter us from entertaining an application for revision, for instance, the important circumstance that, in the course of the law taking effect, third parties have acquired rights, for the record shows that in execution of that decree the plaintiff's interests were sold on the order for costs made against him and were bought by parties who are not before us on this application.

For these reasons, I am of opinion that this application must be refused with costs which I fix at Rs. 31/50.

*Application refused.*

NIHILL, J.

I agree.

**Proctors :—**

*David de Silva*, for the plaintiff-petitioner. (de Saram)

*Alfred Gunaratne*, for the defendants-respondents. (de Silva and Another)

*Present:* HOWARD, C.J., SOERTSZ, J., HEARNE, J., KEUNEMAN, J. & WIJEYEWARDENE, J.

## DE SILVA vs SEENATHUMMA AND OTHERS

*S. C. No.* 1 (*F*)—*D. C. Tangalle* 4226.

Argued on 7th March, 1940.

Decided on 19th March, 1940.

*Civil Procedure Code section 756—Notice of security for respondent's costs of appeal—Two respondents to appeal—Notice given at the same time but served on one of them within the period of twenty days, and on the other after the period of twenty days—Delay in service of notice due to absence of respondent outside jurisdiction of court—Delay not due to any fault of appellants—Can relief under section 756 (3) be granted in such a case.*

On August 18, 1938 the appellants tendered their petition of appeal together with a notice of security calling upon the plaintiff-respondent and the defendant-respondent to take notice that they (the appellants) would on September 1, 1938 move to tender security for the costs of the appeal by offering one A. L. M. M. M. Sahib as surety and that they would on the same day, deposit a sufficient sum of money to cover the expenses of serving the notice of appeal. Thereupon the court ordered notices to issue on the respondents to the appeal, returnable on September 1, 1938, which was the date specified in the notice as the date on which security would be tendered and this date, although it fell within the twenty day period mentioned in section 756 was almost at the end of it. The defendant-respondent was served before September 1. The Fiscal reported on August 31, 1938 that his officer had made search for the plaintiff-respondent but could not find him, that it was said that he had gone to Ambalangoda in the District of Galle for medical treatment. On this the court made order " security will be tendered to-day..... Re-issue on plaintiff-respondent for 3/10," a date outside the period of twenty days within which security for costs had to be accepted. When the case was called on that day, the Fiscal's report showed that notice was served on the plaintiff-respondent on September 12, 1938. But he was absent and the court ordered notice of appeal to issue for November 3, 1938.

It was contended in appeal on behalf of the respondents that there was no proper acceptance of the security on September 1, 1938 because by that date the plaintiff-respondent had not received notice of security and had not had an opportunity to be heard in regard to it and, that the District Judge should have held the petition of appeal to have abated and should have abstained from taking the further step that he took.

**Held :** (i) That notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the court.

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

(iii) That security must be tendered and perfected and the deposit made within twenty days of the giving of the notice of security.

(iv) That relief under section 756 (3) of the Civil Procedure cannot be granted where an appellant fails to comply with (i) and (ii) or with (i) or (ii).

(v) That omission to tender and perfect security and to make the deposit within twenty days, and other omissions, mistakes and defects occurring in the course of tendering security and in the course of perfecting the appeal generally, may be condoned by virtue of section 756 (3) of the Civil Procedure Code in proper cases, if the respondent has not been materially prejudiced by such omission, mistake or defect.

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**Cases referred to :**—*Katonis Appu v. Charles & Another* (12 C.L.W. 162)
*Freeman v. Tranch* (21 L.J.C.P. at 215)
*Fernando v. Nikulan Appu* (22 N.L.R. 1)
*Kangany v. Ramasamy Rajah* (21 N.L.R. 106)

*H. V. Perera, K.C.* with *S. W. Jayasuriya* and *Ranatunge*, for 1–4th defendants-appellants.

*E. B. Wickremanayake* with *C. C. Rasaratnam*, for plaintiff-respondent.

SOERTSZ, J.

A preliminary objection has been taken to the hearing of this appeal, on the ground that it is not properly before this court inasmuch as, it is contended, it must be held to have abated in the court below, for want of conformity with an essential requirement of section 756 of the Civil Procedure Code.

It is deplorable that despite the fact that this section of the Code has functioned in the civil courts of this Island almost daily for over sixty years, there should be so much misapprehension and uncertainty as to its meaning. In the case of *Katonis Appu vs Charles & Another* (12 Ceylon Law Weekly, 162), Abrahams, C.J. felt compelled to observe in the year 1938, that " it is certainly about time that it was fully understood what the provisions of section 756 entail. There have been sufficient decisions over a number of years to make it perfectly clear ; but these cases still go on and litigants pay." Today, the position is no better. If anything, it is worse. Preliminary objections to the manner in which appeals have been constituted are of such frequent occurrence, that they may be said to form a part of the order of the day in our courts of appeal. They have become a " positive nuisance," and they occupy so much of the time of this court with matters of routine, that my Lord the Chief Justice has thought fit to exercise the power vested in him by section 51 of The Courts and their Powers Ordinance, and give directions for five Judges to assemble and consider this matter, in the hope that the parties concerned will take occasion to co-operate in order to put an end to a state of things that may well be described as scandalous. The facts upon which the objection taken here is based, are as follows : On the 18th of August, 1938, the appellants tendered their petition of appeal together with a notice of security calling upon the plaintiff-respondent and the defendant-respondent to take notice that they (the appellants) would on the 1st of September 1938 move to tender security for the costs of the appeal by offering one A. L. M. M. M. Sahib as surety and that they would on the same day, deposit a sufficient sum of money to cover the expense of serving the notice of appeal. Thereupon the court ordered notices to issue on the respondents to the appeal, returnable on the 1st of September 1938, which was the date specified in the notice as the date on which security would be tendered and this date, although it fell within the twenty day period mentioned in section 756, was perilously near the end of it. However,

the defendant-respondent was served before that date, but the Fiscal reported on the 31st of August, 1938, that his officer had made search for the plaintiff-respondent but could not find him and that it was said that he had gone to Ambalangoda in the District of Galle for medical treatment. On this, the court made order " security will be tendered today.....Re-issue on plaintiff-respondent for 3/10," a date far beyond the twenty day period within which security for costs had to be accepted. When the case was called on that day, the Fiscal's report showed that the notice was served on the plaintiff-respondent on the 12th September 1938. But he was absent, and the court ordered notice of appeal to issue for the 3rd November, 1938. That order, of course, implied that the court regarded the security that was, in point of fact, tendered and perfected on the 1st of September, 1938, eleven days before the notice of security had been served on the plaintiff-respondent, as a compliance with the requirements of section 756 that there must be procurement of the acceptance of the security *within twenty days* of the giving of the notice of the security. It was, obviously, in that view of the matter, that the court issued notice of appeal, and directed the subsequent steps to be taken for the appeal to reach this court. It is now contended on behalf of the respondents that there was no proper acceptance of the security on the 1st of September 1938 because by that date the plaintiff-respondent had not received notice of security and had not had an opportunity to be heard in regard to it, and that, therefore, the proper course for the District Judge to have taken was to hold the petition of appeal to have abated and to have abstained from taking the further steps that he took.

Counsel for the appellants concede that there is technical force in this objection but they ask for relief under sub-section (3) of section 756 on the ground that the plaintiff-respondent has not been materially prejudiced by what has occurred in this case. The question that then arises for our consideration and decision is in what instances of failure to observe the provisions of section 756 relief may be granted under this sub-section. For the appellants, the submission is made that sub-section 3 empowers this court to grant relief in all cases of failure, whether *substantial* or *incidental*, provided the respondent to the appeal has not been materially prejudiced.

This question was considered by a Divisional Bench of three Judges of this court,* and Abrahams C.J. who delivered the judgment of that Bench said " It seems to me that there are two forms of a breach of section 756 in respect of which this court *ought not* to give relief. One is when, whether a material prejudice has been caused or not, non-compliance with one of the terms of section 756 has been made *without an excuse* and the other is when though *non-compliance with an essential term may be trivial*, a material prejudice has been occasioned."

This is an authoritative decision of this court and, if we may say so, contains a correct statement of the meaning of section 756 read as a whole, but in view of the fact that that decision does not appear to have been fully appreciated in the succinct form in which it has been expressed, it seems

* 39 N.L.R. 84; 8 C.L.W. 26 (Edd.)

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desirable to elucidate its meaning. The first part of that statement is intended to lay down that where there has been a *total failure* to comply with one of the terms of section 756, relief will not be given even if it should be apparent that no material prejudice has been occasioned to the respondent by such a failure, for peremptory requirements of the law must be given full effect. Such requirements must be put before the interests of individuals and courts have no power to absolve from them. If I may quote the words of Maule, J. in *Freeman vs Tranch* (21 L.J.C.P. at p. 215) " although instances are constantly occurring where courts might profitably be employed in doing simple justice between the parties, unrestrained by precedent or by any technical rule....., the proceeding of all courts must take a defined course and be administered according to a uniform system.....and it is probably more advantageous that it should be so, though at the expense of some occasional injustice."

Now, section 756 speaks in imperative terms when it enacts that the petitioner " shall forthwith give notice to the respondent that he will on a day to be specified in such notice, and within a period of twenty days.....tender security.....and will deposit a sufficient sum of money to cover the expenses of serving notice." In the case before that Divisional Bench, the appellant gave no notice at all of security to be tendered but, within the period of twenty days, she produced what she claimed to be adequate security, and the first part of the statement I have cited from the judgment of Abrahams, C.J. dealt with the actual case before the Bench, and held that the failure on the part of the appellant to give notice of security was fatal. But in coming to that conclusion Abrahams, C.J. appears to have taken notice of the fact that the failure was one for which no excuse was given, for in the preceding sentence he said " the petitioner says she did everything she could, but she has not given any *excuse* for not doing what she should." The argument in the course of the case before us indicated that this qualification has created some doubt. The qualification seems to imply that a complete non-compliance with one of the terms of section 756 may be condoned if a good excuse is forthcoming, but I think I am in a position to say — and the context supports the view — that when Abrahams, C.J. used the words " without an excuse ", he had in mind the practice that obtained in some courts for proctors to waive security for costs by arrangement among themselves, and he intended to say that in a case where no notice of security was given in pursuance of that practice, an objection taken in this court that the letter of the law had not been complied with would be overruled and the failure excused, for a party may waive a rule of Civil Procedure intended for his benefit, and such a waiver would estop him from thereafter insisting upon the requirement he had waived. I can imagine no other excuse that could avail a party who has failed to comply with the peremptory requirement to give notice of security. In the case Abrahams, C.J. considered it is not quite correct to say that the appellant "has not given any excuse for not doing what she should." She did, in fact,

put forward an excuse. She said " she was unable at the time when she ought to have given notice of security to say what form the security was going to take," and so she waited till she could ascertain that. Logically, this appears to be a valid and cogent excuse, but it was rejected, just as any other excuse than the one I have referred to would have had to be rejected, in view of the peremptory terms of the requirement.

Again, in the course of the argument in this case there was indication that difficulty had arisen from the use of the words "ought not to give relief" when in the course of the judgment Abrahams, C.J. stated " it seems to me that there are two forms of a breach of section 756 in respect of which this court *ought not to give relief.*" It was submitted to us that those words imply that in regard to both forms of breach this court could give relief, if it would, but that Abrahams, C.J. took the view that this court ought not to exercise its discretion to do so, and upon that submission, it was contended that such a judicial dictum was no more than " pious opinion." I am unable to accept that suggestion. It seems to me that here too, in the context "ought not" must be taken to mean "ought not for the reason that the law does not permit " for after saying that, Abrahams, C.J. went on to say that the other breach that this court "*ought not*" to relieve from "is when though non-compliance with an essential term may be trivial, a material prejudice has been occasioned." It is obvious that in that context "*ought not*" must mean "cannot" for sub-section 3 implies beyond any manner of doubt that relief may not be granted when the respondent has been materially prejudiced by the failure.

The result thus reached is that this court is not empowered by sub-section 3 to grant relief where there has been a failure to comply with an essential requirement of section 756 regardless of the question of prejudice, but may do so in cases in which there has been " mistake, omission or defect *in complying* with the provision of section 756 " provided the respondent has not been materially prejudiced.

I cannot read sub-section 3 in the manner proposed by the appellants' counsel as covering "all failures" for to read it in that way that sub-section will have to be recast, for instance, as follows " *in the case of a failure to comply with, or* ' any mistake, omission or defect *in complying with.*' "

The next question is what are the requirements of section 756 that *must* be complied with unless they have been *expressly* waived. Section 756 (1) sets them forth explicity. They are (1) that the appellant, once the petition of appeal has been received, shall give notice *forthwith* that he will *on* a date within twenty days of the giving of the notice (*a*) tender and perfect his security (*b*) that he will deposit a sum of money sufficient to cover the expenses of serving the notice of appeal ; (2) that he shall furnish a copy of the petition of appeal for service on the respondent or his proctor. Two of these matters are immediately in his power, namely the giving of notice forthwith and the furnishing of the copy of the petition of appeal. The two other matters, namely, the tendering of the security and of the deposit to

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cover expenses of the service of notice of appeal are not immediately in his power, for they can be effectively done only with notice to the respondent. Section 756 therefore, gives him twenty days' time for that purpose and of course requires him to contrive things so as to discharge those obligations within twenty days. The effect of section 756 is that the failure on the part of the appellant to comply with the matters immediately and completely in his power may not be excused, the other matters may be excused if there has been " reasonable " omission, mistake or defect and the respondent has not been materially prejudiced.

The question then arises as to how the present case stands. There can be no question that these appellants duly furnished a copy of the petition of appeal and gave notice of security forthwith, for they tendered this notice with their petition of appeal. In my opinion it is clear from the words used in section 756 that when it was provided that notice should be *given* forthwith, what was intended was that notice be tendered or filed forthwith not that it should be served forthwith, for there is made available by the section itself an interval within the period of twenty days within which to serve notice. It is in this sense that the words " *give* notice forthwith " were interpreted in *Fernando vs Nikulan Appu* (22 N.L.R. p. 1) and our ruling is that that is the meaning of the words " give notice " in this section. There has, therefore been a compliance by the appellants with the requirements of section 756 that were immediately and completely at their disposal, but in consequence of the mode employed by them to have this notice served on the respondents, it came to pass that service on the plaintiff-respondent could not be effected in time to afford him an opportunity to be heard in regard to the security if he had any objection to offer to its acceptance before the twenty days elapsed. If I may say so with respect, the view taken in the case of *Kangany vs Ramasamy Rajah* (21 N.L.R. 106) is correct, namely, that the notice that should be given to a party respondent is an effective notice, that is to say, a notice that is served on him in time to enable him to be heard in regard to the security before it is accepted within the twenty days allowed by section 756. In that case a notice that reached the respondent " a day after the date on which security was tendered and perfected " was held to be an insufficient compliance with the section and the appeal was rejected for that reason. That case, however, was decided in 1918 when sub-section 3 was not in existence. Today the position is different.

When the appellant in this case tendered the notice of security for costs they followed the course usually taken in regard to service of processes or notices, for section 356 of the Code says that "all notices and orders required by this Ordinance to be given to or served upon any person, shall *unless the court otherwise directs*, be issued for service to the Fiscal." Evidently the appellants hoped that it would be possible to serve the notices on the respondents through the Fiscal, within time, but in view of the peremptory direction in section 756, that the security should be accepted within twenty days they ought to have considered the desirability of asking for special

directions to be given by the court for the service of this notice. They could for instance, have asked to be allowed to serve the notices on the proctors for the respondents. But their failure to do that was not a failure to comply with any special requirement of section 756, for there is no requirement in that section in regard to the manner in which notice of security shall be served. It was only an omission to take a more effective course in complying with an imperative requirement of section 756, namely, the requirement of giving notice of security. As an omission, it falls within the words of sub-section 3 and this court has the power to grant relief from the consequences of the omission, if no material prejudice has resulted to the respondent. Now, it seems clear that in this case there is sufficient security given for the respondent's costs of appeal. The defendant-respondent who was served with notice in time, had nothing to say against it, and the plaintiff-respondent himself has not up to now urged anything against it, and I can imagine no prejudice that will result to the respondents from this omission, mistake or defect. The next question is ought we to grant relief. In regard to that matter, I think we must not overlook the fact that the appellants took the course that has been usually followed for giving notice of security. They were able by those means to have notice served in time on the defendant-respondent. It was the extraordinary fact that the other respondent had just at this time left the district temporarily, that prevented service being effected on him within the period of twenty days.

For these reasons I am of opinion that relief may properly be granted in this case and a direction given that the appeal be listed in the usual course. But I think we should state quite clearly that our decision in this case does not mean that in future cases we shall necessarily give relief in similar circumstances. The experience of these appellants in this case must serve to teach other appellants the hazards to which they expose themselves when in too sanguine expectation, they resort to the usual mode prescribed for the service of processes and notice oblivious of the fact that while in nearly every other instance there is no time limit imposed by the Ordinance for the service, in the instance of section 756 a definite and somewhat exiguous period is fixed. That is a fact to which appellants should pay careful attention, and they should not omit to ask for special directions from the court whenever it appears likely that the usual mode of service may not serve their purpose.

To sum up, the conclusions reached are that (*a*) notice of security, unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the court. *Fernando vs Nikulan Appu* (*supra*) (*b*) a copy of the petition of appeal must be furnished at or before the time the security is accepted and the deposit made (*c*) security must be tendered and perfected and the deposit made within twenty days of the giving of the notice of security (*d*) failure to comply with (*a*) and/or (*b*) is fatal and sub-section (3) of section 756 does not permit relief to be granted by this court, in respect of it ; (*e*) omission to tender and perfect security and to make the deposit within twenty days, and other

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omissions, mistakes and defects occurring in the course of tendering security and in the course of perfecting the appeal generally, may be condoned by virtue of sub-section (3), in proper cases; if the respondent had not been materially prejudiced by such omission, mistake or defect.

In view of these conclusions, the case before us appears to be typical of the cases in which relief may be granted, and for that reason I have already expressed my opinion that it should be listed in the ordinary course, for consideration on the merits of the appeal.

In all the circumstances I think that no order for the costs of this preliminary discussion need be made.

HOWARD, C.J. I agree.

HEARNE, J. I agree.

KEUNEMAN, J. I agree.

WIJEYEWARDENE, J. I agree that the order proposed by my brother Soertsz should be made in this case.

**Proctors :—** *Relief granted.*

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

*L. G. Poulier*, for defendants-appellants. (Seenathumma and Others)

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*Present:* SOERTSZ, J. & HEARNE, J.

## JUSTINA AND ANOTHER vs ANDIYA AND OTHERS

*S. C. No.* 164—*D. C.* (*Inty*) *Matara*, 11114.

Argued and Decided on 28th February, 1940.

*Partition—Final decree—Order that final decree be entered on a future date—Subsequent order that final decree be not entered—Right to intervene after such order.*

No objection having been taken to the scheme of partition and schedule of appraisement, the District Judge made the following order on 20th July, 1937:

"Amend the schedule of appraisement and the scheme of partition by substituting the name of the 6th defendant in place of the 1st defendant. The 6th defendant is present and consents—Enter final decree 10th August 1937." On the 10th of August, 1937 the following journal entry was made: "F/D not complete. Balance S. fees receipt Sch. & appraisement not confirmed. Proxy of 2 A defendant filed. Call case on 24th August."

On 12th August, 1937 on a statement made by the proctor for 2nd defendant the court made the following order: "The appraisement is not to be confirmed and no final decree be entered now. Call case on 24th August."

Thereafter certain parties intervened in the action. Objection was taken by the plaintiff to these interventions on the ground that the order made on 20th July, 1937 amounted to the final decree and the learned District Judge had no power to vary that order. 8 C.L.W. 129 was cited for the intervenients and 9 C.L.W. 33 for the plaintiff.

The District Court upheld this objection. The intervenients appealed.

**Held :** That in the circumstances, the order of 20th July, 1937 did not amount to a final decree and therefore the appellants were in time when they sought to intervene.

**Cases referred to :—** *Ibrahim v. Beebee* (19 N.L.R. 289.)

*S. W. Jayasuriya*, for intervenients-appellants.

*G. P. J. Kurukulasuriya* with *J. A. L. Cooray*, for respondents.

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The question involved in this appeal is whether the intervention presented to the court on the 24th of August, 1937, through proctors Bastiansz and Amarasuriya should be admitted. That question must depend on the other question whether final decree had been entered in the case at the date of this proposed intervention.

It is quite clear from journal entries to which our attention has been called that the court made order that final decree should not be entered in this case till the 10th August, 1937. For that, in effect, was his order when he said: "Enter final decree on the 10th August, 1937." Two days later, however, on 12th August, 1937, proctor Dias appearing on behalf of his clients objected to the appraisement and asked that final decree be not entered till that matter had been investigated.

Upon those representations by proctor Dias the learned Judge made the order: "Call case on the 24th of August; no final decree to be entered." If words mean anything those words mean that the Judge gave special directions that no final decree be entered in the case till the 24th of August; and before that date these intervenients-appellants sought to come in. It was contended that they could not, because on the day the Judge made order "enter final decree on the 10th August" there was in effect a final decree entered. I cannot quite follow this. It seems so contradictory. I do not think it necessary to say much more, for the question involved in this appeal was considered in a Divisional Bench case — *Ibrahim v. Beebee*, page 289, 19 N.L.R. Wood Renton, Chief Justice, in the course of his judgment said:

> "If a Judge intentionally defers signing a final decree in a partition suit pending the satisfaction of any further requisition there would be no decree and in the meantime intervention is possible. But where the investigation is complete and the Judge intended to sign the decree at once and only omitted to do so by inadvertence intervention cannot be allowed thereafter."

It seems quite clear on the facts of the case that it cannot be said that the Judge intended to sign the decree at once but only omitted to do so by inadvertence. He had deliberately given directions that decree should not be entered till a certain date arrived. In those circumstances I think that this case is easily distinguishable from the case referred to by the trial judge in the course of his judgment.*

I would, therefore, hold that the appellants were in time when they sought to intervene, and that this appeal must be allowed, and the case sent back for the intervenients to put their case before court. And that case, no doubt, will be considered in the ordinary course. The intervenients-appellants are entitled to the costs of this case.

HEARNE, J. I agree. *Appeal allowed.*

**Proctors :—**

*A. S. de S. Amarasuriya*, for 6th and 7th intervenients-appellants. (Andiya & Others)

*Messrs. Abeygunawardena and Abeygunawardena*, for plaintiffs-respondents. (Justina and Another)

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* 9 C.L.W. 33. (Edd.)

*Present:* SOERTSZ, J. & NIHILL, J.

## AMIJEE AND OTHERS vs LEWIS AND OTHERS

*Application for writ of Prohibition No.* 417.

Argued on 6th February, 1940.

Decided on 6th March, 1940.

*Courts Ordinance* (*Chapter* 6) *section* 62—*Winding up of company incorporated abroad—Does section* 62 *of the Courts Ordinance confer jurisdiction on the District Court—Writ of prohibition to prohibit District Court from exercising jurisdiction in a winding up on the ground that it has no jurisdiction at all—Section* 42 *of the Courts Ordinance—Sections* 67 *and* 68 *of the Joint Stock Companies Ordinance No.* 4 *of* 1861.

The petitioners to this application for a writ of prohibition against the District Judge of Jaffna are decree holders against the Travancore National and Quilon Bank, Ltd., a banking company incorporated in Quilon in the native state of Travancore in India. They contended that the District Judge is engaged on the compulsory winding up of that Bank and that a District Court has no jurisdiction to wind up a company incorporated abroad.

**Held :** That jurisdiction to wind up companies (whether incorporated in Ceylon or abroad) is conferred on District Courts by section 62 of the Courts Ordinance (Chapter 6), and that sections 67 and 68 of the Joint Stock Companies Ordinance No. 4 of 1861 do no more than provide the test for ascertaining the particular District Court for any given winding up proceeding.

Per SOERTSZ, J.— " If we are satisfied that District Courts as constituted by our laws have no jurisdiction to wind up companies other than those incorporated by registration in Ceylon, for the winding up of which provision is made by the Joint Stock Companies Ordinance, we are at once face to face with a case of a patent lack of jurisdiction, and we are bound *ex debito justitiae* to grant the writ applied for regardless of the motives of the petitioners of their delay in preferring their petition. Questions of motive and delay may have an important bearing in cases in which there has been encroachment by one court on the jurisdiction apportioned to another court of the same class, and not in cases in which there has been a manifest usurpation of jurisdiction."

**Cases referred to :**— *Worthington vs Jeffries* (L.R. 1875–10 C.P. 379)
*Farquhasson vs Morgan* (L.R. 1894–1 Q.B.D. 552)
*Mercantile Bank of Australia* (1892–2 Ch. 204)
*North Australia Co. vs Goldsborough Co.* (61 L.T. 716)
*In the matter of the application of John Ferguson for a Prohibition against the District Judge of Colombo* (1 N.L.R, 181)

*N. E. Weerasooriya, K.C.* with *E. B. Wickremanayake* and *J. A. T. Perera*, for the petitioners.

*H. V. Perera, K.C.* with *T. K. Curtis* and *C. C. Rasaratnam*, for 1st respondent.

*N. Nadaraja*, for 2nd, 3rd and 4th respondents.

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The three petitioners whose petition has been submitted to us for consideration, are decree holders against the Travancore National and Quilon Bank Limited. They make their petition to ask us to exercise the jurisdiction conferred on us by section 42 of the Courts Ordinance, and issue a writ against the District Judge of Jaffna prohibiting him from proceeding further with the compulsory winding up of that Bank on which he has been engaged in Case No. L/2 of his court, initiated at the instance of the 2nd, 3rd and 4th respondents. The 1st respondent is the official liquidator.

The petitioners' case is that the District Court of Jaffna usurped a jurisdiction that was never given to District Courts in this Island, when it addressed itself to the winding up of a Bank that has not obtained incorporation by registration under the provisions of Ordinance No. 4 of 1861, and Ordinance No. 2 of 1897, but is a Bank incorporated by registration in Quilon in the native state of Travancore, in South India.

If we are satisfied that District Courts as constituted by our laws have no jurisdiction to wind up companies other than those incorporated by registration in Ceylon, for the winding up of which provision is made by the Joint Stock Companies Ordinance, we are at once face to face with a case of a patent lack of jurisdiction, and we are bound *ex debito justitiae* to grant the writ applied for regardless of the motives of the petitioners or their delay in preferring their petition. Questions of motive and delay may have an important bearing in cases in which there has been encroachment by one court on the jurisdiction apportioned to another court of the same class, and not in cases in which there has been a manifest usurpation of jurisdiction. This fact emerges clearly in the judgement of Brett, J. in the case of *Worthington vs Jeffries* (L.R. 1875–10 C.P. 379.) and in the judgments of Lord Halsbury and Lopes, L.J. in *Farquhasson vs Morgan* (L.R. 1894-1 Q.B.D. 552.) I indulge in these observations only because counsel for the respondents commented strongly on the motives and the delay imputable to the petitioners.

The sole question, then, that we have to answer is whether the petitioners have made out their case that in the matter of the winding up of companies, District Courts have jurisdiction only by virtue of the Joint Stock Companies Ordinance and only so far as companies falling within the provisions of the Ordinance are concerned. In regard to this question, the submission made to us by petitioners' counsel in the course of the able and learned argument he addressed to us may be summarized as follows : Ordinance No. 4 of 1861 provides in Part IV for the winding up of companies registered under that Ordinance *and of no other companies*, by the District Court having jurisdiction in the District in which the registered office of the company in question is situate. (See sections 67 and 68). Banking and Insurance Companies were not within that Ordinance (see section 3) till it came about that the passing of Ordinance No. 2 of 1897 brought Banks registered under that Ordinance within the purview of Ordinance No. 4 of 1861 in so far as the

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provisions of that Ordinance were not inconsistent with its own provisions (see section 2 of Ordinance 2 of 1897). The Bank with which we are here concerned is not a Bank registered by virtue of Ordinance No. 2 of 1897, and therefore the provisions of Part IV of Ordinance No. 4 of 1861 do not apply to it, and such jurisdiction as was conferred by sections 67 and 68 on District Courts in regard to winding up proceedings does not extend to a case such as this, that is to say, a case of the winding up of a Bank registered abroad. The conclusion reached by this line of reasoning is that a company or Bank registered abroad cannot be wound up in Ceylon. It will be observed that this submission of the petitioners is based on the major premise that jurisdiction is conferred on District Courts in regard to the winding up of companies by sections 67 and 68 of Ordinance No. 4 of 1861 and that apart from those sections District Courts have no jurisdiction. The validity of this submission must therefore necessarily depend upon the validity of that premise. Is the premise valid ? To answer that question, we must examine the Ordinance that provide for the establishment of our courts and defines their powers, that is to say, The Courts and their Powers Ordinance (Vol. 1 Chapter VI Legislative Enactments of Ceylon). Section 3 of that enactment says that " the courts for the *ordinary* administration of justice *civil* and *criminal* within this Island shall continue as heretofore to be as follows :

(*a*) The Supreme Court
(*b*) District Court
(*c*) Court of Requests
(*d*) Magistrates' Courts."

The proviso appended to this section leaves unaffected certain jurisdictions created by Imperial Statute or by certain local Ordinances, but with them we are not at all concerned in this case.

The matter of the winding up of companies is undoubtedly a matter arising in the course of the ordinary administration of justice in a country, and I think it must be assumed that it is, at least, antecedently probable that provision will be made in such an Ordinance as The Courts and their Powers Ordinance, for some court or other to have jurisdiction over such a matter. The question then, is whether the words used in the Ordinance in conferring and apportioning jurisdiction on and among various courts have or have not resulted in the realisation of that *a priori* probability.

It is conceded that a winding up proceeding is not within any original civil jurisdiction of the Supreme Court. It, obviously, is not within the jurisdiction of Courts of Requests or of Magistrates' Courts. It therefore, follows that it must be within the jurisdiction of District Courts or must be registered as an unfortunate *casus omissus*, unfortunate because it is deplorable that local courts should have no jurisdiction to wind up companies which though not registered here have largely lived and moved and had their being here. In other countries, in England, for instance, certain courts are empowered to wind up foreign and colonial companies having assets and

*liabilities* there. *Mercantile Bank of Australia* (1892-2 Ch. 204); *North Australia Co. vs Goldsborough Co.* (61 L.T. 716). The new local Companies Ordinance No. 51 of 1938 makes provision in Part X for the compulsory winding up of unregistered companies. Have we then, heretofore occupied an exceptional position ? I think the answer to that question must be found in Chapter VI of The Courts and their Powers Ordinance, and does not depend upon whether District Courts are superior or inferior courts of record. I refer to this because there was a great deal of argument on the point and if it were necessary to find whether a District Court is a superior or inferior court of record, I should have no difficulty in holding that it is not a superior court in the sense in which that term is understood in English jurisprudence. That was the view taken in *In the matter of the application of John Ferguson for a writ of Prohibition against the District Judge of Colombo* (1 N.L.R. 181), a ruling by a collective court.

Section 62 of Part VI of The Courts and their Powers Ordinance is in these terms: " Every District Court shall be a court of record and shall have original jurisdiction *in all civil, criminal, revenue, matrimonial, insolvency and testamentary* matters save and except such of the aforesaid matters as are herein or by virtue of the said Criminal Procedure Code or any other enactment for the time being in force, exclusively assigned by way of original jurisdiction to the Supreme Court, and shall also have jurisdiction over the persons and estates of lunatics, minors and wards over the estates of *cestuis que* trust, and over guardians and trustees and in any other matter in which jurisdiction has heretofore been, is now or may hereafter be given to District Courts by law." I read these words as meaning that when all the powers given to the Supreme Court are put on one side the entire residuary original jurisdiction in regard to *all civil, criminal, revenue*.....matters is vested in District Courts. Now, in my opinion, a "winding up" proceeding is a civil matter and falls within that jurisdiction. This view is, I think, supported and not controverted by sections 67 and 68 of Ordinance 4 of 1861 on which reliance was placed. Section 68 says: " the expression 'the court' as used in this Ordinance shall mean the District Court *having* jurisdiction in the place which the registered office of the company is situate; and any court to which jurisdiction is given by this Ordinance shall, in addition to its ordinary powers have the same power of enforcing any orders made by it in pursuance of this Ordinance as it has in relation to other matters within the jurisdiction of such court respectively." It will be observed that in the first part of this section it is said the word "court" shall be taken to mean the District Court *having jurisdiction* in the place in which the registered office of the company is situate. The words " having jurisdiction " must mean in the context *already* possessed of a jurisdiction that comprises the relevant jurisdiction, namely, the jurisdiction to wind up, for, on the occasion on which the draftsman is using his words it is not at all to the point that the court he envisages has every other kind of jurisdiction, if it has no jurisdiction to take steps to wind up a company. He is concerned at that point of

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time with winding up proceedings and with nothing else, and when he used the words "*having jurisdiction*" he must be understood to mean jurisdiction to wind up. The words "*having jurisdiction*" are by no means apt if the intention of the draftsman is to confer a new jurisdiction. The later words "and any court to which jurisdiction is given by this Ordinance" create no difficulty, for when he uses those words, the draftsman is clearly referring to the exclusive jurisdiction given by the Ordinance to that District Court within the limits of which the registered office is situate. In other words, the draftsman when confronted with a number of courts that may said to have jurisdiction on the usual grounds on which jurisdiction is conferred, namely, residence of the parties, situation of property, the arising of the cause of action, etc. ignored them all and selects the court within the limits of which the registered office is situate as the court that shall function in winding up proceedings. In the concluding part of section 68, the draftsman goes on to say that the court singled out, because it is the court within whose limits the registered office is situate, shall in addition to its ordinary powers have the power to enforce any orders made in the course of the winding up. The contention of the petitioners' counsel might have appeared to be stronger if section 68 of Ordinance No. 4 of 1861 had been worded in the manner of section 161 of the new Companies Ordinance No. 51 of 1938. That section reads: "The District Court of the district in which the registered office of a company is situate *shall have jurisdiction.*" The words "*shall have jurisdiction*" as contrasted with the words "the District Court *having jurisdiction*" might have afforded more plausible support to the submission that the conferment of a new jurisdiction is in contemplation. But even so the support obtained would have been plausible, and no more, for it seems clear that the words of section 161 in the new Ordinance are not meant to confer a new jurisdiction on District Courts, but only to provide a new test as the sole test by which to ascertain the particular District Court which shall function in any particular winding up proceeding.

The question then arises in regard to the position of a company not registered under the provisions of Ordinance No. 4 of 1861 and not governed by the new Ordinance. Is there no way of winding up such a company? The answer seems to be provided by section 3 of the Introduction of the Law of England Ordinance (Cap. 66 Vol. 1 Legislative Enactments) which provide that "in all questions or issues which may hereafter arise or which may have to be decided in this Island with respect to the law of partnership, Joint Stock Companies, Corporations, Banks and banking.....the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England with such formal alterations as to names, localities, courts offices, persons, moneys, penalties and otherwise as may be necessary to make the same applicable in the circumstances of this Island."

For these reasons I come to the conclusion that jurisdiction to wind up companies is conferred on District Courts by section 62 of The Courts and their Powers Ordinance and that sections 67 and 68 of Ordinance No. 4 of 1861 do no more than provide the test for ascertaining the particular District Court for any given winding up proceeding.

In this view of the matter the major premise as I described it, on which petitioners' counsel based his submission proves to be invalid and invalidates his submission that District Courts have no jurisdiction to wind up companies not registered locally. Consequently the petitioners ' application in the way which it was presented to us fails. The petitioners made no request that the District Court of Jaffna be prohibited for some particular reason, as for instance, for the reason that Jaffna was not the principal place of business of this Bank in this Island and I wish to state quite clearly that this order does not consider or deal with that aspect of the matter or with the propriety of several District Courts in the Island being engaged simultaneously on the winding up of this Bank as was said in the course of the argument to be the case.

The application fails and must be dismissed with costs.

NIHILL, J.

I agree.

*Application dismissed.*

**Proctors :—**

*J. A. Perera*, for Petitioners. (Amijee and Others)

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*Present:* HOWARD, C.J. & SOERTSZ, J.

## PERERA vs JONES AND ANOTHER

*S. C. No.* 110—*D. C. Colombo* 48598.

Argued on 13th February, 1940.

Decided on 22nd February, 1940.

*Mortgage Ordinance* (*Chapter* 74)—*Hypothecary decree—Commission issued to licensed auctioneer to sell the property—Application for execution in the form prescribed by section* 224 *of the Civil Procedure Code* (*Chapter* 86)—*Does section* 347 *of the Civil Procedure Code apply in a case in which a hypothecary decree has been entered and direction given that an auctioneer should carry out a sale in execution of a decree under the mortgage Ordinance.*

**Held :** (i) That section 347 of the Civil Procedure Code (Chapter 86) does not apply in a case in which a hypothecary decree has been entered and direction given that an auctioneer shall carry out the sale, when the judgment-creditors are moving for a commission for the sale of the mortgaged property by an auctioneer.

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(ii) That the mere fact that a judgment-creditor seeking to execute a hypothecary decree makes an application for execution in the form prescribed by section 224 of the Civil Procedure Code, when he is not obliged so to do does not make him bound by all the other provisions in Chapter XXII of the Code which are connected with section 224 in cases in which section 224 applies.

Per SOERTSZ, J.— "The principle of law is "*quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est.*" All the plaintiffs need have done was to move that a commission do issue. They did that but while doing it, they did more. They supported their motion with an application provided for cases different from theirs. What is the legal consequence of that ? In my opinion it would be fallacious to say that a party who has done all that he was required to do to achieve the end he had in view, and who has gone beyond and does what he need not have done, is thereafter bound by all the consequences of the superfluous wrong procedure. In my view, this is surplusage that may be ignored."

**Cases referred to :—** *Muttu Raman Chetty vs Mohamadu* (21 N.L.R. 97)
*Walker vs Mohideen* (26 N.L.R. 310)
*Don Jacovis vs Perera* (9 N.L.R. 173)

*N. Nadarajah* with *Wijeymana*, for 2nd defendant-appellant.

*H. V. Perera, K.C.* with *E. B. Wickramanayake* and *F. C. de Saram*, for plaintiffs-respondents.

SOERTSZ, J.

The respondents to this appeal, brought this action on the 28th April 1932, to recover from the first defendant a sum of money he owed them, on a loan secured by a secondary mortgage of certain landed property that belonged to the 1st defendant, at the time of the transaction, that is to say, on the 12th of July, 1929.

They prayed that the 1st defendant be ordered to pay the sum of Rs. 42,748/49 which was the amount alleged to be due at the date of the institution of the action. They also prayed that the mortgaged property be declared specially bound and executable, and that in default of payment by the 1st defendant of the amount decreed, the mortgaged property be sold by an auctioneer appointed by the court, freed from the interests of one W. Siman Perera who had purchased this property from the 1st defendant after they had obtained their mortgage.

In view of this prayer for a hypothecary decree they made Siman Perera a party, in conformity with section 6 of the Mortgage Ordinance, and in the caption of their plaint, they described him as the second defendant. This was in accordance with what, I believe, has been the invariable practice, but it seems to me that it would have been sufficient, and perhaps more logical if they had only named him, by way of description, adding the words "necessary party" under section 6 of the Mortgage Ordinance. In their plaint, however, they expressly stated that they sought no relief against this party, nor do I see that they could have asked for any relief against him. There was no privity whatever between them and him, and they had no cause of

action against him, as that phrase is understood in the Civil Procedure Code. The mortgagor had given a Warrant of Attorney to confess judgment, and on the production of that warrant duly perfected by the proctor to whom it had been given, judgment was entered against the mortgagor on the 25th January, 1933. On the same day, Siman Perera the necessary party who is the present appellant, asked that he be given three years time to pay the amount decreed against the mortgagor, and when this application was refused he preferred an appeal, and asked the District Judge to stay the sale pending the hearing of his appeal. This request was granted to him on terms. In the end his appeal was dismissed, and the case went back to the District Court on the 6th of November, 1933. Thereafter no steps appear to have been taken in the case till the 20th of July 1938. On that day, the plaintiff's proctor moved that the commission directed in the decree be issued to a licensed auctioneer to sell the mortgaged property in terms of the decree. With this motion they submitted an application for execution in the form prescribed by section 224 of the Civil Procedure Code. The District Judge made order " notice 1*st defendant* for 22.8.38." The notice was served on the 1st defendant. He did not appear and the " notice was made absolute " whatever that may mean, and commission to sell went out.

On the 8th of November 1938 the commissioner appointed for the sale, submitted his report stating that the respondents, had purchased the mortgaged property on 31st of October, 1938. All that remained to be done was for the secretary of the court to satisfy himself that the sale was in conformity with the conditions of the sale approved by the court, and to execute a conveyance in favour of the purchasers.

But before this could be done, the appellant made application praying that the sale be set aside on the ground that he " had no notice whatever of the issue of the commission and of the sale," and contending that " the said sale held under a commission issued without notice to him is bad in law."

The District Judge refused this application with costs, and the present appeal is the appellant's protest against that refusal.

On this appeal, the questions arising for determination are: (*a*) Does section 347 of the Civil Procedure Code apply in a case in which a hypothecary decree has been entered and direction given that an auctioneer shall carry out the sale when the judgment-creditors are moving for a commission for the sale of the mortgaged property by an auctioneer ? (*b*) If it does apply, is the appellant a judgment-debtor within the meaning of that section ; and as such, entitled to be served with the notice indicated therein ? (*c*) in the absence of such notice, is the sale that took place on the 31st of October, 1938 *void* or only voidable ? The second and third questions will of course have to be answered only in the event of the answer to the first being in the affirmative.

A close examination of the matters involved in these questions had led me to the conclusion that section 347 of the Civil Procedure Code does not apply.

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The difficulties in this case appear to take their origin in the fact that the respondent's proctors, when they asked for a commission to sell to issue, tendered along with their motion, an application for execution in accordance with section 224 of the Civil Procedure Code. This was unnecessary, and indeed inappropriate in the case of such decree as had been entered in this case, for in that decree, there were directions cut and dry in regard to what was to follow on the default of the mortgagor, that is to say, on his failure to pay the amount decreed. In the case of an ordinary money decree, however, an application for execution is the *sine qua non* for bringing into operation, the functions of the fiscal by way of enabling a creditor to recover or, at least to attempt to recover his judgement-debt by the seizure and sale of the property.

Section 226 of the Civil Procedure Code, for instance, requires a demand for payment to be made of the judgment-debtor before he can be put in the wrong in such way as to make his property liable. That demand, of course, is possible, only if the fiscal's officer meets the judgment-debtor. If the debtor is absent, the absence itself constitutes the default which entitles the judgment-creditor to point out property for seizure of the sale. Section 223 of the Civil Procedure Code makes this quite clear. It enacts that "*for the purpose of effecting* the required *seizure* and *sale*.....the fiscal *must be put in motion* by application for execution of decree to the court which made the decree sought to be enforced." Section 224 then goes on to provide the form of that application.

Now, the decree entered in this case is such that the intervention of the fiscal is not required, for this decree not only orders the mortgagor to pay the amount decreed, but also declares the mortgaged property " specially bound and executable freed from the interests and rights " of the present appellant and goes on to direct that " in default of payment *forthwith*, the specially bound and executable property freed from the rights and interests of the appellant, be sold by public auction, by *a licensed auctioneer*, on conditions of sale approved by the court." It directs further that "in the event of there being a deficiency" the mortgagor do pay to the plaintiffs the amount of the deficiency, and finally, it provides that the plaintiffs shall be " at liberty at any time, in the course of the proceedings, and until payment of their claim and costs, to apply to this court for any directions either in regard to the sale or otherwise."

In the case of such a decree as this, there is really no place for the fiscal. No demand need be made, for there is already direction in the decree itself that the sale shall take place " *in default of payment forthwith*," nor is the fiscal required in order to effect seizure and sale, for an auctioneer has been appointed to carry out the sale.

It might have been different, if in default of directions such as those given in this case under section 12 of the Mortgage Ordinance or directions given expressly to the effect, the sale came to be held by the fiscal. That

was just what happened in the case of *Muttu Raman Chetty vs Mohamadu* (21 N.L.R. 97.) The decree in that case was entered on the 15th of December, 1902, and it directed that the defendants do pay the sum of money, and that in default of payment, the mortgaged property be sold by the fiscal, and that if the proceeds of sale were insufficient, the balance be recovered by *execution levied upon any other property* of the defendants. No steps were taken till January 1911, and the writ that issued on that occasion proved fruitless. In February 1913, the plaintiffs applied for a re-issue of the writ and the question then arose whether section 337 of the Civil Procedure Code applied and operated to debar them. It was held that it did. That case is clearly distinguishable from this.

In the first place it arose long before our Mortgage Ordinance "amending and consolidating certain laws relating to mortgages," was enacted. Secondly in that case the decree provided for the sale of the property *by the fiscal* and it gave no special directions to him in regard to the conduct and to the conditions of sale, and in the absence of such directions, as the law then stood, the fiscal could be put in motion only in the manner indicated in sections 223 and 224 of the Code, and in the train of those sections come the other provisions of Chapter XXII of the Code. Under the law as it obtained before 1928, the court had no authority to give directions for the execution of the decree except in the decree itself. *Walker vs Mohideen* (26 N.L.R. 310.) Today the position is quite different, for section 12 of the Mortgage Ordinance specially authorises the court to give directions in the decree *or subsequently in regard to the enforcement of the decree.* The result is that what section 337 of the Civil Procedure Code has in view, can now be secured by the court using the power vested in it by section 12 of the Mortgage Ordinance to give or not to give directions as it thinks fit when they are asked for in regard to the sale of the mortgaged property. Thirdly, that case is distinguishable on the ground that there was provision in that decree for the sale of property in the event of a deficiency and failure to pay it. That probably is the position even in the law as it is today. If occasion should arise for directions to be asked for and to be given for the sale of other property after the mortgaged property had been discussed, the provisions of Chapter XXII of the Civil Procedure Code would apply, and the court would require an application for execution to be made under section 223 and 224 of the Civil Procedure Code, for the decree entered in a case like this authorises the auctioneer to sell *only the mortgaged property.* In fact, section 12 of the Mortgage Ordinance empowers a court to give directions in the decree or subsequently only in regard to the sale of the *mortgaged property.* If after that property has been discussed, resort to other property is found necessary, it would appear, that the provisions of the Civil Procedure Code relating to the execution of decrees is the only way in which to put into operation the function of the fiscal whose intervention is then necessary.

In the course of the argument before us, appellant's counsel relying upon the judgment in the case of *Muttu Raman Chetty vs Mohamadu* and in

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the case of *Don Jacovis vs Perera* (9 N.L.R. 173) submitted that a mortgage decree is a decree for the payment of money, and from that submission he sought do deduce the proposition that all the provisions of Chapter XXII of the Code, except those specially excluded by section 12 (4) of the Mortgage Ordinance, applied to every mortgage action. I am quite unable to accede to that proposition because as I have already observed, although in the decree that was entered in the present case, there is an order for the mortgagor to pay the amount, there is also a direction as to what shall be done on default of payment of the sum found due, and a demand under section 226 of the Code is, therefore, not necessary. From the fact it follows that the fiscal need not be put in motion under section 223 of the Code for the sale of the mortgaged property. The inevitable result is that section 347 has no application whatever in the circumstances of this case because that section applies only when there must be application made for execution and when that application is made after more than a year has elapsed from the date of the decree.

But it is contended that in this case there was in point of fact, an application for execution made evidently in compliance with section 224 of the Code. The question then is whether because the plaintiffs when they moved for commission to sell, went further and resorted to a form prescribed for certain cases, they are bound by all the other provisions in Chapter XXII of the Code which are connected with section 224 in cases in which section 224 applies. In my opinion the answer to that question must be that they are not so bound. The principle of law is "*quando plus fit quam fieri debet, videtur etiam illud fieri quod faciendum est.*" All the plaintiffs need have done was to move that a commission do issue. They did that but while doing it, they did more. They supported their motion with an application provided for cases different from theirs. What is the legal consequence of that ? In my opinion it would be fallacious to say that a party who has done all that he was required to do to achieve the end he had in view, and who has gone beyond and does what he need not have done, is thereafter bound by all the consequences of the superfluous wrong procedure. In my view, this is surplusage that may be ignored.

In regard to the cases of *Don Jacovis vs Perera*, and *Silva vs Singho* it must not be overlooked that the application was for execution to recover the balance due on the decree *after the mortgaged property had been* discussed, and in those cases the questions arose between the mortgagee-creditor and the mortgagor-debtor. There was no party in those cases occupying the position of the present appellant.

In that view of the matter, the other questions (*b*) and (*c*) above do not arise.

I dismiss the appeal with costs.

HOWARD, C.J.

I agree.

*Appeal dismissed.*

*Present:* SOERTSZ, J., HEARNE, J. & KEUNEMAN, J.

HERATH (Inspector of Police) vs JABBAR

*S. C. No.* 479—*M. C. Kandy* 62200.

Argued on 29th February, 1940.

Decided on 7th March, 1940.

*Criminal Procedure Code (Chapter 16) section 297—Prosecution against two accused—One accused absent—Evidence affecting absent accused recorded in the presence of one of the accused—Evidence recorded in his absence read over to absent accused on his appearing on warrant—Should the witnesses who gave evidence in the absence of the accused have given their evidence* de novo *in his presence upon his appearance or is it sufficient if the depositions are read to the accused in the presence of the witnesses and an opportunity afforded of cross-examining the witnesses.*

On a report made under section 148 (1) (*b*) of the Criminal Procedure Code (Chapter 16 ) the Magistrate took criminal proceedings against two named accused persons. The second accused was before the court and after recording certain evidence in his presence, he directed a warrant to issue against the first accused. A fortnight later the Magistrate recorded further evidence which affected the first accused in his absence, but in the presence of the second accused. Upon his appearance in court the evidence recorded against the first accused was read to him in the presence of the witnesses and he was given an opportunity of cross-examining them.

**Held :** (i) That the evidence was improperly recorded as against the first accused in his absence, and that, therefore, there was no compliance with the law in merely reading it to him.

(ii) That the witnesses should have been required to give their evidence afresh in the presence of the first accused.

(iii) That the use at a trial of evidence improperly recorded against an accused is an illegality and a conviction founded upon such evidence cannot be sustained.

*L. A. Rajapakse* with *H. A. Wijemanne* and *Jayamanne*, for 1st accused-appellant.

*Crossette Thambiah, Crown Counsel*, for complainant-respondent.

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In this case which has been referred to us the Magistrate took cognizance on 30th March, 1939, of criminal proceedings against two named accused persons on a report made to him under section 148 (1) (*b*) of the Criminal Procedure Code. The 2nd accused was before the court and after recording certain evidence in his presence he directed a warrant to issue against the 1st accused (appellant).

A fortnight later, on 14th June, he recorded further evidence, which affected the 1st accused, in his absence, but in the presence of the 2nd accused. It could not be argued that this evidence, *in so far as it affected the 1st accused*, could have been recorded in his absence by virtue of any of the exceptions to the general rule that " all evidence taken at inquiries and trials shall be taken in the presence of the accused." In particular the exception referred

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to in section 151 has no application. That section permits the examination on oath of a complainant or any other person who can speak to the facts of the complaint, to enable a Magistrate to decide whether process should issue against an accused person who is not in custody. In this case, however, a warrant had already been issued on the 30th May. It is to be noted that the 1st accused was not regarded as having absconded. In that event different considerations would apply (section 407).

Counsel for the Crown did not, in fact, seek to bring the facts of the case within section 151. It was tentatively submitted by him that the evidence recorded on 14th June, might properly have been recorded against the 1st accused under the provisions contained in the last paragraph of section 188, but as this section unambiguously refers to an accused who is present the argument was abandoned.

The question of law which has been referred to us is in effect, whether the witnesses whose depositions were taken on 14th June in the circumstances I have mentioned, should have given their evidence *de novo* in the presence of the 1st accused after his arrest, or whether the reading of the recorded depositions in the presence of the witnesses to the accused with the opportunity given to him of cross-examining them is a sufficient compliance with the law.

The answer is to be found in the provisions of section 297. The section lays down in the first paragraph that " all evidence taken at inquiries or trials shall be taken in the presence of the accused," unless his personal attendance has been dispensed with or unless one of the specific exceptions of the Code is applicable and in the second paragraph that in the latter case " the evidence " of which the accused would otherwise have no notice " shall be read over to him."

The second paragraph of section 297 clearly refers to evidence which has been properly recorded against an accused in his absence. The evidence to which I have referred was improperly recorded as against him in his absence and there was, therefore, no compliance with the law in merely reading it to him. The witnesses should have been required to give their evidence afresh in his presence.

In my view the use made at a trial of an accused person of evidence improperly recorded against him is an illegality and a conviction founded upon such evidence cannot be sustained.

I would allow the appeal and remit the case for trial of the appellant before another Magistrate.

SOERTSZ, J.

I agree.

KEUNEMAN, J.

I agree.

*Appeal allowed & sent back.*

**Proctors :—**

***Mustapha***, for accused-appellant (Jabbar)

*Present:* MOSELEY, J. & KEUNEMAN, J.

## DHARMARAKKITA vs WIJITHA

*S. C. No.* 20—*D. C. Kalutara No.* 19992.

Argued on 21st & 22nd February, 1940.

Decided on 1st March, 1940.

*Buddhist Ecclesiastical Law—Sisyanu Sisya Paramparawa—When may a pupil who is not the senior pupil succeed to an incumbency.*

The plaintiff though not the senior pupil of his tutor, claimed to be entitled to the incumbency of a temple according to the *Sisyanu Sisya Paramparawa* rule of succession. Upon the death of plaintiff's tutor all the pupils including the senior pupil agreed that the plaintiff should succeed to the incumbency.

**Held :** That the pupils of a deceased incumbent have a right to elect one of their own number, other than the senior pupil, as incumbent, when the senior pupil consents to or acquiesces in such election.

*N. E. Weerasooriya, K.C.* with *L. A. Rajapakse* and *Ranawake*, for defendant-appellant.

*H. V. Perera, K.C.* with *H. A. Wijemanne* and *A. C. Gunaratne*, for plaintiff-respondent.

KEUNEMAN, J.

The plaintiff brought this action to be declared the incumbent of the Indasararama Maha Vihare, and to be declared entitled to the rubber coupons issued in respect of certain rubber plantations on the temple property, and asked that the Rubber Controller be directed to issue to him certain coupons which had been allocated to the defendant, and for damages Rs. 900/– and further damages at Rs. 60/– per month till coupons are issued to the plaintiff.

The learned District Judge entered judgment declaring the plaintiff entitled to the incumbency, the rubber coupons and damages at Rs. 720/– and further damages at Rs. 30/– a month till restored to possession. The defendant appeals from this judgment.

The temple in question was founded by Wettawa Indasara, who was the original incumbent. Plaintiff claimed the incumbency by pupillary succession, namely, *Sisyanu Sisya Paramparawa.* Plaintiff stated that Indasara was succeeded by his pupil Sumangala, and that Sumangala was succeeded by his pupil Dhammakkhanda, and that Dhammakkhanda was succeeded by his pupil Sumanasara. Plaintiff claimed that as a pupil of Sumanasara, he succeeded to the incumbency on the death of the latter in 1930.

At the trial, the following issues were framed:—

1. Is the plaintiff the incumbent of the Indasararama Maha Vihare ?
2. Is the defendant entitled to the incumbency by election or otherwise ?
3. Did the defendant wrongly appropriate the rubber coupons from August, 1934 ?
4. Damages.
5. Has the defendant's claim, if any, to the incumbency been prescribed ?

It was admitted in the proceedings that Sumanasara was the incumbent of this temple till his death on the 22nd May, 1930, that the

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plaintiff was a pupil of his, and that the defendant was a co-pupil of Sumanasara, both being pupils of the previous incumbent Dhammananda. It further transpired in the evidence that the plaintiff was not the senior pupil of Sumanasara and that he was also the pupil of the defendant by virtue of his ordination.

According to the plaintiff, on the death of Sumanasara all the pupils of Sumanasara, including the senior pupil Dharmasena, consented to the plaintiff succeeding as incumbent. The plaintiff produced document P 2 signed by his four co-pupils whereby they stated that they had selected and installed him to succeed Sumanasara to the incumbency of the temple.

P 2 purports to bear the date, 29th May, 1930.

Dharmasena in his evidence said : " After Sumanasara's death all of us, pupils of Sumanasara, agreed that the plaintiff should succeed. I have a better right to the incumbency than the plaintiff, being his senior, but withdrew and recognize him as the rightful incumbent." He also added "I remember writing P 2. It was about eight years ago." He was not however able to remember whether the date was on the document when it was originally written.

Another signatory of P 2, Sirinewasa, also acknowledged his signature in P 2, but was not certain whether the date was there when he signed. He was certain, however, that P 2 was signed some time before the defendant was appointed incumbent by the Buddhist Temporalities Committee.

P 2 has been impugned by counsel for the defendant as a later fabrication, but on an examination of the evidence I am satisfied that it is a genuine document. The date has not been strictly proved, but I think the evidence establishes that it was executed shortly after the death of Sumanasara.

P 2 shows that all the pupils of Sumanasara, including the senior pupil Dharmasena, agreed that the plaintiff should succeed as incumbent in the place of Sumanasara, and there is no question that he was not unanimously elected by his co-pupils to fill that office.

Plaintiff said that he reported this election to the Buddhist Temporalities Committee, and produced a reply from the Chairman, P 7, dated 17th August, 1930, wherein he was recognized as incumbent.

The defendant denied that the rule of pupillary succession was applicable to the incumbency in question. According to him, the right to elect the incumbent resided in the Sangha Sabha which appears to comprise the priesthood of the whole sect in this district. Its members were therefore drawn not only from this temple, but also from the other temples in this district, and included the High Priest of his sect, Dewarakkita.

The defendant produced a document, D 7, dated the 21st September. 1930, signed by Dewarakkita and a number of other priests of the various temples, including one priest from the temple now in question, whereby the Sangha Sabha declared that the defendant had been approved by them as a proper and suitable person to be the incumbent of the temple with which

we are concerned. D 7 was sent to the President of the Buddhist Temporalities Committee of Kalutara and on receipt of it, the President wrote D 8 of the 22nd September, 1930, to the defendant, informing him of his appointment to the incumbency. D 9 of the 3rd October, 1930, was also produced to show that the Assistant Government Agent, Kalutara also accepted his appointment. The defendant claimed the incumbency by virtue of this appointment.

The plaintiff had earlier been notified that Kalyana Tissa was appointed incumbent — *vide* P 11 of 17th June, 1930 and had protested against this appointment *vide* P 12 — but Kalyana Tissa appears to have declined the office on the ground of ill-health *vide* D 7.

The first question to be decided is whether the right of pupillary succession applies to the incumbency in dispute.

It has been held that where the right to an incumbency is in question in the absence of evidence to the contrary it must be presumed that the incumbency is subject to the *Sisyanu Sisya Paramparawa* rule of succession *vide Ratnapale Unnanse v. Kowitigala Unnanse* (2 S.C.C. 26) and *Unnanse v. Unnanse* (22 N.L.R. 353.)

In this case there is only the bare statement of the defendant that on previous occasions the Sangha Sabha has made the appointments to the incumbency. No corroboration of this has been given by the production of documents or by other satisfactory evidence. The plaintiff led evidence to the contrary effect, and pointed out that in every case the deceased incumbent was succeeded by his pupil. I must hold that the rule of succession which is applicable is the *Sisyanu Sisya Paramparawa.*

In this connection, I may mention the evidence of Sri Dhammananda, High Priest of Colombo and Chilaw, Principal of the Vidyalankara Pirivena and Chief Officiating Priest for Ordination at Malwatta, admittedly very learned in Buddhist Law and authority on custom. He sets out the rule of succession in the case of *Sisyanu Sisya Paramparawa*, namely, that the senior pupil succeeds the tutor as a matter of course, that the tutor can choose any pupil to succeed him, and that the pupils may choose one of themselves also. (I shall deal with this in another connection). He then goes on to say:

> "Nevertheless the final choice rests with the Sangha Sabha. That right is exercised *when there is no suitable person or when the person elected is not suitable.*" He speaks of the right of the Sangha Sabha " to interfere " when a person who is not suitable is elected. By " suitable " he meant " a pious or learned or just person."

Now, there are several points to be considered on this evidence. In the first place, the right of the Sangha Sabha never arises, unless there is no suitable person or the person elected is not suitable, *i.e.* they only intervene when there is no election possible, or after the election has been made. Clearly they are not the body in whom the primary right of election resides.

In the second place, the witness admits that he does not remember a single instance where the Sangha Sabha interfered with the choice of the tutor of the co-pupils.

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Lastly, the Sangha Sabha mentiond by the witness is a very different body from that which purported to make the appointment in this case. The witness describes the Sangha Sabha as "*the priesthood attached to the particular temple in question*," clearly excluding thereby the priests of other temples. I do not think it is necessary in this case to consider the right which he mentions, because the facts of this case apply to a very different set of circumstances.

Several further points were raised by counsel for the appellant and I think his main arguments may be summed up as follows :

(1) As regards the history of this incumbency, the senior pupil has not in fact succeeded the incumbent, but some pupil other than the senior.

(2) Under the rule of *Sisyanu Sisya Paramparawa*, the succession of the senior pupil is imperative, unless the incumbent has nominated some other pupil. Where the incumbent has not nominated anyone, there is no right on the part of the pupils to elect one of their number who is not the senior pupil. The further corollary to this is that where the senior pupil does not accept the incumbency or had relinquished it, the right to the incumbency is vested in the senior pupil of that senior pupil. In other words, it was contended that if Dharmasena can be regarded as having repudiated the incumbency the proper person to succeed was Dharmasena's senior pupil.

(3) Where the pupil of an incumbent is also the pupil of another priest of the same temple who comes within the line of pupillary succession, such pupil cannot succeed to the incumbency until the death of the surviving tutor, and such tutor is entitled to the incumbency. In this case it was contended that as the plaintiff was the pupil both of Sumanasara and of the defendant who was a co-pupil with Sumanasara, his right to succeed must be deferred till the death of the defendant and that the defendant was entitled to the incumbency.

I shall deal with each of these points in turn.

(1) Counsel for the defendant stated that on the death of each incumbent, he was succeeded, not by his senior pupil, but by some other pupil, and depended upon this to show that the rule of pupillary succession, *Sisyanu Sisya Paramparawa* was not applicable to this temple.

There are questions of fact involved here which we must determine.

The first incumbent was Indasara. On his death he was succeeded by his pupil Sumangala. It was contended that the senior pupil was Gunaratne. The plaintiff led evidence to the effect that Sumangala was the senior pupil. The defendant, in addition to his evidence produced document D 3. D3 is not a document executed in 1889 and appears to be a statement of the movable and immovable property acquired by Indasara and a statement of the pupils ordained by Indasara and his successor Sumangala. In the list of pupil priests ordained by Indasara the name of Gunaratne appears first and that of Sumangala second. There is, however, nothing to show that the compiler of this document was directing his mind to the question of seniority among the pupils, and I cannot see that this document is conclusive evidence of the fact that Gunaratne was in fact the senior pupil.

As regards Sumangala it was contended that his senior pupil was Devananda on the ground that his name occurs in D 3 above that of Dhammakkhanda. The same argument applies to this case as to the previous one. Further, it is by no means clear that either Gunaratne or Devananda was alive at the time of the death of the incumbent tutor.

As regards Dhammakkhandha's pupils it was contended that the senior was Kalyanatissa. Apart from the oral evidence, the defendant relied on a deed of gift by Dhammakkhandha, D 14 of the 27th September, 1913, in which the donor referred to Kalyanatissa as his "chief pupil." As against this the plaintiff led a body of oral evidence and produced document P 15 of the 14th October, 1917, wherein the Mahanayaka of the Sangha Sabha set out the names of "the living pupils" of Dhammakkhandha placing the name of Sumanasara first and Kalyanatissa third. I do not think that any conclusive inference can be drawn from this evidence. It has to be remembered that the burden of proving that some other rule of succession than the *Sisyanu Sisya Paramparawa* rule applied to this temple lay on the defendant. I do not think that the defendant has succeeded in discharging that burden.

Further the question as to the right of the pupils under the *Sisyanu Sisya Paramparawa* to elect one of their number other than the senior pupil will be dealt with later. There is a distinct suggestion in the evidence of the plaintiff's witness Dharmasena that at least one of these persons referred to, namely, Dhammakkhandha, was selected by his co-pupils, because he was the cleverest of the pupils. If in fact there is such a right on the part of co-pupils to choose one of their number who is not the senior, then no inference can be drawn against the application of *Sisyanu Sisya Paramparawa* to this temple.

(2) We may now consider the second argument urged by counsel for the appellant, namely, that under the rule of *Sisyanu Sisya Paramparawa* the right of the senior pupil to succeed is imperative and that no right resides in the pupils to choose any other person out of their number.

It has been pointed out by counsel for the respondent that in *Saranankara Unnanse v. Indajoti Unnanse* (20 N.L.R. 385 at 397) Bertram, C.J. stated :—

> "Where there are several persons in the line of pupillary succession the *adikhari* is appointed from among these persons either by nomination of his predecessor or by selection of these persons. This selection.....is.....the formal choice of the other persons entitled to the succession. By custom the right to succeed is determined by seniority, (though it would appear from the evidence recorded in the case of *Dammaratana Unnanse v. Sumangala Unnanse* 14 N.L.R. 400) that the right attaching to seniority is not so unqualified as some of our decisions appear to suggest.....When, therefore, in such cases, our courts declare that any person is entitled to succeed to an 'incumbency' what they in effect, decide is that the person in question by virtue of seniority (or such other qualification as the court may determine to govern the matter), is by custom entitled to be selected for the office by the other priests in the line of pupillary succession."

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Again, in *Gunananda Unnanse v. Dewarakkita Unnanse* (26 N.L.R. 257 at 275) Jayawardene, A. J. said :

> "If an incumbent dies leaving several pupils, the senior pupil succeeds. The selection of the incumbent, however, rests with the pupils and the right of the senior pupil might, in certain circumstances be disregarded."

It has been pointed out for the appellant that these statements are *obiter dicta*, as the immediate point with which we are concerned did not come up for determination in these cases. This is undoubtedly the fact, but at the same time these statements are of great weight, as the whole question of *Sisyanu Sisya Paramparawa* was investigated in each case, and expert evidence, not only in those cases, but also in *Dhammaratana Unnanse v. Sumangala Unnanse* (14 N.L.R. 400) was fully considered. In the last mentioned case, at the instance of the Supreme Court a series of nine questions was propounded to seven priests of the highest distinction and learning and the evidence of these seven priests appears in the appendix to Vol. 20 of the New Law Reports at page 506. The Supreme Court considered that the answers to these questions "should form a very valuable source of information for future reference on the points inquired about."

Bertram, C. J. had recourse to this evidence in *Saranankara Unnanse v. Indajoti Unnanse* (*vide supra*), and in my opinion correctly so. de Sampayo, J. who sat with him stated: "I think that we may safely adopt such propositions as are supported by a consensus opinion, or are approved by a majority of the learned and eminent priests whose evidence is available to us. The evidence in the Kandy case *i.e. Dhammaratana Unnanse v. Sumangala Unnanse* (14 N.L.R. 400) is the most important, because it was given, not in the interests of the parties, but with a view of assisting this court....."

The evidence in the 14 N.L.R. case is available to us and has been studied by us. One of the questions formulated namely, No. 3, was "does every pupil obtain the right of pupillary succession to his tutor; if so, in what order; if not, which pupil obtains the right?"

The answers to this question are illuminating. Four of the priests deposed to the right of the pupils to select one of their number, but recognised the right of the senior pupil to succeed, in the absence of nomination by the tutor. The emphasis on the two aspects of this question was differently placed by the various priests. Some said that the senior pupils succeed, but if he is unfit or not learned enough, all the pupils join in selecting their head. Others laid more emphasis on the right of selection by the pupils, who were also influenced by the fact of seniority.

Three of the priests stated that in the absence of nomination by the tutor, the senior pupil becomes the incumbent. They did not refer to the right of the pupils in any circumstances to select one of their number. It was contended that they must be regarded as having denied any such right to the pupils. I am not satisfied that this conclusion must be drawn. I think the better opinion is to regard their evidence as silent upon that point.

It may well be that the right of the senior pupil to succeed cannot be displaced except with his consent or acquiescence. I do not express an opinion on that point, because it is not necessary for the determination of this case. But I think that there is a very strong body of expert opinion in favour of this proposition at least, namely, that the pupils have the right to nominate one of their number, where the senior pupil consents to or acquiesces in this.

So far I have not dealt with the evidence called in the present case. Admittedly the most distinguished and learned of the experts on Buddhist Ecclesiastical Law called in this case was Sri Dhammananda, whose evidence I have referred to earlier. He was called by the defendant, but his evidence on this point is favourable to the plaintiff. On this particular point he said:

> "The usual rule of succession is the *Sisyanu Sisya Paramparawa*. The senior pupil succeeds the tutor as a matter of course. The tutor can choose any pupil to succeed him. The pupils can choose one of themselves also. That is the senior pupil can waive his right to the incumbency."

This was said in cross-examination. In re-examination he said.

> "When there are several pupils, the senior pupil is selected; but if there are more suitable pupils, then the most suitable is chosen."

I do not propose to comment on the other evidence on this point, because in respect of weight and authority it is inferior to that of Sri Dhammananda. I need only say that plaintiff called evidence in support of his contention and the defendant called certain evidence to the contrary.

I think that all the evidence to which I have referred undoubtedly establishes the right of the pupils of a deceased incumbent to elect one of their own number, other than the senior pupil, when the senior pupil consents to or acquiesces in this. This is a right pertaining to the rule of the succession *Sisyanu Sisya Paramparawa*. I hold that the plaintiff has been selected by the correct authority, and that his right to the incumbency has been established.

In view of this decision, the further corollary argued, namely, that in any event, if Dharmasena relinquished the right of succession, the proper person to succeed was Dharmasena's senior pupil, does not arise. I may however add that this proposition appears to be contrary to authority.

(3) The third proposition of the appellant's counsel was that in view of the fact that plaintiff was a pupil not only of Sumanasara but also of the defendant who was a co-pupil with Sumanasara, the plaintiff cannot succeed to the incumbency until the death of the defendant, and that the defendant is now entitled to the incumbency. No previous authority to this effect has been cited to us, nor have we been able to trace any case where such a right has been mentioned. On the contrary, one of the questions propounded in the 14 N.L.R. case, namely, No. 4, was:

> "If a person who has been a pupil of one tutor becomes the pupil of another tutor, does he lose the right of pupillary succession to his former tutor from that fact?"

All the answers positively stated that he would not lose his right, and no mention was made by anyone of any special exception as is contended for here.

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Keuneman, J.

Dharmarakkita vs Wijitha

Further, in the case, decided by a Divisional Bench, of *Gunananda Unnanse v. Dewarakkita Unnanse* (*vide supra*) where the right of a pupil to succeed as against the fellow-pupil of his tutor was expressly considered, it was held that the rights of fellow-pupils of the tutor can only arise when that tutor has no pupils of his own or when the direct line of succession is exhausted *vide* at pages 264 and 275. In spite of considerable inquiry made in that case no mention was made of the special instance which is now put forward.

The evidence led in the present case apart from that of the defendant, is as follows :—

Sri Dhammananda, the witness already mentioned, stated :

> " A pupil can have more than one tutor. If a pupil has two tutors in the same temple if pupillary succession applies then the pupil must wait until both die. That is the case if both tutors belong to the same line of pupillary succession."

He added that where the tutors were in different temples this rule had no application.

Now this witness did not expressly mention that the surviving tutor had a right to the incumbency but even if I assume that he meant to say so, several questions arise which have not been satisfactorily answered.

First, has such a tutor the right which is conceded to the ordinary incumbent of nominating his successor from among his pupils ? If he has that right is he entitled to pass over the senior pupil of the deceased incumbent and even to direct the succession to another line. Is this in keeping with the rule of pupillary succession ? I think not. If on the other hand, the right of the pupil is merely suspended during the lifetime of the co-tutor what exactly are the rights of the surviving co-tutor and how are these rights consonant with the rule of pupillary succession ? No satisfactory answer is available to those questions.

One other witness, Wimala Nayaka, cited his own case. He is now the Chief Priest of a certain temple at Walana. His predecessor in the office Mangala Nayake was a co-pupil of the witness under a previous incumbent. Both of them had a pupil in common. On the death of Mangala Nayake witness succeeded to the exclusion of the common pupil. Witness also mentioned the name of two temples in which he said the same thing had happened.

Witnesses for the plaintiff contested the proposition so enunciated, which, I think, gives a right to a co-pupil of the incumbent difficult to reconcile with the decision of the Divisional Court. Further, while it is possible that there may be one or more modern instances on which the appellant can find an argument, I do not think there is that degree of proof which will enable us to hold that any custom has been established whereby the right of the plaintiff to succeed to the incumbency has to be deferred until the death of the defendant. It has not been suggested that this proposition has been spoken to by an expert until the trial of this case and I think that for the establishment of so novel a proposition a strong and satisfactory body of expert opinion is necessary. Such testimony is lacking in this case and I must hold accordingly that the contention for the appellant fails and that the plaintiff is entitled to succeed to the incumbency in spite of the fact that his co-tutor is alive and is a priest in this temple.

The appeal is dismissed with costs.

MOSELEY, J. I agree.

*Appeal dismissed.*

*Present:* WIJEYEWARDENE, J.

## VIOLET CATHERINE PERERA vs Messrs. BROWN & CO., LTD. COLOMBO

*S. C. No.* 859/1939—*No. C*3—32—39.

Argued on 13th March, 1940.

Decided on 15th April, 1940.

*Workmen's Compensation Ordinance (Chapter* 117) *section* 3—*Fatal attack on a workman by a fellow workman—Attack made outside the work place and outside working hours—Was the injury caused by an accident arising out of and in the course of the injured workman's employment.*

The applicant is the widow of a deceased workman. The deceased had been sent by his employer to work at a place outside Colombo along with other workmen. The employer provided no accommodation for his workmen but they were informed that they could make use of any accommodation available at the premises at which they worked provided the authorities there gave them permission.

The deceased workman and his assailant a fellow workman had a quarrel over a screw driver which the deceased had lost. The screw driver belonged to their employer. Three days later the deceased and his assailant met at a tea-boutique outside, the only place at which they quarrelled again and shortly after the deceased was fatally attacked.

**Held :** That the injury to the deceased was caused by an accident not arising out nor in the course of the deceased's employment.

**Cases referred to :**—*Board of Management of Trim Joint District School and Kelly* (1914—A.C. 667)
*St. Helens Colliery Co., Ltd. and Hurstson* (1924—A.C. 59)
*Lee vs Breckman* (1928—21 B.W.C.C. 32)
*Smith vs Stepney* (1929—22 B.W.C.C. 451)

*J. R. Jayawardena* with *M. M. Kumarakulasingham*, for applicant-appellant.

*Van Geyzel*, for respondent.

WIJEYEWARDENE, J.

The applicant-appellant is the widow of one Edwin Perera, a workman employed under the respondent firm.

The respondent firm which has its head office in Colombo entered into a contract to instal a dynamo at the Borstal Institute at Watupitiwela. The firm sent a number of workmen including Perera to Watupitiwela. Perera was paid on an hourly basis, the hours of work being 8 a.m. to 5 p.m. When working at Watupitiwela, Perera received in addition a daily allowance of cts. –/50 to cover any extra expenditure he had to incur in living out of Colombo. The firm did not provide accommodation for the workmen at

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Wijeyewardene, J.

Violet Catherine Perera
*vs*
Messrs. Brown & Co. Ltd., Colombo

Watupitiwela but informed them that they could make use of any accommodation available at the premises with the permission of the authorities in charge of the premises.

On April 1, 1939 while Perera was attending to some work, one of his fellow workmen asked for his screw driver. Perera searched for it and found it missing. Shortly afterwards a small screw driver was found by a fellow workman of Perera in the possession of Soysa, himself a workman employed at the premises. It is not clear from the evidence whether Soysa was also a workman employed under the respondent firm. The screw driver was identified by several workmen as the property of the respondent firm and claimed by Perera as the one with which he worked. Soysa on the other hand claimed the screw driver as his own but gave it to Perera and abused Perera and his fellow workmen who said it was the property of the respondent firm. Nothing further happened till April 4th. By noon that day Perera finished his work and was arranging to return to Colombo when his superior asked him to stay back until the machine was tested. At 6 p.m. that day Perera and some other workmen went to bathe. On their way back to their lines they went to a tea-boutique where they met Soysa who threatened them again and attempted to hit Perera. They went back to their lines at about 6-50 p.m. and had their meals. Some time afterwards Perera got out when he was assaulted fatally by Soysa. He died the next day.

The questions of law to be considered in this appeal are:

1. Whether Perera's death was caused " by accident within the meaning of section 3 of the Workmen's Compensation Ordinance."
2. Whether the injury is caused by accident
   (*a*) arising out of Perera's employment and
   (*b*) in the course of Perera's employment.

There is no difficulty in answering question (1) in the affirmative in view of the decision of the House of Lords in *Board of Management of Trim Joint District School and Kelly* (1914) A.C. 667 where Viscount Haldane, L.C. held that " accident included a mishap unexpected by the workmen irrespective of whether or not it was brought about by the wilful act of someone else."

There are numerous English decisions which seek to elucidate the words " arising out of employment " and " in the course of employment " but it is almost hopeless to try and reconcile them. It may however be taken as an accepted principle that these words in the section should be given an extensive interpretation. But even with such an interpretation could it be said that Perera received his injury in the course of his employment? His work for the day was over at 5 p.m. He was under no obligation to live on the premises. It was merely a privilege conferred upon Perera of which he could have availed himself of or not as he pleased. In remaining on the premises after the hours of work Perera was not doing something in discharge of a duty to the respondent firm directly or indirectly imposed upon him by his contract of service. *Vide St. Helens Colliery Co., Ltd. and Hurstson* (1924) A.C. 59. Nor do I think that it could be stated that the accident

arose out of the employment. There is no evidence whatever as to the immediate circumstances which resulted in the assault on Perera. It was admitted at the argument before me that Soysa was indicted for murder but was found guilty of culpable homicide not amounting to murder. This could only be amounted for by the fact that Soysa pleaded successfully (*a*) that he acted under grave and sudden provocation or (*b*) that acting in the exercise of the right of private defence he exceeded the power given to him by the law or (*c*) that he committed the act without premeditation in a sudden fight. I shall however deal with this part of the case on the assumption that the assault was in some way connected with the suggestion that Soysa made a dishonest claim to the screw driver. It cannot be said that employment under the respondent firm involved a special risk to be assaulted by a person against whom a workman may make such a suggestion. It is a risk that any one may run. Perera by his employment did not expose himself to a risk not incurred by an ordinary member of the public *vide Lee vs Breckman* (1928) 21 B.W.C.C. 32 and *Smith vs Stepney* (1929) 22 B.W.C.C. 451. I think that *Board of Management of Trim Joint District School and Kelley* (*supra*) could be distinguished, as in that case there was some evidence of the unruly character of the pupils with whom the deceased person had to deal and there was a finding by the County Court Judge to that effect. It may perhaps be added that in cases under the corresponding Statute in England, the County Court Judge acts as an arbitrator and " his award can therefore be set aside only if it is apparent that there was no evidence to support it or if an error in the law appears on the face of it."

I dismiss the appeal but I make no order as to the costs of appeal.

*Appeal dismissed.*

**Proctors :—**

*Valentine S. Perera*, for applicant appellant. (Violet Catherine Perera)
*Julius & Creasy*, for respondent. (Messrs. Brown & Co. Ltd., Colombo)

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*Present:* SOERTSZ, J. & HEARNE, J.

## DAISY LAW vs FERNANDO AND OTHERS

*S. C. (Inty.) No.* 152—*D. C. Colombo No.* 315/*Special*
Argued on 6th March, 1940.
Decided on 14th March, 1940.

*Entail and Settlement Ordinance—Public Trustee Ordinance section* 15—
*In what circumstances may money in court be transferred to the Public Trustee.*

**Held :** That section 15 of the Public Trustee Ordinance (Chapter 73) is not intended to serve as a hard and fast rule to be applied to all cases under the Entail and Settlement Ordinance. It provides for cases in which the interests of the parties concerned will best be served by a transfer of money to the Public Trustee.

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Soertsz, J.

Daisy Law *vs* Fernando and Others

*F. C. W. Van Geyzel*, for the appellant.

SOERTSZ, J.

This is one of many cases under the Entail and Settlement Ordinance which are said to be pending in the District Court of Colombo and cumbering the Roll of that court. From their very nature these cases are of indefinite duration and have a very upsetting way of turning up periodically to tax the time and the thought of a heavy court and a busy staff. In these circumstances, it is not surprising that the learned District Judge of Colombo should have given his mind to the question of a remedy for these ills. But has he found one? He has come to the conclusion that section 15 of the Public Trustee Ordinance affords him a comfortable avenue of escape, and in that view, he issued notice on all the parties in this case to appear before him and to show cause why the money lying to the credit of this case should not be transferred from the Loan Board to the Public Trustee. This case is to serve as a test case and on the decision given here, depends the future of many more cases and of very many more persons.

The occasion, therefore, is an anxious one. On the one side we have a harassed Judge, on the other side many frightened people, and I have given the matter my best attention, and I regret to say that it seems to me that the learned Judge must abandon all hope of escape in the manner he proposes. I am quite unable to share his view that section 15 was added to the Public Trustee Ordinance " with the object of giving relief to the courts." I cannot help thinking, perhaps with some disappointment, that when the Legislature added this section, it was more mindful of the interests of parties, than of the convenience of courts. One can easily bring before one's mind many cases in which the interests of the parties concerned would be best served by the proceeds of sale effected under section 4 of the Entail and Settlement Ordinance being transferred to the Public Trustee, and section 15 appears to have had such a state of things in contemplation. If the legislature had intended to alleviate the burden of the work of the courts, surely it could have and would have adopted a more direct approach to that end.

But assuming that section 15 can be utilised for the purpose the Judge has in view, namely, for transferring all moneys lying to the credit of all Entail and Settlement cases to the Public Trustee, to what extent will the courts stand relieved by such a transfer? All that section 15 authorises is the transfer of moneys, not the transfer or delegation of judicial functions. That responsibility of the court must and will remain. Every time a payment falls due to, or is applied for by a party, every time new beneficiaries come forward claiming to take the place of predecessors, judicial consideration, may be, of a formal nature must be forthcoming. It is only after such consideration that directions may be given from time to time by the court to

the Public Trustee. In the result, the work of the court will be increased, not decreased, for, in addition to the work devolving upon it at present, it will have to occupy itself with the task of giving these directions from time to time.

As I have already observed, section 15 provides for cases in which the best interests of the parties—for that, after all, should be the determining factor—will be served by a transfer of money, to the Public Trustee, and is not intended to serve as a hard and fast rule to be applied to all cases under the Entail and Settlement Ordinance. In the case before us, the majority of parties object to the transfer, and their objection appears to be well founded for the transfer will result in a depreciation of their capital, and in a reduction of their dividends, without a compensating advantage of any kind so far as they are concerned.

In this view of the matter, I do not think it necessary to consider the other question raised in the order made by the District Judge. I would, therefore, allow the appeal and set aside the order made by the District Judge.

HEARNE, J.

I agree.

*Appeal allowed.*

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*Present:* HOWARD, C.J. & KEUNEMAN, J.

## FERNANDO vs RANASINGHE

*S. C. No. 55–56—D. C. Colombo No. 876/L*
Argued on 6th March, 1940.
Decided on 13th March, 1940.

*Power of attorney to act in respect of a particular business—Power registered—Cessation of the business—Registration not cancelled—Has attorney authority to execute deeds after cessation of such business.*

The plaintiff had appointed the second defendant as his attorney for the management of his business as a timber merchant. The power of attorney was registered. After the plaintiff ceased to carry on the business of a timber merchant the second defendant transferred two of the plaintiff's lands to the first defendant purporting to act under the registered power of attorney which had not been cancelled. It was sought to justify the second defendant's action on the ground that it was taken to settle some debts of the business.

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Howard, C.J.

Fernando *vs* Ranasinghe

**Held :** That as the power of attorney had been given for the limited purpose of managing the plaintiff's timber business the agent had no power to bind the principal after the cessation of the business.

**Cases referred to :**—*Danby vs Coutts & Co.* (29 Ch. D. 500)
*Attwood vs Munnings* (108 E.R. 727)
*Lewis vs Ramsdale* (55 L.T.—N.S.—179)
*Harper vs Godsell* (L.R. 5 Q.B. 422)

*N. E. Weerasooriya, K.C.* with *E. B. Wickremanayake* and *H. A. Kottegoda*, for the 1st defendant-appellant.

*C. V. Ranawake*, for the 2nd defendant-appellant.

*H. V. Perera, K.C.* with *Dodwell Gunawardene*, for the plaintiff-respondent.

HOWARD, C.J.

This is an appeal by the defendants from a judgment of an Additional District Judge of Colombo dated the 9th December, 1938, who held that certain deeds of transfer numbered respectively 129 and 130 and dated the 1st December, 1936, were executed without any authority. The 2nd defendant purported to execute the deeds transferring certain properties to the 1st defendant by virtue of a registered power of attorney No. 1000, exhibit P3 dated the 6th May, 1933, and executed by the plaintiff in favour of the 2nd defendant. By P3 the 2nd defendant was appointed by the plaintiff to act for him and on his behalf and in his name or otherwise in respect of his business as a timber merchant. In paragraph 6 of his plaint the plaintiff pleaded that he ceased to carry out his said business in or about February, 1935. In paragraph 1 of his answer the 1st defendant admitted the averments contained in paragraphs 1 to 7 of the plaint. The 2nd defendant who was added as a party on the application of the 1st defendant did not in his answer deny the averments contained in paragraph 6 of the plaint. The only question, therefore, for decision by the District Judge was whether, having regard to the fact that the business of the plaintiff had come to an end, the 2nd defendant had authority to execute the two deeds in favour of the 1st defendant. It was argued by counsel for the defendants that even if the business of the plaintiff had come to an end the 2nd defendant was justified in executing the deeds of transfer in order to raise money to pay the debts transacted whilst the business was being carried on. The only witness called was the 2nd defendant whose evidence with regard to such debts was of the vaguest character. The amount of such debt has not been established nor has it been proved that any debts were in fact owing by the 2nd defendant's principal, the plaintiff. The question, therefore, as to whether the 2nd defendant was justified in making the transfer by the existence of business debts owing by the plaintiff was in my opinion, rightly resolved by the District Judge in favour of the plaintiff.

It was further contended by the defendants that the power of attorney being registered and not having been cancelled still supplied the authority for the 2nd defendant to execute the two deeds of transfer. It has been held in a series of cases that the recitals in a power of attorney control the generality of the operative part of the instrument. Thus in *Danby vs Coutts & Co.* (29 Ch. D. 500) the operative part of a power of attorney appointed X and Y to be the attorneys of the plaintiff without in terms limiting the duration of their power, but it was preceded by a recital that the plaintiff was going abroad and was desirous of appointing attorneys to act for him during his absence. X and Y both before and after the plaintiff's return to England purporting to act under the power of attorney borrowed moneys from a Bank on mortgage upon the security of charges on the plaintiff's property. It was held that the charge given after the plaintiff's return was invalid. In *Attwood vs Munnings* (108 E.R. 727) it was held that general words in a power of attorney were not to be construed at large, but as giving general powers for the carrying into effect the special purpose for which they were given. In *Lewis vs Ramsdale* (55 L.T.—N.S.—179) A gave a power of attorney to B to manage real estate, recover debts, settle actions, also to " sell and convert into money " personal property and to execute and perform any contract agreement, deed, writing, or thing that might in B's opinion be necessary or proper for effectuating the purposes aforesaid or any of them. It was held that the general words were limited by the special purpose of the power of attorney, and did not authorise a mortgage of his personal property. In *Harper vs Godsell* (L.R. 5 Q.B. 422) P, a partner in the firm of B. W. & Co. gave A a power of attorney " for the purpose of exercising for me all or any of the powers and privileges conferred by an indenture of partnership constituting the firm of B. W. & Co.," and the power afterwards went on " and generally to do, execute, and perform any other act, deed, matter or thing whatsoever .....in or about my concerns, engagements and business of every nature and kind whatsoever." It was held that the former words restrained the generality of the latter words and consequently that A could not under this power execute a deed in P's name dissolving the partnership of B. W. & Co., and assigning over P's share of the partnership property.

It is now necessary to apply the principles formulated in these cases to the power of attorney on which the defendants rely in this case. The powers given under the operative part of the power are full and general. The power contains, however, *inter alia* the following recitals :

> " And whereas *inter alia* I am carrying on business as a timber merchant."
>
> " And whereas I am desirous of appointing some fit and proper person as my Attorney to manage and transact all my business and affairs in the said Island of Ceylon in respect of my said business as a timber merchant."

The operative part of the power also states that the plaintiff nominates the 2nd defendant his true attorney to act for him and on his behalf and in

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Howard, C.J.

Fernando vs Ranasinghe

his name or otherwise " in respect of my said business." The phraseology of the recital indicated, therefore, that the purpose for which the power was given was the management of the plaintiff's business as a timber merchant and restrained the generality of the operative part. With the closing down of that business the authority of the 2nd defendant to act under the power of attorney was automatically cancelled. In these circumstances I am of opinion that the learned additional District Judge was right in the conclusion at which he arrived.

The 2nd defendant claims that as he had no interest in the action and was an added defendant no order for costs should have been made against him. It must, however, be borne in mind that the 2nd defendant filed answer and participated in the action as a party. He took an active part in it and cannot be heard to complain if an order is made against him for costs. In these circumstances the order for costs against the 2nd defendant was properly made.

For the reasons given both appeals are dismissed with costs against both defendants.

KEUNEMAN, J.

I agree.

*Appeal dismissed.*

**Proctors :—**

*Arther S. Fernando*, for plaintiff- respondent. (Fernando)
*Fred G. de Silva*, for 1st defendant-appellant. (Ranasinghe)

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*Present:* MOSELEY, J.

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## ABEYWEERA vs ENSOHAMY AND ANOTHER

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*S. C. No.* 197—*C. R. Tangalle No.* 14984.

Argued on 16th January, 1940.

Decided on 23rd February, 1940.

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*Planter's share—Can a right to a planter's share be acquired by Prescription—Prescription Ordinance (Chapter 55) section 2.*

**Held :** (i) That a right to a planter's share can be acquired by prescription.
(ii) That a planter's share is an interest in land within the meaning of section 2 of the Prescription Ordinance.

**Cases referred to :—** *Silva vs Cottalewatte Haminey at el* (2 S.C.C. 4)

**Followed :—** *Jayasuriya vs Omar Lebbe Marcar* (2 C.L.R. 6)

*E. B. Wickremanayake*, for 1st defendant-appellant.

*C. V. Ranawake*, for plaintiffs-respondents.

MOSELEY, J.

This action was brought by the plaintiffs against the 1st defendant claiming a declaration of title to a plantation on a certain land, ejectment and damages, on the footing that one Dionis, deceased husband of the 1st plaintiff and father of the 2nd to 6th plaintiffs was a co-owner of the land and had planted thereon 36 coconut trees.

The following issues were framed :

1. Does the land shown as lots A and B in plan 248T made by Mr S. Ginige and filed of record form part of Unakuruwela which is to the east of Bogahakoratuwa ?

2. Did Abeywarna Patabendige Don Dionis plant the said lots A and B with coconuts ?

3. Prescriptive rights of parties

4. Damages

5. Was A.P. Don Dionis a co-owner of Unakuruwela ?

6. Can plaintiffs maintain an action for the plantation apart from the soil ?

The learned Commissioner in discussing the issues said that the real question was whether Dionis planted the land, and he found that he in fact did so. He made no finding as to whether Dionis was a co-owner, being of opinion that it was immaterial whether he was or not.

Judgment was given declaring the plaintiffs entitled to the planters' half-share of the 36 trees and for damages. Against that judgment the 1st defendant appeals.

Counsel for the appellant contended that, inasmuch as the Commissioner had not expressly held that Dionis was a co-owner, but that he had merely planted, the plaintiffs have no rights at all ; that the only rights which Dionis could have acquired as a planter must spring from an agreement and that of such an agreement there was no evidence.

It will be observed that, although the learned Commissioner entered judgment declaring the plaintiffs to be entitled to the planter's half-share, what the plaintiff had asked for in the plaint was that they should be declared entitled to the entire plantation. This was made a ground of appeal, but I do not think that in such an action the plaintiffs should be put out of court merely because they have asked for something which was more than they could possibly be entitled to. I propose, therefore, to treat the action as one for declaration of title to a planter's half-share.

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Moseley, J.

Abeyweera *vs* Ensohamy and Another

In support of his argument counsel for the appellant cited *Silva vs Cottalewatte Haminey et al* (2 S.C.C. 4). In the absence of an agreement such as he contended was necessary to support a claim to a planter's share, counsel for the respondent relied upon prescription.

On this issue I think that the respondent must succeed. The first respondent in her evidence said that Dionis had possessed for more than 15 or 16 years, and that after his death she possessed up to the time of the dispute, that is, for another 5 or 6 years. The learned Commissioner accepted this evidence.

Counsel for the appellant argued that section 3 of the Prescription Ordinance does not apply to coconut trees. He advanced no authority to support his contention. In view of the definition of "immovable property" contained in section 2, I should, even without authority to the contrary, have some difficulty in accepting his view. Moreover, in *Jayasuria vs Omar Lebbe Marcar* (2 C.L.R. 6) the point of prescription to a planter's share is expressly dealt with. Burnside, C.J. expressed the view that a planter's share is an interest in land within the meaning of section 2 of the Ordinance, and that it was an undeniable proposition that title thereto might be obtained by prescription.

I can see no reason whatever for dissenting from the view of the learned Commissioner on this point.

It follows, therefore, that issue 6 must also be answered in favour of the respondents.

As it seems to me that the plaintiffs must succeed on the issue of prescription, it is unnecessary to consider other aspects of the case or the authorities brought to my notice in regard to them.

The appeal is dismissed with costs.

*Appeal dismissed.*