The

Ceylon Law Weekly

containing Cases decided by the Court of Criminal Appeal, 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 XVII

WITH A DIGEST

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INDEX OF NAMES

Alagappa Chettiar & Another *vs* Palaniappa Chettiar 9
Arumugam Pillai & Others *vs* Lewis & Another 78
Assistant Government Agent (Mullaitivu) *vs* Selvadurai 130

Corea (Excise Inspector) *vs* Martin Silva 140

de Silva & Others *vs* de Silva 39

Fernando *vs* Coomaraswamy 1
Fonseka *vs* Leigh Clare 100
Forbes *vs* Rengasamy 45

Haramanis Perera *vs* Carolis Perera & Another 108
Hendrick & Others *vs* Saranelis & Others 87

In re Lucy de Silva 109

Jayasooriya *vs* de Silva 111
Joseph *vs* Joseph 86

King *vs* Kumarasamy 41

Leembrugen (A.S.P., N'Eliya) *vs* Pitchaipillai 49

Mediwaka (Inspector of Police) *vs* Gunasekere 51
Muttucumarasamy *vs* Muttucumarasamy 37

Nelson *vs* Foenander 28

Perera *vs* Assen 8
Perkins (Inspector of Police) *vs* Sri Rajah 56
Peter Singho & Others *vs* Appuhamy 134
Ponnusamy *vs* Aiyadurai & Another 136
Poulier (Inspector of Police) *vs* Abeygunawardena 33
Punchimahatmaya *vs* The Commissioner of Stamps & The Attorney-General .. 118

Rex *vs* Bellana Vitanage Eddin 128
Rex *vs* de Silva 61
Rex *vs* Nugawela 71
Rex *vs* Wijesekere 81
Rosa Maria Fernando *vs* James Fernando & Another 121

Samynathan *vs* Atukorale 114
Superintendent, Etana Estate *vs* Muttuweeran 30

The Commissioner of Income Tax *vs* The Public Service Mutual Provident Association 11
The Commissioner of Stamps *vs* The Highland Tea Co., Ltd. 101
Theobald *vs* The Commissioner of Income Tax 91
Thornhill *vs* The Commissioner of Income Tax 21
The Solicitor-General *vs* Caldera 106

Wijesekera (Excise Inspector) *vs* Arnolis 138
Wijesinghe Hamine & Another *vs* Ekanayake & Others 68

DIGEST

Accomplice

Can one accomplice corroborate another

See Evidence 71

Administration

Administration action—Termination of proceedings with final accounts—Motion by administrator for notice on his proctor to bring certain moneys to court—Fees due to proctor—Is administrator's remedy by way of separate action.

Held : That the appellant's remedy was by way of a separate action and not by way of summary procedure.

PONNUSAMY VS AIYADURAI & ANOTHER 136

Agreement

Agreement embodied in the terms of settlement of an action

See Prevention of Frauds Ordinance 1

Alienation in Fraud of Creditors

See Fraudulent alienation 121

Births and Deaths Registration Ordinance

Births and Deaths Registration Ordinance (Chapter 94)—Change of name—Is a person who has been known by a name different from the name in the register of births entitled to have the entry relating to the name "rectified" under section 20 of the Births and Deaths Registration Ordinance.

Held : That a person who has been known for a long time by a name other than that entered on the register of births is entitled to an order under section 20 of the Births and Deaths Registration Ordinance to have the register altered by the insertion of the name in use in place of the name on the register.

IN RE LUCY DE SILVA 109

Buddhist Temporalities

Buddhist Temporalities Ordinance (Chapter 222)—Scope of the Ordinance—Do the provisions of the Ordinance apply to a devale *exempted from the operation of section 4 (1).*

Held : That a *devale*, which has not been brought under the operation of section 4 (1) of the Buddhist Temporalities Ordinance, falls entirely outside the provisions of the Ordinance.

PETER SINGHO & OTHERS VS APPUHAMY 134

By-Law

By-law made under section 168 (8) of the Local Government Ordinance—Prohibition against preaching in streets without a permit.

See Local Government 56

Change of Name

See Births and Deaths Registration Ordinance 109

Civil Procedure

A trial judge has no jurisdiction to make an order that, if costs of the day are not paid before a certain date, the action should stand dismissed.

See Jurisdiction 8

Civil Procedure Code

Can action be taken under sections 604 and 606 of the Code after decree nisi.

See Divorce 28

Section 608—Can a decree for separation be based entirely upon the consent of parties.

See Divorce 86

Section 169—The taking down of evidence by a shorthand writer under the direction of the judge does not constitute sufficient compliance with the section.

See Penal Code. 81

Section 408. See Prevention of Frauds Ordinance 1

Section 384. See Recripocal Enforcement of Judgments Ordinance .. 9

Costs

Dismissal of action for failure to pay costs of the day before a date fixed by the judge.

See Jurisdiction 8

Court of Criminal Appeal

Misdirection—In what circumstances must the judge in a trial for murder put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder.

See Misdirection 128

Court of Criminal Appeal—Principles which should guide the court—Misdirection —Duty of trial judge to explain to the jury the principle to be followed by them in dealing with circumstantial evidence.

Held : (i) That grounds 3, 4 and 5 cannot be regarded as involving questions of law.

(ii) That it does not necessarily follow that the phraseology of the judge set out in ground 2 suggested to the minds of the jury a confession by the appellant.

(iii) That ground 3 does not bear the construction placed upon it by the appellant.

(iv) That although the judge when referring to the laying out of the body did not particularly refer to the abnormality of the appellant, there was no misdirection because a large part of the summing-up is devoted to a consideration as to whether the appellant was of sound mind.

(v) That although the judge had not informed the jury that there was no evidence that the blood was human blood, the appellant was not prejudiced because the jury were warned that it might be any other kind of blood and the matter was left for them to decide.

(vi) That the judge had sufficiently indicated to the jury that there might be an innocent interpretation in regard to those circumstances that incriminated the appellant.

(vii) That where a strong *prima facie* case is made out against an accused on evidence which is sufficient to exclude the reasonable possibility of someone else having committed the crime without an explanation from the accused, the jury is justified in coming to the conclusion that he is guilty.

(viii) That generally speaking the Court of Criminal Appeal will refuse to give effect to grounds not stated in the notice, but when the appellant is without means to procure legal aid and has drawn his own notice, the court will not as a rule confine him to the grounds stated in his notice.

REX VS DE SILVA 61

Courts Ordinance

Courts Ordinance section 17*—Conviction of proctor—Criminal breach of trust—Removal from office.*

Held : That in the absence of any special circumstances which justify the court in distinguishing the facts of a particular case from others in which the court has exercised the full powers conferred by section 17 of the Courts Ordinance it will order the removal of a proctor convicted of a criminal offence from the roll of proctors.

THE SOLICITOR-GENERAL VS CALDERA 106

Criminal Procedure Code

Criminal Procedure Code section 188*—Plea of guilty—Withdrawal of a statement which amounts to an admission that the accused is guilty of the offence with which he is accused—Effect of such a withdrawal.*

Held : (i) That an accused may before a verdict of guilty is recorded withdraw an admission of guilt even though it be unqualified.

(ii) That where an admission of guilt is withdrawn the Magistrate should proceed as if the admission had never been made.

LEEMBRUGEN (A.S.P., N'ELIYA) VS PITCHAIPILLAI 49

Criminal Procedure Code sections 152 (3) *and* 425*—Principles which should guide a magistrate who is also a District Judge in deciding at what stage of a case he should begin to try it summarily as District Judge under section* 152 (3).

Held : (i) That a magistrate must make up his mind to act under section 152 (3) of the Criminal Procedure Code very early, in fact, before the real inquiry in the presence of the accused begins. Once the inquiry is under-weigh, it should not be turned into a trial.

(ii) That proceedings which have continued for some time on one basis cannot in fairness to the accused be suddenly turned into proceedings of a different nature.

(iii) That where evidence recorded by a magistrate in his capacity as inquiring magistrate is utilised by the same magistrate in the exercise of his powers under section 152 (3) of the Criminal Procedure Code at a late stage of the inquiry, the possibility of prejudice to the accused cannot be overlooked and section 425 of the Criminal Procedure Code will not be applicable to such a case.

MEDIWAKA (INSPECTOR OF POLICE) VS GUNASEKERE 51

Criminal Procedure—Re-trial—Is it open to the magistrate to come to a conclusion by reading the evidence given at the former trial.

Held : That in a case in which a re-trial has been ordered it is irregular for the magistrate to read the evidence given at the previous trial and to decide the case on that evidence.

COREA (EXCISE INSPECTOR) vs MARTIN SILVA 140

Failure to state in charge the by-law under which the accused was charged and the Gazette in which it was published—Effect of.

See Local Government Ordinance. 56

Criminal Procedure Code section 355.
See Penal Code 41

Criminal Trespass

See Estate Labour Ordinance. 45

Divorce

Divorce—Civil Procedure Code (Chapter 86*) sections* 604 *and* 606*—Can action be taken under those sections after decree* nisi.

Held : That sections 604 and 606 of the Civil Procedure Code apply to cases in which collusion or suppression of material facts has occurred not only before but also after decree *nisi.*

NELSON vs FOENANDER 28

Divorce—Husband and wife—Malicious desertion—Acts of cruelty and violence on the part of the husband coupled with an order to leave the house—Do they taken together constitute malicious desertion on the part of the husband.

Held : That the acts of cruelty and violence on the part of the husband coupled with the order to leave the house constituted malicious desertion in law on the part of the husband.

MUTTUCUMARASAMY vs MUTTUCUMARASAMY 37

Divorce—Separatio a mensa et thoro—*Civil Procedure Code section* 608*—Can a decree for separation be based entirely upon the consent of parties.*

Held : That it is clear from the terms of section 608 of the Civil Procedure Code that the court has no authority to enter a decree for separation *a mensa et thoro* based entirely upon the consent of parties.

JOSEPH vs JOSEPH 86

Estate Labour (Indian) Ordinance

Criminal Trespass—Penal Code—Section 433*—Estate Labour (Indian) Ordinance (Chapter* 112*) section* 5*—Month's notice to quit service—May such notice be given on any day in a month—Is a labourer occupying a room in the lines on the estate free of rent a tenant of such premises.*

Held : (i) That a notice, given on the 2nd of December, 1939 to an Indian labourer terminating his services on the 2nd of January, 1940, is a valid notice.

(ii) The relationship of landlord and tenant does not exist between the employer and his estate labourer, who is provided with free housing accommodation by the employer.

FORBES vs RENGASAMY 45

Evidence

Evidence Ordinance (Chapter 11) sections 26 and 167—Confession made when in custody of a Police Officer—Scope of section 26.

Held : That the confession was inadmissible under section 26 of the Evidence Ordinance, as the accused must be taken to have been in Police custody at the time he made the statement.

POULIER (INSPECTOR OF POLICE) vs ABEYGUNAWARDENA 33

Evidence Ordinance section 114 illustration (b) and sections 133 and 157—Accomplice's evidence—Can one accomplice corroborate another.

Held : (i) That one accomplice cannot be corroborated by another accomplice.

(ii) That, although under section 133 of the Evidence Ordinance a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, it is necessary, that the magistrate should have clearly before his mind the fact, that he is dealing with the evidence of an accomplice, and he must give clear and satisfactory reasons for convicting in the absence of corroboration.

(iii) That a person who offers a bribe to a public officer is an accomplice.

(iv) That persons, who have co-operated in the payment of a bribe, or taken some part in the negotiation for its payment, cannot be regarded as independent witnesses whose evidence is free from taint.

REX vs NUGAWELA 71

Accused—Benefit of doubt—Can the magistrate in determining the guilt or the innocence of the accused act on a suggestion by counsel unsupported by evidence.

Held : That the guilt or innocence of an accused person must be determined on evidence and not on some suggestion made by counsel in the course of his argument.

WIJESEKERA (EXCISE INSPECTOR) vs ARNOLIS 138

Sections 80 and 91—The record of evidence given by a witness made by a shorthand writer under the direction of the District Judge cannot be used against that witness in a prosecution for intentionally giving false evidence in a judicial proceeding.

See Penal Code 81

Evidence—Circumstantial

See Court of Criminal Appeal 61

Fraudulent Alienation

Fraudulent alienation—Paulian action—Alienation after notification of claim for damages by creditor ex delicto—Right of such creditor to impeach the alienation—Must it be shown that the impeached alienation rendered debtor insolvent immediately.

Held : (i) That, where a claim for unliquidated damages has been reduced to the form of a decree, the decree-holder is entitled to impeach as fraudulent a deed alienating property executed after the claim arose but before decree was entered.

(ii) That to hold that the decree-holder must prove that such alienation caused immediate insolvency to the alienor is to place an unnecessary restriction on the person defrauded.

(iii) That a subsequent debt can be taken into account in determining the question of insolvency at the time of execution of the impugned alienation.

ROSA MARIA FERNANDO vs JAMES FERNANDO & ANOTHER 121

Husband and Wife

See Divorce 37

Income Tax

Income Tax—Mutual Provident Association—Income from loans to members of the Association—Is such income liable to income tax.

Held : That the interest from loans to members was liable to tax.

THE COMMISSIONER OF INCOME TAX VS THE PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION 11

Income Tax—Profits or income—Section 6 of the Income Tax Ordinance (Chapter 188)—Sale of tea and rubber coupons by the owner of a tea and rubber estate—Are the receipts from the sale of coupons liable to income tax.

Held : That income tax was payable on the receipts from the sale of tea and rubber coupons.

THORNHILL VS THE COMMISSIONER OF INCOME TAX 21

Income Tax—Income Tax Ordinance section 9 and 10 (c)—What is expenditure of a capital nature.

Held : That the expenses claimed were not deductible under section 9 of the Income Tax Ordinance as they were expenditure of a capital nature falling within the ambit of section 10 (*c*).

THEOBALD VS THE COMMISSIONER OF INCOME TAX 91

Jurisdiction

Jurisdiction—Application for amendment of plaint—Order allowing amendment on condition that if costs of the day were not paid before a certain date action to be dismissed—Failure to pay such costs—Dismissal of action—Can court make such order.

Held : That the learned District Judge had no jurisdiction to make the order he did.

PERERA VS ASSEN 8

Landlord and Tenant

The relationship of landlord and tenant does not exist between the employer and his estate labourer who is provided with free housing accommodation by the employer.

See Estate Labour (Indian) Ordinance 45

Local Government Ordinance

Local Government Ordinance (Chapter 195)—By-law made under section 168 (8)—Permit issued under by-law to preach in streets—Can permit be arbitrarily revoked by the Chairman—Validity of by-law doubted—Fatal defect in charge read out to accused.

Held : (i) That the Chairman had no power to revoke the permit arbitrarily.
(ii) That the charge, which was read out from the summons, was bad in that it did not refer to the by-law under which the accused was charged and to the Gazette in which it was published.

PERKINS (INSPECTOR OF POLICE) VS SRI RAJAH 56

Malicious Desertion

See Divorce 37

Misdirection

Misdirection—Charge of murder—In what circumstances must the judge in a trial for murder put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder.

Held : That where the evidence points clearly to a verdict of murder it is not the duty of the judge to put before the jury an alternative issue with regard to culpable homicide not amounting to murder.

REX VS BELLANA VITANAGE EDDIN 128

Case Stated—Provocation offered by words
See Penal Code 41

Mortgage

Mortgage bond—Assignment—Assignee a debtor under the bond—Does the deed of assignment operate as a discharge of the bond as against the co-debtors.

Held : That the plaintiff was entitled to sue on the bond, inasmuch as he did not pay the debt as such but only purchased the mortgagee's rights.

HARAMANIS PERERA VS CAROLIS PERERA & ANOTHER 108

Ordinances

Births and Deaths Registration Ordinance (*Chapter* 94)
Section 20 106

Buddhist Temporalities Ordinance (*Chapter* 222)
Section 4 (1) 134

Civil Procedure Code (*Chapter* 86)
Section 169 81
Section 384 9
Section 408 1
Sections 604 & 606 28
Section 608 86

Court of Criminal Appeal Ordinance (*No.* 23 *of* 1938) .. 61, 128

Courts Ordinance (*Chapter* 6)
Section 17 106

Criminal Procedure Code (*Chapter* 16)
Sections 152 (3) & 425 51
Section 188 49
Section 355 41

Estate Labour (*Indian*) *Ordinance* (*Chapter* 112)
Section 5 45

Evidence Ordinance (*Chapter* 11)
Sections 26 & 167 33
Sections 80 & 91 81
Section 114 (illustration b) and sections 133 & 157 71

Income Tax Ordinance (*Chapter* 188)
Section 6 21
Sections 9 & 10 (c) 91

Local Government Ordinance (*Chapter* 195)
Section 168 (8) 56

Penal Code (*Chapter* 15)
Section 180 130
Section 190 81
Section 204, Exception (1) 41
Section 433 45

Prescription Ordinance (*Chapter* 55)
Section 5 39

Prevention of Frauds Ordinance (*Chapter* 57)
Section 2 1

Privy Council Appeals Ordinance (*Chapter* 85) 68

Reciprocal Enforcement of Judgments Ordinance (*Chapter* 79) 9

Stamp Ordinance 101, 114, 118

Workmen's Compensation Ordinance (*Chapter* 117) 30

Paulian Action

Action to set aside fraudulent alienation.

See Fraudulent alienation 121

Penal Code

Penal Code section 204, *Exception* 1—*Does the exception include provocation offered by words—Should the question whether there was provocation be left to the jury—Misdirection—Case stated under section* 355 *of the Criminal Procedure Code.*

Held : (i) That provocation offered by words is provocation for the purposes of Exception 1 of section 294 of the Penal Code.

(ii) That in the trial of an accused for murder the question whether the facts disclose the existence of provocation should be left to the jury.

KING VS KUMARASAMY 41

Penal Code section 190—*Evidence Ordinance sections* 80 *and* 91—*Civil Procedure Code section* 169—*Nature of evidence necessary for sustaining a charge of intentionally giving false evidence in a judicial proceeding.*

Held : (i) That the taking down of evidence in a civil proceeding by a shorthand writer under the direction of the judge does not constitute sufficient compliance with section 169 of the Civil Procedure Code.

(ii) That the record of the evidence given by a witness made by a shorthand writer in shorthand under the direction of the District Judge cannot be used against that witness in a prosecution for intentionally giving false evidence in a judicial proceeding.

REX VS WIJESEKERE 81

False information—Penal Code (Chapter 15) section 180—When should an accused be convicted under that section—Misdirection.

Held : (i) That to constitute the offence punishable under section 180 of the Penal Code it is necessary that the information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false or that he did not believe it to be true.

(ii) That the accused cannot be convicted if he shows that he had reasonable grounds for believing the information he gave to be true.

ASSISTANT GOVERNMENT AGENT (MULLAITIVU) vs SELVADURAI .. 130

Section 433—Criminal trespass by labourer living on estate labourers' lines

See Estate Labour (Indian) Ordinance 45

Permit to Preach in Streets

See Local Government Ordinance 56

Prescription

Prescription—Last will—Specific devise subject to mortgage by testator—Death of testator—Executor's failure to redeem mortgage—Devised property sold under hypothecary decree—Action against executor by deceased devisee's heirs for value of land—When did cause of action arise—Section 5 of the Prescription Ordinance.

Held : (i) That the plaintiff's cause of action arose on the death of the testator and was not interrupted by the fact of minority of N's children.

(ii) That section 5 of the Prescription Ordinance did not apply in the circumstances.

DE SILVA & OTHERS vs DE SILVA 39

Prevention of Frauds Ordinance

Prevention of Frauds Ordinance (Chapter 57)—Agreement to reconvey land embodied in terms of settlement of an action filed in and accepted by the court—Terms of settlement not embodied in a formal decree—Agreement not executed in the presence of a notary—Is the agreement enforceable—Section 408 of the Civil Procedure Code (Chapter 86)—Failure of the party bound to execute the transfer to carry out his undertaking—Action for damages—Tender.

Held : (i) That an agreement to transfer certain lands when embodied in the terms of settlement in an action when filed of record and accepted by the court is binding on the parties to the settlement though the agreement is neither embodied in a formal decree nor executed in the presence of a notary and two witnesses as required by section 2 of the Prevention of Frauds Ordinance.

(ii) That the party who fails to transfer certain lands in accordance with the terms of settlement arrived at in an action is liable for damages occasioned by such failure to the party entitled to the transfer.

FERNANDO vs COOMARASWAMY 1

Privy Council

Privy Council Appeal—Rule 2 in the Schedule to the Appeals (Privy Council) Ordinance 5 and 5A of the Appellate Procedure (Privy Council) Order, 1921—Scope of the expression "opposite party" in rule 2.

Held : That the service by post on the 1st plaintiff satisfied the requirements of rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance.

(ii) That the despatch to the 1st plaintiff of the notice meant for the 2nd plaintiff was not sufficient compliance with rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance.

(iii) That the words " opposite party " in rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance must imply all the parties in whose favour the judgment appealed was given.

WIJESINGHE HAMINE & ANOTHER vs EKANAYAKE & OTHERS .. 68

Public Officer

Action to recover money paid to a public officer—Action lies against the crown and not against the public officer.

Held : That an action for the refund of a fine paid to a public officer in his official capacity does not lie against the public officer..

FONSEKA vs LEIGH CLARE 100

Quo Warranto

Quo Warranto—*When will the court refuse to grant relief by way of a writ of* Quo Warranto.

Held : That the court will not ordinarily grant a writ of *Quo Warranto* to a relator (*a*) who has acquiesced in the proceedings he seeks to question, or

(*b*) whose *bona fides* is not evident, or

(*c*) who has delayed to make his application.

JAYASOORIYA vs DE SILVA 111

Reciprocal Enforcement of Judgments Ordinance

Reciprocal Enforcement of Judgments Ordinance (Chapter 79)—Civil Procedure Code section 384—Failure to comply with rule 3 of the rules made under the Ordinance is fatal to an application under the Ordinance.

Held : That rule 3 of the rules made under the Reciprocal Enforcement of Judgments Ordinance is a peremptory provision and that the omission to fulfil the requirements of that rule cannot be made good under section 384 of the Civil Procedure Code (Chapter 86).

ALAGAPPA CHETTIAR & ANOTHER vs PALANIAPPA CHETTIAR 9

Revision

Revision—Application for revision by a person who was entitled to become party to proceedings but failed to do so—Powers of the Supreme Court.

Held : That the Supreme Court will ordinarily not exercise its powers of revision after a considerable lapse of time in favour of a person who was entitled to become a party to a proceeding but failed to avail himself of that opportunity to safeguard his interests.

ARUMUGAM PILLAI & OTHERS vs LEWIS & ANOTHER 78

Separatio a Mensa et Thoro

See Divorce 86

Servitude

Servitude—Right of cattle track acquired by prescription—Deviation by non-notarial agreement—Use of new track for eight years—Does the right acquired by prescription attach to the new track.

Held : That a right of way acquired by prescription does not attach to a new route effected by mutual agreement by deviation of the old route in the absence of a notarial deed or a user for ten years.

HENDRICK & OTHERS vs SARANELIS & OTHERS .. . 87

Stamps

Stamp Ordinance—Conveyance by the liquidator of immovable property forming the assets of a company in liquidation to its shareholders—Is the conveyance liable to stamp duty under item 23 (1) (*b*) *or* 23 (4) *of Schedule A Part I of the Stamp Ordinance.*

Held : That the deed was liable to stamp duty under item 23 (4) of Schedule I A Part 1 of the Stamp Ordinance.

THE COMMISSIONER OF STAMPS vs THE HIGHLAND TEA CO., LTD. .. 101

Stamp Ordinance—How should the value of a suit be determined for the purposes of stamping.

Held : That the proper stamp duty on civil proceedings should be determined according to the value placed on the subject-matter in suit in the pleadings, except in a case where the trial judge has gone into the value of the suit in order to determine it for purposes of stamp duty.

SAMYNATHAN vs ATUKORALE 114

Stamp Ordinance sections 29 *and* 31—*Appeal under section* 31—*Gift of life interest reserving to donor a life interest—Item* 32 (3) *of Schedule A Part I of the Stamp Ordinance—How is the value of the property to be determined in calculating the duty payable under item* 32 (3).

Held : (i) That the " value of the property " for the purposes of item 32 (3) of Part I of Schedule A to the Stamp Ordinance cannot mean the value of the land free from all encumbrances.

(ii) That where the application for the opinion of the Commissioner under section 29 of the Stamp Ordinance is made by a proctor on behalf of his client, it is the client who may appeal under section 31 of the Ordinance.

PUNCHIMAHATMAYA vs THE COMMISSIONER OF STAMPS AND THE ATTORNEY-GENERAL 118

Tender

See Prevention of Frauds Ordinance 1

Time—Computation of

Month's notice how computed.

See Estate Labour (Indian) Ordinance 45

Words and Phrases

Month's notice—Meaning of.

See Estate Labour (Indian) Ordinance 45

" *Opposite Party.*"

See Privy Council 68

Workmen's Compensation

Workmen's Compensation—Loss of left eye by a workman who had previously lost his right eye—Total or partial disablement.

Held : That the loss of the remaining eye by a workman who had previously lost one eye amounts to permanent total disablement for the purposes of the Workmen's Compensation Ordinance.

SUPERINTENDENT, ETANA ESTATE vs MUTTUWEERAN 30

Present: SOERTSZ, J. & NIHILL, J.

FERNANDO vs COOMARASWAMY

S. C. No. 132—*D. C. Colombo No.* 8805.
Argued on 4th & 5th February, 1940.
Decided on 19th February, 1940.

Prevention of Frauds Ordinance (*Chapter* 57)—*Agreement to reconvey land embodied in terms of settlement of an action filed in and accepted by the court—Terms of settlement not embodied in a formal decree—Agreement not executed in the presence of a notary—Is the agreement enforceable—Section* 403 *of the Civil Procedure Code* (*Chapter* 86)—*Failure of the party bound to execute the transfer to carry out his undertaking—Action for damages—Tender.*

Held : (i) That an agreement to transfer certain lands when embodied in the terms of settlement in an action when filed of record and accepted by the court is binding on the parties to the settlement though the agreement is neither embodied in a formal decree nor executed in the presence of a notary and two witnesses as required by section 2 of the Prevention of Frauds Ordinance.

(ii) That the party who fails to transfer certain lands in accordance with the terms of settlement arrived at in an action is liable for damages occasioned by such failure to the party entitled to the transfer.

Per SOERTSZ, J.—" Finally, it was submitted that the respondent failed because there has not been ' tender ' of money as required by law. ' Tender ' says Harris in the 1908 edition of his book on that subject at page 1 is ' the instinctive resource of the oppressed against the exactions of the relentless.' The question, then, is whether the respondent made proper use of this resource. The learned trial Judge records his findings on this point in these words : ' To my mind it is perfectly plain that the money was available for payment to the defendant or his attorney if the retransfer transaction materialised, or if the attorney had definitely stated that the reconveyance would be made.' But, it is objected that the money that was being offered was not money at the disposal of the respondent, that it was money belonging to Messrs. Lee Hedges & Co. and would come to be the respondent's money only when the respondent obtained a transfer from the appellant and gave Messrs. Lee Hedges & Co. a mortgage of the lands transferred to him. This appears to have been the position at a certain stage of this transaction. See for instance P5 and P8. Those letters indicate that Messrs. Julius & Creasy were then acting for Messrs. Lee Hedges & Co. But by P10, Messrs. Julius & Creasy wrote on the 29th of April, 1937, that they were acting for the respondent as well, although Messrs. Lee Hedges & Co. were still envisaged as mortgagees (P12). By P14 Messrs. Julius & Creasy informed the appellant's attorney's proctor on the 8th of May, 1937, ' this money is now in our office and we are in a position to pay it to your client upon his executing appropriate conveyance.....we suggest that this matter be completed at say 2 p.m. on Tuesday the 11th instant when we shall be pleased to call at your office and obtain your client's signature to the conveyance against payment of the amount due.'

" They followed up with their letter of the 11th of May, 1937 in which they say ' Mrs. Fernando has now nominated Messrs. Lee Hedges & Co., to receive the transfer .....and we accordingly tender an amended draft conveyance in their favour.' It will be remembered that the agreement P29 provided for a transfer to the respondent *or her*

1940

Soertsz, J.

Fernando
vs
Coomaraswamy

nominee. There was no longer any question of money not being immediately available to the appellant's attorney. In face of all this, to hold that the money was not duly tendered would be to make the Law of Tender a horrible snare."

Cases referred to :— *Heemanta Kumara Devi vs Midnapur Zemindari Co.* (I.L.R. 47 Cal. p. 485.)
The Estate of N. L. M. A. L. M. Alim (3 C.L.R. 5)

H. V. Perera, K.C. with *C. Thiagalingam* and *A. S. Ponnambalam,* for defendant-appellant.

N. Nadarajah with *N. K. Choksy* and *C. X. Martyn,* for plaintiff-respondent.

SOERTSZ, J.

Although the promiscuous manner in which issues were framed in the court below makes this case appear formidable, the questions submitted to us on appeal as the questions in controversy are few, and the facts necessary for their determination lie within narrow compass, and may be stated briefly.

The appellant held a mortgage over forty blocks of land belonging to the respondent. He put his bond in suit in case No. 17049 of the District Court of Kalutara, and at the sale held in execution of the decree he obtained, he was declared the purchaser of those lands. The sale appears to have been conducted on conditions that made it's confirmation by the court a necessary step towards vesting the purchaser with title. Before this confirmation could be given, the respondent presented to the court petition P 26 supplemented by P 27 praying that the sale be set aside on the ground that there had been material irregularities in the mode of advertisement of the sale, and in the mode of the sale itself, and alleging that in consequence she had suffered substantial injury.

The 14th of May, 1936 appears to have been the day appointed for inquiry into this matter. On that day, the parties and their lawyers came to an agreement, and submitted to the court a written motion (P 28) in the following terms :

It is agreed that

(1) The sales of lands 1–40 be confirmed, lands 1–39 inclusive at Rs. 37,053/12 and land No. 40 at Rs. 2,092/50.

(2) The plaintiff the present appellant agrees to sell and retransfer the lands 1–39 to the 1st defendant (the present respondent) or her nominee if within the space of one year from the date hereof the 1st defendant pays a sum of Rs. 35,500/– to the plaintiff.

(3) The plaintiff be given possession of the lands purchased on or before 1st June, 1936.

(4) The plaintiff is entitled to all the coupons in respect of lands 1–39 of the March issue now in the hands of the Rubber Controller.

(5) When the first defendant obtains the transfer in her favour, the expenses of the transfer will be borne by her.

Thereupon, the court made order (P29) as follows:

Of consent, sale of land No. 40 in the sale report confirmed. Sale of lands 1–39 confirmed subject to the terms of settlement filed.

In March 1937, the appellant was about to embark for Europe on furlough, and the respondent began correspondence, at first, with the appellant, and then later with his attorney with a view to obtaining the transfer provided for in the agreement of the 14th of May 1936. But when the 10th of May, 1937 arrived, she was still without a transfer, and in a difficult situation inasmuch as the appellant's attorney was refusing to act in the matter till he had heard from his principal with whom, he said, he was in communication, and was suggesting to her to safeguard herself in the meantime by depositing in court the sum of Rs. 35,500/- agreed upon P 15. In this state of things, the respondent felt compelled to invoke the assistance of the court and on the 11th of May, 1937, the proctors acting for her in the mortgage suit submitted a motion P 22 to the court asking it to direct the appellant's attorney " to appear in court on the 14th instant and to sign the necessary conveyance on payment of the said sum of Rs. 35,500/- or on his failure to do so, that the court do execute the necessary conveyance in terms of the settlement." The District Judge heard counsel on both sides in regard to this motion and said: " I order the defendant to deposit the amount in court before he can compel the plaintiff to execute the necessary conveyance." The respondent appealed from this order and when the appeal came up for hearing, it would appear, and we were so informed at the Bar, the present appellant who had, by this time, returned to the Island was willing to give the transfer asked for, and this court on being addressed to that effect, delivered judgment holding that " in view of the fact that there is no mention in the settlement of the 14th of May, 1936 in regard to the payment of this amount into court.....the Judge was wrong in holding that it must be deposited in court before the execution of the conveyance." The order appealed from was set aside and direction was given " that if within one month of the receipt by the District Court of our order, the defendant should pay Rs. 35,500/- to the plaintiff, the plaintiff shall at the same time execute the necessary conveyance." In accordance with this order, the appellant executed a conveyance on the first of February 1938. The respondent now brings this action alleging that there was default on the part of the appellant between the 14th of May 1937 and the 1st of February 1938, and claiming a sum of Rs. 7,406/08 as the loss she suffered in consequence of this default. In her plaint she put forward a further claim, but with that we are no longer concerned.

On a broad view of the facts established by the evidence in the case, unhampered by questions of legal form and of legal procedure, I find myself in agreement with the conclusion to which the trial Judge came, for I am convinced that the respondent when she sought the assistance of the court on the 11th of May 1937, had done everything that could reasonably have been expected of her to obtain the transfer that had been unequivocally promised, and that she was driven to court by the intransigence of the appellant's attorney, and that, therefore, the appellant is responsible for the delay that occured. But, it is said that the law stands in the way and prevents

1940

Soertsz, J.

Fernando
vs
Coomaraswamy

us from giving effect to this view. If that is the case, there can be no question but that the law must take its course and prevail.

The question, then, is whether the law compels us in this case to a conclusion which, on the ultimate facts as found by the trial Judge and concurred in by us, appears inequitable.

Let us now examine the contentions on which counsel for the appellant relied. He submitted firstly that the agreement of the 14th of May 1936 involved a transaction that was obnoxious to section 2 of the Prevention of Frauds Ordinance, and that it was of no force or avail in law, and that the respondent was, therefore, out of court if her action be treated as based on the agreement. In regard to the respondent's counsel's argument that this action is on the decree of the 14th of May 1936, counsel for the appellant contended (*a*) that only so much of the agreement as related to the action could have been embodied in the decree, and that the part of the agreement providing for retransfer of these lands did not relate to the subject-matter of the action and could not be considered a part of the decree, (*b*) that even if the part relating to the transfer of these lands be regarded as part of the decree, it was, none the less obnoxious to section 2 of the Prevention of Frauds Ordinance. An agreement prohibited by section 2 did not acquire validity by being embodied in a decree.

It seems clear from the plaint filed by the respondent that her action is based on the order made by the District Court of Kalutara on the 14th of May 1936. No formal decree was entered in terms of that order, but I do not think it is or can be disputed that if a minister of the court addressed himself to the task of putting the order in the form of a decree, he would have included in the decree a direction that the plaintiff (in that case) do execute a transfer of lands 1–39 to the defendant (in that case) on the latter paying within one year the sum of Rs. 35,500/– and the expenses of the transfer, for those were terms 2 and 5 of the agreement, and the Judge had ordered " sale of lands 1–39 confirmed subject to terms of settlement now filed." The respondent's action must, therefore, be regarded as an action on the decree. The questions, then, are those involved in the contentions I have set forth as (*a*) and (*b*). As regards (*a*) my opinion is that the interpretation given by counsel to "action" and "subject-matter of action" in section 408 of the Civil Procedure Code is too narrow. The " action " at the stage of the case at which the settlement was reached was the proceeding that arose from the application, on the one hand, by the appellant to have the sale confirmed, and by the respondent on the other hand, to have it set aside in respect of the lands involved in the sale, and not in respect of any other lands. The compromise was that the sale of those lands should be confirmed, but that, within a year it should be open to the respondent to obtain a transfer of lands 1–39 by fulfilling certain conditions. Clearly, therefore, the compromise related to the subject-matter of the action. I cannot entertain the submission that the subject-matter of the action at that

stage, was purely and simply the question whether the sale should be confirmed or not.

In regard to (*b*), appellant's counsel argued that the case of *Heemanta Kumara Devi vs Midnapur Zemindari Co.* (I.L.R. 47 Cal. p. 485) relied on by the respondent's counsel strongly supports, not the respondent's case, but his own. I have examined that case carefully and, in my view, the opinion of the Privy Council delivered by Lord Buckmaster is not of much assistance in this case in view of the fact that we are here concerned with section 2 of the Prevention of Frauds Ordinance, and its bearing on section 408 of our Civil Procedure Code, whereas in the Indian case the Privy Council examined two sections of the Indian Registration Act of 1908 which are very different from section 2 of the Prevention of Frauds Ordinance, in relation to section 375 of the Indian Code of Civil Procedure which is almost identical with our section 408. But as counsel relied so much on this case I think I ought to give some account of it. Kumara Bebi, the appellant in that case instituted two actions, No. 72 against the Government and No. 73 against W. & Co. to obtain possession of certain lands. Action 73 was compromised on terms agreed upon, one of which was that W. & Co. were to retain possession of the lands involved in that case, recognising the appellant as the owner thereof, and that the appellant should grant them a *jote* settlement of the lands involved in the Government suit 72 if, and when, she succeeded in that suit. This agreement was reduced to writing and a petition of compromise was filed in Case No. 73. Judgment was given in terms of the compromise and decree was entered thereon. The appellant succeeded in her case against the Government, but refused to grant the *jote* settlement to W. & Co. in regard to those lands. The respondents, the successors of W. & Co. brought this action for specific performances of the agreement. The appellant denied having made or authorised the agreement and objected that the petition and consent decree were not admissible in evidence against her because, treated as an ordinary contract, it had not been registered in terms of section 17 of the Registration Act of 1908, and because as a decree, it was inoperative in relation to the lands in dispute which were not the subject-matter of the action in which the compromise had been made. Lord Buckmaster who delivered the opinion of the Privy Council held that the agreement to give the *jote* settlement was not, in the circumstances, an agreement to lease, as it was contended it was, and that, therefore, registration was not necessary in that way ; and in regard to liability to registration under section 17 (1) (*b*) of the Indian Registration Act which, required registration of " *other non-testamentary instruments* which *purport* or operate to create, *declare*, assign, limit or extinguish, whether in present or *in future*, any right, title or interest, whether vested or *contingent*, of the value of one hundred rupees and upwards to or in immovable property," his lordship pointed out that by sub-section 17 of the Registration Act, decrees of court were exempted from the requirement of registration. The question that remained was whether the agreement relied on was a part of the decree entered in pursuance

1940

Soertsz, J.

Fernando
vs
Coomaraswamy

of the compromise. It was contended for the appellant in that case that the decree was that part of it which referred to the lands involved in the suit that was compromised and that the lands in suit 72 which were the lands in respect of which the *jote* settlement was given were foreign to the decree and outside it. The Board rejected that contention and held that the decree included the whole agreement because the agreement in regard to the lands outside the action *had also been submitted to the court as part of the compromise.* Now Mr. Perera submits that there is no equivalent in our law to section 17 (2) exempting decrees from the purview of section 2 of the Prevention of Frauds Ordinance and that, therefore, the fact that the agreement in question is embodied in a decree is of no avail in our law. I cannot find anything in the opinion of the Privy Council in the Indian case that supports this contention of counsel. The point in the present case did not arise before the Board.

So far as local authorities go, there is the ruling of Ennis, A.C.J. and Shaw, J, in the case of *The Estate of N. L. M. A. L. M. Alim* (3 Ceylon Law Recorder p. 5) that " the Code of Civil Procedure has made an express provision in section 408 with reference to agreements in settlements of disputes and compromises, and does not require such agreements *if they relate to land* to be notarially executed." That undoubtedly, is the view which our courts have acted.

It is also submitted that deed D14 given by the auctioneer to the appellant after the sale had been confirmed is an absolute conveyance and contains no agreement to retransfer. That is so. But there is reference to the confirmation given by the court on the 14th of May and in view of all the attendant circumstances, it cannot be inferred that the respondent's beneficial interest was disposed of by that deed. The appellant was, therefore, his contructive trustee. In point of fact, he fulfilled the trust eventually.

The next point taken by counsel for the appellant is that if this decree which is implicit in the order of the 14th of May, 1936 is good and operative in regard to the transfer of lands that was undertaken by the appellant, the respondent can obtain only as much relief as she may, by executing the decree and not by a separate action. The answer to this, as I conceive it, is that the respondent has executed so much of the decree as was executable. She took steps in the case in which the settlement was entered and succeeded in the end in securing specific performance of the agreement to transfer. Her present suit is to recover damages, she says, she sustained in consequence of the delay on the part of the appellant to give her the transfer. It is true that it was open to the parties when they were compromising their dispute, to take a long view and to make provision for damages in the event of default or delay. But, they were not bound to do that. In point of fact, they did not do that, and I am not aware of any rule of law or procedure which can be said to debar the respondent from bringing a suit to recover damages that resulted from a breach of one of the directions

given in the order. Parties are entitled to act, and generally do act, on the assumption that agreements and undertakings will be performed, and not broken.

Appellant's counsel also submitted that the judgment of this court directing that the appellant should execute a conveyance on payment being made to him by the respondent within a month of the order of this court being received in the court below, superseded the agreement of the parties and the decree thereon, and that for this reason, the appellant could not be said to have made default. But by the time this court made its order, the default had already occurred, and there is nothing to show that either by agreement, or by direction of court, it was understood that performance at the time indicated in the judgment of this court was to be regarded as performance *nunc pro tunc*.

Finally, it was submitted that the respondent failed because there had not been " tender " of money as required by law. " Tender " says Harris in the 1908 edition of his book on that subject at page 1 is " the instinctive resource of the oppressed against the exactions of the relentless." The question, then, is whether the respondent made proper use of this resource. The learned trial Judge records his findings on this point in these words: " To my mind it is perfectly plain that the money was available for payment to the defendant or his attorney if the retransfer transaction materialised, or if the attorney had definitely stated that the reconveyance would be made." But, it is objected that the money that was being offered was not money at the disposal of the respondent, that it was money belonging to Messrs. Lee Hedges & Co. and would come to be the respondent's money only when the respondent obtained a transfer from the appellant and gave Messrs. Lee Hedges & Co. a mortgage of the lands transferred to him. This appears to have been the position at a certain stage of this transaction. See for instance P5 and P8. Those letters indicate that Messrs. Julius & Creasy were then acting for Messrs. Lee Hedges & Co. But by P10, Messrs. Julius & Creasy wrote on the 29th of April, 1937, that they were acting for the respondent as well, although Messrs. Lee Hedges & Co. still envisaged as mortgagees (P12). By P14 Messrs. Julius & Creasy informed the appellant's attorney's proctor on the 8th of May, 1937, " this money is now in our office and we are in a position to pay it to your client upon his executing the appropriate conveyance.....we suggest that this matter be completed at say 2 p.m. on Tuesday the 11th instant when we shall be pleased to call at your office and obtain your client's signature to the conveyance against payment of the amount due."

They followed up with their letter of the 11th of May, 1937 in which they say " Mrs. Fernando has now nominated Messrs. Lee Hedges & Co., to receive the transfer.....and we accordingly tender an amended draft conveyance in their favour." It will be remembered that the agreement P29 provided for a transfer to the respondent or her nominee. There was no longer any question of money not being immediately available to the

1940

Soertsz, J.

Fernando
vs
Coomaraswamy

appellant's attorney. In face of all this, to hold that the money was not duly tendered would be to make the Law of Tender a horrible snare.

It was also said that the money was not actually produced, but that observation sits ill on the lips of the appellant when we find the appellant's attorney replying to the letters of Messrs. Julius & Creasy on the 1st of May saying " my client has yet to decide whether he should execute the retransfer and he will decide the question *only after the money is paid* if the same is paid within time ; " again on the 7th of May, " in the event of Mrs. Fernando paying the amount as well as the cost of retransfer within time, *my client if so advised* will execute a deed ; " on the 10th of May P15 " My client has been advised not to sign any deed of retransfer without written instructions from the principal. Mr. Coomaraswamy has been written too but a reply has not been received. Until a reply is received my client will not sign any deed of retransfer." To have produced the money to one who was taking up this attitude, would have been an idle formality.

It is not without significance that till answer was filed in this case there was not a word said or heard to suggest that there had not been proper tender. I must, therefore, find that the respondent did everything she had to do to entitle her to the transfer. She took her horse to the water but she could not make him drink.

For these reasons, I am of opinion that the trial Judge came to a correct conclusion, that the appeal fails and that it must be dismissed with costs. The case will go back for the assessment of damages.

NIHILL, J.

I agree.

Appeal dismissed.

Present: SOERTSZ, J. & HEARNE, J.

PERERA vs ASSEN

S. C. No. 167—*D. C. Badulla No.* 6696.

Argued and Decided on 6th March, 1940.

Jurisdiction—Application for amendment of plaint—Order allowing amendment on condition that if costs of the day were not paid before a certain date action to be dismissed—Failure to pay such costs—Dismissal of action—Can court make such order.

Upon an application made on behalf of the plaintiff for an opportunity to amend his plaint, the learned District Judge made order allowing the application on condition that the plaintiff paid a sum of Rs. 50/– as costs of the defendant before 10 a.m. on 20th October. He further ordered that " if the amount is so paid amended plaint is to be accepted, if not, action to be dismissed with costs." Plaintiff failed to pay the costs as directed and the Judge dismissed his action with costs.

Held : That the learned District Judge had no jurisdiction to make the order he did.

Cases referred to :— *Mamnoor vs Mohammed.* (20th Vol. N.L.R. 493)

W. E. Abeyakoon, for plaintiff-appellant.
P. Thiagarajah, for defendant-respondent.

SOERTSZ, J.

This is an appeal from an order made by the learned District Judge of Badulla when upon an application made to him on behalf of the plaintiff for an opportunity to amend his plaint he allowed the application on condition that the plaintiff paid a sum of Rs. 50/- as costs of the defendant before 10 a.m. on 20th October. He ordered that " if the amount is so paid amended plaint to be accepted, if not, action to be dismissed with costs." The plaintiff failed to pay these costs before 10 a.m. on the 20th October and the Judge dismissed his action with costs.

An order of this kind came up for consideration before a Divisional Bench of this court in the case *Mamnoor vs. Mohammed*, reported at page 493 of the 20th volume N.L.R. and this court took the view that the District Judge had no jurisdiction to make such an order. In the circumstances it is quite clear that the order made in this instance is also without jurisdiction.

We, therefore, set aside the order entered by the District Judge on October, 20th 1939, dismissing the plaintiff's action with costs, and we send the case back for a short date to be fixed for the plaintiff to submit his amended pleadings to court and thereafter for another short date for the trial of the case. It has already been unduly delayed.

We do not think that the plaintiff is entitled to much sympathy in this matter and we would show our disapprobation of the dilatory methods adopted by him by making no order for costs in his favour although we allow this appeal.

HEARNE, J.

I agree.

Appeal allowed.

Present: HOWARD, C.J. & KEUNEMAN, J.

ALAGAPPA CHETTIAR & ANOTHER vs PALANIAPPA CHETTIAR

S. C. No. 173—*D. C.* (*Inty.*) *Colombo No.* 2325.

Argued and Decided on 6th March, 1940.

Reciprocal Enforcement of Judgments Ordinance (*Chapter* 79)—*Civil Procedure Code section* 384—*Failure to comply with rule* 3 *of the rules made under the Ordinance is fatal to an application under the Ordinance.*

The appellant sought to enforce a judgment given in his favour by the Supreme Court of Ipoh in the Federated Malay States under the procedure prescribed by the Reciprocal Enforcement of Judgments Ordinance (Chapter 79). He omitted however to comply with the requirements of rule 3 Vol. I subsidiary legislation page 464 of the rules made under that Ordinance.

1940

Howard, C.J.

Alagappa Chettiar and Another *vs* Palaniappa Chettiar

Held : That rule 3 of the rules made under the Reciprocal Enforcement of Judgments Ordinance is a peremptory provision and that the omission to fulfil the requirements of that rule cannot be made good under section 384 of the Civil Procedure Code (Chapter 86).

N. Nadarajah with *S. J. V. Chelvanayagam* and *E. B. Wickremanayake*, for the petitioners-appellants.

H. V. Perera, K.C. with *C. Thiagalingam*, for the respondent.

HOWARD, C.J.

This is an appeal from an order made by the District Judge of Colombo setting aside an order made by another District Judge allowing an application for the registration of a judgment in favour of the applicant given by the Supreme Court, Ipoh, in the Federated Malay States. The ground on which the District Judge set aside this order for registration was that the affidavit of the judgment-creditor supporting the application for registration was defective inasmuch as it did not comply with the provisions of section 3 of the rules made under the Reciprocal Enforcement of Judgments Ordinance No. 41 of 1921. The judgment-creditor instead of seeking the ordinary remedy in these courts by suing his debtor has chosen the short cut of proceeding under the Reciprocal Enforcement of Judgments Ordinance. Having adopted this short cut, it was essential that he should comply with the special procedure which is formulated in the Ordinance and under the rules. He has not complied with that procedure inasmuch as the affidavit on which the application for registration was based did not state that to the best of his information and belief he was entitled to enforce the judgment and also that the judgment does not fall within any of the cases in which under section 3 (2) of the Ordinance a judgment cannot properly be ordered to be registered.

We have been asked by counsel for the judgment-creditor to say that rule 8 (*c*) which applies to a case where an application to set aside the registration has been made, applies, and that under this section the court should have conducted an inquiry and followed the procedure prescribed in Chapter 24 of the Civil Procedure Code. In this connection he refers us to the provisions of section 384 of the Civil Procedure Code which provides for such an inquiry. We are of opinion that section 3 of the rules made under the Reciprocal Enforcement of Judgments Ordinance is peremptory and even if an inquiry was held under section 384 of the Civil Procedure Code that inquiry could not supply or make good the original defect in the affidavit which required certain statements to be made by the deponent. In these circumstances we think the order setting aside the registration is correct. The appeal is, therefore, dismissed with costs.

KEUNEMAN, J.

I agree.

Appeal dismissed.

Present: KEUNEMAN, J. & CANNON, J.

THE COMMISSIONER OF INCOME TAX vs THE PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION

S. C. No. 128/1939—*D. C.* (*Inty.*) *Colombo Income Tax*
Argued on 15th & 16th April, 1940.
Decided on 25th April, 1940.

Income Tax—Mutual Provident Association—Income from loans to members of the Association—Is such income liable to Income Tax.

The Public Service Mutual Provident Association, a body incorporated by the Public Service Mutual Provident Association Ordinance (Chapter 207), invested its surplus funds in certain investments prescribed by section 24 of the Ordinance and in loans to its members. The income of the Association from all sources was, after setting aside a portion for reserve, etc., divided annually in the form of a dividend among all its members in proportion to the amount standing to the credit of each member. The Association claimed exemption from Income Tax for the interest derived from loans to members on the ground that the interest was not "profits."

Held : That the interest from loans to members was liable to tax.

Cases referred to : *The New York Life Insurance Co. vs Styles* (2 Tax Cases 460).
Board of Revenue, Madras vs The Mylapore Hindu Permanent Fund Ltd. (1 Indian Tax Cases 217).
The English and Scottish Joint Co-operative Wholesale Society Ltd. vs The Commissioner of Income Tax, Madras (3 Indian Tax Cases 385).
Madura Hindu Permanent Fund Ltd. vs The Commissioner of Income Tax, Madras (6 Indian Tax Cases 326 at 332).
Municipal Mutual Insurance Ltd. vs Hills (16 Tax Cases 430).
Jones vs The South-West Lancashire Coal Owners' Association Ltd. (11 Tax Cases 814 at 822).
The Liverpool Corn Trade Association Ltd. vs Monks (10 Tax Cases 442).

CASE STATED

UNDER THE PROVISIONS OF SECTION 74 OF THE INCOME TAX ORDINANCE, 2 OF 1932, FOR THE OPINION OF THE HON'BLE THE SUPREME COURT OF THE ISLAND OF CEYLON, ON THE APPLICATION OF

The Commissioner of Income Tax (Appellant).

1. The Public Service Mutual Provident Association, which is a body corporate constituted by Ordinance No. 5 of 1891, Chapter 207, was assessed under the Income Tax Ordinance, 1932, for the year of assessment 1937/1938 as being liable to pay Income Tax on a total investment income of Rs. 139,585/– which included a sum of Rs. 126,718/– being the amount of interest derived by the Association from loans to members, in the year preceding the year of assessment. The tax payable on this amount of interest (if the Association is liable to pay tax on it) is Rs. 2,745/80. The tax payable on the total

1940

Keuneman, J.

The Commissioner of Income Tax *vs* The Public Service Mutual Provident Association

investment income of Rs. 139,585/– is Rs. 3,025/80. The amount of the tax in dispute on this appeal is the said sum of Rs. 2,745/80.

2. The Association was constituted for the general objects of promoting thrift, giving relief to members in times of sickness or distress, of aiding them when in pecuniary difficulties, and of making provision for their widows and orphans (section 3 of Chapter 207). Rules have been framed by the Association under the powers given by section 16. A copy of the rules of the Association, which were in operation at the dates material to the assessment under question, is annexed hereto, marked "A."* Under the rules, the Committee of Management may grant loans to a member to the extent of one-half of the nett amount standing to the credit of such member in the books of the Association. The Association can also make loans to members on the security of landed property to an amount not exceeding one-half of the appraised value of the property. Interest is payable by members on both types of loans made to them by the Association at 6% per annum.

3. The accounts of the Association, for the relevant period shew that Rs. 2,114,850/– had been lent to members and Rs. 633,026/– had been invested in Government Securities and Fixed Deposits in various banks. Of the total loans to members, Rs. 822,054/– had been lent out to members against *mortgages of landed property*. Of the total sum of Rs. 126,718/– received as interest from members Rs. 51,764/– was the interest from secured loans.

4. No question as to the liability of the Association to pay Income Tax on the income derived from the investments in Government securities and Fixed Deposits has been raised; it admits its liability to pay tax on that income.

5. Association however, disputed its liability to pay tax on the sum of Rs. 126,718/–. It accordingly appealed to the Commissioner against the assessment made by the Assessor on the grounds that:

(*a*) The Association is not a business concern and is therefore not liable to tax;

(*b*) The profits are distributed amongst the members.

After hearing the arguments the Commissioner decided against the Association. A copy of the Appeal Minute dated 28th September, 1938, including the copy of the reasons of the Commissioner for the decision dated 6th October, 1938, is annexed hereto marked "B."*

6. Being dissatisfied with the decision of the Commissioner the Association appealed to the Board of Review constituted under the Income Tax Ordinance, on the grounds set out in the exhibit marked "C"* dated 3rd November, 1938, and addressed to the Clerk to the Board of Review. The appeal was heard by the Board of Review on the 20th January, 1939 and the 23rd February, 1939. It was contended on behalf of the Association that it was not a "company" within the meaning of the Income Tax Ordinance nor was the interest derived from loans to members "profits of a company" within the meaning of section 48 of the Ordinance; the Association, it was said, came under the category of "Body of Persons" and that its income from members is not taxable under section 48; that it was not a trading concern; that there must be two parties before there can be any trading; that it was a mutual concern in that the interest paid by the members who took loans was returned to the members by being distributed as a dividend which was credited to the account of every member; that the interest collected from members was on an entirely different footing to the income derived from investments with outside concerns. The Assessor contended that the making of loans to members and the collection of interest on those loans was not a case of mutual trading; that in concerns like the Association certain transactions between the members and the Association may be instances of mutual trading and other transactions may be instances of trading pure and simple between the Association as a whole on one side, and the member individually on the other side; that in this instance the Association, being an incorporated body was a separate legal entity quite apart from the persons who constituted its members from time to time, and that, therefore, it was quite easy to conceive of the Association as an entity dealing with the members separately on the same footing as though they were outsiders; that the

* Not reproduced (Edd)

incorporating Ordinance and the rules showed that the funds which were lent out to the members were the funds of the Association and that the loans were not constituted by a handing back to the borrowing members from out of their particular and individual contributions but out of the common fund formed by the contributions of all the members; that there was no real " mutuality " because all those who participated in the income derived from the interest were not contributors to that income, because it was not the case, on the facts, that every member had taken a loan; that as there was "trading" with outsiders, in the shape of investments made with outside concerns, the foundation for the claim of a " mutual concern " was destroyed ; that in the Madura Fund case (referred to in the decision of the Board) no question even was raised as to the liability of the Fund to tax on the income from interest on loans to members. The Association's representatives, who argued the appeal, replied to the various contentions of the Assessor by an examination of the various authorities bearing on the points involved.

7. The Board decided, by a majority, that the contentions of the Association should be upheld and ordered a reduction of the assessment by the deduction of the sum of Rs. 126,718/- which is the amount of the interest paid by the members in the year preceding the year of assessment, for loans made to members under the rules of the Association. A copy of the decision of the Board giving the reasons of the two members of the Board who accepted the Association's contentions together with a copy of the dissent of one of the members of the Board, marked " D,"* is annexed to this Case Stated.

8. The Commissioner of Income Tax has applied to the Board under the provisions of section 74 (1) to state a case on a question of law for the opinion of the Hon'ble The Supreme Court of the Island of Ceylon. The question is whether the interest derived from loans to members constitutes taxable " profits of income " under the Income Tax Ordinance ; in other words, whether payments made by members of Association to the Association itself as interest on loans from the common fund formed by the contributions of all the members of the Association, which interest was distributed out to all the members, in the shape of a dividend, constitutes taxable income of the Association, under the Ordinance. The Board has accordingly stated and signed this case.

Colombo, 16th day of August, 1939.

1. (Sgd.) Francis de Zoysa
2. (Sgd.) F. J. de Saram
3. (Sgd.) H. J. V. I. Ekanayake

Members of the Board.

E. G. P. Jayatilleke, K. C., Solicitor-General with *H. H. Basnayake, Crown Counsel,* for The Commissioner of Income Tax, appellant.

H. V. Perera, K. C. with *F. C. de Saram,* for assessee-respondent.

KEUNEMAN, J.

This is a case stated by the Board of Review. The Commissioner assessed the respondent, The Public Service Mutual Provident Association, for the year 1937/1938 in respect of three items of interest, namely, (1) on Rs. 74,954/-, unsecured loans to members, (2) on Rs. 51,764/-, secured loans to members, and (3) on Rs. 12,867/- loans to Government and to banks. The total tax payable was assessed at Rs. 3,025/80. Respondent admitted liability on item (3), but disputed his liability under items (1) and (2) and appealed to the Board of Review. That body upheld the contention of the

* Not reproduced (Edd)

1940

Keuneman, J.

The Commissioner of Income Tax *vs* The Public Service Mutual Provident Association

respondent and ordered that the assessment should be corrected by the deletion of items (1) and (2). The tax payable was thus reduced by the sum of Rs. 2,745/80. The matter now comes before this court.

The respondent is a body incorporated under Chapter 207 of the Legislative Enactments (Ordinance No. 5 of 1891 and subsequent enactments). The general objects of the corporation appear in the Preamble and in section 3, namely, "to promote thrift, to give relief to the members in times of sickness or distress, to aid them when in pecuniary difficulties and to make provision for their widows and orphans." Section 22 provides for the vesting of property in the corporation; section 27 provides that the corporation may hold property movable or immovable, section 24 makes it lawful for the Committee of Management to place the whole or any part of the surplus funds belonging to the corporation and not required for loans, advances and other current expenses, in fixed deposit in the local banks or to invest the same in certain Government or Municipal securities; and section 16 provides for the making of rules at any general meeting of the Association.

The rules of the Association have been put in—document A. These provide *inter alia:*

(*a*) for the grant of loans to members up to one-half of the amount standing to their credit in the books of the Association (Chapter I, Rule 12)

(*b*) for the grant of loans for the purpose of relieving members at a time of sickness or distress, or of aiding them in pecuniary difficulties to the extent of either one month's or two months' salary or pension according to the standing of the member (Chapter I, Rule 13)

(*c*) for the grant of loans to members on the security of landed property up to one-half of the appraised value of the lands (Chapter II, Rules 1 and 4).

Each of these classes of loans carries interest at six *per centum per annum.*

The Board of Review by a majority decision held that the respondent Association was a body of individuals banded together for mutual help, that the loans to members were in furtherance of the objects of the Association and advanced out of the common fund formed by the contributions of all the members, that the interest from loans to members was earned by the mutual fund and that this sum (less expenses) was divided between the members in their capacity of members or contributors to the mutual fund (from which the loans were made) and not in any capacity analagous to that of shareholders of a limited liability trading company. The Board depended mainly on the decisions in three cases, namely:

(1) *The New York Life Insurance Co. vs Styles* (2 Tax Cases 460)

(2) *Board of Revenue, Madras vs The Mylapore Hindu Permanent Fund Ltd.* (1 Indian Tax Cases 217)

(3) *The English and Scottish Joint Co-operative Wholesale Society Ltd. vs The Commissioner of Income Tax, Madras* (3 Indian Tax Cases 385.)

The case most nearly related to the present one is the Mylapore case, where a mutual benefit society registered under the Companies' Acts had its share capital subscribed entirely by its members by way of periodical pay-

ments and the income of the fund was derived chiefly from interest earned on overdue subscriptions or on loans given exclusively to its members, who were entitled under the rules to take loans, and also from interest from outside investments with banks. The principle enunciated in this case is that income to be taxable must come from outside and not from within, and that the fact that the fund is a legal entity for certain purposes does not matter and that a person cannot make profit or loss out of himself. It was held, therefore, that interest obtained from members was not taxable, although interest derived from investments in banks was taxable.

Ramesam, J. who delivered the judgment of the court, held that this case was governed by the case of *The New York Life Insurance Co. vs Styles* (*supra*).

The Mylapore case would be of some authority but for one infirmity inherent in it. In a later case, namely, *The Madura Hindu Permanent Fund Ltd. vs The Commissioner of Income Tax, Madras* (6 Indian Tax Cases 326 at 332), it was held, in considering the Mylapore case, that Styles' case had no application to it, and that the Mylapore case could not be based upon it. Ramesam, J. himself admitted that the actual decision in Styles' case did not apply to the Mylapore case, but he added that the Mylapore case was not wrongly decided, apparently on the ground that the observations made by their Lordships in Styles' case supported the result arrived at. In the circumstances, I think it is necessary for us to consider Styles' case, and to see whether the reasoning in that case causes us to arrive at the same conclusion. I may add that the same criticism applies to the other Indian case relied upon by the Board of Review, namely, The English and Scottish Co-operative Society case.

I shall next consider Styles' case. A mutual life insurance company had no members other than the holders of participating policies to whom all the assets of the company belonged. At the close of each year an actuarial valuation was made and if the aggregate receipts of the Company were more than the expenses and the estimated liabilities, the surplus was divided between the policy-holders who received a premium in the shape of either a cash reduction from future premiums or a reversionary addition to the amount of their policies. It was held that so much surplus as arose from excess contributions of the participating policy-holders was not profit assessable to Income Tax.

I am of opinion that the principle decided in Styles' case is as stated in the judgment of Lord Watson: "When a number of individuals agree to contribute funds for a common purpose such as the payment of annuities or of capital sums to some or all of them, on the occurrence of events certain or uncertain and stipulate that their contributions so far as not required for that purpose shall be repaid to them, I cannot conceive why they should be regarded as traders or why contributions returned to them should be regarded as profits." Similarly Lord Herschell says: "The members contribute for a common object to a fund which is their common property; it turns out that

1940

Keuneman, J.

The Commissioner of Income Tax *vs* The Public Service Mutual Provident Association

they have contributed more than is needed, and therefore more than ought to have been contributed by them for this purpose and accordingly the next contribution is reduced by an amount equal to their proportion of the excess. I am at a loss to see how this can be regarded as a 'profit' arising or accruing to them from a trade or vocation which they carry on."

In the later case of *Municipal Mutual Insurance Ltd. vs Hills* (16 Tax Cases 430.), Lord Macmillan laid down the principle of Styles' case as follows :

> "The principle on which the surpluses arising in the conduct of a mutual insurance scheme are not taxable as profits is now well understood. The essence of the matter is that a number of persons who are exposed to some contingency, whether the inevitable contingency of death or such possible contingencies as fire, employees' claims, marine casualties or the like, associate themselves together as contributors to a common fund on the footing that if the contemplated contingency befalls any contributor he or his representatives shall receive a compensatory payment out of the common fund proportional to his contribution. The scale of contributions or premiums is fixed on experience and estimate. If it is found to yield more than enough to satisfy the claims that emerge, the contributors receive the entire benefit in the shape of bonuses, reduction of future contributions or otherwise. As the common fund is composed of sums provided by the contributors out of their own moneys, any surplus arising after satisfying claims obviously remains their own money. Such a surplus resulting merely from miscalculation or unexpected immunity cannot in any sense be regarded as taxable profits."

In my opinion, the present case has features which are not possible to reconcile with the Styles' case, as so interpreted. The present appeal does not deal with the question of any surplus remaining over as the result of miscalculation or unexpected immunity. What takes place in the case of our Society is that money is lent to members at six per cent. interest. It is clear that the volume of these transactions is large and for the year in question in this case a sum of more than two million rupees has been so loaned to members. It is difficult to resist the conclusion that the Society carries on a business with its members in respect of these loans, in point of fact a bigger business than with the Government and the banks. Can the return received by the Society from this business by way of interest be regarded as otherwise than a taxable profit ?

In this connection I may cite a *dictum* of Rowlatt, J. in *Jones vs The South-West Lancashire Coal Owners' Association Ltd.* (11 Tax Cases 814 at 822.):

> "The principle laid down in the New York Insurance Company case is that no one can make a profit out of himself. . . . It is true to say that a person cannot make a profit out of himself, if what is meant is that he may provide himself with something at a lesser cost than that at which he could buy it, or if he does something for himself instead of employing somebody to do it. He saves money in those circumstances, but he does not make a profit. But a company can make a profit out of its members as customers, *although its range of customers is limited to its shareholders.* If a railway company makes a profit by carrying its shareholders, or if a trading company, by trading with its shareholders—even if it is limited to trading with them—makes a profit, that profit belongs to the shareholders, in a sense, but it belongs to them *qua* shareholders. It does not come back to them as purchaser or customer."

Vide also *The Liverpool Corn Trade Association Ltd. vs Monks* (10 Tax Cases 442), where a similar point was decided. With respect, I do not think that in the case of a Society doing business with its own members in the way of loans, and earning interest on such loans to members, there is present the mutuality which existed in Styles' case. I cannot distinguish between the present case and that of a railway company carrying its own members, or a trading company selling to its own members, and making a profit thereby ; and with all deference, I cannot see any decision in Styles' case or in the subsequent cases decided in England, which makes me come to a different conclusion. I think that the amount earned by the Society as interest from loans to its members is a taxable profit obtained from a business.

It was strenuously argued by counsel for the respondent that because the object of the Society was to give loans to members, and because the loans were obtained by virtue of their membership therefore all interest received was to be regarded as an internal accretion and that the element of mutuality was established. I do not think this argument can be sustained. In my opinion, the interest was paid by the member *qua* borrower and the interest paid helped to swell the resources of the whole body of members, *qua* members. There was not that mutuality which exists between members who pay contributions for a common purpose and receive back the excess after the deduction of necessary expenditure. In the latter case the money is paid and received back in only one capacity, namely, that of members. In other words the members are receiving back what has always been their own, and that cannot be regarded as a profit.

Counsel for the respondent also relied on Jones' case, and in particular on the *dictum* of Rowlatt, J.:

> " The broad principle was there (*i.e.* in Styles' case) laid down that, if the interest in the money does not go beyond the people *or the class of people* who subscribed it, then, just as there is no profit earned by the people subscribing, if they do the thing for themselves, so there is none if they get a company to do it for them."

It was argued that the interest earned here was earned from members and enured to the benefit of members of the same class. I do not think that is the true interpretation of the words. Rowlatt, J. was dealing with the possible distinction between the body of members and the corporation. What this case established was that where surpluses were available after deduction of expenditure from the contributions of the members, it did not matter whether these surpluses were paid back immediately or carried to a fund, the benefits of which would be available to members who joined subsequently and who had not made the original contributions. But the fundamental facts of that case were that the contributions were originally made by the members *qua* members, and the benefits of the fund were available to them subsequently in the same capacity, and the principle in Styles' case was held to be applicable. No doubt the principle enunciated

1940
—
Keuneman, J.
—
The Commissioner of Income Tax
vs
The Public Service Mutual Provident Association

in Styles' case may be regarded, as the respondent says, as carried one step further, but I do not think that step has been taken in the direction which the respondent contends for.

I am accordingly of opinion that the interest obtained both in the case of the secured loans and of the unsecured loans is a taxable profit. I allow the appeal, set aside the order of the Board of Review, and restore the items which have been deleted by the Board.

The appellant is entitled to the costs of appeal.

CANNON, J.

This is a case stated by the Board of Review under the Income Tax Ordinance No. 2 of 1932 (section 74) for the opinion of this court as to whether The Public Service Mutual Provident Association is liable to pay Income Tax on interest received from the members of the Association on the loans advanced to them by the Association. The Association appealed to the Board of Review against the decision of the Income Tax authorities to assess this interest for taxation. The Association contended that the Association is not a business concern and that the loan transactions were between the members of the Association themselves in pursuance of the provident objects of the Association on a mutual basis, in that the interest paid by the members who took loans was returned to the members by being distributed as a dividend to the account of every member; and that therefore the interest derived from the loans did not come within the statutory definition of profits—section 188 (6).

The Board by a majority upheld the objection of the Association and upon the application of the Commissioner stated a case for the opinion of this court, the question for decision being whether interest derived from loans to members constitutes taxable profits or income under the Income Tax Ordinance.

The material facts set forth in the case stated are as follows :

" The Public Service Mutual Provident Association which is a body corporate constituted by Ordinance No. 15 of 1891, Chapter 207, was assessed under the Income Tax Ordinance 1932 for the year of assessment 1937/1938 as being liable to pay Income Tax on a total investment income of Rs. 139,585/- which included a sum of Rs. 126,718/- being the amount of interest derived by the Association from loans to members in the year preceding the year of assessment. The tax payable on this amount of interest (if the Association is liable to pay tax on it) is Rs. 2,745/80. The tax payable on the total investment income of Rs. 139,585/- is Rs. 3,025/80. The amount of the tax in dispute on this appeal is the said sum of Rs. 2,745/80.

The Association was constituted for the general objects of promoting thrift, of giving relief to members in times of sickness or distress, of aiding them when in pecuniary difficulties and of making provision for their widows and orphans — section 3. Rules have been framed by the Association under the powers given by section 16. Under the rules the Committee of Management may grant loans to a member to the extent of one half of the nett amount standing to the credit of such member in the books of the Association. The Association can also make

loans to members on the security of landed property to an amount not exceeding one half of the appraised value of the property. Interest is payable by members on both types of loans made to them by the Association at 6% per annum.

The accounts of the Association for the relevant period, shew that Rs. 2,114,850/– had been lent to members and Rs. 633,026/– had been invested in Government Securities and Fixed Deposits in various banks. Of the total loans to members Rs. 822,054/– had been lent to members against mortgages of landed property. Of the total sum of Rs. 126,718/– received as interest from members Rs. 51,764/– was the interest from secured loans.

No question as to the liability of the Association to pay Income Tax on the income derived from the investments in Government Securities and Fixed Deposits had been raised ; it admits its liability to pay tax on that income.

The Association, however, disputed its liability to pay tax on the sum of Rs. 126,718/–."

For the Income Tax authorities Mr. E. G. P. Jayatilleke, K.C. the Solicitor-General pointed out that under the rules made by the Association requiring interest at 6 per cent. to be paid by members for loans such of the rules as deal with the lending of money to members on mortgage do not stipulate that the mortgagee shall be in pecuniary difficulties. The lending of money on interest forms a material part of the activities of the Association the loans totalling Rs. 2,114,850/– for the year in question, those secured bringing in interest in a sum of Rs. 51,764/– and those not secured an amount of Rs. 74,954/–. Counsel contended that as the interest earned was distributed not only to those who paid it but also to the other members there was no mutuality as between those members who paid and those who received. Members were not compelled by the rules to borrow and as only some of them took up loans those who did not do so nevertheless shared in the income derived from the interest to which they were not contributors. Such income, therefore, became profit liable to taxation. He relied upon *Municipal Mutual Insurance Ltd. vs Hills* (16 Tax Cases 430) and *The Liverpool Corn Trade Association Ltd. vs Monks* (10 Tax Cases 442.)

Mr. H. V. Perera, K.C. for the Association took the point that the Association was a body of persons as distinct from a trading company and submitted that section 48 of the Income Tax Ordinance had in that case no application to the Association. Section 48 reads :

> " The profits of a company from transactions with its shareholders which would be assessable if such transactions were with persons other than its shareholders shall be profits within the meaning of this Ordinance."

Counsel next argued that the purpose of the loans was not the making of a profit but the carrying out of one of the objects for which the Association was formed, namely, to aid its members when in pecuniary difficulties ; and that since any income which resulted from such money lending transactions was derived from members and distributed to members only it was a mutual matter and not a business transaction as it would have been, had the transactions been with non-members. The fact that some members participated in the income derived from interest but did not contribute to that income did not, he submitted, make it a profit for the reason that the income did not come from an outside source. It was, he argued, a mere

1940

Cannon, J.

The Commissioner of Income Tax *vs* The Public Service Mutual Provident Association

receipt of money which was an accretion derived from the internal operations of the Association in carrying out one of the objects of its existence, namely, lending money to members in need, to aid them and not to gain profit. It was " the body of persons " who were taxed but the enrichment of that body by internal functioning of its operations according to its objects was not income derived from a transaction with the outside world and therefore was a matter of mutuality and not business. The borrowing member took the loan in his capacity as a member not *qua* borrower or debtor. Though all members did not avail themselves of the right to borrow they were entitled to exercise that right or privilege and consequently there was mutuality between those who did and those who did not borrow. The income need not go back to the identical member who contributed it ; it was sufficient if it went to the class of people who did so, namely, all those who were members of the Association at the time of the distribution. He relied upon *The New York Life Insurance vs Styles* (2 Tax Cases 460) *Board of Revenue Madras vs Mylapore Hindu Permanent Fund Ltd.* (1 Indian Tax Cases 217) and *Jones vs The South West Lancashire Coal Owners' Association Ltd.* (11 Tax Cases 814). My brother Keuneman has in his judgment analysed the *ratio decidendi* of these and the other cases cited.

The cases support Mr. Perera's contentions generally—that a transaction which is restricted to the members of the Association has the character of a mutual transaction and that there is no necessity for the " income " to be returned to the identical people who contributed it. The point, however, remains that while the loans made by this Association are taken from the common fund the interest is not paid out of a common fund and in my view this fact negatives mutuality — see *Municipal Mutual Insurance Ltd. vs Hills* (*supra*) — and this independently of any distinction that may be drawn between the association as a trading company and as a body of persons incorporated for provident purposes. Whether or not the lending of money at 6 per cent. interest to members (as distinct from investments of surplus money) can properly be said to be carrying out the object of the Association of aiding its members when in pecuniary difficulties is, in my opinion, arguable, but the legality of the rules, which were made by the Association permitting this is not raised by the Case Stated. The lending of money is obviously not a minor part of the Association's activities and the rate of interest charged can hardly be characterised as a non-commercial rate. By receiving income from interest which they do not contribute though they contribute to the common fund from which loans are made, non-borrowing members make a benefit at the expense of the other contributors who do borrow, and I would say that all income derived from such interest constitutes taxable income of the Association under the Ordinance.

I agree that this appeal should be allowed with costs.

Appeal allowed.

Present: SOERTSZ, J. & KEUNEMAN, J.

THORNHILL vs THE COMMISSIONER OF INCOME TAX

S. C. No. 131/1939.

In the matter of an Appeal under the Provisions of section 74 of the Income Tax Ordinance, 1932.

Argued on 11th, 12th & 13th March, 1940.

Decided on 29th April, 1940.

Income Tax—Profits or income—Section 6 of the Income Tax Ordinance (Chapter 188)—Sale of tea and rubber coupons by the owner of a tea and rubber estate—Are the receipts from the sale of coupons liable to Income Tax.

The appellant was the owner of a large tea and rubber estate. During the year of assessment 1938/1939 his assessable income was Rs. 93,353/–. Of that sum Rs. 19,622/19 was derived from the sale of tea and rubber coupons. He claimed that that sum was not liable to income tax.

Held : That income tax was payable on the receipts from the sale of tea and rubber coupons.

Cases referred to : *Tennant vs Smith* (1892 A.C. 150).
The Attorney-General of British Columbia vs Ostrum (1904 A.C. 147).
Pool vs The Guardian Investment Trust Co., Ltd. (1921 – 8 Tax Cases 178).

CASE STATED

UNDER THE PROVISIONS OF SECTION 74 OF THE INCOME TAX ORDINANCE, 1932, FOR THE OPINION OF THE HON'BLE THE SUPREME COURT OF THE ISLAND OF CEYLON, ON THE APPLICATION OF

B. A. Thornhill of Denawaka Group, Pelmadulla. (Appellant.)

1. The appellant was assessed under the Income Tax Ordinance, for the year of assessment, 1938/1939, as having an assessable income of Rs. 93,353/– upon which he was assessed to pay Rs. 13,203/42 as Income Tax. The sum of Rs. 93,353/– included a sum of Rs. 19,622/19 being the proceeds of the sale by the appellant of tea and rubber coupons issued to him under the Tea Control Ordinance and the Rubber Control Ordinance respectively. The appellant owns both tea and rubber estates and coupons were issued to him under the Ordinances in accordance with the provisions of those two Ordinances. The appellant sold a number of these coupons and reserved the rest of the coupons issued to him for his own use in connection with the tea, or the rubber, produced from his estates. The Rs. 19,622/19 represented the sale proceeds of such tea and rubber coupons as disposed of apart from the sale or export of any of his tea or rubber. There is always a market for tea and rubber coupons alone, and they are commonly bought and sold in the market quite apart from tea or rubber. If tax is leviable on the Rs. 19,622/19, the amount of tax which the appellant would have to pay in respect of this sum, on the basis of the rate of tax applicable to him, would be Rs. 3,531/96.

2. The appellant appealed to the Commissioner of Income Tax on the ground that the sum of Rs. 19,622/19, should not be included under the *category of* "*agriculture*

1940

Soertsz, J.

Thornhill
vs
The Commissioner of Income Tax

income" or even under any other head of "income" for the purpose of seeking to assess him under the Income Tax Ordinance; his contention being that this amount is not liable to tax at all. *In the return which he furnished under the Ordinance, for the year of assessment in question, the appellant included these proceeds of sale under the heading of income from agriculture and was assessed accordingly. In the notice of assessment this amount comes under the heading of "profits from agriculture."* A copy of the appellant's return for the said year of assessment (filled up to the extent to which it is necessary for the purposes of the appellant's appeal) marked (XI), together with a copy of the assessment of tax, marked (X 2), and also a copy of the Appeal Minute dated 1st March, 1939, marked (X3) are annexed to this Case Stated.*

3. The Commissioner confirmed the assessment and dismissed the appeal, for the reasons which appear in the said Appeal Minute.

4. The appellant thereupon appealed to the Board of Review constituted under the Income Tax Ordinance upon the grounds set out in his notice of appeal dated 29th March, 1939, a copy of which is annexed marked (X4).*

5. At the hearing before the Board, counsel for the appellant, in the course of his argument produced letters which passed between the appellant and the assessor. Copies of those letters are annexed hereto marked as follows :

(*a*1) Letter of 14th September, 1938 from the appellant to the assessor.*
(*a*2) Letter from the appellant to the assessor dated 18th October, 1938.*
(*b*) Letter from the assessor to the appellant dated 26th October, 1938.*
(*c*) Letter from the appellant to the assessor dated 29th October, 1938.*
(*d*) Letter from the assessor to the appellant dated 2nd November, 1938.*
(*e*) Letter from the appellant to the assessor dated 11th November, 1938.*

6. One of the contentions of counsel for the appellant was that the appellant had not been told by the assessor under what category the proceeds of sale of the coupons fall for the purposes of the Income Tax Ordinance ; that the proceeds were not taxable although they had been included in the appellant's return ; that the inclusion by the appellant of the proceeds of sale under "agricultural income" did not necessarily make it that ; it did not fall under any of the other headings of income in the form of return sent under the Ordinance ; that the proceeds of sale were not any form of "income" within the Income Tax Ordinance ; that wherever there was special provisions in the Ordinance for the taxation of the income from any particular source, those provisions alone should be followed and that the general provisions of the Ordinance could not be applied to income from such particular sources; that Chapter 8, section 30 to 32, relate to the ascertainment of profits from *agricultural undertakings*, and that the income arising from an agricultural undertaking has to be ascertained in accordance with the definition of such income contained in section 31 (2) of the Ordinance and that as the proceeds sale of tea and rubber coupons did not constitute agricultural income as defined in that section the proceeds were not liable to tax. It was also contended that, as the appellant is a proprietor of tea and rubber estates, only the income that come into his hands as such, is taxable, in other words, that the sum in question is not taxable because *it did not come into the appellant's hands through his business as a tea and rubber planter;* that the proceeds were not taxable under section 6 (1) (*a*) as the appellant was not carrying on a trade or business in tea and rubber coupons as a coupon merchant. Finally the contention was that by the sale of coupons the appellant was realising a part of his capital as, it was argued, the capital value of his estates diminishes during each year of control in which he disposes of a portion of his coupon issue because any would-be purchaser of his estates, during such a year, would not pay the same price for them as he would have paid if the appellant had not disposed of the whole part of the coupons issued to him for that year.

7. The Assessor's position was that as long as the proceeds of sale of the coupons constitute "profits" or "income" under the Ordinance, they were taxable ; that the expression "profits from agriculture" in the notice of assessment was merely descriptive;

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* Not reproduced (Edd.)

that there was no special category of income known to the Ordinance as "profits from agriculture" which were separately treated for taxation of which fell under "income" from any particular source of profits or income mentioned in section 6 (1) so as to make the provisions of section 30 to 32 exclusively applicable to such income (assuming for the purposes of argument that section 30 to 32 had the effect contended for them by the appellant); that section 31 (2) had no application to the question as that is a section which merely provides for a certain species of relief; that the assessor was not bound to indicate any particular source of income under which any particular class of income falls for the purposes of taxation nor is there any obligation on him to indicate in the notice of assessment which is the particular class of income (of the classes of profits or income which are set out in section 6 of the Ordinance) under which any particular item included in the notice of assessment, falls.

8. The Board held against the contentions of the appellant and dismissed his appeal and confirmed the assessment, a copy of which is annexed marked (X–5.)*

9. Being dissatisfied with the decision of the Board the appellant has asked that a case be stated for the opinion of the Hon'ble the Supreme Court *on the questions whether the said sum of Rs.* 19,622/19 *constitutes "profits" or "income" within the definition of "profits" or "income" under section* 6 (1) (*a*), *or alternatively under section* 6 (1) (*h*), *or whether the said sum represents a realisation of capital and is therefore not liable to tax; and also, whether the assessor was wrong in describing and assessing the amount in question as agricultural income, and if so, whether the assessment is therefore null and void or whether the irregularity or mistake, if any, is covered by section* 68 *of the Ordinance. We have accordingly stated and signed this case.*

Colombo, 6th August, 1939.

1. (Sgd.) S. Obeyesekere
2. (Sgd.) A. R. A. Razik
3. (Sgd.) L. P. Hayward

Members of the Board.

H. V. Perera, K.C. with *Nadesan* and *C. Renganathan*, for assessee-appellant.

H. H. Basnayake, Crown Counsel, for the Commissioner of Income Tax, respondent.

SOERTSZ, J.

This is a case stated under the provisions of the Income Tax Ordinance, but the questions which arise for consideration are so closely connected with the Tea and Rubber Control Ordinances that brief reference to them is necessary. Both these Ordinances restrict owners of tea and rubber lands to a certain exportable maximum of their potential produce, and provide for the issue of coupons which are exchangeable for licences to cover the export of that maximum, and no more. The owners are not, however, involved in any obligation to produce the maximum allotted to them, or any part of it, in order to obtain these coupons. The coupons, when issued, are transferable and saleable. The resulting position is that it lies at the option of tea and rubber land-owners whether they will harvest their produce and use their coupons to obtain export licences and export their maximum, and so obtain their income, or whether they will obtain their income by transferring or selling their coupons, or by using part of the coupons themselves and selling the remainder. These Ordinances leave the owners free to produce more than their allotted maximum, but the excess will be sterile unless these

* Not reproduced (Edd.)

owners are able, by means of coupons, to provide themselves with export licences to cover it. Put in a few words, the scheme of the two Ordinances is to establish a co-operative agricultural undertaking, that is to say, a co-operative business in which all tea and rubber land-owners work together in order to put on the world's market the quota, or as near it as possible, of tea and rubber allotted to this Island. But they need not all work in the same way or with the same intensity. Indeed, some hardly work their lands at all, and yet they contribute to the end in view, for it may be truly said that " they also serve who only stand and wait," inasmuch as they enable others to produce usefully more than they would otherwise, in view of the restriction imposed. Ultimately, these tea and rubber land-owners acting thus together produce the quota, and, in view of their active or inactive collaboration, it may, with justification, be said that each has disposed his land to produce the individual quotas of tea and rubber that go to make up the Island's quota.

To come now to the facts of this case. The appellant before us is the owner of tea and rubber estates. In the income tax year with which this appeal is concerned, he received the tea and rubber coupons to which he was entitled. He made use of some of these coupons to obtain export licences for himself, and sold others in the market to the value of Rs. 19,622/19. In the return of income which he made to the Commissioner he showed these proceeds from the sale of coupons in the class " Income from Agriculture," but when the assessor taxed this amount as " Profits from Agriculture " he was dissatisfied and appealed against the assessment to the Commissioner of Income Tax on the ground that " proceeds of sale of coupons are not agricultural income as described in section 31 (2) nor any income liable to tax under the Ordinance." The Commissioner rejected his appeal and confirmed the assessment. The appellant then appealed to the Board of Review, and, as is to be gathered from the terms of the decision of that Board, he pressed his appeal before them on the grounds:

(*a*) that the amount in question is not assessable income inasmuch as, he contended, it does not fall within the range of section 6 (1) of the Ordinance.

(*b*) that the assessor " has wrongly indicated that the amount is assessable as agricultural income."

(*c*) that " the proceeds of sale of the coupons constituted capital and were therefore free from liability to tax."

The Board refused to entertain any of these submissions and ruled that " the value realised by the sale of coupons.... comes within the range of section 6 (1) (*a*). If it does not come in under section 6 (1) (*a*), it falls within section 6 (1) (*h*)."

Dissatisfied with this decision, the appellant asked the Board to state a case for the opinion of this court, and the case stated to us is " whether the said sum of Rs. 19,622/19 constitutes profits or income within the definition of '*profits*' or '*income*' under section 6 (1) (*a*), or alternatively

under section 6 (1) (*h*); or whether the said sum represents a realisation of capital and is, therefore, not liable to tax; and also, whether the assessor was wrong in describing and assessing the amount in question as agricultural income, and if so, whether the assessment is....null and void, or whether the irregularity or mistake, if any, is covered by section 68 of the Ordinance."

In my opinion, there is no substance in the appellant's contention that inasmuch as the assessor has described this amount as agricultural profits he must either stand or fall by that description, and that if, in point of fact, this is not "agricultural income," the assessment is null and void notwithstanding the fact that the assessment of tax might properly have been made under some other category of section 6 (1). This, I think, is a mere battle of words.

The real question involved is whether this amount is assessable to tax under any of the classifications set forth in section 6 (1) of the Income Tax Ordinance, for, if I may permit myself the observation, to the Income Tax Commissioner it is the thing and not the name that matters. To him the thing that is "income" is like the fragrant rose: it smells as sweet by any name.

Similarly, I am of opinion that the appellant's contention that the proceeds of the sale of the coupons constituted a receipt of capital and not of income is wholly untenable as is sufficiently shown by the observations made on that contention by the Commissioner and by the Board of Review. I should state here that these submissions were not adopted by the appellant's counsel in the course of his very able argument before us, and I have made this brief allusion to them only because they have been raised by the case stated to us for decision.

The one question that was debated with great vigour before us was whether this amount could be assessed as "income" either under section 6 (1) (*a*) or under section 6 (1) (*h*). Counsel for the Commissioner of Income Tax rightly conceded that it did not fall within any of the other classes of "*profits and income*" or "*profits or income*" enumerated in section 6 (1).

Now, this word "income," although it is on everybody's lips and runs like a tune—sometimes, a bad one—in everybody's head, is a baffling sort of word when it comes to defining it for the purpose of the Income Tax Ordinance. The Ordinance itself, after a feeble attempt to define it synonymously with "*profits*," resorts in section 6 (1) to the less ambitious method of enumeration, and sets forth the sources of profits and income in contemplation as sources from which assessable income is derivable. We are, therefore, compelled to search for the meaning of this word "*income*" in the pages of case law.

We are told, for instance, in *Tennant vs Smith* (1892 A.C. 150) that for Income Tax purposes "*income* must be money or something capable of being turned into money." But obviously this statement needs qualification. All money and all things capable of being turned into money are not

1940

Soertsz, J.

Thornhill
vs
The Commissioner of Income Tax

necessarily "*income*" for tax purposes, for, as explained in the case of *The Attorney-General of British Columbia vs Ostrum* (1904 A.C. 147), "the word '*income*' is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of these receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind, except in so far as the statute states or indicates an intention that receipts which are not income in ordinary parlance are to be treated as income," and, I would venture to add, except in so far as the statute states that receipts which, in ordinary parlance, appear to be income are not be treated as income.

Again, Sankey, J. in the course of his judgment in *Pool vs The Guardian Investment Trust Co., Ltd.* (1921 – 8 Tax Cases 178), observed that "as Mr. Justice Pitney points out in giving the judgment of the Supreme Court of the United States of America.....the fundamental relation of capital to income has been much discussed by economists, the former being likened to the tree of the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream to be measured by its flow during a period of time. He cites various definitions one of which was that income may be defined as the gain derived from capital, from labour, or from both combined," and points out that "the essential matter is that income is not a gain accruing to capital, but a gain derived from capital."

Cunningham and Dowland in their treatise on Land and Income Tax Law and Practice examine a number of cases in which the meaning of the word "income" has been considered, and they sum up the essentials of "income" as follows at page 128:

The essential characteristics appear to be the following:

"(*a*) It must be a gain.

(*b*) It must actually *come in*, severed from capital, in cash or its equivalent.

(*c*) It must be either the produce of property or/and the reward of labour or effort.

(*d*) It must not be a mere change in the form of, or accretion to, the value of articles in which it is not the business of the taxpayer to deal.

(*e*) It must not be a sum returned as a reduction of a private expense."

This statement, if I may say so, provides adequate tests by which to ascertain whether a particular receipt is "*income*" or not, and all that now remains to be done is to examine the amount involved in this case by these tests, or at least by as many of them as are applicable. To take them one by one, there can be no question but that:

(*a*) this amount represents a gain, in fact, in his return, the appellant showed it as income

(*b*) it has actually come in, in the sense that it has reached the hands of the appellant, ultimately in the form of cash, and as cash severed from capital

(*c*) in a sense, it is the produce of property, for it has been produced from the sale of coupons which were issued to him under these Ordinances to cover his produce, real or hypothetical.

Counsel for the appellant, however, strongly contended that these coupons were not the "produce" of the appellant's property, and that "produce" in the context meant natural produce, such as fruit, leaves, latex, etc. This contention raises a question of some difficulty, and that difficulty arises from the fact that the "*quotaisation*" of tea and rubber created artificial state of things, which could hardly have been in contemplation when the Income Tax Ordinance was enacted. In consequence, the normal modes of assessment and the phraseology of some of the provisions of that Ordinance seem somewhat inappropriate in a case like this.

But, as I have indicated in the preliminary observations I made, if attention is paid to the substance and not only to words and to the mere form of things, it seems to me that under the scheme of, and in the conditions created by, the Tea and the Rubber Control Ordinances, these coupons may fairly be described at least as the equivalents of the produce of property. Assuming, however, but not conceding that this line of reasoning is fallacious, these coupons fall to be treated as the reward of labour or effort, for in order to obtain these coupons, tea and rubber land-owners have maintained, or had at some relevant point of time to maintain their lands in a certain condition in conformity with the provisions of the Ordinances and the rules made under them, and this maintenance involves or involved labour and effort however small or meagre.

Examined in this way, the amount in question appears to me to be "profits and income" derived from a business, namely, an agricultural undertaking, and assessable to Income Tax under section 6 (1) (*a*) of the Income Tax Ordinance.

If, however, this view is incorrect and the amount is not assessable under that sub-section, I am clearly of opinion that it is not a receipt which escapes altogether from the Ordinance. I find it impossible to resist the conclusion that this is a taxable receipt for, as very pertinently observed by the Board, "if the appellant's contention is accepted, the owner of a five-hundred-acre estate may get it registered, refrain from harvesting its produce, receive coupons, derive large sums of money thereby, and escape taxation altogether in respect of the money he receives in connection with his owning and maintaining an estate." I agree with the Board that if it is assumed that this amount does not fall within the scope of section 6 (1) (*a*), it is caught by the "residuary" sub-section (1) (*h*), for this amount is not something casual or something in the nature of a windfall. It is something that will recur, or, at least, that can be made to recur as long as the Tea and the Rubber Control Ordinances continue in operation.

For these reasons, I am of opinion that this amount was rightly assessed to tax and I would confirm the assessment.

1940

Soertsz, J.

Thornhill
vs
The Commissioner of Income Tax

The appellant will pay the costs incurred by the Commissioner of Income Tax in this court. He will, however, be credited in the course of taxation of costs with the sum of Rs. 50/– paid by him under section 74 (1) of the Ordinance.

Assessment confirmed.

KEUNEMAN, J.

I agree.

Proctors :—

Perera & Perera, for assessee-appellant. (Thornhill)

Present: SOERTSZ, J. & KEUNEMAN, J.

NELSON vs FOENANDER

S. C. (Inty.) No. 150 & 151—D. C. Colombo 1120.

Argued 18th & 19th March, 1940.

Decided on 15th April, 1940.

Divorce—Civil Procedure Code (Chapter 86) sections 604 and 606—Can action be taken under those sections after decree nisi.

Held : That sections 604 and 606 of the Civil Procedure Code apply to cases in which collusion or suppression of material facts has occurred not only before but also after decree *nisi*.

Cases referred to : *Hulse vs Hulse* (24 L.T. 847).
Rogers vs Rogers (70 L.T. 699).
Fender vs Mildmay (1937-3 A.E.R. 402).

N. Nadarajah with *Tiruchelvam*, for plaintiff-appellant in 150, and for plaintiff-respondent in 151.

R. L. Pereira, K.C. with *C. X. Martyn*, for defendant-appellant in 151, and for defendant-respondent in 150.

E. G. Wickramanayake, for petitioner-respondent in both appeals.

SOERTSZ, J.

In this case, submissions were made to us, both on the law and on the facts. In the first place, counsel for the appellants sought to construe sections 604 and 606 of the Civil Procedure Code so as to make *both* sections applicable only to cases in which collusion or suppression of material facts has occured *before* decree *nisi*. But, in my opinion, the plain meaning of the words of section 606 does not, at all, justify such a limitation.

Courts exercising matrimonial jurisdiction have always been gravely concerned to ensure that the marriage state which, according to the earlier law, was permanent and indissoluble, should not, even in the less stringent modern view of that status, be terminable at the option of the parties, and elaborate precautions have been taken to make divorce as collusion-proof as possible. To that end, section 604 of our Code of Civil Procedure enacts that a decree dissolving the marriage bond shall, in the first instance be entered in the form of decree *nisi*, not to be made absolute till, at least, three months have elapsed. During this interval, opportunity is given for *any person* to show that the decree *nisi* has been obtained by collusion or by suppression of material facts. Necessarily, the collusion or suppression contemplated in this section must have reference to something done or omitted before the date of the decree. But it is obvious that there may be collusion or suppression of material facts even during the period between the two decrees, and that there may be cases in which collusion becomes apparent or is suspected before the decree *nisi* stage is reached, or in which pre-decree *nisi* collusion or suppression of facts is suspected, or made apparent only after decree *nisi* has been entered.

Section 606 of the Civil Procedure Code is designed to provide for those contingencies. It authorises a person who suspects collusion between the parties for the purpose of obtaining a divorce, to apply to the District Judge to take such steps in respect of the alleged collusion as may be necessary to enable him to make decree in accordance with the justice of the case, and he is permitted to make his application at any stage of the progress of the action on the ground that there is " present " collusion or that there has been collusion at any relevant point of time. " Progress of the action" in the context, clearly covers the period from the institution of the action to the entering of the decree absolute. This view is, I find, supported by some of the observations made in the course of the judgments delivered in the cases of *Hulse vs Hulse* (24 L.T. 847,) *Rogers vs Rogers* (70 L.T. 699) and *Fender vs Mildmay* (1937–3 A.E.R. 402.)

I am therefore, of opinion that the petitioner was entitled to intervene in this action as he did, and to rely on the collusion that, he alleges, has taken place after decree *nisi* was entered.

All that remains is the question of fact, whether the plaintiff and the defendant have resumed cohabitation. If they have, it follows that the decree *nisi* that has been entered must be rescinded, for to make it absolute despite that fact, would, in the words of the trial Judge " be a travesty of judicial proceeding." It would be tantamount to dissolving a marriage on the ground that there has been desertion by one spouse of the other when, as a matter of fact, both of them are living together. Such intriguing situations belong to comic opera.

In regard to this question of fact, the trial Judge has reached a very definite conclusion. He was in ever so much a better position than we are

1940
—
Soertsz, J.
—
Nelson
vs
Foenander

on a question of this kind, for he saw and heard the witnesses whose evidence he says, he believes, and an appeal court would interfere with such a finding only in exceptional circumstances. In this case the direct evidence is strongly supported by the circumstantial evidence, particularly by the fact that this so called reconciliation appears to have taken place at a time when the plaintiff was confronted with an application for writ made on behalf of the defendant to enable her to recover a sum of Rs. 260/- due to her on account of accumulated alimony and on application for an order on him to pay her a sum of Rs. 150/- to enable her to prosecute her appeal.

The learned trial Judge inclines to the opinion that the reconciliation so far as the plaintiff is concerned is pure stratagem to which he has resorted in order to escape from these applications made on behalf of the defendant and to secure her inactivity till the decree is made absolute.

As for the defendant she appears to have been floundering in a sea of troubles about this time and she was only too ready to clutch at any straw in a desperate attempt to save herself. I cannot help sharing that view.

The appeals fail and must be dismissed. The plaintiff-appellant will pay the petitioner-respondent's costs in both courts. I make no order for costs in regard to the defendant's appeal.

I wish to add that it will perhaps be as well if the District Judge gives directions to the Secretary that this case be brought to his notice in the event of either the plaintiff or the defendant suing for a divorce in future.

Appeal dismissed.

KEUNEMAN, J.

I agree.

Present: HOWARD, C.J.

SUPERINTENDENT, ETANA ESTATE vs MUTTUWEERAN

IN THE MATTER OF A CASE STATED BY THE COMMISSIONER OF WORKMEN'S COMPENSATION UNDER SECTION 39 OF ORDINANCE 19 OF 1934 (NON-FATAL ACCIDENT TO MUTTUWEERAN OF ETANA ESTATE).

Argued on 12th March, 1940.

Decided on 15th March, 1940.

Workmen's Compensation—Loss of left eye by a workman who had previously lost his right eye—Total or partial disablement.

Held : That the loss of the remaining eye by a workman who had previously lost one eye amounts to permanent total disablement for the purposes of the Workmen's Compensation Ordinance.

Counsel for appellant cited the following authorities :
Lewis vs Wrexham (1916–9 B.W.C.C. 518 C.A.)
Willis' Workmen's Compensation (1939 Edn. p. 279) citing
Buchanan vs Manor Powis Coal Co. (1939 S.L.T. 252)

Crown Counsel cited : *Lee vs Baird & Co., Ltd.* (Vol. 1. Butterworths' Workmen's Compensation Cases, p. 34)

CASE STATED

WORKMEN'S COMPENSATION ORDINANCE NO. 19 OF 1934 (NON-FATAL ACCIDENT TO MUTTUWEERAN OF ETANA ESTATE)

1. I have the honour to submit for the opinion of the Supreme Court, in terms of section 39 of the Workmen's Compensation Ordinance No. 19 of 1934, a question of law that has arisen in a case where a workman named Muttuweeran met with an accident to his left eye on Etana Estate, Nelundeniya.

2. A memorandum* of the facts of the case admitted by both the workman and his employer is forwarded herewith. The monthly wages may be accepted as Rs. 9/72 which is the figure given by the employer as it is not disputed.

3. The Insurance Company on behalf of the employer contend that as a result of the accident on 19th August 1938 the workman lost the sight of his left eye only, since the sight of the other eye was lost prior to the accident. Therefore the injury has not caused permanent total loss of the sight of both eyes and it should therefore be considered that there is permanent partial disablement as a result of the injury and under section 6 (1) *c* and Schedule 1 of the Ordinance the percentage of loss of earning capacity for the loss of *one eye* is 30 per cent. On these grounds they are liable to pay compensation at 30 per cent. of Rs. 700 since the monthly wages are less than Rs. 10/–.

4. As against this view it can be argued that Schedule 1 of the Ordinance can only be applied if there is a finding of permanent partial disablement under section 6 (1) *c*. In this case the workman has as a result of the accident become completely blind and is unable in future to earn his livelihood which is admitted by both parties. He has therefore suffered permanent total disablement as a result of the accident and section 6 (1) *b* applies. Therefore he has lost 100 per cent. loss of earning capacity. A further argument in favour of this view is the definition of " total disablement " in section 2 (1). Since section 6 (1) *c* does not apply it is not necessary to consider Schedule 1. Therefore compensation for 100 per cent. loss of earning capacity is payable.

5. I would request you to be so good as to obtain for the opinion of the Supreme Court as to the percentage of loss of earning capacity the workman has suffered and the amount of compensation payable.

6. I am forwarding herewith my file of papers relating to this case.*

(Signed by Commissioner for Workmen's Compensation.)

N. K. Choksy with *Miss Mehta* and *M. Ratnam*, for the employer.
R. R. Crossette-Thambiah, Crown Counsel, appears as *amicus curiae*.

HOWARD, C.J.

This case has been submitted for the opinion of the Supreme Court by the Commissioner for Workmen's Compensation under section 39 of the Workmen's Compensation Ordinance (Chapter 117). The facts which are not in dispute are as follows: Prior to an accident that occurred to him on the 19th August, 1938, the workman had lost the sight of his right eye.

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1940

Howard, C.J.

Superintendent, Etana Estate *vs* Muttuweeran

The time when and the circumstances in which the sight of this eye was lost are unknown, but it occurred long before the 19th August, 1938. Neither the present nor any previous superintendent of the Etana Estate where the workman was employed was aware of the fact that the latter was blind in his right eye. On the 19th August, 1938, the workman suffered injury to his left eye arising out of and in the course of his employment. On the 23rd August, 1938, he entered hospital and lost the sight of his left eye completely. The question for my decision is whether in law the workman has suffered "total" or "partial" disablement. Giving the phraseology of the definition of "partial disablement" where it occurs in section 2 its ordinary meaning, I do not think it can be contended that the disablement suffered by the workman comes within this definition. His earning capacity has, as the result of the accident on the 19th August, 1938, not been merely reduced, in every employment which he was capable of undertaking at the time of the accident, but he has been incapacitated for all such work. The injury, therefore, caused permanent total disablement entitling this workman to compensation under section 6 (1) *b* of the Ordinance. In this connection I would refer to the case of *Lee vs Baird & Co., Ltd.* (Vol. 1. Butterworths' Workmen's Compensation Cases, p. 34). At page 38 Lord Mackenzie states as follows :

> "It is the law that if a man who is 'already afflicted with an infirmity is injured by an accident and thereby incapacitated from' carrying on the work which he was previously fit to do, then that is an injury which results from the accident, even though the accident would not have incapacitated him had he been otherwise sound. The case may be figured of an injury to a man who, to begin with, has only one eye. That renders him more liable to be disabled, but if an accident happens, and if there is injury to the sound eye, those responsible for the accident will be liable for the consequences, although if he had the other eye the result would not have been the same. In the same way, it is obvious that if a man with a lame leg received an injury to the other leg the injury would have very much more serious consequences. Accordingly, I am unable to agree with the view of the learned Sheriff-Substitute upon the facts as stated in the case. It appears to me that this is the case of a man whose right eye has been rendered of little use in consequence of the accident, and that the result of that, coupled with his previous infirmity, is to render him partially incapacitated for work, and accordingly he is still in a state of partial incapacity in the sense of the statute, and that partial incapacity renders the employers liable to make compensation."

In my opinion, therefore, the workmen in this case has suffered permanent total disablement.

Appeal dismissed.

Proctors :—

F. J. & G. de Saram for appellant. (Superintendent of Etana Estate)

Present: CANNON, J.

POULIER (Inspector of Police) vs ABEYGUNAWARDENA

S. C. No. 806—*M. C. Galle No.* 23242.

Argued on 22nd and 23rd April, 1940.

Decided on 23rd April, 1940.

Evidence Ordinance (*Chapter* 11) *sections* 26 *and* 167—*Confession made when in custody of a Police Officer—Scope of section* 26.

The accused was produced by an Inspector of Police before one Mr. Hingly an Assistant Government Agent in his office. Mr. Hingley sent the Inspector outside and asked one of the officers of the Kachcheri and another one Mr. W. H. Perera to be present as witnesses. Mr. Hingley then asked the accused if he wished to make a statement, pointing out that there was no need to make a statement and that no offer, threat or inducement was being offered. The accused, thereupon, made a statement which amounted to a confession of his guilt. Thereafter, Mr. Hingley handed back the accused to the Police.

Held : That the confession was inadmissible under section 26 of the Evidence Ordinance, as the accused must be taken to have been in Police custody at the time he made the statement.

Cases referred to : *Silva vs Silva* (1904-7 N.L.R. p. 189).
Dow vs Appuhamy (1899–1 Thambyah's Reports 72).

N. E. Weerasooriya, K.C. with *E. B. Wickramanayake*, for accused-appellant.

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

CANNON, J.

Section 26 of the Evidence Ordinance provides as follows : "No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against that person." In the case before the court a confession of guilt (P. 14) by the accused was admitted as evidence and he appeals under that section on the ground that the confession was made whilst he was in the custody of the Police. There was no Magistrate present acting as Magistrate and that point does not arise.

The first question then to consider was whether this accused was in the custody of the Police at the time he made his confession. Mr. Weerasooriya for the appellant has submitted that he was and it is a necessary submission, being the basis of the appeal, and Mr. Gunasekera for the Attorney-General contends that he was not. To decide whether he was in custody or not one must look at the record. Two days before this submission was made, according to the evidence for the prosecution, the accused wrote a letter to the President of the Village Tribunal in which he admitted his guilt (P3). The President's evidence at marginal page 12 of the record reads as follows :

"The Government Agent questioned me about the defalcation. I showed him the letter P3 and the other papers and explained to him what had happened.

1940

Cannon, J.

Poulier (Inspt. of Police) *vs* Abeygunawardena

He took the papers into custody and asked the Galle Police through the Nagoda Police to take steps in the matter."

The Government Agent's evidence at page 19 of the record reads :

"I handed the file to Mr. Hingley, Assistant Government Agent. The Police arrested the accused, and Mr. Hingley recorded the statement of the accused."

At page 22 of the record Mr. Hingley says this :

"Mr. Rogerson held an inquiry into a suspected case of defalcation at the Nagoda Village Tribunal. This accused was produced before me the same day by the Inspector of Police in my office. I sent the Inspector outside and I asked one of the officers of the Kachcheri to be present as a witness. I believe that person was the extra Office Assistant, Mr. Kanapathipillai. I also called in Mr. W. H. Perera to be present. I then asked this accused if he wished to make a statement. I pointed out to him that there was no need to make a statement and I made it clear to him that I was asking no offers, threats or inducements."

And in cross-examination this witness says at marginal page 25 :

"The accused was produced before me in Police custody and given back to the Police after the statement was made to me."

That is the evidence of witnesses independently of the accused—witnesses called for the prosecution. The accused himself gave evidence and he says at marginal page 96 this :

"On the 13th January, 1939 a Sub-Inspector of Police and the Assistant Superintendent of Police came and brought me to the Kacheheri. I was questioned by Mr. Hingley. The Atta Pattu Mudaliyar and the Sub-Inspector of Police only were present. The Office Assistant was also there. The Assistant Superintendent of Police was there. From the time I left my house I was in the custody of the Police."

At page 97 he says this :

"After the inquiry I was removed to the Police Station and there I was bailed out. I then realised I was on a criminal charge."

The Magistrate himself in his judgment says at marginal page 111 of the record :

"On the 13th January, 1938 the Government Agent visited Nagoda for electing the Chairman of the Nagoda Village Committee. The President was questioned by him and he then showed the letter P3 sent by the accused to him. The Government Agent put the Police on the track of the accused and he was produced before the Assistant Government Agent, then Mr. Hingley."

This evidence tends to show that the witnesses were under the impression that the accused was detained by the Police. Mr. Gunasekera in support of his submission that the accused was not in Police custody at the time of the confession cited the case of *Dow vs Appuhamy* (1899–1 Thambyah's Reports page 72). In that case a Policeman had seen a servant in suspicious circumstances with a bottle of oil and so he took the servant to his master and the result was that the servant confessed to stealing this bottle of oil. The master thereupon told the Police to deal with the servant according to law. The point now under consideration arose, and the Judge, on appeal, held that the servant was not in custody until the master had told the Police to deal with him according to law.

I should be unwilling to adopt that reasoning without further argument. But I cannot decide this case on that authority for the reason that there is no definite evidence as to when the accused was charged—whether before or after he was taken by the Police to the Assistant Government Agent. One has to remember the extracts I have read, especially that which states that the Government Agent took the papers and asked the Police to take steps in the matter; and also the Magistrate's remarks that the Government Agent put the Police on the track of the accused and he was produced before the Government Agent. I hold that the accused was in the custody of the Police when he made the confession (P14) and hat the confe sion was therefore not admissible in evidence against the accused under section 26.

Then it is urged for the Crown that assuming he was in custody, it was not a lawful custody. There is no evidence as to the presence or absence of any warrant but it seems to me that whether it was a lawful or an unlawful arrest, is not material to this issue.

The next point for decision is how does the admission of this evidence affect the conviction ? Does it go to the root of the matter and make the conviction untenable, or can the conviction be allowed to stand under section 167 of the Evidence Act which reads :

> "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

There was evidence of other facts which, if accepted, would without the confession, have justified the Magistrate in convicting the accused. There is the letter P3. This is in the handwriting of the accused written on the 11th of January to the President of the Village Tribunal. It reads as follows :

> "Sir, I beg to lay before your honour the following facts for your kind and sympathetic consideration, that the fines collected from last August were not yet remitted. I had these monies and I do not know what happened. I tried my level best to procure this amount by taking a loan on mortgaging my land, but it has not yet settled and postponing from day to day. I did not bring this to your notice so long, thinking that I will be able to procure this amount and remit this. As I have no way of remitting this amount, I beg that you will be pleased to remit this amount on taking a necessary document from me. I am still not well to attend to work. Further I beg of you to see to this and grant me redress. I am so sorry and shame to look at your face as I have done this act. I again tell you the fact that I do not know what has happened to this money. All the time I was trying my best to earn this amount but to my misfortune all failed. Beg that you will help me at this juncture. I am, Sir, Your Obedient Servant."

The accused's explanation of that document was that the books had not been kept properly for some months. The Government Agent was expected in January and the accused alleged that on this day the President

1940

Cannon, J.

Poulier (Inspt. of Police) *vs* Abeygunawardena

went to his house and told him that there would probably be deficiency; that the Government Agent was coming; and asked whether he would write a letter saying that he was responsible for the deficiency. The accused says that he gave that letter to the President on the promise that he would be saved from trouble. He says that he wrote it at the dictation of the President.

Dealing with this letter, the Magistrate in his judgment says the effect that that letter alone coupled with the evidence of the President and of the accused would not have induced him to convict the accused, because, he says, evidence had been led that the President sometimes had custody of some of the fines that were levied in the court. This is what the Magistrate says on that point:

> "The prosecution admits that the ultimate responsibility for the money was with the President, and in point of fact the amount has now been made good by him to the Government Agent. In view of that, if the evidence was that of the President and the accused alone it would have become necessary for me at least to give the accused the benefit of the doubt that would arise."

In the confession (P14) the accused said:

> "I admit that I spent the money for medical expenses and for home requirements. I was constantly trying to make up the money I had spent....After the President had signed all the papers I retained them instead of sending in the money."

I might mention here that the Magistrate, when he admitted that confession in evidence had not the advantage of the objection being put before him in the way it has been put before this court. It was not put before him as inadmissible under section 26 of the Evidence Act. The Magistrate found that the confession was a voluntary one. If the objection had been raised under section 26 of the Evidence Ordinance he might have decided otherwise. I think the most cogent evidence that can be put before a Tribunal is an admission or a confession. The Magistrate takes that view for he says in effect that this confession, added to P3, induced him to accept P3. This is how he puts it:

> "The prosecution admits that the ultimate responsibility for the money was with the President and in point of fact the amount has now been made good by him to Government. In view of that, if the evidence was that of the President and the accused alone, it would have become necessary for me at least to give the accused the benefit of the doubt that would arise."

He goes further and says:

> "But when, as here, the letter P3 is followed up by a confession within two days of it to another official against whom no such allegations even can be cast to the Assistant Government Agent, and the retraction was made only 16 days later, I can come to no other conclusion than that the affidavit P12 was an afterthought."

P12 was an affidavit which the accused swore 16 days later, stating that he had written P3 at the dictation and persuasion of the President.

I do not think (in view of the passage of the judgment I have just cited) that I can say that the Magistrate would have come to the same conclusion without the evidence of the confession.

Now what order should be made? Section 347 of the Criminal Procedure Code gives power to this court to send the case back for retrial or to commit it for trial The crown submits that if the court holds that the conviction cannot stand because of the admission of this confession, the court has authority to commit the case for trial or retrial on the ground that the Magistrate should not have tried the case. An authority for that proposition is *Silva vs Silva* (1904-7 N.L.R. p. 182) where it was held that in a case of complexity or where difficult questions arose, the Magistrate should not assume jurisdiction, but commit for trial. I am not prepared to hold that the Magistrate was wrong in assuming jurisdiction.

I hold that the confession was made when the prisoner was in the custody of the Police and it is impossible to say that had it been excluded the Magistrate would have come to the same conclusion.

The conviction is therefore quashed and the accused is discharged.

Proctors :— *Conviction quashed.*

G. E. Abeywardena, for accused-appellant. (Abeygunawardena)

Present: MACDONELL, C.J. & POYSER, J.

MUTTUCUMARASAMY vs MUTTUCUMARASAMY

S. C. No. 380 *(F)—D. C. Colombo No.* 141.

Argued and Decided on 20th February, 1936.

Divorce—Husband and wife—Malicious desertion—Acts of cruelty and violence on the part of the husband coupled with an order to leave the house—Do they taken together constitute malicious desertion on the part of the husband.

This is an action by the wife against the husband for divorce *a vinculo matrimonii* or in the alternative for separation *a mensa et thoro*, on the grounds of cruelty and violence. It was proved that the conduct of the husband was such that the wife was compelled to leave the house. It was also proved that on one occasion he actually ordered her out.

Held : That the acts of cruelty and violence on the part of the husband coupled with the order to leave the house constituted malicious desertion in law on the part of the husband.

Cases referred to : *Sickert vs Sickert* (1899, Probate Division p. 282)
Crossley vs Crossley. (1912, W.L.D. 49)

R. L. Pereira, K.C., with *R. G. C. Pereira*, for the plaintiff-appellant.

MACDONELL, C.J.

In this case the wife sued the husband for divorce *a vinculo matrimonii*, or in the alternative for separation *a mensa et thoro*, on the grounds of cruelty and violence on the part of the defendant, her husband, which she said constituted in law malicious desertion by that husband.

The case was tried in the District Court of Colombo, and the cruelty and acts of violence were quite clearly proved. After these acts of cruelty and violence, and the plaintiff says in consequence thereof, she left the

1936

Macdonell, C.J.

Muttucumarasamy vs Muttucumarasamy

defendant's house, and urges that she was compelled to do so by his conduct; in other words, that in law the defendant deserted her. The learned judge, however, said that he was not satisfied that her leaving the house in these circumstances, that is, certain assaults in November, 1933, would be sufficient to constitute desertion by the defendant. In another part of the judgment he puts it in this way: "I would hold that the plaintiff has failed to prove such conduct on the part of the defendant as compelled her to leave his house, or as would constitute malicious desertion on his part."

It must always be a question in these cases of the less and the more, but I really think on the acts of violence proved against the defendant, coupled with at least on one occasion defendant's order to the wife to leave the house, it did amount to malicious desertion in law on the part of the husband. The acts of violence were numerous, and seem to have been more or less continuous. How much longer could the plaintiff stay in the house with the defendant, suffering from this continuance of acts of violence, even granting that no one act was of a very serious character? In *Sickert vs Sickert* (1899, Probate Division p. 282) Gorell Barnes, J. says: "In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion." That would apply here. It really does seem as if the conduct of the defendant has caused a termination of the cohabitation, and if so, then he has committed an act of desertion. In Transvaal case, *Crossley vs Crossley* (1912, W.L.D. 49) Bristowe, J. said as follows: "The question seems to me to be who is the person substantially responsible for the separation. The party who really deserted is the one who compels the desertion." That puts the matter very pithily.

Under all the circumstances, I think the learned judge should have held that there had been in law malicious desertion on the part of the defendant, and that therefore the plaintiff, the wife, was entitled to a divorce *a vinculo*.

The appeal must be allowed, and the decree amended so as to grant the plaintiff this decree dissolving her marriage. The portion of the decree with regard to alimony will also have to be formally amended, to say that the defendant must pay to the plaintiff the sum of Rs. 250/- per month as alimony *dum sola et carsa* and Rs. 100/- per month for the child. The rest of the decree will remain as originally given. I agree with the learned judge that the payment of these sums should be secured by the hypothecation of immovable property belonging to the defendant. I understand that he has promised to do so, but has not yet carried out his promise.

This appeal will be allowed on the above terms with costs.

POYSER, J.

I agree.

Appeal allowed.

Present: SOERTSZ, J. & HEARNE, J.

DE SILVA AND OTHERS vs DE SILVA

S. C. No. 33—*D. C. Galle* 36337.

Argued on 5th March, 1940.

Decided on 15th April, 1940.

Prescription—Last will—Specific devise subject to mortgage by testator —Death of testator—Executor's failure to redeem mortgage—Devised property sold under hypothecary decree—Action against executor by deceased devisee's heirs for value of land—When did cause of action arise—Section 5 of the Prescription Ordinance.

A by his last will devised to N a specific gift of land which was subject to a mortgage created by A. A died on 3rd of April, 1931 and N died on 21st April, 1934. N's sole heirs were her husband and five children three of whom were minors. The mortgage bond was put in suit and the property in question was sold under hypothecary decree in 1933. In 1937 N's said heirs sued A's executor for the value of the land on the ground that the law cast a duty on him to redeem the mortgage out of the assets of the estate and that he failed to perform that obligation.

The executor denied that he was under any legal duty to redeem the said bond and further pleaded that even if the plaintiffs had a right of action, it was prescribed. The learned District Judge held in favour of the defendant on the first contention and dismissed plaintiffs' action. On appeal, the Supreme Court held* that the defendant as executor was bound by law to discharge the mortgage created by the testator and sent the case back for the determination of the issue on prescription which was again decided in favour of the defendant. The plaintiffs appealed.

Held : (i) That the plaintiff's cause of action arose on the death of the testator and was not interrupted by the fact of minority of N's children.

(ii) That section 5 of the Prescription Ordinance did not apply in the circumstances.

Authorities referred to : 14 *Laws of England* (*Hailsham*) *p.* 341.
Cassim vs Marikar (15 S.C.R. 180)
Silva vs Silva (10 N.L.R. 234)
Alagakwandi vs Muttumal (22 N.L.R. 111)
Fernando vs Soysa (2 N.L.R. 40)

L. A. Rajapakse with *M. M. I. Kariapper* and *H. A. Wijemanne*, for the plaintiffs-appellants.

H. V. Perera, K.C. with *G. P. J. Kurukulasooriya*, for the defendant-respondent.

SOERTSZ, J.

On the last occasion on which this case came up on appeal, Keuneman, J. held that in the absence of a contrary intention in the will, the executor was bound by our law, to discharge a mortgage created by the testator, over a land devised by him so that the legatee might take the legacy free from encumbrances. Maartensz, J. agreed.*

The case was remitted to the trial court for the determination of issue No. 8, namely, " Is the plaintiffs' claim prescribed ? " The trial Judge has answered that issue in the affirmative, and the present appeal is from that finding.

* See 11 C.L.W. 131 (Edd.)

1940

Soertsz, J.

de Silva and Others *vs* de Silva

Counsel for the appellants contended before us (*a*) that it was section 5 of the Prescription Ordinance that applied in this case because he submitted the action was one to compel the performance of a trust, and as such was not barred till ten years had elapsed, and that, in this instance, the action was instituted on the 25th of October, 1937, and was, therefore, within time even if the correct view is that the cause of action to recover a legacy accrues to the legatee on the death of the testator. The testator died on the 3rd of April, 1931. He contended, however, (*b*) that the correct view is that the cause of action in a case like this accrues when the executor puts it beyond his power to pay the legacy. In this case that happened only in February, 1933, when the executor, although he had funds sufficient to pay the amount due on the mortgage to which the land devised was subject, permitted it to be sold in execution. (*c*) Alternatively he contended that no cause of action arose (1) till the executor obtained probate on the 18th of October, 1932, or (2) till final account was filed on the 11th February, 1936; or (3) till the estate was declared closed on the 28th October, 1937.

Counsel for the respondent submitted that this action was in reality, an action for damage and as such, barred by section 9 of the Prescription Ordinance in two years or at best that it was within section 10 and was barred in three years. In either case the plaintiff came into court too late, for he contended the cause of action arose on the death of the testator.

After careful consideration of the questions raised by the appellants' counsel I have come to the conclusion that section 5 of the Prescription Ordinance has no application at all. There is no express trust here, nor is there such a constructive trust as is put upon the footing of an Express Trust by the English Law. I am also of opinion that the cause of action cannot depend upon such uncertain or at least such indefinite events as the obtaining of probate or the filing of the final account, or the so called closing of the estate. The correct view seems to be that taken by the trial Judge and contended for by the respondent, namely, that a cause of action to obtain his legacy accrues to a legatee on the death of the testator. That certainly is the view taken by the English Law. See 14 Laws of England (Hailsham) p. 341 and the cases cited there, and that is the view implied in the local cases *Cassim vs Marikar* (15 S.C.R. 180); *Silva vs Silva* (10 N.L.R. 234); *Alagakwandi vs Muttumal* (22 N.L.R. 111); *Fernando vs Soysa* (2 N.L.R. 40).

In this view of the matter prescription began to run when the testator died on the 3rd of April, 1931 that is to say, in the lifetime of the legatee and it was not interrupted by the fact of minority of her children at the time of her death some three weeks later.

The appeal therefore, fails and must be dismissed with costs.

HEARNE, J.

I agree.

Appeal dismissed.

Proctors :—

W. E. de Silva, for plaintiffs-appellants. (de Silva and Others)

A. S. Jayawickreme, for defendant-respondent. (de Silva)

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

KING vs KUMARASAMY

Case stated in S. C. No. 8—M. C. Point Pedro No. 18682.
Argued on 22nd April, 1940.
Decided on 3rd May, 1940.

Penal Code section 294, *Exception* 1—*Does the exception include provocation offered by words—Should the question whether there was provocation be left to the jury—Misdirection—Case stated under section* 355 *of the Criminal Procedure Code.*

Held : (i) That provocation offered by words is provocation for the purposes of Exception 1 of section 294 of the Penal Code.

(ii) That in the trial of an accused for murder the question whether the facts disclose the existence of provocation should be left to the jury.

Cases referred to : *Rex vs Welsh* (11 Cox's Criminal Law Cases 326)
Rex vs Mason (8 Criminal Appeal Reports 121)
Queen vs Huri Giree (10 Southerland's Weekly Reporter (Criminal) p. 26).

H. V. Perera, K.C., with *G. G. Ponnambalam*, for the prisoner.

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

MOSELEY, A.C.J.

This is a case stated by Nihill, J. under section 355 of the Criminal Procedure Code, as follows :

"1. In this case the accused on an indictment for murder was found guilty of an offence under section 317 of the Penal Code by the jury's majority verdict of five to two. I thereupon sentenced the accused to five years' rigorous imprisonment. After sentence had been passed, counsel for the defence requested me to state a case under section 355 of the Criminal Procedure Code on the grounds that I had misdirected the jury in my charge in not leaving to them the issue of provocation. Thereby the accused had been prejudiced insomuch as, had that issue been left to the jury, they might have found him guilty under section 326 and he could not then have received a sentence in excess of four years' rigorous imprisonment.

I granted the request for the following reasons :

(*a*) My charge admittedly contained a mis-statement or at least an incomplete statement of the Law in regard to the sufficiency of provocation occasioned by mere words of abuse alone. I told the jury that mere abuse unaccompanied by some physical act was insufficient provocation. What I should have said and what in fact I intended to say was that mere abuse would be insufficient in this case if they believed the evidence which was to the effect that the accused after listening to the abuse had run some little distance from the scene and had

1940

Moseley, A.C.J.

King
vs
Kumarasamy

returned with a rice pounder with which he had dealt a blow on the forehead of the deceased. The principle which I intended to make clear to the jury but may not have done is that set out in Archbold (27 Ed. p. 881) under the paragraph entitled ' insufficient provocation.'

(*b*) I then proceeded to direct the jury that if they held that it was the accused that had dealt the blow, then if they were satisfied that the accused had the intention or knowledge demanded by section 296 they should find him guilty of murder but that if they had a reasonable doubt as to the presence in the mind of the accused of those ingredients, their proper verdict would be to find him guilty of an offence under section 317.

I considered briefly the Code exceptions which may reduce murder to culpable homicide not amounting to murder but indicated that in my opinion there was no evidence before them which could bring the case within the exceptions. I would add here that the defence made no attempt to prove the existence of any such circumstances (*vide* section 105 of the Evidence Ordinance). No evidence was called and the defence so far as it was suggested by cross-examination was to the effect that the accused was elsewhere at the time of the assault.

2. Counsel for the defence has submitted that the question whether the ' provocation ' received by the accused (that is to say words of abuse directed against him and his wife) was grave and sudden enough to prevent the offence from amounting to murder was a question of fact which should have been left to the jury. My view of the ' explanation ' to section 294 of the Penal Code is that it is for the Judge to decide whether the issue of provocation can arise from the evidence and if it does and only then it is for the jury to consider its sufficiency and suddenness. If this view be right then I consider that although my charge contained a mis-statement of law this did not amount to a mis-direction because it was my duty to point out that mere abuse only could not in law extenuate the use of an instrument which, used in the way it was, was likely to cause death.

3. If however I am wrong in the above view then clearly there has been a mis-direction which may have affected the jury's verdict and I accordingly felt that I should state a case for consideration by two or more Judges. In short the question that emerges is whether in telling the jury that on the evidence the issue of provocation could not arise I was right or whether I should have told them that it was for them to consider whether the abuse uttered by the deceased was calculated to deprive the accused of his power of self control. That if they thought it was and they thought that intention or knowledge necessary to constitute culpable homicide was present, they should find the accused guilty of culpable homicide not amounting to murder, or if intention or knowledge was not present, of an offence under section 326.

4. As regards sentence I imposed only half the maximum permissible under section 317 and refrained from ordering a whipping because I took into account the effect on the accused of the abuse hurled at him and his wife by the deceased woman. Had I left the question of provocation with the jury and had they brought in a verdict under section 326, I should have imposed the maximum term of imprisonment."

The application by counsel for the defence that a case should be stated was based upon the direction to the jury that " mere abuse unaccompanied by some physical act was insufficient provocation."

The principle set out in Archbold's Criminal Pleading, Evidence and Practice, to which the learned Judge refers, is stated as follows : " As a general rule, no words or gestures, however opprobrious or provoking, will be considered in law to be sufficient to reduce homicide to manslaughter, if the killing is effected with a deadly weapon or an intention to do the deceased some grievous bodily harm is otherwise manifested." The proposition is based largely upon an excerpt from the summing-up of Keating, J. in *Rex vs Welsh* (11 Cox's Criminal Law Cases 326), and in a later case *Rex vs Mason* (8 Criminal Appeal Reports 121), the Court of Criminal Appeal, per Ridley, J., agreed that " mere words of provocation or abuse could not, but words of provocation coupled with such an act as spitting upon the appellant might (though they need not necessarily) have the effect of reducing the crime from murder to manslaughter." The trial Judge has directed the jury in those terms, the jury had declined to find a verdict of manslaughter, and the court saw no reason to interfere with the verdict of murder.

It may, therefore, be taken for granted that the principle set out is well established in English Law, and that in the light of that principle the direction of Nihill, J. is un-exceptionable.

It will, however, be observed that the relevant provision of the Penal Code, *i.e.* section 294 draws no distinction between different varieties of provocation. Exception 1 to section 294 is as follows :

> " Culpable homicide is not murder if the offender whilst deprived of the power of self control by grave and sudden provocation causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident."

To this exception is added the following explanation: " Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact." That mere verbal provocation is contemplated seems clear if one refers to illustration (*d*), which is as follows :

> " (*d*) A appears as a witness before Z, a Magistrate. Z says that he does not believe a word of A's deposition, and that A has perjured himself. A is moved to sudden passion by these words and kills Z. This is murder."

That the offence of A (in the illustration) is not reduced is undoubtedly due to the fact that the provocation words were uttered by a public servant in the lawful exercise of his powers, and not for the reason that the words in themselves did not amount to provocation.

To support this view of the intention of the legislature counsel for the accused referred us to Mayne's Criminal Law of India (4th Ed. p. 490) in which the commentator quotes the following words of the framers of the Code :

> " We greatly doubt whether any good reason can be assigned for this distinction. It is an indisputable fact that gross insults by word or gesture have as great a tendency to move many persons to violent passion as dangerous or

1940

Moseley, A.C.J.

King
vs
Kumarasamy

painful bodily injuries. Nor does it appear to us that passion excited by insult is entitled to less indulgence than passion excited by pain. On the contrary the circumstance that a man resents an insult more than a wound is anything but proof that he is a man of a peculiarly bad heart."

Counsel also invited our attention to the phraseology of section 326 of the Penal Code, under which it was contended that the accused might have been properly convicted if the question of provocation had been left to the jury. In section 326 there is no express condition that the offender shall be *deprived of the power of self control*, but merely that he shall have acted on grave and sudden provocation. Counsel queried probably without strong conviction the necessity for such a degree of provocation that would deprive the offender of the power of self control. There would, however, appear to be no jurisdiction for drawing a distinction to this extent between the provocation required by section 294 and that contemplated in section 326. Indeed to relax the requirements in the case of section 326 might well lead to an absurdity such as an offender who had received grave and sudden provocation, but who had admittedly not been deprived of his self control, proceeding in cold blood to break every bone in his provoker's body knowing that he was protected by the law against adequate punishment. In any case it is in my opinion unnecessary for the purpose of the present case to draw any such distinction.

The Attorney-General who appeared as *amicus curiae* drew our attention to several Indian cases of which I think it is necessary to refer to one only. In *Queen vs Huri Giree* (10 Southerland's Weekly Reporter (Criminal) p. 26) the accused was convicted of culpable homicide not amounting to murder on the ground of grave and sudden provocation. Glover, J. in delivering the judgment of the court said: "No doubt the question whether such provocation was sufficient to take the case out of the purview of section 300 was a question of fact." The Appellate Court found it impossible to say that the provocation that the accused had received was of such a nature as to take away from him all power of self control. But inasmuch " as the Judge and Assessors have found on the evidence that the prisoner is not guilty of murder.....this court cannot interfere, no question of law being involved..... The court, however, thought it right to say that the finding was not justified by the evidence.

Nihill, J. drew our attention to the fact that the only evidence of provocation was given by the witness for the prosecution and that the defence was that the accused was elsewhere at the time of the assault. There, however, is ample authority for the proposition that even if the defence of manslaughter is not raised, the question should be left to the jury if the evidence for the prosecution discloses facts upon which such a defence could be based (XVIII Cril. Appl. Rep. 189).

In my opinion the question whether the facts disclosed the existence of provocation and not only of the *quantum* is one which should be left to the jury, and had that been done in this case, the jury might well have

convicted the accused of causing grievous hurt upon grave and sudden provocation. I think, therefore, that the conviction under section 317 should be set aside and that one under section 326 should be substituted therefor.

In regard to sentence the learned Judge has indicated that had the jury returned a verdict under section 326 he would have imposed the maximum term of imprisonment *i.e.* four years. It has been urged that it is for this court in such a case as this to form its own opinion as to the sentence which should be imposed. No doubt that is the correct view. Even so it seems to me that the accused has received every benefit which the law confers and which he might reasonably expect to receive at the hands of a jury. The maximum sentence of four years' rigorous imprisonment is in my view no more than adequate and that is the sentence which the accused will undergo.

SOERTSZ, J.

I agree.

KEUNEMAN, J.

I agree.

Conviction varied.

Present: KEUNEMAN, J.

FORBES vs RENGASAMY

S. C. No. 336/1940. *M. C. Hatton No.* 210 *with application for revision in M. C. Hatton No.* 210 (*S. C. No.* 212)

Argued on 17th May, 1940.

Decided on 23rd May, 1940.

Criminal Trespass—Penal Code—Section 433—*Estate Labour* (*Indian*) *Ordinance* (*Chapter* 112) *section* 5—*Month's notice to quit service—May such notice be given on any day in a month—Is a labourer occupying a room in the lines on the estate free of rent a tenant of such premises.*

Held : (i) That a notice, given on the 2nd of December, 1939 to an Indian labourer terminating his services on the 2nd of January, 1940, is a valid notice.

(ii) The relationship of landlord and tenant does not exist between the employer and his estate labourer, who is provided with free housing accommodation by the employer.

Per KEUNEMAN, J.—" I think it is clear that residence on the estate is in the interest of the estate, and that such residence is conducive to that purpose and the more effectual performance of the service. The labourer's position is more akin to that of the 'coachman, the gardner, or the porter.' "

Cases referred to :— *Ebbels vs Perianen* (4 C.L.J. 119; 16 C.L.W. 15)
Burne vs Munisamy (21 N.L.R. 193)
Hughes vs The Overseers of the Parish of Chatham (5 Manning & Granger 54)
Marsh vs Estcourt (24 Q.B.D. 147)
Smith vs The Overseers of Seghill (1874-5 L.R. 10 Q.B.D. 422).
Dobson vs Jones (5 Manning & Granger 112)

1940

Keuneman, J.

Forbes *vs* Rengasamy

L. A. Rajapakse with *Aiyer* and *Thambiah*, for accused-appellant.

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

KEUNEMAN, J.

The accused was charged and convicted under section 433 of the Penal Code for committing criminal trespass on 3rd January, 1940, by unlawfully continuing to remain on Thornfield Estate with intent to annoy the complainant who is the superintendent of the Estate. He was sentenced to one month's rigorous imprisonment. He now appeals.

Several points of law were argued by his counsel. Most of those points have been raised in a previous case, *Ebbels vs Perianen* (4 C.L.J. 119; 16 C.L.W. 15), and have been decided by de Kretser, J. But as the matter has been fully argued before me again, I shall myself deal with the arguments.

One point raised may be disposed of shortly. It is contended that the month's notice terminating the accused's service was illegal in that the notice was given on the 2nd December, 1939, terminating on the 2nd January, 1940. It was contended that notice must be given before the commencement of a month, and terminate at the end of that month. But section 5 of Chapter 112—The Estate Labour (Indian) Ordinance—reserves the right to both labourer and employer to determine the contract of service "*at the expiry of one month from the day of giving such notice.*" Similar words in Ordinance No. 11 of 1865 have been interpreted by a bench of two Judges in *Burne vs Munisamy* (21 N.L.R. 193). I hold that the notice in this case was a good notice, and that the contract of service terminated on the 2nd January, 1940.

The further argument addressed to me is that the accused was a monthly tenant of the room in which he lived, and that he was entitled to notice to quit the room given before the commencement of a month, and terminating at the end of that month.

Two English cases have been cited to me on this point by the appellant's counsel, namely, *Hughes vs The Overseers of the Parish of Chatham* (5 *Manning & Granger* 54) and *Marsh vs Estcourt* (24 Q.B.D. 147). In the former case Tindal, C.J. stated: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest....As there is nothing in the facts stated to shew that the claimant was *required* to occupy the house for the performance of his services, or did occupy it *in order to* their performance, or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his service; ....., we cannot say that the conclusion at which the revising barrister has arrived is wrong." The revising barrister had held that the servant occupied the house in the capacity of tenant, and was entitled to be on the list of voters.

The latter case was decided under the County Electors Act, 1888. The claimants were labourers residing in cottages on the farms of their employers. They were permitted but not required to live in the cottages on the terms that they were to give up the possession when their employment ceased, and were either charged a reduced rent or had the rent deducted from their wages. The rates were paid by the employers and the names of the claimants appeared in the rate-book as occupiers. It was held that the facts showed an occupation by the claimants not by virtue of service but as householders. Wills, J. stated: "The labourers were not required to reside in the cottages, but were allowed to reside in them as a privilege. It would be an abuse of language to call residence under such conditions occupation by virtue of service."

Appellant's counsel also referred me to Halsbury's Laws of England (Hailsham Edition) Vol. 22, page 117, paragraph 196, which runs as follows:

> "Where it is necessary for the due performance of his duties that a person should occupy certain premises, or where he is required to occupy premises for the more satisfactory performance of his duties, although such residence is not necessary for that purpose, such person occupies in the capacity of servant; but where a person is merely permitted to occupy premises, whether as a privilege, or by way of remuneration or part payment for his services, he occupies as tenant and not as servant...."

It continues:

> "Occupation by the servant is occupation by the master, and a servant has neither estate nor interest in the premises he occupies in that capacity."

In the case cited by respondent's counsel *Smith vs The Overseers of Seghill* (1874-5 L.R. 10 Q.B.D. 422), Mellor, J. stated:

> "It appears that the appellants and the other workmen are only entitled to occupy the houses during the time of their services at the colliery; the occupation terminates at the time the service terminates. Still the appellants are tenants though not tenants for any fixed time."

Lush, J. also said:

> "It is true that the holding is not for any fixed term; the tenure is co-existent with the service; but it may still be that during the period of the service the colliers occupy in the character of tenants."

Another aspect of this matter is to be found in *Dobson vs Jones* (5 *Manning & Granger* 112). There Tindal, C.J. said that:

> "The relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made — with a view, not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the service required from such officer or servant."

and he instanced the case of a coachman, a gardner, or a porter.

In the present case, it is in evidence that Thornfield Estate falls within the class of estate paying acreage fees. It is also one of the estates which provide "free housing accommodation" (to use the words of Schedule C of the Rules, *vide* Subsidiary Legislation Volume 1, page 591) included in the wages. The evidence for the defence itself established that "in practice all Indian labourers (the accused is one) reside on the estate, but there are

1940

Keuneman, J.

Forbes *vs* Rengasamy

stray cases where Tamil labourers reside in villages and go to the estates for work." I think it is clear that residence on the estate is in the interest of the estate, and that such residence is conducive to that purpose and the more effectual performance of the service. The labourer's position is more akin to that of the coachman, the gardner, or the porter.

Further, there is no evidence that any particular room is appropriated to the accused. It is in evidence here that the accused, as well as his father, his mother and other members of the family, have been allotted two rooms. Though housing accommodation is provided, if the exigencies of the service require it, there seems to be nothing to prevent the superintendent from removing labourers to different rooms or even to different lines. I hold that the accused was not a tenant of the premises, but that his residence in the room was in his capacity as servant. Even if he was a tenant, his tenancy terminated when his contract of service was legally ended, and his subsequent residence was a trespass.

I do not think that there is any substance in the further point that the superintendent was not "in occupation of the lines." I hold that as representative of the owners in full charge of the estate he was in such occupation.

The last matter urged was that the intention to annoy the superintendent has not been proved. In this case there is evidence to show that the accused was warned that he must leave the estate on the expiration of the term of the notice and that about the middle or end of December, 1939, the accused came to the superintendent and said he had not been able to get employment elsewhere and that he could not go on the 2nd January. He was informed that he must leave on that date. He has on several occasions been warned to leave the estate, but he refused to accept his discharge ticket, and refused to leave the estate. The refusal to accept the discharge ticket is significant, as without it the accused cannot obtain employment elsewhere. This tends to show that the excuse made by the accused was not a genuine one. The accused has not given evidence in this case as to his intention in remaining on the Estate. His conduct was calculated to cause annoyance, and, in fact, has done so. The superintendent said that the accused's attitude was one of defiance. In the circumstances, the Magistrate has come to the conclusion that the accused continued to remain on the premises with the intention of annoying the superintendent, and I think the finding is justified.

The application for revision has not been persisted in and is dismissed.

As regards sentence, I see no reason to alter the sentence, but I order that the period of detention pending appeal should be taken into account in calculating the month, and if the whole period spent in prison by the accused, whether subject to rigorous imprisonment or not, is equal to, or more than, one month, he is entitled to be released. Subject to this the appeal is dismissed.

Appeal dismissed.

Present: HOWARD, C.J.

LEEMBRUGEN (A. S. P., N'Eliya) vs PITCHAIPILLAI

Application for revision in M. C. Hatton 97, 98, 99.
Application for revision in M. C. Hatton 101, 102, 103, 104, 107, 108, 110, 111 & 112.
S. C. No. 147—*M. C. Hatton No.* 100.
S. C. No. 148—*M. C. Hatton No.* 101.
S. C. No. 149—*M. C. Hatton No.* 102.
S. C. No. 150—*M. C. Hatton No.* 103.
S. C. No. 151—*M. C. Hatton No.* 104.
S. C. No. 152—*M. C. Hatton No.* 107.
S. C. No. 153—*M. C. Hatton No.* 108.
Argued on 11th March, 1940.
Decided on 14th March, 1940.

Criminal Procedure Code section 188—*Plea of guilty—Withdrawal of a statement which amounts to an admission that the accused is guilty of the offence with which he is accused—Effect of such a withdrawal.*

Held : (i) That an accused may before a verdict of guilty is recorded withdraw an admission of guilt even though it be unqualified.

(ii) That where an admission of guilt is withdrawn the Magistrate should proceed as if the admission had never been made.

Cases referred to : *Fernando vs Costa* (5 C.W.R. 225)
Rosemalecocque vs Sally (37 N.L.R. 139)

L. A. Rajapakse with *S. Aiyar* and *M. Balasunderam*, for the accused-petitioners in applications for revision in M. C. Hatton Nos. 97, 98, 99 and Nos. 101, 102, 103, 104, 107, 108, 110, 111, 112 and for the accused-appellants in S. C. Nos. 147, 148, 149, 150, 151, 152, 153.

M. T. de S. Ameresekera, K.C., Acting Solicitor-General with *Nihal Gunasekera, Crown Counsel*, for the crown-respondent in applications for revision in M. C. Hatton Nos. 97, 98, 99, 101, 102, 103, 104, 107, 108, 110, 111, 112 and S. C. Nos. 147 to 153.

HOWARD, C.J.

The points that arise for decision in these cases are the same and in these circumstances counsel on both sides have asked that they should be taken together. In applications for revision in M. C. Hatton Nos. 97, 98 and 99 the petitioners pray that the court may be pleased to quash the proceedings had against them on the 30th January, 1940, and thereafter make order directing the continuation of the trial in accordance with the law. In applications for revision in M.C. Hatton Nos. 101, 102, 103, 104, 107, 108, 110, 111 and 112, and in appeals M.C. Hatton Nos. 100, 102, 103, 104, 107, 108 the petitioners pray that the court may set aside the convictions

1940

Howard, C.J

Leembrugen (A. S. P., N'Eliya) *vs* Pitchaipillai

and sentences entered against them and make order allowing the appellants to withdraw their pleas of guilt and make such other orders as may seem meet and proper to the court. In cases Nos. 97 and 98 each of the petitioners on the 30th January, 1940, who on the 20th January, 1940, had pleaded "not guilty" stated "I am guilty. I will leave the estate in a week." The Magistrate thereupon made order as follows: "Call case on the 7th February at N'Eliya." In case No. 99 the accused made the same statement and the Magistrate thereupon made order as follows: "Call case at N'Eliya on the 7th February. Sentences deferred until then." No further orders have been made by the Magistrate in these three cases.

In the other cases the Magistrate on the 30th January, 1940, made the same order as in cases Nos. 97 and 98. On the 7th February, 1940, counsel for each of the accused applied to withdraw the latter's plea of guilty. This application was refused and the Magistrate then found each of the accused guilty on his own plea and convicted them and sentenced them to a term of one month's rigorous imprisonment. On behalf of the various accused Mr. Rajapakse has contended that the Magistrate was wrong in law in refusing to allow the accused to withdraw their pleas of guilty. The Acting Solicitor-General admits that, if the pleas of guilty were qualified, they could be withdrawn. He also admits that the wording of those pleas and the affidavits of the accused in support of their petitions permit of some doubt as to whether the pleas in law amounted to unqualified admissions of guilt. In these circumstances he suggests that the matter should be referred to the Magistrate for report. I am of opinion that the pleas are so phrased that it is a matter of inference as to whether they are unqualified admissions of guilt. It is conceivable that they amount to a plea of guilty on the condition that a week is allowed for the accused to leave the estate. If this inference is correct the plea of guilty was not unqualified In these circumstances the doubt as to whether the pleas are unqualified must be resolved in favour of the accused. I, therefore, hold that the accused should in these cases have been permitted to withdraw their pleas and substitute pleas of "not guilty."

Even if the pleas were unqualified, it is maintained by Mr. Rajapakse that they could be withdrawn. The Magistrate has not recorded a formal conviction of the accused in any of these cases. In these circumstances the judgment of Bertram, A.C.J. in *Fernando vs Costa* (5 C.W.R. 225) is authority for the proposition that such pleas could at the option of the accused be withdrawn and treated as never having been made. *Rosemalecocque vs Sally* (37 N.L.R. 139) is a further authority for the same proposition. In cases Nos. 100, 101, 102, 103, 104, 107, 108, 110, 111 and 112 the convictions and sentences must be set aside and the cases remitted to be tried by a different Magistrate.

In cases Nos. 97, 98 and 99 the proceedings are also quashed and the cases remitted for trial by a different Magistrate.

Set aside and sent back.

Present: NIHILL, J.

MEDIWAKA (Inspector of Police) vs GUNASEKERE

S. C. No. 656—*M. C. Matara No.* 23649.

Argued on 25th January, 1940.

Decided on 21st February, 1940.

Criminal Procedure Code sections 152 (3) *and* 425—*Principles which should guide a Magistrate who is also a District Judge in deciding at what stage of a case he should begin to try it summarily as District Judge under section* 152 (3).

Held : (i) That a Magistrate must make up his mind to act under section 152 (3) of the Criminal Procedure Code very early, in fact, before the real inquiry in the presence of the accused begins. Once the inquiry is under-weigh, it should not be turned into a trial.

(ii) That proceedings which have continued for some time on one basis cannot in fairness to the accused be suddenly turned into proceedings of a different nature.

(iii) That where evidence recorded by a Magistrate in his capacity as inquiring Magistrate is utilised by the same Magistrate in the exercise of his powers under section 152 (3) of the Criminal Procedure Code at a late stage of the inquiry, the possibility of prejudice to the accused cannot be overlooked and section 425 of the Criminal Procedure Code will not be applicable to such a case.

Per NIHILL, J.—" In section 152 the Magistrate can so move and it is important therefore, that Magistrate should not apply the section in a way under which even an appearance of prejudice to an accused person may be manifested. I do not consider therefore, that the amendments to Chapter XV introduced in 1938 warrants any substantial change in the view hitherto held with regard to section 152. A Magistrate must address his mind to the matter at the outset of the inquiry and quickly form his opinion thereon, because that is the only way in which an appearance of prejudice can be avoided. It will not do for him to meander through the evidence as an enquiry Magistrate until at a late stage it is driven into his consciousness that it is a case which he might have tried himself from the start.

In the present instance nearly four months elapsed between the appearance to the summons and the assumption of the jurisdiction and by that time the bulk of the evidence for the prosecution had been recorded, and when he did exercise his power, he gave no reasons.

I have no hesitation therefore under all those circumstances in holding that on this occasion he exercised his discretion improperly."

Cases referred to : *Queen vs Uduman* (4 N.L.R. 1)
Silva vs Silva (7 N.L.R. 182)
Punchirala vs Don Cornelis (8 N.L.R. 58)

R. L. Pereira, K.C., with *C. V. Ranawake* and *S. W. Jayasuriya*, for accused-appellant.

Nihal Gunasekere, Crown Counsel, for complainant-respondent

1940

Nihill, J.

Mediwaka (Inspector of Police) *vs* Gunasekere

NIHILL, J.

This is an appeal from a conviction for cheating offences under section 403 of the Penal Code. The value of the property in respect of which it was alleged the offence had been committed did not exceed Rs. 200/00 and the offences could, therefore, have been tried summarily by the Magistrate in the first instance except for the fact that counts were also included embodying charges under section 392 relating to the same transaction.

He therefore started non-summary proceedings and then after the bulk of the evidence for the prosecution had been led assumed jurisdiction as a District Judge and proceeded to try the case summarily in that capacity under section 152 (3) of the Criminal Procedure Code. He did not record any reasons for so doing.

It has been argued before me that the Magistrate assumed jurisdiction so late in the case that his action was highly prejudicial to the accused and that on this ground alone the conviction cannot stand.

I have not considered the merits of this appeal apart from this preliminary point. Mr. Nihal Gunasekere for the crown was content to take up the position that if an irregularity had occurred it was curable by the application of section 425 of the Criminal Procedure Code. Before considering that aspect of the matter however, I must first consider whether the Magistrate did in fact go outside the proper ambit of section 152 (3) in assuming the jurisdiction of a District Judge when he did.

It will perhaps be convenient to state the facts in some detail. On the 24th of January, 1939 report was made to the Magistrate under section 148 (1) (*b*) alleging that the appellant and one other (since acquitted, had dishonestly drawn certain sums from the Assistant Government Agent at Matara for the purpose of paying for the lighting of a lamp at Hakmana Market during the period March-August 1937. The report alleged that in fact no lamp was lit during the period. The appellant was named as the Chairman of the Village Committee. Summons was issued and the accused appeared before the Magistrate on the 10th of February, when the charges were read to him in accordance with the provisions of section 156. A remand on bail was granted until the 27th of February and the evidence for the prosecution was started. The preliminary enquiry had begun. It continued with various adjournments until the 30th of May when the Magistrate decided to try the case summarily as a District Judge and trial was fixed for the 15th of June. Up to this date nine witnesses had been called, their cross-examination having been reserved. On the 15th of June, these witnesses were recalled for cross-examination. Their evidence-in-chief was not taken *de novo*, although further evidence-in-chief was elicited from some of them. After two further witnesses had been called, the prosecution was closed.

After hearing evidence for the defence the Magistrate convicted the appellant on the 13th of July on two counts relative to section 403, and

sentenced him to two terms of six months' rigorous imprisonment to run concurrently. It should be noted here that the conviction was in respect to the offences which the Magistrate could have tried summarily in the first instance.

Now is there a stage in a preliminary enquiry beyond which the Magistrate cannot retrace his steps and elect to try the case himself as a District Judge ? In *Queen vs Uduman* * Bonser, C.J. quashed a conviction on the ground that the serious offence of housebreaking by night was not one which a Magistrate should try summarily. In that case the Magistrate had heard all the evidence for the prosecution and the Chief Justice in the course of his judgment at page 3 said :

> " Even if the offence was one which he could try summarily, which it was not, it seems to me that it was late for him to exercise the power given him by section 152. It is quite clear from the whole of chapter 15, in which that section occurs, that the Magistrate is to make up his mind whether he will try summarily as District Judge or not after hearing evidence under section 149. It is not competent for him to take all the evidence for the prosecution as a committing Magistrate, and then, after various remands say suddenly : ' All this time I have not been acting as a committing Magistrate, but trying the case as District Judge.' That is what it comes to."

In 1904 the scope and effect of section 152 (3) came before a Bench of three Judges, but the question as at what stage of the proceedings the Magistrate should act or beyond what stage he could not act was not considered. See *Silva vs Silva.*† Their lordships in that case held against the view that the jurisdiction was confined to Magistrates who were also the District Judges of the District and they held also that the exercise of the discretionary power of Magistrates was not conclusive and could be reviewed by the Supreme Court on appeal. As a corollary to that they indicated that Magistrates should give reasons for their opinion that the offence might properly be tried summarily.

The question as to the stage at which the Magistrate's decision should be taken did not arise probably because, in the case which formed the basis of the submission to the Full Bench, it had been taken at a very early stage, that is to say, when the Magistrate had partly heard the evidence of the complainant.

In the same year, however Layard, C.J. sitting alone, held in *Punchirala vs Don Cornelis* ‡, that it was too late for the Magistrate to change his mind after he had taken the evidence of the complainant in full but he stated that it might be different " if he had recalled the complainant after he had made up his mind to try the case as District Judge."

This case together with *Queen vs Uduman* (*supra*), is authority for the view that the assumption of the jurisdiction should also take place at an early stage. I would mention, however, that in the present case as the

* 4 N.L.R. 1 † 7 N.L.R. 182 ‡ 8 N.L.R. 58

1940

Nihill, J.

Mediwaka (Inspector of Police) *vs* Gunasekere

accused appeared before the Magistrate on summons, it was not imperative, in view of amendment to section 149 (now section 151) effected by section 5 of Ordinance No. 13 of 1938, that he should take the evidence of the complainant or some material witness or witnesses before issue of the summons.

Under section 149 of the Code as before amendment the Magistrate would have had to have heard evidence forthwith before issuing his warrant as the report had disclosed a non-summary offence. Now, under the Code as amended, the Magistrate has a discretion in such cases either to issue a warrant in which case he must examine the complainant or some material witness or witnesses on oath, or to issue a summons. If he decides on the latter course it is again in his discretion whether he shall or shall not forthwith take evidence on oath. The question, I think, arises whether this amendment in procedure has not to some extent altered the position as it stood when Bonser, C.J. and Layard, C.J. gave the judgments I have cited. It seems to me that the view expressed in these judgments amounts to this: that the Magistrate must make up his mind very early, in fact, before the real enquiry in the presence of the accused begins. Once the enquiry is under-weigh it should not be turned into a trial.

Now in cases such as the one we are considering, I think, it can reasonably be urged that the Magistrate must take some evidence after the accused has answered the summons before he can be in a position to exercise his discretion. If that be so, it is doubtless difficult to draw a line and to say thus far and no further. Nevertheless, I consider it important that the principle should be maintained that proceedings which have continued for some time on one basis cannot in fairness to the accused be suddenly turned into proceedings of a different nature.

It must be remembered that the assumption of a Judge's power by a Magistrate is not one that the accused can resist. In that sense it differs from what might be termed the converse procedure provided for in section 166. Under that section the Magistrate assumes no additional jurisdiction, he remains a Magistrate and tries a non-summary case summarily because, having regard to the character and antecedents of the accused, the nature of the offence and all the circumstances of the case, he thinks it expedient to do so. In sub-section (3) of that section it is expressly provided that he may make up his mind to try the case summarily during the hearing of the case and after he has become satisfied by the evidence that it is a proper one for the application of the section. But the accused cannot possibly be prejudiced because the Magistrate cannot move without his consent.

In section 152 the Magistrate can so move and it is important therefore that Magistrates should not apply the section in a way under which even an appearance of prejudice to an accused person may be manifested. I do

not consider, therefore, that the amendments to Chapter XV introduced in 1938 warrants any substantial change in the view hitherto held with regard to section 152. A Magistrate must address his mind to the matter at the outset of the inquiry and quickly form his opinion thereon, because that is the only way in which an appearance of prejudice can be avoided. It will not do for him to meander through the evidence as an enquiry Magistrate until at a late stage it is driven into his consciousness that it is a case which he might have tried himself from the start.

In the present instance, nearly four months elapsed between the appearance to the summons and the assumption of the jurisdiction and by that time the bulk of the evidence for the prosecution had been recorded, and when he did exercise his power he gave no reasons.

I have no hesitation, therefore, under all these circumstances, in holding that on this occasion he exercised his discretion improperly.

Now there remains the question whether this irregularity is curable under section 425. If prejudice has in fact been caused to the accused, then clearly it is not. On the face of it such prejudice may be difficult to detect. The accused who was represented made no objection at the time and he has been convicted only of those offences which the Magistrate could have tried summarily as a Magistrate and he has not received sentence greater than the Magistrate as a Magistrate could have imposed.

It has been urged for the appellant, however, that a Magistrate when conducting a preliminary investigation has a character different from that of a trial Judge and my attention was drawn to section 392 (2). I must confess I find it difficult myself to reconcile the provisions of that section with the amendments introduced by Ordinance No. 13 of 1938. How a Magistrate can conveniently " conduct the prosecution " and at the same time address himself judicially to the question as to whether the case warrants committal is not easy to see. The position was of course formerly quite otherwise as committal then lay only on the instructions of the Attorney-General. Whilst I do not believe for a moment that this provision of the law did in fact affect the Magistrate's attitude of judicial impartiality I cannot overlook that it is open for the appellant to say that up till the 30th of May, the Magistrate was, to put it at its lowest, acting as a quasi-prosecutor. After that date the evidence-in-chief of the prosecution witnesses was not taken afresh, so we are left with the position that the evidence upon which the Magistrate ultimately convicted as a trial Judge was evidence which had been extracted from the witnesses by his diligence as an enquiring Magistrate. That being so I cannot overlook the possibility of prejudice having caused and I decline, therefore, in this instance, to invoke the aid of section 425.

1940

Nihill, J.

Mediwaka (Inspector of Police) *vs* Gunasekere

The case must go back for rehearing before another Magistrate. If the charges are confined to those counts which can be tried summarily the Magistrate can of course dispose of the matter himself.

With regard to the other accused who was acquitted, my order will not affect him. He was acquitted, for reasons which would have been equally good as against his committal for trial and it would not be fair that he should be placed in jeopardy again.

Set aside and sent back.

Proctors :

E. P. Wijetunge, for accused-appellent. (Gunasekere)

Present: WIJEYEWARDENE, J.

PERKINS (Inspector of Police) vs SRI RAJAH

S. C. No. 898—*M. C. Badulla No.* 1577.

Argued on 11th March, 1940.

Decided on 20th March, 1940.

Local Government Ordinance (Chapter 195)—*By-law made under section* 168 (8)—*Permit issued under by-law to preach in streets—Can permit be arbitrarily revoked by the Chairman—Validity of by-law doubted—Fatal defect in charge read out to accused.*

The accused was charged with having addressed a crowd within the limits of the U.D.C. of Badulla without a valid permit from the Chairman. It transpired in the course of the evidence that the accused had obtained a permit from the Chairman, U.D.C. under a by-law made under sections 164 & 168 (8) *d* of the Local Government Ordinance (Chapter 195) and that the Chairman had revoked it subsequently on representations made to him by the Police. The by-law in question is fully set out in the judgment. No power is taken therein for imposing any conditions in the permit issued thereunder, nor is the Chairman empowered to revoke any permit once issued.

Held : (i) That the Chairman had no power to revoke the permit arbitrarily.

(ii) That the charge, which was read out from the summons, was bad in that it did not refer to the by-law under which the accused was charged and to the Gazette in which it was published.

Per WIJEYEWARDENE, J,—" The accused was not represented at the hearing of the appeal and I did not have, therefore, the advantage of hearing counsel on the question whether the by-law referred to is *ultra vires*. Section 164 of the Local Government Ordinance No. 11 of 1920 empowers a District Council, subject to the approval of the Local Government, to make only such by-laws as may appear to the council necessary for the purpose of the exercise of its powers and duties under the Ordinance. Now the particular by-law discussed in this case is purported to have been made under section 168 (8) of the Ordinance which sets out the purpose as follows :

> ' The regulation of processions and assemblages and of the performance of music in thoroughfares,'

It is, to say the least open to serious doubt whether the framing of this particular by-law could be justified under section 168 (8) of the Ordinance."

Cases referred to: *Inspector, Sanitary Board, Waddduwa vs Podinona* (28 N.L.R. 415)
Cassell vs Jones (1913-108 Law Times 806)

No appearance for accused-appellant.

R. R. Crossette-Thambiah, Crown Counsel, for complainant-respondent.

WIJEYEWARDENE, J.

The accused-appellant has been convicted of the offence of preaching to an assembly within the limits of the Urban District Council, Badulla without a valid permit from the Chairman, Urban District Council, and sentenced to pay a fine of Rs. 20/– and in default undergo simple imprisonment for three weeks.

On a written report made by an Inspector of Police under section 148 (*b*) of the Criminal Procedure Code, the Magistrate ordered summons to issue on the accused. When the accused appeared in court on receiving the summons the Magistrate read the charge to him from the summons, and the accused pleaded not guilty.

The summons sets out the charge as follows :

> " You did on the 1st day of August 1939 at.....preach or address an assembly or crowd within the limits of the Urban District Council, Badulla without a valid permit from the Chairman, Urban District Council and you thereby committed an offence punishable under section 164, 168 (8) (*d*) of the Penal Code."

Now section 164 of the Penal Code refers to a fraudulant or malicious infraction of duty by a public servant employed in the Government Telegraph Department and section 168 of the Penal Code refers to the offence of personating a public servant. There is no section in the Penal Code numbered as 168 (8) (*d*). Mr. Crossette-Thambiah who appeared for the complainant showed me a by-law published in the Government Gazette 7973 of March 24, 1933 which enacts that :

> " No person shall preach or address any assembly or crowd or hold any meeting on any thoroughfare within the limits of the Badulla Urban District Council area, except in pursuance of a permit from the Chairman of the Urban District Council and within the times and limits specified on such permit. Any person who shall commit a breach of this by-law shall be guilty of an offence and shall be liable on conviction to a fine not exceeding Rs. 50/–."

This by-law is purported to have been made by the U.D.C. in the exercise of its powers under sections 164, 168 (8) (*d*) of the Local Government Ordinance No. 11 of 1920. The reference in the summons to the Penal Code is clearly a mistake for the Local Government Ordinance No. 11 of 1920 due to carelessness on the part of an officer of the Magistrates' Court. Moreover the summons was defective as it did not refer to the particular by-law and the Gazette in which it was published. These defects in the summons

1940

Wijeyewardene, J.

Perkins (Inspector of Police) *vs* Sri Rajah

show serious carelessness on the part of some responsible officer and it is somewhat disconcerting to find that the learned Magistrate did not detect them when according to the record he explained the charge to the accused from the summons. The conviction of the accused cannot be sustained in view of these defects.

The facts of the case are briefly as follows : The Chairman issued a permit P2 of May 24, 1939 granting the accused permission to " preach in the streets between the hours of 6 a.m. to 6 p.m. in the town of Badulla, for a period of 24-5-39 to 23-11-39." The permit stated that it was liable to be revoked

1. when the meeting was attended by any obstruction to traffic or pedestrians.

2. when the preaching caused annoyance to the public.

3. if the holder failed to produce the permit when requested to do so by any Police Officer.

On July 22, 1939 the Chairman addressed a letter to the accused and sent it by registered post to the accused informing him that the permit was cancelled and requested him to return it to the Office. This letter was, in fact, delivered by the postal authorities to the keeper of a boutique where the accused took his meals often. The boutique keeper handed the letter to one Perera who says he gave the letter to the accused on 1st or 2nd August. Both the boutique keeper and Perera are witnesses for the prosecution. On August 1, 1939 the Assistant Superintendent of Police, Uva, found the accused preaching at 8-30 a.m. on a public road. The Assistant Superintendent of Police says that he was aware at the time that the accused's permit had been cancelled by the Chairman of the Urban District Council. He went to the accused and got the permit from the accused. He adds " When the accused took this permit out he also handed to me with it an envelope containing a letter from the Chairman, Urban District Council addressed to him. P 3 dated 22-7-39 is a copy of the letter that was in the envelope handed to me by the accused. The letter came out from the accused's pocket accidentally. I read it and handed it back to the accused immediately. I made a note of the number of the letter and the date....."

The Police Officer appears to deserve commendation for efficiency for observing the letter which came out by accident from the accused's pocket and for having thought it useful to read the letter and note its date and number in spite of the fact that he was then aware that the permit had been cancelled by the Chairman and he had no reason to believe that there would be any question as to the letter having reached the accused without delay. The learned Magistrate accepts " unhesitatingly " the evidence of the Assistant Superintendent of Police on this point and states that he has not the " slightest doubt " in holding that the Chairman's letter must have reached the accused before August 1, in spite of some difficulty created by the evidence of two other witnesses for the prosecution, the boutique keeper

and Perera. I add that the accused appears to have charged the Superintendent in M.C. Badulla No. 1514 with assault, wrongful restraint and wrongful confinement in respect of certain acts alleged to have been committed by him at the time of the arrest. The Magistrate acquitted the Assistant Superintendent of Police on August 21, 1939.

There is a conflict of evidence with regard to the reasons for the cancellation of the permit. The evidence of the Assistant Superintendent of Police on this point is:

> "I wrote to the Chairman on 22-7-39 asking him to withdraw the permit issued to the accused as I found that the accused had published a pamphlet inciting communal feelings and he was also distributing similar pamphlets. I did not hear what the accused preached. I thought the accused was a dangerous man to be allowed to preach."

The Chairman Urban District Council states in his evidence:

> "On 22-7-39 on representations made to me by the A.S.P. Uva I wrote to the accused a letter.....informing him that the street preaching licence issued to him is cancelled. I thought that if I could issue the permit I could also withdraw it. I thought the object of the by-law was to control preaching. I went through the file of the accused and found that he was on the black list of the D.I.G. of Police. The accused had refused to give the permit to the Police and I was satisfied with it. When I withdrew the permit I did not look into the by-law specially."

The Chairman whose attention was drawn to the permit and the by-law in the course of his cross-examination appears to justify the revocation of the permit on the ground that the accused had committed a breach of condition (3) appearing on the permit requiring the production of the permit when requested to do so by a Police Officer. Besides the Chairman the prosecution has called seven witnesses including two members of the Police Force. But none of these witnesses have stated that the accused at any time committed a breach of condition (3) given in the permit. In one part of his evidence the Chairman seems to suggest that the "cancellation" was induced by some discovery which he made in the "Black List of the Deputy I.G. of Police." In the absence of any evidence as to the character and contents of this Black List to which the Chairman makes a cryptic reference I am unable to understand the exact nature of the reason which the Chairman suggests as one of the possible reasons.

I wish to add, moreover, that if it became necessary for me for the purpose of this appeal to consider the soundness of the reasons given by the Assistant Superintendent of Police for the action taken by him in asking the Chairman to revoke the permit, I would have had no material before me on which I could have reached a decision as to the adequacy of the reasons given by him. The A.S.P. has merely stated that in his opinion the pamphlet issued by the accused incited communal feelings. A court cannot be expected to surrender its judgment to a Police Officer and hold

1940

Wijeyewardene, J.

Perkins (Inspector of Police) *vs* Sri Rajah

that the tendency of the pamphlet was to incites " communal feeling " and the person publishing the pamphlet was therefore a " dangerous man " merely because the Police Officer states so in his evidence.

I am not satisfied on the evidence that the accused has committed a breach of the conditions subject to which the permit was issued to him. Nor do I think that the Chairman of the Urban District Council could arbitrarily revoke the permit. The authority cited by the learned Magistrate, *Inspector, Sanitary Board, Wadduwa vs Podinona* (28 N.L.R. 415), deals with building regulations and has no application in the present case.

The accused was not represented at the hearing of the appeal and I did not have therefore the advantage of hearing counsel on the question whether the by-law referred to is *ultra vires*. Section 164 of the Local Government Ordinance No. 11 of 1920 empowers a District Council subject to the approval of the Local Government Board to make only such by-laws as may appear to the council necessary for the purpose of the exercise of its powers and duties under the Ordinance. Now the particular by-law discussed in this case is purported to have been made under section 168 (8) of the Ordinance which sets out the purpose as follows :

> " The regulation of processions and assemblages and of the performance of music in thoroughfares."

It is, to say the least, open to serious doubt whether the framing of this particular by-law could be justified under section 168 (8) of the Ordinance. On the other hand section 166 of the Ordinance declares that by-laws purporting to be made under the Ordinance shall when published in the Government Gazette become as legal, valid and effectual as if they had been enacted in the Ordinance and the modern tendency of the courts has been not to scrutinise too strictly the by-laws made by a public body on the ground of unreasonableness but to support them if possible by a benevolent interpretation unless it is quite clear that the public body has exceeded its powers, and credit those who are to administer them with an intention to do so in a reasonable manner. *Cassell vs Jones* (1913-108 Law Times 806). I do not think it however desirable that I should express a definite opinion on the validity of the particular by-law as the matter was not argued before me.

I allow the appeal and acquit the accused.

Appeal allowed.

Present: HOWARD, C.J. (President), KEUNEMAN, J. & NIHILL, J.

REX vs DE SILVA

IN THE COURT OF CRIMINAL APPEAL

Appeal No. 1 of 1940.

S. C. No. 5—M. C. Kalutara 44026—2nd Western Circuit, 1940.

Argued on 3rd and 4th June, 1940.

Decided on 12th June, 1940.

Court of Criminal Appeal—Principles which should guide the court—Misdirection—Duty of trial judge to explain to the jury the principle to be followed by them in dealing with circumstantial evidence.

The appellant was found guilty of the charge of murder by a unanimous verdict of the jury and sentenced to death on May 1, 1940, at the criminal sessions of the Supreme Court held at Kalutara, presided over by Wijeyewardene, J.

The following are the grounds of appeal:

1. As a matter of law there was no case to go to the jury.

2. In dealing with a possible theory involving the guilt of the accused the learned judge addressed these words to the jury: "I cannot refer to anything that he may have said to the Police because the law prevents any reference being made to that." It is submitted that this is a misdirection in that the words used by the judge, having regard to the context in which they are used, suggest or tend to suggest to the jury that the accused had made a confession to the Police.

3. In the course of his charge the learned judge said: "the murderer, whoever he may be, or others acting with the murderer, had stabbed the woman, laid out her body, placed it on a mat and pillow in a decent manner, covered it with a cloth, arranged her hands, placed flowers, placed a candle, locked the door and gone.....was it the accused, or was it anyone else who did all this?" It is submitted that this was a misdirection in that it identifies the person who locked the door with the person who stabbed the woman. Having regard to the fact that it was the accused who unlocked the door for the Police to enter, it is submitted that this misdirection was calculated to cause grave prejudice to the accused.

4. In dealing with the admittedly abnormal behaviour of the accused in general, the judge directed the jury to consider whether such behaviour would be sufficient to bring the accused within the exception created by section 77 of the Penal Code, but failed to direct the attention of the jury to the bearing of such abnormality on the question of inferences to be drawn, with reference to the alleged guilt of the accused, from the conduct of the accused in relation to the incidents of the day in question. Referring to the possibility of the accused having dressed and laid out the body of the deceased, the learned judge directed the jury to consider whether the master of a house, finding his servant stabbed, would act in that way, without immediately informing the Police, implying thereby that the jury had to consider whether a man would normally act in that way, if the deceased had been killed by someone else. It is submitted that the failure to draw the attention of the jury to the fact that the accused was abnormal in his general behaviour is a non-direction amounting in the circumstances to a misdirection.

5. In the absence of proof that the blood found on exhibits P2 and P3 was human blood, or a tittle of evidence indicating it to be such, the judge was wrong in directing the jury to regard it as an item of real evidence, which may be taken into account by them.

1940

Howard, C.J

Rex
vs
de Silva

Counsel for the appellant also invited the court to give consideration to an alternative ground not mentioned in the notice of appeal, namely that the learned judge omitted to explain to the jury the main principles to be followed in appreciating circumstantial evidence, and in particular to point out to them that before they could convict, they must be satisfied that the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.

Held : (i) That grounds 3, 4 and 5 cannot be regarded as involving questions of law.

(ii) That it does not necessarily follow that the phraseology of the judge set out in ground 2 suggested to the minds of the jury a confession by the appellant.

(iii) That ground 3 does not bear the construction placed upon it by the appellant.

(iv) That although the judge when referring to the laying out of the body did not particularly refer to the abnormality of the appellant, there was no misdirection because a large part of the summing up is devoted to a consideration as to whether the appellant was of sound mind.

(v) That although the judge had not informed the jury that there was no evidence that the blood was human blood, the appellant was not prejudiced because the jury were warned that it might be any other kind of blood and the matter was left for them to decide.

(vi) That the judge had sufficiently indicated to the jury that there might be an innocent interpretation in regard to those circumstances that incriminated the appellant.

(vii) That where a strong *prima facie* case is made out against an accused on evidence which is sufficient to exclude the reasonable possibility of someone else having committed the crime without an explanation from the accused, the jury is justified in coming to the conclusion that he is guilty.

(viii) That generally speaking the Court of Criminal Appeal will refuse to give effect to grounds not stated in the notice, but when the appellant is without means to procure legal aid and has drawn his own notice, the court will not as a rule confine him to the grounds stated in his notice.

Per HOWARD, C.J. " The line of demarcation between questions of law and fact is a somewhat narrow one and it is advisable that the principles on which this court is to be guided in matters such as this should be clearly stated at the earliest opportunity after its establishment. Ordinance No. 23 of 1938 follows almost word for word the Imperial Criminal Appeal Act, 1907, and hence it is expedient that our procedure in Ceylon should model itself on the decisions and practice of the English Court of Criminal Appeal. In England leave to appeal is considered to be necessary unless the misdirection alleged is clearly misdirection as to the law. Where the misdirection consists of a wrong direction as to the law in general which obtains in the class of cases to which the particular case belongs, or as to the law which is applicable to the special facts of the case, the complaint clearly involves a question of law. A mistake of the judge as to fact, or an omission to refer to some point in favour of the accused is not, however, a wrong decision of a point of law, but merely comes within the very wide words " any other ground " in section 3 (*b*). In this connection I would refer to the judgment of Channell, J. in *Rex vs Cohen and Batemen* (2 Cr. App. Rep. 207)."

Cases referred to : *Rex vs Cohen and Batemen* (2 Cr. App. Rep. 207)
Rex vs Abraham George (1 Cr. App. Rep. 168)
Rex vs Lord Cochrane and Others (Gurney's Rep. 479)

H. V. Perera, K.C., with *M. T. de S. Amerasekere, K.C.*, *S. Alles* and *N. M. de Silva*, for the accused-appellant.

J. W. R. Ilangakoon, K.C., Attorney-General, with *E. H. T. Gunasekere, Crown Counsel*, for the Crown.

HOWARD, C.J.

Several points have arisen for consideration in the hearing of this appeal which is the first to be heard under the Court of Criminal Appeal Ordinance, No. 23 of 1938. In his notice of appeal the appellant relies on five grounds of appeal. The Attorney-General has taken the preliminary objection that the last four grounds three of which complain of misdirection and one of non-direction by the judge do not involve questions of law and hence cannot be considered by this court without the prior leave of the court or upon the Certificate of the Judge who tried the appellant granted under section 4 (*b*) of the Ordinance. The line of demarcation between questions of law and fact is a somewhat narrow one and it is advisable that the principles on which this court is to be guided in matters such as this should be clearly stated at the earliest opportunity after its establishment. Ordinance No. 23 of 1938 follows almost word for word the Imperial Criminal Appeal Act, 1907, and hence it is expedient that our procedure in Ceylon should model itself on the decisions and practice of the English Court of Criminal Appeal. In England leave to appeal is considered to be necessary unless the misdirection alleged is clearly misdirection as to the law. Where the misdirection consists of a wrong direction as to the law in general which obtains in the class of cases to which the particular case belongs, or as to the law which is applicable to the special facts of the case, the complaint clearly involves a question of law. A mistake of the judge as to fact, or an omission to refer to some point in favour of the accused is not, however, a wrong decision of a point of law, but merely comes within the very wide words " any other ground " in section 3 (*b*). In this connection I would refer to the judgment of Channell, J. in *Rex vs Cohen and Others* (2 Cr. App. Rep. 207). Applying the principles I have formulated we are of opinion that grounds 3, 4 and 5 cannot be regarded as involving questions of law. The suggestion in ground 5 that the learned Judge was wrong in directing the Jury to regard the finding of the blood as real evidence is a complaint with regard to a misdirection as to a fact. Ground 4 is an alleged omission to refer to some point in favour of the appellant. Ground 3 is an alleged mis-statement of the evidence. We are of opinion that ground 2 must be regarded as involving a question of law inasmuch as the phraseology employed by the Judge, if construed as contended for in the grounds of appeal, had the effect of bringing to the notice of the Jury the fact that the appellant had made a confession. Applying therefore the strict letter of the law, grounds 3, 4 and 5 were not properly before the court. In view, however, of the uncertainty with regard to what is a question involving a point of law we have decided in making our decision on the appeal to take these grounds into consideration.

We do not consider that ground 3 bears the construction placed upon it by counsel for the appellant. Read with the rest of the context it cannot be said that the learned Judge told the Jury that one person must have done all of these acts. He is putting before the Jury various hypotheses.

1940

Howard, C.J.

Rex
vs
de Silva

The words that follow the passage of which complaint is made indicate that the person who locked the door, that is to say the appellant, may not have been the murderer.

Ground 4 raises a matter of small importance. It is true that with regard to the laying out of the body the learned Judge did not particularly refer to the abnormality of the appellant. On the other hand a large part of the summing up is devoted as to a consideration to whether he was of sound mind. It cannot be contended, therefore, that such abnormality would not be present in the minds of the Jury when they were considering this and every aspect of the case.

With regard to ground 5 it might have been better if the learned Judge had informed the Jury that there was no evidence that the blood was human blood. On the other hand they were warned that it might be any other kind of blood and the matter was left for them to decide. We do not consider the appellant was prejudiced by this passage.

The point made with regard to ground 2 is that the reference to the statement made by the appellant to the police would inevitably lead the Jury to think that the appellant had made a confession. The policeman to whom the statement had been made by his omission to relate in his evidence what the appellant said to him might with equal force be said to have brought to the notice of the Jury that the appellant had made a confession. Moreover, Jurymen are not so well versed in legal procedure as to infer from the words used by the learned Judge that a confession had been made. Jurymen know that the law formulates various rules with regard to the admission of evidence. They are not, however, fully acquainted with such rules and in these circumstances it does not follow that the phraseology of the Judge suggested to their minds a confession.

To sum up we are of opinion for the reasons I have stated that there is no real substance in grounds 2, 3, 4 and 5.

The main case for the appellant was based on the ground that as a matter of law there was no case to go to the Jury. In connection with this ground Mr. Perera asked us to give consideration to an alternative ground not mentioned in the notice of appeal, namely that the learned Judge omitted to explain to the Jury the main principles to be followed in appreciating circumstantial evidence and in particular to point out to them that before they could convict, they must be satisfied that the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt. This alternative ground of appeal is intimately connected with ground 1 and in these circumstances we have given it consideration although it is not raised in the notice of appeal. Generally speaking this court will refuse to give effect to grounds not stated in the notice, but when the appellant is without means to procure legal aid and has drawn his own notice, the court will not as a rule confine him to the grounds stated in his notice.

Counsel for the appellant contends that although no submission was made by counsel for the accused at the close of the case for the prosecution, the Judge should at this stage have directed the Jury to return a verdict of "Not Guilty." It was argued that section 234 (1) of the Criminal Procedure Code imposes this duty on the Judge if he considers that there is no evidence to go to the Jury that the accused committed the offence. The English law is somewhat different. In *Rex vs Abraham George* (1 Cr. App. Rep. 168) it was held that at the close of the case for the prosecution a Judge is not in law, bound to withdraw the case from the Jury if the point is not submitted to him. If prisoner elects to go on, the court will look at the case as a whole. It is therefore material at this stage to consider whether there was any evidence that the appellant committed the offence. In this connection the following facts have been established. The deceased was a young girl introduced into his house by the appellant ostensibly as a cook. There was at that time another girl called Pody Nona who also lived in the house and assisted in the cooking. About three weeks before the death of the deceased, the girl Pody Nona left the appellant's house. There was evidence that the appellant regarded the deceased from another aspect than that of a servant. The witness Bastian Senanayake has testified that the appellant informed him that the deceased had bolted because he held her breasts. There is evidence that the appellant was jealous of the attentions that he thought the deceased was receiving from other men. It was established that at the time when the deceased met with her death she was living alone with the appellant in the latter's house. She was last seen alive by Charles, the carter, at the appellant's house at 7 a.m. on the morning of the 23rd June, the day before the murder. On this occasion the appellant told Charles apparently in the presence of the deceased that the latter was a woman of bad character and asked her to leave the house. He also asked Charles to advise the deceased and Charles told her to live well according to the instructions of her master. Charles on that day took the accused to Alutgama in his cart and brought him back to his home about 5-30 p.m. He did not see the deceased on his return. On the following day about 6-30 p.m. Charles was driving his cart about 1/4 mile from the appellant's house when he met the appellant. The latter got into the cart and was driven to Alutgama Police Station. During the drive the appellant made no mention to Charles of the death of the deceased. At the Police Station the appellant made a statement in consequence of which Sub-Inspector Ratnarajah went with the appellant to his house. The appellant opened the door with a key which he had in his pocket. All the doors and windows were closed. In a room the Inspector saw the body of the deceased covered with a cloth laid on a met with the head resting on a pillow. She was dressed in a white jacket and a white cloth which were soaked with blood. Her hands were placed on her chest clasped together with a bunch of orchids placed in her hand. A candle fixed in a bottle was burning at the time. A knife covered with blood stains and identified as having previously been in the possession

1940

Howard, C.J.

Rex
vs
de Silva

of the appellant was on the pillow. The deceased's hair was cropped short. The appellant told the Inspector that the hair cut from the woman's head would be in the shed. The Inspector went to the shed and found the hair there. The appellant also took from the bed some clothes — exhibits P2 and P3 — which were identified by the dhoby as belonging to the appellant. These clothes had blood stains on them. It was not however established that it was human blood. The Inspector then took the appellant to the Police Station searched him and found a diary in one of his pockets. Inside the diary was a Galle Gymkhana Club Sweep ticket the *nom-de-plume* being " Lily " one of the names of the deceased. The diary also contained certain entries. The handwriting that made these entries was not proved to be that of the appellant. In these circumstances we are of opinion that such entries cannot be taken into consideration.

Mr. Perera maintains that there was no case to go to the Jury inasmuch as there was no evidence of previously expressed intention or preparation or motive and such evidence as there was only indicated opportunity and did not exclude opportunity by other persons. He also contended that there were no circumstances incriminating the appellant. The circumstances in which the appellant found himself were not incompatible with his innocence. Though there was suspicion, that suspicion did not amount to proof. We have given careful consideration to the submission of Mr. Perera and have come to the conclusion that the Judge was right in not withdrawing the case from the Jury. It seems to us that the following facts incriminate the appellant and definitely associate him with the crime. The deceased was living alone in the house with the appellant and was last seen alive in his house at 7 a.m. on the previous day. The appellant left the house after locking the door and taking the key with him about 6-15 p.m. on the 24th June, 1939, which, according to the medical evidence, was about the time that the deceased might have met with her death. The appellant omitted to tell Charles the driver of the cart anything about the death of the deceased although on the day before he had made complaints to Charles about her conduct and asked the latter to give her advise as to her behaviour. The position in which the body of the deceased was found and its surroundings indicated the improbability of its having been so arranged by an intruder or stranger to the house. The hair of the deceased had been cropped and the appellant had pointed out to the police where it would be found. The Sweepstake ticket in the diary indicated that the appellant did not regard the deceased in the light of a servant only and in this respect reinforces the evidence of Charles and Bastian. The interest thus evinced by the appellant in the deceased indicates that he was actuated by feelings of jealousy which supply a possible motive for the crime. We are of opinion that in view of the evidence to which I have referred the learned Judge would not have been justified in withdrawing the case from the Jury. In considering whether the Jury were entitled to convict on such evidence, it must also be borne in mind that the appellant gave no evidence and offered no explanation of

the various parts of the evidence that incriminated him. On the assumption that he was innocent of this crime he alone was in a position to tell the Jury the circumstances in which he found the body of the deceased. He could moreover, have offered his explanation of the body being found lying in his house draped in white, with the hands clasped and holding orchids, a candle burning in a bottle and his blood stained knife on the pillow. He could also have explained how he knew that the hair of the deceased was in the shed. In this connection I would refer to the following dictum of Lord Ellenborough in the case of *Rex vs Lord Cochrane and Others* (Gurney's Rep. 479).

> "No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him ; but, nevertheless, if he refuses to do so where a strong *prima facie* case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."

This dictum applies in the present case. A strong *prima facie* case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime. Without an explanation from the appellant the Jury were justified in coming to the conclusion that he was guilty.

I now come to the final point made by Mr. Perera, namely, that the learned Judge in his charge to the Jury has omitted to explain the main principles to be followed in appreciating circumstantial evidence. It is true that, when the Judge deals with the evidence generally he has not explained fully those principles. On the other hand the charge has to be considered as a whole. If it is found that the Jury have been warned in judging each circumstance that incriminates the appellant to look for an innocent as well as a guilty explanation, the charge cannot be said to be unfair or prejudicial to the defence. Perusal of the charge indicates that the passages with regard to the arrangement of the body, the lighting of the candle, the closing of the door and the supplying of information to the police without a word to anyone invite the Jury to find an innocent as well as a guilty explanation of such circumstances. The charge, so it seems to us, recognised that there might be an innocent interpretation in regard to those circumstances that incriminated the appellant. Even if the charge failed to explain as it should have done the principle to be followed by the Jury in dealing with circumstantial evidence we are of opinion that on a right direction the Jury would have come to the same conclusion.

The appeal is therefore dismissed.

Appeal dismissed.

Present: HOWARD, C.J. & SOERTSZ, J.

WIJESINGHE HAMINE & ANOTHER vs EKANAYAKE & OTHERS

Application for Conditional Leave to Appeal to Privy Council.

S. C. No. 4—D. C. Matara 11374.

Argued on 16th February, 1940.

Decided on 22nd February, 1940.

Privy Council Appeal—Rule 2 in the Schedule to the Appeals (Privy Council) Ordinance sections 5 and 5A of the Appellate Procedure (Privy Council) Order, 1921—Scope of the expression " opposite party " in rule 2.

The applicants are the defendants-appellants in D. C. Matara Case No. 11374. The plaintiffs are husband and wife. The applicants sent the notice of the application for leave to appeal required by rule 2 to the 1st plaintiff by express post within the time prescribed in the rule. In the same envelope the notice to the 2nd plaintiff was also enclosed. The 1st plaintiff was not the agent of the 2nd plaintiff.

Held : That the service by post on the 1st plaintiff satisfied the requirements of rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance.

(ii) That the despatch to the 1st plaintiff of the notice meant for the 2nd plaintiff was not sufficient compliance with rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance.

(iii) That the words " opposite party " in rule 2 of the rules in the Schedule to the Appeals (Privy Council) Ordinance must imply all the parties in whose favour the judgment appealed was given.

N. K. Choksy, with *Miss Mehta* and *M. Ratnam*, for the petitioners (defendants-appellants).

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, and *C. J. Ranatunga*, for the respondents (plaintiffs).

HOWARD, C.J.

This is an application by the defendants for conditional leave to appeal to Privy Council against a judgment of the Supreme Court dated 28th November, 1939. Under rule 2 in the Schedule to the Appeals (Privy Council) Ordinance the applicant, for leave to appeal, shall within 14 days from the date of judgment give the opposite party notice of the intended application. Sections 5 and 5A of the Appellate Procedure (Privy Council) Order 1921 made under section 4 of the Ordinance makes provision for the service of notices. Section 5 provides that a party who is required to serve any notice may himself serve it or cause it to be served, or may apply by motion in court before a single Judge for an order that it may be issued by and served through the court. Section 5A provides that if after reasonable exertion it is found that service can be duly effected upon a party personally or upon his proctor empowered to accept service thereof, it shall be competent for the court which may consist of a single Judge on being satisfied by evidence adduced before it that reasonable exertion to effect service has been made and that service cannot be effected, to prescribe any

other mode of service. In this case the defendants did not choose to effect service through the court. On 11th December 1939, the last but one for effecting service, according to an affidavit made by the 2nd defendant a notice was posted by express delivery to the 1st plaintiff addressed to her, C/o Hayes Jayasundera, Light House Street, Galle, her son-in-law, where according to such affidavit the 1st plaintiff was alleged at the time to be staying although it was not her permanent address. The notice contained an intimation of the defendants' intention to appeal to the Privy Council against the said judgment of the Supreme Court. The 2nd defendant in her affidavit also states that in the same envelope she enclosed a copy of the said notice addressed to the 2nd plaintiff as the husband of the 1st plaintiff as well as two copies of the petition filed in the application for conditional leave to appeal that is to say one copy for each of the plaintiffs.

It was contended by counsel for the plaintiffs that service in the manner described in the affidavit of the 2nd defendant was not in accordance with the rules to which I have referred. That service of the notice had not been properly made in the case of either of the plaintiffs and with regard to the 2nd plaintiff not even an attempt at service had been made. The question as to whether the mode of service adopted in the case of the 2nd plaintiff is an adequate compliance with the rules must be considered in the light of two decisions which have been cited in this case. In *Fradd vs Fernando* (36 N.L.R. 132)* the interpretation of rules 5 and 5A read in conjunction with rule 2 in the Schedule to the Ordinance was considered by a Supreme Court Bench constituted by Macdonell, C.J. and Dalton, J. The court held that service upon a " party personally " meant the party who is to be made a respondent him or herself and that it does not include an attorney under a power of attorney. In an election petition, *Piyadasa vs Hewavitarne* (40 N.L.R. 421)† it was held that service on a person not duly appointed as the agent of the respondent did not constitute service of notice on the respondent. Applying these two cases and giving the phraseology employed in rules 5 and 5A its ordinary meaning I think it is clear that adequate service of the notice on the 2nd plaintiff has not been effected.

The question as to whether the mode of service adopted in the case of the 1st plaintiff is adequate is not so easy to answer. The cases of *Fradd vs Fernando* and *Piyadasa vs Hewavitarne* were decided on the ground that the service had been effected not on the party himself, but on a different person alleged to be the agent of such party. Neither case dealt with what actual steps were necessary when an attempt was made to serve the party himself. There is no doubt in this case that a letter containing the notice addressed to the party at an address where she was known to be staying was an attempt to serve such party. That party has not adopted the course of denying by affidavit as she might have done, that she received the letter or that she was staying at that address. But are the requirements of the law with regard to service thus satisfied? The case of *Gooneratne vs Bank of Chettinad* (16 C.L.R. 13) would seem to indicate that they are not. In that case it was

* 2 C.L.W. 452 † 6 C.L.W. 139 (Edd.)

1940

Howard, C.J.

Wijesinghe Hamine & Another *vs* Ekanayaka & Others

alleged by affidavit that the proctor for the respondent posted by registered post to an insolvent under the Insolvency Ordinance a letter, a copy of which was filed with the affidavit and that a reply had been received from another proctor referring to this letter which had been addressed to the appellant and sending a cheque for Rs. 100/– on account and that the cheque had been returned. The court held that this did not amount to personal service and referred to a dictum of Parke, B. in the English Case of *Goggs vs Huntintower* (12 M. & W. 503) in which the latter said as follows :

> " In consequence of those decisions the Judges have come to the conclusion that, in future, there shall be no equivalent for personal service."

Accepting this dictum Mr. Justice Akbar held that personal service means an actual service on the person affected, by a duly constituted agent who hands the document into the hands of the person so affected. If this is the law, it is obvious that the service in this case effected on the 1st plaintiff falls short of what is required. In the case of *Joseph vs Sockalingam Chetty* (32 N.L.R. 59) which was not referred to in the report of *Gooneratne vs Bank of Chettinad*, a different view of the law was taken by the Supreme Court. That case like the present one was before the court with reference to the adequacy of service of a notice on an application for leave to appeal to Privy Council under rule 2 of Schedule I, Appeals (Privy Council) Ordinance. There was proof that a letter containing a notice had been handed into the post office for transmission. Also, as in this case there was no denial of its receipt by the respondent. The court constituted by Garvin, A.C.J. and Jayawardene, J. held that in those circumstances they are entitled to presume that a letter which they were satisfied was properly directed and is proved to have been handed to the postal authorities for transmission reached its destination in due course and that it was received by the person to whom it was addressed. They, therefore, held that there had been a sufficient compliance with the requirements of rule 2 of the Ordinance. I find it a matter of some difficulty to distinguish the facts of *Joseph vs Sockalingam Chetty* from those of the present case and being an authority on the rules governing leave to appeal to Privy Council. I am of opinion that it must be followed. In these circumstances service on the 1st plaintiff was good.

This finding with regard to service of the notice on the 1st plaintiff does not dispose of the case. The judgment of the Supreme Court from which leave to appeal is requested was in favour of both plaintiffs. The notice served or attempted to be served was addressed to both plaintiffs. Rule 2 of the Schedule to the Ordinance provides that the applicant should within 14 days from the date of such judgment give the " opposite party " notice of such intended application. Inasmuch as only the 1st plaintiff has been given notice it is obvious that compliance has not been made with the provisions of the rule. Counsel for the applicant has contended that as the 2nd plaintiff has not executed the deed he is not a necessary party to the appeal. I do not consider there is any substance in this contention. "Opposite party" must imply all the parties in whose favour the judgment appealed against was given. In this connection I would refer to the judgment of the Full Bench in *Ibrahim vs Beebee et al* (19 N.L.R. 189) and *Supramaniam Chettiar vs Senanayake and Others* (16 C.L.W. 41). In the latter case de Kretser, J. held that even when parties against whom no relief is claimed are made respondents to an appeal notice of security should be given to them. For these reasons, I am of opinion that notice has not been served on the opposite party. The application must, therefore, be dismissed with costs.

Soertsz, J.

I agree.

Application dismissed.

Present: KEUNEMAN, J.

REX vs NUGAWELA

S. C. Nos. 797–798/1939—*M. C. Dandagamuwa No.* 5700.
Argued on 22nd, 23rd and 24th May, 1940.
Decided on 29th May, 1940.

Evidence Ordinance section 114 *illustration* (*b*) *and sections* 133 *and* 157—*Accomplice's evidence—Can one accomplice corroborate another.*

Held : (i) That one accomplice cannot be corroborated by another accomplice.

(ii) That, although under section 133 of the Evidence Ordinance a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, it is necessary, that the Magistrate should have clearly before his mind the fact, that he is dealing with the evidence of an accomplice, and he must give clear and satisfactory reasons for convicting in the absence of corroboration.

(iii) That a person who offers a bribe to a public officer is an accomplice.

(iv) That persons, who have co-operated in the payment of a bribe, or taken some part in the negotiation for its payment, cannot be regarded as independent witnesses whose evidence is free from taint.

Per KEUNEMAN, J.—" Where, accordingly, the law regards the evidence of one witness sufficient in itself to establish guilt, the evidence of that witness may be tested as to its consistency and credibility by proof of complaints made to the same effect by the witness earlier. But in the case of an accomplice the rule of practice requires something more than the mere testing of his story. In the language of Lord Reading in *Rex vs Baskerville* (1916–2 K.B.D. 658 ; 115 L.T. 453), there ' must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.' There is ample authority that previous statements made by accomplices do not constitute the ' independent testimony ' which is needed — *vide* the judgment of Lord Hewart, C.J. in *Rex vs Whitehead* (1929–1 K.B.D. 99 ; 139 L.T. 640). ' Corroboration must proceed from something extraneous to the witness who is to be corroborated.' He adds that otherwise the accomplice would only have to repeat his story 25 times to get twenty five corroborations. *Vide* also *Iyer vs Hendrick Appu* (34 N.L.R. 330) and *Dole vs Romanis Appu* (40 N.L.R. 449)."

Cases referred to : *Rex vs Lowell* (139 L.T. 638)
Rex vs Baskerville (1916–2 K.B. D. 658 ; 115 L.T. 453)
Rex vs Whitehead (1929–1 K.B.D. 99 ; 139 L.T. 640)
Iyer vs Hendrick Appu (34 N.L.R. 330)
Dole vs Romanis Appu (40 N.L.R. 449)

No. 797

H. V. Perera, K.C., with *G. G. Ponnambalam* and *Cyril E. S. Perera*, for accused-appellant.

J. W. R. Ilangakoon, K.C., Attorney-General, with *Nihal Gunasekera, Crown Counsel*, for complainant-respondent.

1940

Keuneman, J.

Rex
vs
Nugawela

No. 798

J. W. R. Ilangakoon, K.C., Attorney-General, with *Nihal Gunasekera, Crown Counsel,* for complainant-appellant.

H. V. Perera, K.C., with *G. G. Ponnambalam* and *Cyril E. S. Perera,* for accused-respondent.

KEUNEMAN, J.

The accused-appellant, who is the Ratemahatmaya of Katugampola Hatpattu, was charged under three counts with obtaining gratifications other than legal remuneration as a motive or reward for doing official acts, namely:

(1) a gratification of Rs. 5/- obtained from K. Peter Fernando on the 6th January, 1939, for appointing him as a Kangany to supervise the relief works at Talgammana Wewa.

(2) a gratification of Rs. 17/- obtained from S. H. M. Appuhamy (Jnr.) on the 30th January, 1939, for appointing him as a Kangany of the relief works at Dandagamuwa Tank; and

(3) a gratification of Rs. 5/- obtained from M. J. M. Kiri Mudiyanse, Vel Vidane of Welpalla, on the 10th February, 1939, for appointing him as Kangany of the relief works Mankade Oya.

All these offences were punishable under section 158 of the Penal Code.

The learned Magistrate acquitted the accused in respect of counts (1) and (2), and convicted him under count (3). In appeal No. 797, the accused appealed from this conviction, and in appeal No. 798, the Attorney-General appeals against the acquittal so far as it relates to count (1). I shall deal with appeal No. 797 first.

The accused is admittedly a public servant, and was only interdicted from duty on the 12th May, 1939, after the material dates in this case. It was established in evidence that it was a part of his official duties to appoint kanganies and overseers under the scheme for the administration of relief which came into force in December, 1938.

The story of the prosecution as regards the third count is given by Kiri Mudiyanse himself and by the witness Deonis Fernando. Both these witnesses were Vel Vidanes. Shortly stated, the story amounts to this. Kiri Mudiyanse and Deonis say that they received information about the appointment of kanganies and overseers from the Korale of Hundirapola, who informed them that payments had to be made in order to obtain these posts. The scale of charges was variously given by the two witnesses; according to Kiri Mudiyanse Rs. 10/- and Rs. 15/- was to be paid to obtain the post of kangany and overseers respectively, while Deonis gives different figures. Both these witnesses were dissatisfied with the amounts demanded, and met later and decided to pay Rs. 5/- each direct to the accused, in order to obtain the jobs. In pursuance of this object, the two witnesses went together to the accused's *walauwe* on the 10th February, 1939, in the morning but the accused had left or was about to leave on official business. They, therefore, waited till the accused returned in the evening, and then went up to him

as he was seated in the verandah. Kiri Mudiyanse handed to the accused Rs. 5/– placed on betel leaves. Deonis also handed him money on betel leaves. Deonis says that he intended to give Rs. 5/– in one-rupee notes, but by mistake only Rs. 4/– was actually given and one note remained in his pocket. The accused asked them to give their names to the clerk Perera, and told them they would be appointed kanganies when the new lists came out.

The conviction has been attaked on a number of points.

The first point is that a mass of inadmissible evidence has been led in the case, which had the effect of prejudicing the Magistrate. This evidence falls into two classes.

(*a*) evidence of offences other than those with which the accused was charged, and

(*b*) evidence of statements and complaints made against the accused by persons not called as witnesses.

As regards (*a*) it was argued that the evidence given by Deonis that he also gave a bribe on the same occasion was inadmissible. Similarly, there was evidence given relating to the first and second counts by witnesses who state that on each of these occasions they also offered bribes The evidence on the third count is typical of the kind of evidence led as regards the first and second counts. On each of these occasions, a number of persons met together with the intention of offering bribes to the accused. They acquainted each other of their intentions, and went in a body to the accused's house, and there, one after another offered sums of money placed on betel leaves to the accused, who accepted them. The acts of each set of witnesses were inextricably mixed together and, if the witnesses other than the ones named in the charge had remained silent about their offers of bribes, an imperfect and probably unreal picture of the events of that day would have been given. The Attorney-General argued that these other offers of bribes were really a part of the *res gestae*, and this evidence may well be so regarded. At the least it may offer an explanation of the presence of these witnesses on the occasion in question, and the part that each witness actually played on that day. In any event, I do not think there had been any serious prejudice to the accused by the admission of this evidence, and certainly the evidence elicited strongly fortifies one of the arguments of counsel for the defence which will be dealt with later.

As regards (*b*), it is clear, and not denied, that evidence which should have been excluded has been admitted into the case. A fairly serious instance is the letter P9. This is a letter dated the 18th March 1939, written by the witness Subasinghe to the Minister for Labour, in which he states that representations had been made to him by responsible people that the accused, his clerk Perera and the Korale of Pitigal Korale have received various sums of money from various people to obtain the posts of overseers and kanganies under the relief scheme works. The letter continues: "I made

1940

Keuneman J.

Rex
vs
Nugawela

very careful inquiries which have satisfied me as to the truth of these allegations."

The Attorney-General has pointed out that no objection was taken to this document by the accused's counsel, and that in fact the existence and some of the contents of this document had been elicited by accused's counsel in cross-examination of the prosecution witness Illankoon, before the document was produced. This is correct, but, whatever the circumstances, I am of opinion that this document should never have been admitted, and that its admission may have had a prejudicial influence on the decision of the Magistrate. In fact, I have come to the opinion that the evidence of Subasinghe, the private investigator into these matters, was unnecessary, where it was not irrelevant. I shall deal later with P7 and P22, statements of Kiri Mudiyanse and Deonis, recorded by Subasinghe. At the most, Subasinghe's evidence may have been called merely to show that he had not instigated a false charge against the accused as alleged by the defence. As far as the prosecution was concerned, it was sufficient to get a bare denial of these allegations. In fact, however, in his examination-in-chief, Subasinghe was allowed to speak not only to the statements made to him by Kiri Mudiyanse and Deonis, but also to say " I also had several similar complaints against the accused.....I recorded a number of statements regarding general allegations of bribery." This evidence was objected to by accused's counsel, but was admitted on the ground that the accused had already put his good character in issue. I hold that this ruling was wrong. This is not evidence of bad character under section 54 of the Evidence Ordinance. It is not evidence of "general reputation" or of "general disposition" within the meaning of the illustration. It is evidence of individual complaints, and it is not shown that any of these complaints resulted in a conviction. The admission of this evidence was capable of creating prejudice in the mind of the Magistrate.

There is also much other irrelevant matter introduced into the case, but there the whole or the bulk of this evidence has been introduced in the cross-examination by the defence counsel.

That a certain degree of prejudice may have been imported into the case is, I think, possible, for, when the Magistrate deals with the defence witnesses, one cannot fail to detect a note of over-emphasis. To give a single example, the witness Pabilis admitted that the Adigar, accused's father, spoke to him in court about the case, and that later he went to the Adigar's house, because he thought the Adigar may be angry because he was among the witnesses for the prosecution. The Magistrate thought that this showed not only that the witness had been interfered with, but that he had been suborned. I need only say that as regards the latter finding, the Magistrate has held as a fact what at the most may have been a matter of surmise.

The most serious objection taken by the accused's counsel is that the Magistrate has not kept in mind the fact that both Kiri Mudiyanse and

Deonis were accomplices. There is clear evidence that in this matter the two men were acting in concert, and that the intention to offer bribes was entertained by them voluntarily, and not as the result of pressure exercised by the accused or, indeed, by anyone else. I think that, if their evidence is examined, it is difficult to resist the conclusion that they abetted the offence committed by the accused. They should have been treated as accomplices. The Magistrate has undoubtedly failed to take this fact into consideration.

Counsel further argued that there was no corroboration of the evidence of these accomplices. I think this contention is right. The only other evidence led on the third charge was that of the alleged statement made by the two witnesses to Subasinghe and to Mr. Ernst, the Government Agent. The statements made to Subasinghe were P7 by Kiri Mudiyanse, and P22 by Deonis, and were recorded on the 9th March 1939. Subasinghe says that complaints were made to him by these two persons a few days earlier. It is necessary to have a clear conception as to the value of these two statements. In the language of Lord Hewart, C.J. in *Rex vs Lowell* (139 L.T. 638) such complaints are " not evidence of the facts complained of," but are merely " matters which may be taken into account.....in considering the consistency and therefore the credibility of the story." Where, accordingly, the law regards the evidence of one witness sufficient in itself to establish guilt, the evidence of that witness may be tested as to its consistency and credibility by proof of complaints made to the same effect by the witness earlier. But in the case of an accomplice the rule of practice requires something more than the mere testing of his story. In the language of Lord Reading in *Rex vs Baskerville* (1916–2 K.B.D. 658 ; 115 L.T. 453), there " must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it." There is ample authority that previous statements made by accomplices do not constitute the "independent testimony " which is needed — *vide* the judgment of Lord Hewart, C.J. in *Rex vs Whitehead* (1929–1 K.B.D. 99 ; 139 L.T. 640). "Corroboration must proceed from something extraneous to the witness who is to be corroborated." He adds that otherwise the accomplice would only have to repeat his story 25 times to get twenty five corroborations. *Vide* also *Iyer vs Hendrick Appu* (34 N.L.R. 330) and *Dole vs Romanis Appu* (40 N.L.R. 449).

Further, in this case, the statements P7 and P22 and the previous statements made to Subasinghe cannot in any event be used " to corroborate the testimony " of Kiri Mudiyanse and Deonis under section 157 of the Evidence Ordinance. (In passing, I may note that these words, "*to corroborate the testimony*," appear to bring out the distinction mentioned in Lowell's Case). The offence alleged was committed on the 10th February, 1939. No statement or complaint was made till early in March. At that time Kiri

1940

Keuneman, J.

Rex
vs
Nugawela

Mudiyanse was disappointed because he had not been appointed kangany, and Deonis because he had been discontinued after a short period of service. It is clear that complaints were not made " at or about the time when the fact took place," and accordingly these statements should not have been admitted even to test the consistency and credibility of the evidence given by the witnesses.

The reasons I have already mentioned apply with equal force to the statements P10 and P11, recorded by the Government Agent on the 27th March, 1939. I hold that they should not have been admitted.

It is also clear law that one accomplice cannot corroborate another accomplice. Deonis' evidence, therefore, cannot be regarded as supplimenting that of Kiri Mudiyanse.

Under section 133 of the Evidence Ordinance, a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice. But, it is necessary that the Magistrate should have clearly before his mind the fact that he is dealing with the evidence of an accomplice and he must give clear and satisfactory reasons for convicting in the absence of corroboration. The Appeal Court can then assess the cogency of his reasoning. In this case the Magistrate has clearly not appreciated the fact that both Kiri Mudiyanse and Deonis were accomplices.

I am of opinion that the judgment of the Magistrate cannot be supported. I set aside the conviction and acquit the accused on the third charge. This disposes of Appeal No. 797.

In appeal No. 798 the Attorney-General appeals against the acquittal by the Magistrate of the accused on the first charge. The evidence in relation to that charge was given by Peter Fernando himself and by Bandappuhamy and Sunderahamy. All these witnesses say that on the 6th January, 1939 they went to the accused's house accompanied by the Headman of Dahanagedera and in the society of several other applicants for the posts of kangany and overseer. The Headman introduced the parties to the accused and one after another they offered to the accused betel with money placed on it, for the purpose of securing the posts they desired. These amounts were accepted by the accused.

The Magistrate considered this evidence and pointed out certain contradictions in the stories. Some of these contradictions are not without a degree of importance. The Magistrate stated: " I may not ordinarily have considered them sufficiently material to create a reasonable doubt in my mind regarding the payment, but in this case, in view of the serious consequences which must result from a conviction I, feel that the proof must be more cogent than in other cases. That is to say, it must leave no room for any doubt whatever." This is a misdirection, for in this case, as in all criminal cases, the Magistrate should have given the accused the benefit of any reasonable doubt, and should not have taken into account any doubts which he did not consider reasonable,

But, on the other hand in connection with this charge the Magistrate has failed to consider whether Bandappuhamy and Sunderahamy were accomplices. Clearly Peter Fernando was an abettor, and therefore an accomplice. The evidence shows that each of these persons including Peter Fernando independently conceived the intention of offering a bribe to the accused in order to secure employment as kangany of the Relief Works. They arrived at this intention voluntarily and without any compulsion. At the instance of the Headman of Dahanagedera they all assembled at the Headman's house on the 6th January 1939. Here all these men informed each other of the object of their coming, namely, to offer bribes to the accused. They all set out for the accused's house some in a cart, some on bicycles. Those who went ahead on bicycles waited at a boutique till the rest of the party in the cart arrived. The whole party was then conducted to the house of the accused by the Headman and on arrival one after another offered the bribe placed on betel leaves to the accused. I think it is clear that at any rate from the time they arrived at the Headman's house and consulted together they were all acting in concert and co-operating with each other in the giving of the bribes. It is not necessary to consider whether they were abettors of the offence. I think there is evidence that each was an accomplice of the others. "A person who offers a bribe to a public officer is an accomplice.....Persons merely present when money is given to a bribe-taker are not accomplices, but the case is different if they have co-operated in the payment of the bribe, or taken some part in the negotiations for its payment. In the latter case they cannot be regarded as independent witnesses and their evidence is tainted." Vide Ameer Ail on The Law of Evidence (9th Edition, p.953). I hold in this case that Bandappuhamy and Sunderahamy should have been treated as accomplices, as well as Peter Fernando. Their evidence does not supply corroboration to the story of Peter Fernando.

There is no other independent evidence which gives the necessary corroboration.

I think in view of this fact that it would be very dangerous to upset the acquittal of the accused on this first count. He is entitled to obtain the benefit of the presumption that these witnesses are unworthy of credit.

Appeal No. 798 is dismissed.

Appeal of the accused allowed.
Appeal of the complainant dismissed.

Proctors :

O. M. P. Perera, for accused-appellant. (Nugawela)

Present: KEUNEMAN, J. & NIHILL, J.

ARUMUGAM PILLAI & OTHERS vs LEWIS & ANOTHER

S. C. No. 20

Application for Revision or Restitutio in Integrum in D. C. Jaffna No. 42

Argued on 7th June, 1940.

Decided on 12th June, 1940.

Revision—Application for revision by a person who was entitled to become party to proceedings but failed to do so—Powers of the Supreme Court.

Held : That the Supreme Court will ordinarily not exercise its powers of revision after a considerable lapse of time in favour of a person who was entitled to become a party to a proceeding but failed to avail himself of that opportunity to safeguard his interests.

Cases referred to : *Perera vs Simeon Appuhamy* (2 Times of Ceylon L.R. 119)
Velupillai vs Ponnambalam (2 Times of Ceylon L.R. 136)
Appuhamy vs Weeratunga (23 N.L.R. 467)
Samynathan vs The Registrar-General (37 N.L.R. 289)

N. K. Choksy with *Miss A. Mehta*, for petitioner.
H. V. Perera, K.C., with *N. Nadarajah*, for 1st-respondent.
E. B. Wickramanayake, for 2nd-respondent.

KEUNEMAN, J.

This is an application by a creditor of the Kandy Branch of the Travancore National and Quilon Bank. The 1st respondent is the official liquidator of the Bank appointed by the District Court of Jaffna. The 2nd respondent is the official liquidator appointed by the District Courts of Colombo, Kandy and Galle.

The application is made in respect of the order of the District Judge of Jaffna dated the 19th December, 1938. A preliminary objection has been taken to this application under the following circumstances.

The Jaffna liquidator, on the 17th November, 1938, moved that the rateable distribution of 60 per centum of the deposit in the hands of the Jaffna Court be paid to certain persons, namely, the creditors of the Jaffna Branch. Thereupon on the 18th November, 1938, the court ordered a notice to be published in several Ceylon and Indian Newspapers that a distribution would be made, unless cause was shown to the contrary by any person or persons interested, on or before the 12th December, 1938. Notice was duly given. On the date mentioned, the present petitioner did not appear or file proxy. But the liquidators in Madras appeared and showed cause. They were supported by the liquidator in Travancore. The liquidator in

Colombo, Kandy and Galle, (the present 2nd respondent), was not represented in court on that occasion, but he had previously filed a proxy in the Jaffna Court. After argument, the Judge reserved order, and later delivered his order on the 19th December, 1938. Thereafter, the Madras liquidators appealed to this court, making the liquidators in Jaffna, Travancore, Colombo, Kandy and Galle, respondents. The liquidator in Colombo, Kandy and Galle, the present 2nd respondent, also moved this court to revise the order of the 19th December, 1938. The appeal and the application for revision came up before this court on the 26th October, 1939. On that day, by consent, the appeal was dismissed without costs, and the application was withdrawn and dismissed without costs, without liberty to make a fresh application. The present petitioner made his application to this court on the 8th January, 1940.

The 1st objection taken by counsel for the 1st respondent is that the present petitioner was no party to the proceedings, and has no status to make the application. *Perera vs Simeon Appuhamy* (2 Times of Ceylon L.R. 119) and *Velupillai vs Ponnambalam* (2 Times of Ceylon L.R. 136) were cited in this connection. As against these cases, counsel for the petitioner cited *Appuhamy vs Weeratunga* (23 N.L.R. 467). This last case, however, is not on all fours with the present case. There, in a partition action, by a clerical error, the decree was so drawn up as to include the petitioner's land. The petitioner was not interested in the partition action at all, and had no right to intervene until the error in the decree came into being, and all he asked for was that the decree should be brought into conformity with the judgment.

In the present case, the petitioner was interested in the question of the distribution of the deposit. As a creditor of the Bank, he was entitled even at an earlier stage to become a party to the proceedings in the Jaffna Court. He did not even avail himself of the opportunity of appearing and showing cause on the 12th December, 1938, and up to the date he has not appeared before the Jaffna Court.

Further, the present petitioner has delayed to make this application till the 8th of January, 1940, more than a year after the Judge made his order. No explanation of this delay appears in the petitioner's affidavit. Counsel suggests on his behalf that he was awaiting the result of the appeal and the application in revision, which were pending before this court. I think this is not a satisfactory excuse. There is no explanation of the further delay of about two-and-a-half months after the appeal, and the application for revision were dismissed.

Counsel for the petitioner contends that the order of the District Judge results in an injustice to him. In this connection I have to remember that the liquidators in Madras did not persist in their appeal, and that the liquidator in Colombo, Kandy and Galle withdrew his application for revision

1940

Keuneman, J.

Arumugam Pillai & Others *vs* Lewis & Another

without liberty to renew his application. This latter liquidator particularly may well be regarded as having the interests of the petitioner among others in his mind, and he decided not to go on with his application for revision. It is not suggested that there was anything improper in the withdrawal of the appeal or of the application for revision.

There is no doubt that the powers of this court to act in revision are very wide, but we must bear in mind the fact that " a proceeding in revision is invoking an extraordinary remedy, which the court is required to exercise with great care, otherwise there would be no end to litigation once commenced " — per Dalton, J. in *Samynathan vs The Registrar-General* (37 N.L.R. 289).

I do not think it would be fair to allow the petitioner, who has preferred to let others bear the brunt of the opposition, to apply in revision now, when the efforts of these others have failed, and a considerable period of time has elapsed. It is intolerable that this matter should be allowed to drag on so long.

The application for revision or *restitutio in integrum* is dismissed with costs to be paid by the petitioner to the 1st respondent.

NIHILL, J.

I agree.

Application refused.

Proctors:

George R. Motha, for petitioner.

M. E. Wickramasinghe, for respondent.

Present: KEUNEMAN, J. & NIHILL, J.

REX vs WIJESEKERE

S. C. No. 7 of 1940—*D. C. Colombo (Crim.) No.* 87.

Argued on 11th and 12th June, 1940.

Decided on 20th June, 1940.

Penal Code section 190—*Evidence Ordinance sections* 80 *and* 91—*Civil Procedure Code section* 169—*Nature of evidence necessary for sustaining a charge of intentionally giving false evidence in a judicial proceeding.*

Held : (i) That the taking down of evidence in a civil proceeding by a shorthand writer under the direction of the Judge does not constitute sufficient compliance with section 169 of the Civil Procedure Code.

(ii) That the record of the evidence given by a witness made by a shorthand writer in shorthand under the direction of the District Judge cannot be used against that witness in a prosecution for intentionally giving false evidence in a judicial proceeding.

Cases referred to : *Emperor vs Nabab Ali Sarkar* (A.I.R. 1924 Calcutta 705)
Nath Sinha Roy & Others vs Harishee Bagdhi (A.I.R. 1929 Calcutta 79)
Riel vs The Queen (10 Appeal Cases (1884–1885) 675))

H. V. Perera, K.C., with *Cyril E. S. Perera, P. H. K. Goonetilleke, Dodwell Goonewardene* and *T. D. L. Aponsu*, for accused-appellant.

Nihal Gunasekere, for Crown-respondent.

NIHILL, J.

The appellant who is an Inspector of Police, was convicted in the District Court of Colombo for intentionally giving false evidence in a judicial proceeding contrary to section 190 of the Penal Code. The alleged false statement which formed the basis of the indictment was given by the appellant in evidence in a matrimonial suit brought by him against his wife for divorce on the grounds of malicious desertion. His petition for divorce was heard *ex parte* and in the course of his evidence he is recorded as having said that "about 1937 she (his wife) left me altogether." His evidence was taken down at the time by a shorthand writer who subsequently transcribed it into English.

At the trial the prosecution called evidence which clearly demonstrated that the statement taken in its ordinary meaning was not true. Indeed it was proved that up to the time of the hearing of the petition the parties had been living together, outwardly at least, as man and wife ; that on the very morning of the hearing he had driven her in a car to a hair dresser in the Colombo Fort and that he had re-joined her in a restaurant when the hearing was over.

1940

Nihill, J.

Rex
vs
Wijesekere

The appellant in his defence denied that he used the words complained of, but agreed that he might have said that " about 1937 she left me in September." He explained that on the 10th of September, 1937, when he was in Kandy he received a letter (not produced) from his wife who was then in Moratuwa indicating that she wished to return to her parents in England and that it was useless for them to continue to live together under false pretences. In November his wife did return to his house but they occupied separate rooms and thereafter there was never any true consortium.

The appellant, it appears as a keen Police Officer, is a student of law and he stated that he had formed the idea in his mind that he was entitled to a divorce on account of the constructive desertion of his wife, so that when he used the word " left " in his evidence he used it in the sense of constructive desertion and not with the intention to convey the false idea of physical desertion.

His proctor who was called by the prosecution to some extent bore out this contention but it becomes difficult to attach much importance to it when one looks at the plaint filed in the matrimonial suit and at the document P1 which contains the appellant's evidence given at the hearing of the petition.

In the plaint not a word was said about constructive desertion and the parties were given different addresses nor in his evidence in the matrimonial suit did the appellant give any indication that he was attaching some special legal meaning to the ordinary meaning of common English words.

I feel constrained to say that did this appeal rest on questions of fact alone I would have no hesitation in dismissing it and affirming the conviction.

A point of law, however, of some difficulty does arise on this appeal which merits close consideration. It is contended for the accused that his conviction cannot stand because there was at his trial no legal proof that the accused did in fact state what he was charged with stating.

What happened at the trial was this : The assistant recordkeeper of the Colombo District Court put in the record of the matrimonial suit, P1, and the shorthand writer who had taken down the accused's evidence spoke to having done so. He had no independent recollection of what the accused had said and no other evidence was called so that the prosecution in order to prove the statement, relied on the record and on the presumptions set out in section 80 of the Evidence Ordinance.

The question that arises is, was this statement of the accused " taken in accordance with law " so that the presumptions can apply ? The matter is governed by section 169 of the Civil Procedure Code which runs as follows : " The evidence of each witness shall be taken down in writing in the English language by the Judge not ordinarily in the form of question and answer but in that of a narrative."

On the face of it there was no compliance with section 169. The evidence of the accused was not taken down in the English language by the Judge but by someone else who by the use of certain symbols was able to

record what he heard on to paper so that later he could transcribe those symbols into the English language. Later again this transcript was signed by the Judge. The learned District Judge before whom this point was also argued, felt able to hold that there had been a sufficient compliance with the section.

I should be happy if I could reach the same conclusion but I confess I find great difficulty in doing so. The introduction into our courts of the shorthand writer has been a considerable aid to the speedy and efficient administration of justice. Given skill and integrity on the part of the shorthand writer this method of recording evidence has obvious advantages and I should regret if any judgment of mine should retard its development.

Nevertheless our duty is to look at the law as it is and in the interpretation of a statute we cannot add to the ordinary meaning of words something which is not there.

No local case was cited to us which is directly in point but we have been given extensive references to Indian and English cases. The corresponding rule in Indian Civil Procedure is Order XVIII Rules 5, 8 and 14, but this Order is more flexible than section 169 since it allows evidence to be taken down in writing " in the language of the court by or in the presence and under the personal direction and superintendence of the Judge "—but if not taken down by the Judge himself, Rule 8 requires the Judge to make a memorandum of the substance of what each witness deposes.

If our section 169 was in similar terms some of the difficulties in the present case would disappear although there would still remain the question whether a taking down in shorthand was a taking down in the language of the court. Gour, in paragraph 2059 of the 1936 edition of his Penal Law of British India in discussing proof of perjury, writes as follows : " The deposition if reduced to writing must have been taken in accordance with law. That is to say, it must comply with the requirements of the law under which it was taken. If, for instance, it was taken under the Code of Civil Procedure it must comply with the provision of that Code relating to the reading over and signing of it by the Judge, in the absence of which there can be no prosecution for perjury."

It may be also noted that under the Indian Civil Procedure Code a number of safeguards are provided to ensure the accuracy of the record. For instance, it must be taken under the personal direction and superintendence of the Judge and where the Judge does not himself take down the evidence he has to make a memorandum of the substance of what each witness deposes. Further, the record has to be read over in the presence of the Judge and the witness, and if necessary corrected. Under the Ceylon Civil Procedure Code the only safeguard is the taking down by the Judge, and where the record has to be proved in a charge of perjury special emphasis must, therefore, be placed on that requirement of the law.

A study of the Indian cases fully bears out the principle stated above. Thus in *Emperor vs Nabab Ali Sarkar* * two Judges held that where the

* A.I.R. 1924 Calcutta 705

1940

Nihill, J.

Rex
vs
Wijesekere

provisions of Order 18 Rule 5 had not been fully complied with, it was not permissible to prosecute the witness on his statement informally recorded. In that case the deposition had not been read over to the witness. In *Nath Sinha Roy & Others vs Harishee Bagdhi* * the evidence was not taken down by the Judge himself nor did he make a memorandum under Rule 8. He dictated the evidence to a typist. It was held by Page, J. that this was not sufficient compliance with Order XVIII but that it was a curable irregularity. It should be noted that in this case no question of a prosecution arose. The appellant there sought to set aside a decree on the grounds that no legal evidence had been taken. The matter was heard in revision and the court refused to treat the whole proceedings as a nullity on the grounds that it would not promote the ends of justice but would work hardship and injustice to the opposite parties.

I think the following passage from the judgment of Page, J. is worth quoting because it may have some application to the present case: "The fallacy, I think, that underlies the construction which the opposite parties urge upon the court is that the shorthand writer or the typist who takes down the evidence at the dictation of the Judge is not a mere instrument like the pen or the typing machine, that needs must re-act to the touch of the Judge, but a human being with a will and intelligence of his own and fallible as all men are."

With that I agree, and it is for this reason that I find it difficult to agree with the learned District Judge in this case who seems to have regarded the shorthand writer as the Judge's "*alter ego*." How can he be? The evidence in the matter before us was taken down in narrative form; that was the first intellectual process to which the shorthand writer had to address himself, he then had to write down the appropriate symbols and later transcribe those symbols into English words. There are three stages here in which error might occur, and at no stage in the process can the Judge have exercised any effective control.

Mr. Gunasekere, for the Crown-respondent, has cited to us an English case in which their Lords of the Privy Council as early as 1885 dealt with the question of the taking of evidence in shorthand. This is the case of *Riel vs The Queen.* † Not much help, however, can be got from this case because there the corresponding section in Canadian Procedure required the Magistrate to take or *cause to be taken* in writing full notes of the evidence, and their Lordships held that the taking of full notes of the evidence in shorthand was a *causing* to be taken in writing of full notes of the evidence and therefore a literal compliance with the statute.

I would say at once that on the authority of that decision I would be prepared to hold in the present instance that there had been compliance with section 169 if the Judge himself had taken down the evidence in shorthand. It is the absence of the words "cause to be taken" in section 169 which creates the difficulty.

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* A.I.R. 1929 Calcutta 79 † 10 Appeal Cases (1884–1885) 675

These words do occur in section 170. Mr. Gunasekere attempted to argue and did argue with skill that the words " cause to be taken " act as an expansion of section 169 and shows the intention of the draftsman who drafted sections 169–172. I wish I could agree but I cannot. The clear meaning of section 170 coming after section 169 is that for a particular purpose, that is, for the recording of a particular question and answer the Judge can stop his own taking down of evidence which will ordinarily be in narrative form and direct someone else to take the question and answer down. That is what the two sections say and I can read nothing further into them.

Again under section 172 where on objection the Judge refuses to allow a question to be put, on the request of the questioner, the burden is placed on the Judge himself to take down the question, the objection, and the decision of the court.

In my opinion, therefore, there has not been a compliance with section 169 and I would hold, therefore, that the evidence of the accused in the matrimonial suit was not taken in accordance with law. I would concede that section 169 is directory in the sense that an irregularity in its application would not necessarily vitiate the entire proceedings. It would not, in my view, in the present instance, have entitled the respondent to vacate the *decree nisi* on the grounds that no evidence had been tendered at all. But when it comes to the application of section 80 of the Evidence Ordinance I think the matter is different. That section lightens the burden of proof on the party producing the document but the document itself must be free from all taint, for then and then only can the party producing the document obtain the benefit of the presumptions.

Even apart from section 80, we are here dealing with the proof of the record. The law requires that the evidence should be taken down by the Judge. It is not possible to say here that, in any real sense, there was any taking down by the Judge. The record which should have supported the charge of perjury is not available and another record taken down by the shorthand writer is offered as proof. This cannot be allowed.

The application of section 91 of the Evidence Ordinance was also argued before us. For the accused it was urged that this section prevented the Crown from adding parol evidence in support of the document or giving any proof except the document itself containing the record of evidence.

Mr. Gunasekere on the other hand has contended that the section is not intended to cover records of evidence at all, that read with section 92 it seems that the section is contemplating only documents *inter partes* such as contracts, partnership agreements and wills. I found this argument attractive but it is against the trend of the Indian decision and it is difficult to reconcile it with words used in the section : " and in all cases in which any matter is required by law to be reduced to the form of a document."

However, for the purposes of this appeal, it is not necessary to decide this point for if the record of what the accused is alleged to have said is put

1940

Nihill, J.

Rex vs Wijesekere

aside as I consider it must be, the prosecution did not prove by parol evidence that the accused did make the statement set out in the indictment.

For the above reasons I have reached the conclusion, with reluctance, that there was no legal evidence before the District Judge on which he could have convicted, and accordingly the appeal should succeed and the accused be acquitted.

KEUNEMAN, J.

I agree.

Appeal allowed.

Present: KEUNEMAN, J. & NIHILL, J.

JOSEPH vs JOSEPH

Application for Restitutio in Integrum *in D. C. Jaffna No.* 138 (*Divorce*)

Argued & Decided on 11th June, 1940

Divorce—Separatio a mensa et thoro—*Civil Procedure Code section* 608— *Can a decree for separation be based entirely upon the consent of parties.*

Held : That it is clear from the terms of section 608 of the Civil Procedure Code that the court has no authority to enter a decree for separation *a mensa et thoro* based entirely upon the consent of parties.

N. Nadarajah with *N. Kumarasingham*, for the petitioner.

S. J. V. Chelvanayagam, for the respondent.

KEUNEMAN, J.

In this case the plaintiff brought an action against his wife, the defendant, asking for a separation *a mensa et thoro*. The matter came up for trial on the 14th of February, 1940. The plaintiff alleged, first, cruelty, and secondly malicious desertion on the part of the defendant, and issues were framed upon that footing. At the trial the plaintiff actually got into the witness-box to give evidence, but before he had given any evidence relating either to cruelty or to malicious desertion it is recorded that the case was settled and that the defendant consents to a decree for separation and for the return of certain articles in the schedule to the plaint. Thereupon the Judge proceeded to enter decree for the plaintiff accordingly.

The objection is taken here that the learned District Judge had no power to enter a decree entirely based upon the consent of parties. Our attention has been called to section 608 of the Civil Procedure Code which lays down that the court should enter decree on being satisfied on due trial of the truth of the statements made in the plaint, and that there is no legal ground why the application should not be granted. It is clear that there was no evidence whatsoever on which the court could have decided as to the truth of the statements made in the plaint. The court purported to act entirely upon the consent of parties. I think it is clear from the terms of

this section that the court had no authority to enter such a decree based entirely upon consent. If we examine the subsequent sections, 609 and 610, we see that a decree entered by court materially affects the wife's right with regard to property, with regard to contracts and with regard to the right to sue. This relates to a decree of separation entered by court under section 608. I think, accordingly, that the court should not enter such a decree.

The present application is for *restitutio in integrum* or in the alternative for revision. Counsel for the respondent argues that there was a right of appeal in this case. I am not at all satisfied that there was any such right of appeal. Even if it can be conceded that there might possibly be a right of appeal, I do not think it is any good ground for refusing the defendant the remedy which she claims. At the least it was extremely dubious as to whether there would be an appeal or not available.

Under the circumstances, I think we must allow the application and set aside the proceedings taken and the order made on the 14th of February, 1940, and any subsequent proceedings taken thereafter. The case will be sent back to the court for trial in due course. The petitioner is entitled to the costs of this application.

NIHILL, J.

I agree.

Application allowed.

Present: HOWARD, C.J.

HENDRICK & OTHERS vs SARANELIS & OTHERS

S. C. No. 202/39—*C. R. Gampaha No.* 8248.

Argued on 7th June, 1940.

Decided on 20th June, 1940.

Servitude—Right of cattle track acquired by prescription—Deviation by non-notarial agreement—Use of new track for eight years—Does the right acquired by prescription attach to the new track.

Held : That a right of way acquired by prescription does not attach to a new route effected by mutual agreement by deviation of the old route in the absence of a notarial deed or a user for ten years.

Cases referred to : *Don Dionis vs Saranhamy* (1 C.L.W. 85)
Madanayake vs Thimotheus (3 C.L.R. 8)
Karunaratne vs Gabriel Appuhamy et al (15 N.L.R. 257)
Kandaiah vs Seenitamby (17 N.L.R. 29)
Morgappa vs Casie Chetty (17 N.L.R. 31)
Costa vs Livera (16 N.L.R. 26)
Andris vs Manuel (2 S.C.D. 69)
Fernando vs Fernando (31 N.L.R. 126)
Dias vs Fernando (37 N.L.R. 305)

Dissented from : *Dias vs Fernando* (37 N.L.R. 305)

1940

Howard, C.J.

Hendrick & Others *vs* Saranelis & Others

H. V. Perera, K.C., with *J. R. Jayawardena*, for the plaintiffs-appellants.

Francis de Zoysa, K.C., with *L. A. Rajapakse*, for the defendants-respondents.

HOWARD, C.J.

This is an appeal from a judgment of the Commissioner of Requests, Gampaha dismissing the plaintiffs' action. In view of the attitude assumed by the defendants at the trial in denying that the plaintiffs had ever taken cattle over the land of the 1st defendant, the Commissioner made a further order that the defendants would be entitled to only half costs. The plaintiffs claimed by prescription a right of way over a cattle track 6 feet wide marked H.G.E.F. in plan No. 1063, X1, situated on the land of the defendants, and damages for obstruction of their right by the defendants. It was proved at the trial that the plaintiffs had acquired by prescription a right of way for their cattle over a track marked A.B.C.D.E.F. on the said plan and situated on the land of the defendants. It was admitted at the trial that eight years prior to the obstruction of which complaint is made by the plaintiffs, the plaintiffs and defendants by agreement substituted for the route A.B.C.D.E.F. the route H.G.E.F. The point, therefore, at issue between the parties was whether the right of way acquired by the plaintiffs over the land of the defendants attached to the new route effected by mutual agreement by deviation of the old route. The learned Commissioner in finding for the defendants, held that the plaintiffs had not merely to prove user of the cattle track but also that they used it adversely and that their use of the cattle track through the new gate at H was not adverse. In coming to the conclusion that the plaintiffs' user of the track was not adverse, the Commissioner was apparently influenced by the fact that they had been permitted this user during the life of Amaris, the father of the defendants. There was, however, no evidence of any formal agreement between the plaintiffs and Amaris with regard to the former's user of the cattle track. Assent by acquiescence does not prevent the period of prescription running. In this connection I would refer to *Don Dionis vs Saranhamy* (1 C.L.W. 85) The reasoning, therefore, on which the Commissioner found for the defendants is based on wrong premises.

The question as to whether the prescriptive rights of the plaintiffs with regard to the old route attached after the deviation to the new route has been argued before me by reference to Voet and a number of decisions of this court. It would be idle to pretend that I have not found considerable difficulty in reconciling those decisions. The passages in Voet on which reliance had been placed by the plaintiffs are to be found in Book VIII, Tit. III. Section 8. Those passages, however, as has been pointed out by Schneider, J. in *Madanayake vs Thimotheus* (3 C.L.R. 8) make it clear beyond any manner of doubt that the writer is speaking of only those servitudes which are created in a particular way, namely, where the right is granted in

general terms without mention of the route of which it is to be exercised. From the very terms of its creation the right is in theory exercisable over every part of the land. It is, therefore, necessary for principles to be laid down upon which the precise route should be determined. In indicating those principles Voet points out that the owner of the right having made his election is bound to the route selected by him and so far as he is concerned the rest of the land is free from the burden. This determination of the route will not prevent the owner of the land which is the servient tenement from altering the route, provided he allows another route which in no way prejudices the owner of the dominant tenement. These principles cannot be made applicable to a servitude of way acquired by user for the necessary period of prescription over a definite route. It is not a right which can be said to extend over the whole of the servient tenement. It is acquired without the consent of the owner of the servient tenement and by possession adversely to him. Support for the view taken by Schneider, J. in *Madanayake vs Thimotheus* is to be found in the judgment of Lascelles, C.J. in *Karunaratne vs Gabriel Appuhamy et al* (15 N.L.R. 257) where it is stated as follows :

> "In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined. How far the principles of the Roman-Dutch Law to which I have referred are applicable to a case where the right to pass over a defined track has been acquired by prescription is a question of some difficulty."

In *Kandaiah vs Seenitamby* (17 N.L.R. 29) it was held by de Sampayo, A.J. that the reasoning in Voet 8.3.8. was not applicable to a case where the very question is as to the existence of a right of servitude and where one is sought to be established by prescription, inasmuch as *ex natura rei* possession or user for purposes of prescription must be in respect of a particular part or track of the land. Reference was also made by the learned Judge to C.R. Mallakam, 16080 (S.C. Min. June 26th 1909) in which Wendt, J. laid down that "the evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere straying across an open land at any point which is at the moment most convenient." The same reasoning was followed by Ennis, J. in *Morgappa vs Casie Chetty* (17 N.L.R. 31). In this case the learned Judge stated that one track cannot be substituted for another without a notarially executed document or user of the new track for the full prescriptive period. He distinguished the case of *Costa vs Livera* (16 N.L.R. 26) because in that case the existence of a right of way was admitted. The same principle was also formulated by Wendt, J. in *Andris vs Manuel* (2 S.C.D. 69) and applied by Fisher, C.J. in *Fernando vs Fernando* (31 N.L.R. 126) in which the cases of *Madanayake vs Thimotheus*, *Karunaratne vs Appuhamy* and *Kandaiah vs Seenitamby* were cited with approval.

In view of this volume of authority it might be thought that the matter had been placed beyond the regions of doubt. In *Dias vs Fernando*

1940

Howard, C.J

Hendrick & Others *vs* Saranelis & Others

(37 N.L.R. 305) however, it was held by Koch, J. and Soertsz, A.J. that, where a person acquired a right of way over another's land and a deviation of the route was effected by a mutual agreement which was not notarially attested, the servitude attached to the new route. The decision of Koch, J. was based on the opinion of de Sampayo, J. in *Costa vs Livera* (16 N.L.R. 26). From the wording in the judgment of Soertsz, J. it will be observed that latter's acquiescence in the decision of the court was given with great reluctance. In fact the reasoning of Soertsz, J.'s judgment indicates that the decision should have been in favour of the defendant. It is, therefore, of importance to examine closely the grounds on which the judgment of Koch, J. are based. He states as follows :

> " If the views expressed by this court in *Karunaratne vs Gabriel Appuhamy*, *Fernando vs Fernando*, *Madanayake vs Thimotheus*, *Andris vs Manuel* and *Morgappa vs Casie Chetty*, are carefully examined, it will be found that the correctness of de Sampayo, J.'s opinion has never been questioned. His view is that the incorporeal right to use remained although the path along which it was used was changed. ' What is prescribed by long user he says, is not the ground over which the way lies but the incorporeal right of the servitude.' "

Scrutiny of the reports of the cases mentioned by Koch, J. indicates that *Costa vs Livera* is not referred to in *Karunaratne vs Appuhamy*, *Fernando vs Fernando*, *Madanayake vs Thimotheus* or *Andris vs Manuel*. It is, therefore, difficult to understand how the learned Judge could draw any deduction as to the soundness of the decision in *Costa vs Livera* from the fact that de Sampayo, J.'s opinion was not questioned. Incidentally the earlier cases of *Andris vs Manuel* and *Karunaratne vs Appuhamy* were not mentioned in *Costa vs Livera*. Hence it might with equal force be said that the opinions expressed by the Judges in these earlier cases were not questioned. The case of *Costa vs Livera* was mentioned and distinguished in *Morgappa vs Casie Chetty* because in the earlier case the existence of a right of way was admitted. In *Costa vs Livera* whilst the plaintiff's right to use the old route was contested it was admitted by the defendant that the plaintiff had the right to use the new route. A right of way was therefore admitted, and the question arose as to whether the plaintiff had abandoned the old route. The case was sent back for the re-trial of this question. It is difficult to understand how it can be regarded as an authority for the proposition accepted by Koch, J. in *Dias vs Fernando* and put forward by the plaintiff in this case. de Sampayo, J. does not even mention the case of *Costa vs Livera* in the case of *Kandaiah vs Seenitamby* which, so it seems to me, is authority for the contrary proposition. In the circumstances I am of opinion that *Dias vs Fernando* is in conflict with the numerous other authorities that I have cited. The right of a cattle track over the new route is based neither on 10 years user nor on a notarially executed agreement. The appeal therefore fails and must be dismissed with costs.

Appeal dismissed.

Present: KEUNEMAN, J. & NIHILL, J.

THEOBALD vs THE COMMISSIONER OF INCOME TAX

S. C. No. 157 *S*/1939—*D. C.* (*Inty.*) *Colombo Income Tax.*

Argued on 27th and 28th May, 1940.

Decided on 6th June, 1940.

Income Tax—Income Tax Ordinance section 9 *and* 10 (*c*)—*What is expenditure of a capital nature.*

The facts are fully set out in the case stated. Shortly they are as follows : The assessee F. C. Theobald was engaged in the manufacture of papain, in partnership with another. The partnership took on lease from the Crown and from private persons blocks of jungle lands and grew papaw trees on them. The leases were generally for a period of two to four years. No rent was as a rule paid for the use of the land. In return for its use the assessee carried out reafforestation in the case of Crown lands, and in the case of lands belonging to private persons he planted the land with some permanent plantation such as coconut.

For the purpose of converting the milk into papain for export, the firm used a special drying oven which had to be housed in sheds of zinc erected on each land. Sheds were also erected on each land for the housing of labourers.

On the expiration of a lease the drying sheds and labourers' lines were generally left behind as it was found to be uneconomical to remove them. Only in certain cases did the lessors pay compensation for the buildings left behind.

In the year of assessment under consideration the firm claimed a deduction under section 9 of the Income Tax Ordinance of a sum of Rs. 6,512/- as being expenses incurred in constructing drying sheds and labourers' lines. This claim was disallowed on the ground that it was not deductible as it was expenditure of a capital nature—section 10 (c) Income Tax Ordinance. The assessee appealed and both the Commissioner and the Board of Review dismissed his appeal. He thereupon applied that a case be stated for the opinion of the Supreme Court.

Held : That the expenses claimed were not deductible under section 9 of the Income Tax Ordinance as they were expenditure of a capital nature falling within the ambit of section 10 (c).

Cases referred to : *The Vallambrosa Rubber Co., Ltd. vs Farmer* (5 Tax Cases 529.)
Atherton vs The British Insulated and Helsby Cables, Ltd. (1926 H. L. A. C. 205 ; 10 Tax Cases 155.)
The Anglo-Persian Oil Co., Ltd. vs Dale (16 Tax Cases 253.)
Eastmans, Ltd. vs Shaw (14 Tax Cases 218.)
The Granite Supply Association Ltd. vs Kitton (5 Tax Cases 168.)
Smith vs The Westinghouse Brake Co. (2 Tax Cases 357.)
Hyam vs The Commissioners of Inland Revenue (14 Tax Cases 479).
Mallett vs The Staveley Coal and Iron Co., Ltd. (13 Tax Cases 772.)
John Smith & Son vs Moore (12 Tax Cases 266.)

1940

Kerneman, J.

Theobald
vs
The Commissioner of Income Tax

CASE STATED

UNDER THE PROVISIONS OF THE INCOME TAX ORDINANCE, 1932, (CHAPTER 188 OF THE LEGISLATIVE ENACTMENTS OF CEYLON), FOR THE OPINION OF THE HON'BLE THE SUPREME COURT OF THE ISLAND OF CEYLON UPON THE APPLICATION OF F. C. Theobald of "Charmaine," Schofield Place, Colpetty, Colombo. (Appellant.)

1. The appellant claimed to be entitled to deduct a sum of Rs. 3,256/– from his assessable income for the year of assessment 1938/1939 in the following circumstances: The appellant has been carrying on, for some years, the business of making papain from the papaw fruit, in partnership with another. The partnership take on lease from the Crown and from private parties various blocks of jungle lands and grow papaw trees on them for obtaining the milk for the making of papain, from the fruits of these trees.

2. The leases were stated to be generally of a period from *two or four years* during which time the lessees clear the land and carry out either reafforestation, in the case of Crown lands, or the planting of a permanent agricultural plantation, such as coconut, on private lands, *in lieu of rent*, as the lands are leased out free of rent, because of the permanent afforestation or plantation which the lessees have to effect whilst they carry out the planting of papaw trees and extract the papain therefrom in the course of their business. The papaw trees yield almost the whole *milk* that can be got from them in about two years and on the expiration of the leases the properties are handed back with the permanent plantation which has been established whilst the papain was being tapped from the papaw trees which have been grown.

3. For the purpose of converting the milk into papain for export, the firm used a special kind of drying oven. The ovens and the sheds in which they are housed, covered with zinc sheets all round, are set up on each block of land on which the growing of papaw trees is done. In addition to that, temporary cooly lines to house the labourers employed in the business, are also erected on those blocks of land. There are invariably a number of different blocks of such lands, in various places, on which the firm are carrying on their business operations.

4. On the expiration of a lease it is frequently found not worth while dismantling these structures and re-erecting them elsewhere *so they are generally left on the land when it is surrendered to the lessors who, sometimes, pays something as compensation for them and sometimes does not. So that on the opening of a new block, for planting trees and tapping of papain, fresh drying sheds and lines have to be erected, more often than not.*

5. In the year of assessment under consideration a sum of Rs. 6,512/– was claimed by the firm as having been incurred by it in erecting such drying sheds and lines, of which Rs. 4,270/– was spent on the erection of papain drying sheds and Rs. 2,242/– on cooly lines. The assessor disallowed the claim as *not being expenditure incurred for producing the income, or as being expenditure of a capital nature, or as a loss of capital,* none of which are allowed to be deducted under *section* 10 of the Ordinance. In respect of the individual assessment for tax under the Ordinance the appellant claimed a deduction of Rs. 3,256/– *being a half share of the total expenditure of* Rs. 6,512/– under the two heads of erection of drying sheds and of cooly lines. As a result of the claim by the appellant, and its disallowance, the amount of the tax in dispute, upon the assessment on the appellant, in respect of these two items, is a sum of Rs. 586/08.

6. Being dissatisfied with the assessment by the assessor in that he disallowed the deduction claimed, the appellant appealed to the Commissioner, who dismissed the appeal. A copy of the appeal Minute of the Commissioner dated 18th April, 1939, containing his determination and his reason for the determination, is annexed to this case stated and is marked (C 1.)*

* Not reproduced

7. Thereupon the appellant appealed to the Board of Review, constituted under the Ordinance, against the decision of the Commissioner, upon grounds of appeal dated 15th May, 1939 a copy of which is annexed to this case stated marked (C 2)*. Copies of the letter and affidavit marked A* and B*, dated 13th February, 1939 and 17th April, 1939, respectively, which are referred to in the grounds of appeal are also annexed, similarly marked.

8. At the argument before the Board on the 26th July, 1939, it was argued for the appellant that the sum claimed represented expenses or outgoings necessarily incurred in the production of the income, and which were deductible under section 9 (1). It was said that the business in which the appellant was engaged *was an industrial* and not an *agricultural* undertaking and that these expenses were incurred in the production of the income from that industrial undertaking.

9. As against the contention of the assessor, appellant's counsel argued that capital assets were of two kinds, namely, "*fixed*" capital assets, and "*circulating*" capital assets ; that these structures were temporary structures in that they were abandoned after a time, and that they were therefore "*circulating*" capital assets, and not "*fixed*" assets ; that "*circulating*" assets were those that were intended to be turned over or sold in the course of a business or trade ; and that these structures came under this category. A passage in Volume 17 of Halsbury's Laws of England (Hailsham Edition) page 118 was relied on in support. It was admitted by counsel for the appellant, in answer to the Board, that the sheds and lines were not erected with the intention of being sold but were put up with the object of being used on the business.

10. Another contention put forward was that these items should have been allowed, as even the cost of clearing the land and planting the papaw trees and also the cost of the permanent plantation, or whatever kind, was allowed as a deduction. But it was explained by the assessor that, if any lease rent had been paid that would have been allowed as a deduction, *in accordance with the practice of the department*, but that as no such rent was paid in this instance, the other deductions just set out were allowed instead.

11. The assessor maintained the position that he had taken all along, namely, that it was not an expense or an outgoing incurred in the production of the income, as it was not money expended for the purpose of producing the income ; that, it was, *an expenditure of a capital nature or a loss of capital;* that section 10 of the Ordinance did not permit the deduction; that the profit was made from using or employing the sheds and lines in question, and not from turning them over in the course of the carrying on of the business or as a part of the business of the firm, *the sum represented "fixed" capital assets.*

12. After a consideration of the arguments and authorities submitted by both sides the Board came to the conclusion that the *deduction claimed could not be allowed as it was in fact an outlay of capital each time it was incurred and was not an expenditure which could be regarded as an ordinary item of revenue expenditure in the commercial sense, made in the course of the carrying on of such a business as this, nor could the sheds and cooly lines be regarded, from the business point of view, as assets intended to be turned over in the course of this business.* The Board accordingly held against the appellant on the arguments and contentions placed before it and dismissed the appeal, and confirmed the assessment, for the reasons set out in the decision of the Board ; a copy of the decision is annexed to this case stated marked (C 3)*.

13. The appellant has requested the Board to state a case for the opinion of the Supreme Court on a question of law. *The question upon which the opinion of the court is sought is whether the sum of Rs. 3,256/– could be allowed as a deduction under section 9 or whether it was a deduction not allowable under section 10. We have accordingly stated and signed this case.*

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* Not reproduced

1940

Keuneman, J.

Theobald
vs
The Commissioner of Income Tax

H. V. Perera, K.C., with *Aiyer* and *Renganathan*, for assessee-appellant.

H. H. Basnayake, Crown Counsel, for Commissioner of Income Tax, respondent.

KEUNEMAN, J.

The appellant claimed to be entitled to deduct a sum of Rs. 3,256/- from his assessable income for the year of assessment 1938/1939 in the following circumstances which are set out in the case stated :

> " The appellant has been carrying on for some years the business of making papain from the papaw fruit, in partnership with another. The partnership take on lease from the Crown and from private parties various blocks of jungle lands and grow papaw trees on them for obtaining the milk for the making of papain, from the fruits of these trees.
>
> The leases were stated to be generally of a period from two or four years during which time the lessees clear the land and carry out either reafforestation in the case of Crown lands, or the planting of a permanent agricultural plantation such as coconut, on private lands, in lien of rent, as the lands are leased out free of rent, because of the permanent afforestation or plantation which the lessees have to effect whilst they carry out the planting of papaw trees and extract the papain therefrom in the course of their business. The papaw trees yield almost the whole milk that can be got from them in about two years, and on the expiration of the leases, the properties are handed back with the permanent plantation which has been established whilst the papain was being tapped from the papaw trees which have been grown.
>
> For the purpose of converting the milk into papain, for export, the firm used a special kind of drying oven. The ovens and the sheds in which they are housed, covered with zinc sheets all round, are set up on each block of land on which the growing of papaw trees is done. In addition to that, temporary cooly lines to house the labourers employed in the business are also erected on these blocks of land. There are invariably a number of different blocks of such lands, in various places, on which the firm is carrying on its business operations.
>
> On the expiration of a lease, it is frequently found not worth while dismantling these structures and re-erecting them elsewhere, so they are generally left on the land when it is surrendered to the lessor, who sometimes pays compensation for them and sometimes does not. So that, on the opening of a new block for planting trees and tapping papain, fresh drying sheds and lines have to be erected more often than not."

The sum of Rs. 6,512/- was claimed by the firm as having been incurred in the year in question, namely, Rs. 4,270/- on the erection of papain drying sheds, and Rs. 2,242/- on cooly lines. The appellant claimed a deduction of Rs. 3,256/-, namely half of the total expenditure. The amount of tax payable in respect of this sum is Rs. 586/08.

The appellant's claim was disallowed by the assessor, and, on appeal, by the Commissioner of Income Tax. On the 26th July, 1939, the matter was argued before the Board of Review. The Board held that the expenditure was of the nature of capital expenditure under section 10 (c), which cannot be allowed as a deduction under section 9 of the Income Tax Ordinance (Chapter 188). The assessment was accordingly affirmed.

The matter now comes before this court on a case stated by the Board of Review, under section 74 of the Income Tax Ordinance.

Counsel for the appellant referred us in the first instance to the case of *The Vallambrosa Rubber Co., Ltd. vs Farmer* (5 Tax Cases 529). In this case, a rubber company had an estate, of which, in the year under review, one-seventh only produced rubber, the other six-sevenths being in process of cultivation for the production of rubber. Expenditure for the superintendence, weeding, etc., was incurred by the company in respect of the whole estate. It was held that in arriving at the assessable profits, the company was entitled to deduct the expenditure for superintendence, weeding, etc., on the whole estate and not one-seventh of such expenditure only. After considering and rejecting the proposition that nothing could ever be deducted as an expense unless the expense was purely and solely referable to a profit which was reaped within the year, the Lord President proceeded to give a rough definition of " capital expenditure."

> " I think it is not a bad criterion of what is capital expenditure as against what is income expenditure to say that capital expenditure is a thing which is going to be spent once and for all, and income expenditure is a thing that is going to recur every year."

This definition of capital expenditure was carried a stage further in the case of *Atherton vs The British Insulated and Helsby Cables Ltd.* (1926 H.L.A.C. 205 ; 10 Tax Cases 155). There, the respondent company claimed as a deduction in computing its profits for income tax purposes a lump sum of £ 31,784 which it had contributed irrevocably as a nucleus of a Pension Fund established by trust deed for the benefit of its clerical and technical salaried staff, that being the sum actuarially assertained to be necessary to enable past years of service of the then existing staff to run for pension. It was held by a majority of the House of Lords that the sum in question was not an admissible deduction. In the course of his judgment, Viscount Cave, Lord Chancellor, discusses the distinction between revenue expenditure and capital expenditure, and criticises the rough criterion set up in the *Vallambrosa Case* (*supra*). He says :

> " The criterion is not, and was obviously not intended by Lord Dunedin to be, a decisive one in every case ; for it is easy to imagine many cases in which a payment, though made ' once and for all,' would be properly chargeable against the receipts."

His Lordship then goes on to give instances from decided cases, and proceeds to lay down a general principle :

> " But when an expenditure is made, not only once and for all, but with a view to bringing into existence an asset or advantage for the enduring benefit of a trade I think that there is very good reason, (in the absence of special circumstances leading to an opposite conclusion), for treating such an expenditure as properly attributable, not to revenue, but to capital."

His Lordship was satisfied that the payment in that case was " in the nature of capital."

One other case cited by the appellant must be mentioned, namely, *The Anglo-Persian Oil Co., Ltd. vs Dale* (16 Tax Cases 253). There, by

1940
—
Keuneman, J.
—
Theobald
vs
The Commissioner of Income Tax

agreements made in 1910 and 1914 the appellant company appointed another company as its agents in Persia and the East for a period of years, upon the terms (*inter alia*) that the agents should be remunerated by commission at specified rates. In course of time, the amounts payable to the agents increased far beyond the amounts originally contemplated by the company, and, after negotiation between the parties, the agreements were cancelled in 1922 the agent company agreeing to go into voluntary liquidation, and the company agreeing to pay the agents £ 300,000 in cash. This sum was in fact paid, and it was held that this payment was an allowable deduction for the purposes of income tax and corporation profits tax. This case was ultimately decided in the court of appeal.

Counsel for the appellant laid great stress on the language of Romer, L.J. where he deals with the passage from Viscount Cave's judgment in the *Atherton Case* (*supra*):

> " It should be remembered, in connection with this passage, that the expenditure is to be attributed to capital if it be made ' with a view ' to bringing an asset or advantage into existence. It is also to be observed that the asset or advantage is to be for the ' enduring ' benefit of the trade. I agree with Mr. Justice Rowlatt that by ' enduring ' is meant ' enduring in the way that fixed capital endures.' An expenditure on acquiring floating capital is not made with a view to acquiring an asset that may be turned over in the course of trade at a comparatively early date."

Counsel for the appellant argued that the proper test to apply in this case is that laid down by Viscount Cave and explained by Lord Justice Romer. He argued further that, if that test was applied, the expenditure in the present case would be clearly not of a capital nature. I shall deal more fully with this argument later.

Counsel for the respondent has also referred us to several cases, and I shall refer to some of them. One of these cases is *Eastmans, Ltd. vs Shaw* (14 Tax Cases 218), where the appellant company carried on business as butchers and meat retailers. It was the policy of the company to close or to open shops in accordance with the needs of their business as a whole, and it was advantageous to dispose of fixtures and fittings in the shop given up rather than to transfer them to a newly acquired shop. It was held that the company could not deduct the difference between the cost of new fixtures and the price obtained for old fixtures in computing the company's profits for the purpose of income tax and corporation profits tax. This was decided finally in the House of Lords on the ground that the expenses were of a capital nature.

In this case, Rowlatt, J. dealt with an interesting question which may have a bearing on the present case :

> " Then Mr. Needham says, and this is the point. Their business was really that of travelling butchers. He said for instance, like a circus..... Let us take a travelling butcher who has his stall in one town today, and his stall in another town tomorrow, and whose business it is to sell here today and there tomorrow. He may very well, I should think, charge his moving expenses..... as an expense of his travelling business. But this is not a travelling business. It is, if I may borrow the expression from the *Granite Case* (5 Tax Cases 168), a

'flitting' business....They substitute one shop, which for however short a time it lasts, is permanent in its nature, for another shop, which, for however short a time it has lasted, has also been in its nature of a permanent character. They are substituting shops for shops, and are not, I think, in any reasonable sense of the words, travelling their business from place to place."

So also, in the case of *The Granite Supply Association Ltd. vs Kitton* (5 Tax Cases 168), where a granite company moved their business to larger premises, the expenses of carting the granite from the old to the new premises and of taking down and re-erecting two cranes were held not to be allowable deductions. *Vide* also *Smith vs The Westinghouse Brake Co.* (2 Tax Cases 357) and *Hyam vs The Commissioners of Inland Revenue* (14 Tax Cases 479) in which an interesting comment on *Eastmans' Case* (*supra*) is to be found. The Lord President says :

" That was the case of a multiple-shop business, in which the policy was not to carry on business on a number of permanently established premises, but to carry on....a mobile trade here, there, and everywhere, so long as there was a prospect in any particular locality however temporary, of doing profitable business..... It might be argued that, having regard to the mobile character of the trade and the constant change of premises which was necessarily incident to it, the cost of supplying these temporary premises with fittings was a proper revenue charge. But it was not so regarded either by the Judge of first instance or by the court of appeal or by the House Lords."

Another case has also to be considered, namely, *Mallett vs The Staveley Coal and Iron Co., Ltd.* (13 Tax Cases 772). Here, a colliery company held the right to work certain beds of coal under mining leases for terms of sixty-three and twenty-one years respectively. The company agreed in 1923 for the surrender of a part of the seams demised. It was held that the payment for the surrender of the seams was an expenditure of capital and not an admissible deduction from profits for income tax purposes. In this case, Lord Hanworth, Master of the Rolls, accepted the test applied by Rowlatt, J.

" The company do not make these payments to get rid of any annual charge against revenue in the future. They make these payments to get rid of the loss in the business or apprehended loss in the business — an entirely different matter..."

Another case of interest is *John Smith & Son vs Moore* (12 Tax Cases 266), which, although relating to excess profits duty, has also an application to the present question. The matter that concerns us is the payment of £ 30,000 for the acquisition of certain unexpired contracts for the supply of coal at fixed prices. All these contracts expired at the end of the year in which they were purchased. The majority of their Lordships in the House of Lords held that this was a capital expenditure. Viscount Haldane said in this connection :

" In the case before us, the appellant, of course, made profit with circulating capital, by buying coal under the contracts,.....,but he was able to do this simply because he had acquired, among other assets of his business, including the goodwill, the contracts in question. It was not by selling these contracts, of limited duration though they were, it was not by parting with them to other masters, but by retaining them, that he was able to employ his circulating capital in buying under them. I am accordingly of opinion that *although they may have been of short duration*, they were none the less part of his fixed capital,"

1940

Keuneman, J.

Theobald
vs
The Commissioner of Income Tax

I have stated the law so far as it appears to be relevent to the present case. It remains now to apply the law to the facts.

The business of the appellant is the making of papain from the papaw fruit. For the purposes of this business, he takes leases for periods of two or four years generally, which is the period which is profitable for the exploitation of the land for the appellant's purposes. The leases are free of money rent, but the appellant carries out an afforestation scheme in the case of Crown lands, or carries out the planting of a permanent plantation in the case of private lands. To protect the drying ovens, the appellant puts up sheds, and, to house the labourers employed in the business, he puts up temporary cooly lines. As the exploitation of each land continues for a limited period, the appellant does not put up any structure of permanent character. At the end of each lease, these structures are generally left standing on the land when it is surrendered to the lessor. Occasionally the lessor pays compensation to the appellant, but ordinarily no compensation is obtainable. It is rarely worth the while of the appellant to dismantle the structures and to re-erect them on fresh blocks of land taken on lease. So, for the most part, the appellant has to utilise fresh material to erect his sheds and cooly lines on the lands to which he moves.

Does the expenditure in respect of these structures fall within the definition of Viscount Cave in *Atherton's Case*, as explained by Romer, L.J. in the *Anglo-Persian Oil Case ?*

To begin with, is it made " once and for all ? " There is no doubt that the expenditure is incurred " once and for all " in respect of each land leased, but counsel for the appellant argued that, as far as the business is concerned, it is a constantly recurring item. I think the matter will best be argued in connection with the third element in Viscount Cave's definition.

Secondly, was the expenditure incurred " with a view to bringing into existence an asset or advantage " for the benefit of the business ? I think this element is clearly satisfied in the present case.

Thirdly, is that asset or advantage " for the enduring benefit of the business ? "

Now, I may point out, with all respect, that, although in other cases the words " permanent " and " relatively permanent " have been used, Viscount Cave adopted the word " enduring. " How does fixed capital endure ? Their Lordships of the House of Lords held in *John Smith's Case* (*supra*) that the fact that it is of short duration does not prevent an asset from being regarded as fixed capital. In the case in question, it was a wasting asset. Fixed capital, I take it, may be wasting, it may also be subject to depreciation, and it may be that in the course of time its value may be practically nil. Further, I think it may be fixed capital, although it is in the contemplation of the owners that it will have to be superseded in the process of time. The asset must, however, be for the enduring benefit of the business to be regarded as fixed capital. Romer, L.J. in the *Anglo-Persian Oil Case* (*supra*) appears to have had in mind this distinction between

fixed capital and what has been referred to in other cases as circulating capital, and which he refers to as "floating capital," namely, "an asset which may be turned over at a comparatively early date."

It has not been argued by counsel for the appellant, nor can I myself see, that the expenditure in question in this case can be regarded in any way as circulating or floating capital. Counsel for the appellant in effect sought to compare his case to that of the travelling circus or travelling butcher mentioned by Rowlatt, J. in *Eastmans' Case* (*supra*). He argued that this is in its nature a travelling business. He instanced the case of a building contractor who puts up his shed for the purpose of his operations, and keeps moving from one site to another as his business requires, and on each site erects the necessary sheds. *Eastmans' Case*, counsel argued, is to be distinguished because it was the intention of the company in that case to maintain each shop it opened as a permanent shop, if the nature of the business in the locality was favourable.

In the present business, it must be submitted, there is a certain degree of mobility, and there is no intention of remaining on any land leased for a longer period than the two or four years necessary for the exploitation of the land. But can this business really be regarded as a travelling business ? I think the position is not in any reasonable sense comparable with that contemplated by Rowlatt, J. where the butcher has his stall in one place today and in another place tomorrow. In the present case, the appellant obtains the benefit of the structures for the full period for which the land can be regarded as economically exploitable for the making of papain, and that period of time is, in my opinion, a substantial period, or, to adopt the language of Romer, L.J., the appellant has no intention of removing or abandoning the structures "at a comparatively early date." For the purposes of his exploitation of the land, expenditure on sheds and cooly lines is necessary, and he takes care to adapt his expenditure to the economic conditions.

No doubt the appellant realises that, at the end of his exploitation, there may be no value whatever attaching to the structures. But I think the expenditure is incurred for the enduring benefit of the business, not only in relation to the particular land, but also in relation to his business generally, and is made once and for all.

It is not an easy matter to say whether a particular set of facts fall on one side of the line of division or of the other. But in this case, I am of opinion that the expenditure in question is of "a capital nature" within the meaning of section 10 (c) of the Income Tax Ordinance, and that it satisfies the conditions laid down by Viscount Cave as set out earlier.

The assessment is confirmed and the appeal is dismissed with costs, but any deposit made by the appellant under section 74 (1) of the Income Tax Ordinance will be reckoned as part of the costs.

NIHILL, J.

Appeal dismissed.

I agree.

Present: SOERTSZ, J.

FONSEKA vs LEIGH CLARE

S. C. No. 11—*C. R. Colombo No.* 52372.

Argued on 23rd April, 1940.

Decided on 24th May, 1940.

Action to recover money paid to a public officer—Action lies against the Crown and not against the public officer.

The plaintiff, a cart contractor, brought this action against H. J. Leigh Clare, Principal Collector of Customs, for the refund of a fine of Rs. 200/– imposed by him as Principal Collector and paid to him. It was alleged in the plaint that the fine was paid under protest and that it was wrongly imposed. The defendant alleged that the plaintiff assisted or was concerned in the illegal removal of a bag of green peas in contravention of sections 106 and 127 of the Customs Ordinance.

Held : That an action for the refund of a fine paid to a public officer in his official capacity does not lie against the public officer.

N. Nadarajah, for plaintiff-appellant.

D. W. Fernando, Crown Counsel, for defendant-respondent.

SOERTSZ, J.

It seems to me that I have no alternative but to dismiss this appeal with costs. The plaint makes it quite clear that the cause of action is not based on a tort said to have been committed by a public officer, but on a contract, or more correctly, on a quasi-contract between him as a public officer and the plaintiff. The plaintiff asks not for damages, but for the refund of an amount paid by him when, according to him, it was not due to be paid. In that state of things, the authorities clearly establish that the action lies against the Crown and not against the public officer who is the servant of the Crown. See *Regina vs Treasury* (1872-L.R. 7 Q.B. 387), *Macbeath vs Haldimund* (1786–1 Term Rep. 182), *Paluse vs Hutchinson* (1881–6 A.C. 619), *Raleigh vs Goschan* (1898–1 Ch. 73), to mention only a few cases.

This view has been consistently followed in Ceylon—see *Muttupillai vs Bowes* (17 N.L.R. 453) and *Singer Sewing Machine Co. vs Bowes* (4 C.W.R. 78).

Section 456 of the Civil Procedure Code provides that actions against the Crown shall be instituted against the Attorney-General.

I wish to add, however, that now that the position taken up by the defendant has been upheld, it seems desirable that the Attorney-General should consider whether he ought not to intervene in this action and consent to the plaintiff amending this plaint and substituting the name of the Attorney-General for that of the defendant. Substantially the Attorney-General has had the notice required by section 461, and this course will save a subject, who believes he has a claim against the Crown, from further expense and delay in prosecuting that claim. The plaintiff must, however, pay all costs of the present defendant.

Appeal dismissed.

Present: SOERTSZ, J. & KEUNEMAN, J.

THE COMMISSIONER OF STAMPS vs THE HIGHLAND TEA Co., LTD.

D. C. (Inty) No. 19
Argued on 18th June, 1940.
Decided on 25th June, 1940.

Stamp Ordinance—Conveyance by the liquidator of immovable property forming the assets of a company in liquidation to its shareholders—Is the conveyance liable to stamp duty under item 23 (1) (*b*) *or* 23 (4) *of Schedule A Part I of the Stamp Ordinance.*

The facts shortly are as follows :

The Highland Tea Company of Ceylon, Ltd. held all the shares of another company called the Portmore Tea Company of Ceylon, Ltd. At an extraordinary General Meeting of the said Portmore Tea Company it was duly resolved that the said Portmore Tea Company be wound up voluntarily, and for that purpose, a liquidator was appointed. The liquidator was authorised to pay the debts and liabilities of the Company and then to distribute in specie or kind among the contributories of the said Portmore Company in accordance with their respective rights and interests therein, the whole of the assets of the Portmore Company. In pursuance of this resolution the liquidator paid the liabilities and executed the following conveyance * in favour of the Highland Tea Company.

Held : That the deed was liable to stamp duty under item 23 (4) of Schedule I A Part I of the Stamp Ordinance.

Cases referred to : *Waharaka Instrument Co. vs Commissioner of Stamps* (34 N.L.R. 266.)
Currie vs Misa (L.R. 10 Ex 162)
Knowles vs Scott (1891 60 L.J. 284.)

No. 1379 *

TO ALL TO WHOM THESE PRESENTS SHALL COME Portmore Tea Company of Ceylon Limited a company incorporated in England under the Companies Acts and having its registered office at 16 Philpot Lane in the City of London England now in voluntary liquidation (hereinafter called " the Portmore Company ") and Ernest Edward Bunce of 16 Philpot Lane aforesaid the liquidator of the Portmore Company (hereinafter called " the Liquidator.")

SEND GREETING

WHEREAS Highland Tea Company of Ceylon Limited a company registered in England under the Companies Acts and having its registered office at 16 Philpot Lane aforesaid is the registered holder of or otherwise beneficially entitled to all the issued shares in the Portmore Company as the Liquidator doth hereby admit.

AND WHEREAS at an extraordinary general meeting of the Portmore company duly convened and held on the Eighth day of November One Thousand Nine Hundred and Thirty Nine a special resolution was duly passed that the Portmore Company be wound up voluntarily and that the Liquidator be appointed Liquidator for the purposes of such winding up and that the Liquidator be authorised (when and so soon as the debts and liabilities of the Portmore Company shall have been paid and satisfied or duly provided

1940

Soertsz, J.

The Commissioner of Stamps *vs* The Highland Tea Co., Ltd.

for) to distribute in specie or kind amongst the contributories of the Portmore Company in accordance with their respective rights and interests therein the whole of the assets of the Portmore Company.

AND WHEREAS all the debts and liabilities of the Portmore Company have been paid and satisfied or duly provided for the Portmore Company now holds all the assets of the Portmore Company including all those the two estates plantations and premises called and known as Portmore and Aldourie in the schedule hereto particularly described for the benefit of the Highland Company

AND WHEREAS in exercise of the authority conferred on him by the aforesaid special resolution and in pursuance of the statutory duty imposed on him by section 247 of the Companies Act 1929 it is necessary for the Liquidator to transfer the said Portmore and Aldourie estates to the Highland company.

NOW KNOW YE AND THESE PRESENTS WITNESS that the Portmore Company and the Liquidator do and each of them doth hereby convey assign transfer set over and assure unto the Highland Company and its assigns all those the said Portmore and Aldourie estates plantations and premises in the said schedule hereto particularly described together with all the crops and produce therefore and all the nurseries buildings bungalows coolie lines erections factories fixed plant machinery and fixtures thereon or thereto or belonging and all rights privileges easements servitudes and appurtenances whatsoever thereunto belonging or in anywise appertaining thereto or held used or enjoyed therewith or reputed or known as part and parcel thereof and all the estate right title interest property claim and demand whatsoever of the Portmore Company and the Liquidator and of each of them in to out of or upon the same and all deeds documents and other writings therewith held or relating thereto

TO HAVE AND TO HOLD the said Portmore and Aldourie estates plantations and premises hereby conveyed and assigned or expressed or intended so to be with all and singular the appurtenances thereunto belonging unto the Highland Company and its aforewritten absolutely for ever

AND the Portmore Company and the Liquidator as to their own acts only to hereby covenant and agree with the Highland Company and its aforewritten that the Portmore Company and the Liquidator have not at any time heretofore done or knowingly suffered or been party or privy to any act deed matter or thing whereby or by means whereof the said Portmore and Aldourie estates plantations and premises hereby conveyed and assigned or expressed or intended so to be or any part or portion thereof are is can or may in anywise be impeached encumbered or prejudicially affected in title charge estate or otherwise howsoever or whereby or by means whereof the Portmore Company and the Liquidator are in anywise hindered from conveying and assigning the said Portmore and Aldourie estates plantations and premises or either of them or any part or portion thereof in the manner in which the same are expressed to be conveyed and assigned and that the Portmore Company and the Liquidator shall and will at all times thereafter at the request cost and expense of the Highland Company or its aforewritten do and execute or cause to be done and executed all such further and other acts deeds assurances and things as the Highland Company or its aforewritten shall or may reasonably require for more perfectly and effectually conveying and assuring the said Portmore and Aldourie estates plantations and premises or either of them or any part or portion thereof unto the Highland Company and its aforewritten but the Portmore Company and the Liquidator do not further or otherwise warrant the title hereto

AND the Portmore company and the Liquidator do hereby cede and surrender unto the Highland Company and its aforewritten all and whatever rights of action the Portmore Company may have by law or under or by virtue of the deeds in its favour or the deeds in favour of the predecessors in title of the Portmore Company or by reason of any covenant to warrant title or any other covenants or agreements therein respectively contained or otherwise howsoever against all or any of the prior vendors of the said Portmore and Aldourie estates plantations and premises in the said schedule hereto particularly

described and each of them and every part or portion thereof or the heirs executors or administrators of such prior vendors or vendor. And it is hereby declared that in no action to enforce such rights as aforesaid shall the Portmore Company or its aforewritten be made or be bound to be parties nor shall the Portmore Company or the Liquidator be liable for any costs or charges incurred in respect thereof.

In Witness Whereof James Aubrey Martensz of Colombo in the Island of Ceylon attorney of the said Portmore Tea Company of Ceylon Limited has set his hand and seal for and on behalf of the Portmore Company and the said Ernest Edward Bunce as Liquidator as aforesaid has set his hand to these presents and to two others of the same tenor and date at Colombo aforesaid this Twenty-ninth day of November One thousand nine hundred and thirty nine.

H. V. Perera, K.C., with *Gratiaen*, for the petitioner-appellant.
Basnayake, Crown Counsel, for the respondent.

Soertsz, J.

The facts from which this appeal arises may be stated briefly as follows: At an extraordinary general meeting of the Portmore Tea Company of Ceylon Limited, it was duly resolved that the said Company be wound up voluntarily, and for that purpose, a liquidator was appointed. The liquidator was authorised to pay the debts and liabilities of the Company and then "to distribute in specie or kind among the contributories of the Portmore Company in accordance with their respective rights and interests therein, the whole of the assets of the Portmore Company." Accordingly, the liquidator paid and satisfied all the debts and liabilities of the Company and by deed No. 1379 dated the 29th of November, 1939, the Company and the liquidator conveyed, assigned, transferred, set over and assured unto the Highland Company the lands and estates described in the schedule to the deed, for the reason that the transferee, that is to say, the Highland Tea Company was the "the registered owner of or otherwise beneficially entitled to all the issued shares in the Portmore Company." (See the first recital in the deed). This deed was stamped with a ten rupee stamp, and the Highland Tea Company thought fit to apply to the Commissioner of Stamps in terms of section 29 of the Ordinance, to have his opinion as to the duty with which the instrument is chargeable, and through their lawyers submitted it to him for that purpose.

The Commissioner by his letter of the 5th/6th March, 1940, gave his opinion that the instrument is a transfer of immovable property for consideration and is liable to a duty of Rs. 9,592/– under item 23 (1) (*b*) of Schedule A Part 1 of the Stamp Ordinance.

The Highland Tea Company is dissatisfied with this determination of the Commissioner of Stamps, and prefers the present appeal against it. The Commissioner has given no reasons for his opinion. It is suggested by counsel that the opinion given has the quality of wishful thinking, and he submits that upon the correct view of the matter, this instrument falls under item 23 (4) or, alternatively under item 23 (8) of Schedule A Part 1 of the Stamp Ordinance and that it was rightly stamped with a ten rupee stamp. It was not at all clear to me how Crown Counsel sought to make out that there

1940

Soertsz, J.

The Commissioner of Stamps *vs* The Highland Tea Co., Ltd.

was consideration. He seemed to contend that because this was not a deed of gift, there was some sort of consideration. That, however is to overlook conveyances such as are contemplated by items 23 (4) and 23 (8).

The item under which the Commissioner of Stamps places this instrument is in these terms. " Conveyance or transfer of any immovable property *for any consideration* where the purchase or consideration money *therein or thereupon expressed*, or if the consideration be other than a pecuniary one, or partly pecuniary, and partly other than pecuniary, the value of the property shall be over Rs. 0 and not over Rs. 50.....one rupee etc....."

The crucial words are " for any consideration " and " therein or thereupon expressed " and in the context, this word " consideration " bears the meaning " money " or " partly " money and " partly " other than money consideration. Now in this instance there is no " purchase or consideration money " expressed in or upon the instrument, nor is any consideration " other than a pecuniary one, or partly pecuniary, and partly other than pecuniary," expressed in or upon the instrument, and, in my opinion, in this case, that fact alone takes the instrument out of class 23 (2) (*b*). But even if it is relevant to consider the question whether although no kind of consideration is expressed in or upon the deed, yet, in reality there was consideration, I reach the conclusion that the deed falls outside the class referred to on the ground that there was, in reality, no consideration for this deed.

It is clear that the word consideration as used in the Stamps Ordinance bears the meaning it has in English Law. If authority is required for that proposition there is the case of *Waharaka Instrument Co. vs Commissioner of Stamps* (34 N.L.R. 266). In that case Macdonell, C.J. dealing with item 22 (*b*) of Part 1 of Schedule B of the then Stamps Ordinance which is identical with the present item 23 (2) Schedule A Part 1, observed as follows: " I would say that wherever in one of our Statutes the term ' consideration ' occurs, there is a strong presumption that it must be given the meaning it has in English Law, and indeed what other meaning can you give it, if it is a term peculiar to English Law ?" and he went on to point out that the meaning generally given to that term in English Law was stated in the case of *Currie vs Misa* (L.R. 10 Ex 162) to be "some right interest, profit or benefit accruing to one party or some forbearance, detriment, loss and responsibility given, suffered or undertaken by the other." Examined by that test, there was no " consideration " for the instrument before us. So far as the transferors are concerned there is no right, interest, profit or benefit accruing to them, and in regard to the transferees there is not apparent or conceivable any forbearance given or shown, or any detriment or loss suffered, or any responsibility undertaken by them. Once the directors of the Portmore Tea Company resolved that the Company be wound up voluntarily, and appointed a liquidator for the purpose, the resulting position was that this Company held its assets in order that the debts and liabilities of the Company

might be paid and thereafter distribution made of what remained in specie or in kind among the contributories of the Company. In other words, it might justifiably be said that the Portmore Tea Company held its remaining assets in trust for those beneficially entitled to them. It is not disputed that the Highland Tea Company of Ceylon were so entitled either as registered holders, or otherwise, to all the issued shares of the Portmore Company. The conveyance did no more than give unto the Highland Tea Company the things that were theirs.

In my view, this conveyance falls within item 23 (4). It is a conveyance of immovable property by a trustee to the person beneficially entitled to it. But, counsel for the respondent contended that "trustee" in that context meant a trustee as understood in the Trusts Ordinance. Assuming that to be so, it seems to me that by virtue of section 96 of our Trusts Ordinance the Portmore Company stood in that capacity. But quite apart from that view of the matter there are English cases in which the relationship between a company in course of liquidation and the shareholders has been placed on that footing, for instance in *Knowles vs Scott* (1891 60 L.J. 284) Romer, J. while refusing to saddle a liquidator with the responsibility of a "trustee in the strict sense," went on to observe as follows " in support of the plaintiffs' contention, reference has been made to dicta by distinguished Judges in various cases, which describe liquidators as trustees or as holding assets of companies in trust. No doubt in a certain sense, and for certain purposes, a liquidator may fairly enough be described as a trustee.....A director is not a trustee for the shareholders of the Company, though he is often referred to in various cases as a trustee, and no doubt, rightly enough for certain purposes." In the case before us, the transferors are the liquidator and the Portmore Tea Company, and in view of this participation of the Company as a transferor, I would refer to the case of *In re The Oriental Inland Steam Company, Ltd.* (1874-43 L.J. Ch. P. 699), in which Mellish, L.J. said " under a winding up order, the legal estate in the property of the Company ordered to be liquidated was not taken from the Company, but the beneficial interest in the property was and.....a trust attached for the benefit of all creditors." That was a case concerning creditors.

It is not necessary, however, to pursue this matter any further for once it is held that this conveyance does not fall within 23 (1) (*b*), the question whether it falls within 23 (4) is academic. Crown Counsel conceded that if this conveyance is not in the class assigned to it by the Commissioner of Stamps it must fall under 23 (4) or 23 (8), and in either event, the duty chargeable is ten rupees.

In conclusion, I should wish to make it quite clear that my consideration of the question before us is based on the fact that all the averments and recitals in the deed in question are admitted by the Commissioner of Stamps. I understood Crown Counsel to say that. At any rate he did not dispute or question them. It is not, therefore, necessary to decide in this case what the position would have been in a case in which the Commissioner

1940

Soertsz, J.

The Commissioner of Stamps *vs* The Highland Tea Co., Ltd.

contended that although no consideration was expressed in or upon the instrument, that that was pure contrivance and that there was, in reality, consideration as understood in English Law.

In my opinion, this appeal is entitled to succeed and I hold that the duty payable on the deed is the duty that was paid on it. The appellant is entitled to the costs of the appeal.

KEUNEMAN, J.

I agree.

Present: MOSELEY, J., SOERTSZ, J. & KEUNEMAN, J.

THE SOLICITOR-GENERAL vs CALDERA

In the matter of the Rule issued on George Alexander Caldera, a Proctor of the Supreme Court.

Argued on 24th June, 1940.

Decided on 28th June, 1940

Courts Ordinance section 17—*Conviction of proctor—Criminal breach of trust—Removal from office.*

The respondent a proctor of the Supreme Court was convicted of the offence of criminal breach of trust. A rule was issued on him to show cause why he should not be removed from the office.

Held : That in the absence of any special circumstances which justify the court in distinguishing the facts of a particular case from others in which the court has exercised the full powers conferred by section 17 of the Courts Ordinance it will order the removal of a proctor convicted of a criminal offence from the roll of proctors.

E. G. P. Jayatilleke, K.C., Solicitor-General, with *M. F. S. Pulle, Crown Counsel* appear in support of the rule.

N. E. Weerasooria, K.C., with *U. A. Jayasundere,* for the respondent.

MOSELEY, J.

The respondent has been called upon to show cause why he should not be removed from office in accordance with section 17 of the Courts Ordinance (Chapter 6 of the Laws of Ceylon). He was convicted on 30th August, 1939, of criminal breach of trust in respect of a sum of approximately Rs. 3,500/–, part of the proceeds of a cheque for Rs. 4,000/– which had been entrusted to him by one E. S. Captain in the course of their relationship as proctor and client. The respondent received the cheque on 2nd April, 1936, for the purpose of, in the first place, paying off a debt due from some people named Huzair to the Misses La Brooy, in consequence of which the Huzairs were to execute a primary mortgage in favour of Mr. Captain.

The firm of which the respondent was a member had no business banking account. The cheque was therefore paid into the respondent's private account. In the next few days there were several minor operations on the account and on 6th April the respondent drew out Rs. 3,350/– in one sum which left to his credit a sum of only Rs. 160/–. The respondent explained

this withdrawal as a measure of precaution, alleging that he had issued an accommodation cheque for Rs. 650/– and he feared that contrary to arrangement, it might be presented and paid and so divert some of Mr. Captain's money to an improper avenue. He further said that he kept the proceeds of the cheque and a further sum of Rs. 650/– in cash, that is to say Rs. 4,000/ in all, in his house. Be that as it may the money due to the Misses La Brooy was not paid and the respondent explained the ommission by alleging that he had the permission of Mr. Captain and the Huzairs to use the money for his own purposes and that he lent the sum of Rs. 3,000/– to a brother proctor who is now dead. There was no corroboration of the latter allegation, and on the former point Mr. Huzair denies that any request, as alleged by the respondent, was made or that permission was granted and the District Judge found against the respondent.

The District Judge expressed the opinion that the conviction itself was sufficient punishment for one in the position of the respondent and sentenced him to imprisonment till the rising of the court and to a fine of Rs. 250/–, in default three months rigorous imprisonment.

Counsel for the respondent has not challenged before us the finding of fact by the District Judge but has brought to our notice that neither Mr. Captain nor the Huzairs have suffered any loss, since the respondent's partner has made good the deficiency, that they have not lodged any complaint against the respondent, and would not of their own volition have instituted a prosecution. He also points out that Mr. Captain did not emphatically deny that he had given the respondent permission to use the money for his own purposes. He has referred to the long drawn out nature of the proceedings.

On the other hand there is before us a letter written by the respondent to his partner which is in the nature of a confession and leaves no doubt in our minds as to the course of conduct which the respondent was pursuing. We have, too, the attempt on his part to attribute his action in the matter to the alleged importunities of a brother proctor in support of which he has not been able to adduce a vestige of proof.

After giving due consideration to all the submissions made on his behalf by his counsel it does not appear to us that there are any circumstances which justify us in distinguishing the facts of this case from others in which this court has exercised the full powers conferred by section 17 of of the Courts Ordinance. The case reveals a serious act of professional misconduct on the part of the respondent. He has forfeited the right to be entrusted by the public with its business.

We order that the respondent be removed from his office as a proctor of the Supreme Court.

SOERTSZ, J.

I agree.

KEUNEMAN, J.

I agree.

Present: MOSELEY, J.

HARAMANIS PERERA vs CAROLIS PERERA AND ANOTHER

S. C. No. 72—C. R. Panadura, No. 7289.

Argued on 25th June, 1940.

Decided on 28th June, 1940.

Mortgage bond—Assignment—Assignee a debtor under the bond—Does the deed of assignment operate as a discharge of the bond as against the co-debtors.

The plaintiff's father executed a mortgage bond. After the death of the plaintiff's father the mortgagee assigned the bond to the plaintiff. The plaintiff then sued the defendant, who is the legal representative of the deceased's estate. The deceased had left nine children including the plaintiff, and in bringing his suit the plaintiff credited the estate with the value of his 1/9th share.

Held : That the plaintiff was entitled to sue on the bond, inasmuch as he did not pay the debt as such but only purchased the mortgagee's rights.

Cases referred to : *Dias et al. vs Silva* (34 N.L.R. 108).
Peries vs Peries (3 C.W.R. 222).

A. C. Z. Wijeratne for the plaintiff-appellant.

No appearance for the defendant-respondent.

MOSELEY, J.

The plaintiff in this action is the son of one Mudalihamy, deceased, who in his lifetime had executed a mortgage-bond in favour of one Herman Perera. After the death of Mudalihamy, Herman Perera assigned the bond to the plaintiff. The latter sued the defendant who is the legal representative of the deceased's estate. The deceased had left nine children including the plaintiff and in bringing his suit the latter credited the estate with the value of his 1/9th share. The main issue upon which the parties went to trial was: Does the deed of assignment operate as a discharge of the mortgage-bond ?

The learned Commissioner answered this issue in the affirmative, relying upon the case of *Dias et al. vs Silva* (34 N.L.R. 108) where it was held that where one of a number of co-debtors of a debt secured by a mortgage has paid and discharged the debt the property does not become burdened with a real charge in favour of that debtor.

Counsel for the plaintiff brought to the Commissioner's notice the case of *Peries vs Peries* (3 C.W.R. 222) and the Commissioner was of opinion that the principle in each case was the same.

The facts in the latter case are almost exactly similar to those in the present case.

De Sampayo, J. in the course of his judgment observed as follows :

" The plaintiff did not pay the debt as such, but only purchased Rodrigo's (the mortgagee) rights on the bond. There might be a merger in respect of his

own share of the debt, but even on the footing of payment of the debt he had a right to contribution from his co-debtors. Consequently I think it was competent to plaintiff not only to recover Carolis' (co-mortgagor) share of the debt but to realise the same by sale of his share of the land on the footing of the mortgage."

It seems to me that this decision is exactly in point and that the issue should have been answered in the negative.

I would therefore allow the appeal with costs. The judgment of the Court of Requests is set aside and judgment will be entered for the plaintiff as prayed with costs.

Present: SOERTSZ, J. & KEUNEMAN, J.

In the matter of an application by Lucy de Silva under section 20 of the Births and Deaths Registration Ordinance.

S. C. No. 161 (*Special*)—*D. C.* (*Inty*) *Kalutara No.* 299.

Argued on 21st June, 1940.

Decided on 25th June, 1940.

Births and Deaths Registration Ordinance (*Chapter* 94)—*Change of name—Is a person who has been known by a name different from the name in the register of births entitled to have the entry relating to the name 'rectified' under section* 20 *of the Births and Deaths Registration Ordinance.*

Held : That a person who has been known for a long time by a name other than that entered on the register of births is entitled to an order under section 20 of the Births and Deaths Registration Ordinance to have the register altered by the insertion of the name in use in place of the name on the register.

J. L. M. Fernando, with *C. C. Rasa Ratnam*, for the petitioner-appellant.

H. H. Basnayake, Crown Counsel, on behalf of the Attorney-General, noticed by the District Judge.

SOERTSZ, J.

The petitioner applied to the District Judge of Kalutara under section 20 of the Births and Deaths Registration Ordinance, to have the entry relating to her birth altered by the name Engo Nona being struck out and the name Lucy substituted in its place. Her case is that although her name was given as Engo Nona to the Registrar on the occasion of the registration of her birth, she was never called by that name, but was always known as Lucy, both at home and at school. The petitioner is a school teacher, and it is obvious that she may be gravely prejudiced by this conflict in names. Her case is not disputed, and the District Judge has found that the petitioner " has been always called Lucy by the members of her family and that by that name she was known in school." In this state of things one feels naturally disposed to allow an application such as this if the law permits it. But the learned District Judge was of opinion that " for an

1940
—
Soertsz, J.
—
In re Lucy de Silva

entry to be struck off it must be proved that such entry *was* wrong. It is only when an entry is wrong that a Court can rectify the Register..... There is no evidence at all to show *that a wrong name was given* by the informant who was the father of the petitioner." Crown Counsel adopted this position at the argument of this appeal. This point of view appears to be based on the assumption that rectification can be made under section 20 only in respect of some entry that was wrong at the time it was made.

In my opinion, this assumption is unsound. The words of the section are " any person.....who shall feel aggrieved by any such entry as in the preceding sections prescribed, shall be entitled to apply to the District Court.....to cause such entry to be rectified, and the said Court shall .....make such order as the justice of the case may require....."

It is clear that the name of the child is entered on the Register in accordance with section 10 of the Ordinance and it is in respect of that entry that the petitioner says she is aggrieved. Up to this point then, her application is within the words of the section. The only question that remains is whether the rectification available under this section is one that is permissible only in respect of some entry that is shown to be wrong in relation to the point of time at which it was made. I see no reason for taking so narrow a view. To rectify means " to correct from a wrong, erroneous or false state," and 'this state' may be wrong, erroneous or false in relation to the time at which it came into being and/or in relation to the time at which the correction is sought. 'Right' and 'wrong' in cases of this kind are relative terms and the quality of 'rightness' or 'wrongness' must be determined with reference to the relevant facts. A thing that is right in one state of facts may become wrong in another state of facts. In this instance, at the time the correction is sought, the entry in question is not in correspondence with reality, for at that time the person dealt with in this entry on the Register is a person who, so far as she and others concerned know, is Lucy. The result is that although the name Engo Nona cannot be said to have been wrongly entered at the time of the registration, it is not in accordance with the actual state of things at the date of the application. And this is the cause of the petitioner's grievance.

The section gives a wide discretion to the District Judge who is empowered to make 'such order as the justice of the case may require,' and in view of the finding of the District Judge, the proper order to make is, in my opinion, to direct the Registrar to enter on the Register in respect of this particular entry a note to the effect that upon an inquiry held under section 20 of the Ordinance, it has been found that the person whose name is given as Engo Nona has ever since the date of the Registration been known as Lucy and is the petitioner on this application. I make order accordingly and direct the District Judge to act upon it as he is required to do by section 22.

KEUNEMAN, J.

I agree.

Present: SOERTSZ, J.

JAYASOORIA vs DE SILVA

Application for a writ of Quo Warranto No. 192.

Argued on 10th June, 1940.

Decided on 9th July, 1940.

Quo Warranto—When will the court refuse to grant relief by way of a writ of Quo Warranto.

Held : That the court will not ordinarily grant a writ of Quo Warranto to a relator (*a*) who has acquiesced in the proceedings he seeks to question or

(*b*) whose *bona fides* is not evident, or

(*c*) who has delayed to make his application.

Per SOERTSZ, J. " In the light of the proceedings of the 9th of December, 1939, it is perfectly obvious that it would have been cast in favour of the respondent. The result is that, in effect and in substance, the majority of the members present were in favour of the respondent and although the letter of the law has not been fulfilled, its spirit has been satisfied. When in that state of things a voter such as the petitioner acting clearly on behalf of parties who had acquiesced in the procedure adopted, comes forward insisting upon the letter of the law, straining at a gnat so to speak, a court exercising a discretion vested in it, may well refuse relief in this extraordinary manner. It has been repeatedly laid down by Judges on occasions like this that however clear in point of law the objection may be to the respondent's title to office, the court in exercising its discretion will have regard to, and be influenced by (*a*) the conduct, motives or interest of the petitioner, (*b*) the consequences which may result from the granting of the relief sought. in *R. V. Ward* (42 L. J. Q. B. 126), Blackburn, J. as he then was, said that an irregularity not *really* affecting the result of the election to an office, would not, in the absence of bad faith, induce the court to grant a Quo Warranto. In the course of his judgment, he observed as follows: 'We think that the mistake committed here has produced no result whatsoever, that the same person has been elected who would have been elected if the election had been conducted with the most scrupulous regularity, and that the defendant's title if bad at all, is only bad, as I may say, on special demurrer, we sought in the exercise of our discretion, to refuse leave to disturb the peace of the district by filing the information.'

"Moreover in this case there had been delay in making the application, and that again is a matter a court will take into consideration when called upon to exercise its discretionary power. I therefore, refuse the application with costs."

C. V. Ranawake with *M. Swaminathan*, for petitioner.

L. A. Rajapakse, for respondent.

SOERTSZ, J.

This is an application for a writ of Quo Warranto, and its ultimate object is to have the election of the respondent on the 9th of December, 1939, as Vice-Chairman of the Kolonnawa Urban District Council, for the year

1940
—
Soertsz, J.
—
Jayasooria
vs
de Silva

1940, declared null and void, on the ground that the said election was " not decided upon, and done by the majority of the members present " on that occasion, as required by section 23 of the District Councils Ordinance (Vol. 5 Chap. 195 Legislative Enactments), read with by-law 14 (*b*) published in the Government Gazette No. 7973.

The admitted facts are that, on the day on which the respondent was elected Vice-Chairman, there were eight members present including the Chairman. One member, by name W. P. Hendrick Perera, proposed, and another, J. D. William, seconded that the member named L. R. Perera be re-elected Vice-Chairman for the year 1940. Thereupon, the Chairman D. A. J. Tudugalla, proposed as an amendment that W. A. de Silva, that is, the present respondent, be elected as Vice-Chairman for 1940. The member J. D. William who had seconded the motion seconded this amendment as well. The amendment was put to the house, and the voting resulted as follows : " *Ayes*—Messrs. D. A. J. Tudugalla, T. P. de S. Munasinghe, W. A. de Silva and Dr. H. A. Dirckze. *Noes*—Messrs. L. R. Perera and W. Hendrick Perera. Messrs. J. D. William and D. C. Liyanage declining to vote. The motion was then put to the house, and was declared lost, the voting being as follows : *Ayes*—Messrs. L. R. Perera and W. P. Hendrick Perera. *Noes*—Messrs. D. A. J. Tudugalla, T. P. de S. Munasinghe, W. A. de Silva and Dr. Dirckze. Messrs. J. D. William and D. C. Liyanage declining to vote. The Chairman declared Mr. W. A. de Silva duly elected as Vice-Chairman for 1940."

The next monthly meeting of the Council took place on the 13th of January, 1940. The minutes of the meeting of the 9th of December, 1939 were read and confirmed in the presence of Messrs. L. R. Perera and of his proposer and seconder, and there was no question or dissent in regard to the validity of the election made on the 9th of December, 1939. The respondent took his oath of office on the 5th January, 1939, and was from that date, by virtue of his office a Justice of the Peace and Unofficial Magistrate. On the 9th of February, 1940, the Chairman in the exercise of powers conferred on him by section 35 (2) of the Ordinance authorised the respondent to do and perform certain administrative acts, and the affidavit submitted by the respondent shows that he has performed many acts in his capacity of Vice-Chairman, as well as in his capacity of a Justice of the Peace.

The present application was filed in the registry of this court, on the 1st May, 1940, almost five months after the date of the election, and the question that now arises before me is whether I should exercise the discretion that is vested in me to allow the application.

I must say at once, that I agree with the contention of the petitioner's counsel that the method of voting was contrary to the requirement of the Ordinance. The section and the by-law I have already referred to put that fact beyond question. The section enacts that " all acts whatsoever authorised or required by virtue of this or any other Ordinance to be done by any

Council may and shall be decided upon and done by the *majority of members present*..... And the by-law provides that " on any question being put whether in Council or committee.....every member present shall record his vote, either for the Ayes or for the Noes."

Now, in this instance, the motion was lost and the amendment was carried by four votes. The members present numbered eight. Four was therefore not a majority of the members present. The words of the section are "by the majority of members present," and not "by the majority of members *present and voting*." The majority was, therefore, not a majority in conformity with section 23, and the voting itself was not in conformity with the by-law which requires every member present to vote Aye or No. In this instance, two members declined to vote. In that emergency, the Chairman should have invited the attention of the two declining members to the requirement of the by-law, and if they did not wish to vote they could have withdrawn, or could have been made to withdraw from the meeting. If that had been done, there would have been the required majority to support the election of the respondent.

Looking at the matter in another way, if the members present had not acquiesced in the way the votes were taken, if for instance, Mr. L. R. Perera and his proposer and seconder had made prompt objection, the worst that could have happened from the respondent's point of view is that the two "declining" members might have voted in support of the motion. That would have resulted in an equality of votes, and in that contingency, the Chairman's casting vote would have come into operation by virtue of the proviso to section 23. In the light of the proceedings of the 9th of December, 1939, it is perfectly obvious that it would have been cast in favour of the respondent. The result is that, in effect and in substance, the majority of the members present were in favour of the respondent and although the letter of the law has not been fulfilled, its spirit has been satisfied. When in that state of things a voter such as the petitioner acting clearly on behalf of parties who had acquiesced in the procedure adopted, comes forward insisting upon the letter of the law, straining at a gnat so to speak, a court exercising a discretion vested in it, may well refuse relief in this extraordinary manner. It has been repeatedly laid down by Judges on occasions like this that however clear in point of law the objection may be to the respondent's title to office, the court in exercising its discretion will have regard to, and be influenced by (*a*) the conduct, motives or interest of the petitioner, (*b*) the consequences which may result from the granting of the relief sought. In *R. V. Ward* (42 L.J.Q.B. 126), Blackburn, J. as he then was, said that an irregularity not *really* affecting the result of the election to office, would not, in the absence of bad faith, induce the court to grant a Quo Warranto. In the course of his judgment, he observed as follows: " We think that the mistake committed here has produced no result whatsoever ; that the same person has been elected who would have been elected if the election had been conducted with the most scrupulous regularity, and that the defendant's

1940
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Soertsz, J.
—
Jayasooria
vs
de Silva

title if bad at all, is only bad, as I may say, on special demurrer, we sought in the exercise of our discretion, to refuse leave to disturb the peace of the district by filing the information."

Moreover, in this case there has been delay in making the application, and that again is a matter a court will take into consideration when called upon to exercise its discretionary power. I therefore, refuse the application with costs.

Proctors : *Application refused.*

Cli e Abeyewardena, for petitioner. (Jayasooria)
C. R. de Alwis, for respondent. (de Silva)

Present: SOERTSZ, J. & KEUNEMAN, J.

SAMYNATHAN vs ATUKORALE

S. C. No. 78, D. C. (Inty.) Ratnapura No. 5916, with S. C. No. 135/ D. C. (Final) Ratnapura No. 5916. Order on preliminary objection.

Argued on 24th and 25th June, 1940.

Decided on 26th June, 1940.

Stamp Ordinance—How should the value of a suit be determined for the purposes of stamping.

Held : That the proper stamp duty on civil proceedings should be determined according to the value placed on the subject-matter in suit in the pleadings, except in a case where the trial judge has gone into the value of the suit in order to determine it for purposes of stamp duty.

Cases referred to : *Lee vs Perera* (15 C.L.W. 3)
In re Porkodi Achi (1922 A.I.R. Madras 211)
In re G. B. Seethayamma (1925 A.I.R. Madras 323)
Sinnethamby vs Tangamma (1 C.A.C. 151)

H. V. Perera, K.C., with *N. E. Weerasooriya, K.C.*, *E. A. P. Wijeratne* and *A. E. R. Corea*, for the 1st defendant-appellant in both appeals.

R. L. Pereira, K.C., with *M. T. de S. Amerasekera, K.C.*, and *C. S. Barr Kumarakulasingham*, for the plaintiff-respondent in both appeals.

SOERTSZ, J.

Counsel for the plaintiff-respondent takes a preliminary objection to the hearing of this appeal on the ground that the petition of appeal is insufficiently stamped and that the stamps tendered for the certificate in appeal and for the decree for this court are also insufficient. If this objection is sound, it is clearly fatal to the appeal. The stamps affixed and furnished by the defendant-appellant are admittedly in accordance with the value of the matter in litigation as averred in the amended plaint filed by the plaintiff-

respondent himself, but respondent's counsel contends that the question of the sufficiency of the stamps must be determined at this stage in this case (*a*) with reference to the value of the improvements claimed by the defendant and stated by him in his answer to be over Rs. 100,000/–, or (*b*) with reference to the value of Rs. 90,000/– fixed by the defendant in his answer as the value of the lands in litigation or (*c*) at least with reference to the value of the lands that emerges as Rs. 88,000/– as a result of the answer given by the trial Judge to issue No. 23.

In regard to these contentions, I have had little difficulty in reaching the conclusion that in the circumstances of this case the value put upon his improvements generally and the value put upon the land in litigation by the defendant-appellant have no bearing on the question of the value of the action for the purpose of fixing the stamp duty payable. These values occur in the course of allegations made by the defendant in his answer but were not made by him the basis upon which to found an actual claim in reconvention. The only claim made by way of reconvention, in the proper meaning of that phrase, was a claim for Rs. 7,500/– on account of damages said to have been sustained by the defendant in consequence of the injunction which he alleged the plaintiff had wrongfully and unlawfully obtained in this case. Apart from this claim in reconvention the defendant's chief prayer in regard to the plaintiff's case was that it should be dismissed, but he took the precaution to ask in the alternative that in the event of the plaintiff being declared entitled to any portion of the land in litigation he be condemned to pay the defendant compensation for improvements found to have been effected by him on that portion. Obviously no value could have been placed on such a claim at that stage. Its value must necessarily depend on the ultimate finding by the Judge in regard to the title to the bare land involved in the litigation. Therefore, in my opinion, the mere fact that the defendant-appellant in the course of his answer stated that he " has planted and erected valuable buildings and cooly lines upon and otherwise improved an extent of 200 acres from lots 18 and 41, and 10 acres from lots 14 and 14A at an expense of over Rs. 100,000/– " is really of no consequence. The plaintiff at no stage claimed more than 176 acres and at the time the defendant made the statement I have referred to in his answer there was nothing to show that the major part in value of the defendant's improvements fell within the land claimed by the plaintiff. Counsel for the respondent has invited our attention to the evidence given by the defendant-appellant where he said: "I have claimed Rs. 100,000/– as compensation in the event of my not being declared entitled to the land." I do not think we can take any notice of this. The statement is inaccurate. The defendant-appellant did not claim Rs. 100,000/– nor did he claim to be declared entitled to the land. All he asked for was a dismissal of the plaintiff's action and for an investigation into the question of compensation in the event of the plaintiff being declared entitled to any part of the land found to have been improved by him. Such a claim for any unliquidated amount by way of compensation

1940

Soertsz, J.

Samynathan *vs* Atukorale

or set off cannot, in my opinion, be accurately described as a claim in reconvention.

The case of *Lee vs Perera* (15 C.L.W. 3) has no application here. The defendant in that case made a claim in reconvention that was higher than the claim the plaintiff had made. In other words, he brought into the case a claim involving a larger sum of money than was involved in the plaintiff's claim and once that happened it necessarily followed that the stamping had thereafter to be on the basis of the new value imported into the suit.

Then in regard to the argument based on the value of Rs. 90,000/– put upon the land by the defendant-appellant, that again, in my opinion, does not affect the question. There has been no finding by the Judge at any stage in regard to this conflict in values for the purpose of fixing the stamp duty that was leviable and no order was made by him with that matter in view. There seems to me to be no justification for saying that when a defendant puts a higher value on the matter in litigation than was placed upon it by the plaintiff there results an alteration in the class of the case. To say the least, in the absence of an order by the trial Judge in regard to the value of the matter in litigation, there is no good reason that I can find in law or in logic for preferring the value fixed by the defendant to that given by the plaintiff.

The next question that arises for consideration is whether the value put upon the lands by the trial Judge in answering issue No. 23 results in placing this action in a higher class, at least as from the date of that finding. In my opinion it does not, so long as the trial Judge has not made that finding a basis for an order that instruments and documents in the case should be stamped in accordance with his finding. There is no such order here. Even if there had been such an order and the plaintiff appealed against it, it seems to me that the petition of appeal would be correctly stamped if its stamping were in accordance with the value put upon the action by the plaintiff. But in reality in this case the answer to issue No. 23 appears to have been sought and to have been given in view of the claim for improvements. The question of sufficient stamping does not seem to have been contemplated by counsel when that issue was framed or by the Judge when he answered it.

It only remains for me to refer to the Indian cases relied upon by counsel for the respondent. The applicability of those cases must depend upon the identity of the context in which those decisions were given with the context in which this question arises before us. So far as the material disclosed in the judgments in those cases is concerned, it would appear that the point involved in the case of *In re Porkodi Achi* (1922 A.I.R. Madras 211) arose under a particular Act known as the Court Fees Act which provides for the classification of suits in different ways for the purpose of ascertaining the court fees payable by the parties to the litigation. For that purpose suits for possession of immovable property are placed in one class, suits for money in another and so forth. The learned Judge in that case after reviewing a number of authorities said: " The current of authority is

clearly in favour of the view that the value of any appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of." This dictum is not quite accurately worded, at least, so far as the report before us goes. What the learned Judge appears to have intended to say is that the current of authority is clearly in favour of the view that the value of an appeal is not in all cases the value of the suit as originally filed but may in some cases be the value of the relief granted by the decree which a party wishes to get rid of. This dictum, however, hypothesizes for its applicability a case in which the value of the suit as originally filed and the value of the relief granted are different. In the case before us the relief given to the plaintiff is the relief he sought subject to the payment of certain compensation for improvements. But the appellant here seeks to get rid of the relief given to the plaintiff in the decree in that it declares him entitled to the land he sought to vindicate. If he succeeds in obtaining that relief, the question of compensation for improvements does not arise. For this reason alone my view is that this case has no application. Nor, in my opinion, has the other Indian case cited to us, *In re G. B. Seethayamma* (1925 A.I.R. Madras 323). In that case the plaintiff obtained a decree against the 11th defendant for the recovery of a half share of certain lands on payment to the 11th defendant of Rs. 12,000/–. The 11th defendant appealed and asked that the plaintiff's suit for recovery of possession of the lands in question be dismissed. It was contended by him that the court fee payable on the appeal should be ascertained by deducting Rs. 12,000/– from the market value of the lands. The learned Judge rejected this contention and pointed out that the appellant " seeks to have the decree of the lower court, which directed the possession of the lands to be given to the other side, set aside. It is clear that in such a case the subject-matter of the appeal is the land and not any money." This decision, if applicable at all, seems to support the case for the appellant on the point we are considering. But my view is that these cases have hardly any application under our stamping law in which there is no classification of suits on the lines of the Indian Court Fees Act and in which a suit remains throughout the proceedings, so far as the local courts are concerned, in the class in which the pleadings placed it, unless, of course, an order of the court at a relevant stage of the case puts it in a class of higher or lower value. The ruling in the case of *Sinnethamby vs Tangamma* (1 C.A.C. 151) supports this view.

For these reasons I hold that the preliminary objection fails and I overrule it.

KEUNEMAN, J.

I agree.

Objection overruled.

Proctors :

Artigala, for defendant-appellant. (Samynathan)
Pinto, for plaintiff-respondent. (Atukorale)

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

PUNCHIMAHATMAYA vs THE COMMISSIONER OF STAMPS & THE ATTORNEY-GENERAL

S. C. No. 35 (*Inty.*)

In the matter of an appeal under section 31 *of Ordinance No.* 22 *of* 1909 (*Now Chap.* 189 *of the Laws*).

Argued on 28th June, 1940.

Decided on 4th July, 1940.

Stamp Ordinance sections 29 *and* 31—*Appeal under section* 31—*Gift of life interest reserving to donor a life interest* *—*Item* 32 (3) *of Schedule A Part I of the Stamp Ordinance—How is the value of the property to be determined in calculating the duty payable under item* 32 (3).

Held : (i) That the " value of the property " for the purposes of item 32 (3) of Part I of Schedule A to the Stamp Ordinance cannot mean the value of the land free from all encumbrances.

(ii) That where the application for the opinion of the Commissioner under section 29 of the Stamp Ordinance is made by a proctor on behalf of his client, it is the client who may appeal under section 31 of the Ordinance.

* No. 372 DEED OF GIFT. Rs. 15,000/-

KNOW ALL MEN BY THESE PRESENTS that I, Wanasundera Muhandiramalage Punchimahatmaya of Ratnapura in and for the consideration of the love and affection and the help and assistance rendered to me and other divers good causes and considerations which I have and bear unto my beloved wife Kuruppu Achchige Dona Ellen Kuruppu Wanasundera Hamine of Ratnapura do hereby gift and grant and set over unto her only the right to possess the premises in the Schedule hereto fully described, reserving to me the right to possess the same during my life time, by way of gift absolute and irrevocable, valuing at Rupees Fifteen Thousand (Rs. 15,000/-) of the lawful money of Ceylon.

The Gift of the said right to possess the said premises granted to the said Kuruppu Achchige Dona Ellen Kuruppu Wanasundera Hamine is on the condition that after my death, the same shall not be sold mortgaged or leased for a period not exceeding five years but to reside and receive the rents and profits and after her death to be subject to the terms and conditions set out in the Last Will and Testament made by me.

And I the said donor Wanasundera Muhandiramalage Punchimahatmaya do hereby further covenant and agree that I have the full right and power to make the gift hereby made and that I have not done any act heretofore against this and to confirm and ratify the gift hereby made and to do and execute all such further acts deeds and assurances for the more perfectly and effectually assuring the gift hereby made.

And I the said Kuruppu Achchige Dona Ellen Kuruppu Wanasundera Hamine do hereby thankfully and gratefully accept the gift made to me by my husband.

J. E. M. Obeyesekere, for appellant.

H. H. Basnayake, Crown Counsel, for respondents.

MOSELEY, J.

1940

Moseley, J.

Punchimahatmaya *vs* The Commissioner of Stamps & The Attorney-General

The appellant, by a deed dated 8th May, 1937, * gave to his wife the "right to possess" certain lands, reserving to himself a life-interest in the said lands. There was a further condition that after the death of the donor the lands should not be "sold, mortgaged, or leased for a period exceeding five years." The donee had the right "to reside and receive the rents and profits" but after her death the lands were to be subject to the terms and conditions set out in the donor's will.

This right to possess conferred upon the donee was valued, in the deed, at Rs. 15,000/–, and the deed was stamped with stamps to the value of Rs. 532/– as provided by item 30 (*c*) of Schedule B Part I of the Stamp Ordinance (now item 32 (3) (*b*)). For the sake of convenience I shall refer to sections of the Ordinance and items in the Schedule by their present enumeration.

Later the appellant applied in terms of section 29 of the Ordinance for the opinion of the Commissioner as to the duty with which the instrument is chargeable and the Commissioner determined that the duty payable under item 32 (3) (*b*) was Rs. 1,435/–, and called upon the appellant to pay the deficiency, *i.e.* Rs. 903/–, and a further like sum as penalty. Against that finding by the Commissioner this appeal is brought.

Counsel for the respondent took the preliminary point that section 31 confers the right of appeal only upon the person who, by virtue of section 29, makes the application for the Commissioner's opinion, and that in this case it was not the appellant who made the application, but a firm of proctors. Section 29 (1) is as follows :

> "When any instrument, whether executed or not and whether previously stamped or not, is brought to the Commissioner of Stamps, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of five rupees, the Commissioner of Stamps shall determine the duty (if any) with which in his judgment the instrument is chargeable."

If this section is constructed rigidly the effect would be that only the person who physically brings an instrument to the Commissioner has a right of appeal against his determination. This seems to me much too narrow an interpretation to place upon the words "person bringing." Moreover, in the present case, the appellant has sworn in his affidavit filed in these proceedings that *he* applied to the Commissioner. The natural, and indeed only, inference that can be drawn is that the firm of proctors were acting on behalf of the petitioner, since they themselves could have no more than a vicarious interest in the matter. The objection must, therefore, in my opinion, fail.

Counsel for the appellant contended that the word "property" where it occurs in item 32 connotes interest in property, which in the present case is a right to possess. and that the dominium in the property does not pass by the deed to the donee ; that the donor has valued that right to possess at Rs. 15,000/– and that the Commissioner has no power to go beyond the value expressed in the deed ; that section 25 requires that the consideration must

* Vide page 118

1940

Moseley, J.

Punchimahatmaya
vs
The Commissioner of Stamps & The Attorney-General

be fully and truly set out, and section 64 provides a penalty for a breach of this requirement. Moreover, if the Commissioner so desires, he has the power, under section 29 (2), for the purposes of arriving at his determination, to call for an affidavit or other evidence, which in this case he has not done.

The Commissioner apparently based his determination upon a "Government valuation of the lands affected by the deed" which is set out as Rs. 40,750/–, and this sum, says counsel for the appellant, is the value, not of the right to possess, but of the unencumbered land which is something which the deed does not give.

On the other hand counsel for the respondents contends that, since the donor has reserved to himself no more than a life interest, he has parted with the dominium and that the latter cannot remain in suspension and must therefore be vested in the donee. In support of this contention he brought to our notice the following passage from Voet, Bk. VII Tit. I paras. 9 and 10:

> "But in more than one case a doubt arises whether usufruct only must be taken to have been bequeathed or full right of dominium. For what if a house fixed and determined as to its limits and site were bequeathed to inhabit or enjoy, or an estate were bequeathed for aliment? In these cases not usufruct but rather full ownership would seem to be bequeathed .....Again, if we find a usufruct either of a single thing or a whole inheritance bequeathed with the burden of restoring the thing or estate to a third person after the death of the legatee, in this case when there is a doubt the ownership with the burden of *fideicommissum* must be considered bequeathed rather than the usufruct: for reason does not admit of the burden of restoring only a usufruct being imposed on the legatee; since by his death, he loses the whole right of usufruct *ipso jure*, to such an extent that nothing remains to be restored.....
> .....Again, if a usufruct of property be given to a wife or any other person, with the addition of a prohibition against alienation.....we must consider nothing less than full ownership to be bequeathed....."

Even so, assuming that the dominium has passed to the donee, it seems to me that the "value of the property" where the words appear in item 32 (3) cannot mean the value of the land free from all encumbrances. Counsel for the respondents, indeed, concedes that the words mean the true value, that is to say, the price which a purchaser would be prepared to give in view of the restrictions and encumbrances. It may be that in this case it is impossible to estimate such a value with any degree of accuracy. The value may be nil, if the donee predecease the donor.

The value set upon the lands by the Government valuer, if it is the value free from encumbrances, is clearly wrong. On the other hand the donor has assessed the value at Rs. 15,000/– which may indeed be a very fair valuation. In any case the Commissioner has not shown that it is an under-valuation.

I would therefore allow the appeal with costs.

DE KRETSER, J. — *Appeal allowed.*

I agree.

Present: SOERTSZ, J. & KEUNEMAN, J.

ROSA MARIA FERNANDO vs JAMES FERNANDO & ANOTHER

S. C. No. 96/1939—*D. C.* (*Final*) *Negombo No.* 10615.

Argued on 18th, 20th & 21st June, 1940.

Decided on 28th June, 1940.

Fraudulent alienation—Paulian action—Alienation after notification of claim for damages by creditor ex delicto*—Right of such creditor to impeach the alienation—Must it be shown that the impeached alienation rendered debtor insolvent immediately.*

Held : (i) That, where a claim for unliquidated damages has been reduced to the form of a decree, the decree-holder is entitled to impeach as fraudulent a deed alienating property executed after the claim arose but before decree was entered.

(ii) That to hold that the decree-holder must prove that such alienation caused immediate insolvency to the alienor is to place an unnecessary restriction on the person defrauded.

(iii) That a subsequent debt can be taken into account in determining the question of insolvency at the time of execution of the impugned alienation.

Per KEUNEMAN, J.—"But the question still remains whether the alienation must cause insolvency to the alienor immediately. On this point no direct authority has been cited to us. But, I am inclined to think that such a view would place an unnecessary restriction on the person defrauded. In this case, it has been established that the alienation was made by the 2nd defendant fraudulently and with the express intention of hindering and defrauding the claim of the 1st defendant. It is clear that prior to the date of the alienation a cause of action *ex delicto* had accrued to the 1st defendant, and that the 1st defendant had notified to the 2nd defendant his intention of bringing an action for damages. I hold that the 2nd defendant knew that in consequence of the alienation, the 1st defendant would not be able to realise his decree, in other words, that he acted so that when the decree came into being, there would be no assets or insufficient assets to levy execution on. In fact the 2nd defendant was deliberately rendering himself insolvent as against the time that the decree would come into being. In the result, the claim of the 1st defendant has been defeated. Further, it is not possible to acquit the plaintiff from complicity in this matter.

I do not think it is necessary to go as far as to hold that the 1st defendant was a creditor of the 2nd defendant, or that there was a debt due to him at the time of the alienation. I may add, however, that I incline towards holding that he was a creditor *ex delicto*, and, therefore, to be regarded as an antecedent, and not as a subsequent, creditor. It is sufficient to say that even if he is to be regarded as a subsequent creditor, he has established the conditions necessary to enable him to succeed in this action. I think this finding is in conformity with the argument of Bertram, C.J. in *Fernando vs Fernando* and not at variance with that of Jayawardene, A.J. in the same case, and that it follows also from the decision in the case of *Silva vs Mack*."

Cases referred to : *Fernando vs Fernando* (26 N.L.R. 292)
Silva vs Mack (1 N.L.R. 131)
Muttiah Chetty vs Mohamood Hadjiar (25 N.L.R. 185)
Saravanai Arumugam vs Kanthar Ponnampalam (3 Leader L.R., Part II. P. 11)

H. V. Perera, K.C., with *L. A. Rajapakse*, for plaintiff-appellant.

N. Nadarajah with *H. A. Wijemanne*, for 1st defendant-respondent.

1940

Keuneman, J.

Rosa Maria Fernando *vs* James Fernando & Another

KEUNEMAN, J.

The plaintiff brought this action against the 1st and 2nd defendants, praying that she be declared entitled to the lands mentioned in Schedules "A" and "B" of the plaint, that the 2nd defendant be declared not entitled to the said lands, and that the said lands be declared not liable for seizure or sale for any debt or liability of the 2nd defendant, for damages and costs. The plaintiff alleged that the 2nd defendant, her husband, conveyed to her by deed P1 of the 17th September, 1935, the lands mentioned in Schedule "A" for valuable consideration, and by the same deed conveyed to her the lands in Schedule "B" which he was holding in trust for her. She alleged that the 1st defendant, her brother, obtained a decree in D. C. Negombo No. 9022 for damages, Rs. 3,000/–, and for costs, Rs. 530/72½, as against the 2nd defendant, and had seized in execution fifteen out of the eighteen lands conveyed on deed P1. The plaintiff had claimed the said lands in D. C. Negombo No. 9022, but her claim was dismissed.

The 1st defendant filed answer praying that the action be dismissed and that the lands mentioned in Schedules "A" and "B" of the plaint be declared liable to seizure and sale in execution of writ in D. C. Negombo No. 9022. He further prayed that the deed P1 be declared null and void, as the said deed was executed in fraud of creditors.

The 2nd defendant admitted the allegation in the plaint but prayed that he be not condemned to pay damages and costs.

After trial, the learned District Judge dismissed plaintiff's action with costs to be paid to the 1st defendant, and the plaintiff appeals.

In evidence it was established that the 2nd defendant shot and injured the 1st defendant on the 2nd September, 1934. The 2nd defendant was charged with having voluntarily caused grievous hurt, and was convicted and sentenced to a fine of Rs. 1,000/– and imprisonment till the rising of the court. Out of the amount paid, Rs. 750/– was paid to the 1st defendant as compensation. By his proctor's letter, P15 or 1D1, dated the 9th September, 1935, the 1st defendant claimed damages from the 2nd defendant to the amount of Rs. 15,000/–. No reply was received to this letter, and the 1st defendant subsequently filed action D. C. Negombo No. 9022, and, on the 25th March, 1936, decree was entered for Rs. 3,000/– and costs in this action. The 2nd defendant appealed, but his appeal was dismissed. The costs in the case were taxed at Rs. 530/72½.

Meanwhile, on the 17th September, 1935, the 2nd defendant executed the deed P1, conveying to his wife, the plaintiff, the lands mentioned in Schedules "A" and "B" of the plaint. The 2nd defendant stated in evidence that the letter of demand, P15 or 1D1, was not received by him till after the execution of P1, but the District Judge has rejected this evidence, and has held that the letter was received two or three days after its dispatch and before the execution of P1. I agree with the District Judge in this respect.

The principal points argued before us in appeal were as follows :

(1) That the 1st defendant could not be regarded as a creditor of the 2nd defendant at the date of P1, namely, the 17th September, 1935, as his decree was not obtained till the 25th March, 1936.

(2) That there was no evidence that the 2nd defendant was insolvent at the date of P1, as there were no debts proved as being in existence on that date. There is no proof that there was any indebtedness on the part of the 2nd defendant to any other person than the 1st defendant.

(3) That the deed P1 could not be set aside, because the lands in Schedule " A " were sold to the plaintiff for valuable consideration, and the lands in Schedule " B " had been held by the 2nd defendant in trust for the plaintiff.

(4) That there is sufficient property in the hands of the 2nd defendant, whereby the 1st defendant's claim can be realised in full, namely, the lands mentioned in deed P2, dated the 29th June, 1932, which is a transfer by Pedru Fernando to the 2nd defendant, and also certain movable property of the 2nd defendant.

I think it is convenient to deal with argument (4) first.

By deed P2 of the 29th June, 1932, Pedru Fernando purported to convey to the 2nd defendant for the consideration of Rs. 2,400/– a one-sixth share of twenty-one lands. The entirety of these lands had belonged to Abraham Fernando, father of Pedru Fernando and of the 1st defendant. Abraham Fernando, by his last will of the 20th June, 1911, (1D3), devised these lands and certain other lands to his wife Maria Fernando, and ordered that " she shall after filing the final account of my estate divide and set over the said property unto my and her children who are living at that time as she and Pattage Manuel Fernando who will be appointed executor, please." Abraham Fernando died about 1915, and the will was admitted to probate in D. C. Negombo (Testy) No. 1533, and the final account was filed in March, 1916, and was passed and settled about two years after the death of the testator.

Maria Fernando, an old lady of about eighty years of age, was called by the plaintiff, and stated :

> " I was directed by the will to divide the estate. I did not divide the property. I told my children to possess the lands. I do not claim the lands possessed by the children. Pedru possessed some estate lands.....I did not execute a deed in my children's names. They are in possession....."

On the 1st June, 1918, Manuel Fernando, the executor of Abraham Fernando's estate, sued Maria Fernando in D. C. Negombo No. 12818 for the sum of Rs. 1,633/– on the footing that Maria Fernando, the sole heir of the deceased, undertook to pay that amount to him. In her answer, Maria Fernando denied that she was the owner of the deceased's estate, and added :

> " The estate (was) handed over to her children about two years ago as desired by the testator, and the defendant states the plaintiff's action if any is against them and not against her whose interest (ceased) with the filing of the final account."

This answer was filed on the 9th July, 1918 (*vide* P 10). We are not aware of the result of this litigation as no decree in the case has been filed.

1940

Keuneman, J.

Rosa Maria Fernando *vs* James Fernando & Another

I do not think the statement in the answer can be regarded as accurate. The injunction of the testator was that the estate should be divided among the children as Maria Fernando and the executor, Manuel Fernando, pleased. The mere "handing over" of the estate was not contemplated by the testator. There is no allegation that this "handing over" was done with notice to the executor or with his approval. I am inclined to agree with the District Judge that this was merely a statement made to evade a claim. What the testator contemplated was a division of the estate approved by Maria Fernando and the executor, Manuel Fernando. The division need not necessarily be in equal shares or in equal values. For the purpose of passing title to the children Maria Fernando would have to execute a deed or deeds. In point of fact, all that happened, as Maria Fernando herself says, is that she told her children to possess the lands. It was open to her at any time to execute deeds of division, and I think the children could by action compel her to do so.

It was further argued that Pedru had since that date perfected his title to one-sixth of the lands in question by prescription. The evidence of prescription is very weak and I think the District Judge has rightly rejected that evidence. I may add that there is specific evidence to the contrary given by the first defendant.

After the present action was filed, Maria Fernando had executed a deed of disclaimer, P18, dated the 21st July, 1938, whereby she disclaimed title to the one-sixth shares of the twenty-one lands dealt with by Pedru Fernando in P2, and purports to confirm and ratify P2. I do not think this makes any difference in the present case. I am inclined to think thst Pedru had no title to convey the shares of the lands dealt with in P2, and that no title in these lands has passed to the second defendant.

The District Judge has held that in any event the lands dealt with in P2 were not of sufficient value to enable the 1st defendant to realise his claim and costs in full. Two of these lands have been transferred by P1 to the plaintiff. Apart from the value as disclosed in the deed P2, it must be remembered that what the purchaser-in-execution would get would, at the best, be a litigation, and consequently he would not be willing to pay anything more than a nominal amount. I think that for all practical purposes the value of this asset, if it can be regarded as an asset, is nil. The movable property of the 2nd defendant is of small value and falls far short of the 1st defendant's claim.

I now propose to deal with argument (3) advanced by plaintiff's counsel.

The first question is whether the lands mentioned in Schedule "A" of the plaint were transferred to the plaintiff for valuable consideration. The consideration stated in the deed is Rs. 5,000/–. The plaintiff alleged that this sum was spent by her in the defence of the 2nd defendant in the criminal case, and also for medical and other expenses during his illnesses. The District Judge has taken into consideration the fact that the plaintiff

borrowed certain amounts about the time of the criminal case, but does not accept the story of the plaintiff that any amounts borrowed were spent on the 2nd defendant. He has also considered the financial position of the 2nd defendant as disclosed in the evidence, and has come to the conclusion that the 2nd defendant did not need his wife's assistance to pay his bills. It was alleged that P1 was executed because the 2nd defendant was seriously ill at the time and not expected to live, and that pressure was put upon the 2nd defendant to execute P1 in order to ensure to the plaintiff the amount borrowed from her. The District Judge does not accept the story of this serious illness. He further comments on the fact that the value of the lands in Schedule "A" of the plaint was about Rs. 12,000/–, to judge from the consideration stated in the deeds by which the 2nd defendant obtained title. For her alleged debt of Rs. 5,000/– the plaintiff obtained lands worth over double that amount. I think it is difficult to resist the conclusion, accepted by the District Judge, that the transfer was not made in good faith, and was without valuable consideration.

As regards the lands included in Schedule "B" of the plaint, the plaintiff produced mortgage bonds P4, P5 and P6 of 1925, and P3 of 1927, where certain sums of money were lent out in her own name. In 1933, on deeds P7, P8 and P9, the lands mortgaged on these bonds were transferred to the 2nd defendant in satisfaction of the mortgage debts. These are the lands in Schedule "B." The plaintiff alleged that the moneys lent out on P4, P5, P6 and P3, were her moneys, and that the 2nd defendant held the lands transferred to him on P7, P8 and P9 in trust for her. The 1st defendant alleged that the moneys lent out on P4, P5, P6 and P3 were the moneys of the 2nd defendant, and that he lent these out in the name of his wife, the plaintiff, because he was a Government servant, and that, after his retirement, he had the transfers made out in his own name.

The District Judge has rejected the story of the plaintiff and the 2nd defendant, and has accepted the story of the 1st defendant. As the District Judge points out, the explanation offered that P7, P6 and P9 were made out in the 2nd defendant's name because he had to institute partition actions cannot be true, because the plaintiff was accustomed to litigation and in point of fact brought a partition suit for one of the lands in Schedule "B." The 2nd defendant, on the other hand, was an invalid. No partition action has been brought by him. It is further to be noticed that in P1 there is no suggestion that the lands in Schedule "B" were held in trust for the plaintiff, and no attempt was made to differentiate them from the lands in Schedule "A". In fact, in the deed P1, there are not two Schedules. All the lands were transferred as the property of the 2nd defendant. The District Judge further rejected the plaintiff's story that she had money enough to lend out of her dowry and her savings. I uphold the findings of the District Judge in this connection.

The way is now open to examine arguments (1) and (2) of the plaintiff's counsel. He argued with much force that the 1st defendant could not be

1940

Keuneman, J.

Rosa Maria Fernando *vs* James Fernando & Another

regarded as a creditor of the 2nd defendant, and that there was no debt due to the 1st defendant from the 2nd defendant till March 25th, 1936, when decree was entered in D. C. Negombo No. 9022. He contended that the 1st defendant must be regarded at the date of deed P1 as a future creditor, and urged that a future creditor was in no better position than an antecedent creditor, and had to prove that the voluntary alienation rendered the debtor insolvent at the time of the alienation. He urged that the subsequent debt must not be taken into account in determining the question of insolvency.

In *Fernando vs Fernando* (26 N.L.R. 292) a problem somewhat akin to the present question was raised. Bertram, C.J. discussed the question whether the person who has only an unliquidated claim for damages is a creditor for the purpose of the Paulian action. He pointed out that Pothier in his "Commentary on the Pandects" expressed the opinion that a person to whom something is due *ex delicto* may be considered a creditor. He proceeded to show that there were two views as to what constituted a "creditor" among the Roman jurists. One was that a creditor was a person who relied upon the good faith of another. The other was that anyone to whom anything was due for any cause was a creditor. Bertram, C.J. did not decide this matter, but found a solution, namely, that a person may be considered to have formed a design to defraud future creditors. Prejudice caused by such a design, he said, was within the scope of the remedy. He referred to the judgment of Judge Berwick (*vide infra*). He continued :

> "The action does not lie unless the plaintiff can show not only a fraudulent intention, '*consilium*' but also actual prejudice, '*eventus*,' demonstrated by legal process."

Jayawardene, A.J., in the same case, was of opinion that the term "creditor" would not include persons having claims for unliquidated damages arising out of breach of contract, or *ex delicto*. But he went on to add that once decree was entered in favour of a person who has such a claim, he was entitled to put in issue the question of alienation in fraud of creditors.

At least one point can be regarded as settled in that case, namely, that where the claim is for unliquidated damages, the person who has such a claim cannot maintain a Paulian action, until his claim has been reduced into the form of a decree.

In the present action the 1st defendant has a decree in his favour but this does not dispose of the whole matter. Is it necessary that the 1st defendant should prove insolvency on the part of the 2nd defendant at the time of the deed P1, leaving out of account the amount of the decree subsequently obtained ?

In this connection the case of *Silva vs Mack* (1 N.L.R. 131) is important. The judgment of Judge Berwick in the District Court is given *in extenso*, and is valuable, not only because of the full and able discussion of the authorities bearing on the matter, but also because it appears to have been accepted by the Supreme Court. Judge Berwick considered the principle of the English Law, whereby the element of fraudulent intent

seems to be entirely eliminated, and a subsequent debtor may impeach a voluntary settlement, if there be still existing at the time of the impeachment any debt contracted antecedent to the settlement. He asked whether this was also the Roman-Dutch Law, or, failing, facilities to answer the question in that form of the Civil Law. He continued: "It appears to me that the Civil Law requires a concurrence of prejudice and fraudulent intention immediately directed against the person who seeks to impeach the deed; that is to say, there must be both these circumstances, and they must also meet in the same person." But where the creditor who was intended to be defrauded was paid off with money of subsequent creditors, the latter were entitled to impeach the fraudulent act. These two elements are further emphasised again where Judge Berwick quotes with approval a passage from Kent's Commentaries to the effect that in Louisiana a deed cannot be set aside as fraudulent unless it be proved to have been made with an intention to defeat future creditors. He adds:

> "This I consider exactly to express the law of this country, if we add the words, 'or unless it be proved that a person, who was a creditor at its date, has been paid with the money of the subsequent creditor who seeks to set it aside.' And with this addition it exactly and tersely summarizes what I have decided on the points raised on this suit."

I agree that is the correct conclusion to be drawn from the authorities discussed.

But the question still remains whether the alienation must cause insolvency to the alienor immediately. On this point no direct authority has been cited to us. But, I am inclined to think that such a view would place an unnecessary restriction on the person defrauded. In this case, it has been established that the alienation was made by the 2nd defendant fraudulently and with the express intention of hindering and defrauding the claim of the 1st defendant. It is clear that prior to the date of the alienation a cause of action *ex delicto* had accrued to the 1st defendant, and that the 1st defendant had notified to the 2nd defendant his intention of bringing an action for damages. I hold that the 2nd defendant knew that in consequence of the alienation, the 1st defendant would not be able to realise his decree, in other words, that he acted so that when the decree came into being, there would be no assets, or insufficient assets to levy execution on. In fact the 2nd defendant was deliberately rendering himself insolvent as against the time that the decree would come into being. In the result, the claim of the 1st defendant has been defeated. Further, it is not possible to acquit the plaintiff from complicity in this matter.

I do not think it necessary to go as far as to hold that the 1st defendant was a creditor of the 2nd defendant, or that there was a debt due to him at the time of the alienation. I may add, however, that I incline towards holding that he was a creditor *ex delicto*, and, therefore, to be regarded as an antecedent, and not as a subsequent, creditor. It is sufficient to say that even if he is to be regarded as a subsequent creditor, he has established the conditions necessary to enable him to succeed in this action. I think this

1940

Keuneman, J.

Rosa Maria Fernando *vs* James Fernando & Another

finding is in conformity with the argument of Bertram, C.J. in *Fernando vs Fernando* (*supra*), and not at variance with that of Jayawardene, A.J., in the same case, and that it follows also from the decision in the case of *Silva vs Mack* (*supra*).

Further I do not think it is in conflict with Voet's Commentary on the Pandects (42-8-14).

> "There must be fraud on the part of the alienating debtor, and two things are necessary before this can be alleged, to wit, that he should have had a fraudulent intention, knowing that he was not solvent, and nevertheless diminishing his estate, although he may not have intended to defraud this or that particular person; and the result should have corresponded with the intention so that the creditors are unable to obtain their own; and finally, that the fraudulent intention and the result should both meet in the person of the creditor, unless he whom the debtor originally intended to defraud, has been paid from the money of the person whom he has defrauded in fact."

I see no reason why the words, "knowing that he was not solvent, and nevertheless diminishing his estate," should not cover the facts of the present case.

I may add that in *Muttiah Chetty vs Mohamood Hadjiar* (25 N.L.R 185), Ennis, A.C.J., following Hutchinson, C.J. in *Saravanai Arumugam vs Kanthar Ponnampalam* (3 Leader L.R., Part II. P. 11), laid down the circumstances under which a fraudulent intention can be inferred, among them "(4) that the transfer left (the debtor) without any property, and (5) or without enough to pay the debts which he owed at the time or was about to incur."

The appeal is dismissed with costs.

SOERTSZ, J.

I agree.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL.

Present: HOWARD, C.J., (President), KEUNEMAN, J. & NIHILL, J.

REX vs BELLANA VITANAGE EDDIN

Application No. 3/1940—*S. C. No.* 16—*M. C. Kalutara No.* 45867.

(*2nd Western Circuit* 1940)

Argued & Decided on 4th June, 1940.

Misdirection—Charge of murder—In what circumstances must the judge in a trial for murder put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder.

Held : That where the evidence points clearly to a verdict of murder it is not the duty of the judge to put before the jury an alternative issue with regard to culpable homicide not amounting to murder.

Mackenzie Pereira, for the accused.
E. H. T. Gunasekera, Crown Counsel, for the Crown.

HOWARD, C.J.

This is an appeal from the refusal of my brother Nihill to grant the appellant leave to appeal under section 24 of the Court of Criminal Appeal Rules, 1940. When this application was heard by my brother, the appellant was not represented by counsel. The appeal to my brother was made on grounds which were mentioned in his application. The appellant before the court of appeal has been represented by Mr. Mackenzie Pereira, who has relied in his argument not on the grounds of appeal which were before my brother but on another ground. That ground was that the learned Judge in his charge to the jury omitted to give the jury or put to the jury the alternative of finding the accused guilty of culpable homicide not amounting to murder. That defence was not raised nor relied upon by the accused at his trial. That fact in itself would not be sufficient to relieve the Judge of the duty of putting this alternative to the jury if there was any basis for such a finding in the evidence on the record. It, therefore, remains for consideration as to whether there was anything in the record of the evidence to provide material on which the jury could find the accused guilty of culpable homicide not amounting to murder.

The question which the jury had to decide was as to the intention of the accused ; that is to say, whether the act by which the death was caused was done with the intention of causing death, or secondly, if it was done with the intention of causing such bodily injury as the offender knows to be likely to cause death to the person to whom the hurt is caused or thirdly, if it was done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

If the case came within any of these three examples the offence of which the accused was guilty, was murder. The learned Judge referred to the injuries found on the deceased and left it to the jury to say whether these injuries indicated that the accused caused them with the intention of causing death or of causing such bodily injury as is likely to cause death.

Now, turning to the medical evidence we find that there were four injuries inflicted on the head the first three of which caused three separate fractures. The fourth did not cause a fracture but it was inflicted on the right side of the back of the head indicating that at the time when it was inflicted the deceased was running away. The medical evidence is also to the effect that the deceased man had been assaulted practically all round, front, left, right, and the rear of the face, that the injuries could have been caused by blows with a club, that Nos. 1, 2 and 3 were the result of heavy blows and that after receiving injuries 2 and 3 it was not likely that the man

1940

Howard, C.J.

Rex
vs
Bellana Vitanage Eddin

could have spoken. He also states further on in his evidence that the injuries on the deceased would have caused death in the ordinary course of nature but each wound by itself is not necessarily fatal.

Now, what inference is to be drawn from the nature of the injuries that were inflicted on the deceased, or can any other inference be made from those injuries except that the accused intended to cause death or such bodily injury as he knew was likely to cause death or to cause bodily injury to the deceased. And the bodily injury intended to be caused was sufficient in the ordinary course of nature to cause death. I think it is obvious that no other intention can be inferred from the nature of the blows, the part of the body on which they were inflicted, and the force with which they were inflicted. That, moreover, is not the only evidence as to the intention of the accused. The witness, Silva, a fishmonger of Paiyagala gave evidence that he was present on the Colombo–Galle Road that night and he heard the deceased say to the accused. "You threatened to kill me. If you can, do so now." This witness says that he separated the two men, and the accused at the same time said: "You be on the look-out. Before dawn I will kill you." If any other evidence was required as to the intention of the accused, it is supplied by the evidence of this man Silva, which amounts to evidence of a definite threat on the part of the accused.

In view of what I have said with regard to the medical evidence and the threat, we are of opinion that the jury could have arrived at no other verdict except one of murder. In these circumstances, it was not the duty of the learned Judge to put before the jury an alternative issue with regard to culpable homicide not amounting to murder. To do so would have merely confused their minds as to the issues on which they had to find.

The application must be refused.

Application refused.

Present: HOWARD, C.J.

ASST. GOVT. AGENT (Mullaitivu) vs SELVADURAI

S. C. No. 274/1940—*M. C. Mullaitivu No.* 16130.
Argued on 8th July, 1940.
Decided on 10th July, 1940.

False information—Penal Code (Chapter 15) section 180—When should an accused be convicted under that section—Misdirection.

Held: (i) That to constitute the offence punishable under section 180 of the Penal Code it is necessary that the information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false or that he did not believe it to be true.

(ii) That the accused cannot be convicted if he shows that he had reasonable grounds for believing the information he gave to be true.

Per HOWARD, C.J.—"In allowing this appeal I feel it incumbent on me to say something with regard to the judgment and the whole atmosphere pervading the trial of this case. The learned Magistrate seems to have regarded the weight to be attached to the evidence of various witnesses from an administrative rather than from a judicial point of view. As an instance of this attitude he accepts the evidence of the Udiyar of Naducheddikulam apparently on the grounds that the latter could count three generations of his ancestors as having held influential and trusted offices in Government, that he holds a medal for good work and has no censures in his record of service. The evidence for the defence is rejected because it is given by witnesses taken at random from the village where the incidents connected with the 11th June 1939, are said to have taken place. This is not the method that a Judicial Officer should employ to test the credibility of witnesses."

Cases referred to : *Murad vs Empress* (29 P.R. 1894 Cr.)
Goonetilleke vs Elisa (20 N.L.R. 140)

S. Nadesan, for the accused-appellant.

E. H. T. Gunasekera, Crown Counsel, for the complainant-respondent.

HOWARD, C.J.

The conviction in this case cannot be maintained. To constitute the offence punishable under section 180 of the Penal Code it is necessary that the information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false or that he did not believe it to be true. There must have been positive knowledge or belief that it was false. In *Murad vs Empress* (29 P.R. 1894 Cr.) Plowden, J. stated as follows :

> "it is not enough to find that he has acted in bad faith, that is, without due care of inquiry or that he has acted maliciously or that he had not sufficient reason to believe or did not believe the charge to be true. The actual falsity of the charge, recklessness in acting upon information without testing it or scrutinising its sources — actual malice towards the persons charged — they are relevant evidence more or less cogent, but the ultimate conclusion must be in order to satisfy the definition of the offence that the accused knew that there was no just or lawful ground for proceeding. It may be difficult to prove this knowledge but, however difficult it may be, it must be proved and unless it is proved the informer must be acquitted."

The accused cannot be convicted if he shows that he had reasonable grounds for believing the information to be true. He is not bound to show that it was in fact true.

The prosecution have not proved that the accused knew or believed the information which he gave to be false. In fact the evidence indicates that he had real grounds for thinking that it was true. The first false statement charged against the accused is that he stated that the District Mudaliyar, Vavuniya South, came to Rasenthirankulam on the 11th instant and included in the list for relief work all people who had large quantities of paddy. The Assistant Government Agent in his evidence stated that

1940

Howard, C.J.

Asst. Govt. Agent (Mullaitivu) *vs* Selvadurai

work had been given to S. Velupillai although he had 18 bags of paddy and to S. Kaddaiyar who had 4 or 5 bags of paddy. Also that some were given relief work in spite of their having seed paddy. The Udaiyar— Karthigesu Nagamany — in his evidence also admits that there was paddy in some of the houses where relief was given. In view of this evidence it is clear that the falsity of the statement has not been established. There may have been some exaggeration, but on the other hand it would appear that the accused had reasonable grounds for thinking that it was true.

The second false statement alleged is that the accused stated in his petition that the District Mudaliyar had given relief work to those who can live comfortably even if Government does not give one cent. If the petition is scrutinised it is clear that this was not a charge made by the accused against the Mudaliyar in his petition. The passage in the petition on which this charge against the accused is based is merely a repetition by the latter of what he said to the Mudaliyar. Moreover, the falsity of the accused's statement has not been established.

The third false statement alleged is that the District Mudaliyar has included for relief work 2 from a family of 4, 2 from a family of 3 and 3 from a family of 7. The evidence of Karthigesu Nagamany indicates that this statement was approximately correct. Knowledge of its falsity has moreover not been brought home to the accused.

The fourth false statement alleged is set out in the charge as follows:

> "(4) For all these the District Mudaliyar did not act according to the Regulations."

The Magistrate states that (4) is a general summing up of (1), (2) and (3). If (1), (2) and (3) are accepted against the accused, suffice it to say that (4) has to be accepted against him. The accused's knowledge of the falsity of (1), (2) and (3) has not been established. In these circumstances (4) stands in the same category.

In allowing this appeal I feel it incumbent on me to say something with regard to the judgment and the whole atmosphere pervading the trial of this case. The learned Magistrate seems to have regarded the weight to be attached to the evidence of various witnesses from an administrative rather than from a judicial point of view. As an instance of this attitude he accepts the evidence of the Udiyar of Neducheddikulam apparently on the grounds that the latter could count three generations of his ancestors as having held influential and trusted offices in Government, that he holds a medal for good work and has no censures in his record of service. The evidence for the defence is rejected because it is given by witnesses taken at random from the village where the incidents connected with the 11th June 1939, are said to have taken place. This is not the method that a Judicial Officer should employ to test the credibility of witnesses.

The Magistrate's strictures on a statement in the accused's petition begging the Assistant Government Agent to do away with the injustice of the subordinate headman and grant them his help can only be described as

lamentable. These strictures are couched in flowery language in which are drawn inferences unwarranted and unjustifiable. It is ludicrous for the Magistrate to infer from the words " do away with the injustice " a request for the Assistant Government Agent to use his lawful power to dismiss the acting Mudaliyar or, if that is not possible, to recommend him for dismissal or censure or fine him.

The Magistrate in addition to misdirecting himself both on the law and the evidence, has allowed evidence of previous charges against the accused to be given in evidence. It does even appear that convictions in these cases were recorded against the accused. Not content with this, the Magistrate allowed evidence to be tendered of previous petitions sent by the accused but not referring to the subject-matter of the petition which formed the subject of the charge in this case. In spite of objections by counsel for the accused this evidence was admitted under section 146 of the Evidence Ordinance. Needless to say this section has no relevance in the matter.

The record of the case offers a good example of how a judicial enquiry should not be conducted.

I would also refer to the concluding paragraph of Shaw, J's judgment in *Goonetilleke vs Elisa* (20 N.L.R. 140).* The present case is also one in which in my opinion, the provisions of section 180 of the Penal Code should not have been exercised.

The appeal is allowed and the conviction set aside.

Conviction set aside.

" Although I quite agree with the remarks of the present Chief Justice in *Cooksen vs Appuhamy* of the importance for the protection of the villagers themselves of punishing false and malicious petitioners, I think that the provisions of section 180 should be exercised very sparingly and with great caution, in the case of petitions against the police to their superior officers, for it is much better that a Police Superintendent's time should be occasionally wasted in inquiring into an unfounded charge against one of his subordinates than that villagers should be deterred by criminal prosecutions from laying their complaints against the police, which are necessarily somewhat difficult to prove in a court of law, before their superior officers for departmental inquiry." (Edd. C.L.W.)

Present: MOSELEY, S.P.J. & WIJEYEWARDENE, J.

PETER SINGHO & OTHERS vs APPUHAMY

S. C. No. 221—*D. C. Chilaw No.* 11294.
Argued on 8th July, 1940.
Decided on 12th July, 1940.

Buddhist Temporalities Ordinance (Chapter 222)—Scope of the Ordinance—Do the provisions of the Ordinance apply to a devale *exempted from the operation of section* 4 (1).

Held : That a *devale*, which has not been brought under the operation of section 4 (1) of the Buddhist Temporalities Ordinance, falls entirely outside the provisions of the Ordinance.

Per WIJEYEWARDENE, J.— "It is admitted that the particular *devale* is a temple within the meaning of the Ordinance (*vide* section 2) and also that it is a temple exempted from the operation of section 4 (1). This *devale* should, therefore, come under section 4 (2) if it is regulated by the Ordinance. But section 4 (2) as indicated by me earlier vests the management of the property of such a "temple" in a "*Viharadhipati*." This term "*Viharadhipati*" is defined in the Ordinance as "the principal *Bhikshu* of a temple other than a *devale* or *kovila* whether resident or not." It is clear from a consideration of those sections that a *devale* which is not brought under section 4 (1) does not fall under section 4 (2) as there is no *Viharadhipati* for a *devale*. It is only in a case of a *devale* not exempted from the operation of section 4 (1) that the Ordinance authorises the appointment of a trustee who may in certain circumstances be called Basnayake Nilame. Section 5 of the Ordinance subjects only trustees appointed under the Ordinance and the controlling *Viharadhipatis* to the general supervision of the Public Trustee."

Barr Kumarakulasingham, for appellants.
N. Nadarajah with *G. E. Chitty*, for respondent.

WIJEYEWARDENE, J.

The five plaintiffs-appellants instituted this action under section 102 (1) of the Trusts Ordinance against the defendant-respondent in respect of Aiyanayake Devale.

Several issues were framed at the trial, three of which were as follows :

Issue No. 3	Are the plaintiffs persons interested in the said trust within the meaning of section 102 of the Trust Ordinance ?
Issue No. 10	Is the Aiyanayake Devale a Devale within the meaning of Ordinance No. 19 of 1931 ?
Issue No. 11	Is so, can the plaintiff maintain the action ?

The District Judge answered issues No. 3 & 11 in the negative and issue No. 10 in the affirmative and dismissed the plaintiff's action.

It is not possible to say that the finding of the District Judge on issue No. 3 is incorrect and the appeal must therefore be disallowed.

The observations of the learned District Judge on issue No. 10 with regard to the scope of the Buddhist Temporalities Ordinance No. 19 of 1931

appear to be based on a misconception of the provisions of that Ordinance. By section 3 the provisions of the Ordinance are made applicable to every temple in the Island, but the Governor is given the power to exempt any temple other than the Dalada Maligawa, the Siripadasthana and the Atmasthana from the operation of all or any of its provisions. As it was found that the number of temples to be exempted was far in excess of the number of temples to be regulated by the Ordinance the various proclamations published under section 3 stated that all temples other than those mentioned in the respective schedules annexed to the proclamations were exempted from the operation of section 4 (1) of the Ordinance. Section 4 (1) vests the management of the property belonging to a temple not exempted from the operation of the sub-section in the trustee duly appointed under the provisions of the Ordinance. Section 4 (2) vests the management of the property belonging to a temple exempted from the operation of section 4 (1) in the *Viharadhipati* of the temple referred to in the Ordinance as the controlling *Viharadhipati*.

It is admitted that the particular *devale* is a temple within the meaning of the Ordinance (*vide* section 2) and also that it is a temple exempted from the operation of section 4 (1). This *devale* should, therefore, come under section 4 (1) if it is regulated by the Ordinance. But section 4 (2) as indicated by me earlier vests the management of the property of such a "temple" in a "*Viharadhipati*." This term "*Viharadhipati*" is defined in the ordinnance as "the principal *Bhikshu* of a temple other than a *devale* or *kovila* whether resident or not." It is clear from a consideration of these sections that a *devale* which is not brought under section 4 (1) does not fall under section 4 (2) as there is no *Viharadhipati* for a *devale*. It is only in a case of a *devale* not exempted from the operation of section 4 (1) that the Ordinance authorises the appointment of a trustee who may in certain circumstances be called Basnayake Nilame. Section 5 of the Ordinance subjects only trustees appointed under the Ordinance and the controlling *Viharadhipatis* to the general supervision of the Public Trustee.

As the *devale* in this case has not been brought under the operation of section 4 (1) of the Ordinance it falls entirely outside the Ordinance and none of its provisions is applicable to the devale in question.

The case of *Ratwatte vs The Public Trustee** (1933–12 Ceylon Law Recorder 208) referred to in the judgment of the learned District Judge has no bearing on the question, as the devale in question in that case was the Kataragama Devale, Kandy, which was brought under the operation of section 4 (1) of the Buddhist Temporalities Ordinance by a proclamation published in the Ceylon Government Gazette No. 7, 896 of December 4th 1931.

The appeal is dismissed with costs.

MOSELEY, S.P.J.

I agree.

Appeal dismissed.

*2 C.L.W. 134 (Edd)

Present: MOSELEY, S.P.J. & WIJEYEWARDENE, J.

PONNUSAMY vs AIYADURAI & ANOTHER

S. C. No. 30 (*Inty*)—*D. C. Jaffna No.* 6741.
Argued on 23rd July, 1940.
Decided on 29th July, 1940.

Administration action—Termination of proceedings with final accounts —Motion by administrator for notice on his proctor to bring certain moneys to court—Fees due to proctor—Is administrator's remedy by way of separate action.

Final accounts having been filed, the court made an order "closing" the estate in March, 1931. In December, 1937, the administrator-appellant moved that his proctor, the respondent be asked to bring into court certain sums of money which were in his hands. The motion itself indicated that the appellant had not paid all the fees due to the respondent. On the motion being referred by court to the respondent he reported to court that he objected to it and among other reasons he stated that fees were due to him for professional work done in connection with the testamentary case and in connection with various other matters.

Held : That the appellant's remedy was by way of a separate action and not by way of summary procedure.

R. L. Pereira, K.C., with *M. Tiruchelvam*, for petitioner-appellant.
N. Nadarajah with *H. W. Thambiah*, for respondent.

WIJEYEWARDENE, J.

The appellant is the administrator of the intestate estate of his wife, and the respondent was his proctor in the testamentary proceedings until his proxy was revoked in February, 1938.

The testamentary proceedings started in 1928 and the appellant files a "final" account on December, 10th 1929. This final account was as follows :

To amount of money invested with Swaminather Sammugam with interest till date of death	Rs.	4,222.00
,, amount value of movables mentioned under items 2 to 3 in the Inventory	,,	500.00
,, amount value of immovables in charge of heirs	,,	800.00
Total	Rs.	5,522.00
By amount of immovables taken over by the heirs	,,	800.00
,, amount of costs of administration	,,	348.00
,, amount of commission due to the administrator at 1½%	,,	82.83
,, amount of jewels worn by the minor daughter who is the sole heir	,,	500.00
,, amount of funeral expenses	,,	550.00
,, amount in deposit to the credit of the heirs	,,	3,241.17
Total	Rs.	5,522.00

The sum of Rs. 3,241/17 shown in the final account was deposited in court in July, 1930 and the court made an order "closing" the estate on March 18th 1931, after due notice to the respondents in the testamentary case. Whatever be the legal effect of an order "closing" the estate without a judicial settlement, there can be no doubt that for all practical purposes the parties to the testamentary proceedings considered the order as terminating the testamentary proceedings.

In December, 1937, more than 6 years after the order "closing" the estate the appellant moved that the proctor should be asked to bring into court (*a*) the interest on Rs. 4,222/- from October, 1929 till June, 1930 and (*b*) the sum of Rs. 980/33 made up of the items Rs. 348/-, Rs. 82/83 and Rs. 550/- shown in the final account and claimed to be due to the administrator from the estate on account of the costs of administration, commission and funeral expenses.

The motion itself indicated that the appellant had not paid the respondent all the fees due to him.

On this motion being referred to the respondent by the District Judge the respondent submitted a report giving his reasons for stating that no interest was due from him on the sum of Rs. 4,222/- from October, 1929 to June, 1930 and alleging that the sum of Rs. 980/33 due to the appellant from the estate was retained by him according to the appellant's instructions on account of fees due to him from the appellant for professional work done by him in the testamentary case and in connection with various other matters. The appellant thereafter filed a petition and an affidavit through another proctor in February, 1940 and asked for a notice on the respondent to show cause why he should not deposit in court the sum of Rs. 980/33 and the interest on Rs. 4,222/- from October, 1929 till June, 1930. The District Judge refused to allow notice to issue on the respondent and referred the petitioner to a separate action. The present appeal has been preferred against that order.

The counsel for the appellant was unable to cite any provision of the Code or any local decision in support of his argument that the appellant was entitled to ask for relief by way of summary procedure against his proctor in the circumstances of the case. He argued that the court had an inherent jurisdiction to grant relief asked for and referred to section 839 of the Civil Procedure Code.

Even assuming that the District Court had an inherent power to grant the relief asked for, I do not think that the circumstances of the case called for the exercise of such a power. I hold that the learned District Judge has exercised his discretion rightly in referring the petitioner to a separate action.

I dismiss the action with costs.

MOSELEY, S.P.J.

I agree.

Appeal dismissed.

Present: WIJEYEWARDENE, J.

WIJESEKERA (Excise Inspector) vs ARNOLIS

S. C. No. 354E—M. C. Panadura No. 5976.

Argued on 10th July, 1940.

Decided on 12th July, 1940.

Accused—Benefit of doubt—Can the Magistrate in determining the guilt or the innocence of the accused act on a suggestion by counsel unsupported by evidence.

Held : That the guilt or innocence of an accused person must be determined on evidence and not on some suggestion made by counsel in the course of his argument.

E. H. T. Gunasekera, Crown Counsel, for complainant-appellant.

No appearance for the accused-respondent.

WIJEYEWARDENE, J.

This is an appeal with the sanction of the Attorney-General against the acquittal of the accused.

The accused was charged in the Magistrate's Court with having committed :

(i) an offence punishable under section 43 (*g*) of the Excise Ordinance by selling fermented toddy in contravention of section 17 of the Ordinance, or in the alternative

(ii) an offence punishable under section 45 (*c*) of the Excise Ordinance by transferring fermented toddy by way of gift in contravention of condition 2 (*b*) of a tapping license issued to him.

The condition No. 2 of the Tapping License as prescribed by Excise Notification No. 291 published in Government Gazette No. 8232 of July, 3rd 1936 reads as follows :

(*a*) All toddy tapped or drawn under this license for the supply of a distillery, tavern or vinegar manufactory shall be delivered at a collecting station named in the license. Provided that toddy tapped or drawn for the supply of a tavern or vinegar manufactory and transferred otherwise than by cart, motor vehicle or other conveyance, may be delivered at the tavern or vinegar manufactory direct.

(*b*) No toddy tapped, drawn or transported under the license shall be sold or gifted or disposed of otherwise than in the manner prescribed in paragraph (*a*) of this condition.

The complainant — an Excise Inspector—and an Excise Guard gave evidence before the Magistrate for the prosecution. This evidence which was accepted by the Magistrate was to the following effect: The two witnesses went to the *tope* where the accused tapped trees for fermented toddy on a tapping license. As they approached they saw the accused pouring

toddy from a pot in his hand into a small pot which one Juwanis Perera was holding. Seeing them approach the accused proceeded to empty the contents of his pot to the ground and Juwanis Perera ran into a house, carrying the small pot. The Excise Inspector seized Juwanis Perera with the pot in his hand, which was found to contain fermented toddy. The Excise Guard seized the accused who was still holding his pot. A few drops of fermented toddy was found in that pot. The ground where the accused was seen to empty his pot was wet and smelt of fermented toddy. No money was found in the possession of the accused.

At the close of the case for the prosecution the Magistrate called upon the defence. No evidence was however called and the proctor for the accused said he would rest his defence entirely on a point of law. As there is no record of the argument, it has to be gathered from the judgment of the Magistrate who upheld the contention of the accused's proctor and acquitted the accused. This legal argument appears to have been as follows :

> This is a case in which a doubt arises as to the guilt of the accused, and the benefit of the doubt must be given to the accused. The Excise Inspector has stated under cross-examination that " for every *tope* there is a collector. The Inspector knows the collectors of *topes* within his range." He has not stated that Juwanis Perera is not a collector. It must be presumed therefore that Juwanis Perera is a collector in spite of the evidence that Juwanis Perera ran into a house on seeing the Excise party and that he has been charged in a connected case for illicit possession of toddy. This evidence no doubt tends to show that Juwanis Perera was not a collector for if he was one there should be a reason for his running away on seeing the Excise party. The defence could suggest an explanation for the conduct of Juwanis Perera and the subsequent prosecution against him. (The reason given appears in the following extract from the judgment: " that he (Juwanis Perera) ran into the house and that he was charged, Mr. Jayatilleke (proctor for the accused) suggests, are stage managed)."

It is not every kind of doubt the benefit of which an accused person is entitled. An accused person could claim only the benefit of a reasonable doubt. It is always possible to conjure up a doubt of a very flimsy nature. But an accused person cannot be acquitted on the ground of such a doubt. I fail to see how there could be in this case any reasonable doubt of the guilt of the accused. I find great difficulty in appreciating the argument that has been addressed to the Magistrate. If the Inspector knows all the collectors in his range and if he was nevertheless chosen to prosecute the accused for transferring the toddy to Juwanis Perera, the most natural inference that one can draw in the absence of any evidence to the contrary or any suggestion against the *bona fides* of the Inspector, is that Juwanis Perera is not a collector. The exact significance of the reference to a " stage management " is not clear. Is it suggested that Juwanis Perera who was getting the toddy as a collector ran into the house and got himself prosecuted in pursuance of a conspiracy between him and the Excise Officers to have the accused brought up on a false charge ? This was not even

1940

Wijeyewardene, J.

Wijesekera (Excise Inspector) *vs* Arnolis

suggested in the cross-examination of the prosecution witnesses. The guilt or innocence of an accused person must be determined on evidence and not on some suggestion made in the course of an argument. I set aside the order of acquittal and send back the case for the Magistrate to record a verdict of guilty and pass an adequate sentence.

Set aside and sent back.

Present: HOWARD, C.J.

COREA (Excise Inspector) vs MARTIN SILVA

S. C. No. 260—*M. C. Balapitiya No.* 35159.
Argued & Decided on 28th June, 1940.

Criminal Procedure—Retrial—Is it open to the Magistrate to come to a conclusion by reading the evidence given at the former trial.

Held : That in a case in which a retrial has been ordered it is irregular for the Magistrate to read the evidence given at the previous trial and to decide the case on that evidence.

L. A. Rajapakse with *S. Alles* and *V. F. Gunaratne*, for the accused-appellant.

G. E. Chitty, Crown Counsel, for the complainant-respondent.

HOWARD, C.J.

These proceedings are wholly irregular. The case against the accused was sent back to be retried by another Magistrate. The method adopted by this Magistrate was to read the evidence which had been given in the previous trial, and come to a conclusion on the case as the result of that previous evidence. This is not a retrial but merely a continuation of a former trial. In these circumstances the proceedings must be quashed and it will be left for those responsible for the prosecution to decide whether any further proceedings should be instituted against the accused.

Proceedings quashed.