# The Ceylon Law Weekly

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

## VOLUME LV

WITH A DIGEST

Hon'ble Mr. **HEMA H. BASNAYAKE,** Q.C.
*Chief Justice*
(*Consulting Editor*)

**G. P. J. KURUKULASURIYA**
*Advocate of the Supreme Court*
(*Editor*)

**B. P. PIERIS,** LL.B. (LOND.)
**C. CHELLAPPAH,** B.A. (LOND.)
**M. H. M. NAINA MARIKAR,** B.A. LL.B. (CANTAB.)
**B. SENARATH DIAS,** B.A. (LOND.)
**W. P. N. de SILVA,** B.A. HONS. (LOND.) **F. C. PERERA,** L.L.B. (CEYLON)
*Advocates of the Supreme Court*
(*Asst. Editors*)

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# DIGEST

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## Cattle Trespass

*Cattle Trepass Ordinance No. 9 of 1876—Loss of cattle in headman's custody—Degree of Care—Negligence—Liability.*

A headman who takes charge of cattle that had been seized under Section 7 of the Cattle Trespass Ordinance is in the position of a bailee for reward. As he is entitled to the fair and reasonable costs and charges for keeping the animals he must take the utmost care of them. He must exercise a high degree of deligence and the onus is upon him to disprove even the slightest negligence on his part in dealing with the animals in his custody.

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The appellants filed their petition of appeal on 20-9-55 and on the same day tendered an application for typewritten copies of the record and moved for an order to deposit the necessary fees. On that application the District Judge made order " Issue P.I.V. for Rs. 12/-. On 26-9-55 (within the prescribed period for perfecting the appeal) the proctors for the appellants filed Kachcheri receipt for Rs. 12/- being the amount of the prescribed fees for the typewritten copies.

A preliminary objection was taken to the hearing of the appeal on the ground that as the procedure adopted by the appellants did not satisfy the requirements of Rule 2 (1) of the Civil Appellate Rules of 1938, which provided that the application for typewritten copies should be accompanied by the fees prescribed in the schedule, the appeal had abated by operation of Rule 4 of the Civil Appellate Rules.

**Held** : (1) That the procedure adopted by the appellants is in conformity with the administrative arrangements of the Courts and the Financial Regulations of the Government, which do not permit an appellant to tender to the Judge or the Secretary or the Chief Clerk, as the case may be, the fees for typewritten copies as required by Rules 2 (1) and 2 (3) of the Civil Appellate Rules.

(2) That the failure to comply with the requirement of Rule 2 (1) was due to no fault of the Appellants, and applying the maxim " Lex non cogit ad impossibilia aut inutilia, the appeal should not be deemed to have abated.

*Per* BASNAYAKE, C.J.—" We cannot part from this case without stating what in our opinion should be the procedure an appellant should follow in complying with the Civil Appellate Rules in the present state of the financial regulations. We think that—

(*a*) where the Court is situated in a place in which there is a Kachcheri or Treasury Office the prescribed fees should first be deposited in the Kachcheri or Treasury Office and the receipt tendered along with the application under Rule 2 (1) for typewritten copies.

(*b*) where the Court is situated in a place in which there is no Kachcheri or Treasury Office the applicant should along with the application for typewritten copies tender a money order or postal order for the amount of the prescribed fees in favour of the Government Agent of the revenue district in which the Court is situated. The proper officer of the Court should then transmit the money order or ports order to the nearest Kachcheri and obtain a receipt.

The procedure we have laid down above is in accordance with the practice that now obtains in the majority of the Courts."

The objection is overruled.

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A failure to examine the title of each party in a partition action vitiates the decree.

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*Section 92—Journal kept recording all events in an action—Presumption that it is regularly kept—Burden of rebutting it—Evidence Ordinance, Section 114.*

**Held** : (1) That the Journal kept under section 92 of the Civil Procedure Code is the principal record of an action, and the court is entitled to presume under section 114 of the Evidence Ordinance that it was regularly kept.

(2) This is a rebuttable presumption and the burden of placing sufficient material to rebut it is on the party against whom the presumption is sought to the used.

*Per* K. D. DE SILVA, J.—" The date s'amp on the plaint is by no means conclusive. Although date stamping is extremely desirable and must be accurately done, yet I must observe that there is

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no provision in the Civil Procedure Code which requires it ".

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*Section 347—Failure to Comply with requirements of—Are they imperative or directory—Effect on execution proceedings.*

**Held**: That the requirements of Section 347 of the Civil Procedure Code are imperative and that the failure to comply with them is fatal.

*Per* BASNAYAKE, C.J.—" It is a rule of interpretation of statutes that enactments which regulate the proceedings in courts are usually imperative and not merely directory. In the instant case the failure to comply with provisions of the Statute has not been on the part of one of the parties to the proceedings but on the part of the court itself, and the question for decision is whether the non-observance of the requirements of section 347 by the court would render the proceedings void ".

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*Common intention, several accused charged together with criminal offences on the basis of —Failure on the part of the Magistrate to consider evidence against each—Duty of Magistrate—Failure of investigating Police officer to give evidence where his evidence, if led, could have thrown light on the truth or falsity of the prosecution and defence versions.*

**Held**: (1) That where several accused are charged together with criminal offences on the basis that there existed a common intention shared by all to commit the offences, the magistrate should examine the evidence as against each of the accused in order to arrive at a decision in regard to the common intention.

(2) That where the evidence of the investigating Police officer could throw much light on the truth or falsity of the prosecution and defence versions, such evidence must always be led. Failure to do so, entitles the defence to invite the court to draw an inference adverse to the prosecution.

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The plaintiff transferred to the 1st defendant three lands for Rs. 1,000/- reserving the right to obtain a re-transfer within five years on payment of the said sum of Rs. 1,000/- together with interest thereon. The 1st defendant sold the lands to the 2nd defendant, who sold one of the lands to the 3rd defendant. Plaintiffs having failed to obtain a re-transfer within the period stipulated instituted this action seeking to redeem the lands conveyed on the ground that the deed in favour of the 1st defendant was in fact a mortgage though drawn in the form of a transfer.

The District Court held that the deed was a sale with an agreement to re-transfer and not a mortgage. The plaintiff appealed.

**Held**: (1) That the deed in favour of the 1st defendant is clear and unambiguous and is an outright transfer with a *pactum de retrovendendo.*

(2) That Section 92 of the Evidence Ordinance precludes the plaintiff from leading parol evidence for the purpose of establishing that the deed in question is a mortgage.

For a fuller discussion of the questions involved on this subject see *William Fernando vs. Roslyn Cooray,* 55. C. L. W. p 25.

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## Contract

*Contract—Carriage of goods—Cargo deposited in warehouse—Non delivery of part—Liability of carrier —Absence of special agreement.*

Plaintiff became entitled to a cargo of 500 crates of potatoes as endorsees for value on two bills of lading from a 3rd party. The defendant who is a carrier by trade landed the full quantity of the cargo into their lighters at the ship's side but the plaintiff was able to obtain delivery from the warehouse of only 362 crates.

The plaintiff sued the defendant company for damages arising from the loss of 198 crates. The trial Judge awarded damages to the plaintiff holding that the defendant was liable for the non-delivery after the cargo had been deposited in the warehouse.

**Held**: That in the absence of a special agreement by which a carrier by trade becomes liable, as bailee or insurer of goods in a Queen's warehouse, his responsibility ceases when the goods had been duly deposited in the warehouse.

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## Corporation Sole

*Land Commissioner is a corporation sole. No particular words are necessary in the creation of a corporation sole.*

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*Criminal Procedure—Proceedings instituted by Police Officer under section* 148 (1) (*b*) *of the Criminal Procedure Code—Against accused in respect of certain offences—Charges framed by Magistrate—No evidence recorded before framing of charges—Conviction of accused—Is it legal?—Criminal Procedure Code, sections* 187 (1), 425—

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**Held** : Pulle, J. dissenting : That it is imperative that a Magistrate should record evidence on oath in terms of section 151 (2) of the Criminal Procedure Code before framing charges against an accused person, where proceedings have been instituted under section 148 (1) (*b*) of the Code. Failure to do so amounts to an illegality which vitiates the entire proceedings and cannot be cured under section 425 of the Code.

*per* K. D. de Silva, J.—" This section 187 (1) includes not only a case where the accused is present in custody, but also where he is present on remand on police bail or on being warned by the police to appear in Court. In all instances it would appear that it is incumbent on the Magistrate to hold the examination contemplated by section 151 (2)—".

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*Section* 306 (1)—*Requisites of a judgment—Duty of Magistrate to give reasons for his decision. In recording evidence Magistrate to comply with Section* 298 (3) *Criminal Procedure Code.*

**Held** : (1) That the omission by a Magistrate to give reasons for his decision occasioned a failure of justice. A mere outline of the case for the prosecution and the defence is not a sufficient compliance with section 306 (1) of the Criminal Procedure Code.

(2) That in recording evidence it is the duty of the Magistrate to comply with the requirements of section 298 (3) of the Criminal Procedure Code.

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## Damages

*Damages—When Appellate Court will vary award by trial Court. Award of interest in appeal—A matter of discretion.*

**Held** : (1) That an Appellate Court should not interfere with an award made by trial Court unless it is satisfied that the Judge in assessing damages applied a wrong principle of law or the amount awarded is subinordinately low or inordinately so high that it must be a wholly erroneous estimate of the damage.

(2) That an award of interest in appeal is a matter in the discretion of the Court. This discretion will not be exercised when the claim is made for the first time in appeal.

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*Damages against Insurance Company—Lorry running off the road due to steering rod giving way—Serious damage, to lorry—Claim resisted by Company—Defence that (1) damage not caused by " accidental, external means ", (2) false answer in proposal, (3) failed to take all reasonable precautions to safeguard from loss or damage and to maintain in efficient condition in breach of condition of Policy—Dismissal of action.*

*Judicial Notice, of what matters can Court take—Burden of Proof—Where it lies in these cases. Motor Traffic Act, No. 14 of 1957, Section 36.*

**Held** : (1) That where a lorry ran off the road by accident when the steering rod gave way and was damaged when it collided with a log, the case fell within the phrase " accidental, external means ".

(2) That where the answer to the question in a proposal for insurance of a lorry, " maximum carrying capacity " of vehicle ", was stated to be 3½ tons when the licensing authority had under section 36 of the Motor Traffic Act, specified in the license only two tons as the maximum payload which may be carried, and where there was evidence that this authorised capacity in the license is sometimes less than the actual carrying capacity of the vehicle at the discretion of the Commissioner of Motor Transport, it cannot be said that the answer has been proved to be false. The burden is on the Insurance Company to prove that a particular answer is false.

(3) That the Court cannot take Judicial notice of the fact that, if there are any smooth tyres on a motor vehicle is un-road-worthy or was not in efficient condition. It is a matter to be established by the evidence of an expert speaking to the facts of the particular case.

(4) That it is unsafe to infer that the mechanism of a motor vehicle had not been in an efficient condition, merely because it failed to function just before the accident occurred.

*Wigmore on Evidence* :—" The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is : (1) Is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know ? and (2) Is it certain and indisputable ? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence ".

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## Declaratory Action

*Declaratory Action—Primary Mortgage of several lands to three persons, K. L. M.—Secondary Mortgage of same lands to five persons L, M, N, O, P, including two mortgagees on primary bond—In both bonds money repayable to anyone of the mortgagees—Secondary bond put in suit by K only and decree obtained—Transfer by mortgagor of undivided shares in four out of the mortgaged lands to L and P in the proportion* 1/3 *and* 2/3 *in full satisfaction of debt due on Primary bond and decree entered on secondary bond—Subsequent devolution of interests of L and P on Plaintiff.*

*Land Redemption Ordinance No.* 61 *of* 1942—*Land Commissioner taking steps to acquire the four lands under—Declaratory action by plaintiff challenging Land Commissioner's right to acquire against Attorney-General and Land Commissioner and praying for injunction—Do the lands undivided shares of which were sold to K and P come within the ambit of Section* 3 (1) (*b*) *of Land Redemption Ordinance—*

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*Is the transfer to P a transfer in satisfaction of a debt—Joint and several creditors—Roman Dutch Law—Land Commissioner's functions—Can he be sued nomine officii—Is he to be regarded as a corporation sole—How a corporation sole can be created—Can an injunction be issued against a public servant—Determination to acquire lands under the Ordinance—Is it the the Land Commissioner's or the Minister's—What the attitude of the Courts should be in declaratory actions against public functionaries.*

*Provision in Section 3 (4) of the Ordinance that determination of Commissioner shall be final—Does it preclude Courts from declaring functions contrary to statute as illegal—Meaning of the word final—Jurisdiction conferred on Courts—How may it be taken away.*

*Courts Ordinance, Section 86—Right of Courts to entertain any action against Crown or its officers and grant injunctions—Availability of regular action regardless of whether illegal action complained of was administrative or quasi-judicial—Existence of other remedies no bar—Should considerations governing prerogative writs be extended to injunctions.*

*Interpretation—Statutes encroaching on the property rights of subject—Need to construe them strictly.*

E mortgaged eleven allotments of land in 1928 on bond P1 for a loan of Rs. 50,000/- to K. L. M. The bond contained the condition that the money was repayable to any one of the three mortgagees or their attorneys or heirs. In 1930 E executed a secondary mortgage of the same lands on bond P2 for Rs. 25,000/- in favour of the said K and L and three others, *viz.*, N. O. P. This loan was also repayable to any one of the five mortgagees or their attorneys or heirs. In 1931 E executed a tertiary bond P3 in favour of W.

K sued E on bond P2 adding W as a party to the action and obtained decree on 22/6/33. On 4th May, 1935 E by deed P5 transferred to K and P for Rs. 75,000/- undivided shares in four of the lands mortgaged on P1 and P2 in the proportion of 2/3 to K and 1/3 to P. The consideration was set off in full satisfaction of the claim and costs under the said decree and the money due on P1. E undertook to release the lands from bond P3. This resulted in saving seven of the mortgaged lands for E.

In 1940 K transferred an undivided 1/3 share of the lands to O and his remaining 1/3 to the representatives in interest of N. In 1945 O, P and the representatives in interest of N transferred to the plaintiff the undivided shares transferred by E on P5. The plaintiff entered into possession of the said lands thereafter.

In February, 1949 the Land Commissioner informed the plaintiff that he was taking steps to acquire their four lands under the Land Redemption Ordinance No. 61 of 1942. The plaintiff challenged the Land Commissioner's right to acquire the lands and instituted action against the Attorney-General and the Land Commissioner praying for an injunction restraining them jointly or in the alternative from taking steps under the Ordinance to acquire the lands. E was later added as the 3rd defendant.

The 1st and 2nd defendants (the Attorney-General and the Land Commissioner) pleaded *inter alia* (1) that the land is one which comes within the description contained in Section 3 (1) (*b*) of the Ordinance.

(2) That the Commissioner's determination to acquire the said lands was final and conclusive and could not be questioned by the District Court and that it had no jurisdiction to entertain the action.

(3) That the plaintiff is not entitled to proceed against the 1st defendant (Attorney-General) as representing the Crown to obtain an order of injunction against the Land Commissioner (2nd defendant).

(4) That the plaintiff could not maintain this action against the 2nd defendant without suing the officer who made the order in question by name. In the course of the trial it was conceded that the action could not be maintained against the Attorney-General.

The learned District Judge dismissed the plaintiff's action on the ground that the land in question was capable of being acquired under Section 3 of the Ordinance and that the Land Commissioner's decision on facts was final. He also held (i) that the authority to acquire a particular land was subject to review by the Court.

(ii) That the Land Commissioner could be sued *nomine officii* and that the action taken by the Commissioner was covered by Section 3 (1) (*b*) and (4) of the Ordinance.

The plaintiff appealed.

**Held:** (by BASNAYAKE, C.J., PULLE, J., and K. D. DE SILVA, J. *dissentiente*)

(1) That the lands transferred on P5 did not come within the ambit of Section 3 (1) (*b*) of the Land Redemption Ordinance and the Land Commissioner had no authority to acquire them as (*a*) what was transferred by E was not the mortgaged lands themselves, but undivided shares of some of them (the section refers to 'land' and not to undivided shares of land).

(*b*) P's right to claim the debt from E ceased on the institution of the mortgage action by K, the obligation created by P2 being joint and several. (Therefore the transfer to P was not a transfer in satisfaction of a debt due from E to P.)

(2) That the enactment under which the office of Land Commissioner is created and the other enactments under which he has functions and duties to perform indicate that the Land Commissioner is regarded as a corporation sole in regard to his statutory duties and functions. No particular words are necessary in the creation of a corporation sole.

(3) That an action can be properly instituted against the Land Commissioner *nomine officii.*

(4) That an injunction can be issued a public functionary such as the Land Commissioner.

(5) That the determination that any land should be acquired for the purpose of the Land Redemption Ordinance is the Land Commissioner's and not the Minister's.

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(6) That with the increase of statutory functionaries the Courts should be ever ready to entertain declaratory actions as a means of exercising their jurisdiction to prevent injustice.

(7) That the provision in Section 3 (4) that the determination of the Land Commissioner shall be final does not preclude the Courts from declaring in appropriate proceedings that the action of such a functionary who has acted contrary to the statute is illegal.

(8) That the jurisdiction conferred by our Courts Ordinance could not be taken away except by express and clear language.

(9) That our Courts, unlike in England, are free to entertain any action against the Crown or its officers under Section 86 of the Courts Ordinance. Our Courts can grant injunctions whether the defendant is the Crown or a servant of the Crown or the subject.

(10) That the remedy of regular action is, under of our law, available, regardless of whether the illegal action against which relief is claimed is administrative or quasi-judicial. The existence of other remedies such as *Certiorari* is not a sound reason to refuse to adjudicate on a matter rightly before Court.

(11) That there is no justification in Ceylon for extending to injunctions the considerations governing the prerogative writ of Mandamus.

(12) The Land Redemption Ordinance constitutes a serious encroachment on the property rights of the subject and therefore it should be strictly construed and its scope should be strictly confined by preferring a construction in favour of the subject and against the acquiring authority.

*Per* BASNAYAKE, C.J.—" In this country the Attorney-General, the Fiscal, the Collector of Customs, the Postmaster-General, the Director of Public Works, and a whole host of Government functionaries act and are regarded as if they were corporations sole in the matter of contracts on behalf of the Government and in legal proceedings. All contracts are entered into by these functionaries binding them and their successors as if they were corporations sole acting for and on behalf of the Crown. This practice has been in existence to my personal knowledge for well over thirty years. It would appear that the Crown and the subject have both acted on that footing for a quite a long time.

Observations of Farwell J. on actions against Government Departments in respect of their illegal acts referred to in the judgment. Also the principles governing the exercise of their functions by statutory functionaries as declared by the Courts in England and other commonwealth countries set out.

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**Held**: That section 55 of the Estate Duty Ordinance Cap. 187 has no application to money lying to the account of any suit. The Commissioner of Estate Duty has no authority in law to issue a notice under that section to a Court or Judge.

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*Evidence—Conviction for burglary and theft—Only evidence a palm print—Failure to identify finger print slip.*

The accused was charged with the offences of house breaking and theft of articles some of which were in a wardrobe. The only evidence incriminating the accused was a palm print on one of the doors of the wardrobe but the prosecution made no attempt to identify the finger print slip or refer to it by number.

**Held**: That in the absence of proof as to the indentity of the person whose finger and palm prints were to be found on the finger print slip used for purposes of comparison, the conviction could not stand.

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**Held** : That where the question was whether the child left by a deceased person was his legitimate child by his first marriage and therefore became entitled to certain fidei-commissum property, statements made by him in divorce proceedings against the wife of his second marriage, to the effect that he married his first wife are not inadmissible as admissions under section 18 (3) (*c*), since the person proving them (child by 1st marriage) does not derive her interest in the subject-matter of these proceedings from the maker of the statement. They are relevant under section 32 (5) of the Evidence Ordinance.

(2) That these statements are not of a self-serving nature as they are not in the interest of the person making it.

(3) That the weight and sufficiency of statements as establishing a fact is a matter for the trial Judge to decide.

(4) That in deciding whether a foreign marriage has been duly proved, the presumption *omnia rite esse acta* could be applied.

(5) That under section 50 Evidence Ordinance, evidence that relatives regarded the respondent as legitimate and conducted themselves accordingly towards the respondent was relevant.

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*See Civil Procedure* ... ... ... 21

## Fidei Commissum

Fidei commissum—*Donation by a Muslim under last will of property subject to certain conditions—Law governing devolution of—Who is a " Residuary " in Muslim law ?—Transfer of property by one of the donees to conform apparently to conditions of the will but in effect in violation thereof—Effect of.*

A Muslim by his last will devised his interests in certain lands to two of his sons in equal shares, and another property to another son prohibiting and rendering void any alienation, mortgage sale, or lease for a period exceeding four years, or gift of the interests to any outsider except to themselves. In the event of the condition being infringed, the premises were to devolve on the lawful child or children of the donees absolutely.

**Held** : (1) That the terms of the will created a valid fidei commission as the testators intention was to pass the lands, other than those which had been valid by alienated, ultimately to the children of the respective donees.

(2) That on the death of the donee *i.e.*, the fiduciary, the property devolved on his children in equal shares and not to his heirs according to Muslim Law.

(3) That on the death of the fidei commissaries, the devolution of the property would be governed by Muslim Law.

(4) That where a fidei commissary died leaving a mother, two sisters and a paternal uncle, the paternal uncle would inherit under Muslim Law exclusively as a residuary.

(5) That, where as in this case, one of the donees under the will transferred his interests in the property to the other donee, who, immediately thereafter, transferred the interests to an outsider, such a transfer amounted to a violation of the condition.

Abeygunawardena *et al vs.* Deonis Silva 5

## Husband and Wife

*Proof of foreign marriage.*

Wijesekera *vs.* Weliwitigoda *et al* ... 95

## Indian and Pakistani Residents (Citizenship) Act

*Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Respondent, an applicant for registration as a citizen of Ceylon—Requirements for registration—Sections 6 and 22 as amended by Section 4 of the Indian and Pakistani Residents (Citizenship) (Amendment) Act No. 37 of 1950—Meaning of " permanently settled in Ceylon " in Section 22 (b) of the Act—Onus and method of proof of such intention—Not to be equated with " domicile "—Application for registration after satisfying other requirements only established a* prima facie *case, not conclusive evidence, for registration.*

*Appeal to the Privy Council—Right of—Meaning of " civil suits or actions " in Section 3 of the Appeals (Privy Council) Ordinance (Cap. 85)—Same as Section 52 of the Charter of 1833—Section 6 of the Civil Procedure Code.*

**Held** : (1) That an Indian or a Pakistani resident in Ceylon is entitled to be registered as a citizen of Ceylon, if at the time of his application,

(*a*) he and his family, (if any) possess the residential qualification respectively prescribed by section 3 of the Indian and Pakistani Residents (Citizenship) Act.

(*b*) he satisfies all the relevant conditions laid down in section 6 (2) of the Act.

(*c*) he satisfies the requirement as to " origin " in para. (*a*) or that he is a descendant of such a person.

(*d*) he proves that he has " permanently settled in Ceylon ", that is, he must supply evidence that at the time of his application he has the intention of settling permanently in Ceylon.

(2) That the application for citizenship together with compliance of the requirements in (*a*), (*b*) and (*c*) afford a *prima facie* case for registration. It does not amount to conclusive evidence of an intention to settle permanently in Ceylon and entitling him as of right to be registered as a citizen. The Commissioner, after considering all relevant matters, may yet decide that at the time of application the applicant had not a genuine intention to settle permanently in Ceylon. To prove such intention, it is not necessary for the applicant to prove change of domicile.

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(3) That there is a right of appeal to the Privy Council from an order of the Supreme Court refusing or allowing an application for registration under the Act.

(4) That the words " civil suits or actions " in section 3 of the Appeals (Privy Council) Ordinance bears the same meaning as that contained in section 52 of the Charter of 1833. Section 52 of the Charter granted to a subject labouring under a sense of grievance the fundamental right of appealing to the sovereign and did not intend to exclude cases differentiated by reference to the form of proceedings, regardless of the gravity of the result occasioned by them. It is erroneous to limit the words " civil suits or action in section 3 of the Appeals (Privy Council) Ordinance to a " proceeding in which one party sues or claims something from another in regular proceedings ".

*Obiter.* The term " action in the Charter and the Appeals Ordinance is that which is contained in section 6 of the Civil Procedure Code.

H. E. TENNEKOON *vs.* PATUPATHI KITNAN DURAISAMY ... ... ... 81

## Injunction

*An injunction can be issued against a public functionary such as the Land Commissioner.*
*Injunction may be granted whether the defendant is the Crown or a servant of the Crown or the subject.*

LADAMUTTU PILLAI *vs.* ATTORNEY-GENERAL AND OTHERS ... ... ... 59

## Interpretation of Statutes

*See* LADAMUTTU *vs.* ATTORNEY-GENERAL ... 59

## Judgment

*See Civil Procedure Code* ... ... 9

## Joint and Several Creditors

*Liability under Roman Dutch Law—*

*See* LADAMUTTU *vs.* THE ATTORNEY-GENERAL ... 59

## Kandyan Law

*Kandyan Law—Deceased father leaving acquired property and legitimate son and illegitimate daughter —Daughter the sole illegitimate child—Does she lose her right to the acquired property by marrying in deega.*

**Held** : (1) That where there is a sole illegitimate child who marries in ' deega ', she does not forfeit her moiety even where the parents of both the legitimate and illegitimate children are the same.

(2) That a party to an action cannot escape the operation of section 207 of the Civil Procedure Code by inviting the court not to decide issues that arise on the pleadings, unless the reservation of issues comes within the provisions of section 406 of the Civil Procedure Code.

MALLAWA AND ANOTHER *vs.* SOMAWATHIE GUNASEKERA ... ... 42

## Land Commissioner

*Regarded as a Corporation Sole in regard to his statutory duties and functions.*
*An action can be properly instituted against the Land Commissioner nomine officii.*
*An injunction can be issued against a public functionary such as the Land Commissioner.*

LADAMUTTU PILLAI *vs.* ATTORNEY-GENERAL AND OTHERS ... ... ... 59

## Landlord and Tenant

*Landlord and Tenant—Dispossession of tenant—Injuria involving contumelia—Landlord's liability for damages.*

A landlord is not entitled to take possession of the premises he has let to a tenant unless the tenant has vacated the premises or surrendered possession and even if the tenant had agreed to quit.

Such act amounts to a wrongful dispossession which constitutes an *injuria* involving *contumelia* for which damages are payable.

ABEYWARDENA *vs.* REV. SIRI NIVASA *et al* ... 93

*Lease of grass land and buildings as a single unit —Right of lessee to claim protection of the Rent Restriction Act—Can the lessee be ejected from the grass land.*

Where property consisting of highland with buildings thereon and a grassfield is let as a single unit at a single rent, the real question is not whether what was let consisted of property to which the Act did not apply as well as property to which it did, but whether it consisted of buildings with appurtenant land or land with appurtenant buildings. This is a question of fact.

ELIZABETH A. PAUL AND OTHERS *vs.* GEVERAPPA REDDIAR ... ... ... 110

## Land Redemption Ordinance No. 61 of 1942

*Section* 3 (1) (*b*) *and* 3 (4) *Proviso—meaning of the word 'final'*

*This Ordinance constitutes a serious encroachment on the property rights of the subject and therefore it should be strictly construed. The determination that any land should be acquired for the purposes of the Ordinance is the Land Commissioner's and not the Minister's.*

LADAMUTTU PILLAI *vs.* ATTORNEY-GENERAL AND OTHERS ... ... ... 59

## Maintenance

*Maintenance Ordinance, Section 2—Order refusing maintenance reversal in appeal—Order granting maintenance substituted—From what date it becomes payable—Criminal Procedure Code, Section 347.*

Where an order refusing maintenance is reversed in appeal and the Supreme Court substituted an order allowing maintenance, the maintenance so ordered becomes payable from the date on which

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the Magistrate's order would have taken effect if there would have been an allowance of the maintenance by the Magistrate.

SOLOMON FERNANDO *vs.* PADMA LALANI FERNANDO ... ... ... ... 23

*Maintenance Ordinance Section 8—Defendant in arrears for six years—Sentence of imprisonment for six years—Is it illegal—Criminal Procedure Code, Section 312—What defendant should do to avoid such punishment.*

In this case the defendant was in arrears of maintenance for a period of six years. The defendant made no attempt to pay the arrears though time was allowed for the purpose. The Magistrate sentenced him to six years' imprisonment in the following terms :—

"For the first six months in default he will undergo six months' rigorous imprisonment and likewise for each subsequent period of six months in default, he will be sentenced to six months' rigorous imprisonment.

Held : (1) That the sentence is not illegal in view of the provisions of Section 8 of the Maintenance Ordinance.

(2) That if a defendant in a maintenance case wishes to avoid a long term in jail he must make a reasonable effort to meet the obligations he owes to his wife.

LIYANAGE SIRIWARDENE *vs.* DEWATHANTRIGE EMALIN ... ... ... ... 36

*Maintenance—Application to cancel maintenance order—Wife's refusal to live together—Husband living in adultery—Burden of proof—Maintenance Ordinance, Sections 3 and 5.*

Where a husband applies for the cancellation of a maintenance order on the ground that the wife refuses to live with him and the latter alleges that her refusal is due to the husband living in adultery.

Held : That in an application for an order for cancellation maintenance order the burden is on the person seeking to cancel the order to prove the existence of circumstances stated in Section 5 of the maintenance Ordinance.

GALLEGE JASLIN NONA *vs.* CHARLIS SINGHO ... 44

*Maintenance Ordinance—Order made under Section 2—Decree for divorce subsequently—Order for alimony in wife's favour—Application by wife to enhance order under Section 2 after decree for divorce—Is she entitled to make such application.*

Held : That a divorced wife is entitled to make an application under section 10 of the Maintenance Ordinance to enhance an order of maintenance obtained by her under section 2 prior to divorce.

B. FRANCIS FERNANDO *vs.* VINCENTINA FERNANDO ... ... ... 111

## Muslim Law

*Donation by Muslim under last will subject to certain conditions—Law governing devolution of Fidei commissum.*

## Negligence

*See Cattle Trespass* ... ... ... 10

ABEYGUNAWARDENA *et al vs.* DEONIS SILVA ... 5

## Partition

*Failure to examine the title of each party in a partition action vitiates the decree.*

DONA LUCIHAMY *et al vs.* CICILIYANAHAMY *et al* ... ... ... ... 9

*Partition Act, No. 16 of 1951 Sections 20, 25, 26 and 61—Duty of Court in Partition Actions—Adverse possession—What is necessary to prove.*

In a partition action under the Act 16 of 1951, apart from deciding on the points of contest raised by the parties, there is an obligation on the Court under section 25 to scrutinise the title of each party before any share is allotted to him in the Interlocutory Decree under section 26.

Where a party fails to produce his documents of title, the procedure laid down in sections 20 and 61 of the Act should be followed.

In the leading evidence of prescriptive title the manner of adverse possession should be set out. The observations in 21 N.L.R. at 326 approved.

*Per* L. W. DE SILVA, A.J.—"We are of the opinion that a partition decree cannot be the subject of a private arrangement between parties on matters of title which the Court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest *inter se* and to obtain a determination on them, the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do. The interlocutory decree which the court has to enter in accordance with its findings in terms of section 26 of the Act is final in character or since no interventions are possible or permitted after such a decree. There is therefore the greater need for the exercise of judicial caution before a decree is entered. The court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act".

JULIANA HAMINA *et al vs.* DON THOMAS *et al* ... 18

*Partition Action—Plaintiff's title based on a deed of 1911—Defendant's plea that it was a forgery—Deed sought to be proved by production of certified copy only—Presumption under section 90 of the Evidence Ordinance—Does it apply to a certified copy—Effect of failure to object to production of such copy—What certified copy proves—Proof of Public Documents Ordinance, (Cap. 12) Section 2.—Evidence Ordinance, Section 90.*

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In this Partition action filed in 1953, the plaintiff claimed certain shares of a land on a series of deeds commencing with a deed of 1911. In their answer the defendants repudiated this deed as being a forgery and this formed one of the points of contest. In proof of the due execution of the said deed of 1911, the only evidence adduced was a certified copy (P1) of the duplicate transmitted to the Registrar of lands by the attesting Notary as required by the Notaries Ordinance. At the production of P1 no objection was raised by the defendants, but in cross-examination a point was made that it was only a copy.

**Held** : (1) That the plaintiff had failed to prove due execution of the deed of 1911.

(2) That the presumption under section 90 of the Evidence Ordinance does not apply to a certified copy of a document purporting to be thirty years old. It only applies to a document which purports or is proved to be thirty years old.

(3) That section 2 of the Proof of Public Documents Ordinance only means that the production of the certified copy shall be evidence of the contents of the original document and such a copy produced would only be secondary evidence as defined in section 63 of the Evidence Ordinance.

(4) That proof of the contents of the document does not amount to proof of its execution.

(5) That even if the failure to object to the reception of P1 in evidence constituted an admission by the defendants the admission did not go beyond conceding that the original duplicate of the deed of 1911, being in the custody of the Registrar of lands, was a document of which a certified copy is permitted by law to be given in evidence on the conditions for the admission of secondary evidence being satisfied.

The case was remitted to the District Court to enable the plaintiff to produce the duplicate copy of the deed of 1911 in the custody of the Registrar of lands with the right reserved to the contesting defendants to lead further evidence available on the question of the due execution of that deed together with a direction to return the proceedings with the finding on that question.

SABARATNAM *et al vs.* KANDAVANAM ... 49

*Partition Action—Prayer for a declaration for right of way over land outside the corpus to be partitioned—Can such declaration be granted.*

**Held** : That in a partition action a declaration cannot be obtained for a right of servitude in respect of a land outside the subject—matter of the action.

THAMBIAH *vs.* SINNATHAMBY ... ... 55

*Partition Act, No. 16 of 1951, sections 14 and 48 (1)—Interlocutory decree entered without due service of summons on a party—Effect of such decree—Meaning to be given to the words " notwithstanding any omission or defect of procedure "—Does failure to serve summons come within these words.*

**Held** : (1) That an interlocutory decree for partition entered under the Partition Act No. 16 of 1951 without due service of summons is bad in law and should be vacated.

(2) That due service of summons on a party is an essential step and does not come within the term " omission or defect of procedure " in section 48 (1) of the act.

SIRIWARDENA *et al vs.* JAYASUMANA ... 98

## Preliminary Objection

*See Civil Appellate Rules* ... ... 37

## Prescription

*Prescriptive title—Gift of entire property by one co-owner to his daughter—Daughter's exclusive possession of the property through the donor for over ten years—Can she acquire a prescriptive title to the entire land—Need to prove adverse possession.*

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*Manner of proving adverse possession.*
*See* JULIANA HAMINE *vs.* DON THOMAS ... 13

## Privy Council

*Appeal—Privy Council—Notice of intention to apply for leave to appeal under Rule 2 in the Schedule to Appeals (Privy Council) Ordinance—Sufficient if notice reaches respondent's address within the prescribed period—Applicability of Rules 5 and 5A of the Appellate Procedure (Privy Council) Order 1921 to Rule 2.*

Under Rule 2 of the Rules in the schedule to the Appeals (Privy Council) Ordinance, an applicant for leave to appeal to the Privy Council is required to give the opposite party within fourteen days from the date of the judgment to be appealed from, notice of his intention to apply for leave.

The University of Ceylon, the applicant for leave to appeal, had sent by registered post two notices to the respondent, one directed to his residence and the other to his place of employment. The university also sent a notice to the Proctor representing the respondent, and caused another notice to be handed to the Proctor personally. These notices reached their destination within the prescribed period of 14 days. The respondent filed an affidavit stating that he became aware of the notices only after the prescribed period as he was away from his residence and place of employment.

It was contended on behalf of the respondent (1) that a notice under Rule 2 to be effective must reach the respondent in the sense of his becoming aware of it within the prescribed period.

(2) that the notice given to and served on the Proctor is not valid as the Proctor had no authority under his proxy to receive such a notice.

(3) that by reason of the decision in *Fradd vs. Fernando*, the delivery of a notice to the Proctor is not effective under Rule 2, even if the Proctor is regarded as the respondent's agent, as he must

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have special authority to accept under procedural Rule 6 of the Appellate Procedure (Privy Council) Order 1921.

**Held**: (1) That the requirement of "giving notice" under Rule 2 is satisfied once a letter is despatched and reaches its destination within the prescribed period. It is not necessary that it must "reach" the addressee in the sense of his becoming aware of it, and that therefore the applicant had given a valid notice.

(2) That Rules 5 and 5A of the Appellate Procedure (Privy Council) Order 1921 do not control the operation of Rule 2 as,

(*a*) these are framed under section 4 of the Appeals (Privy Council) Ordinance and cannot be construed to modify Rule 2, which is part and parcel of the main enactment.

(*b*) that since the Rules prescribe the mode of personal service, they cannot apply to Rule 2, which does not require personal service of the notice required to be given by it.

The question whether a notice posted within the prescribed period and in fact, delivered after it is valid or not, referred to but not decided.

UNIVERSITY OF CEYLON *vs.* FERNANDO ... 1

*Appeal to Privy Council—Final leave to appeal granted—Failure to serve on respondent list of documents considered necessary for due hearing of appeal within time prescribed—Application for extension of time—Proctor's negligence in regard to sending notices—Should time be granted.*

*Appellate Procedure (Privy Council) Order—Rules* 10, 18 *and* 25*—Is the requirement to give notice of necessary documents under Rule* 10 *mandatory—Does the failure to give such notice alone entitle the opposing party for a declaration under Rule* 25 *that appeal should stand dismissed.*

**Held**: (1) That where the failure to comply with rule 10 of the Appellate Procedure (Privy Councils) Order of 1921, which requires the appellant to serve on the respondent within ten days of the grant of final leave to appeal a list of all documents necessary for the due hearing of the appeal, was due to the negligence of the Proctor for the appellant, no extension of time should be granted by the Supreme Court.

(2) That the said rule 10 is mandatory, not directory.

(3) That where an application for extension of the time allowed under rule 10 is refused, there is no other alternative but to grant a declaration under rule 25 that the appeal stands dismissed for non-prosecution.

REV. M. BUDDHARAKKHITA THERO *vs.* WIJEWARDENA *et al* ... ... ... 105

## Proof of Public Documents Ordinance

*Section 2—Only means that the production of the certified copy shall be evidence of the contents of the original document and such a copy produced would only be secondary evidence as defined in section 63 of the Evidence Ordinance.*

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## Registration

*Registration—Gift of premises subject to* fidei commissum *in favour of descendants—Transfer of premises by* fidei commissary *during the life time of the fiduciary—Prior registration of the deed of transfer —Gift not registered—Priority and effect of the deed of transfer—Land Registration Ordinance* 1891, *sections* 38, 39*—Decree in previous case declaring fiduciary entitled to title and possession of the premises as against the transferee—Plea of* res adjudicata.

S gifted by a deed P1 to R his son certain premises reserving to himself a life interest and creating a *fidei commissum* in favour of R's descendants. During the life-time of R, his son L by deed 6 D1 transferred the whole of the premises to D, and the deed was registered. P1 was not registered.

Previous to the present action R had sued D for a declaration of title to and ejectment from the premises. The Supreme Court in that case (No. 11739 D.C. Colombo) held that R was entitled to a declaration of title and possession but deleted a finding by the District Court that 6 D1 was null and void.

The plaintiff as a *fidei commissary* under P1 filed this action in the District Court for a sale of the premises under the Partition Ordinance. The defendant as successor-in-title to D resisted the claim on the ground that the premises belonged to him by reason of the prior registration of 6 D1 under the Land Registration Ordinance 1891. On appeal to the Supreme Court from a dismissal of the plaintiff's action, the Supreme Court held that the principle of prior registration was irrelevant, as the decree in case 11739 D.C. Colombo operated as *res adjudicata* in that it decided that P1 prevailed over 6 D1. On appeal to the Privy Council it was argued that as at the time 6 D1 was registered it did not pass any interest, it was not an instrument coming within the range of documents described in section 38 of the Land Registration Ordinance of 1863, and that in consequence the registration was ineffective at the time it was made and remained ineffective thereafter.

**Held**: (1) That the description of instruments contained in section 38 is wide and sufficient to cover instruments which though they are ineffective at the time of the execution may become effective at a later date and that 6 D1 effectively wiped out the provisions of P1 as it was a registered instrument within the terms of section 38.

(2) That the decree of the Supreme Court in case No. 11739 did not amount to *res adjudicata* as that case did not decide the question involved in the present action, namely, whether on the death of R the deed of transfer 6 D1 could be said to be a duly registered instrument passing title. That

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case merely decided that the deed of gift P1 prevailed over 6 D1 and that it fixed D with notice of *fidei commissum.*

THE COLOMBO APOTHECARIES COMPANY LIMITED *vs.* MARTHA AGNES PEIRIS AND OTHERS ... ... ... ... 77

## Sale of Goods

*Sale of Goods Ordinance (Chap. 70). Section 50, Sub-Sections (2), (3)—Measure of Damages—Non-delivery of Goods under a contract of sale—Damages not claimed by buyer under sub-contract.*

**Held** : That in assessing damages for non-delivery of goods under a contract of sale where there is an available market, the law does not take into account accidental factors between plaintiff and defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of goods. The measure of damages should be the difference between the market price and the contract price at the time the goods should have been delivered. The absence of a claim for damages against the plaintiff by the buyer under the intermediate contract is not relevant to the question of damages between the plaintiff and the defendant.

ROMANIS *vs.* SHERHAM DE SILVA AND CO., LTD. 89

## Servitude

*Prayer for a declaration for right of way outside the corpus to be partitioned—Can such declaration be granted.*

THAMBIAH *vs.* SINNATHAMBY ... ... 55

## Vendor and Purchaser

*Vendor and Purchaser—Sale of immovable property in discharge of an existing debt—Agreement to retransfer to vendor within two years on payment of consideration mentioned in deed together with interest—Vendor to remain in possession till such retransfer—Vendor's failure to repurchase within period stipulated—Vendee entering into possession—Action by vendor for declaration that transfer deed was a security and restoration to possession. No allegation of fraud or trust—Can vendor lead parol evidence to prove that it was a mortgage or security? —Evidence Ordinance, Section 92.*

Plaintiff was owner of two contiguous allotments of land admittedly worth at least Rs. 10,000/-. On three different occasions the plaintiff borrowed moneys aggregating to Rs. 2,700/- on three Mortgage Bonds by hypothecating these lands. When plaintiff applied to the defendant for a fourth loan the latter asked for a ' conditional transfer ' of the lands. Deed P1 was accordingly executed, the consideration specified therein being the aggregate amount of all the loans given by the defendant to the plaintiff together with accrued interest.

P1 was an absolute transfer subject to the condition that the vendee shall reconvey the said premises to the vendor within two years from this date at the cost of the vendor " if he (the vendor) shall repay to the vendee or her aforesaid the sum of Rs. 3,407/87 together with interest at 15% per annum from this date. Until such payment the vendor shall be in possession of the same."

The plaintiff failed to obtain a repurchase as stipulated and the defendant entered into possession of the lands. Thereafter plaintiff instituted this action praying that the deed P1 be declared a security and not a transfer and that he be restored to possession of the lands.—He did not allege any fraud or trust.

The defendant resisted this claim on the ground that P1 was an outright transfer subject to the condition set out therein and that on the failure of the plaintiff to comply with the condition, she lawfully entered into possession thereof.

The District Court upheld the defendant's contention on the ground that it was not open to the plaintiff to seek to vary the unambiguous terms of the deed P1 by attempting to show that it is something other than what it purports to be.

**Held** : (1) That under the Roman-Dutch law a court is entitled to ignore the label and the form that the parties give to particular transaction evidenced by a deed and ascertain its substance and true nature.

(2) That this right is restricted by section 92 of the Evidence Ordinance and any evidence which a party is entitled to lead for the purpose of ascertaining the true nature of the transaction must not offend the provisions of that section. Evidence which is prohibited by that section, even if admitted without objection, cannot be acted upon.

(3) That it is only when there is an ambiguity in the deed that evidence of conduct and surrounding circumstances become admissible in terms of proviso 6 of section 92.

(4) That the time stipulated in P1 is of the essence of the contract and on the expiry of the period the defendant is relieved of the undertaking to re-transfer the property.

(5) That the terms of P1 are clear and unambiguous and no extraneous evidence is necessary to construe this document.

(6) That there cannot be a valid objection to fixing the price at which the property was to be bought back in terms of interest.

(7) That the fact that the existing mortgage debts due to the vendee formed the whole or part of the consideration on P1 could not alter the character of the deed.

WILLIAM FERNANDO *vs.* ROSLYN COORAY ... 25

*Deed of Transfer—Several vendors—Failure of one of the vendors to sign deed—Effect of—Equitable relief—Who may claim it—How may such relief be claimed.*

*Prescriptive title—Gift of entire property by one co-owner to his daughter—Daughter's exclusive possession of the property through the donor for over ten*

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*years—Can she acquire a prescriptive title to the entire land—Need to prove adverse possession.*

The plaintiff claimed title to a certain share of a land on several deeds commencing with a deed of 1911. One of the vendors mentioned in the said deed had either omitted or declined to sign it. It was contended on behalf of the defendant (who claimed the entirety of the land on a deed of gift from her father who had signed the said deed as one of the vendors) that the effect of such failure to sign was that the deed was not binding even on the parties who executed it, as the parties who executed it must have done so in the faith that it would be executed by the defaulting party as well.

This contention was based on the English rule of equitable relief as stated by Jessel, M. R. in *Luke vs. South Kensington Hotel Co.* (1879) 11 Ch. D. 121 that " if two persons execute a deed on the faith that a third party will do so and that is known to the other parties to the deed the deed does not bind in equity, if the 3rd refuses to execute, and consequently the deed would not have bound the two."

**Held**: (1) That even if this equitable relief is applicable in an appropriate case, it could not be availed of by the defendant as she was not a party to the deed.

(2) That such equity must be alleged and proved.

(3) That a stranger, who subsequent to the deed in his favour possesses a land through the very co-owner who sold it to him (even conceding that he was ignorant of the fact that his vendor had no title to the entirety of it) could not acquire prescriptive title thereto unless it is established that such possession was adverse to the other co-owners.

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## Words and Phrases

" Civil suits or actions "

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" Final "

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" Permanently resident in Ceylon "

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G. A. NISSANKA PROCTOR NOTARY COLOMBO

*Present :* BASNAYAKE, C.J., PULLE, J., K. D. DE SILVA, J., SANSONI, J., and L. W. de SILVA, A.J.

## UNIVERSITY OF CEYLON vs. FERNANDO

*In the Matter of an Application for Conditional Leave to Appeal to the Privy Council in S.C. 559/D.C. Colombo* 28909.

*Argued on :* 1st, 2nd, 3rd, 4th and 5th July, 1957
*Decided on :* 31st July, 1957

*Appeal—Privy Council—Notice of intention to apply for leave to appeal under Rule* 2 *in the Schedule to Appeals* (*Privy Council*) *Ordinance—Sufficient if notice reaches respondent's address within the prescribed period—Applicability of Rules* 5 *and* 5A *of the Appellate Procedure* (*Privy Council*) *Order* 1921 *to Rule* 2.

Under Rule 2 of the Rules in the schedule to the Appeals (Privy Council) Ordinance, an applicant for leave to appeal to the Privy Council is required to give the opposite party within fourteen days from the date of the judgment to be appealed from, notice of his intention to apply for leave.

The University of Ceylon, the applicant for leave to appeal, had sent by registered post two notices to the respondent, one directed to his residence and the other to his place of employment. The university also sent a notice to the Proctor representing the respondent, and caused another notice to be handed to the Proctor personally. These notices reached their destination within the prescribed period of 14 days. The respondent filed an affidavit stating that he became aware of the notices only after the prescribed period as he was away from his residence and place of employment.

It was contended on behalf of the respondent (1) that a notice under Rule 2 to be effective must reach the respondent in the sense of his becoming aware of it within the prescribed period.

(2) that the notice given to and served on the Proctor is not valid as the Proctor had no authority under his proxy to receive such a notice.

(3) that by reason of the decision in *Fradd vs. Fernando,* the delivery of a notice to the proctor is not effective under Rule 2, even if the Proctor is regarded as the respondent's agent, as he must have special authority to accept under procedural Rule 6 of the Appellate Procedure (Privy Council) Order 1921.

Held : (1) That the requirement of " giving notice " under Rule 2 is satisfied once a letter is despatched and reaches its destination within the prescribed period. It is not necessary that it must " reach " the addressee in the sense of his becoming aware of it, and that therefore the applicant had given a valid notice.

(2) That Rules 5 and 5A of the Appellate Procedure (Privy Council) Order 1921 do not control the operation of Rule 2 as,

(*a*) these are framed under section 4 of the Appeals (Privy Council) Ordinance and cannot be construed to modify Rule 2, which is part and parcel of the main enactment.

(*b*) that since the Rules prescribe the mode of personal service, they cannot apply to Rule 2, which does not require personal service of the notice required to be given by it.

The question whether a notice posted within the prescribed period and in fact, delivered after it is valid or not, referred to but not decided.

Overruled : *Fradd vs. Fernando,* 36 N.L.R. 132.
Cases referred to : *Reg. vs. Deputies of the Freeman of Leicester,* 117 E.R. 613 at 615.
*Ex Parte Portingell* (1892) L.R. 1 O.B. 15 at 17.
*Retail Dairy Company Ltd. vs. Clarke,* (1912) 2 K.B. 388.
*Browne vs. Black,* (1912) 1 K.B. 316 at 322.
*Walter vs. Haywes,* (1824) 171 E.R. 975.
*Jones vs. Marsh,* (1791) 100 E.R. 1121.
*Neville vs. Dunbar,* (1826) 173 E.R. 1062.
*Tanham vs. Nicholson,* (1871—2) 5 L.R. H. L. at 573, 574.
*Balasubramaniam Pillai vs. Valliapa Chettiar,* 40 N.L.R. 89.
*Hayley and Kenny vs. Zainudeen* 25 N.L.R. 312.
*Municipal Council Colombo vs. Letchiman Chettiar,* 44 N.L.R. at 219.

*H. W. Jayawardene, Q.C.,* with *John de Saram,* for the applicant-appellant.
*Colvin R. de Silva* with *Walter Jayawardena, K. Shinya* and *M. Hussien,* for the respondent-respondent.

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Basnayake, C.J.

This is an application by the University of Ceylon (hereinafter referred to as the University) for leave to appeal to the Privy Council from the Judgment of this Court delivered on 28th November, 1956.

Rule 2 of the Rules in the Schedule (hereinafter referred to as Scheduled Rule 2) to the Appeals (Privy Council) Ordinance requires an applicant for leave to appeal to the Privy Council—

(*a*) to give, within fourteen days from the date of the judgment to be appealed from, the opposite party notice of his intention to apply for leave, and

(*b*) make an application to this Court by petition within thirty days from the date of such judgment.

The present application has been made within the prescribed time; but the opposite party (hereinafter referred to as the respondent) opposes it on the ground that the University has not given the prescribed notice. It is not disputed that failure to give the prescribed notice is fatal to this application. This Court has all along taken the view that the provision of Scheduled Rule 2 as to notice is imperative and that compliance therewith is a condition precedent to the reception of an application for leave to appeal.

Learned counsel on behalf of the University claims that it has in the instant case complied with the requirements of Scheduled Rule 2 by doing the following acts:—

(*a*) By sending by registered post on 6th December, 1956, two notices directed to the respondent, one signed by the Vice-Chancellor and Registrar of the University and sealed with its Seal, and the other signed by the Proctor for the University, to each of the following places:—

(i) No. 82, Barnes Place, Colombo, the admitted residence of the respondent, and

(ii) St. Peter's College, where at the material date the respondent was a teacher.

(*b*) By sending by registered post on 6th December, 1956, to the address for service given in the Proxy of the Proctor who represented the respondent both at the trial and in the appeal to this Court, two notices in the same terms and signed by the same persons who signed the notices sent to the respondent.

(*c*) By handing to the same Proctor personally, two similar notices on 11th December, 1956, before the expiry of the period of fourteen days.

All the notices sent on 6th December, 1956 were delivered on 7th December, 1956, at the respective addresses. Learned counsel for the University submits that all the notices satisfy the requirements of Scheduled Rule 2.

The respondent has filed an affidavit in which he says that on 7th December, the day on which the notices were delivered both at 82 Barnes Place and at St. Peter's College, he left his residence at 8 a.m. before the letters were delivered there, for the purpose of invigilating at a term test at St. Peter's College, where he worked from 8-45 a.m. to 10-30 a.m. From St. Peter's College he went to the National Museum and worked there till 4-30 p.m., and came back to the College where he helped at its Christmas Fete till 7-30 p.m. and later left for Peradeniya by the 8-15 p.m. train without going back to his house. He returned to Colombo on the night of 16th December, 1956, and was handed the letters containing the notices by his mother the next morning. The respondent also states that on being informed on 21st December by his Proctor, Lucien Jansz, that notices addressed to him had been sent by post to the care of the Rector, St. Peter's College, he went to the College and found them lying on a table in the Master's Room.

On these facts learned counsel for the respondent submitted—

(*a*) that notice as required by Scheduled Rule 2 has not been given,

(*b*) that a notice under that Rule to be effective must reach the respondent, in the sense of his becoming aware of it, or of the notice coming to his knowledge, within the prescribed period of fourteen days,

(*c*) that the delivery of a notice at the respondent's residence without proof that he read the notice or otherwise became aware of it within the fourteen days, is not notice as contemplated in Scheduled Rule 2,

(*d*) that the delivery of a notice at the place where the respondent is employed, without proof that he read the notice or otherwise became aware of it within the fourteen days, is not notice as contemplated in Scheduled Rule 2,

(*e*) that the notice given to and served on the Proctor who represented the respondent at the trial of the action and in the appeal to this Court does not amount to giving notice to the respondent as the Proctor

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had no authority to act for him beyond the terms of his Proxy which did not expressly authorise him to receive a notice given under Scheduled Rule 2,

(*f*) that even if the Proctor who represented him at the trial can be regarded as his agent the delivery of a notice to him in the absence of a special authority under Procedural Rule 6 of the Appellate Procedure (Privy Council) Order, 1921, does not satisfy the requirement of Scheduled Rule 2 in view of the decision of this Court in *Fradd vs. Fernando*, 36 N.L.R. 132.

We have had the advantage of a full argument by learned counsel on both sides and we have been referred to a number of decisions both of this Court and of the Courts in England. It is not necessary for the purpose of this judgment to refer to most of the cases cited and only those which have a direct bearing on the questions arising for decision will be mentioned herein.

It is an established principle that where personal service is required it must be so stated in express words in the enactment and in the absence of such words a notice required to be given by a statute may be given in any other way. (*Reg. vs. Deputies of the Freemen of Leicester*, 117 E.R. 613 at 615, *Ex parte Portingell*, (1892) L.R. 1 Q.B. 15 at 17). Our Civil Procedure and Criminal Procedure Codes and the Insolvency Ordinance contain examples of such express provisions prescribing personal service. The words " give ", " send ", " deliver ", and " serve " by themselves are not to be regarded as connoting personal service. In certain contexts they have been held to mean merely send or despatch or transmit (*vide Retail Dairy Company Ltd. vs. Clarke*, (1912) 2 K.B. 388, and the Judgment of Buckley, L.J. in *Browne vs. Black*, (1912) 1 K.B. 316 at 322). In other contexts they have been held to mean not only sent, despatched or transmitted but also sent, despatched or transmitted and received at the other end. (*Vide* Judgments of Vaughan Williams and Kennedy, L.JJ. in *Browne vs. Black*, (1912) 1 K.B. 316 at 319 and 326). The decisions of this Court have recognised the use of the post as a means of giving the notice required by Scheduled Rule 2 and learned counsel for the respondent does not seek to question the right of an applicant for leave to send the prescribed notice by post. Where the post is used as a medium of transmitting the prescribed notice, is an applicant for leave required to do more than send, in due time, a properly addressed prepaid letter containing the name and address of the opposite party? We think not, for it is not in his power to do more. Besides, it is well established that " where a letter, fully and particularly directed to a person at his usual place of residence, if proved to have been put into the post-office, this is equivalent to proof of a delivery into the hands of that person; because it is a safe and reasonable presumption that it reaches its destination "—per Abbott, Ld. C.J. in *Walter vs. Haynes*, (1824) 171 E.R. 975. Although the law does not require that the registered post should be used it is the practice of cautious persons (as in the instant case) to adopt the safeguard of registering the letter so that proof of its delivery at its destination could be adduced should it become necessary to do so.

Now when we turn to Scheduled Rule 2 we find no express words requiring personal service. The requirement of " giving notice " is therefore satisfied by sending a notice by post. In our opinion the requirements of the statute are satisfied once the letter is despatched and reaches its destination within the prescribed period. The addressee may not be at his house, he may not choose to open the letter, he may destroy it, his servant or other person to whom the letter is handed by the postman may forget to give it to him; but all these are not considerations which affect the act of the applicant once he has performed it in due time. To expect the applicant not only to send the notice in due time, but also to ensure that the respondent reads it or becomes aware of it within the prescribed period, is to ask the applicant to do the impossible. *Lex non cogit ad impossibilia* is a well-known maxim applicable to the interpretation of statutes. A statute should be construed so as not to place upon it an interpretation which requires the performance of the impossible. Without express words in that behalf we are not disposed to place on Scheduled Rule 2 the construction that learned counsel for the respondent seeks to place on it. We are unable to uphold his submission that not only must a notice sent by post be delivered to the address to which it is despatched but it must also " reach " the addressee in the sense that he must become aware of it by opening and reading the letter within the prescribed period.

We are of opinion that in the instant case notice was given the moment the letters reached No. 82, Barnes Place and St. Peter's College and that it is immaterial that the respondent was not at his residence at the time the letter was delivered and for nine days thereafter or did not read the notices till after the fourteen days. The duty cast on an applicant for leave to appeal being to give notice, once a notice in writing has

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been delivered at the usual place of residence of the opposite party in due time, the terms of the statute are satisfied and it is immaterial whether he reads the notice within the prescribed period or after it or never.

In support of his contention that the delivery of the letter at the house of the respondent was sufficient, learned counsel for the University referred us to the following remarks of Lord Kenyon in *Jones vs. Marsh*, (1791) 100 E.R. 1121 :—

> " But in every case of the service of a notice, leaving it at the dwelling-house of the party has always been deemed sufficient. So wherever the Legislature has enacted, that before a party shall be affected by any act notice shall be given to him, and leaving that notice at his house is sufficient."

The view we have formed is in accord with the observations quoted above, and in our opinion they apply with equal force to a letter delivered by post.

The soundness of this principle has been reaffirmed by Lord Chief Justice Abbott in *Doe dem. Neville vs. Dunbar*, (1826) 173 E.R. 1062, and in the later case of *Tanham vs. Nicholson*, (1871-2) 5 L.R. H.L. English and Irish Appeals 561 at 573 and 574 by Lord Westbury where he pointed out that owing to the looseness of the language in some of the later judgments the erroneous notion grew that it was competent to meet the evidence of delivery by counter testimony and to prove that the notice never reached the person for whom it was intended.

The argument of this case proceeded on the assumption that Scheduled Rule 2 is not satisfied unless the notice is in fact delivered at the address of the respondent within the period of fourteen days. The question whether a notice posted within the prescribed period and in fact delivered after it, owing either to delay or mishap in the post or on account of the letter having been posted without allowance being made for its delivery in the ordinary course of post at the address of the opposite party within the period, is a valid notice, does not arise for decision here, and we do not therefore propose to refer to it in this judgment although it was discussed at length in the course of the hearing and the decision of this Court in *Balasubramaniam Pillai vs. Valliapa Chettiar*, 40 N.L.R. 89, was cited in support of the argument that it is sufficient if the notice is sent within the fourteen days even though it is delivered to the opposite party after that period.

Counsel for the University contended that a mere sending or despatching of the notice within the fourteen days was sufficient while counsel for the respondent maintained that not only must the notice be delivered at the address of the respondent within the fourteen days but it must also reach him in the sense of his being made aware of it within that period.

Our opinion that the University has complied with Scheduled Rule 2 disposes of this application. But as this application was referred to a Bench of five Judges for the purpose of deciding the further question whether Rules 5 and 5A of the Rules made under section 4 of the Ordinance (hereinafter referred to as the Procedural Rules) were applicable to the giving of notice under Scheduled Rule 2, it is necessary to deal with it as the conclusion we have come to is in conflict with the previous decisions of this Court.

It appears to have been assumed in all the previous cases that Procedural Rule 5 prescribed a mode of serving the notice required to be given under Scheduled Rule 2. The principle which we have stated above, that where personal service is not expressly required by a statute it should not be construed as requiring personal service does not seem to have been given due consideration in the previous decisions. We have no reason to doubt the soundness of that principle and we do not see how, without doing violence to it, Procedural Rule 5 can be said to prescribe the mode of giving notice under Scheduled Rule 2. Procedural Rule 5, which prescribes 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 ", can therefore have no application to a rule which does not require personal service. The Schedule is a part of the enactment, and to hold that Procedural Rule 5 controls the Schedule would amount to saying that a subsidiary rule can over-ride the enabling enactment. It is well settled that a rule made under an anactment cannot derogate from the enactment itself and where a subsidiary rule is inconsistent with the enabling enactment it must yield to the enactment. If Procedural Rule 5 was designed to apply to Scheduled Rule 2 it would clearly be *ultra vires*. There is no ground for assuming that the rule-making authority intended to make a rule which is clearly *ultra vires*. Procedural Rule 5 must be regarded as being *intra vires* of the enabling power, but as having no application to Scheduled Rule 2.

As stated above our opinion that Procedural Rule 5 does not prescribe the mode of giving the notice required by Scheduled Rule 2 is in

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conflict with the previous decisions of this Court, chiefly *Fradd vs. Fernando*, 36 N.L.R. 132. In that case it was held that Procedural Rules 5 and 5A should be read in conjunction with Scheduled Rule 2 and that as Procedural Rule 5 prescribes personal service the notice required by Scheduled Rule 2 should be served on the opposite party personally. We are unable to agree with that decision. Our reasons are—

(*a*) As stated in the earlier part of this judgment, Scheduled Rule 2 does not require personal service of the notice required to be given by it. A rule prescribing the mode of personal service cannot therefore apply to it.

(*b*) Procedural Rule 5 is made under section 4 of the Appeals (Privy Council) Ordinance which provides for the making of rules to be observed in any proceedings before the Supreme Court. The notice given under Scheduled Rule 2 not being a proceeding before the Supreme Court, Procedural Rule 5 can have no application to it. (*Vide Hayley and Kenny vs. Zainudeen*, 25 N.L.R. 312; *Municipal Council, Colombo vs. Letchiman Chettiar*, 44 N.L.R. 217 at 219).

(*c*) Procedural Rule 5 is designed to apply to notices given after proceedings have commenced in Court while the notice prescribed in Scheduled Rule 2 is a step to be taken before the application for leave to appeal is made.

(*d*) A statute cannot be modified by rules made under it in the absence of express power in that behalf. To read Procedural Rule 5 as applying to Scheduled Rule 2 would amount to holding that the Schedule (which is part and parcel of the enactment) can be modified by rules made under it. Section 4 does not confer any power to make rules inconsistent or in conflict with the Ordinance. It would therefore be wrong to read Procedural Rule 5 as controlling Scheduled Rule 2.

(*e*) Procedural Rule 5 when read as applying to notices required to be given after proceedings have commenced is *intra vires* of the enabling enactment and should be read in that sense so as to give it validity.

In our opinion therefore *Fradd vs. Fernando* (*supra*) has been wrongly decided and we accordingly over-rule it.

We wish to repeat that Scheduled Rule 2 does not require personal service of the notice required to be given thereunder and Rules 5 and 5A of the Procedural Rules have no application to it.

The application for leave is granted upon the condition that the appellant shall within a period of one month from the date of this judgment enter into good and sufficient security by depositing with the Registrar a sum of Rs. 3,000/- and by hypothecating that sum by bond for the due prosecution of this appeal and the payment of all such costs as may become payable to the respondent.

We declare the University entitled to costs of the hearing into the respondent's objection.

PULLE, J.
I agree.

K. D. DE SILVA, J.
I agree.

SANSONI, J.
I agree.

L. W. de SILVA, A.J.
I agree.

*Leave to appeal granted.*

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*Present :* SANSONI, J. and L. W. de SILVA, A.J.

ABEYGUNAWARDENA *et al vs.* DEONIS SILVA *et al*

*S. C. No. D. C. (F)* 315/L—*D. C. Tangalla No.* 5990

*Argued on :* 18th and 19th June, 1957

*Decided on :* 27th June, 1957

Fidei commissum—*Donation by a Muslim under last will of property subject to certain conditions—Law governing devolution of—Who is a "Residuary" in Muslim law?—Transfer of property by one of the donees to conform apparently to conditions of the will but in effect in violation thereof—Effect of.*

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A Muslim by his last will devised his interests in certain lands to two of his sons in equal shares, and another property to another son prohibiting and rendering void any alienation, mortgage sale, or lease for a period exceeding four years, or gift of the interests to any outsider except to themselves. In the event of the condition being infringed, the premises were to devolve on the lawful child or children of the donees absolutely.

**Held :** (1) That the terms of the will created a valid fidei commission as the testators intention was to pass the lands, other than those which had been valid by alienated, ultimately to the children of the respective donees.

(2) That on the death of the donee i.e. the fiduciary, the property devolved on his children in equal shares and not to his heirs according to Muslim Law.

(3) That on the death of the fidei commissaries, the devolution of the property would be governed by Muslim Law.

(4) That where a fidei commissary died leaving a mother, two sisters and a paternal uncle, the paternal uncle would inherit under Muslim Law exclusively as a residuary.

(5) That, where as in this case, one of the donees under the will transferred his interests in the property to the other donee, who, immediately thereafter, transferred the interests to an outsider, such a transfer amounted to a violation of the condition.

**Authorities referred to :** *Kirthiratne, vs. Salgado* (1932) 34 N.L.R. 69.
*Narina Lebbe vs. Marikkar* (1921) 22 N.L.R. 295.
*Dingiri Naide, vs. Kirimenike* (1956) 57 N.L.R. 559.
*Tyabji :* Principles of Muhammadan Law (2nd edition) p. 873.
*Wilsons :* Anglo Muhammadan Law (6th edition, pp. 270, 277.
*Ameer Ali :* Mahammadan Law (6th edition) Vol. 2, p. 55.

*A. L. Jayasuriya* with *A. M. Ameen* and *S. H. Mohamed* for the plaintiff and 2nd and 3rd Defendants-appellants.

*H. W. Jayawardene* Q.C. with *T. P. P. Goonetilleke* and *D. R. P. Goonetilleke* for the 4th, 5th and 6th Defendants-Respondents.

SANSONI, J.

It is common ground between the parties in this action that one Asana Marikkar was the owner of a 1/6 share of the land called Vederalage Meegahawatte, the entirety of a land called Polgaswela-watte, and 2/3 share of a land called Kopiwatte at the time of his death.

By his last will (P 4) of 1922 Asana Marikkar devised his interests in these three lands to two of his sons Hashim and Samadu (2nd defendant) in equal shares. He also devised certain other lands to another son named Sadakathula. These devises were subject to the condition that they (the devisees) " shall not be at liberty to lease the said premises for a period exceeding 4 years, and they shall not be at liberty to sell, mortgage or gift the said premises or alienate the same to any outsider except the said brothers, and if any such alienation, mortgage, or lease exceeding 4 years became necessary, the same shall be done to and with the said brother, or brothers, and on the contrary all the alienations, mortgages and leases exceeding 4 years done to and with any outsider shall become totally null and void and the said premises shall become entitled to his or their lawful child or children who shall be at liberty to do whatever therewith ".

When Asana Marikkar died he left surviving him by his first wife those two sons Hashim and Samadu (2nd defendant) and two daughters, namely, Ayesha and Pathumma. He also left his son Sadakathula and a daughter Eknieth Umma who were born to him by his second wife.

The first question which arises for decision is the effect of the condition in the last will which I have already set out. It contains a prohibition against alienation except to certain specified persons, and it also provides for what is to happen in the event of the breach of that condition. It seems to me that while the testator permitted alienation by the devisees amongst themselves, all other alienations were forbidden. He further provided that if a prohibited alienation took place, the lands so alienated should devolve on the children of the respective devisees. The prohibition against alienation therefore does not stand by itself, for the beneficiaries to whom the lands should pass in the event of a breach of it have been clearly indicated. Obviously it was the testator's intention that the lands, other than those which had been validly alienated, should ultimately pass to the children of the respective devisees—I am therefore of the opinion that the clause containing the condition in question was sufficient to create a valid *fidei commissum*. In this respect the will is different from those considered in *Kirthiratne vs. Salgado*, (1932) 34 N.L.R. 69, *Narina Lebbe vs. Marikkar*,

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(1921) 22 N.L.R. 295 and other cases where there was only a bare prohibition without a designation of any person to whom the property should pass if there was an alienation in breach of the prohibition.

The devisee Hashim died leaving a widow Amina Umma and three daughters, namely, the 4th and 6th defendants and one Mahakumath Umma, surviving him. Hashim did not alienate any of the lands devised to him and I would hold that his share of those lands devolved, under the terms of the last will, on his three daughters in equal shares. I am unable to agree with the view put forward for the appellants that the devolution of Hashim's share is governed by the Muslim law of inheritance for the will showed clearly what the testator's intention regarding that share was. But that law would apply to the devolution of Mahakumath Umma's share when she died leaving her mother and two sisters (4th and 6th defendants) and her paternal uncle Samadu. It is not disputed that her mother inherited a 1/6 share and her two sisters a 1/3 share each of Mahakumath Umma's estate as sharers.

Another question which was argued before us was as to who inherited the remaining 1/6 share of that estate. The appellants contend that it devolved on the 2nd defendant Samadu exclusively as sole residuary; the respondents contend that it devolved on the two sisters exclusively as joint residuaries. I have no difficulty in holding that the appellants' contention is right. Residuaries are divided into three classes, viz.: (1) Residuaries *in their own right,* who are all males " in whose line of relation to the deceased no female enters "; (2) residuaries *in the right of another* who only take as such in company with a male; and (3) residuaries *with* others, who only take as residuaries with daughters or sons daughters. A full sister, such as the 4th and 6th defendants are, can therefore only be a residuary if there is also a brother or if there is a female descendant of the deceased.

Authority for this view will be found in Tyabji's Principles of Muhommadan Law (2nd edition) page 873 and Wilson's Anglo-Muhammadan Law (6th edition) pages 270 and 277. The paternal uncle in this case is a residuary in the absence of full sisters who can claim to inherit as residuaries. The rule that preference is given to propinquity to the deceased, on which the respondents rely, only applies " when a person dies leaving behind him several relations who may be classed as residuaries of the different kinds mentioned ", in which event " the residuary with another when nearer to the deceased than the residuary in himself, would come first ": See Syed Ameer Ali's Muhammadan Law (6th edition) Vol. 2, page 55. But the person claiming to inherit must first satisfy certain essential conditions before he can even claim to be classed as a residuary, and the 4th and 6th defendants fail in this respect. Therefore that 1/6 share out of Mahakumath Umma's 1/3 share out of Hashim's 1/2 share of Asana Marikkar's interests in the three lands in question devolved, on Mahakumath Umma's death, on her uncle Samadu (2nd defendant). The interests which thus devolved on the 2nd defendant were not subject to any restrictions as regards alienation and he was free to deal with them as he pleased. Those interests were transferred by him to his brother Sadakathula who in turn transferred them to the 3rd defendant, who is now entitled to them.

Samadu (2nd defendant) also purported to transfer the interests which he obtained under his father's last will by those same deeds to his brother Sadakathula. He was entitled to do so under the will, but the matter does not end there. The interests which Sadakathula obtained in that way in Vederalage Meegahawatte and Polgaswelawatte were transferred by him by a contemporaneous deed to the 3rd defendant. Sadakathula has given evidence which clearly shows that he was being used by the 2nd defendant and 3rd defendant as a tool in order that the condition imposed by the will might be evaded. It is difficult to see any other purpose for which these two lands were transferred by the 2nd defendant to Sadakathula and immediately thereafter by the latter to the 3rd defendant. Under these circumstances the two deeds in question (P 14 and P 15) have the same effect as if they were one deed—see *Dingiri Naide vs. Kirimenike* (1956) 57 N.L.R. 559.

In effect, then, the second defendant contravened the condition of the last will as regards alienation to an outsider. Whether his interest in those lands which he derived under the will did or did not pass to the 3rd defendant, can only be decided after it has been ascertained whether Samadu has any children. On this point the parties have failed to lead any evidence, and apart from evidence that Samadu is married the question remains at large.

With regard to the interests which the 2nd defendant derived under the will in Kopiwatte, different considerations apply. He transferred those by deed P 20 in 1941 to his brother Sadakathula as he was entitled to do under the will. Title passed to Sadakathula and he was entitled to do what he pleased with those interests since there is nothing in the will restricting his power

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to alienate those interests once he has acquired them—see *Kirthiratne vs. Salgado* (1) (*supra*). The 3rd defendant claims to have purchased those interests from Sadakathula by deed P 21 of 1952, but the title recited therein is not deed P 20 but another deed which is said to have been executed on the same day as deed P 21. That deed has not been produced in evidence. It is therefore not possible to hold that the 3rd defendant became the owner of the 2nd defendant's interests in Kopiwatte derived under the last will. We are unable to say on the material before us who owns those interests. But the transfers by the 2nd defendant in favour of Sadakathula, and by the latter in favour of the 3rd defendant, are sufficient to vest title in the 3rd defendant so far as the interests which the 2nd defendant inherited from his niece Mahakumath Umma are concerned.

It has been proved that the remaining 1/3 share of Kopiwatte also formerly belonged to Asana Marikkar. He by deed P 17 of 1914 sold that share to Kadija Umma who by deed P 18 of 1946 leased that 1/3 share to the 3rd defendant for 7 years commencing from 1st January, 1945.

The plaintiffs came into court in this case claiming that the 2nd and 3rd defendants by deeds of lease P 13 and P 16 of 1949 leased certain specified shares of the 3 lands in question to the 2nd plaintiff for 5 years commencing from 1st March, 1949, and that the 2nd plaintiff by deed P 22 of 1949 assigned those leasehold rights to the 1st plaintiff. The action was brought against the 1st defendant who claimed on a deed of lease 1 D 1 of 1945 executed in his favour by the 4th, 5th, and 6th defendants leasing 1/3 of Kopiwatte, 1/2 of Polgaswelawatte, and 1/12 of Vederalapadinchivasitiyawatte (which is another name for Vederalage Meegahawatte) for 8 years commencing from 25th December, 1945. The 4th, 5th and 6th defendants were added as parties to this action after they had been noticed to warrant and defend as lessors, and they pleaded that the deeds of lease relied on by the plaintiffs were invalid ; also that the 4th and 6th defendants, and nobody else, were the heirs of Mahakumath Umma. They asked that the plaintiff's action be dismissed with costs.

When this case came up for trial, issues were framed at the instance of the lawyers appearing for the respective parties (2nd and 3rd defendants had also been added as parties by then) and those issues required the court to determine exactly what rights the parties had in these lands.

I have answered the questions as far as possible on the material before us. But we have no evidence as regards Samadu's children, nor as regards the state of the title in regard to the interests of Samadu in Kopiwatte which he derived under the will : it is not possible, therefore to say what the correct shares of the parties in all three lands are, even to the extent of the interests which Asana Marikkar formerly owned.

The learned District Judge declared the plaintiffs entitled to possess the leasehold interests of certain shares of the three lands respectively, and ordered the 1st defendant to pay the plaintiffs damages. The 1st defendant has not appealed, but the plaintiffs were dissatisfied with the judgment and filed this appeal claiming that they were entitled to possess larger shares of the three lands than the judgment gave them. The 4th, 5th, and 6th defendants have failed a cross appeal complaining that the devolution of title as found by the learned Judge was incorrect. It was also submitted on their behalf that this action must fail in any event because all the co-owners of the land have not been joined. We do not agree with this submission. The issues framed show that all the parties at the trial invited the trial judge to make such a decision. But they have not given him the assistance he was entitled to expect.

The shares of the respective parties except with regard to certain interests already mentioned, can be arrived at on the basis of the findings in this judgment. The plaintiffs fail in their appeal because they have not shown that their lessors owned larger shares than the judge has awarded them. The 4th, 5th and 6th defendants have failed in part and succeeded in part in their cross appeal. I would therefore dismiss the appeal with costs and make no order as to the costs of the cross appeal.

*Dismissed.*

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*Present :* BASNAYAKE, C.J. AND L. W. de SILVA, A.J.

DONA LUCIHAMY *et al* VS. CICILIYANAHAMY *et al*

*S.C.* 225 1956—*D.C. Gampaha* 4222/*P*

*Argued on :* 4th September, 1957.
*Decided on :* 20th September, 1957.

*Civil Procedure Code, Section* 187—*Judgment—Failure to review or discuss evidence germane to each issue or point of contest—Bare answers to issues not a compliance with section* 187—*Need to examine the title of each party in a partition action.*

Held : That bare answers without reasons to issues or points of contest raised in a trial are not a compliance of the provisions of section 187 of the Civil Procedure Code.

A failure to examine the title of each party in a partition action vitiates the decree.

*Sir Lalitha Rajapakse, Q.C.,* with *A. W. W. Goonewardena,* for the 1st, and 3rd to the 6th defendants-appellants.

*C. D. S. Siriwardene,* with *G. D. C. Weerasinghe* for the plaintiff-respondent.

*H. Wanigatunga* with *A. Nagendra,* for the 7th to 11th defendants-respondents.

L. W. de SILVA, A.J.

The plaintiff instituted this action for the partition of a land called Dawatagahawatte described in the plaint and depicted as lots A and B in the plan No. 24 marked X, made for this action. She alleged that the only other owners were the 1st, 2nd and 3rd defendants. The 1st, 3rd, 4th, 5th, and 6th defendants, who are the appellants, filed answer alleging that the land depicted in the plan marked X was not Dawatagahawatte but a portion of Hedawakagahawatte in which the plaintiff had no interest. The appellants further contended that the original owner Juseappu owned both lands Hedawakagahawatte and Dawatagahawatte which adjoin each other. The appellants denied the devolution of title pleaded in the plaint and relied on a separate title according to which they claimed to be the sole owners of Hedawakagahawatte. They claimed all the improvements and prayed for a dismissal of the action. The 7th to the 11th defendants claimed an exclusion of lot B as a part of a paddy field belonging to them. They claimed no interests in lot A. The appellants opposed their claim to lot B. After trial, the learned District Judge held that the land in suit is Dawatagahawatte and not Hedawakagahawatte and entered an interlocutory decree for a partition of lot A on the basis of the shares stated in the plaint. Lot B was excluded.

The learned District Judge has failed to consider the important point raised by the appellants that Hedawakagahawatte is in two portions. According to them, the southern portion is the corpus in suit as depicted in the plan X, and the land adjoining the corpus on the south is Dawatagahawatte. In other words, the appellants maintained that the plaintiff has sought a partition of a portion of Hedawakagahawatte by calling it Dawatagahawatte. If the appellants' contention is correct, the northern boundary in P1, which is stated to be Hedawakagahawatte, appears to be explained. The learned District Judge's finding that Dawatagahawatte is not the same as Hedawakagahawatte does not solve the problem of the identity of the two lands. The only other deeds to which reference is made in the judgment are P2 and P9. There is no reference at all to the appellants' title deeds or the boundaries stated therein. The judgment refers to certain oral evidence without relating it to the documents on the question of the identity of the corpus.

According to the plaintiff, Joramanu is said to have sold his interests along with the 1st defendant's brothers to the 3rd defendant appellant. No title deeds were produced by the plaintiff for the sale of these shares. If the plaintiff admits that this title was conveyed on 1D11 of 1934 and 1D13 of 1941, as she appears to do (for there is no other basis for admitting a title in the 3rd defendant-appellant) she must account for the description of the land Hedawakagahawatte appearing in those deeds which should have no place in the devolution of title relied on by her. In view of the order we have decided to make, it is unnecessary to consider these matters in greater detail.

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No reasons at all have been given in the judgment for the exclusion of lot B. There were two issues relating to this portion :—

(7) Is lot B in plan X a part of the land called Wetekeyagahakumbura alias Millagahakumbura belonging to the 7th to the 11th defendants ?—
Need not be answered.

(8) If so, should lot B be excluded ?—
Lot B should be excluded.

It is not possible to answer the 8th issue without answering the 7th.

There were 12 issues raised in this case. Some of them do not bring out the real points of contest. The learned District Judge has stated in his judgment: "All the issues that have been raised can be crystallised in this one contest," that is, whether the land in suit is Dawatagahawatte or Hedawakagahawatte. In the result, the evidence germane to each issue has not been reviewed or discussed. No reasons precede or follow the answers which are mostly "yes" or "no" or "does not arise." Such a record has not disposed of the matters which the Court had to decide. Bare answers to issues or points of contest—whatever may be the name given to them—are insufficient unless all matters which arise for decision under each head are examined. Section 187 of the Civil Procedure Code (Cap. 86) is in the following terms :—

> "The judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision."

The judgment of the trial Court does not conform to these requisites.

The appellants made specific claims to the improvements on lot A. Some of these were not counter-claimed by other parties, but the judgment allots some of the admitted improvements in common without reasons being given. Learned Counsel for the respondents so conceded at the hearing of this appeal.

We are of the opinion that the failure of the trial Judge to examine the title of each party has prejudiced the substantial rights of the parties. We accordingly order a new trial. We allow the appeal by setting aside the judgment and decree of the District Court. Each party must bear the costs both here and in the Court below.

Basnayake, C.J.
I agree.

*Set aside and sent back.*

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*Present :* H. N. G. Fernando, J. and T. S. Fernando, J.

## PATHIRAGE SEDIRIS PERERA vs. H. JANIS PERERA

*S. C.* 460 (*Final*) *of* 1955—*D. C. Panadura* 4298

*Argued on :* 5th June, 1957
*Decided on :* 25th September, 1957

*Cattle Trespass Ordinance No.* 9 of 1876—*Loss of cattle in headman's custody—Degree of Care—Negligence—Liability.*

A headman who takes charge of cattle that had been seized under Section 7 of the Cattle Trespass Ordinance is in the position of a bailee for reward. As he is entitled to the fair and reasonable costs and charges for keeping the animals he must take the utmost care of them. He must exercise a high degree of deligence and the onus is upon him to disprove even the slightest negligence on his part in dealing with the animals in his custody.

*Sir Lalitha Rajapakse, Q.C.,* (*with him, D. C. W. Wickramasekera*) for the plaintiff-appellant.
*T. P. P. Goonetilleke,* (*with him, P. Somatillekam*) for the defendant-respondent.

T. S. Fernando, J.

This appeal raises the question of the nature of the liability of a headman towards an owner of cattle inrespect of cattle taken charge of by him in terms of the Cattle Trespass Ordinance (Cap. 331), but lost while they are still in his custody. It has been stated at the Bar that there is no local case in which the nature and extent of this liability has been discussed.

The relevants facts may be summarised very briefly thus :—

The plaintiff had lent several buffaloes to a man called Babun to be used for the purpose of ploughing certain fields. Four of these buffaloes had been seized by one Jinoris on the allegation

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that they had got on to his lands and damaged his crops. Jinoris gave notice of seizure on 8th. January, 1954, to the defendant, the Vel Vidane of the area and an Irrigation headman within the meaning of section 7 of the Cattle Trespass Ordinance. The defendant, as he is required to do under the said Ordinance, went to Jinoris's land where the buffaloes were being detained and, with the aid of assessors, assessed the damage caused to Jinoris's crops; and, as the owner or owners of the buffaloes were not then known, took charge of the animals and had them brought over by about 7 p.m. that same evening to his own residing land. According to the defendant's evidence, which the District Judge has accepted, the animals were tied close to his house which was enclosed on all sides by barbed-wire fences. He retired to sleep, but at midnight he got up and looked through an open window of his bedroom and was able to see that the animals were still there where they had been tied on his land. He woke up again at 4 a.m. and looked out of his window only to discover that the animals had disappeared. He then found that the barbed wire had been cut at one place and he concluded rightly that the animals had been stolen from the premises. Babun, learning of the seizure of the buffaloes came in search of them to the house of the defendant on the 9th January, but by the time he came the buffaloes had, of course, been stolen. There has since been no trace of these stolen buffaloes.

The learned District Judge has stated correctly that the question for decision is whether the buffaloes, while being in the custody of the defendant, were lost or stolen by reason of the negligence of the defendant. He has, in the course of his judgement, referred to certain relevant Roman-Dutch Law authorities, but has dismissed the plaintiff's action on the ground that the defendant has not been negligent in any degree in looking after the buffaloes while they were in his custody. The loss of the buffaloes, according to the learned judge, was occasioned by an act beyond the defendant's control.

If a Government officer fails to perform what is ordinarily part of his duty or what he has specially undertaken to perform, he will be held answerable for his negligence—see Nathan's Common Law of South Africa, Vol. III, page 1718. The liability of a person for doing negligently a thing which he is legally under a duty to do is formulated in the same treatise, at page 1744, as follows :—

> "It has been shown that, in the law of contract, the degree of negligence which is required in order render a man liable varies according to the special contract which is in question, such as sale, lease, agency or bailment. In the law of torts no such careful distinction is made. If a duty is by law imposed on a person to do a thing, and he performs his duty negligently, and thereby injures another, he is liable even if he was guilty of slight negligence only . . . Consequently, in the law of torts it is sufficient if there has been a want of due diligence on the part of the person charged with negligence. There must be just sufficient proof to indicate that the damage complained of arose from negligence, and not from mere accident."

In Nathan's Law of Torts (1921 ed.), at page 266, the learned author, discussing the liability of a poundmaster, states that "a poundmaster by virtue of his office has the duty imposed upon him of taking care of all animals impounded and entrusted to him. He has to obey all statutory regulations with regard to pounds. In addition, his position at common law is that of a *bailee for reward,* who must take the utmost care of what is entrusted to him. If a poundmaster deals with animals entrusted to him in the manner in which such animals are ordinarily and customarily dealt with, and during the course of such dealing injury results to the animals *without negligence on his part,* he is not liable . . . But the poundmaster must exercise a high degree of diligence, and the onus is upon him to disprove even the slightest negligence on his part in dealing with the property in his custody."

The defendant, as a headman of the class referred to in section 7 of the Cattle Trespass Ordinance, was entitled to the fair and reasonable *costs and charges* for keeping the buffaloes during their detention, and, in my opinion, there is no reason why his position should not be regarded as being analogous to that of a bailee for reward. The nature of the liability of a bailee for reward is stated also in Wille's Principles of South African Law (4th ed. 1956) at page 427 as follows :—

> "If the deposit is for reward, it is clear that the depositary is liable for any degree of negligence, unless by express agreement the property is stored at "owner's risk." If the depositary does not return the property at all, or if he returns it in a damaged condition, the onus is on him to prove, by a preponderance of probability, that the loss or damage was occasioned despite the exercise by him of due diligence, whether the contract is gratuitous or for reward."

There is no definite test in all cases to show whether a person has been guilty of negligence. The question whether a person has been negligent or not will depend on the circumstances of the particular case. In this case, the defendant brought the buffaloes and tied them near his house. What care did he take of them? He stated that he tied them close to his house and retired to sleep. He stated that he had asked a man to sleep on the verandah of his house as was his custom when he detained any animals in his premises. This man has not been called as a

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witness. We do not know whether he watched the animals at night; we are entitled to assume, on the defendant's own evidence, that all this man did was to sleep on the verandah. A watcher can hardly be said to have been on watching duty if he was actually sleeping. As learned counsel for the plaintiff pithily put it, a watcher's duty is to watch and not to sleep. The defendant himself had had a busy day on 7th January in connection with an application he had made to be appointed a Village Headman, and he has been busy on 8th January as well. In these circumstances it is not unlikely that the defendant himself was enjoying a well-earned sleep on the night of the 8th January. But even on an acceptance of his evidence it can scarcely be contended that the defendant's own conduct in getting up once that night—at about midnight—constituted the exercise of due diligence in preventing the loss of the animals.

I am unable to resist the conclusion that the loss of the animals was occasioned by an absence of due diligence on the part of the defendant.

The plaintiff's evidence that the buffaloes are worth Rs. 800/- was not contested. I would therefore set aside the decree dismissing the plaintiff's action and direct that judgment be entered for the plaintiff in a sum of Rs. 800/- with costs in both courts.

H. N. G. Fernando, J.
I agree.

*Appeal allowed.*

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*Present :* Basnayake, C.J., Pulle, J. and K. D. De Silva, J.

## ALIYAR MOHIDEEN vs: INSPECTOR OF POLICE, PETTAH

*S.C.* 1345—*M.C. Colombo* 19862·B

*Argued on :* 19th, 20th and 21st June, 1957.
*Decided on :* 9th December, 1957.

*Criminal Procedure—Proceedings instituted by Police Officer uuder section* 148 (1) (*b*) *of the Criminal Procedure Code—Against accused in respect of certain offences—Charges framed by Magistrate—No evidence recorded before framing of charges—Conviction of accused—Is it legal?—Criminal Procedure Code, sections* 187 (1), 425—

**Held :** Pulle J. dissenting : That it is imperative that a Magistrate should record evidence on oath in terms of section 151(2) fo the Criminal Procedure Code before framing charges against an accused person, where proceedings have been instituted under section 148(1) (*b*) of the Code. Failure to do so amounts to an illegality which vitiates the entire proceedings and cannot be cured under section 425 of the Code.

*per* **K. D. de Silva, J :** " This section 187(1) includes not only a case where the accused is present in custody, but also where he is present on remand on police bail or on being warned by the police to appear in Court. In all instances it would appear that it is incumbent on the Magistrate to hold the examination contemplated by section 151 (2)—".

**Approved and followed :** *Vargheese vs. Perera,* **43 N.L.R. 564.**

**Cases Referred to :** *Assen vs. Maradana Police,* **45 N.L.R. 263.**
*Thomas vs. Inspector of Police,* **47 N.L.R. 42.**
*Cader vs. Karunaratne,* **45 N.L.R. 23.**
*Dias vs. Nadharaja,* **48 N.L.R. 301.**
*Ebert vs. Perera,* **23 N.L.R. 362.**
*Vethanayagam vs. Inspector of Police,* **50 N.L.R. 185.**

*A. Nagendra* for the accused-appellant.

*D. St. C. B. Jansz, Q.C.,* Acting Attorney-General, with *V. S. A. Pullenayagam, C.C.* for the complainant-respondent.

Basnayake, C.J.

I have had the advantage of reading the judgment prepared by my brother de Silva. As the question that arises for consideration on this appeal is one of some importance, instead of recording my bare concurrence I wish to add my own views as briefly as possible on certain aspects of the question dealt with in my brother's judgment.

The report under section 148 (1) (*b*) of the Criminal Procedure Code was preceded by a

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report of an investigation into a cognisable offence under section 126A (1) of the Code. In that report Sub-Inspector of Police W. F. S. Peiris, who does not state that he is an officer in charge of a Police Station, purported to summarise the statements of the witnesses examined in the course of the investigation. On that report the Magistrate made an order under sub-section (2) remanding the accused till 22nd August. On that day a report under section 148 (1) (*b*) was filed, and the accused who was present in Fiscal's custody was charged from the charge sheet under section 187. Now, section 187 of the Criminal Procedure Code requires that where an accused is brought before the court otherwise than on a summons or warrant the Magistrate shall after the examination directed by section 151 (2), if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against him. It has been held in a number of decisions of this Court, the chief of which is *Ebert vs Perera*, 23 N.L.R. 362, that the provisions of section 187 are imperative, and that failure to comply with the requirements of that section cannot be cured under section 425 of the Criminal Procedure Code. It is urged on behalf of the Crown that, where an accused is brought before the Court in custody and a report under section 148 (1) (*b*) is filed, the provisions of section 151 (2) are not as a rule complied with. The practice is to frame the charge against the accused and read the charge as required by section 187 (3). If the provisions of section 187 are imperative, as I think they are, it is difficult to resist the conclusion that the requirement that the Magistrate shall ascertain whether there is sufficient ground for proceeding against the accused after the examination directed by section 151 (2) is also imperative. The fact that a practice which is contrary to the section has grown is no ground for holding that that practice is legal. A practice however inveterate cannot alter the law. Section 148 prescribes the methods by which proceedings in a Magistrate's Court may be instituted. The learned Attorney-General argued that proceedings may be instituted in more than one of the ways prescribed. I am unable to agree with that contention. The opening words of the section are: " Proceedings in a Magistrate's Court shall be instituted in one of the following ways ". To give effect to the learned Attorney-General's contention it would be necessary to interpolate the words " or more " between the word " one " and the word " of ". The rules of construction of statutes do not permit such a course. If it has been the practice not to observe the requirement of that section but to institute proceedings in more than one of the prescribed modes it should cease. In the instant case when the accused was brought before the Court from Fiscal's custody accused of having committed the offences referred to in the report under section 126A, he was brought before the Magistrate of the Court, in custody without process, accused of having committed offences which such Court had jurisdiction to inquire into. Be that as it may, the question whether proceedings were instituted under section 148 (1) (*d*) or 148 (1) (*b*) is of little importance in this case as admittedly the accused was brought before the Court otherwise than on a summons or warrant. In such a case clearly the procedure under section 187 must be followed. The word " brought " in that section does not mean brought by a Police Officer, but compelled to attend either by virtue of the fact that he is in Police custody and is forwarded to Court or is accompanied by a Police Officer or is compelled to attend by virtue of having executed a bail bond under section 126A or section 127. The learned Attorney-General contended that " brought before the Court " would include cases in which the accused happens to be in Court on his own business, whereupon he may be charged by the Magistrate if he consents to be charged. I am unable to agree that a person who happens to be in Court on some private business of his can suddenly be called upon to answer a charge of which he has not been given notice. The law provides that when criminal proceedings are instituted under section 148 (1) (*a*), (*b*), or (*c*), the Magistrate shall, if he is of opinion that there is sufficient ground for proceeding against some person who is not in custody, if the case appears to be one in which according to the fourth column of the First Schedule a summons should issue in the first instance, issue a summons for the attendance of such person, or if the case appears to be one in which according to that column a warrant should issue in the first instance, issue a warrant for causing such person to be brought or to appear before the Court at a certain time. In every case under paragraph (*a*) or (*b*) of section 148 (1) before issuing the warrant he must examine on oath the complainant or some material witness. If he is so minded he may before issuing even a summons examine on oath the complainant or some material witness. These are very necessary safeguards which are provided by law in the public interest. The accused person should have warning of the charge that is going to be laid against him; he should have an opportunity of resorting to legal advice. It is unthinkable that a person who happens to be in Court on other business should

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be suddenly put into the dock and called upon to answer a criminal charge without being afforded an opportunity of taking legal advice. I do not think therefore that it is open to a Magistrate to frame a charge against a person under section 187 except where he has been brought before the Court in one of the ways contemplated by the Criminal Procedure Code or where he appears on a summons or warrant. The safeguard of an examination as directed by section 151 (2) before the charge is framed is a most salutary one because a citizen should not be made to face a criminal charge except where there is ground for placing him in peril. It was urged that the adoption of the procedure prescribed in section 151 (2) before framing a charge is inconvenient and would create difficulties. I am unable to agree that this is a consideration which can affect the interpretation of section 187. Provisions such as are prescribed in the Code for safeguarding the rights of citizens must be strictly observed, and non-compliance with such provisions can bring about only one result and that is to render proceedings void.

The learned Attorney-General argued that even if the true construction of section 187 was that the examination directed by section 151 (2) should precede the framing of the charge, section 425 applies to this case, and that the omission to carry out the requirement of section 151 (2) would not be such an irregularity as would enable this Court to reverse or alter in appeal the judgment of the Magistrate unless it occasioned a failure of justice. He relied on the words "no judgment passed by a Court of competent jurisdiction shall be reversed or altered on appeal for revision on account of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during the trial unless such error, omission, irregularity, or want has occasioned a failure of justice". He stated that the instant case fell within the ambit of the words "other proceedings before trial". He submitted that we were not free to set aside this conviction as the omission of the Magistrate has not occasioned a failure of justice.

I am unable to agree that a failure to comply with the imperative requirement of the Code in regard to the framing of charges is an omission or irregularity within the ambit of section 425. Disregard of the provisions of an enactment such as the Criminal Procedure Code, especially a provision such as section 187 the observance of which is a condition precedent to a summary trial, cannot be regarded as an "omission in the complaint, summons, warrant, charge, judgment, or other proceedings". In my opinion section 425 was not designed to apply to a complete disregard of the imperative requirements of the Code. It seems to me to have been designed to apply to errors, omissions, or irregularities other than disregard of the imperative provisions of the Code. Failure to observe provisions which are intended for the benefit of the citizen and are in the interests of justice, especially in criminal statutes, must be presumed to occasion a failure to justice. It is not necessary for the party seeking relief to establish that the failure to observe an imperative requirement of the Code has occasioned a failure of justice. As in the case of a trial to which the Court of Criminal Appeal Ordinance applies, a wrong decision of law is a sufficient ground for setting aside a conviction unless the prosecution is in a position to establish that no substantial miscarriage of justice has actually occurred.

The words "subject to the provisions hereinbefore contained" in section 425 remain to be considered. They have not been the subject of interpretation in any reported case previously decided by this Court. My own view is that those words are designed to embrace the sections of the Code which occur before section 425 and not only the provisions of sections 423 and 424. The learned Attorney-General submitted that those words applied only to the two preceding sections in Chapter XLII, but I am unable to agree with him. The word "hereinbefore" is a word of wide import and would ordinarily, in the absence of any controlling words in the context, apply to all that has gone before. In this context there is nothing that limits its meaning. On the other hand its association with the words "provisions" and "contained" on either side of it leaves no room for doubt as to its meaning. In India there has been a difference of opinion as to whether the word "hereinbefore" occurring in the corresponding section of the Indian Criminal Procedure Code has reference to all the provisions preceding the section or only to the two sections immediately preceding it. In *Ram Subhag Singh vs. Emperor*, (1916) A.I.R., Calcutta 693 at 701), it has been held by the High Court of Calcutta that it refers to only the two preceding sections but a contrary view had been taken in the case of *Raj Chunder Mozumdar vs. Gour Chunder Mozumdar*, (1894) 22 Calcutta 177), and in *Nilratan Sen vs. Jogesh Chunder Bhattacharja* (1 Calcutta Weekly Notes 57). That view has also been approved in the Full Bench decision in the matter of *Abdur Rahman and Keramat*, (1900) 27 Calcutta 840 at 847) and in the Privy Council decision of *Subramaniam Iyer vs. King Emperor*, (1901) 28 L.R. I.A. 257. In the last mentioned case it was held

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that disobedience of express provision as to the mode of trial cannot be regarded as a mere irregularity. The Lord Chancellor in the course of his judgment said that, " the remedying of mere irregularities is familiar in most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted that this contravention of the Code comes within the description of error, omission, or irregularity ". The Lord Chancellor stated in support of his view the observations of Lords Herschell, and Lord Russell of Killowen, in the case of *Smurthwaite vs. Hannay* (1894 A.C. 494) wherein Lord Herschell said with reference to joinder of plaintiffs : " If unwarranted by any enactment or rule, it is, in my opinion, much more than an irregularity."

I am of opinion therefore that the case of *Vargheese vs. Perera*, 43 N.L.R. 564, has been rightly decided and that the appellant is entitled to succeed.

The next question is whether in allowing the appeal we should direct a retrial or acquit the accused. I think the facts deposed to by the witnesses disclose a very grave crime for which the accused should be tried in the manner provided by the Criminal Procedure Code.

K. D. DE SILVA, J.

On August 20, 1955, a Police Sergeant submitted a report to the Magistrate and at the same time produced the accused-appellant in Court in terms of section 126 A(1) of the Criminal Procedure Code (hereinafter referred to as the Code). The Magistrate acting under section 126 A(2) remanded the accused to the custody of the Fiscal till August 22, 1955, on which date the Police Sergeant instituted proceedings against him by filling a report in terms of section 148 (1) (*b*) of the Code. When this report was filed the accused was present on remand. The offences disclosed in the report were (1) putting one Abubucker in fear of injury in order to commit extortion, (2) mischief and (3) house trespass punishable under sections 374, 410 and 434 of the Penal Code respectively. The Magistrate then framed a charge against the accused to which he pleaded " not guilty." On a subsequent day he was tried and convicted and sentenced to 2 years' rigorous imprisonment and 2 years' Police supervision. The appeal is from this conviction and sentence.

This matter originally came up for hearing before my brother (H.N.G.) Fernando, when the Counsel for the appellant raised a point of law relying on the decision of Soertsz, J. in *Vargheese vs. Perera*, 43 N.L.R. 564. As my brother Fernando doubted the correctness of that decision he reserved this appeal to be heard by a fuller Bench to be appointed by My Lord the Chief Justice.

The point of law which arises on this appeal is that the Magistrate should have recorded evidence on oath in terms of section 151(2) before he proceeded to frame a charge against the appellant. It is submitted that the failure to do so is not merely an irregularity but amounts to an illegality which vitiates the conviction. In support of that contention the Counsel for the appellant relied on the decision in *Vargheese vs. Perera*, (*Supra*). In that case the prosecuting officer made a report to Court in terms of section 148 (1) (*b*) alleging that the accused had committed an offence in contravention of the Poisons, Opium and Dangerous Drugs Ordinance and at the same time he produced the accused before the Court. The Magistrate without examining the prosecuting officer or any other person on oath framed a charge against the accused who pleaded guilty. When the case came up before this Court in appeal on a point of law Soertsz, J. held that the Magistrate had disregarded an imperative requirement of section 151(2). The learned Judge was of the view that this procedure amounted to an illegality which was fatal to the conviction. The Attorney-General who appeared for the respondent in the instant case submitted that *Vargheese vs. Perera*, (*Supra*) was wrongly decided. He sought to support this conviction on the ground that proceedings in this case were instituted under section 148(1) (*b*). His submission was that the examination contemplated by section 151(2) is restricted to proceedings instituted under section 148(1) (*d*). He also argued that in any event it was possible to regard these proceedings as coming under both paragraphs (*b*) and (*d*) of section 148(1) and that therefore the Magistrate was entitled to act under either of those paragraphs and that in the proceedings instituted under section 148(1) (*b*) there is no requirement of law to record evidence on oath before framing the charge. The Attorney-General also submitted that even if the procedure followed by the Magistrate was wrong it amounted merely to an irregularity to which the provisions of sections 425 apply.

Section 148(1) of the Code makes provision for the institution of proceedings in a Magistrates' Court in six different ways which are set out in paragraphs (*a*), (*b*), (*c*), (*d*), (*e*) and (*f*) of that section. The paragraphs relevant to this appeal are (*b*) and (*d*). Paragraph (*b*) reads ;—

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"On a written report to the like effect being made to a Magistrate of such court by an inquirer under Chapter XII or by a peace officer or a public servant or a Municipal servant or a servant of a District Council or a servant of a Local Board ; "

while paragraph (*d*) is in the following terms :—

"On any person being brought before a Magistrate of such court in custody without process, accused of having committed an offence which such court has jurisdiction either to inquire into or try ; "

Section 151(1) deals with the issue of process, after the institution of the proceedings under paragraphs (*a*) or (*b*) or (*c*) of section 148(1) against a person who is not in custody. Under this provision the Magistrate shall either issue summons or warrant in conformity with the First Schedule of the Code. According to the proviso of section 151(1)—

(i) The Magistrate may, if he thinks fit, issue summons instead of a warrant.

(ii) In any case under paragraph (*a*) of paragraph (*b*) of section 148(1) the Magistrate shall, before issuing a warrant and may before issuing a summons record evidence on oath and

(iii) (not material to this appeal).

Section 151(2) provides that when proceedings have been instituted under paragraph (*d*) of section 148(1) the Magistrate shall forthwith examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case.

My brother Fernando has taken the view that when the proceedings are instituted under paragraph (*b*) of section 148(1) the fact that the accused is produced in custody does not alter the character of the institution of the proceedings. That is to say, the proceedings, instituted under section 148 (1) (*b*) continue to be a proceeding instituted under that section even though the accused is produced in custody.

That is why he considered that *Vargheese vs. Perera*, 1 (*Supra*) was wrongly decided. His view is that no examination under section 151(2) was necessary in that case although the accused was produced in Police custody, because the proceedings were instituted under section 148(1) (*b*). The facts in that case are substantially similar to those of the instant case.

It is section 187 of the Code which deals with the framing of charges. The question whether or not evidence has to be recorded in any particular case before the charge is framed against the accused has to be decided in terms of the provisions of that section. That section reads :—

"Where the accused is brought up before the Court otherwise than on a summons or warrant the Magistrate shall after the examination directed by section 151(2) if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against the accused."

It was contended by the Attorney-General—and that was the view taken by my brother Fernando too—that as these proceedings were instituted under section 148(1) (*a*) there was no obligation on the Magistrate to hold the examination contemplated by section 151(2). He also submitted that the words "if necessary" should be inter-polated immediately after the words "directed by section 151(2)" in section 187(1). I do not think there is any justification for such an interpolation. Section 151 does not make provision for a situation when the accused is present in proceedings instituted under section 148(1) (*b*). It sets out the procedure to be followed only when the accused person is not present in Court. If section 151 is silent as to what procedure is to be followed when the accused is present at the time of the institution of proceedings under section 148(1) (*b*) there is no reason why the other sections of the Code should not be examined to obtain the necessary guidance. That guidance, in my opinion, is offered by section 187(1). The opening words of paragraph (*d*) of section 148(1) are "On any person being brought before a Magistrate of such court in custody without process" whereas, section 187(1) refers to a case "where the accused is brought before the Court otherwise than on a summons or warrant." It is significant that the words "in custody" appearing in section 148(1) (*d*) are omitted in section 187(1). Therefore the latter section is wider in application than paragraph (*d*) of 148 (1) and it embraces all cases where the accused is present otherwise than on summons or warrant. This section 187(1) includes not only a case where the accused is present in custody, but also when he is present on remand on Police bail or on being warned by the Police to appear in Court. In all those instances it would appear, that it is incumbent on the Magistrate to hold the examination contemplated by section 151(2). I am unable to see what valid objection there can be to the utilisation, in section 187(1) of a wholesome procedure devised earlier by section 151(2) for a different, though, an analogous purpose.

I am unable to assent to the proposition that *Vargheese vs. Perera*, (*supra*) came to be wrongly decided because Soertsz, J. in construing section 151(2) ignored its opening words "where proceedings have been instituted under section 148(1) (*d*)." These opening words are not relevant in interpreting section 187(1) because that section is not restricted only to the proceedings instituted under 148 (1) (*d*).

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No case was cited to us where it has been held that it is proper to frame a charge against an accused without holding the examination contemplated by section 151(2) when he is produced in custody and the proceedings are instituted under section 148(1) (*b*). In *Assen vs. Maradana Police*, 45 N.L.R. 263 the proceedings were instituted under section 148(1) (*b*) and the accused was produced in custody while the charge was framed without recording evidence on oath. Howard C. J. held that this amounted to an irregularity but as no prejudice had been caused to the accused he declined to interfere with the conviction and sentence. The facts in *Thomas vs. Inspector of Police, Kottawa*, 47 N.L.R. 42, were exactly similar to those of the instant case. There Wijewardene, J. expressed the view that framing of the charge against the accused without recording evidence was an irregularity but as no prejudice had been caused to the accused he dismissed the appeal. The decisions in *Cader vs. Karunaratne*, 45 N.L.R. 23, and *Dias vs. Nadharaja*, 48 N.L.R. 301, are not in point because in neither of those cases was the accused produced in custody.

In the instant case I am of opinion that when the charge was framed against the accused without holding the examination contemplated by section 151(2) there was a failure to comply with the provisions of section 187(1). Does this non-compliance amount merely to an irregularity or an illegality fatal to the conviction? In *Ebert vs. Perera*, 23 N.L.R. 362, which is a decision of a Bench of three Judges it was held that charging an accused from a report filed under section 148(1) (*b*) in respect of an offence punishable with more than three months' imprisonment amounted to an illegality which cannot be cured by section 425. That section reads :—

> " Subject to the provisions hereinbefore contained no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account—
>
> (*a*) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, or other proceedings before or during trial or in any inquiry or other proceedings under this Code ; or
>
> (*b*) of the want of any sanction required by section 147 ; or
>
> (*c*) of the omission to revise any list of assessors,
>
> unless such error, omission, irregularity, or want has occasioned a failure of justice."

It is important to observe that this section expressly states that it is to operate subject to the earlier provisions of the Code. One of those provisions is section 187 relating to the framing of the charge. Therefore the noncompliance of an imperative requirement of section 187 cannot, in my view, be cured by this section. In *Vethanayagam vs. Inspector of Police, Kankesanturai*, 50 N.L.R. 185, My Lord the Chief Justice when he was a Puisne Justice, held that failure to comply with section 190 was not merely an irregularity but an illegality which cannot be cured by section 425 and stated as follows :—

> " Non-observance of a procedural statute is an illegality and not a mere irregularity as was laid down in the case of *Smurthwaite vs. Hanny*. (1894, A.C. 494)"

With respect, I agree with that observation.

If I may say so with respect, *Vargheese vs. Perera*, 43 N.L.R. 564 was correctly decided. The point of law raised on this appeal is entitled to succeed. The failure to comply with the provisions of section 187(1) vitiates the conviction.

I would therefore quash the proceedings and remit the case for trial on a charge that should be framed in conformity with the provisions of section 187(1), that is to say, after holding the examination directed by Section 151 (2).

PULLE, J.

I have the misfortune to arrive at a decision in this appeal which does not commend itself to my brethren. In regard to two incidental matters arising out of the question—whether the charges against the appellant were framed after due compliance with the requirements of the Criminal Procedure Code—I am, if I may be permitted to say so, in complete accord with the opinions expressed by them. The first is that if the Code ordains a procedural step to be taken preliminary to the framing of a charge, the failure to take that step would vitiate the charge. The second which is a corollary to the first is that a conviction upon such a charge cannot on an appeal be allowed to stand by invoking the provisions of section 425. A charge bad in law is not a mere irregularity which can be cured.

On the day the appellant was taken before the Magistrate in custody without process. The accusation against him was set forth in a written report purporting to be under section 148 (1) (*b*) which was accepted by the Magistrate. In my opinion proceedings were instituted in the Magistrate's Court against the appellant when the report under section 148 (1) (*b*) was accepted by the Court as it is undoubtedly one of the ways of instituting a proceeding. Section 126A provides for the remand of a person from time to time pending an investigation under Chapter XII.

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If the argument is valid that when the appellant, who was on remand pending such an investigation, was produced on 22nd August, 1955, there was an institution of proceedings under section 148 (1) (*d*), it must follow that even on the very first occasion he was produced under section 126A (1), the court had no alternative but to take the evidence required by section 151 (2) and to frame a charge under section 187 (1). It would serve no purpose, if the investigation is incomplete, to embark on a trial; or to embark on an inquiry, if the offence under investigation, still incomplete, is an indictable one. I think that, so long as an inquirer is exercising the powers conferred on him by Chapter XII, it is open to him to cause proceedings to be instituted under section 148 (1) (*b*). The bare fact that in pursuance of an earlier order of detention the appellant was produced on 22nd August, 1955, did not make the " institution " of proceedings any the less one under section 148 (1) (*b*).

If I am correct in the view which I have just expressed, there was no room for the application of section 151 (2) which deals with only a case where proceedings have been instituted under section 148 (1) (*d*). There was also no room for the application of section 151 (1), because it provides for a case where the accused is not in custody. In the result the framing of a charge against the appellant upon the report being filed was, in my opinion, perfectly proper.

Section 187 (1) speaks of an examination directed by section 151 (2). The latter provision is limited by its very terms to section 148 (1) (*d*) and cannot be extended to cover an institution of proceedings under section 148 (1) (*b*). As section 151 (2) did not apply, it cannot be said that the charge framed against the appellant was in violation of section 187 (1) or any other provision of the Code by reason only of the fact that the person who brought the appellant before the Court was not examined on 22nd August.

In my opinion the appeal fails and should be dismissed.

*Set aside and sent back.*

*Present :* Basnayake, C. J. and L. W. de Silva, A. J.

JULIANA HAMINE *et al* vs. DON THOMAS *et al*

*S. C.* 770 of 1956—*D. C. Gampaha* 3279/*P*

*Argued :* 30th August and 2nd September, 1957
*Decided on :* 30th September,1957

*Partition Act, No.* 16 *of* 1951 *Sections* 20, 25, 26 *and* 61—*Duty of Court in Partition Actions—Adverse possession—What is necessary to prove.*

In a partition action under the Act 16 of 1951, apart from deciding on the points of contest raised by the parties, there is an obligation on the Court under section 25 to scrutinise the title of each party before any share is allotted to him in the Interlocutory Decree under section 26.

Where a party fails to produce his documents of title, the procedure laid down in sections 20 and 61 of the Act should be followed.

In leading evidence of prescriptive title the manner of adverse possession should be set out. The observations in 21 N.L.R. at 326 approved.

Per L. W. de Silva, A.J.—" We are of the opinion that a partition decree cannot be the subject of a private arrangement between parties on matters of title which the Court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest *inter se* and to obtain a determination on them, the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do. The interlocutory decree which the court has to enter in accordance with its findings in terms of section 26 of the Act is final in character or since no interventions are possible or permitted after such a decree. There is therefore the greater need for the exercise of judicial caution before a decree is entered. The court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act ".

*Sir Lalitha Rajapakse Q. C., with D. C. W. Wickremasekera,* for the 3rd, 5th and 6th Defendants-Appellants.

*Austin Jayasuriya* for the Plaintiff-Respondent.

L. W. de Silva, A.J.

The plaintiff instituted this action for the partition of a divided portion of a land called Kahatagahawatte marked lot B in extent 3 roods, 6 and 13/100 perches on the footing that he owned 6/8 shares and the 1st defendant the remaining 2/8 shares. The plan No. 534 marked X made for this action by the commissioner appointed by the District Court refers to lot B depicted in a plan of 1904. The extent of the alleged divided portion according to the plan X is 2 roods and 35 perches.

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The 2nd and 3rd defendants, who were claimants at the survey, filed an answer alleging that Nicholas Appu, the original proprietor referred to in the plaint, was the owner of an undivided 1/12 share of Kahatagahawatte in extent about 8 acres, and set out a devolution of title claiming the half share which was inherited by Catherinahamy as the widow of Nicholas Appu. They thus joined issue with the plaintiff. The 5th and 6th defendants, who are appellants along with the 3rd defendant, are the heirs of the deceased 2nd defendant.

After trial, the learned District Judge pronounced his judgment and entered an interlocutory decree for a partition of the corpus depicted in the plan X, allotting to the plaintiff and to the first defendant the respective shares set out in the plaint. The claim of the contesting defendants appellants was dismissed. Their appeal questions the correctness of the findings in respect of Catherinahamy's half share which they claimed at the trial and which has been allotted to the plaintiff.

Points of contest were framed at the trial with regard to the devolution. Catherinahamy's 1/2 share in relation to the respective titles pleaded and the prescriptive rights of the parties. The identity of the corpus was not specifically raised as a point of contest.

The share which devolved on Catherinahamy was conveyed by her on 3D2 in 1907 to Lavaris who gifted the share to the 2nd and 3rd defendants on 3D3 in 1925. Thereafter Catherinahamy on P1 in 1934 purported to convey the same interests to Selesthinu from whom the plaintiff purchased them on P2 in 1940. These competing deeds deal with an undivided 1/12 share of the larger land of 8 acres. The Court had to consider and determine whether the deeds applied to the corpus in suit and whether the title of the 2nd and 3rd defendants was superior to that of the plaintiff. The learned District Judge held that 3D2 and 3D3 did not apply to the land depicted in the plan X and upheld the plaintiff's title to it on P2. In coming to this conclusion, he was misled by the boundaries in the defendants' deeds. An examination of the documents shows that the boundaries in the two sets of deeds are identical. Learned Counsel for the respondent conceded that the trial Judge had erred in coming to his conclusion. Where there are two titles derived from one and the same source, the earlier title must prevail. No question of priority by registration was raised. It is thus obvious that the title which passed to the 2nd and 3rd defendants on 3D2 and 3D3 must prevail over P1 and P2.

Having erroneously found that the plaintiff was entitled to Catherinahamy's 1/2 share on P2, the learned District Judge proceeded to make a finding that the 3rd defendant and the heirs of the deceased 2nd defendant had failed to prove a title by prescription. This finding cannot be supported. The paper title being in the 2nd and 3rd defendants, the burden of proving a title by prescription was on the plaintiff. That burden he has failed to discharge. Apart from the use of the word *possess*, the witnesses called by the plaintiff did not describe the manner of possession. Such evidence is of no value where the Court has to find a title by prescription. On this aspect, it is sufficient to recall the observations of Bertram, C. J. in the Full Bench Case of *Alwis vs. Perera* : 21 N.L.R. 326.

> " I wish very much that District Judges—I speak not particularly, but generally—when a witness says ' I possessed ' or ' We possessed ' or ' We took the produce', would not confine themselves merely to recording the words, but would insist on those words being explained and exemplified. I wish District Judges would abandon the present practice of simply recording these words when stated by the witnesses, and would see that such facts as the witnesses have in their minds are stated in full and appear in the record."

But a finding on the mere devolution of title as set out in the judgement of the Court of trial is of no consequence unless there is also a finding which determines the corpus to which that title relates. While the plaintiff purported to obtain a title on P2 to 1/12 share of a land of 8 acres, he purported to obtain a title on P4 to 1/4 share of lot B in extent 3 roods, 6·13 perches. He did not adduce any evidence to explain how the corpus he has sought to partition was reduced at various stages. The plaint does not refer to a plan nor does it aver how the divided portion marked lot B came into existence. The plan of 1904 referred to in the plan X made for the purposes of this action was not produced at the trial. The boundaries appearing in the plaint are different from those shown in the plan X. There is no evidence whatever to identify the land described in the plaint with the land depicted in the plan X. The material elicited in the cross-examination of the plaintiff confirms his ignorance and uncertainty :—

*Q.* This land is a portion of a bigger land ?

*A.* I do not know. It is a separate portion.

*Q.* Who pointed out the boundaries to the surveyor ?

*A.* The 1st defendant and I.

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*Q.* All round this land are portions of Kahatagahawatte?
*A.* Yes.
*Q.* So that this is also a portion of Kahatagahawatte?
*A.* Must be.

The learned District Judge has not considered this aspect of the case. The speculative nature of the plaintiff's purchases is borne out by his own deeds. Search was dispensed with on his purchase of a 1/12 share of a larger land on P2. His next purchase of a 1/4 share of lot B on P4 was made eleven days later through another Notary. Learned Counsel for the appellants has brought some of these matters to our notice since they have a bearing on the investigation of the title of the parties.

I now turn to the title of the 1st defendant. He filed no answer, but a Proctor filed his proxy. According to the plaint, two of Nicholas Appu's children are said to have sold their 2/8 shares to the 1st defendant. The only evidence touching his title was given by the plaintiff who did no more than repeat his averment in the plaint. The title deeds of the 1st defendant were not produced at the trial though he was present in Court and expressed a desire to have his interests allotted on the northern side. The Court had no opportunity of examining his title. Nevertheless, the judgment states: "the 1st defendant has obtained title to 2/8 share from two of the children of Nicholas Appu."

But learned Counsel for the plaintiff respondent has pointed out that title of the 1st defendant is not the subject of this appeal and has argued that the appellants are not entitled to rely upon matters which the trial Judge was not called upon to decide. We are unable to accept this contention without qualification. This is a partition action governed by the Partition Act No. 16 of 1951. Section 25 of the Act is as follows:—

> "On the date fixed for the trial of a partition action or on any other date to which the trial may be adjourned, *the court shall examine the title of each party* and shall hear and receive evidence in support thereof and shall try and determine all questions of law and fact arising in that action in regard to the right, share, or interest of each party to, for or in the land to which that action relates, and shall consider and decide which of the orders mentioned in section 26 should be made."

Since this provision of law makes it obligatory on the Court to examine the title of each party, the title of the 1st defendant had to be subjected to scrutiny before any share was allotted to him. The finding that the 1st defendant has obtained title to a 2/8 share is unfounded. The learned trial Judge does not appear to have made use of section 20 or 61 of the Partition Act. Section 20 prescribes the step which the Court should take when a party to a partition action fails to produce at the trial his material documents of title, while section 61 prescribes the procedure to be followed where a party omits to prove his title. We wish to commend the use of these sections. Without an examination of the 1st defendant's title, the Court of trial could not, without causing prejudice to the other parties, proceed to the next stage of considering and deciding which of the orders mentioned in section 26 of the Act should be made.

We are of the opinion that a partition decree cannot be the subject of a private arrangement between parties on matters of title which the Court is bound by law to examine. While it is indeed essential for parties to a partition action to state to the Court the points of contest *inter se* and to obtain a determination on them, the obligations of the Court are not discharged unless the provisions of section 25 of the Act are complied with quite independently of what parties may or may not do. The interlocutory decree which the court has to enter in accordance with its findings in terms of section 26 of the Act is final in character since no interventions are possible or permitted after such a decree. There is therefore the greater need for the exercise of judicial caution before a decree is entered. The court of trial should be mindful of the special provisions relating to decrees as laid down in section 48 of the Act. According to its terms, the interlocutory and final decrees shall be good and sufficient evidence of the title of any person as to the interests awarded therein and shall be final and conclusive for all purposes against all persons whomsoever, notwithstanding any omission or defect of procedure or in the proof of title adduced before the court, and notwithstanding the provisions of section 44 of the Evidence Ordinance, and subject only to the two exceptions specified in sub-section 3 of section 48 of the Act.

We are of the opinion that the plaintiff has failed to prove a title to the property he has sought to partition. On a consideration of all the matters to which we have referred, we allow the appeal and dismiss the plaintiff's action with costs both here and in the court below.

Basnayake, C.J.

I agree.

*Appeal allowed.*

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*Present :* K. D. de Silva, J., T. S. Fernando, J. and Sinnetamby, J.

## S. SEEBERT SILVA vs. F. ARONONA SILVA AND 4 OTHERS

*S.C.* 182—*D.C. Panadura No.* 3189/134 *A*

*Argued on :* 18th and 19th November, 1957
*Decided on :* 3rd December, 1957

*Civil Procedure Code, Section* 92—*Journal kept recording all events in an action—Presumption that it is regularly kept—Burden of rebutting it—Evidence Oridnance, Section* 114.

**Held :** (1) That the journal kept under section 92 of the civil Procedure Code is the prinicipal record of an action, and the court is entitled to presume under section 114 of the Evidence ordinance that it was regulaly kept.

(2) This is a rebuttable presumption and the burden of placing sufficient material to rebut it is on the party against whom the presumption is sought to the used.

*Per* K. D. de Silva, J.—" The date stamp on the plaint is by no means conclusive. Although date stamping is extremely desirable and must be accurately done, yet I must observe that there is no provision in the Civil Procedure Code which requires it ''.

*Sir Lalitha Rajapakse Q.C.*, with *B. Senaratne* and *D. C. W. Wickremasekera* for the Plaintiff-appellant.

*G. P. J. Kurukulasooriya*, with *C. Chellapah*, for the 1st, 2nd and 5th defendants-respondents.

K. D. de Silva, J.

The question of fact which comes up for determination on this appeal is whether or not the plaint in this action which is one instituted under section 247 of the Civil Procedure Code was filed in Court on 11th September, 1951. The plaintiff-appellant who is the judgment-creditor in D.C. Kalutara Case No. 577 took out a writ of execution against Seemel the present 3rd defendant who was the judgment debtor in that case to recover a sum of Rs. 1,026/- the amount due on the decree and seized the land called Panwilakumbura belonging to the 3rd defendant. Thereupon the 1st and 2nd defendants who are the wife and minor son respectively of the 3rd defendant claimed the property as belonging to them. This claim was upheld on 31st August, 1951. Thereafter the plaintiff instituted this action. The 5th defendant is the guardian-*ad-litem* of the 2nd defendant. At the trial the objection was taken that this action was not instituted within fourteen days as contemplated by section 247. The learned District Judge after hearing the Counsel for both parties upheld the objection and dismissed the plaintiff's action with costs. This appeal is from that order.

Sir Lalitha Rajapakse who appeared for the plaintiff-appellant contended that the plaint which on the face of it bears the date 11th September, 1951, was in fact tendered to Court on that day although it bears the date stamp of 29th November, 1951. If that contention is correct it is conceded by Mr. Kurukulasooriya the Counsel for the 1st, 2nd and 5th respondents that the action was instituted within time. But Mr. Kurukulasooriya submitted that this plaint was presented to Court only on 29th November, 1951. At the trial this question was tried as a preliminary issue but neither party called any witnesses although certain documents were marked in evidence. The learned District Judge held that this plaint was in fact filed in Court only on 29th November, 1951.

Mr. Tudor A. Perera the Proctor for the plaintiff filed in Court the motion P2 dated 11th September, 1951, which reads, " I file my power of appointment as Proctor for S. Seebert Silva together with plaint, petition supported by an affidavit and for the reasons stated therein move that Franciscudura Aronona Silva the 2nd respondent be appointed guardian-*ad-litem* over the minor Sandradura Sumanasena Silva the 1st respondent for all purposes of this action." This motion has been journalised under the date 11th September, 1951. This journal entry which is very relevant reads as follows :—

" Mr. Tudor A. Perera files appointment and plaint together with petition and affidavit and moves that F. Aronona Silva be appointed as guardian-*ad-litem* over the minor Sandradura Sumanasena Silva." Against this entry appear the words " enter and issue O/N on respondents for 24-10-51." These words were presumably written by an officer of the Court for the purpose of obtaining the signature of the District Judge to the proposed order. But the District Judge —he is not the same Judge who tried the case— deleted the words " on respondents for 24-10-51 " and substituted therefor in his own hand writing the words " if draft plaint is filed." It is im-

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portant to observe that this journal entry is made on a form in which the words " files appointment and plaint together with documents marked " appear in print and of these the last two words " documents marked " have been scored off by drawing a line over them in ink. This too appears to have been done by the officer who made the journal entry. The next journal entry is dated 29th November, 1951, and is in the following terms :—" Proctor for plaintiff files draft plaint and moves for a date to issue Order Nisi." This motion has been allowed by the District Judge. This journal entry as originally written had the word " amended " but it has been scored off and the word " draft " has been entered above it.

This same alteration occurs in the corresponding motion also. It would appear that an officer of the Court made this correction. The draft plaint which is stated to have been filed on 29th November, 1951, is not present in the record now. There are two factors in support of the submission made by Mr. Kurukulasooriya. The first is the date stamp on the plaint and the second is the absence of the draft plaint filed on 29th November, 1951. The learned District Judge also thought that the first journal entry which directed that the decree nisi be issued after the draft decree is filed was also a point in favour of the respondent. In one sense it is so but the fact that the District Judge who corrected the minute made by the clerk did not strike off the printed word " plaint " is a point in favour of the appellant. It is not possible to say why exactly the learned Judge directed that a draft plaint be filed. Section 493 of the Civil Procedure Code which governs the appointment of a guardian-*ad-litem* does not require that a draft plaint should accompany the application for such appointment. It may be possible that the District Judge erroneously believed that a draft plaint too was necessary even though the plaint itself had been filed.

As against the points in favour of the respondents there are, on the other hand, several facts and circumstances which clearly support the contention that the plaint was filed in Court on 11th September, 1951. They are (1) the first journal entry in the case and the connected motion, (2) the date of the cancellation of the stamps on the plaint and the affixing of the stamp for binding fee on it, (3) the journal entry of 29th November, 1951, and the motion on which it is based, and (4) the entry in the record of the stamp duty.

The first journal entry which is dated 11th September, 1951, clearly states that the plaint was filed on that day together with all papers. This entry is supported by the motion tendered to Court by the plaintiff's Proctor. It is most unlikely that if the plaint was not tendered on that date that the Record-Keeper and the subject clerk would have failed to detect it. That the learned District Judge did not lightly sign the journal is borne out by the fact that he altered the minute made by the clerk. He must have done so after going through the papers filed by the Proctor. If in the course of checking, the Judge found that the plaint had not been filed, he would certainly have struck off the printed word " plaint " in the journal.

The stamps affixed to the plaint have been cancelled on 11th September, 1951. If, as the learned District Judge thought, that this plaint was tendered to Court only on 28th November, 1951, how is it that the binding fee stamp is affixed to it and not to any paper which was admittedly filed on 11th September, 1951 ? It has not been suggested that when a case is instituted the Court would accept the papers even though the stamp for binding fee is not tendered. The presence of this stamp on the plaint and the absence of it on any other paper filed on 11th September, 1951, is very strong evidence that the plaint was in fact filed on 11th September, 1951.

The journal entry of 29th November, 1951, and the connected motion also confirm the plaintiff's case. The words " amended plaint " in that motion indicate that the plaint had already been filed. The alteration of the word " amended " to " draft " both in the motion as well as in the journal is very significant. If in fact it was the stamped plaint that was tendered on that day it is hardly likely that any Court clerk would describe it as a draft plaint.

In regard to the entry in the record of stamp duty the learned District Judge having stated that it was made on 11th September, 1951, dismissed it as being of not much consequence because, there was " nothing to show that the stamp register was entered by reference to the documents." But this entry has in fact been made not on 11th September, 1951, but on 13th September, 1951. If it had been dated 11th September, 1951, one could even say that it was a mechanical entry made with reference only to the date of the institution of the action. But, in view of the fact that the entry was made two days later it is almost impossible to say that the clerk who was responsible for it did not check up the stamps before making the entry. The learned District Judge has held that this stamped plaint was filed only on 11th November, 1951. If this view is correct then the entry in the

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record of stamp duty should have been made on or after that date and not before.

The learned District Judge commented on the fact that Mr. Tudor A. Perera the Proctor for plaintiff did not give evidence. But unfortunately he has failed to consider the significance of section 92 of the Civil Procedure Code. That section provides that with the institution of the action the Court shall keep a journal in which shall be minuted, as they occur, all the events in the action and that the journal so kept shall be the principal record of the action. A journal has been maintained in this action and the Court is entitled to presume that it was regularly kept. This presumption which arises under section 114 of the Evidence Ordinance is based on the maxim "*Omnia praesumunter rite et solemniter esse acta.*" This presumption is of course rebuttable but the respondents, on whom is the burden, have not placed before the Court sufficient material to rebut it. The relevant journal entries in the case support the contention that the plaint in this case was filed on 11th September, 1951. The date stamp on the plaint is by no means conclusive. Although date stamping is extremely desirable and must be accurately done, yet I must observe that there is no provision in the Civil Procedure Code which requires it. The draft plaint filed on 29th November, 1951, may well have been misplaced.

For the reasons given above I allow the appeal with costs in both Courts. The case is remitted to the District Court for trial on the other issues arising between the parties.

T. S. Fernando, J.
I agree.

Sinnetamby, J.
I agree.

*Appeal allowed.*

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*Present :* T. S. Fernando, J.

## SOLOMON FERNANDO *vs.* PADMA LALANI FERNANDO

***S. C. No.* 466 *of* 1957—*M. C. Panadura (Addl.) No.* 37198**

*Argued on :* 4th December, 1957

*Decided on :* 13th December, 1957

***Maintenance Ordinance, Section 2—Order refusing maintenance reversed in appeal—Order granting maintenance substituted—From what date it becomes payable—Criminal Procedure Code, Section* 347.**

**Where an order refusing maintenance is reversed in appeal and the Supreme Court substituted an order allowing maintenance, the maintenance so ordered becomes payable from the date on which the Magistrate's order would have taken effect if there would have been an allowance of the maintenance by the Magistrate.**

*S. P. C. Fernando* (with him, *Stanley Perera*), for the defendant-appellant.

*M. M. Kumarakulasingham* (with him, *B. S. Dias*), for the applicant-respondent.

T. S. Fernando, J.

The applicant, the wife of the defendant, made an application to the Magistrate in terms of the Maintenance Ordinance on 10th November, 1954, seeking maintenance for herself. By his order delivered on 10th September, 1955, the Magistrate dismissed the application of the applicant. She appealed to this Court and was successful in obtaining a reversal of the Magistrate's order. The order of this Court delivered on 6th August, 1956, fixed the allowance payable by the defendant to the applicant at Rs. 100/- a month. The question that arises upon this appeal relates to the date from which maintenance becomes payable as a result of the order of this Court.

The learned Magistrate has held that maintenance is payable from 10th September, 1955, the date the Magistrate made the order dismissing the application which was reversed by this Court. The defendant's counsel argues that

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maintenance is payable only from 6th August, 1956, the date of the reversal of the Magistrate's order and the date on which the Supreme Court made its order directing the payment of maintenance.

The argument of counsel necessitates the examination of Section 2 of the Maintenance Ordinance and of Sections 347 and 350 of the Criminal Procedure Code. Section 2 of the Maintenance Ordinance is the provision of law which empowers the making of an order for maintenance. This section empowers a Magistrate to make such an order and provides that maintenance shall be payable from the date of the order. It will be observed that but for this statutory limitation it might have been competent for a Magistrate to direct that maintenance be payable from the date of the application itself.

A person dissatisfied with an order refusing maintenance has a right to appeal to this Court, and Section 17 of the Ordinance enacts that " Sections 338 to 352 of the Criminal Procedure Code shall apply to such appeal ". Under Section 347 of the Criminal Procedure Code, this Court is empowered on an appeal to alter or reverse an order of a Magistrate's Court, and it seems to me that when this Court made its order on 6th August, 1956, it was acting in terms of Section 347, and that it reversed the Magistrate's order dismissing the application. This Court has no original jurisdiction in the matter of making an order for maintenance its jurisdiction is purely appellate; and, in reversing the order dismissing the application and in directing payment of maintenance, this Court was doing no more than substituting for the Magistrate's order of 10th September, 1955, an order for maintenance; in other words, this Court held that the Magistrate should on 10th September, 1955, have made an order allowing maintenance. This Court's order now stands in the place of the Magistrate's order and should, in my opinion, take effect on the date on which the Magistrate's order would have taken effect if there had been an allowance by the Magistrate of the application.

Where a person has appealed against the allowance of an application for maintenance and this Court dismisses the appeal, it is beyond dispute that the date of the order under Section 2 of the Maintenance Ordinance is the date the Magistrate made the order. Where a person appeals against the quantum of maintenance and is successful in obtaining on appeal an increase or a reduction of the quantum, it is not possible to contend successfully that the date from which the order allowing the altered maintenance takes effect is any other than the date on which the Magistrate made the order. I am not convinced that a different result is obtained where, on appeal, a refusal of maintenance is reversed and in place of the order dismissing the application there is substituted an order allowing maintenance. What the Court of Appeal does is to ascertain what decision the Magistrate should correctly have reached in the premises and to direct that further action be taken in the case on the basis that the Magistrate has reached what it (the Court of Appeal) considers was the correct decision.

Had it not been for the express enactment to the contrary contained in Section 2 of the Maintenance Ordinance, it would have been possible to contend that an applicant is entitled to maintenance as from the date of neglect or refusalto maintain on the part of the person legally liable to do so. A court of law should be slow to give an interpretation to this expressed limitation of the operative date which would have the effect of placing an applicant for maintenance at a greater disadvantage than the strict meaning of the limitation demands.

Learned Counsel for the defendant drew attention to Section 350 (2) of the Criminal Procedure Code and contended that upon the receipt of the record back from the Supreme Court the Magistrate is required to make an order conformable to the Supreme Court's order, and that this order can only operate as from the date on which it is made by the Magistrate's Court. This contention would in normal circumstances render the operative date of the order for maintenance a date even subsequent to the date on which the Supreme Court delivered its order. I do not think it profitable to consider the nature of orders that may have to be made by Magistrates in a ministerial capacity in compliance with judicial orders of the Supreme Court in hypothetical cases. It would suffice if I consider the order the Magistrate was called upon to make conformable to the order of this Court delivered on 6th August, 1956. As this Court ordered the payment of maintenance and as this Court had no original jurisdiction to make such an order, what this Court did, as I have stated already, was to substitute for the Magistrate's order of 10th September, 1955, its own order of 6th August, 1956. The date from which this Court's order took effect therefore in my opinion related back to 10th September, 1955, and that is the date from which the defendant has to pay maintenance. The Magistrate was therefore correct in directing that maintenance has to be paid from 10th September, 1955.

I would dismiss the appeal with costs.

*Dismissed.*

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*Present :*

BASNAYAKE, C.J., PULLE, J., K. D. DE SILVA, J., T. S. FERNANDO, J. AND L. W. DE SILVA, A.J.

## WILLIAM FERNANDO vs. ROSLYN COORAY

*S.C. 99—D.C. Colombo No.* 6639/*L*

*Argued on :* 31st October & 1st, 11th & 12th November, 1957
*Decided on :* 18th November, 1957

*Vendor and Purchaser—Sale of immovable property in discharge of an existing debt—Agreement to retransfer to vendor within two years on payment of consideration mentioned in deed together with interest—Vendor to remain in possession till such retransfer—Vendor's failure to repurchase within period stipulated—Vendee entering into possession—Action by vendor for declaration that transfer deed was a security and restoration to possession. No allegation of fraud or trust—Can vendor lead parol evidence to prove that it was a mortgage or security ?—Evidence Ordinance, Section* 92.

Plaintiff was owner of two contiguous allotments of land admittedly worth at least Rs. 10,000/-. On three different occasions the plaintiff borrowed moneys aggregating to Rs. 2,700/- on three Mortgage Bonds by hypothecating these lands. When plaintiff applied to the defendant for a fourth loan the latter asked for a 'conditional transfer' of the lands. Deed P1 was accordingly executed, the consideration specified therein being the aggregate amount of all the loans given by the defendant to the plaintiff together with accrued interest.

P1 was an absolute transfer subject to the condition that the vendee shall reconvey the said premises to the vendor within two years from this date at the cost of the vendor "if he (the vendor) shall repay to the vendee or her aforesaid the sum of Rs. 3,407/87 together with interest at 15% per annum from this date. Until such payment the vendor shall be in possession of the same."

The plaintiff failed to obtain a repurchase as stipulated and the defendant entered into possession of the lands. Thereafter plaintiff instituted this action praying that the deed P1 be declared a security and not a transfer and that he be restored to possession of the lands.—He did not allege any fraud or trust.

The defendant resisted this claim on the ground that P1 was an outright transfer subject to the condition set out therein and that on the failure of the plaintiff to comply with the condition, she lawfully entered into possession thereof.

The District Court upheld the defendant's contention on the ground that it was not open to the plaintiff to seek to vary the unambiguous terms of the deed P1 by attempting to show that it is something other than what it purports to be.

**Held :** (1) That under the Roman-Dutch law a court is entitled to ignore the label and the form that the parties give to a particular transaction evidenced by a deed and ascertain its substance and true nature.

(2) That this right is restricted by section 92 of the Evidence Ordinance and any evidence which a party is entitled to lead for the purpose of ascertaining the true nature of the transaction must not offend the provisions of that section. Evidence which is prohibited by that section, even if admitted without objection, cannot be acted upon.

(3) That it is only when there is an ambiguity in the deed that evidence of conduct and surrounding circumstances become admissible in terms of proviso 6 of section 92.

(4) That the time stipulated in P1 is of the essence of the contract and on the expiry of the period the defendant is relieved of the undertaking to re-transfer the property.

(5) That the terms of P1 are clear and unambiguous and no extraneous evidence is necessary to construe this document.

(6) That there cannot be a valid objection to fixing the price at which the property was to be bought back in terms of interest.

(7) That the fact that the existing mortgage debts due to the vendee formed the whole or part of the consideration on P1 could not alter the character of the deed.

**Approved** : *Setuwa vs. Ukku*, 56 N.L.R. 337.

**Disapproved** : *Palingu Menike vs. Mudiyanse*, 50 N.L.R. 566.

**Authorities cited** : *Setuwa vs. Ukku*, 56 N.L.R. 337.
*Saminathan Chetty vs. Vanderpoorten*, 34 N.L.R. 287.

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*de Silva vs. de Silva,* 39 N.L.R. 169.
Opinion No. 74 of Opinions of Grotius—De Bruyn's Translation.
Voet Bk. 13, Title 7, Section 1,—Gane's Translation Vol. 3, page 54.
*Zandberg vs. Van Zyl,* (1910) A.D. 302.
*Bhunja vs. Khoja,* (1937) N.L.R. 246.
*Palingu Menike vs. Mudiyanse,* 50 N.L.R. 566.
Voet Bk. XVIII, Tit. 111 Section 7.
*Wijayawardane vs. Peris,* 37 N.L.R. 179.
*Balkishen Das and others vs. Legge,* (1899) 27 Law Reports Indian Appeals 58.
Voet Bk. XVIII, Title 3, Section 7—Gane's Translation
*Saverimuttu vs. Thangavelautham,* 55 N.L.R. 532.
*Perera vs. Fernando,* 17 N.L.R. 486.
*Chandra Nandi vs. Prashad Singh,* A.I.R. (1917) Privy Council 23.
*Somasunderam Chetty vs. Todd,* 13 N.L.R. 361 at 368.
*Perera vs. Fernando,* 17 N.L.R. 486.
*Adaicappa Chetty vs. Karuppen Chetty,* 22 N.L.R. 417.
*Don vs. Don,* 31 N.L.R. 73.
*Fernando vs. Peiris,* 32 N.L.R. 25.
*Mohamadu vs. Pathumah,* 11 Law Recorder 48.
*Jonga vs. Nanduwa,* 45 N.L.R. 128.
*Sobana vs. Meera Lebbe,* 5 C.L.J. 46.
*Thambipillai vs. Muthucumarasamy,* 58 N.L.R. 387.
*Silva vs. Zoysa,* 58 N.L.R. 303.
*Appuhamy vs. Saiya Nona,* 46 N.L.R. 313.
*Belgaswatte vs. Ukkubanda,* 43 N.L.R. 281.
*Dingiri Naide vs. Kirimenike,* 57 N.L.R. 559.
*Penderlan vs. Penderlan,* 50 N.L.R. 513.
*Ukku vs. Dintuwa,* 1 S.C.C. 89.
*Saverimuttu vs. Thangavelautham,* 55 N.L.R. 529 at 532 and 535.
*Valliyammi Atchi vs. Abdul Majeed,* 48 N.L.R. 289.
*Abeywickreme vs. Carlo,* 3 Lorenz 68.
Jayawardene on Mortgage, p. 15.
*Peugh vs. Davis,* (1877) 96 U.S. Supreme Court Reports 332-336, Bk. 24 Lawyers' Edn. 775
*Beckett vs. Tower Assets Company,* (1891) 1 Q.B. 638.
*Trustee of G. Mellor vs. Maas & another,* (1903) 1 B.K. 226, 1905 A.C. 102.
*Samuel vs. Salmon & Gluckstein Ltd.* (1945) 2 11 E.R. 520. A
*Woods vs. Wise,* (1955) 1 All E.R. 767.
Wille on Mortgage, p. 76.
Norman on Purchase and Sale in South Africa, pp. 16-18.
Lee—Introduction to Roman Dutch Law 187 (5th Edn.).
*Hanif-un-Nissa and another vs. Faiz-un-Nissa and another,* 33 I.L.R. Allahabad p. 340.
*Baijnath Singh vs. Hajee Vally Mohamed Hajee Abba,* (1925) A.I.R. P.C. 75.
*Bhagwan Sahai vs. Bhagwan Din & others,* (1890) 17 I.R. I.A. 98.
*Raja Bahadur Narasingerji Gyanagerji vs. Raja Dhanarajagirji,* (1924) A.I.R. P.C. 226.
*Shah Mukhun Lall & others vs. Baboo Shree Kishen Singh & others* (1868) 12 Moo I.A. 157.
Wigmore on Evidence Vol. IX S2425.

*H. W. Jayawardena Q.C.* with *G. T. Samarawickreme, B.S.C. Ratwatte* and *N. R. M. Daluwatte* for the Plaintiff-Appellant.

*E. B. Wickramanayake Q.C.* with *A. L. Jayasuriya Colin Mendis* and *E. D. Wickramanayake* for the Defendant-Respondent.

K. D. de Silva, J.

The plaintiff-appellant purchased the two small allotments of land which form the subject matter of this action on deed No. 407 dated November 3, 1941 (D1) for a sum of Rs. 300/-. By deed No. 2560 of August 18, 1950 (P1) he sold and transferred the same to the defendant-respondent for a consideration of Rs. 3,407/87, subject to a condition, in the following terms :—" To have and to hold the said premises hereby sold and conveyed with the rights and appurtenances unto the said vendee and her heirs executors and administrators and assigns absolutely forever subject however to the condition that she shall reconvey the said premises to the vendor within two years from this date at the cost of the vendor if he shall repay to the vendee or her aforesaid the sum of Rs. 3,407/87 together with interest at 15% per annum from this date and until such payment the vendor shall be in possession of the same."

The plaintiff having failed to pay the sum of Rs. 3,407/87 within the stipulated period which expired on August 18, 1952, the defendant entered into possession of the lands thereafter.

In this action which was instituted on September 16, 1952, the plaintiff alleged that he " was always of the impression " that the deed P1 was given as security for the sums of money borrowed

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by him from the defendant and he pleaded that this deed was really a document to secure the repayment of money. In the prayer, he asked, *inter alia*, that the deed P1 be declared a security and not a transfer and that he be restored to possession of the lands.

The defendant in her answer averred that the deed P1 was an outright transfer subject to the condition set out therein and that on the failure of the plaintiff to comply with that condition she lawfully entered into possession of the lands.

The case proceeded to trial on several issues and the learned District Judge held that the deed P1 was an outright transfer subject to the vendor's right to claim a re-conveyance within two years on the payment of the stipulated sum. He also took the view, relying on the decision in *Setuwa vs. Ukku*, 56 N.L.R. 337, that it was not open to the plaintiff to seek to vary the unambiguous terms of the deed P1 by attempting to show that it is something other than what it purports to be. Accordingly he dismissed the action with costs. This appeal is from that judgment. In view of the conflicting decisions on the question of law which arises for determination in this case My Lord the Chief Justice has, in terms of section 51(1) of the Courts Ordinance (Cap. 6), referred this appeal to a Bench of five Judges.

The main question for decision is whether the transaction relating to P1 amounts merely to a security for money lent or whether it is a contract of sale of immovable property subject to a condition for re-conveyance. Mr. Jayawardene, for the appellant, submitted that it was the former, while Mr. Wickramanayake for the respondent, contended that it was the latter. If this deed created only a security for money lent the document would be regarded as a mortgage and the equity of redemption cannot be lost despite the time limit laid down for the performance of the condition—*Saminathan Chetty vs. Vanderpoorten*, 34 N.L.R. 287. But, if it is a bill of sale subject to a condition, time is of the essence of the contract and the condition must be performed within the stipulated period—*de Silva vs. de Silva*, 39 N.L.R. 169.

P1 on the face of it purports to be a contract of sale subject to a condition. However, Mr. Jayawardene argued that, no matter what label the parties attached to a particular transaction, it was the duty of the Court to scrutinize it carefully and ascertain its true nature. This view finds support from Grotius and Voet. Grotius expressed the view that an agreement embodied in a written contract relating to two ships, although drawn up in the form of a sale was a transaction in the nature of a pledge (*Opinion No. 74 of Opinions of Grotius—De Bruyn's Translation*).

Dealing with "Disguised Pledge" Voet states, "Such a contract of pledge, though it is sometimes cloaked by the contracting parties under the title of purchase or of giving by way of payment, nevertheless does not on that account remain the less a pledge, when the accompanying circumstances prompt that view according to the opinion of *Hugo Grotius*." (*Voet Bk.* 3, *Title* 7, *Section* 1. —*Gane's Translation Vol.* 3, *page* 54). This principle has been acted upon by the Courts both here and in South Africa. It was held in *Zandberg vs. Van Zyl* (1910) A.D. 302 that regard should be had to the substance of the transaction and not to the designation that the parties attach to it. Innes J. who was one of the three Judges who decided that case stated, "Not frequently, however (either to secure some advantage which other wise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name, or give it shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is ; not what in form it purports to be." A similar view was expressed in *Bhunja vs. Khoja*, 1937) N.L.R. 246. In *de Silva vs. de Silva Hearne, J.* adopted the same view.

Mr. Wickramanayake conceded that it was the duty of the Court to ascertain the true nature of the transaction evidenced by the deed but he maintained that for that purpose the Court was not entitled to go outside the document itself. He relied on the decision in *Setuwa vs Ukku* (Supra.) Mr. Jayawardene submitted that case was wrongly decided and that the correct statement of law was as laid down in *Palingu Menika vs. Mudiyanse*, 50 N.L.R. 566, which is a case decided by My Lord the Chief Justice when he was a Puisne Justice. *Setuwa vs. Ukku* (Supra) is a recent case decided by Gratiaen, J. and Sansoni, J. Most of the relevant Ceylon cases on this question have been referred to by Sansoni, J. in his judgment in that case. The facts in that case are as follows :—In the year 1929 the 1st defendant borrowed a sum of Rs. 700/- from the 1st plaintiff on a mortgage bond. In 1937 the 1st defendant sold the land in dispute and another land to the 1st plaintiff for a sum of Rs. 1,410/- of which Rs. 1,350/- was set off against the principal and interest due on the mortgage and the balance was paid in cash. By a contemporaneous deed the 1st plaintiff agreed to retransfer the lands to the 1st defendant if she paid a sum of Rs. 1,410/- within a period of 5 years. The 1st defendant failed to comply with

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the terms of the agreement and the 1st plaintiff in 1949, gifted the land in dispute to the 2nd plaintiff. In an action brought by the plaintiffs against the 1st defendant and 4 others for a declaration of title etc., the defendants pleaded that the deed of sale in favour of the 1st plaintiff though in form a transfer was in fact a mortgage for the repayment of Rs. 1,410/- and that the 2nd plaintiff had no title to the land. In support of this contention evidence, both oral and documentary, of the circumstances surrounding the transaction of 1937 and the subsequent conduct of the parties was led by the defendants. After considering the numerous decisions on the matter, Sansoni, J. observed, " If I may sum up the result of the authorities I have referred to I would say that it is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that it is a deed of mortgage. In *Palingu Menika vs. Mudiyanse* (Supra) which was decided before the last mentioned case the relevant facts were the following :—Palingu Menika and one Nadar on P1 sold and transferred a land to Mudiyanse the plaintiff for Rs. 75/- reserving the right to re-purchase the same within a period of three years by payment of that sum together with interest Nadar became a party to that deed because on a prior deed, P2 similar in terms to P1, Palingu Menika conveyed the same land to him. It was conceded by Mudiyanse that even after the execution of P1 Palingu Menika, by agreement, was allowed to remain in possession of the land Palingu Menika failed to obtain a re-conveyance of the property within the stipulated period. Mudiyanse thereafter sued Palingu Menika and two others for a declaration of title and ejectment. The defendants pleaded that P1 related to a money lending transaction. The question which arose for decision was whether the deed P1, in law, was mortgage or a transfer with an undertaking to re-sell within a specified time. In deciding this question Basnayake, J. observed, " In order to determine the nature of the transaction the circumstances leading up to and surrounding the execution of the document under consideration and the language employed therein may all be taken into account." That observation was based on the Privy Council decision in *Saminathan Chetty vs. Vanderpoorten* (Supra). The learned Judge then proceeded to consider whether P1 was a conditional transfer and stated, " P1 is not the form in which a *pactum de retrovendendo* (1910) A.D. 302, is expressed, for Voet says : ' Nearly allied to the pactum commissorium is the *pactum de retrovendendo*, agreement for repurchase (or *Jus Redimendi*), the effect of which, when annexed to a purchase, is that the vendor may within or after a time fixed, or at any time, redeem or take back the thing sold, on restoring the same price he actually received for it, and not what may be the just price and equivalent to the commodity at the time of the redemption, unless it has been expressly agreed otherwise.' The stipulation of interest and the retention of possession by the vendor in that case were held to be circumstances which went a long way to negative the claim that P1 was a *pactum de retrovendendo*. The plaintiff's evidence in cross-examination that money was " borrowed " on P1 to pay Nadar's " loan " was taken into consideration in support of the view that the transaction evidenced by P1 was one between debtor and creditor. Sansoni, J. in *Setuwa vs. Ukku* (Supra) has disagreed with the view that oral evidence of a stipulation for payment of interest and the retention of possession by the vendor was admissible to negative the express terms of the deed. He probably held that view because in his opinion the reception of that evidence would offend the provisions of section 92 of the Evidence Ordinance.

In *Saminathan vs. Vanderpoorten* (Supra) two deeds Nos. 471 and 472 executed on the same day came up for consideration before their Lordships of the Privy Council. The first deed was an out and out transfer of a large tract of land in favour of Vanderpoorten by a number of persons referred to as the Syndicate while the second deed, i.e. No. 472 was an agreement whereby Vanderpoorten undertook to pay the profits from the land to the members of the Syndicate *pro rata*. The plaintiffs alleged that Vanderpoorten was attempting to effect a fictitious sale fraudlently and in breach of trust. In the circumstances of that case their Lordships held that the transaction effected by the two deeds was the creation of a security for money advanced by Vanderpoorten which in certain events imposed upon him duties and obligations in the nature of trusts. That was probably the reason as was pointed out by Soertsz, J. in *Wijayawardene vs. Peris*, 37 N.L.R. 179, that circumstances leading up to and surrounding the execution of the two deeds were considered in construing those documents. No fraud was alleged and no trust was pleaded either in *Setuwa vs. Ukku* (Supra) or *Palingu Menika vs. Mudiyanse* (Supra). In the instant case too no such pleas were set up in appeal.

Mr. Jayawardene cited several Indian and English decisions which support the view that it is open to the Courts to examine closely a deed which purports on the face of it to be a transfer to ascertain whether the transaction evidenced by it is in fact a contract of sale or a mortgage.

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One such case is ***Balkishen Das and others vs. Legge*** (1899) 27 Law Reports Indian Appeals 58, decided by the Privy Council. In that case, two deeds, one an outright transfer of immovable property by Legge in favour of Balkishen Das and another and other an agreement by the vendees to re-convey the same property to Legge on the payment of a stipulated sum within a specified period came up for consideration. It was contended that the two deeds together constituted a mortgage and oral evidence was led in support of that contention. Their Lordships held that section 92 of the Indian Evidence Act of 1872 must be complied with That section is identical with section 92 of our Evidence Ordinance. Lord Davey who delivered the judgment stated, " The case must therefore be decided on a consideration of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to shew in what manner the language of the document is related to existing facts." The extrinsic evidence referred to above is evidence that is admissible under proviso 6 of section 92.

That under the Roman-Dutch Law the Court is entitled to ignore the label and the form that the parties give to a particular transaction evidenced by a deed and ascertain its substance and true nature is beyond question. For that purpose the conduct of the parties and the surrounding circumstances leading up to the transaction would be relevant. But this right which springs from our common law has been restricted by statute law. That is section 92 of the Evidence Ordinance. Any evidence which a party is entitled to lead for the purpose of ascertaining the true nature of the transaction must not offend the provisions of section 92. Evidence which is forbidden by that section, even if admitted without objection, cannot be acted upon. If the terms of the deed are clear and unambiguous no evidence of the conduct of the parties and the circumstances surrounding the transaction is admissible for the purpose of construing the document. The intention of the parties has to be gathered from the document itself. It is only when there is an ambiguity in the deed that evidence of conduct and surrounding circumstances becomes admissible in terms of proviso 6 of section 92.

The terms of the deed P1 in this case are clear and unambiguous. It is an outright transfer of the premises to the defendant subject to an undertaking by her to re-convey the property if the sum of Rs. 3,407/87 with interest at 15% is paid to her by the plaintiff within a period of two years. Therefore time is of the essence of the contract. On the expiry of the period of two years the defendant is relieved of the undertaking to re-transfer the property. No extraneous evidence is necessary to construe this document.

Mr. Jayawardene's first submission that the Court is entitled to inquire into the transaction executed by the deed P1 unfettered by the restrictions of section 92 is untenable. He made a second submission that even if section 92 is operative he was entitled to lead parol evidence under proviso 1 to show that what was paid to him on deed P1 was not the purchase price but a loan and that what passed on that deed was not the dominium to the property but merely security. This proposition is clearly obnoxious to the main section because such evidence would have the effect of contradicting the deed. The final submission made by Mr. Jayawardene was that even if section 92 applied there was no bar which prevented the Court from examining all the surrounding circumstances for the sole purpose of ascertaining whether time was of the essence of the contract. Here again there is no purpose in examining the surrounding circumstances when this can be ascertained from the document itself.

Mr. Jayawardene also argued that the stipulation for the payment of interest in the deed P1 was inconsistent with a pactum de retrovendendo. Voet's definition of this pactum reads, " Allied to these agreements is the agreement for selling back. By attaching this agreement to purchases it is arranged that the seller shall have the freedom to buy back or receive back the property within or after a definite time or at any time on refunding the same price given not, unless it was expressly otherwise agreed, a price which could seem at the time of buying back to be just and suitable to the property.'" (*Voet Bk. XVIII, Title* 3, *Section* 7 —*Gane's Translation.* This definition shews that it is possible by agreement to fix a fair price at which the property is to be re-purchased. In the deed P1 the vendor is entitled to obtain a reconveyance within a period of two years on the payment of Rs. 3,407/87 with interest at 15%. I see no valid objection to fixing the price at which the property is to be bought back in terms of interest. Such an agreement would, in my opinion, be more favourable than not to the original vendor because if he decides to buy back the property within a month of his sale, for instance, the additional amount he has to pay would be negligible.

In the attestation clause of P1 it is stated that the sum of Rs. 3,407/87 which forms the consideration was made up of the amounts due to the vendee on the mortgage bonds D3, D5 and D6 and a further sum of Rs. 500/- paid in cash at the time of the execution of the deed. It was argued that this was evidence of a money lending transaction.

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I am unable to agree with that submission. The fact that existing mortgage debts due to the vendee formed the whole or part of the consideration on P1 cannot alter the character of the deed.

In the case of *Saverimuttu vs. Thangavelautham*, 55 N.L.R, 532 a case decided by the Privy Council the plaintiff sought to establish a trust by leading oral evidence. That oral evidence is admissible for the purpose of proving a trust is conceded. Their Lordships held that the oral agreement sought to be proved in that case amounted not to a trust but to an agreement to transfer immovable property which would be invalid as it contravenes the provisions of section 2 of the Prevention of Frauds Ordinance. Their Lordships also held that the decision in *Perera vs. Fernando*, 17 N.L.R. 486, sets out correctly the law of Ceylon. In that case it was held that where a person transferred a land on a notarial deed which on the face of it is a sale it was not open to the transferor to lead oral evidence to show that the transaction was in fact a mortgage because such evidence comes within the direct prohibition of section 92. It was also held there that evidence of subsequent conduct of parties was not admissible because " conduct can only corroborate the oral evidence as to the original agreement."

I wish to observe that in *Palingu Menika vs. Mudiyanse*, (Supra) there is no indication that an objection was taken to the reception of oral evidence. The effect of section 92 of the Evidence Ordinance also was not considered in that case.

In my view *Setuwa vs. Ukku*, (Supra) was correctly decided. Accordingly I dismiss the appeal with costs.

Pulle, J.

I agree.

T. S. Fernando, J.

I agree.

L. W. de Silva, A. J.

I agree with my brother K. D. de Silva, J. and wish to refer to two aspects of the case. Since the question for decision is whether the deed creates a security for money lent or whether it is a sale with an agreement for a repurchase, the court has to find out the substance of the transaction and give effect to its findings. As stated by *Wille on Mortgage*, 75, 76 : " Each case must depend upon its own facts ; no general rule can be propounded which can meet them all." But proof of a transaction recognized by the Common Law is governed by the restrictive requirements of the Evidence Ordinance. Since the deed is on the face of it a sale subject to the vendor's right to claim a reconveyance within a specified time on payment of a stipulated sum, evidence forbidden by law (section 92 of the Evidence Ordinance) cannot be admitted to prove that the deed is a mortgage. I find it impossible to regard the deed as a mortgage without substituting other suitable words for " vendor," " vendee," " sold, assigned, transferred," " sold and conveyed," " shall reconvey,"—terms which do not have more than one meaning and which are used throughout the deed. The period of two years within which the reconveyance has to be obtained cannot be treated as superfluous. There is no rule of legally admissible evidence which permits a plain deed of sale like this to be transformed into a mortgage. The plaintiff has not alleged fraud or the like. Learned Counsel for the appellant urged however that the intention of the parties must be gathered. The answer to this has been given by the Privy Council in *Chandra Nandi vs. Prashad Singh*, A.I.R. (1917) Privy Council 23.

> " In construing the terms of a deed, the question is not what the parties may have intended, but what is the meaning of the words which they used."

The other matter to which I refer is the point pressed by learned Counsel for the appellant that the stipulation in the deed for the payment of interest is very strong intrinsic evidence that the transaction is a mortgage, and that such a stipulation is alien from the ingredients of a *pactum de retrovendendo*. He relied on Voet xviii-3-7. For a determination of this question, it is necessary to consider two passages from this citation. The first passage is at the commencement of section 7 and defines the pact. It is as follows :

> " est et vicinum hisce pactum de retrovendendo, quod emtionibus adjecto id agitur, ut venditori liceat vel intra vel post certum tempus vel quandocunque redimere seu recipere rem, reddito pretio eodem quod datum est, non eo, quod tempore redemtionis justum ac rei respondens videri posset, *nisi aliud* nominatim actum sit."

> " The agreement to resell has a close resemblance to this (i.e. *the pactum commissorium*). When it is annexed to purchases, the arrangement is to permit the vendor to repurchase or take back the property within or after a fixed period of time or at any time upon a refund of the price actually paid, and not, *unless it has been expressly otherwise agreed*, a price which may appear at the time of the repurchase to be a just return for the property."

The second passage from section 7 relates to *interest and profits* and is as follows :

> " caeterum uti solum pretium emtori offerendum est ad redemtionem faciendam, non item usurae ejus ; eo quod venditor, in cujus gratiam redimendi jus pacto inductum fuit, nullam videri potest *moram* commisisse ;

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ita nec emtor venditori redimenti ad medii temporis fructus restiiuendos obstrictus est, sed tantum ad eos, qui post moram, seu oblatum a venditore pretium, percepti sunt."

" But as a tender has to be made only of the price and not also interest on it to the purchaser for the purpose of making the repurchase because the vendor, in whose favour the right of repurchase was introduced by the agreement, cannot be regarded as having made any *default*, so the purchaser is liable to make good to the repurchasing vendor not the profits of the intervening period but only those profits which have been appropriated after his own default or after the tender of the price by the vendor."

Voet goes on to say that the result of a *pactum de retrovendendo* is a new sale rather than an invalidation of the previous sale. He does not appear to draw any distinction between movables and immovables except for certain covenants which are necessary if they are to run with the land.

The point to be noted in the first passage I have cited is this: by an express agreement annexed to the deed, the parties may fix the price of repurchase at a different figure which may appear at the time of the repurchase to be a just return for the property. The point in the second passage is the reason given why interest is not payable for the purpose of making the repurchase. This passage appears to me to mean that there is no legal liability to pay interest in the absence of an agreement in the deed. In other words, without an agreement to pay interest, there can be no default. The word used by Voet for *default* is *mora* which (according to Berwick's note) was necessary by Roman Law, in the absence of express contract, to render one liable for interest. It appears therefore, according to Voet, interest is not forbidden if provision for its payment is embodied in the deed by the agreement of the parties.

Having regard to both citations, I am of the opinion that the stipulation for the payment of interest is in fact less onerous to the vendor. If he exercises his option to repurchase within a short period after his transfer, his financial liability is bound to be considerably less than on a covenant for the payment of a lump sum the whole of which he would become liable to pay irrespective of the period of time within which he may choose to buy back the property. I therefore regard the provision for the payment of interest as a lawful method of arriving at an estimate of the market price.

The fact that the consideration in the deed is made up of sums of money due on certain mortgage bonds granted by the vendor together with a cash payment made to him makes no difference to the substance of the transaction. The former relationship of mortgager and mortgagee is not continued in the deed merely because the interest was accumulated and utilized as consideration for the sale.

The appeal is accordingly dismissed with costs.

Basnayake, C.J.

The question that arises for decision in this appeal, which has been referred to a Bench of five Judges on account of the conflict of decisions of this Court, is whether the deed P1 is a mortgage or a contract of sale with a condition for the reconveyance of the land by the vendee on the payment of the purchase price with interest thereon at 15 per cent. within two years from the date of its execution.

Briefly the relevant facts are as follows: The plaintiff was the owner of the two allotments of land described in P1. They are adjoining allotments and are about half an acre in extent. On 19th March, 1950, the plaintiff borrowed Rs. 2,000/- from the defendant on a mortgage of those lands by Bond No. 2489. On 30th April, 1950, the plaintiff borrowed a further sum of Rs. 200/- from her on Bond No. 2507. On 30th June, 1950, he borrowed a still further sum of Rs. 500/- on Bond No. 2534. When the plaintiff applied for still another loan of Rs. 500/- the defendant said (these are her very words): " The plaintiff came and spoke to me about the moneys that were due to me. I told him that I will not advance him any more money on bonds and to execute a conditional transfer." The deed P1 was then executed the consideration specified therein being Rs. 3,407/87, the aggregate amount of all the loans given by the defendant to the plaintiff together with accrued interest.

It is common ground that an acre of land in this area is worth from Rs. 10,000/- to Rs. 12,000/-. At that rate the price of this land would work out to Rs. 5,000/- to Rs. 6,000/. But the plaintiff places a much higher value on it—Rs. 25,000/- to Rs. 30,000/-. He claims to have built a house on this land for the construction of which he spent all the money he borrowed and more. It is a house with plastered cabook walls; but with a cadjan roof. The plaintiff was in possession of the land till about 18-8-52, when he was forcibly ousted by the defendant who is in possession since and has improved it by building a large house thereon costing about Rs. 15,000/-.

The plaintiff claims that P1 is a mortgage; the defendant denies it and states that it is a transfer with a condition to reconvey the land

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within the stipulated period on payment of the purchase price and interest at 15 per cent on it.

The learned District Judge has held in favour of the defendant. This appeal is from that decision. Before I proceed to discuss the principles of law applicable to this case I think it will be useful if I were to set out below the material paragraphs of the deed P1.

"Know all men by these Presents that Weerasangili Nakathige William Fernando of Maharagama (hereinafter sometimes referred to as the said Vendor) for and in consideration of the sum of Rupees three thousand four hundred and seven and cents eighty seven (Rs. 3,407/87) of lawful money of Ceylon well and truly paid to him by Nawalage Roslin Cooray of Maharagama (the receipt whereof I do hereby admit and acknowledge) granted bargained sold assigned transferred and set over and do by these Presents grant bargain sell assign transfer and set over unto the said Nawalage Roslin Cooray (hereinafter sometimes referred to as the Vendee) her heirs executors administrators and assigns the premises fully described in the Schedule hereunder written together with all and singular the rights ways easements advantages servitudes and appurtenances whatsoever to the said premises belonging. . .

"To have and to hold the said premises hereby sold and conveyed with rights and appurtenances unto the said vendee her heirs executors and administrators and assigns absolutely for ever subject however to the condition that she shall reconvey the said premises to the vendor within two years from this date at the cost of the vendor if she shall repay to the vendee or her aforesaid the sum of Rs. 3,407/87 together with interest at 15% per annum from this date until such payment the vendor shall be in possession of the same . . ."

It is settled law that no matter what name or title parties give to a transaction the Court will inquire into the substance of it and give legal effect to what it finds it to be in truth and fact. This principle of law is not of recent origin. It is expressed in the Roman Law maxim *plus enim valet quod agitur, quam quod simulate concipitur* (Code 4, 22)—(That which is done is of more avail than that which is pretended to be done). Voet says: (*Voet* 13-7-1 *Gane's translation*) "An agreement of pledge, though it may be disguised as a sale by the contracting parties, nevertheless remains a pledge whenever the surrounding circumstances point to this." It is almost a universal rule. In support of his contention learned counsel for the appellant relied on not only decisions of this Court *Somasundram Chetty vs. Todd*, 13 N.L.R. 361 at 368; *Perera vs. Fernando*, 17 N.L.R. 486; *Adaicappa Chetty vs. Karuppen Chetty*, 22 N.L.R. 417; *Don vs. Don*, 31 N.L.R. 73; *Fernando vs. Peiris*, 32 N.L.R. 25; *Mohamadu vs. Pathumah*, 11 Law Recorder 48; *Wijewardene vs. Peiris*, 37 N.L.R. 179; *de Silva vs. de Silva*, 39 N.L.R. 169, *Jonga vs. Nanduwa*, 45 N.L.R. 128; *Sobana vs. Meera Lebbe*, 5 C.L.J. 46; *Thambipillai vs. Muthcumarasamy*, 58 N.L.R. 387; *Silva vs. Zoysa*, 58 N.L.R. 803; *Appuhamy vs. Saiya Nona*, 46 N.L.R. 313; *Belgaswatte vs. Ukkubanda*, 43 N.L.R. 281; *Dingiri Naide vs. Kirimenike*, 57 N.L.R. 559; *Penderlan vs. Penderlan*, 50 N.L.R. 513; *Ukkuvs. Dintuwa*, 1 S.C.C. 89; *Saverimuttu vs. Thangavelautham*, 55 N.L.R. 529 at 532 and 535; *Valliyammai Atchi vs. Andul Majeed*, 48 N.L.R. 289; *Abeywickreme vs. Carlo*, 3 Lorenz 68; *Jayawardene on Mortgage*, p. 15; *Saminathan Chettiar vs. Vander Poorten*, 34 N.L.R. 287 at 294; but also on decisions from the American (*Peugh vs. Davis*, (1877) 96 U.S. Supreme Court Reports 332-336, Bk 24 Lawyers' Edn. 775;) English (*Beckett vs. Tower Assets Company*, (1891) 1 Q.B. 638; *Trustee of G. Mellor vs. Mass and another*, (1903) 1 B.K. 226, 1905 A.C. 102; *Samuel vs. Salmon and Gluckstein Ltd.* (1945) 2 All E.R. 520; *Woods vs. Wise*, (1955) 1 All E.R. 767;) South African (*Zandberg vs. Van Zyl* 1910 A.D. 302 at 307 & 315 etc.) and Indian (*Hanif-un-Nissa and another vs. Faiz-un-Nissa and another*, 33 I.L.R. Allahabad p. 340; *Baijnath Singh vs. Hajee Vally Mohamed Hajee Abba*, (1925) A.I.R. P.C. 75; *Bhagwan Sahai vs. Bhagwan Din and others*, (1890) 17 L.R. I.A. 98; *Raja Bahadur Narasingerji Gyanagerji vs. Raja Dhanarajagirji*, (1924) A.I.R. P.C. 226; *Balkishen Das and others vs. Legge*, (1899) 27 L.R. I.A. 58 at 64; *Shah Mukhun Lall and others vs. Baboo Shree Kishen Singh and others* (1868) 12 Moo I.A. 157), Courts. Hence though the parties may call their contract a conditional transfer or a mortgage the Court will determine its true nature. The practice of disguising a disposition granted by way of security for a loan as an absolute disposition to a creditor is a very old one. The principle that a Court may look beyond the terms of the instrument to the real transaction and give effect to the actual contract of the parties when a deed absolute in form is shown to be executed as a security for a loan of money is too well-established to admit of any dispute. The only question is what evidence may the Court use in piercing the veil that shrouds the transaction. Section 92 of our Evidence Ordinance which enacts a rule of law, which itself is one of universal application, excludes evidence of any oral agreement or statement as between the parties to an instrument, or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms. I think it is now settled by several decisions of the Privy Council that oral evidence of the intention of any party cannot be admitted for the purpose of ascertaining the true intent of the parties or construing the deeds. But it has been repeatedly stated in those self same decisions that it is open to the Court to decide the question "on a consideration

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of the contents of the documents themselves, with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts " (*Balkishen's* case). In the case of *Raja Bahadur Narasingerji Gyanagerji* the Privy Council affirmed its decision in *Balkishen's* case and proceeded to decide the true meaning of the deed by examining the surrounding circumstances. This view was reiterated in *Baijnath Singh's* case where the Board said : " Section 92 merely prescribes a rule of evidence ; it does not fetter the Courts' power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances." The law is that in examining a transaction such as the one before us the Court will not take into account the evidence of the parties as to their intention so as to vary, add to or subtract from the terms of the instrument recording it, but will look into all the other evidence of " surrounding circumstances." This rule has been put into the following simple form by Wigmore (Wigmore on Evidence Vol. IX S2425) : " When a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of this act."

Having laid down this rule and having amplified and examined its historical development, Wigmore goes on to say " the intent of the parties must be sought where always intent must be sought, namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice."

The view taken in *Setuwa vs. Ukku*, (1955) 56 N.L.R. 337, is in my opinion too rigid a view of section 92 of the Evidence Ordinance and in my opinion introduces a greater restriction on parol evidence than is imposed by that section.

Having ascertained the nature of the evidence that may be looked at I shall now proceed to ascertain the true nature of the document P1 by reference to it. The plaintiff had within the space of four months in 1950 obtained three loans of Rs. 2,000/-, Rs. 200/-, and Rs. 500/- from the defendant on primary, secondary, and tertiary mortgages of the lands affected by P1. The interest on these loans was 15 per cent. and 18 % if the interest was not paid timeously. The plaintiff approached the defendant for a fourth loan of Rs. 500/- when the defendant informed him that no further " advances " could be given except on a " conditional transfer." The result was deed P1. The consideration mentioned therein is the total amount of the three loans plus the sum of Rs. 500/- which the plaintiff sought to borrow and accrued interest up to the date of the execution of the deed. The deed states that the plaintiff the vendor is to remain in possession. Both according to the plaintiff, and the defendant's witness the headman, land in the locality in question is worth Rs. 10,000/- to Rs. 12,000/- per acre. In fact the plaintiff places it as high as Rs. 25,000/- to Rs. 30,000/-. Even taking the admitted figure of Rs. 10,000/- to Rs. 12,000/-, the land in question would be worth at least Rs. 5,000/- as it is a little over half an acre in extent. There is a further circumstance of the stipulation of 15 per cent. interest, and the fact that the plaintiff improved the house on the land with the money he borrowed and more. The defendant and his witness the headman do not concede that the house is as good and as large as the plaintiff says it was (it has since been pulled down by the defendant) but they admit that it was of cabook with walls plastered in lime with a cadjan roof. To my mind all these circumstances negative the defendant's claim that the transaction is a sale subject to the right of repurchase in two years. The transaction is not in reality a *pactum de retrovendendo* although it endeavours to assume its garb. Voet says : " Allied to these agreements is the agreement for selling back. By attaching this agreement to purchases it is arranged that the seller shall have freedom to buy back or receive back the property within or after a definite time or at any time on refunding the same price as was given—not, unless it was expressly otherwise agreed, a price which could seem at the time of the buying back to be just and suitable to the property." In the leading case of *Zandberg vs. VanZyl*, (1910) A.D. 302, Lord de Villiers C.J. observed : " It is quite true, as was remarked by Mr. Justice Hopley, that Voet (18-3-7 & 8) refer to the *pactum de retrovendendo* —by virtue of which it is agreed that the seller shall have the right to repurchase a thing sold by him for the same price which he has received—as being a usual and legal pact ; but Voet appears to assume that, until the exercise of such right, the thing would be in possession of the original purchaser. If the thing is allowed to remain in the possession of the seller, and it is manifest that the real object of the parties was not to transfer the ownership to the purchaser, but to secure the payment to him of a debt owing to him by the seller, the obvious conclusion is that the intention of the parties was to effect a pledge and not a sale." The same view is expressed in Voet 13-7-1.

For the reasons I have given above, I would allow the appeal with costs and enter judgment for the plaintiff as prayed for with costs.

*Appeal dismissed.*

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*Present :*
BASNAYAKE, C.J., PULLE, J., K. D. DE SILVA, J., T. S. FERNANDO AND L. W. DE SILVA, A. J.

## SIRIWARDENA AND ANOTHER vs. SARNELIS AND OTHERS

*S.C. 476—D.C. Gampaha No. 3604/C/D*

*Argued on :* 12th and 13th November, 1957
*Decided on :* 18th November, 1957

*Conditional Transfer—Transfer of Lands by plaintiff reserving right to re-purchase within five years on payment of consideration stated in deed together with interest—Failure to redeem within stipulated period—Action instituted by plaintiff for declaration that the deed of transfer was in fact a mortgage—No allegation of fraud or trust—Can plaintiff lead parol evidence to establish that it is a mortgage—Evidence Ordinance, Section* 92.

The plaintiff transferred to the 1st defendant three lands for Rs. 1,000/- reserving the right to obtain a re-transfer within five years on payment of the said sum of Rs. 1,000/- together with interest thereon. The 1st defendant sold the lands to the 2nd defendant, who sold one of the lands to the 3rd defendant. Plaintiffs having failed to obtain a re-transfer within the period stipulated instituted this action seeking to redeem the lands conveyed on the ground that the deed in favour of the 1st defendant was in fact a mortgage though drawn in the form of a transfer.

The District Court held that the deed was a sale with an agreement to re-transfer and not a mortgage. The plaintiff appealed.

**Held :** (1) That the deed in favour of the 1st defendant is clear and unambiguous and is an outright transfer with a *pactum de retrovendendo.*

(2) That Section 92 of the Evidence Ordinance precludes the plaintiff from leading parol evidence for the purpose of establishing that the deed in question is a mortgage.

For a fuller discussion of the questions involved on this subject see *William Fernando vs. Roslyn Cooray,* 55 C.L.W. p 25.

**Cases referred to :** *Palingu Menika vs. Mudiyanse,* 50 N.L.R. 566.
*Setuwa vs. Ukku,* 56 N.L.R. 337.
Voet Bk. 3, Title 7, Section 1—Gane's Translation Vol. 3 page 54.
*Zandberg vs. Van Zyl,* (1910) A.D. 302.
*de Silva vs. de Silva,* 39 N.L.R. 169.
*Perera vs. Fernando,* 17 N.L.R. 486.
*Balkishen Das and others vs. Legge,* (1899) 27 Law Reports Indian Appeals 58.
*Saverimuttu vs. Thangavelautham,* 55 N.L.R. 532.
Voet Bk. XVIII, Title 3, Section 7—Gane's Translation Vol. 3, page 296.

*A. M. Ameen* with *M. Hussein* for the Plaintiffs-Appellants
*C. V. Ranawake* with *A. Nagendra* for the 2nd & 3rd Defendants-Respondents.

K. D. DE SILVA, J.

This appeal has been referred to a Bench of five Judges by My Lord the Chief Justice in terms of section 51(1) of the Courts Ordinance. (Cap. 6). The plaintiffs-appellants by deed No. 6317 of March 27, 1953 (P1) conveyed for a consideration of Rs. 1,000/- three allotments of land to the 1st defendant in the following terms :— " . . . have hereby sold transferred assigned, set over and assured unto the said Wanniaratchige Don Sarnelis Appuhamy the property described in the schedule hereto together with everything appertaining thereto, and having reserved the right with us to effect a retransfer of the said property within a full period of five years on payment of the said sum of Rupees one thousand together with the interest thereof at the rate of sixteen per centum per annum, at once." The 1st defendant by deed No. 7863 of May 10, 1950 (P2) sold and transferred the premises in question to the 2nd defendant who by deed No. 2158 of February 15, 1953 (3D 50 N.L.R. 566) sold and transferred one of the lands dealt with on P1 to the 3rd defendant. The plaintiffs failed to pay the sum of Rs. 1,000/- with interest within five years of the date of execution of the deed P1. They instituted this action on May 6, 1953 seeking to redeem the lands conveyed on P1 alleging that the deed P1 was in fact a mortgage though drawn up in the form of a transfer. The learned District Judge held that this deed was a sale with an agreement to re-transfer and not a mortgage and dismissed the action. This appeal is from that judgment. No allegation of fraud or a claim based on trust arised on this appeal.

The question for determination on this appeal is whether it is open, to a party who conveys immovable property for valuable consideration by a deed which is *ex facie* a contract of sale but subject to the reservation that he is entitled to re-purchase it within a stipulated period on the repayment of the consideration together with interest thereon, to lead parol evidence to show

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that the transaction was not a sale but a mortgage. There is a long series of decisions on this point. In *Palingu Menika vs. Mudiyanse*, 50 N.L.R. 566, which was decided by a single judge, Basnayake, J. took the view that in order to determine the nature of the transaction parol evidence relating to circumstances leading up to and surrounding the execution of the document under consideration was admissible. In *Setuwa vs. Ukku*, 56 N.L.R. 337, Gratiaen, J. and Sansoni, J. took the opposite view. In that case Sansoni, J. observed. " It is never open to a party who executes a conveyance which is unambiguously a deed of sale to lead parol evidence to show that it is a deed of mortgage."

In the matter of a document of this nature it is open to the Court according to the Roman-Dutch Law to consider the substance and the true nature of the transaction ignoring the label that the parties have attached to it in the document. That is the view held by Grotius in his Opinion No. 74 of Opinions of Grotius—De Bruyn's Translation. Dealing with " Disguised Pledge " Voet states, " Such a contract of pledge, though it is sometimes cloaked by the contracting parties under the title of purchase or of giving by way of payment, nevertheless does not on that account remain the less a pledge, when the accompanying circumstances prompt that view, according to the opinion of *Hugo Grotius*." (Voet Bk. 3, Title 7, Section 1—Gane's Translation Vol. 3 page 54.) That view has been followed by the Courts both in South Africa and *Ceylon—Zandberg vs. Van Zyl* (1910) A.D. 302, and *de Silva vs. de Silva*, 39 N.L.R. 169. In the latter case Hearne, J. was, however, careful to observe that the true nature of the transaction had to be ascertained by evidence that is legally admissible.

Although according to the common law it was open to a party to show that what purported to be a sale on the face of the document was in fact a mortgage the provisions of section 92 of the Evidence Ordinance have considerably restricted that right. Within the ambit of that section a party is entitled to exercise his common law right of showing the true nature of the transaction. In *Perera vs. Fernando*, 17 N.L.R. 486, it was held that where a person transferred a land on a notarial deed which on the face of it is a sale it was not open to the transferor to lead oral evidence to show that the transaction was a mortgage in view of the provisions of section 92. In the Indian case *Balkishen Das vs. Legge*, (1899) Law Reports Indian Appeals 58, the Privy Council took the same view. Their Lordships of the Privy Council held in *Saverimuttu vs. Thangavelautham*, 55 N.L.R. 532, that the decision in *Perera vs. Fernando*, (Supra) sets out correctly the law of Ceylon on this question. The position, therefore, is that if the terms of the deed are clear and unambiguous no parol evidence can be led for the purpose of construing the document. Extraneous evidence can be adduced only if there is an ambiguity in the terms of the deed. The terms of the deed P1 which comes up for consideration on this appeal are clear. There is no ambiguity whatsoever in it. It is an outright transfer with a *pactum de retrovendendo* attached to it. The learned Counsel for the appellants relied on certain admissions made by the 1st and 2nd defendants in the course of the trial. The 1st defendant admitted that the transaction evidenced by P1 was a money lending transaction while the 2nd defendant stated that at the time of the execution of P2 he was aware that P1 represented a money lending transaction. It was contended on behalf of the appellants that these admissions are admissible in evidence under section 21 of the Evidence Ordinance. I am unable to agree with that submission in view of the provisions of section 92. The receipt P3 too, is inadmissible because it would have the effect of contradicting the deed.

It was also submitted by the appellant's Counsel that the stipulation of interest in P2 was inconsistent with the requirements of a *pactum de retrovendendo.* But Voet's definition of this *pactum* (Voet Bk. XVIII, Title 3, Section 7—Gane's Translation Vol. 3, page 296) shows that the parties are permitted to fix by agreement at the time the contract is entered into, a higher price at which the property is to be bought back. There is nothing objectionable, in principle, to that higher price being calculated in terms of interest.

The appeal therefore fails and I accordingly dismiss it with costs.

Pulle, J.
I agree.

T. S. Fernando, J.
I agree.

L. W. de Silva, A.J.
I agree.

Basnayake, C.J.

The question that arises for decision on this appeal is whether the deed P1 is a mortgage or a deed of sale subject to a condition to reconvey. The material portion of the deed is set out below.

> " Know all men by these Presents that we Hadunpathirennehelage Chandrawathie Menike and husband Heenkenda Mudalige Wilmot Henry Siriwardena residents of Gampaha Pahalagama in the Raigam Pattu of Aluthkuru Korale in consideration of the sum of Rupees One thousand (Rs. 1,000/-) of lawful money of Ceylon well and truly paid to us by Wanniaratchige Don Sarnelis Appuhamy of Orutota in the Meda Pattu of Siyane Korale (the receipt whereof is hereby admitted

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and acknowledge by us) have hereby sold transferred assigned set over and assured unto the said Wanniaratchige Don Sarnelis Appuhamy the property described in the schedule hereto together with everything appertaining thereto, and having reserved the right with us to effect a retransfer of the said property within a full period of five years on payment of the said sum of Rupees One thousand together with the interest thereof at the rate of sixteen per centum per annum at once (එකවර)."

Shortly the facts are as follows :— On 13th December, 1947, the plaintiffs who are husband and wife executed deed P1 in favour of the 1st defendant. On 2nd February, 1949, the 1st plaintiff paid him Rs. 300/- and obtained a receipt P3. On 10th May, 1950, the 1st defendant transferred the lands dealt with in P1 to the 2nd defendant who is the 1st plaintiff's nephew. The possession of the lands continued to be in the 1st plaintiff, deed P1 notwithstanding. It is not seriously disputed that the lands are worth many times more than the amount stated in P1. The village headman values them at about Rs. 8,000/-. The 1st and 2nd defendants do not deny that the deed though in form a conditional sale was intended to serve as security for a loan of Rs. 1,000/-. In his evidence the 1st defendant admitted that he lent Rs. 1,000/- on P1 and accepts the position that P1 was intended to be a mortgage.

I have stated my view of the law applicable to a case such as this in my judgment in S.C. 99/D.C. Colombo Case No. 6639 and it is unnecessary to repeat what I have said there. The circumstances which are in evidence in my opinion clearly show that P1 though in form a sale is in fact meant to serve as security for the loan of Rs. 1,000/-.

The circumstances which I have in mind are :—

(*a*) the stipulation of interest,

(*b*) the fact that possession continued to be in the plaintiff after the execution of P1,

(*c*) the wide disparity in the "consideration" stated in the deed and the market value of the lands,

(*d*) the fact that though both parties were agreed as to the terms of P1 neither intended that it should operate as a sale,

(*e*) the admitted payment of Rs. 300/- by the plaintiff to the 1st defendant.

I am of opinion that the appeal should be allowed with costs and judgment entered for the plaintiff as prayed for.

*Dismissed.*

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*Present :* T. S. FERNANDO, J.

## LIYANAGE SIRIWARDANA *vs.* DEWATHANTIRIGE EMALIN

*S. C. No.* 564 *of* 1957 *M. C. Gampaha* 36344/A.

*Argued on :* 8th August, 1957
*Decided on :* 19th November, 1957

*Maintenance Ordinance Section* 8—*Defendant in arrears for six years—Sentence of imprisonment for six years—Is it illegal—Criminal Procedure Code, Section* 312—*What defendant should do to avoid such punishment.*

In this case the defendant was in arrears of maintenance for a period of six years. The defendant made no attempt to pay the arrears though time was allowed for the purpose. The Magistrate sentenced him to six years' imprisonment in the following terms :—

"For the 1st six months in default he will undergo six months' rigorous imprisonment and likewise for each subsequent period of six months in default, he will be sentenced to six months' rigorous imprisonment.

**Held :** (1) That the sentence is not illegal in view of the provisions of Section 8 of the Maintenance Ordinance.
(2) That if a defendant in a maintenance case wishes to avoid a long term in jail he must make a reasonable effort to meet the obligations he owes to his wife.

*E. R. S. R. Coomaraswamy* (with him, *T. G. Gunasekera*) for the defendant-appellant.
No appearance for the applicant-respondent.

T. S. FERNANDO, J.

When this appeal was argued before me, Counsel for the appellant indicated that the appellant was willing to deposit immediately a substantial part of the arrears of maintenance due from him. I therefore directed that the case be remitted to the Magistrate's Court to enable the appellant to pay in some of the money due from him. The record of the case has now been received back from the Magistrate's Court, and it is quite clear that the appellant has made no attempt to pay into Court any sum at all.

The only point that now remains to be decided relates to the sentence of imprisonment which the appellant has been ordered to undergo. The argument that the maximum term of imprisonment that could have been awarded in this case was six months depends on the question whether section 312 of the Criminal Procedure Code applies. That section can apply only if express provision had not been made in respect of

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enforcement in the Maintenance Ordinance itself. Such express provision has been made in section 8 of the Maintenance Ordinance, and I am unable to conclude that the sentence is illegal. I have been urged to interfere with the sentence on the ground that it is harsh. While the total sentence of imprisonment the appellant may have to undergo can extend to a long term, it is within the appellant's power to reduce this sentence. If he wishes to avoid a long term in jail he must make a reasonable effort to meet the obligations he owes to his wife.

The appeal is dismissed.

*Dismissed.*

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*Present :* BASNAYAKE, C. J., AND L. W. DE SILVA, A. J.

## SOPAYA PEIRIS AND ANOTHER vs. WILSON DE SILVA

*S.C.* 137—*D.C. Kalutara* 18807

*Argued on :* 2nd, 3rd and 18th September, 1957

*Decided on :* 30th September, 1957

*Preliminary Objection—Civil appellate Rules,* 1938, *Rules* 2(1) *and* 4—*Application for typewritten copies of records—Should the fees prescribed in Schedule be paid in cash to court at the time of making such application—Validity of practice in Courts requiring receipt to be filed after depositing such fees in Kachcheri.*

The appellants filed their petition of appeal on 20-9-55 and on the same day tendered an application for typewritten copies of the record and moved for an order to deposit the necessary fees. On that application the District Judge made order " Issue P.I.V. for Rs. 12/-. On 26-9-55 (within the prescribed period for perfecting the appeal) the proctors for the appellants filed Kachcheri receipt for Rs. 12/- being the amount of the prescribed fees for the typewritten copies.

A preliminary objection was taken to the hearing of the appeal on the ground that as the procedure adopted by the appellants did not satisfy the requrements of Rule 2(1) of the Civil Appellate Rules of 1938, which provided that the application for typewritten copies should be accompanied by the fees prescribed in the schedule, the appeal had abated by operation of Rule 4 of the Civil Appellate Rules.

**Held** : (1) That the procedure adopted by the appellants is in conformity with the administrative arrangements of the Courts and the Financial Regulations of the Government, which do not permit an appellant to tender to the judge or the Secretary or the Chief clerk, as the case may be, the fees for typewritten copes as required by Rules 2 (1) & 2 (3) of the Civil Appellate Rules.

(2) That the failure to comply with the requirement of Rule 2 (1) was due to no fault of the Appellants, and applying the maxim " Lex non cogit ad impossibilia aut inutilia, the appeal should not be deemed to have abated.

*Per* BASNAYAKE, C.J.—" We cannot part from this case without stating what in our opinion should be the procedure an appellant should follow in complying with the Civil Appellate Rules in the present state of the financial regulations. We think that—

(*a*) where the Court is situated in a place in which there is a Kachcheri or Treasury Office the prescribed fees should first be deposited in the Kachcheri or Treasury Office and the receipt tendered along with the application under Rule 2(1) for typewritten copies.

(*b*) where the Court is situated in a place in which there is no Kachcheri or Treasury Office the applicant should along with the application for typewritten copies tender a money order or postal order for the amount of the prescribed fees in favour of the Government Agent of the revenue district in which the Court is situated. The proper officer of the Court should then transmit the money order or postal order to the nearest Kachcheri and obtain a receipt.

The procedure we have laid down above is in accordance with the practice that now obtains in the majority of the Courts.''

The objection is overruled.

*H. V. Perera, Q.C.*, with *Neville Wijeratne* for the Respondent-Appellants.

*Sir Lalitha Rajapakse, Q.C.*, with *V. C. Gunatilaka* for the Substituted-Plaintiff Petitioner-Respondent.

BASNAYAKE, C.J.

A preliminary objection to the hearing of this appeal was taken by learned counsel for the respondent on the ground that the appeal has abated by operation of Rule 4 of the Civil Appellate Rules 1938, as the application of the appellants for typwritten copies of the record was not accompanied by the prescribed fees as required by Rule 2 (1) of those rules.

The relevant facts shortly are as follows : The appellants preferred their petition of appeal on 20th September, 1955, and on the same day tendered an application for typewritten copies of the record and moved for an order to deposit the necessary fees. On that application the

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District Judge made order " Issue P.I.V. for Rs. 12/-".

On 26-9-55 the Proctors for the appellants filed Kachcheri Receipt for Rs. 12/-, the amount of the prescribed fees for the typewritten copies.

Learned counsel for the respondent submits that the procedure adopted by the appellants does not satisfy the requirement of Rule 2 (1) that the application for typewritten copies shall be accompanied by the fees prescribed in the Schedule. He submits that the fees should be tendered along with the application to the Judge or Commissioner of Requests and that thereafter the prescribed fees should be paid in cash to the Secretary or Chief Clerk, as the case may be, and a receipt obtained for the payment in the prescribed form as required by Rule 2 (3).

In view of the fact that the same objection was taken in a number of other appeals we caused the Registrar of this Court to ascertain by circular letter from the different Courts the practice in each of them in regard to applications for typewritten copies of the record. The replies show—

(*a*) that in no Court does the applicant tender the prescribed fees along with his application to the District Judge or Commissioner of Requests,

(*b*) that in no Court situated in a town in which there is a Kachcheri or Treasury Office does the Secretary or Chief Clerk receive payment in cash as provided by Rule 2 (3),

(*c*) that the procedure adopted in every Court situated in a town in which there is a Kachcheri or Treasury Office is for the appellant or his Proctor to apply for a paying-in voucher and pay in the money to the Kachcheri or Treasury Office and obtain a receipt therefor,

(*d*) that in thirteen of the Courts the practice is for the appellant or his Proctor to obtain the paying-in voucher before making the application for typewritten copies and tender the Kachcheri or Treasury Receipt along with the application for typewritten copies,

(*e*) that in every Court the practice is to file the Kachcheri or Treasury Receipt before the time limited for the completion of the security for the respondent's costs of appeal,

(*f*) that there is no uniformity of practice in regard to the tender of the prescribed fees in the Courts situated in towns in which there is neither a Kachcheri nor a Treasury Office. In some a money order is tendered for the amount of the prescribed fees along with the application, and the money order is sent by the Secretary or Chief Clerk by post to the Kachcheri and a receipt obtained therefor; in others cash is accepted by the Chief Clerk who obtains a money order and transmits it to the Kachcheri which sends a receipt,

(*g*) that in no Court is a deposit note as provided in the Payment into Court Order 1939 issued in respect of fees for typewritten copies,

(*h*) that in all the Courts the procedure prescribed in the Payment into Court Order 1939 which is also prescribed in the form of Financial Regulation 691 is regarded as applying only to suitors' deposits.

We also examined in this case the Secretary of the Kalutara District Court, and in two of the other cases the Secretaries of the Gampaha and Galle District Courts, all of whom confirmed that the Secretary or the Chief Clerk does not receive cash in respect of fees for typewritten copies because the Financial Regulations prohibit the acceptance of cash by the Secretary or the Chief Clerk. Such a prohibition is not necessary in the case of Judges as it has never been the practice for nor is it the function of Judges to receive fees or payments required by law to be paid into Court. They also confirmed that the practice of the Courts to which they have been attached in the course of their service is as stated above.

We are indebted to the District Judge of Matara for his helpful and informative reply to the Registrar's circular. He has referred to the relevant financial regulations which we find it necessary to reproduce in this judgment. The first of them is Financial Regulation 690 which reads as follows :—

" 690. Receipt of Moneys by Court Officers.—(i) Court officers are authorized to receive moneys in respect of the following only—

(*a*) Fines and confiscations,
(*b*) Court fees (under F. R. 1206),
(*c*) Proceeds of sale of unserviceable articles and articles and unclaimed effects,
(*d*) Unclaimed property of patients dying in hospital,
(*e*) Productions in criminal cases,
(*f*) Cash securities in criminal cases,
(*g*) Remittances from outside Ceylon.

(ii) Receipts shall be issued on the prescribed form for all moneys received under the above paragraph. Except in the case of court fees which are directly appropriated by Court officers, all collections received at a Court shall be paid promptly into the nearest Kachcheri.

(iii) No Court officer shall accept any money except as provided in paragraph (i) of this regulation.

(iv) The public must be informed that payment to Court officers is so prohibited. Notices in English and in the vernaculars in Form Judicial C. F. 73 shall be posted up at prominent places in the Court-house and in the office of the Secretary in the case of District Courts,

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or of the Chief Clerk in the case of Courts of Requests and Magistrate's Courts, informing the public of this restriction and stating how correct information can be obtained of the methods of making payment.

(v) When a demand is made by letter for payment of money into Court, a copy of the directions as to the manner of payment (Form Judicial C. F. 74) shall be forwarded with the letter.

(vi) If a remittance is received at a Court by post from a person residing in Ceylon, it shall be returned to him together with a Deposit Note for the amount of the remittance and a copy of the directions indicating the correct procedure for payment "into Court" (Form Judicial C. F. 74).

(vii) Under no circumstances shall a Kachcheri accept any money collected by Court officers in contravention of paragraph (iii) of this regulation."

The paying-in voucher procedure in regard to fees for typewritten copies furnished under the Civil Appellate Rules is prescribed in Financial Regulation 493 which reads :—

"493. Paying-in vouchers. (i) When a Government Department pays in money the amount must be accompanied by a paying-in voucher on form General 118* duly filled up and signed by the Head of the Department or other responsible officer, and his voucher will constitute the 'order to receive.'

(ii) Courts will use form Judicial C. F. 38, and Fiscals form Fiscal 11, as paying-in vouchers for suitors' deposits.

(iii) The voucher will first be taken to the Second Clerk who will see that it is correctly headed and otherwise in order, and then initial it. The sum to be paid, with the voucher, must then be taken to the Shroff who must at once enter the amount in his Cash Book and issue a receipt forthwith on form General 172 and hand it to the payer."

(*Except in the case of sums paid in for drafts, —vide F. R. 751).

Fees for typewritten copies issued under the Civil Appellate Rules are treated by all Courts as Miscellaneous Payments and are governed by Financial Regulation 693 as well. That regulation reads :

"693. **Miscellaneous payments.**—Miscellaneous payments other than money brought into Court, e.g., survey fees, may be signified to Court by the production of a Kachcheri receipt, or by the receipt of the person to whom the money is payable, and shall be recorded in the journal."

It is clear therefore that the administrative arrangements of the Courts and the financial regulations of Government do not permit an appellant to tender to the Judge or the Secretary or the Chief Clerk as the case may be the fees for typewritten copies as required by Rules 2 (1) and 2 (3) of the Civil Appellate Rules. The procedure now adopted in all the Courts with the exception of the Courts coming within paragraph (*f*) above is in conformity with the financial regulations of Government and is as follows :—

The Proctor for the appellant or the appellant himself obtains from the appropriate officer of the Court a paying-in voucher in the following form :—

(No..........................)

PAYING-IN VOUCHER General 118

Head of Receipt :

Date : , 19

Sub-head :

To : ..........................................................................

(Here state Bank or Department to which payment is made.)

Please receive to the credit of the Government of Ceylon from..........................................................

Rupees :..........................................

Cents : ..........................................

being

Rs.............................. (Signature)

---

(For the use of the Shroff of the Receiving Department only.)

Received the above amount.

Date : Shroff

This form is taken by the appellant or his Proctor to the Kachcheri, or where there is no Kachcheri to the Treasury Office, and tendered with the cash to the officer authorised to receive payments of money. The officer accepts the money and issues a receipt called a Kachcheri Receipt or where there is no Kachcheri but a Treasury Office a Treasury Receipt. This receipt is tendered by the appellant or his Proctor to the Court before the expiration of the time limited for completion of the security for costs of appeal.

We are of opinion that as the administrative machinery of the Courts renders it impossible for an appellant to comply with the Civil Appellate Rules, he should not be penalised for not complying with such of the requirements of those rules as are impossible of performance. *Lex non cogit ad impossibilia aut inutilia* and its variant *nemo tenetur ad impossibilia* are well-established maxims and are applicable to the construction of statutes (Maxwell on Interpretation of Statutes, 10th Edn. p. 385). In South Africa the maxim has been applied even to penal statutes (Gardiner and Lansdown, South African Criminal Law and Procedure, Vol. I, 5th Edn., p. 88). The rule succinctly expressed in the maxim may be stated thus : Where a duty is cast on a person by a statute or statutory rule and performance of that duty is impossible or impracticable without any fault on the part of the person on whom the duty is cast, then the law does not penalise him for non-performance of what is impossible of performance. The case

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of *Paradine vs. Jane*, 82 English Reports 897, expresses the rule thus:

> "Where the law creates a duty or charge, and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him."

Several instances in which performance of what is prescribed is not insisted upon on the ground of impossibility of performance will be found in Maxwell (Maxwell on Interpretation of Statutes, 10th Edn., p. 385 *et seq. R. vs. Leicestershire*, (1850) 15 Q.B. 88; *Mayer vs. Harding*, (1866-1867) L.R. 2 Q.B.D. 410).

The South African case of *R. vs. Mostert*, (1915) C.P.D. 266, shows that the Courts in that country have applied the maxim even to a case of non-observance of revenue laws.

The right of appeal is a valuable right specially conferred by statute and a person should not be deprived of that right merely because the administrative machinery is such that compliance with one of the requirements of a rule of procedure for the exercise of that right is impossible or impracticable.

The instant case is eminently one in which we should apply the maxim and hold that this appeal shall not be deemed to have abated. The appellant made application for typewritten copies within the prescribed time and complied with all the requirements of Rule 2 bar the only requirement which it was impossible for him to comply with. For failure to comply with such a requirement it will be wrong to penalise the appellant.

There is another aspect of the matter which needs consideration. Rule 4 provides that an appeal shall be deemed to have abated where the appellant fails to make application for typewritten copies in accordance with the requirements of the rules. A person who finds it impossible for no fault of his to comply with one of the requirements of a rule cannot in our opinion be said to have failed to do so.

We cannot part from this case without stating what in our opinion should be the procedure an appellant should follow in complying with the Civil Appellate Rules in the present state of the financial regulations. We think that—

(*a*) where the Court is situated in a place in which there is a Kachcheri or Treasury Office the prescribed fees should first be deposited in the Kachcheri or Treasury Office and the receipt tendered along with the application under Rule 2 (1) for typewritten copies,

(*b*) where the Court is situated in a place in which there is no Kachcheri or Treasury Office the applicant should along with the application for typewritten copies tender a money order or postal order for the amount of the prescribed fees in favour of the Government Agent of the revenue district in which the Court is situated. The proper officer of the Court should then transmit the money order or postal order to the nearest Kachcheri and obtain a receipt.

The procedure we have laid down above is in accordance with the practice that now obtains in the majority of the Courts.

The objection is overruled.

L. W. DE SILVA, A.J.
I agree.

*Overruled.*

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*Present :* WEERASOORIYA, J. AND SANSONI, J.

## THE CEYLON WHARFAGE COMPANY LIMITED vs. DADA *et al*

*S.C.* 508—*D.C.* (*F*) *Colombo* 27821/*M*

*Argued on :* 1st, 5th and 7th February, 1957
*Delivered on :* 20th February, 1957

*Contract—Carriage of goods—Cargo deposited in warehouse—Non delivery of part—Liability of carrier—Absence of special agreement.*

Plaintiff became entitled to a cargo of 500 crates of potatoes as endorsees for value on two bills of lading from a 3rd party. The defendant who is a carrier by trade landed the full quantity of the cargo into their lighters at the ship's side but the plaintiff was able to obtain delivery from the warehouse of only 362 crates.

The plaintiff sued the defendant company for damages arising from the loss of 198 crates. The trial judge awarded damages to the plaintiff holding that the defendant was liable for the non-delivery after the cargo had been deposited in the warehouse.

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**Held**: That in the obsence of a special agreement by which a carrier by trade becomes liable, as bailee or insurer of goods in a Queen's warehouse, his responsibility ceases when the goods had been duly deposited in the warehouse.

*Walter Jayawardene* with *L. Mututantri* for the defendant-appellant.
*S. J. Kadirgamar* with *P. Somatilkam* for the plaintiffs-respondents.

WEERASOORIYA, J.

This is an appeal from the judgment and decree of the District Court of Colombo ordering the defendant-appellant (a company carrying on business as landing and shipping agents) to pay to the plaintiffs-respondents a sum of Rs. 1,000/- as damages arising from the loss of 198 crates of potatoes which had arrived *ex* s.s. " Rampang " in the port of Colombo.

According to the plaintiffs-respondents the 198 crates formed part of a cargo of 500 crates of potatoes bearing specific marks and shipped on the two bills of lading P4 and P5 to a third party from whom the plaintiffs became the endorsees for value of the two bills and entitled to the said cargo. Apart from the question of the identification of the cargo by its marks, it may be taken as established on the evidence adduced at the trial, and in particular the documents P18 and P19, that the appellant company, in its capacity as a carrier by trade, landed the full quantity of the cargo into their lighters at the ship's side and, further, that out of that quantity the respondents had been able to obtain delivery of only 302 crates from the Kochchikade warehouse (being a Queen's warehouse) where in accordance with the procedure laid down in the Customs Ordinance (Cap. 185) the full cargo had been deposited.

The duties and liabilities of a carrier by trade in a case like the present one have been considered in *Bagsoobhoy vs. The Ceylon Wharfage Co., Ltd.*, 49 N.L.R. 145, where it was held that upon proof of receipt of the goods by the carrier and their loss or non-delivery to the consignee, the carrier is liable unless he can bring himself within the exceptions (*vis major* and *damnum fatale*), the onus of proof being on the carrier. The decision in that case that the carrier was liable proceeded on the finding that he had failed to prove the delivery of the missing cargo at the Queen's warehouse after taking charge of it from the ship's side. In the present case it was, however, conceded by learned counsel for the respondents at the hearing of the appeal that the 500 crates of potatoes had been duly deposited by the appellant in the Queen's warehouse. But, relying chiefly on the decision of this Court in *Coonji Moosa vs. The City Cargo Boat Co.*, 49 N.L.R. 35, he submitted that even so the appellant would be liable in regard to the non-delivery to the respondents of the 198 crates (which fact, as stated earlier, may be taken as established) from the Queen's warehouse. The short point to be decided in this appeal is, therefore, whether the appellant is liable for such non-delivery after the cargo had been deposited in the Queen's warehouse.

The letter P19 written by the appellant company to the respondents states that 198 crates (of potatoes) were lying at the Kochchikade warehouse, the suggestion being that the respondents should take delivery of those crates as part of the cargo which arrived *ex* s.s. "*Rampang*" although, according to a survey made a few days earlier, the potatoes in those crates had decomposed and a black liquid was exuding from them. This letter was sent with reference to the respondents' complaint in P6 (with a copy to the appellant) addressed to the ship's agents regarding the short delivery of 198 crates *ex* s.s. "*Rampang*". Certain evidence was led at the trial by the respondents with a view to establishing that the 198 crates referred to in P19 had come on an entirely different ship. Even if this evidence fell short of establishing that fact it would not have availed the appellant company since, if it was liable for non-delivery of the cargo from the Queen's warehouse, it has not discharged the onus of proving that the 198 crates to which the respondents were referred in P19 formed part of the 500 crates *ex* the s.s. "*Rampang*" in respect of which the bill P18 had been rendered to the respondents and payment received from the latter on the basis that they had been landed from the ship.

The same point that arises for decision in this appeal was considered in *Coonji Moosa vs. The City Cargo Boat Co.*, (*supra*) where it was held that though the carrier's responsibility had ceased after the goods had been deposited in the Queen's warehouse he had, nevertheless, rendered himself liable as warehouseman because, in terms of the contract in evidence in that case, the goods were in his custody and control, he had assumed responsibility for their loss from the warehouse and they were in fact lost as a result of the negligence of his servants.

The evidence in the present case is that although the same Queen's warehouse into which the 500 crates of potatoes had been deposited also contained cargo deposited by other landing companies, the appellant and the other landing

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companies each maintained a staff of sorters, delivery clerks and watchers for the purpose of the delivery of the cargo from the warehouse to the respective consignees after the various customs formalities had been complied with. Reliance was placed on this evidence, and also on the fact that payment had been recovered by the appellant in terms of P18, for the submission of respondents' counsel that this case too must be considered on the basis that (in the absence of express terms to that effect) there must be read into the contract between the parties the implied terms that the appellant was to retain custody of the goods and be responsible for their loss from the warehouse. I do not think, however, that this submission can be accepted. Even if for the smooth operation of the delivery to consignees of cargoes lying in deposit in the Queen's warehouses the several landing companies concerned, with the permission of the customs authorities, maintain their own staff of employees it is clear from the evidence in this case and from a consideration of sections 36 and 49 and other relevant provisions of the Customs Ordinance that all goods while lying in deposit in the Queen's warehouses are exclusively in the custody and control of the customs authorities for and on behalf of the Crown. No doubt, while the goods are lying there it is open to a landing company, by contract, to undertake liability as bailee or insurer of the goods. But such a liability is not to be inferred from any of the circumstances already referred to, and this was pointed out in the case of *Athinavayanpillai vs. The Ceylon Wharfage Co., Ltd.*, 53 N.L.R. 419, which followed a very old decision of this Court in *Asana Marikar vs. Livera*, 7 N.L.R. 158, where most of the submissions addressed to us by learned counsel for the respondents were considered and rejected. In both those cases it was held that in the absence of a special agreement by which the carrier became liable as bailee or insurer of goods in a Queen's warehouse his responsibility ceased when the goods had been duly deposited in the warehouse. But in the more recent case of *Hussain Alibhoy vs. The Ceylon Wharfage Co., Ltd.*, 51 C.L.W. 65, the liability of a carrier of goods from ship to shore seems to have been considered by Gratiaen, J. on the basis that one of the obligations imposed on the carrier was " in due course to deliver at the (Queen's) warehouses to each particular consignee any part of the cargo which could be identified (by reference to the relative documents) as his property ", provided the customs dues and the carrier's landing charges were first paid; and he came to the conclusion that even on that basis the carrier was exempt from liability if the loss of the goods from the warehouse was " purely fortuitous and due to inevitable accident ". It seems, however, that the observations of Gratiaen, J. in that connection were not intended to imply that the obligation to give delivery from the Queen's warehouse is one of the normal incidents of the contract of carriage of goods from ship to shore as in the concluding portion of his judgment he affirmed the view expressed in the two earlier cases that the carrier's responsibility was at an end where the goods, on being deposited in the Queen's warehouse, were exclusively within the control of the customs authorities.

The judgment and decree appealed from must be set aside and decree entered dismissing the plaintiffs-respondents' action with costs in both Courts.

Sansoni, J.
I agree.

*Set aside.*

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*Present :*

Basnayake, C. J., Pulle, J., K. D. de Silva, J., T. S. Fernando, J., and L. W. de Silva, A. J.

## MALLAWA & ANOTHER vs. SOMAWATHIE GUNASEKERA

*S.C.* 180—*D.C. Kandy P.* 3317

*Argued on :* 28th and 29th October, 1957
*Decided on :* 11th November, 1957

*Kandyan Law—Deceased father leaving acquired property and legitimate son and illegitimate daughter—Daughter the sole illegitimate child—Does she lose her right to the acquired property by marrying in deega.*

**Held :** (1) That where there is a sole illegitimate child who marries in ' deega ', she does not forfeit her moiety even where the parents of both the legitimate and illegitimate children are the same.

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(2) That a party to an action cannot escape the operation of section 207 of the Civil Procedure Code by inviting the court not to decide issues that arise on the pleadings, unless the reservation of issues comes within the provisions of section 406 of the Civil Procedure Code.

*E. B. Wickramanayake, Q.C.*, with *W. D. Gunasekera* for the Defendants-Appellants.
*H. V. Perera, Q.C.*, with *C. R. Gunaratne* and *B. S. C. Ratwatte* for the Plaintiff -Respondent.

Basnayake, C.J.

The plaintiff-respondent (hereinafter referred to as the respondent) instituted this action for a partition of four lands which are the acquired property of her deceased father Singa. In each of them she claims she is entitled to an undivided half share.

The main question that arises for decision on this appeal, which has been referred to a Bench of five Judges under section 51 of the Courts Ordinance, is whether under Kandyan Law an illegitimate daughter who is also the sole illegitimate child of her father loses her right to his acquired property by marrying in *diga* after his death.

The facts as found by the learned trial Judge were not questioned. It would appear that the respondent's father Singa and mother Rankiri were married in 1905. They had one child, a son, Sumanasiri, born in wedlock in 1907. His parents obtained a divorce in 1908. Four years later, in July, 1912, the respondent was born, Singa being the father and Rankiri the mother. Singa died in April, 1912, before the respondent was born and had no other children born out of wedlock. The respondent married in *diga* in 1927. Her father left acquired property of which she claims a moiety. The 1st appellant, who is Sumanasiri's successor in title, claims the entirety of the acquired property of Sumanasiri's father on the ground that the respondent forfeited her right to a share in them by going out in *diga*.

The precise question whether an illegitimate daughter who is the sole illegitimate child forfeits her inheritance by going out in *diga* has not been decided in any reported case. Learned counsel for the appellants relied on the case of *Ran Menike vs. Nandohamy*, 57 N.L.R. 453. That case which decided the right of succession under the Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938, of an illegitimate daughter who married in *diga*, does not apply to the case now before us.

It is settled law that on a *diga* marriage the only legitimate daughter who is also the sole child of the father does not forfeit her right to succeed to his acquired property *Ukkuwa vs. Tikiri*, (1851) Austin 122. It is also settled that where a Kandyan father leaves both legitimate and illegitimate children his acquired property is shared between them, each branch taking a moiety *Rankiri vs. Ukku*, 10 N.L.R. 129. In such a case the succession is *per stirpes* and not *per capita*. It is accepted that where a father leaves issue by two marriages and the issue of each marriage inherit a moiety, the only child of one marriage does not forfeit her moiety by marrying in *diga Punchi Menika vs. Tennekoongedera*, (1843) Morgan 350.

The question that has not been settled is—what happens to the moiety that goes to the illegitimate children when there are legitimate and illegitimate children and when the only illegitimate child, a daughter, goes out in *diga*? Does it go to the legitimate children or does it remain with the sole illegitimate child though married in *diga*? Learned counsel for the appellants contended that on the *diga* marriage of the respondent her right to the acquired property of her father was forfeited and enured to the benefit of Sumanasiri, the legitimate son of the father. He argued that in the instant case the respondent did not as in the case of children of two marriages inherit a moiety because the respondent and Sumanasiri were children of the same parents and the rule of succession that would apply in their case would be the rule that applies to legitimate children of the same parents.

Learned counsel for the respondent contended that the respondent was an illegitimate child as the marriage of her parents had been dissolved at the time she was conceived, and that the moiety of the illegitimate issue is not forfeited on the *diga* marriage of the sole illegitimate child, a daughter, because there is no one in whose favour the forfeiture could operate. He submitted that where there are children of two or more marriages the division is *per stirpes* and not *per capita* and that the rule is the same in the case of legitimate and illegitimate children even though they be of the same parents. We are of opinion that the contention of the learned counsel for the respondent is entitled to succeed.

In our opinion the sole test of legitimacy in a case like the present one is the marriage of the parents and by that test Sumanasiri was legitimate and the plaintiff illegitimate even though they were the children of the same parents. That marriage is the true test is recognised by the Legislature in section 14 of the Kandyan

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

If illegitimate children as a group are entitled to succeed to a moiety of their father's acquired property, there is no principle of Kandyan law which can be invoked to justify placing a sole illegitimate daughter contracting a marriage in *diga* in a less advantageous position than the sole legitimate daughter of the same father.

The rule that applies in the case of children of two marriages should apply to the case of legitimate and illegitimate children of the same father, and where there is a sole illegitimate child who marries in *diga* she does not forfeit her moiety even where the parents of both the legitimate and the illegitimate children are the same.

We accordingly hold that the respondent, the only illegitimate child of Singa, did not forfeit her right to her moiety of her father's acquired property by marrying in *diga*.

It was assumed for the purpose of this appeal that the fact that the respondent went out in *diga* fifteen years after the death of her father whereupon her moiety would have vested in her did not affect the rule as to forfeiture on a *diga* marriage.

There is only one other question that arises for decision in this appeal, namely, the question of *res judicata*. We are of opinion that the decision in M.R. Kandy 120, a case instituted after the respondent had married in *diga*, in which Sumanasiri sought a declaration that he was the sole heir of his deceased father Singa and that the respondent was not the child of Singa is *res judicata*. In that case it was decided that Sumanasiri was not the sole heir of Singa and that the respondent was the child of Singa and Rankiri. Reliance was placed on the fact that certain material issues which were framed by the learned trial Judge in that case were reserved for consideration in separate proceedings. It flows from the decree which declared that Sumanasiri was not the sole heir of Singa that any issue of fact, whether raised or decided at the hearing or not, directed to reverse the decree cannot be re-agitated in a subsequent case. We uphold the submission of learned counsel for the respondent that the 1st appellant cannot escape the operation of section 207 of the Civil Procedure Code by inviting the Court not to decide issues that arise on the pleadings unless the reservation of such issues comes within the provisions of section 406 of the Civil Procedure Code.

We accordingly dismiss the appeal with costs.

PULLE, J.
I agree.

K. D. DE SILVA, J.
I agree.

T. S. FERNANDO, J.
I agree.

L. W. DE SILVA, A.J.
I agree.

*Dismissed.*

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***Present :*** **T. S. FERNANDO, J.**

## GALLEGE JASLIN NONA vs. CHARLIS SINGHO

*S.C. No.* 225 *of* 1957—*M.C. Matara* 38842

*Argued on :* 25th May, 1957
*Decided on :* 10th June, 1957

***Maintenance—Application to cancel maintenance order—Wife's refusal to live together—Husband living in adultery—Burden of proof—Maintenance Ordinance, Sections 3 and 5.***

**Where a husband applies for the cancellation of a maintenance order on the ground that the wife refuses to live with him and the latter alleges that her refusal is due to the husband living in adultery.**

**Held : That in an application for an order for cancellation of a maintenance order the burden is on the person seeking to cancel the order to prove the existence of circumstances stated in Section 5 of the maintenance Ordinance.**

*Vernon Wijetunga*, for the Applicant-appellant.

*S. D. Jayasundra*, for the Defendant-Respondent.

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T. S. Fernando, J.

This is an appeal against the cancellation under section 5 of the Maintenance Ordinance (Cap. 76) of an order for maintenance and, it is submitted by learned counsel for the respondent, that no right of appeal lies. Reliance was placed on section 17 of the Ordinance and on the decision of this Court in the case of *Mariapillai vs. Saverimuthu*, (1911) 14 N.L.R. 244. The correctness of this submission is not disputed by learned counsel for the appellant, but he argues that the circumstances in which the order appealed against was made are such that the order is manifestly illegal and oppressive to his client. He submits that this is a case calling for the exercise of the powers of revision vested in this Court and points out that in the very case referred to above as well as in the case of *Kandaswamy vs. Puvaneswari*, (1946) 47 N.L.R. 486, this Court in somewhat similar circumstances examined in its revisionary capacity the correctness of the orders made by the Magistrate's Court. It is necessary therefore to examine the relevant facts that preceded this order of cancellation.

The applicant who is married to the defendant made on 24th January, 1955, an application for maintenance under section 2 of the Ordinance. On 12th April, 1955, the proctor for the defendant stated to the Court that the defendant invites his wife to live with him whereupon the applicant stated that her husband is keeping a mistress. On the day fixed for trial, 28th June, 1955, the defendant consented to pay Rs. 10/- a month as maintenance. The record made by the Magistrate on that day reads as follows :—

> " This *order* is not to affect and is without prejudice to the proceedings in D.C. Matara D78. The defendant reserves to himself the right to vacate this order after the decision of D78 if necessary. Applicant accepts the amount. First payment as from today."

Although two monthly payments of maintenance in pursuance of this *order* appear to have been made, the defendant thereafter defaulted and a distress warrant was issued on 4th August, 1956. The issue of the distress warrant brought no relief to the applicant as the report showed that the defendant had no property available for seizure. When warrant was finally issued for the arrest of the defendant, he came into Court on 8th November, 1956, and deposited a sum of Rs. 1001-50. On 24th November, 1956, the entry made by the Magistrate in the Court record reads as follows :— " Defendant now invites applicant who declines alleging adultery." At an inquiry into this matter held on 5th January, 1957, no evidence was called for either party, but it was contended on behalf of the defendant that the onus is on the applicant to prove adultery, and for this contention reliance was placed on section 3 of the Ordinance. The learned Magistrate agreeing with the contention of defendant's counsel and observing that the applicant " had not substantiated the allegation of adultery or any other ground " cancelled the order of maintenance made on 28th June, 1955. The subject of complaint is this order of cancellation.

I fail to see what application section 3 of the Ordinance has in the circumstances of this case where, as mentioned above, an order under section 2 had already been made in favour of the applicant. What the defendant was doing on 24th November, 1956, was clearly to invoke the power of the Court under section 5 to cancel the order of 28th June, 1955. Section 5 requires the Court to cancel an order of maintenance (*i.e.* an order made under section 2) " *on proof* that any wife in whose favour an order has been made under section 2 is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent ". The burden of proving the existence of the circumstances stated in section 5 lies in my opinion on the person seeking to cancel the order and, in this case, that person is obviously the defendant—see sections 101 to 103 of the Evidence Ordinance. As neither the defendant nor the applicant called any evidence in this case there was an absence of the proof required by law.

The fact that the applicant herself alleged her husband's adultery as a reason or a justification for her refusal to live with him is in the circumstances irrelevant for the decision of the question of the burden of proof. The defendant had to establish that " without sufficient reason " his wife was refusing to live with him. The counter allegation of the wife may have been premature, but it certainly had not the effect of shifting the burden of proof to her. If the defendant had adduced some evidence in an attempt to make out that his wife's refusal to live with was him, at any rate, *prima facie* without sufficient reason, then it would have been time enough for the wife to counter such evidence with evidence of her husband's alleged adultery. If the submission advanced on behalf of the defendant is correct, a husband who after a trial has had an order for maintenance made against him can on the day following such order come before the Court and *by a mere invitation* to his wife to come and live with him reduce her to a situation in

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which she is called upon to satisfy the Court that her refusal to live with him is not "without sufficient reason". The Maintenance Ordinance does not in my opinion place a *successful* applicant in such a harassed position.

The defendant, not having led evidence to prove that his wife had not sufficient reason to refuse to live with him, was not entitled to obtain a cancellation of the order for maintenance.

I would, acting in the exercise of the revisionary powers of this Court, set aside the order made by the learned Magistrate on 5th January, 1957, cancelling the order for maintenance. The applicant will be entitled to the costs of the inquiry in the Magistrate's Court and to a sum of Rs. 311-50 as the costs of the proceedings in this Court.

*Puisne Justice.*

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*Present :* T. S. FERNANDO, J.

## M. M. BANDAPPUHAMY vs. G. M. B. EKANAYAKE, INSPECTOR OF POLICE, KOSWATTE

*S.C. No.* 232 *of* 1957—*M.C. Chilaw* 16487

*Argued on :* 21st May and 18th June, 1957
*Decided on :* 20th June, 1957

*Evidence—Conviction for burglary and theft—Only evidence a palm print—Failure to identify finger print slip.*

The accused was charged with the offences of house breaking and theft of articles some of which were in a wardrobe. The only evidence incriminating the accused was a palm print on one of the doors of the wardrobe but the prosecution made no attempt to identify the finger print slip or refer to it by number.

**Held** : That in the absence of proof as to the indentity of the person whose finger and palm prints were to be found on the finger print slip used for purposes of comparison, the conviction could not stand.

*E. A, G. de Silva,* for the accused-appellant.
*Ananda G. de Silva,* Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The negligence of the prosecution in the Magistrate's Court is responsible for the decision I have reached in this case that the conviction of the appellant must be set aside.

The appellant had been charged with the commission on 1st June, 1956, of the offences of housebreaking and of theft of articles, some of which had been in a wardrobe in the burgled house. The wardrobe itself had been forced open and the contents of one of its drawers rifled by the thief or thieves. The only evidence which, according to the Magistrate, incriminated the appellant was the finding of a palm print on the exposed side of one of the doors of the wardrobe. The Magistrate was satisfied that this palm print had been identified as the left palm print of the appellant by comparison of it with the palm prints of the appellant alleged to have been taken in Court. I shall consider presently the nature of the evidence led to establish the identification. The appellant in giving evidence on his own behalf attempted to give an explanation of the circumstances in which his palm print could have been left behind on the wardrobe door, but this explanation has been rejected by the learned Magistrate. If it has been proved that it was the appellant's palm print that was left on the wardrobe door, it follows that the appellant has failed to account for the innocent presence there of his palm print.

Learned counsel for the appellant has contended that no proof was adduced in the Magistrate's Court that the finger print slip (marked P6 in this case) with which the finger print on the wardrobe was compared by the witness Velin did in fact contain the finger prints and palm prints of the appellant. Sergeant Daniel of the Chilaw Police who gave evidence before the Magistrate stated that on the orders of the Court he obtained the finger and palm prints of the appellant in open Court and that the prints so taken were sent through the Court to the Registrar of Finger Prints. He did not purport to identify the finger print slip so taken or to refer to it by any identifying number. He did not even say on which date he took the appellant's finger prints. In this state of facts there was no proof before the Magistrate's Court that

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the document which Velin used for purposes of comparison with photographs of the prints left on the wardrobe was the document referred to by Sergeant Daniels as that containing prints of the appellant. The case was therefore left without proof as to the identity of the person whose finger and palm prints were to be found on the document which was used by Velin for purposes of comparison. The objection taken by counsel is, no doubt technical, but going as it does to the root of the whole case against the appellant cannot be brushed aside. Counsel's contention that the guilt of his client has therefore not been established is in my opinion entitled to prevail.

Although the point referred to above is sufficient to dispose of the case, it is noteworthy that the lapses of the prosecution did not end in this case with its failure to prove the finger print slip alleged to have been taken in Court. Learned counsel has raised a further point that there is no evidence that the witness Velin who has expressed an opinion upon a comparison of finger and palm prints is an expert. He contends that Velin's evidence would have become relevant only if evidence had been adduced to show that he was an expert as contemplated in section 45 of the Evidence Ordinance. Velin described himself as an Assistant to the Registrar of Finger Prints. He did not say he had any expert knowledge of the science of finger print comparison nor was a single question put to him in an attempt to show that he was otherwise competent to express an opinion on identification by a comparison of finger prints. A question asked of this witness when under cross-examination appears to suggest that the person putting the question assumed the witness to be an expert on the particular science, and learned Crown Counsel points out to me that in the report (P8) of this witness produced in Court the legend "Finger Print Expert" has been appended beneath his name. In the view I have taken of the first point raised by counsel for the appellant it becomes unnecessary for me to express any opinion on the merits of this further point; but I should add that by a failure to prove the competency of a person a party calls into the witness box as an expert a serious and very real risk is being run of the evidence of such a person being ruled out as irrelevant.

As indicated above, the conviction and sentence must be set aside and the appellant acquitted.

*Conviction and sentence set aside.*

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*Present :* SINNETAMBY, J.

## SIYADORIS *et al* vs. UDALAGAMA, INSPECTOR OF POLICE, BADDEGAMA

*S.C. No.* 627-630 *P/*56—*M.C. Galle Case No.* 20091

*Argued on :* 23rd October, 1956
*Decided on :* 26th October, 1956

*Common intention, several accused charged together with criminal offences on the basis of—Failure on the part of the Magistrate to consider evidence against each—Duty of Magistrate—Failure of investigating Police officer to give evidence where his evidence, if led, could have thrown light on the truth or falsity of the prosecution and defence versions.*

**Held :** (1) That where several accused are charged together with criminal offences on the basis that there existed a common intention shared by all to commit the offences, the magistrate should examine the evidence as against each of the accused in order to arrive at a decision in regard to the common intention.

(2) That where the evidence of the investigating Police officer could throw much light on the truth or falsity of the prosecution and defence versions, such evidence must always be led. Failure to do so, entitles the defence to invite the court to draw an inference adverse to the prosecution.

*G. P. J. Kurukulasuriya* for the Accused-Appellants.
*B. E. de Silva*, Crown Counsel for the Complainant-Respondent.

SINNETAMBY, J.

The accused-appellants were charged with voluntarily causing grievous hurt, wrongful confinement and causing simple hurt. The basis on which all were charged was that there existed a common intention shared by all the accused to commit these offences. The learned Magistrate has made no effort to consider this aspect of the case and to examine the evidence as against each of the accused in order to arrive at a decision in regard to common intention. The vicarious liability sought to be imposed on the 3rd and 4th accused must, it seems to me in the light of the evidence, fail.

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According to the complainant the 2nd and 3rd accused were the first to rush at him and hold him. First accused was in the compound. The 2nd accused struck him with a katty. He fell on the road and got up when 1st accused struck him with a katty. He received two blows on the head and knees, the latter being inflicted as he was being dragged into 1st accused's house. There the 4th accused gave him three digs with a club. He was detained in 1st accused's house till the Police arrived. For his cries his sisters Gunawathie and Alice came.

Gunawathie's evidence is that when she came her brother was in 1st accused's verandah. She attempted to enter the house when 1st accused kicked her. According to her 1st accused had a katty and 2nd accused a club. She says 4th accused kicked her brother. She said the 4th accused had no weapon while 2nd accused kept on striking the complainant with the club on his hand. The injured man himself makes no reference to kicks or blows on the head, nor were there any injuries in the head. She admits that to the Police she said the 2nd accused struck her brother on the chest.

This is the only prosecution evidence relating to the infliction of the injuries. Apart from the contradictory versions of what the 2nd and 4th accused did there is nothing to indicate that 3rd accused inflicted any blows. The 4th accused, an old woman, came on the scene later and on this evidence one would hesitate to draw an inference of common intention, certainly in so far as the 3rd and 4th accused were concerned. The prosecution must prove that the common intention was to cause grievous hurt. The facts in my view do not justify such an inference in regard to the 2nd accused as well. According to the injured man the grievous injuries found on him by the doctor were caused by 1st accused and if this evidence is accepted only 1st accused would become liable for that offence.

It is significant that although according to Gunawathie she despatched Jeremias at 7 p.m. to make the complaint to the Police the complaint was first made at five minutes to 1 a.m. The complaint D1 which incidentally was not produced by the prosecution alleges that the injured man was assaulted by the 2nd accused. No mention was made of 1st accused presumably because when Gunawathie arrived at the scene the assault by 1st accused was over.

The defence is that the injured man attempted to burgle the boutique of the 4th accused. When he was in the act of doing so the father of 1st accused and husband of 4th accused, viz.: Johanis cut him with a katty and raised cries for which the others came. Both 1st accused and Johanis gave evidence. They had detained the injured man till the Police arrived and according to 1st accused this same complaint was made to the Police.

It will be seen from the above recital of the facts deposed to by the prosecution and defence witnesses that much light could have been thrown upon the truth or falsity of the prosecution and defence versions if the investigating Police Officer had chosen to give evidence. According to the prosecution witnesses the cut injuries were mainly if not wholly inflicted on the road outside 2nd accused's house and the injured man was dragged to 2nd accused's verandah. According to the defence the injuries were inflicted in 4th accused's boutique. The medical evidence describing injuries 1 and 2 indicate that there would have been considerable bleeding and the Police Officer who went for investigation could have helped the Court considerably by stating whether he found blood in 4th accused's boutique or on the road. The prosecution cannot expect to succeed in a criminal prosecution without placing such important and relevant evidence before the Court. The first complaint too was not produced by the prosecution. The defence was compelled to call a prosecution witnesses to produce it. In my view the evidence of the investigating Police Officer should in cases of this nature be always led. Failure to do so in circumstances similar to those which arose in this case would entitle the defence to invite the Court to draw an inference adverse to the prosecution. The learned Magistrate did not address his mind to this aspect of the matter. Had he done so I have no doubt he would have entertained, as indeed I do, doubts as to the truth of the prosecution case particularly in view of the matters already adverted to and also in view of the following :—

Ordinarily persons who take part in an assault disappear from the scene as quickly as possible. They do not keep their victim in their custody till the arrival of the Police. That is conduct which is consistent with the facts narrated by the defence witnesses. When a thief is caught he is sometimes assaulted and invariably detained till the arrival of the Police. The conduct of the accused is consistent with their version of the facts.

I accordingly set aside the conviction and sentence and acquit the accused-appellants.

*Conviction and sentence set aside.*

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*Present :* WEERASOORIYA, J. AND SANSONI, J.

SABARATNAM *et al* vs. KANDAVANAM

*S.C.* 124—*D.C.* (*Inty*) *Point Pedro* 4431

*Argued on :* 27th January, 1st March and 2nd March, 1956
*Delivered on :* 25th April, 1956

*Partition Action—Plaintiff's title based on a deed of* 1911—*Defendant's plea that it was a forgery—Deed sought to be proved by production of certified copy only—Presumption under section* 90 *of the Evidence Ordinance—Does it apply to a certified copy—Effect of failure to object to production of such copy—What certified copy proves—Proof of Public Documents Ordinance,* (*Cap.* 12) *Section* 2.—*Evidence Ordinance, Section* 90.

In this Partition action filed in 1953, the plaintiff claimed certain shares of a land on a series of deeds commencing with a deed of 1911. In their answer the defendants repudiated this deed as being a forgery and this formed one of the points of contest. In proof of the due execution of the said deed of 1911, the only evidence adduced was a certified copy (P1) of the duplicate transmitted to the Registrar of lands by the attesting Notary as required by the Notaries Ordinance. At the production of P1 no objection was raised by the defendants, but in cross-examination a point was made that it was only a copy.

**Held :** (1) That the plaintiff had failed to prove due execution of the deed of 1911.

(2) That the presumption under section 90 of the Evidence Ordinance does not apply to a certified copy of a document purporting to be thirty years old. It only applies to a document which purports or is proved to be thirty years old.

(3) That section 2 of the Proof of Public Documents Ordinance only means that the production of the certified copy shall be evidence of the contents of the original document and such a copy produced would only be secondary evidence as defined in section 63 of the Evidence Ordinance.

(4) That proof of the contents of the document does not amount to proof of its execution.

(5) That even if the failure to object to the reception of P1 in evidence constituted an admission by the defendants the admission did not go beyond conceding that the original duplicate of the deed of 1911, being in the custody of the Registrar of lands, was a document of which a certified copy is permitted by law to be given in evidence on the conditions for the admission of secondary evidence being satisfied.

The case was remitted to the Distirict Court to enable the plaintiff to produce the duplicate copy of the deed of 1911 in the custody of the Registrar of lands with the right reserved to the contesting defendants to lead further evidence available on the question of the due execution of that deed together with a direction to return the proceedings with the finding on that question.

**Cases referred to :** *Basant Singh vs. Brij Raj Saran,* (1935) A.I.R. (P.C.) 132.
*Kathiripillai et al vs. Government Agent, Northern Province, et al,* S.C. Nos. 57-58 (Inty) D.C. Jaffna 7105 (Minutes of 21-9-54).
*Arulampikai vs. Thambu,* 45 N.L.R. 457.

*C. Thiagalingam, Q.C.*, with *A. Nagendra* for the appellants.
*S. J. V. Chelvanayagam, Q.C.*, with *K. Rajaratnam* for the respondent.

WEERASOORIYA, J.

The plaintiff-respondent filed this action for the partition of a land called Malaisanthai depicted in Plan No. 1292 and filed of record marked X. It is common ground that one Kanagasingha Mudaliyar was at one time the owner of the land and he died leaving two sons, Subramaniam and Thiagar. The contest that arose at the trial between the plaintiff and the 1st and 2nd defendants-appellants (who are husband and wife) is as regards the devolution of the land from Kanagasingha Mudaliyar. The case for the plaintiff is that both his children inherited it in equal shares and that the interests of their respective successors in title have to be determined accordingly. The 1st and 2nd defendants contend, on the other hand, that the entirety of the land was possessed by Subramaniam, to the exclusion of Thiagar, and devolved on his grand-daughter Meenachipillai (who married Sanderasegerampillai, a grand-son of Thiagar) and after her death on her son, Sathasivampillai, who by 2DI of 1920 gifted it as dowry to his daughter the 2nd defendant on the occasion of her marriage to the 1st defendant.

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On the basis of the case for the plaintiff as set out above he claimed undivided 7/32 (or 42/192) shares of the land on a series of deeds starting with Deed No. 11385 dated the 20th October, 1911, attested by R. Arumugam, Notary Public, which purports to be a transfer in favour of one Kandiah by certain persons in the line of succession to Thiagar dealing with their undivided interests in the land. It is to be noted that one of the alleged transferors is no other than Sathasivampillai, the father of the 2nd defendant, whose title is recited as by right of *mudusom* from Meenachipillai also described as the wife of Manusegera Mudaliyar. This Meenachipillai is the mother of Kanagasingha Mudaliyar and is not Sathasivampillai's mother Meenachipillai who is herself a transferor on the deed in respect of her life interest in the undivided 6/32 shares purported to have been transferred by Sathasivampillai. If this document is in fact the deed of Sathasivampillai and the other transferors, it is a circumstance which strongly supports plaintiff's case that Thiagar also, as one of the two children of Kanagasingha Mudaliyar, became entitled to an undivided half-share of the land, inasmuch as the 2nd defendant's own predecessors in title have acted on that footing.

To complete the statement of plaintiff's claim of title, Kandiah the transferee of Deed No. 11385 sold his interests to one Kanagasingham by P2 of the 14th June, 1950, who three days later transferred the same to the plaintiff on P3. The present action was filed on the 9th February, 1953.

In the answer filed by the 1st and 2nd defendants Deed No. 11385 was repudiated as being a forgery, and one of the points of contest on which the case went to trial was whether it was the act and deed of Sathasivampillai. In proof of the due execution of this deed the only evidence adduced was the certified copy P1 of the duplicate which had been transmitted by the attesting Notary to the Registrar of Lands in terms of Section 30 (25) (*a*) of the Notaries Ordinance (Cap. 91). Apparently those responsible for the presentation of the plaintiff's case at the trial considered that on the production of the certified copy the plaintiff would be able to rely on the presumption in Section 90 of the Evidence Ordinance relating to documents purporting to be thirty years old. P1, it may be stated, was admitted in evidence without any objection by the defendants but in the cross-examination of the plaintiff, who produced it, a point was made that it was only a copy.

At the hearing of the appeal Mr. Thiagalingam on behalf of the 1st and 2nd defendants took up the position that no proof had been adduced of the due execution of the deed of which P1 is a certified copy and that the plaintiffs' case must, therefore, necessarily fail *ab initio* and his action dismissed. Mr. Thiagalingam's argument was that the presumption in Section 90 of the Evidence Ordinance does not apply to a certified copy of a document purporting to be thirty years old and he relied on a decision of the Judicial Committee of the Privy Council to that effect in *Basant Singh vs. Brij Raj Saran*, (1934) A.I.R. (P.C.) 132. That decision was followed by this Court in the unreported case of *Kathiripillai et al vs. Government Agent, Northern Privince, et al.* S.C. Nos. 57-58 (Inty.)/D.C. Jaffna 7105 (Minutes of 21-9-54). Mr. Chelvanayakam on behalf of the plaintiff had two submisions to make in regard to the argument of Mr. Thiagalingam. His first submission was that the fact P1 had been received in evidence without objection by the 1st and 2nd defendants amounts to an admission by them that Deed No. 11385 had been duly executed. I am unable to agree with this submission, for it seems to me that if the failure to object to the reception in evidence of P1 constituted an admission by the 1st and 2nd defendants, the admission did not go beyond conceding that the original duplicate of Deed No. 11385, being in the custody of the Registrar of Lands, was a document of which a certified copy is permitted by law to be given in evidence on the basis that condition (6) of the conditions prescribed under Section 65 of the Evidence Ordinance for the admission of secondary evidence of the contents of an original document had been satisfied in this case. Mr. Chelvanayakam's next submission was that since Section 2 of the Proof of Public Documents Ordinance (Cap. 12) requires that, in a case to which that section applies, only a certified copy shall be produced in evidence in place of the original, the presumption in Section 90 of the Evidence Ordinance must be held to apply to the original document (if it purports to be thirty years old) on the production of the ertified copy. I think that there is fallacy in this submission too since Section 90 of the Evidence Ordinance in its terms applies only to a document which purports or is proved to be thirty years old, and not to a copy of it. In my opinion all that Section 2 of the Proof of Public Documents Ordinance means is that the production of the copy shall be evidence of the contents of the original document. But proof of the contents of a document does not amount to proof of its execution, and notwithstanding the production of P1, the burden still lay on the plaintiff to prove the due execution of the original document in terms of the relevant provisions

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of the Evidence Ordinance. If the plaintiff wished to discharge that burden by recourse to the presumption created in Section 90 of the Evidence Ordinance, and for that purpose it became necessary to produce the original document in Court, it was open to him to have made an application to Court in that behalf in terms of the proviso to Section 2 of the Proof of Public Documents Ordinance. In *Basant Singh vs. Brij Raj Saran* (Supra) a submission somewhat similar to that put forward by Mr. Chelvanayakam seems to have been rejected, for in that case too it was urged that since the copy in question had been admitted as secondary evidence of the original document under Section 65 of the Indian Evidence Act, the Court was entitled to presume the genuineness of the original document (which purported to be thirty years old) by virtue of Section 90 of that Act (these sections being identical with Sections 65 and 90 respectively of our Evidence Ordinance). In my opinion the position is in no way different in that in the present case the copy produced is a certified copy under Section 2 of the Proof of Public Documents Ordinance corresponding to which there is, as far as I am aware, no legal provision in India. Even under Section 2 of that Ordinance the certified copy that is produced would only be secondary evidence (as defined in Section 63 of the Evidence Ordinance) of the contents of the original document.

I am constrained therefore to hold that the plaintiff has failed to prove that Deed No. 11385 was duly executed. This necessarily involves a finding that the plaintiff has not proved his title to the land sought to be partitioned, and the further question that arises is whether his action should be dismissed.

Mr. Chelvanayakam submitted that this is an appropriate case in which this Court will, in the exercise of its discretionary power and in the interests of justice, afford the plaintiff an opportunity, even on terms, of producing the original of P1 and for this purpose he requested that the case be remitted to the lower Court for further trial. He relied on the case of ***Kathiripillai et al vs. Government Agent, Northern Province, et al*** (Supra) where the same course was adopted by this Court. But that was adopted on the ground that no dispute had been raised in the pleadings of the opposing party, nor was there any issue or point of contest, regarding the due execution of the deed in question. Mr. Thiagalingam relied on the case of *Arulampikai vs. Thambu*, 45 N.L.R. 457 as a precedent to be followed in refusing the application of Mr. Chelvanayakam. In that case the point raised for the first time in appeal was upheld that a person who writes out a will for a testator is incapacitated from taking any benefit under it unless the testator has added a clause in his own handwriting acknowledging its correctness or in some other manner has clearly confirmed the disposition, and the Court refused to accede to an application made on behalf of the beneficiary, who was the respondent to the appeal, that he be given an opportunity of adducing further evidence on the point. The reason for the refusal was that had such evidence been available it would undoubtedly have been put forward at the trial seeing that the will had been impugned on the ground that it was procured by undue influence and in cross-examination of the respondent attention was repeatedly called to the fact that he had himself written out the will, and that to send the case back for such evidence "might only serve to expose the parties to stronger temptation than they appear to be able to resist." The position in the present case is, however, different in that what is sought to be done is the formal production of the duplicate which is in the custody of a public officer so as to enable the Court, if it chooses to do so, to apply the presumption in Section 90 of the Evidence Ordinance as regards its due execution.

Apart from the failure of the plaintiff to prove his title on the deeds to the land which is the subject matter of the present action, it was submitted by Mr. Thiagalingam that there was another ground for allowing this appeal. One of the points of contest at the trail was whether the 2nd defendant has acquired " a prescriptive right and title to the entirety of the land sought to be partitioned." The 2nd defendant's case is that ever since the execution of the dowry deed 2D1 of 1920 in her favour she has been in possession of it as sole owner and adversely to the plaintiff and his predecessors in tile and she claims the benefit of such possession. As already stated, the 2nd defendant's father Sathasivampillai executed 2D1 on the footing that he was the sole owner of the land by right of *mudusom* from his mother Meenachipillai. The learned trial Judge has held on the evidence that the land was in the possession of Sathasivampillai until his death, that after his death the 2nd defendant was in possession and that the continued and undisturbed possession of the land by Sathasivampillai and the 2nd defendant for over thirty years has been established. But he also held that in view of Deed No. 11385 of 1911 (in regard to the due execution of which he applied the presumption contained in Section 90 of the Evidence Ordinance) in which Sathasivampillai and his mother Meenachipillai, as two of the transferors, recognised the rights of Thiagar and his descendants to

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interests in this land, the possession of Sathasivampillai prior to and even subsequent to the execution of 2D1 of 1920 and up to the time of his death (which, on the evidence of the 1st defendant, took place in or about 1944) was that of a co-owner. When this action was filed in 1953 less than ten years had elapsed since Sathisivampillai's death. The learned trial Judge accordingly found in favour of the plaintiff on the point of contest whether the 2nd defendant had acquired a prescriptive right and title to the entirety of the land. This finding was challenged by Mr. Thiagalingam in appeal. Even in regard to the correctness of this finding much turns on the question whether Deed No. 11385 was duly executed or not.

In all the circumstances it is, in my opinion, desirable that the proceedings should be remitted to the Court below to enable the plaintiff to produce the duplicate of Deed No. 11385 which is in the custody of the Registrar of Lands. The right is also reserved to the 2nd defendant to adduce such further evidence as is available to her on the question of the due execution of that deed, and the trial Judge will, after recording such evidence, return the proceedings to this Court with his finding on that question. We have been given to understand that the Judge who delivered the judgment appealed from is still functioning at Point Pedro. We consider it desirable that the further proceedings be taken before him and that priority be given to these proceedings over other cases on the roll so that the record may be returned to this Court as early as possible for a final adjudication of the appeal. On receipt of the record the appeal will be re-listed for further hearing before the same Bench.

The question of costs is reserved for determination at the further hearing of the appeal.

SANSONI, J.
I agree.

*Sent back.*

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*Present :* WEERASOORIYA, J. AND SANSONI, J.

## SABARATNAM *et al* vs. KANDAVANAM

*S.C.* 124—*D.C.* (*Inty.*) *Point Pedro* 4431

*Argued on :* 12th February, 1957
*Delivered on :* 4th March, 1957

*Deed of Transfer—Several vendors—Failure of one of the vendors to sign deed—Effect of—Equitable relief—Who may claim it—How may such relief be claimed.*

*Prescriptive title—Gift of entire property by one co-owner to his daughter—Daughter's exclusive possession of the property through the donor for over ten years—Can she acquire a prescriptive title to the entire land—Need to prove adverse possession.*

The plaintiff claimed title to a certain share of a land on several deeds commencing with a deed of 1911. One of the vendors mentioned in the said deed had either omitted or declined to sign it. It was contended on behalf of the defendant (who claimed the entirety of the land on a deed of gift from her father who had signed the saiddeed as one of the vendors) that the effect of such failure to sign was that the deed was not binding even on the parties who executed it, as the parties who executed it must have done so in the faith that it would be executed by the defaulting party as well.

This contention was based on the English rule of equitable relief as stated by Jessel, M. R. in *Luke vs. South Kensington Hotel Co.* (1879) 11 Ch. D. 121 that " if two persons execute a deed on the faith that a third party will do so and that is known to the other parties to the deed the deed does not bind in equity, if the 3rd refuses to execute, and consequently the deed would not have bound the two."

**Held :** (1) That even if this equitable relief is applicable in an appropriate case, it could not be availed of by the defendant as she was not a party to the deed.

(2) That such equity must be alleged and proved.

(3) That a stranger, who subsequent to the deed in his favour possesses a land through the very co-owner who sold it to him (even conceding that he was ignorant of the fact that his vendor had no title to the entirety of it) could not acquire prescriptive title thereto unless it is established that such possession was adverse to the other co-owners.

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**Cases referred to :** *Luke vs. South Kensington Hotel Co.*, (1879) 11 Ch.D. 121 at 125.
*Bolitho vs. Hillyar*, (1865) 34 Beav. 180.
*Ex parte Harding*, (1879) 12 Ch.D. 557 at 564.
*Kanapathipillai vs. Meerasaibo et al*, 58 N.L.R. 41.
*Fernando vs. Podi Nona*, 56 N.L.R. 491.
*Corea vs. Appuhamy*, 15 N.L.R. 65.

*C. Thiagalingam, Q.C.*, with *A. Nagendra* for the 1st and 2nd defendants-appellants.

*S. J. V. Chelvanayagam, Q.C.*, with *K. Rajaratnam* for the plaintiff-respondent.

WEERASOORIYA, J

In accordance with our previous order the proceedings were remitted to the District Court to enable the plaintiff-respondent to produce the duplicate of deed No. 11385 dated the 20th October, 1911, which is in the custody of the Registrar of Lands. This deed has now been produced marked P1A, and the learned District Judge has held that the presumption in section 90 of the Evidence Ordinance relating to the due execution and attesting of it may be applied. We see no reason to disturb that finding.

This deed purports to be a sale of certain interests in the land in suit, aggregating an undivided 8/32 share, in favour of one Velar Kandiah, by Sathasivampillai (who is the predecessor in title of the 2nd defendant-appellant) in respect of an undivided 6/32 share, and Nagalingam and Sivasambu each in respect of an undivided 1/32 share. Meenatchipillai the mother of Sathasivampillai also joined in the conveyance in respect of her life interest over the share of Sathasivampillai. Although the deed recites Sivasambu as one of the parties to it, his interest did not actually pass as he either omitted or declined to sign it. The claim of the plaintiff-respondent to the balance undivided 7/32 (or 42/192) share rests mainly on this deed.

We were invited by learned counsel for the defendants-appellants to hold that the failure of Sivasambu to sign the deed has the result that it is not binding even on those parties who executed it since, according to his submission, the parties who executed it must have done so on the faith that it would be executed by Sivasambu as well, and he invoked the English rule of equitable relief as stated by Jessel, M. R., in *Luke vs. South Kensington Hotel Co.*, (1879) 11 Ch.D. 121 at 125, (and for which the earlier case of *Bolitho vs. Hillyar*, (1865) 34 Beav. 180, is also an authority) that " if two persons execute a deed on the faith that a third party will do so, and that is known to the other parties to the deed, the deed does not bind in equity if the third refuses to execute, and consequently on that ground the deed could not have bound the two." But even if this rule is applicable in an appropriate case I do not see how it can be availed of by the defendants-appellants who were not parties to the deed. Moreover, it was held in *Ex parte Harding* (1879) 12 Ch.D. 557 at 564, that such equity " must be alleged and proved." No issue regarding this was raised at the trial, nor is there any evidence that the other parties executed the deed on the faith that Sivasambu himself would do so. Hence counsel's submission that the deed is not binding on the parties who executed it cannot be accepted.

In view of this deed it clearly would not be open to the 2nd defendant-appellant to take up the position that Sathasivampillai was the sole owner of the land in suit or acted under that belief. The 2nd defendant-appellant is the daughter of Sathasivampillai, and on the occasion of her marriage to the 1st defendant-appellant, Sathasivampillai, ignoring the other co-owners, purported to convey the entirety of the land to her by way of dowry on deed 2D1 of the 15th August, 1920. The trial Judge held, in regard to such of the interests of Sathasivampillai conveyed on 2D1 as had already been sold on P1A, that 2D1 by reason of its prior registration prevailed over P1A, and this finding has been accepted by the plaintiff-respondent. But apart from those interests Sathasivampillai had, at the time of the execution of 2D1, certain other undivided interests as well, and these undoubtedly passed under 2D1. The only question remaining for decision is whether by reason of the alleged exclusive possession of the entire land by the 2nd defendant-appellant after the execution of 2D1 she has prescribed against the other co-owners.

The principle is now well recognised that where a co-owner purports to sell the entire common property to a stranger and the latter enters into possession claiming title to the entirety, prescription begins to run at once and uninterruped possession over a period of ten years results in the acquisition of a prescriptive title to the land. Most of the cases affirming this principle are referred to in *Kanapathipillai vs. Meerasaibo et al*, 58 N.L.R. 41, where, however, it was held that the principle did not apply if the stranger was aware that his vendor was only a co-owner. Relying on these decisions learned counsel for the defendants-appellants contended that despite

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the fact that Sathasivampillai was only a co-owner of the land, the principle referred to would apply in the present case as the 2nd defendant-appellant is in the position of a stranger to whom the entirety of the land had been transferred and there is no evidence that she had knowledge of the true capacity in which her father Sathasivampillai was in possession of the land nor should such knowledge be inferred merely from her relationship to Sathasivampillai.

The evidence regarding the possession of the land subsequent to the execution of 2D1 is by no means satisfactory. According to those witnesses called by the defendants-appellants who claimed to be in a position to speak to possession, the land was a barren one which could not be cultivated except " once in a way," for about three or four years one Mandalam was in occupation of it, ostensibly under Sathasivampillai, and another person called Ponniah had been running a boutique on a portion of it for many years. It is clear, however, that during this period the other co-owners had no reason to think that the land was otherwise than in the occupation of Sathasivampillai, and in his capacity as a co-owner, however may have been actually on the land from time to time. The 1st defendant-appellant himself stated that he commenced possessing the land (on behalf of the 2nd defendant) only after Sathasivampillai's death which, it is clear, took place within ten years of the institution of the action. Even if the possession of the land by the 2nd defendant-appellant from that point of time onwards be regarded as adverse to the other co-owners (and I express no opinion on this question) the period is insufficient for her to have acquired a prescriptive title to it. But she would have acquired such a title if her possession through Sathasivampillai during the period subsequent to the execution of 2D1 is held to be adverse to the other co-owners.

The present case is, however, different from any of the earlier cases in which the principle relied on by learned counsel for the defendants-appellants was applied as in each of them the stranger himself would appear to have entered on possession of the land after the sale to him. The *ratio decidendi* of those cases seems to be that the possession of a stranger in such circumstances is in itself sufficient notice to the other co-owners of the adverse nature of it. The same cannot, in my opinion, be said of a stranger who possesses the land through the very co-owner who sold it to him (even conceding that he was ignorant of the fact that his vendor had no title to the entirety of it).

In the case of *Fernando vs. Podi Nona*, 56 N.L.R. 491, it was stated by Gratiaen, J. that where " a stranger enters into possession of a divided allotment of property, claiming to be sole owner, although his vendor had legal title to only a share, *Corea vs. Appuhamy*, 15 N.L.R. 65, has no application unless his occupation of the whole was reasonably capable of being understood by the other co-owners as consistent with an acknowledgement of their title." Having regard to the evidence in the present case it is manifest that the continued occupation of the land by Sathasivampillai after the execution of 2D1, though covertly on behalf of the 2nd defendant-appellant, was reasonably capable of being understood by the other co-owners as consistent with an acknowledgement of their title.

The effect of the decision of the Judicial Committee of the Privy Council in *Corea vs. Appuhamy* (supra) is that where a person who is in fact a co-owner is in possession of the whole of the common property, then in the absence of evidence of ouster by him of the other co-owners, his possession is referable to the right which he has to the enjoyment of the land by virtue of his being a co-owner, and it cannot, therefore, be regarded as adverse to the other co-owners. Notwithstanding that 2D1 purported to be a conveyance of the entire land, the 2nd defendant-appellant acquired only certain undivided interests on that deed and her possession of the land thereafter through Sathasivampillai was consistent with her rights as a co-owner. There is no room, therefore, for holding that her possession of the land up to the time of Sathasivampillai's death was adverse to the other co-owners.

The appeal is dismissed with costs. The plaintiff-respondent will, however, pay the defendants-appellants their costs of the proceedings in which, in terms of our previous order, the plaintiff-respondent was given an opportunity of producing the duplicate of deed No. 11385 dated the 20th October, 1911.

Sansoni, J.

I agree and only wish to add some observations on two submissions made by Mr. Thiagalingam. They are :—

(1) that deed P1A was ineffective because Sivasambu, one of the intended executants, did not sign it; and

(2) that even though Sathasivampillai was a co-owner when he executed the deed 2D1 in favour of his daughter the 2nd defendant, prescription began to run in her favour from that point of time as it was a deed executed by a co-owner in favour of a stranger for the entire land, and Sathasivampillai's possession thereafter was his daughter's possession.

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On the 1st point the rule enunciated by Jessel, M.R., in *Luke vs. South Kensington Hotel,* (1879) 11 Ch.D. 121, to which my brother has referred has been criticised by the House of Lords in *Lady Naas vs. Westminster Bank Limited,* (1940) A.C. 366, where it was held that the rule was expressed far too widely. Lord Russell of Killowen, at page 391 said :—

" I do not think that the proposition can be carried further than this, that the equity arises where a deed is sought to be enforced against an executing party, and owing to the non-execution by another person named as a party to the deed the obligation which is sought to be enforced is a different obligation from the obligation which would have been enforceable if the non-executing person had in fact excuted the deed."

Lord Wright and Lord Romer were in substantial agreement with this view, and the latter said at page 410 :—

" The equitable principle that they lay down is that where, owing to the non-execution of a deed by one of the parties, the others who have executed it would by the application of the common law rule be bound by a covenant or transaction different in kind from that which it was their intention to enter into, they can be be relieved in equity from the results of their execution of the deed."

These opinions show that the appellants who are no parties at all to the impugned deed P.A., cannot derive any assistance from this equitable principle.

On the 2nd point it must be remembered that so long as Sathasivampillai was in possession of the common land prior to his transfer to his daughter in 1920, he was there as a co-owner. " His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent. To ouster could bring about that result "—per Lord MacNaghten in *Corea vs. Appuhamy,* (1913) 15 N.L.R. 65. Assuming, then, that Sathasivampillai continued to be solely on the land and that he intended to be there and possess it on behalf of his daughter from 1920, such possession will not assist the appellants because neither ouster nor its equivalent has been established.

But it is said that although Sathasivampillai could not have have prescribed against his co-owners on his own behalf, he was able to prescribe on his daughter's behalf because this was a case where a co-owner transferred the entirety of a common land to a stranger. This is to ignore the very reason of the rule which permits a stranger in such a case to prescribe against the other co-owners. That rule has been stated as follows :—" while the possession of one co-owner is, in itself, rightful, and does not imply hostility, the position is different when a stranger is in possession. The possession of a stranger in itself indicates that his possession is adverse to the true owners....................................When one of several co-sharers lets into possession a stranger who proceeds to cultivate the land for his own benefit the other co-sharers must, unless they deliberately close their eyes, know of what is going on, but if they are so regardless of their own interests they must take the consequences "—see the judgment of Leach, C.J., in *Palania Pillai vs. Amjath Ibrahim Rowther,* 55 L.W. 532. The rule cannot therefore apply in this case becasue there was no such possession by the stranger (2nd defendant) as would indicate to Sathasivampillai's co-owners that prescription had commenced to run against them. It is impossible for these reasons to uphold Mr. Thiagalingam's argument that the 1st and 2nd defendants had acquired prescriptive title to this land by reason of Sathasivampillai's possession on their behalf from 1920.

I agree to the order proposed by my brother.

*Dismissed.*

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*Present :* WEERASOORIYA, J. AND SANSONI, J.

## THAMBIAH vs. SINNATHAMBY

*S.C.* 723—*D.C.* (*F*) *Jaffna* 10179/*L*

*Argued on :* 10th, 11th and 12th September, 1957

*Delivered on :* 21st January, 1958

***Partition Action—Prayer for a declaration for right of way over land outside the corpus to be partitioned—Can such declaration be granted.***

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**Held:** That in a partition action a declaration cannot be obtained for a right of servitude in respect of a land outside the subject—matter of the action.

**Cases referred to:** *Kanthia vs. Sinnatamby*, 2 Bal. Notes of Cases 19.

*C. Thiagalingam, Q.C.*, with *V. Arulambalam* and *S. Thangarajah* for the Plaintiff-Appellant.
*S. J. V. Chelvanayakam, Q. C.*, with *V. Ratnasabapathy* for 3rd defendant-respondent.

Weerasooriya, J.

The substantial point involved in this appeal is in regard to the right of way claimed by the plaintiff-appellant along the points XYZ in Plan P1 as a means of access from his land on the south, depicted as lots 6 and 7, to the public lane on the north through the by-lane represented by lot 5.

The plaintiff filed this action as a co-owner for the partition of the land depicted as lots 6 and 7 in Plan P1. The only other co-owner is the 2nd defendant. There is no dispute as regards their respective shares. The plaintiff also claimed a declaration that the land is entitled to a right of way as stated above. The 3rd defendant has been joined as a party because he is the owner of lots 2 and 3 within which XYZ fall. Lots 2 and 3 form a separate land to the north of the plaintiff's land.

It is not clear how in a partition action a declaration can be obtained that a land outside the land to be partitioned is subject to a servitude, for this in effect is what the plaintiff seeks. Our attention was drawn by Mr. Chelvanayakam who appeared for the 3rd defendant-respondent to the case of *Kanthia vs. Sinnatamby*, 2 Bal. Notes of Cases 19, where it was held that such a declaration could not be granted. The position seems to be the same under the Partition Act, No. 16 of 1951, which governs the present action. On this ground alone, therefore, the declaration sought for by the plaintiff should have been refused.

But as the point was not taken at the trial the learned trial Judge considered the matter on its merits and arrived at the conclusion that the plaintiff had failed to establish his right to a pathway along XYZ. The basis on which the plaintiff claims the pathway is a grant from K. Vinasy, the 3rd defendant's father, who originally owned lots 6 and 7 and also lots 1-5, 8 and 9 in Plan P1 as one land of 46½ lachams. By P5 of 1907 Vinasy transferred an extent of about 20 lachams on the southern side from this land (and now represented by lots 6 and 7 in P1) to his daughter Vallipillai by way of dowry. In doing so he reserved for the use of the grantee a strip of land four cubits wide out of another portion of his land to the north in extent 2½ lachams as a means of access to the public lane further north. At the time of the execution of P5 there were two lands forming the northern boundary of the land transferred thereon. One of those two lands is represented by lots 4, 8 and 9 in Plan P1 and had been already transferred by Vinasy to the 3rd defendant on P4. The other land (exclusive of the strip referred to) consisted of lots 2 and 3 in Plan P1 and was still owned by Vinasy. That is the land described as "the northern boundary land belonging to the first named of us" in the clause in P5 in which the right of way is granted in the following terms: "together with the right of path four cubits wide running from the public lane on the northern side along the eastern boundary of the northern boundary land belonging to the first named of us, for people, cattle and sheep to pass and re-pass to and from this land." It is to be noted that in the subsequent dealing with that land by Vinasy on P8 in favour of the 3rd defendant a path four cubits wide running along its eastern boundary is specially excluded. This seems to be the same strip reserved in P5 as a means of access (through the by-lane, lot 5) to the public lane on the north from the land transferred on P5.

There is, thus, much to be said in favour of the contention of Mr. Thiagalingam, who appeared for the plaintiff-appellant, that a pathway as a means of access from his client's land on the south to the public lane was the subject of a specific grant by the original owner Vinasy on P5 and P8. He also contended that the reference in the subsequent deed P9 to a "right of path four cubits wide running from the public lane on the north along the eastern boundary of the northern land" is to the same pathway reserved in P5 and excluded from the land conveyed on P8, and that the learned District Judge was wrong in thinking that the reference was to a different path shown in Plan P1 as the eastern boundary of lot 8 and comprised of lot 9. With this contention too I agree. But even so, it quite clear that the pathway granted on the deeds P5 and P8 cannot possibly fall within lots 2 and 3 but it must form the eastern boundary of those lots. Nor can the pathway fall within lot 4 (which is on the east of lots 2 and 3) since lot 4 is said to form a part of the extent alienated by Vinasy in favour of the 3rd defendant on P4 which is earlier than P5. But according to the plan P1, lots 2 and 3 on their eastern side abut on lot 4 and there is nothing in between in the nature of a path, nor are there traces of a path on lots 2 and 3 or on lot 4.

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It is important in this connection to note that according to the plaint, and also the statement made by the plaintiff before the surveyor who prepared the plan P1, the right of way claimed is a defined path six feet wide over lots 2 and 3 (on the eastern side) connecting XYZ. Although X is at the southern extremity of the by-lane (lot 5) which leads up to the public lane on the north, there appears to be no direct access from the by-lane to lot 2 because of the intervening boundary fence of lot 2: But there is direct access from lot 4 to the by-lane at its southern end.

Although the plaintiff came into Court on the footing that the right of way claimed by him was over lots 2 and 3, he seems to have been in two minds about it at the time of the trial, for his evidence refers only to his having gone across lot 4 as a means of access from the public lane to his land on the south. In re-examination he stated categorically: " Ever since I understood things we have been using the path to the east of the 2½ lachams (land) as access to lots 6 and 7 ". Since lots 2 and 3 now form the " 2½ lachams " land, it is clear from the plan P1 that east of that land is lot 4. While the 3rd defendant probably had no objection to the plaintiff going across lot 4 (in which the well shares in common is situated) it is obvious that he would have strongly resented any attempt on the part of the plaintiff to go over lot 2 which is the 3rd defendant's residing land. That land, even on the plaintiff's evidence, is separated on its eastern side from lot 4 by a fence.

In the view of the trial Judge the plaintiff was content to use the path shown as lot 9 on the extreme east of lot 8 as the means of access from his land to the public lane until in more recent times he acquired by purchase (on 3D2 of 1952) a share in the northern land shown as lot 1 in P1 and which is situated between lot 2 and the public lane. Undoubtedly in order to reach his newly acquired land from his land on the south it would have been easier for the plaintiff to cut across lot 4 than go along lot 9. But the fact that he did so in no way advances his case that he is entitled to a right of way over lots 2 and 3. In my opinion the learned trial Judge was correct in holding that the plaintiff failed to establish his right to a pathway along XYZ, even though I do not agree with all his reasons for coming to that conclusion.

In addition to the pathway given in P5, certain reservations were also made in favour of the grantee relating to a share of the well and the " thoorvai " land both of which, it is common ground, are situated in lot 4 in Plan P1. At the hearing before us Mr. Chelvanayakam conceded that the present owners of the land sought to be partitioned are entitled to the rights in the well and the " thoorvai " land as reserved in P5, and Mr. Thiagalingam invited us to make a specific declaration in favour of the plaintiff in regard to those matters. But, as indicated earlier, I do not see how in a partition action such a declaration can be made in respect of a land outside the subject matter of the action. In the unlikely event, however, of a dispute arising in the future as regards the rights of the plaintiff to a share of the well and the " thoorvai " land on lot 4 in plan P1, I apprehend that nothing that has happened in the present case will preclude him from vindicating those rights in a properly constituted action.

The appeal is dismissed with costs.

SANSONI, J.

I agree.

*Dismissed.*

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

## WICKRAMASINGHE AND ANOTHER vs. WEERAKOON AND ANOTHER

**S.C. 445—D.C. Panadura No. TK. 310/23558**

*Argued and Decided on :* July 15, 1957

*Civil Procedure Code, Section 347—Failure to Comply with requirements of—Are they imperative or directory—Effect on execution proceedings.*

**Held :** That the requirements of Section 347 of the Civil Procedure Code are imperative and that the failure to comply with them is fatal.

*Per* BASNAYAKE, C.J.—" It is a rule of interpretation of statutes that enactments which regulate the proceedings in courts are usually imperative and not merely directory. In the instant case the failure to comply with provisions of the Statute has not been on the part of one of the parties to the proceedings but on the part of the court itself, and the question for decision is whether the non-observance of the requirements of section 347 by the court would render the proceedings void ".

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*H. W. Jayawardene, Q.C.*, with *C. de S. Wijeratne* and *P. Ranasinghe* for the Plaintiff-Appellants.

*Walter Jayawardene*,, with *P. Somatilakam*, for 7th and 8th Respondents-Respondents.

BASNAYAKE, C.J.

This is an appeal by the 1st plaintiff, a minor, (who appears by his next friend the 2nd plaintiff), in a partition action in which lot 12 in extent 7 acres, 1 rood and 24.8 perches was allotted to him. In the partition decree he was also condemned to pay a sum of Rs. 55/- in the result to the 2nd and 6th defendants in equal shares and also *pro rata* costs of the action to the 6th defendant. Final decree was entered on the 28th of August, 1948, and on the 26th of October, 1951, the 6th defendant applied for writ of execution against the plaintiffs. The application has not been made in conformity with section 224 of the Civil Procedure Code and the plaintiffs have not been named as the respondents to the petition nor has the court as required by section 347 of the Civil Procedure Code caused the petition to be served on the judgment-debtor. The Fiscal, in pursuance of the writ which was issued, proceeded to the residence of the judgment-debtor as required by section 226 of the Civil Procedure Code, and not finding him there proceeded to seize and sell lot 12 which was allotted to the plaintiff. The land was sold for a sum of Rs. 1,525/- and was purchased by the 2nd defendant. Thereupon the plaintiffs took steps to have the sale set aside on a number of grounds which were urged at the trial but which were not upheld by the learned trial Judge.

Of the points taken in appeal the only point which seems to be of substance is that the provisions of section 347 of the Civil Procedure Code have not been complied with. That section requires that where more than one year has elapsed between the date of the decree and the application for its execution, the court shall cause the petition to be served on the judgment-debtor. It is a rule of interpretation of statutes that enactments which regulate the proceedings in courts are usually imperative and not merely directory. In the instant case the failure to comply with the provisions of the Statute has not been on the part of one of the parties to the proceedings but on the part of the court itself, and the question for decision is whether the non-observance of the requirements of section 347 by the court would render the proceedings void. The rule governing this aspect of the matter is stated in *Maxwell on the Interpretation of Statutes at page* 380 :—

> " The same imperative effect seems, in general, presumed to be intended even where the observance of the formalities is not a condition exacted from the party seeking the benefit given by the statute, but a duty imposed on a court or public officer in the exercise of the power conferred on him when no general inconvenience or injustice calls for a different construction."

In the instant case the failure to comply with the provisions of section 347 of the Civil Procedure Code has resulted in 7 acres of land allotted to the minor plaintiff being sold at a price disproportionate to the market value of the land, clearly resulting in injustice to him.

Learned counsel for the appellants has referred us to the decisions of this Court as to the construction of section 347 of the Civil Procedure Code. In the case of *de Silva vs. Upasaka Appu*, 6 C.W.R. 227 and *Fernando et al vs. Thambiraja*, 46 N.L.R. 81, it was held that the failure to comply with the requirements of section 347 of the Civil Procedure Code is fatal. He has also drawn our attention to the case of *Silva et al vs. Kavanihamy et al*, 50 N.L.R. 52 where it has been held that the provisions of section 347 of the Civil Procedure Code are merely directory and that the failure to serve the petition as required by that section is only an irregularity. We find ourselves unable to agree with the view taken in the last named case and we prefer the view taken in the cases mentioned earlier that the requirements of section 347 of the Civil Procedure Code are imperative and that the failure to comply with them is fatal.

We therefore set aside the order of the learned trial Judge and allow the appeal. The appellants are entitled to costs both here and in the court below.

PULLE, J.
I agree.

*Appeal allowed.*

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Present : Basnayake, C.J., Pulle, J., and de Silva, J.

## LADAMUTTU PILLAI vs. ATTORNEY-GENERAL AND OTHERS

*S. C. 457—D. C. Colombo* 288/Z

*Argued on :* 20, 21, 22, 25, 26, 27, 28 and 29, November, 1957.
*Decided on :* 31st January, 1958.

*Declaratory Action—Primary Mortgage of several lands to three persons, K. L. M.—Secondary Mortgage of same lands to five persons L, M, N, O, P, including two mortgagees on primary bond—In both bonds money repayable to anyone of the mortgagees—Secondary bond put in suit by K only and decree obtained—Transfer by mortgagor of undivided shares in four out of the mortgaged lands to L and P in the proportion* 1/3 *and* 2/3 *in full satisfaction of debt due on Primary bond and decree entered on secondary bond—Subsequent devolution of interests of L and P on Plaintiff.*

*Land Redemption Ordinance No.* 61 *of* 1942*—Land Commissioner taking steps to acquire the four lands under—Declaratory action by plaintiff challenging Land Commissioner's right to acquire against Attorney-General and Land Commissioner and praying for injunction—Do the lands undivided shares of which were sold to K and P come within the ambit of Section* 3 (1) (*b*) *of Land Redemption Ordinance —Is the transfer to P a transfer in satisfaction of a debt—Joint and several creditors—Roman Dutch Law—Land Commissioner's functions—Can he be sued* nomine officii*—Is he to be regarded as a corporation sole—How a corporation sole can be created—Can an injunction be issued against a public servant—Determination to acquire lands under the Ordinance—Is it the Land Commissioner's or the Minister's—What the attitude of the Courts should be in declaratory actions against public functionaries.*

*Provision in Section* 3 (4) *of the Ordinance that determination of Commissioner shall be final—Does it preclude Courts from declaring functions contrary to statute as illegal—Meaning of the word final—Jurisdiction conferred on Courts—How may it be taken away.*

*Courts Ordinance, Section* 86*—Right of Courts to entertain any action against Crown or its officers and grant injunctions—Availability of regular action regardless of whether illegal action complained of was administrative or quasi-judicial—Existence of other remedies no bar—Should considerations governing prerogative writs be extended to injunctions.*

*Interpretation—Statutes encroaching on the property rights of subject—Need to construe them strictly.*

E mortgaged eleven allotments of land in 1928 on bond P1 for a loan of Rs. 50,000/- to K. L. M. The bond contained the condition that the money was repayable to any one of the three mortgagees or their attorneys or heirs. In 1930 E executed a secondary mortgage of the same lands on bond P2 for Rs. 25,000/- in favour of the said K and L and three others, *viz.*, N. O. P. This loan was also repayable to any one of the five mortgagees or their attorneys or heirs. In 1931 E executed a tertiary bond P3 in favour of W.

K sued E on bond P2 adding W as a party to the action and obtained decree on 22/6/33. On 4th May,1935 E by deed P5 transferred to K and P for Rs. 75,000/- undivided shares in four of the lands mortgaged on P1 and P2 in the proportion of 2/3 to K and 1/3 to P. The consideration was set off in full satisfaction of the claim and costs under the said decree and the money due on P1. E undertook to release the lands from bond P3. This resulted in saving seven of the mortgaged lands for E.

In 1940 K transferred an undivided 1/3 share of the lands to O and his remaining 1/3 to the representatives in interest of N. In 1945 O, P and the representatives in interest of N transferred to the plaintiff the undivided shares transferred by E on P5. The plaintiff entered into possession of the said lands thereafter.

In February, 1949 the Land Commissioner informed the plaintiff that he was taking steps to acquire their four lands under the Land Redemption Ordinance No. 61 of 1942. The plaintiff challenged the Land Commissioner's right to acquire the lands and instituted action against the Attorney-General and the Land Commissioner praying for an injunction restraining them jointly or in the alternative from taking steps under the Ordinance to acquire the lands. E was later added as the 3rd defendant.

The 1st and 2nd defendants (the Attorney-General and the Land Commissioner) pleaded *inter alia* (1) that the land is one which comes within the description contained in Section 3 (1) (b) of the Ordinance.

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(2) That the Commissioner's determination to acquire the said lands was final and conclusive and could not be questioned by the District Court and that it had no jurisdiction to entertain the action.

(3) That the plaintiff is not entitled to proceed against the 1st defendant (Attorney-General) as representing the Crown to obtain an order of injunction against the Land Commissioner (2nd defendant).

(4) That the plaintiff could not maintain this action against the 2nd defendant without suing the officer who made the order in question by name. In the course of the trial it was conceded that the action could not be maintained against the Attorney-General.

The learned District Judge dismissed the plaintiff's action on the ground that the land in question was capable of being acquired under Section 3 of the Ordinance and that the Land Commissioner's decision on facts was final. He also held (*i*) that the authority to acquire a particular land was subject to review by the Court.

(ii) That the Land Commissioner could be sued *nomine officii* and that the action taken by the Commissioner was covered by Section 3 (1) (b) and (4) of the Ordinance.

The plaintiff appealed.

**Held**: (by BASNAYAKE, C.J., PULLE, J., and K. D. DE SILVA, J. *dissentiente*)

(1) That the lands transferred on P5 did not come within the ambit of Section 3 (1) (b) of the Land Redemption Ordinance and the Land Commissioner had no authority to acquire them as (a) what was transferred by E was not the mortgaged lands themselves, but undivided shares of some of them (the section refers to ' land ' and not to undivided shares of land).

(b) P's right to claim the debt from E ceased on the institution of the mortgage action by K, the obligation created by P2 being joint and several. (Therefore the transfer to P was not a transfer in satisfaction of a debt due from E to P.)

(2) That the enactment under which the office of Land Commissioner is created and the other enactments under which he has functions and duties to perform indicate that the Land Commissioner is regarded as a corporation sole in regard to his statutory duties and functions. No particular words are necessary in the creation of a corporation sole.

(3) That an action can be properly instituted against the Land Commissioner *nomine officii*.

(4) That an injunction can be issued against a public functionary such as the Land Commissioner.

(5) That the determination that any land should be acquired for the purpose of the Land Redemption Ordinance is the Land Commissioner's and not the Minister's.

(6) That with the increase of statutory functionaries the Courts should be ever ready to entertain declaratory actions as a means of exercising their jurisdiction to prevent injustice.

(7) That the provision in Section 3 (4) that the determination of the Land Commissioner shall be final does not preclude the Courts from declaring in appropriate proceedings that the action of such a functionary who has acted contrary to the statute is illegal.

(8) That the jurisdiction conferred by our Courts Ordinance could not be taken away except by express and clear language.

(9) That our Courts, unlike in England, are free to entertain any action against the Crown or its officers under Section 86 of the Courts Ordinance. Our Courts can grant injunctions whether the defendant is the Crown or a servant of the Crown or the subject.

(10) That the remedy of regular action is, under of our law, available, regardless of whether the illegal action against which relief is claimed is administrative or quasi-judicial. The existence of other remedies such as *Certiorari* is not a sound reason to refuse to adjudicate on a matter rightly before Court.

(11) That there is no justification in Ceylon for extending to injunctions the considerations governing the prerogative writ of Mandamus.

(12) The Land Redemption Ordinance constitutes a serious encroachment on the property rights of the subject and therefore it should be strictly construed and its scope should be strictly confined by preferring a construction in favour of the subject and against the acquiring authority.

*Per* BASNAYAKE, C.J.—" In this country the Attorney-General, the Fiscal, the Collector of Customs, the Postmaster-General, the Director of Public Works, and a whole host of Government functionaries act and are regarded as if they were corporations sole in the matter of contracts on behalf of the Government and in legal proceedings. All contracts are entered into by these functionaries binding them and their successors as if they were corporations sole acting for and on behalf of the Crown. This practice has been in existence to my personal knowledge for well over thirty years. It would appear that the Crown and the subject have both acted on that footing for quite a long time.

Observations of Farwell J. on actions against Government Departments in respect of their illegal acts referred to in the judgment. Also the principles governing the exercise of their functions by statutory functionaries as declared by the courts in England and other commonwealth countries set out.

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**Cases referred to** : *Tone Conservators vs. Ash* (1829) 10 B and C (349 at 384).
*Government Agent, N.P. vs. Kanagasunderam* (31 N. L. R. 115).
*Dyson vs. Attorney-General* (1911) (1 K. B. 410).
*Hodge vs. Attorney-General* (1839) (3 Y and C. Ex. 342).
*Pawlett vs. Attorney-General* (1667), (Hardres' Rep. 465 at p. 469).
*Rex vs. Board of Education*, (1910) 2 K. B. 165.
*Deare vs. Attorney-General* (1 Y and C Ex. at p. 208).
*Roberts vs. Hopwood*, (1925) (A. C. 578 at 613).
*R. vs. Vestry of St. Pancras*, (1890) 24 Q. B. D. 371 at 375-376.
*R. vs. Brighton Corporation* (1916) (85 L. J., K. B. 1552, 1555).
*R. vs. Mayor and Corporation of Newcastle-on-tyne*, (1889) 60 L. T. 963
*R. vs. Ormesby Local Board*, (1894) 43 W. R. 96.
*R. vs. Board of Education*, (1910) 2 K. B. 165 at 170.
*Board of Education vs. Rice* (1911) A. C. 179.
*Smith vs. Macnally*, (1912) 1 Ch. 816, 825.
*Short vs. Poole Corporation*, (1926) 1 Ch. 66, 90-91.
*Westminster Corporation vs. London and North Western Rly.* (1905) A. C. 426, 428.
*Municipal Council of Sydney vs. Campbell*, (1925) A. C. 338, 343.
*The King vs. Minister of Health Ex p. Davis*, (1929) 1 K. B. 619.
*Hanson vs. Radcliffe, U. D. C.*, (1922) 2 Ch. 490, 500.
*Martin vs. Eccles Corporation* (1919) 1 Ch. 387.
*Short vs. Poole Corporation*, (1926) 1 Ch. 66, 91.
*R. vs. Robert ex p. Scurr and others*, (1924) 2 K. B. 695.
*Short vs. Poole Corporation*, (1926) 1 Ch. 66, 90.
*Simms Motor Units Ltd., vs. Minister of Labour and National Service* (1946) 2 All E. R. 201.
*Roncarelli vs. Duplessis* (1952) 1 D. L. R. 680.
*Cooper vs. Wilson*, (1937) 2 All E. R. 726
*Attorney-General (N. S. W.) vs. Trethowan*, (1930-31) 44 Commonwealth Law Reports 394,
*Nireaha Tamaki vs. Baker*, (1901) A. C. 561.
(*Sutton's Hospital* case (1912) 10 Rep. 32B).
(*Ex parte Newport Marsh Trustee*, 18 Law J. (N. S.) Chanc. 49, S. C. 16, Sim 346).
1 and 2 Geo. 4, c. 69, 3 Geo. 4, c. 108, 2 Will. 4, c. 25 (Grant p. 279).
*In re William Clark* (Morgan's Digest, p. 249).
*In re Weir Hospital* (1910) 2 Ch. 124.
*In re Hardy's Crown Brewery* (1910) 2 K. B. 257.

**Other Authorities referred to** : (Voet Bk. XLV, Tit. 2, Sec. 2—Gane, Vol. 6, p. 657).
(Voet Bk. XLV, Tit. 2, Sec. 1—Gane, Vol. 6, p. 655).
(Voet Bk. XLV, Tit. 2, Sec. 3—Gane 6, p. 659).
(Voet, Bk. XLV, Tit. 2, Sec. 7—Gane 6, p. 663).
(Vol. I, p. 144—Evan's translation).

*H. V. Perera, Q.C.*, with *H. Wanigatunge* and *S. L. D. Bandaranayake*, for the Substituted—Plaintiff-Appellant.

*Walter Jayawardena*, with *V. Tennekoon*, Senior Crown Counsel, and *A. Mahendrarajah*, Crown Counsel, for the 1st and 2nd Defendants-Respondents.

*H. W. Jayawardene, Q.C.*, with *S. C. E. Rodrigo* and *W. G. N. Weeratne*, for the Added—Defendant-Respondent.

BASNAYAKE, C.J.

Many questions of great public importance arise on this appeal which has been very ably argued by learned counsel.

The facts are not in dispute. Briefly they are as follows :- Warnakula Aditha Arsanilaitta Don Elaris Perera, the 3rd added defendant-respondent (hereinafter referred to as Elaris Perera), was the owner of four lands known as (*a*) Keeriyankalliya Estate, (*b*) Dangahawatta alias Thalgahawatta, (*c*) Siyambalagahawatta Mukalana and Thalawewa Mukalana, Siyambalagahawatta, and (*d*) Angunuwila Estate situated in the Chilaw and Puttalam Districts. They are 42 acres, 6 acres, 9 acres and 65 acres respectively.

By Bond No. 391 of 30th September, 1925 (P1) Elaris Perera mortgaged as security for a loan of Rs. 50,000/- the eleven allotments of land referred to in the schedule thereof of a total extent of about 150 acres to M. S. V. S. Sockalingam Chettiar, M. S. U. Subramaniam Chettiar and A. R. M. K. Arunasalam Chettiar. The condition of the bond was that money was repayable to any one of the mortgagees or their attorneys or heirs. By Bond No. 533 of 8th April, 1930 (P2) Elaris Perera executed a secondary mortgage of the same lands for Rs. 25,000/- in favour of M. S. O. Muttiah Chettiar, M. S. O. Velayutham Chettiar, M. S. O. Suppramaniam Chettiar, M. S. O. Sockalingam Chettiar and S. K. N. S. Sekappa Chettia

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This loan also was repayable to any one of the mortgagees or their attorneys or heirs.

On 8th March, 1931 Elaris Perera executed Tertiary Bond No. 2339 (P3) for Rs. 20,000/- in favour of Warnakulasuriya Elaris Dabarera Appuhamy of Marawila over the same and other lands.

Sockalingam Chettiar put Bond P2 in suit in D.C. Negombo case No. 7365 and added the tertiary mortgagee as a party to the action. Decree was entered on 22nd June, 1933 in favour of Sockalingam Chettiar for a sum of Rs. 32,625/- with further interest on Rs. 25,000/- at 15% per annum from 7th February, 1933 till the date of decree with further interest on the aggregate amount of the decree at 9% per annum till payment in full with costs of the action within four months of decree. By deed No. 4010 of 4th May, 1935 (P5) Elaris Perera transferred to Sockalingam Chettiar and Sekappa Chettiar for a sum of Rs. 75,000/- undivided shares in the lands mortgaged on P1 and P2 in the proportion of 2/3 share to Sockalingam and the remaining 1/3 to Sekappa Chettiar. It would appear from the attestation clause in the deed that the full consideration was set off in full satisfaction of the claim and costs due in case No. 7365 D.C. Negombo and the principal and interest due on Bond P1. Elaris Perera also appears to have undertaken to release the lands from Tertiary Bond P3. Sockalingam Chettiar by deed No. 1375 of 10th October 1940 (P6) transferred an undivided 1/3 share of the lands to Velayutham Chettiar and by deed No. 1387 of 13th October, 1940 (P7) he transferred his remaining 1/3 share to Kalyani Atchi, administratrix of the Estate of Muttiah Chettiar, and to Meyappa Chettiar, the son of Muttiah. By deed No. 761 of 24th February, 1945 (P8) Sekappa Chettiar, Velayuthan Chettiar, Kalyani Atchi and Meyappa Chettiar transferred to the plaintiff, Muthuwairen Sittambalam Pillai, also known as Muthuwairen Ladamuttu Pillai, for a sum of Rs. 75,000/- the lands undivided shares of which were transferred to Elaris Perera on P5. The plaintiff thereafter entered into possession of them.

On 7th February, 1949 the Land Commissioner informed the plaintiff that he was taking steps to acquire under the Land Redemption Ordinance No. 61 of 1942 four of the lands purchased by him under P8. The plaintiff challenged the Land Commissioner's right to acquire the lands and instituted this action against the Attorney-General as the 1st defendant and the Land Commissioner as the 2nd defendant in which he prays for an injunction restraining the defendants jointly or in the alternative from taking steps under Ordinance No. 61 of 1942 to acquire the lands described in the schedule to the plaint.

The plaintiff died on 8th April, 1951 and Ladamuttu Pillai Kathirkamam Pillai, his eldest son and administrator of his Estate, was substituted as partly plaintiff.

The Attorney-General and the Land Commissioner in their joint answer filed on 2nd March, 1950 stated that on 16th May, 1945 Elaris Perera applied to the Land Commissioner for the redemption of the lands described in the schedule to the plaint and that on 12th May, 1947 the Land Commissioner acting under section 3 (4) of the Land Redemption Ordinance No. 61 of 1942 made his determination that Keeriyankalliya Estate be acquired and that notification of his determination was conveyed to the plaintiff on 7th February, 1949. The defendants further asserted :

(*a*) that the land is land of the description contained in section 3 (1) (*b*) of the Ordinance.

(*b*) that the Land Commissioner's determination to acquire Keeriyankalliya Estate under the provisions of the Land Redemption Ordinance was final and conclusive and could not be questioned in this action and that the District Court had no jurisdiction to entertain it.

Elaris Perera petitioned the Court that his presence before it was necessary in order that it may effectively and completely adjudicate on all matters arising in the trial, and was added as the 3rd defendant. In his answer he raised substantially the same objections of law as the Attorney-General and the Land Commissioner.

The following issues were framed at the trial:

(1) Is the land in question capable of acquisition under section 3 of the Land Redemption Ordinance No. 61 of 1942 ?

(2) Did the Land Commissioner on or about 12-5-1947 make a determination under section 3 (4) of the Land Redemption Ordinance No. 61 of 1942 that Keeriyankalliya Estate be acquired ?

(3) Was the said Estate on or about 12-5-47 a land of the description contained in section 3 (1) (*b*) of the Land Redemption Ordinance No. 61 of 1942 ?

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(4) Is the Land Commissioner's determination with regard to the acquisition of Keeriyankalliya Estate final ?

(5) If so can the correctness of the said determination be questioned in these proceedings ?

(6) Is the plaintiff entitled to proceed against the 1st defendant as representing the Crown to obtain an order of injunction against the Crown ?

(7) Can plaintiff maintain this action against the 2nd defendant as the Land Commissioner without suing the officer who made the order in question by name ?

(8) Is the plaintiff a bona fide purchaser for value from the original transferees of the said lands from the 3rd defendant ?

(9) If so, is the 2nd defendant empowered to acquire lands from him ?

The learned District Judge dismissed the plaintiff's action. He answered the first, second, third, seventh, eighth and ninth issues in the affirmative, the sixth issue in the negative. In answer to the fourth and fifth issues he held that the Land Commissioner's decision on facts is final and that the question of law whether he had authority to acquire a particular land is subject to review by the Court.

He held that :

(*a*) the Land Commissioner can be sued *nomine officii*,

(*b*) the Court was entitled to consider whether he had acted within the powers granted by the section,

(*c*) the action taken by the Land Commissioner was covered by section 3 (1) (*b*) and (4) of the Ordinance.

It appears from the judgment of the learned District Judge that in the course of the final addresses of counsel for the plaintiff it was conceded that the Attorney-General could not be sued, and that the action as against him should be dismissed.

Learned counsel for the appellant challenged the findings of the learned trial Judge on those issues which were decided against him. He submitted that the land Commissioner's construction of section 3 of the Ordinance was wrong and that upon a wrong construction of the statute he had arrogated to himself a jurisdiction which he did not have.

Section 3 of the Ordinance in the form in which it stood on 12th May, 1947 reads as follows :—

3. (1) The Land Commissioner is hereby authorised to acquire on behalf of Government the whole or any part of any agricultural land, if the Land Commissioner is satisfied that the land was, at any time before or after the date appointed under section 1, but not earlier than the first day of January 1929 either :—

(*a*) sold in execution of a mortgage decree, or

(*b*) transferred by the owner of the land to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was immediately prior to such transfer, secured by a mortgage of the land.

(2) Every acquisition of land under sub-section (1) shall be effected in accordance with the provisions of sub-section (5) and shall be paid for out of funds provided for the purposes of this Ordinance under section 4.

(3) No land shall be acquired under sub-section (1) until the funds necessary for the purpose of such acquisition have been provided under section 4.

(4) The question whether any land which the Land Commissioner is authorised to acquire under sub-section (1) should or should not be acquired shall, subject to any regulations made in that behalf, be determined by the Land Commissioner in the exercise of his individual judgment; and every such determination of the Land Commissioner shall be final.

(5) Where the Land Commissioner has determined that any land sheall be acquired for the purposes of this Ordinance, the provisions of the Land Acquisition Ordinance, subject to the exception, modifications and amendments set out in the First Schedule, shall apply for the purposes of the acquisition of that land ; and any sum of money which may, under such provisions be required to be paid or deposited by the Land Commissioner or by Government by way of compensation, costs or otherwise, shall be paid out of funds provided for the purposes of this Ordinance under section 4.

The lands which the Land Commissioner is seeking to acquire in the instant case are admittedly agricultural lands. It is common ground that they are not lands sold in execution of a mortgage decree. The question then is—Are they lands " transferred by the owner of the lands to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was, immediately prior to such transfer, secured by a mortgage of the lands "? Learned counsel for the Land Commissioner contended that they

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were, while learned counsel for the appellant contended that they were not. The latter submitted that section 3 (1) (*b*) applies only to a case where the lands transferred by the owner are the very lands which were security for the debt due from the owner. He submitted that the section does not apply to a case in which the lands transferred are, as in this case, some only of the lands secured by the mortgage. Where several lands are given as security for a debt, the section would not apply unless all the lands are transferred. He further submitted that in a case where only one land is given as security for a debt due from its owner the section would apply only if the entirety of that land was transferred by the owner in satisfaction or part satisfaction of his debt, and not if only a part of the land was transferred. He submitted that in applying the rule of interpretation in section 2 (*x*) of the Interpretation Ordinance words in the singular number shall include the plural where the plural is read and in the instant case the word " land " should be read as " lands " throughout. According to that view he submitted that the section should be rendered " that the lands were transferred by the owner of the lands so transferred to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was, immediately prior to such transfer, secured by a mortgage of (all) the lands transferred." He also submitted that statutes such as the Land Redemption Ordinance which encroach on the rights of the subject should be strictly construed. I am in entire agreement with the view submitted by learned counsel.

Doubtless all statutes must be construed with due regard to their language and if the words of a statute are precise and unambiguous they must be expounded in their natural and ordinary sense. But where a statute encroaches on the rights of the subject and its language admits of more than one construction, that which is in favour of the subject and not against him must be preferred. In a statute which interferes with the person or property of the subject the Court should not supply the defects of language or eke out against the subject by a strained construction the meaning of an obscure passage. The rule of strict construction also requires that the benefit of a doubt created by any equivocal words or ambiguous sentence should be given to the subject.

It must be presumed that the Legislature does not intend to encroach upon the rights of the subject except where it says so plainly and that where it intends to do so it will manifest its intention, if not in express words, at least by the clearest implication and beyond all doubt. The Land Redemption Ordinance is an enactment which constitutes a serious intrusion on the property rights of the subject. It should therefore be strictly construed and its scope should be strictly confined by preferring a construction in favour of the subject and against the acquiring authority.

Learned counsel bases his contention that the transfer P5 does not fall within the ambit of section 3 (1) (*b*) on the following considerations :-

(*a*) What was transferred was not the lands themselves but undivided shares in the lands. The transfer of a land and of an undivided share in a land is not the same. The section contemplates transfer of a land or lands and not undivided shares in a land or lands.

(*b*) The transfer to Sekappa was not in satisfaction or part satisfaction of a debt which was due from Elaris Perera to Sekappa. It was in satisfaction of the debt due on bond P1 in favour of Sockalingam, Subramaniam and Arunasalam.

The submission that the section applies only to the transfer of the land securing the debt and not to the transfer of an undivided share in it, is sound. The section refers to land and not to undivided shares in land. An undivided share in a land is not the same as the land itself and the transfer of an undivided share in a land is not a transfer of the land. Learned counsel for the Crown did not seriously resist this argument.

Learned counsel also submitted that once Sockalingam instituted action for the recovery of the money due on bond P2, Sekappa who was party to that bond lost his right to proceed against Elaris Perera, the obligation created thereby being joint and several.

It is correct that when one of joint and several creditors institutes an action to recover a debt, payment to the other co-creditors does not extinguish the debt. The moment Sockalingam instituted the action on the bond Elaris Perera's right to choose the co-creditor to whom he would pay the debt ceased and his debt became payable to Sockalingam alone.

There is no presumption that where there are a number of creditors the obligations is joint and

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several. The obligation must, as in Bonds P1 & P2, be expressly created (Voet Bk. XLV, Tit. 2, Sec. 2 Gane, Vol. 6, p. 657).

On this topic of the rights of joint and several creditors Voet states :- (Voet Bk. XLV, Tit. 2, Sec. 1 Gane, Vol. 6, p. 655) ;

> There are two parties to a stipulation or credit when two or more persons stipulate as principals each in whole for the same thing at one and the same time, with the intention of each indeed collecting the whole thing, yet all of them collecting only one such thing.

Where a correal obligation has been created :-

> It is in the power of the stipulator to say which of a number of promisors of the same thing he prefers to sue for the whole. Likewise on the other hand it is in the discretion of the debtor to say which of a number of joint and several creditors he prefers to pay and to favour in such wise that he is himself freed from all of them. This he can do until one of a number of parties to the stipulating has started to sue and to safeguard his interests, for after that time a promisor effects nothing by tendering the money to another. (Voet Bk. XLV, Tit. 2, Sec. 3—Gane. 5, pp. 659).

Again Voet says :

> But whatever one of the 'parties to a stipulation has collected, he is not held liable to treat it proportionally as common with another, unless there was partnership between them. Surely the one who has obtained his due in full holds nothing beyond what was due to him. Hence it comes about that a promisor, when already sued by one creditor, effects nothing by tendering the money to another. (Voet, Bk. XLV, Tit. 2, Sec. 7—Gane. 6, p. 663).

In support of his contention that after judgment was entered in favour of Sockalingam, no debt was due to Sekappa on P2, learned counsel cited paragraphs 258 and 260 of Pothier on Obligations (Vol. I, p. 144—Evan's translation) The former paragraph (258) reads :

> Regularly, when a person contracts the obligation of one and the same thing in favour of several others, each of these is only creditor for his own share, but he may contract with each of them for the whole when such is the intention of the parties, so that each of the persons in whose favour the obligation is contracted is creditor for the whole, but that a payment made to any one liberates the debtor against them all. This is called Solidity of Obligation. The creditors are called *correi credendi, correi stipulandi*.

and the latter paragraph (260) reads :

> The effects of this solidity amongst creditors are, 1st. That each of the creditors being creditors for the whole, may consequently demand the whole, and, if the obligation is executory, constrain the debtor for the whole. The acknowledgment of the debt made to any one of the creditors, interrupts the prescription as to the whole of the debt, and consequently enures to the benefit of the other creditors, 1 *fin. cod. de duobus reis*. 3rd. The payment made to any one of the creditors extinguishes the debt, for the creditor being such for the whole, the payment of the whole is effectually made to him, and this payment liberates the debtor as against all, for although there are several creditors, there is but one debt, which ought to be extinguished by the entire payment made to one of the creditors.
>
> It is the choice of the debtor to pay which of the creditors he will, as long as the matter is entire ; but, if one of them has instituted a process against him, he cannot make an effectual payment, except to that one ; *Ex duobus reis stipulandi, si semel unus egerit, alteri promissor offerendo pecuniam nihil agit.* 1. 16 *ff de duob. reis*. 4. Each of the creditors being such for the whole may, before a process instituted by any of the others, make a release to the creditor, and liberate him, as against them all.
>
> For in the same manner as a payment of the whole, to any one of the creditors, liberates the debtor against all, a release by one, which is equivalent to a payment, ought to have the same effect. *Acceptilatione unius tollitur obligatio*, 1. 2 *ff de duob. reis*.

The foregoing citations support learned counsel's contention that Sekappa's right to claim the debt from Elaris Perera ceased on the institution of the mortgage action by Sockalingam and that the transfer to Sekappa was not therefore a transfer in satisfaction or part satisfaction of a debt due from Elaris Perera to Sekappa. Clearly then the transfer, apart from it being a transfer of undivided shares, does not for this additional reason, come within the ambit of section 3 (1) (*b*).

The Land Commissioner had therefore no authority in law to acquire the land and the plaintiff's prayer that he should be restrained from doing so must be granted.

The other questions which arise for decision on this appeal are as follows :

(*a*) that the plaintiff is not entitled to ask for the relief he has sought in this action against either the Attorney-General or the Land Commissioner,

(*b*) that as sub-section (4) of section 3 declares that every determination of the Land Commissioner under sub-section (1) is final his determination cannot be questioned in an action of this nature,

(*c*) that in any event the action is bad as it had been brought against the Land Commissioner *nomine officii* and not in his personal name against the officer who made the determination in question,

(*d*) that an injunction cannot be granted against the Crown or the officers or servants of the Crown,

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(*e*) that as the Land Commissioner exercises under section 3 (1) a quasi-judicial function his determination can be canvassed only by certiorari and not by a regular action.

I shall now proceed to deal with the points as far as is convenient in their order as set out above.

Points (*a*) and (*c*) are best dealt with together. Learned Crown Counsel's contention is that an action can be brought against a person natural or juristic and that as there is no juristic person known as the Land Commissioner an action cannot be brought against the Land Commissioner by that name. It can only be brought against the natural person appointed to that office.

That office of Land Commissioner was created by the Land Development Ordinance. Section 2 of the Ordinance defines the expression Land Commissioner thus :

"Land Commissioner" means the officer appointed under section 3 of this Ordinance, and includes any officer of his Department authorised by him in writing in respect of any particular matter or provision of this Ordinance.

Section 3 of the Ordinance provides :

(1) There may be appointed a Land Commissioner who shall be responsible :—

(*a*) for the due performance of the duties and functions assigned to him as Land Commissioner under this Ordinance ;

(*b*) for the general supervision and control of all Government Agents and Land Officers in the administration of Crown land and in the exercise and discharge of the powers and duties conferred and imposed upon them by this Ordinance.

(2) In the exercise of his powers and in the discharge of his duties under this Ordinance, the Land Commissioner shall be subject to the general direction and control of the Minister.

The Ordinance vested in the Land Commissioner a number of statutory functions to be performed by the person for the time being holding the office. Other statutory functions are vested in the Land Commissioner by the Land Redemption Ordinance and the Crown Lands Ordinance. The former Ordinance (section 2) provides :

The Land Commissioner shall be the officer of Government responsible for and charged with the administration of this Ordinance and shall in the exercise,—performance or discharge of any power, duty or function conferred or imposed upon or assigned to him by or under this Ordinance be subject to the general direction and control of the Minister.

The latter Ordinance provides (section 90) :

(1) The Land Commissioner shall be the officer of Government responsible for and charged with the administration of this Ordinance.

(2) In the exercise of his powers and in the discharge of his duties under this Ordinance, the Land Commissioner shall be subject to the general direction and control of the Minister.

The Ordinances I have referred to above make it clear that the Land Commissioner, as regards his functions under them, is a statutory functionary who while the Ordinances are in force has a continued existence, though the holders of the office may change from time to time. Statutory functions commenced during the tenure of the office by one officer are continued by his successor or successors as if the functionary had a continued and uninterrupted existence despite the change of individuals holding the office. The enactment under which the office is created and the other enactments under which he has functions and duties to perform indicate that the Land Commissioner is regarded as a corporation in regard to his statutory duties and functions. It is true that none of the Ordinances referred to above declare him in so many words to be a corporation sole. But no particular words are necessary in the creation of a corporation (*Sutton's Hospital* case (1912) 10 Rep., 32 (*b*) *Tone Conservators vs. Ash* (1829) 10 B & C 349 at 384). The intention to incorporate though not established by express words of creation can be gathered from the statute having regard to the nature of the functions and duties entrusted to the functionary. Such corporations are corporations by implication.

Our law on the subject of corporations is the English Law. It is so declared by section 3 of the Civil Law Ordinance. The material portion of it reads as follows :—

In all questions or issues which may hereafter arise or which may have to be decided in this Island with respect to the law of..................corporations.............. the law to be administered shall be the same as would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England,unless in any case other provision is or shall be made by any Ordinance now in force in this Island or hereafter to be enacted.

It is therefore necessary that we should turn for assistance to authoritative English treatises on the subject. I have consulted Grant on Corpora

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tions, a treatise which is well recognised. On this topic Grant says (p. 8) :

> It has been held, that a body will be taken to be a corporation when it is constituted by an act of Parliament in such a way and for such purposes as shown that the meaning of the legislature was that the body should have a perpetual duration, although no express words are used constituting it a corporation. (*Ex parte Newport Marsh Trustee*, 18 Law J. (N. S.) Chanc. 49, S. C. 16, Sim. 346). This is called a corporation by implication. And this agrees with the old law, that if the Crown grant land to the men of Islington, *without saying to them and their successors*, rendering rent, this incorporates them for ever for the purpose of the farm ; for without such incorporation the intention of the grant could not be fully carried into effect.

A number of persons is not necessary for creating a corporation. To quote Grant again (p. 48) :—

> With respect to the number of persons in whom a corporation may be vested, it is to be observed that a corporation may reside in a single person, as the king, archbishops, bishops, deans, canons, archdeacons, parsons, who are all said to be corporations sole at common law. The chamberlain of London is also a corporation sole for some purposes, and is said to be a corporation by custom (4 Rep. 65 a) ; that is, the earliest known origin of the rights exercised by that officer is usage.

Grant also speaks of *quasi* corporations having corporate rights and capacities in a limited and imperfect degree only, and for certain purposes only (p. 48). A corporation by implication may sue for an injury to its real property (Grant, p. 53 *Tone Conservators vs. Ash*, 10 B & C 349).

There is no doubt that in England at common law many aggregate bodies, as counties, hundreds wapentakes, forests, cities and boroughs, though not incorporated, were treated as though they were bodies corporate, and could take in perpetual succession, and have a common seal (Grant 58). Some of the professorships in the Universities of Oxford and Cambridge have been at times treated as though the several professors were respectively bodies corporate (Grant 196). Lands are held by many bodies in the nature of a corporation, who nevertheless are not in such possession of the lands as to be the objects of an action in ejectment. Thus the Board of officers of Her Majesty's Ordinance Department are in the nature of a corporation for the management of ordinance property, by virtue of the statutes 1 & 2 Geo. 4, c. 69, 3 Geo. 4, c. 108, 2 Will. 4, c. 25 (Grant p. 279).

Speaking of *quasi* corporations, Grant (p. 661) says :—

> Some instances of *quasi* corporations sole remain. These are generally officers of the Crown, as the Lord Chancellor, the Lord High Treasurer, or the Chief Justices, who, for certain purposes are in the nature of corporations sole respectively.

The English Law concept of *quasi* corporations sole and of officers regarded as corporations is in accord with the concepts of such bodies in Roman Law and in systems of Law which spring from it. Savigny in his treatise on Jural Relations (translation by Rattigan) observes (p. 2) :—

> A jural capacity may, for instance, in the first place, be either wholly or partially denied to many individual men ; it may in the second place, be transferred to something external to the individual man, and thus a Juristical Person may by this means be artificially created.

A Juristical Person, Savigny says, is a person who is assumed to be so for purely juristical purposes. In it we find a Bearer of Jural Relations as well as the individual man. Among the Juristical Persons enumerated by him are the State or the Fiscus, Subordinate Officials, who were appointed by the Authorities for the management of different affairs, such as Librarii, Fiscales, and Censuales. Savigny also expresses the view that Juristical Persons come into existence not only by the express sanction of the Sovereign " but also tacitly, by a conscious toleration or by an actual recognition."

In this country the Attorney-General, the Fiscal, the Collector of Customs, the Postmaster-General, the Director of Public Works, and a whole host of Government functionaries act and are regarded as if they were corporations sole in the matter of contracts on behalf of the Government and in legal proceedings. All contracts are entered into by these functionaries binding them and their successors as if they were corporations sole acting for and on behalf of the Crown. This practice has been in existence to my personal knowledge for well over thirty years. It would appear that the Crown and the subject have both acted on that footing for quite a long time.

It is not contended that the person holding the office of Land Commissioner at the time the determination was made (Mr. A. G. Ranasinha, now Sir Arthur), purported to act in his private capacity. At the time this action was instituted the person holding the office of Land Commissioner was Mr. S. F. Amarasinghe. It is his proxy that has been filed in these proceedings. It is admitted that Mr. Amarasinghe no longer holds the office and his successor too has been transferred. If as contended by counsel for the Crown the individual holding the office of Land Commissioner must be sued, difficult questions for which he has not provided a satisfactory answer arise. They are :—

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(*a*) Who is the person to be sued? Is it the person holding the office :—

(*i*) at the time proceedings are commenced under section 3 of the Land Redemption Ordinance, or
(*ii*) at the time the determination under that section is made, or
(*iii*) at the time of the institution of the action?

(*b*) What is to happen on the transfer of the person holding the office of Land Commissioner to another department of Government after legal proceedings have been instituted against him? Is the action to continue against the original defendant regardless of whether he holds the office of Land Commissioner or not, or is his successor to be substituted? If the action is to continue against the original defendant how is he to obey the order of the Court if it is made against him when he is not the holder of the office of Land Commissioner? His successor not being bound by the decree would have no authority in law to carry it out. If his successor is to be substituted under what provision of the Civil Procedure Code may it be done?

(*c*) What is to happen on the retirement from the service of the Government of the person against whom the action is brought while it is pending? Is the action to proceed against him notwithstanding his retirement? If so how is he going to implement the decision of the Court if it is against him? His successor not being bound by the decree would be under on legal duty to obey it, nor can he be substituted as there is no provision of the Civil Procedure Code under which it can be done.

(*d*) What is to happen on the death of the officer against whom the action is brought? Is the action to continue against his successor in office, or his legal representative? There is no provision in the Civil Procedure Code for substituting his successor in office. Section 398 provides for the substitution of the legal representative of the deceased defendant. If the legal representative carries on the action and it is lost or does not choose to carry it on and decree is entered against him, in either case, the holder of the office of Land Commissioner at the time the decree is entered is in law not bound by it and would have no power to give effect to the decree of the Court.

For the purposes of the Civil Procedure Code the expression " legal representative " means section 394 (2), an executor or administrator or the next of kin who have adiated the inheritance in the case of an estate below the value of Rs. 2,500/-. It will therefore be seen that the course suggested by learned Crown Counsel is impracticable and will result in profitless legal proceedings and in a denial of justice. It is not contended that in an action against the Crown, which the law requires should be instituted against the Attorney General, the name of the person holding that office should be mentioned. Nor is it contended that on any change in the holder of that office or on his death there should be a substitution of the new holder or that even the proxy of the new holder of the office should be filed. It would appear therefore that for the purposes of legal proceedings the Attorney-General also must be regarded as a corporation sole. In regard to proceedings at law the legal position of other public functionaries such as the Government Agents and other officers who have a multitude of statutory functions to perform is the same.

In my opinion the action has been properly instituted against the Land Commissioner *nomine officii*. That an injunction can be issued against a public functionary such as the Land Commissioner or the Postmaster-General was recognised by this Court so long ago as 1838 in the case of *In re William Clark* (Morgan's Digest, p. 249), and later in the case of *Govt. Agent, N. P. vs. Kanagasunderam* (31 N. L. R. 115).

The next question is whether the determination of the Land Commissioner can be questioned in these proceedings. The provisions of the Civil Procedure Code are wide enough to permit an action of this nature. Learned Counsel for the Crown emphasized the fact that the plaintiff had sought an injunction instead of asking for a declaration. In the instant case the plaintiff was seeking to prevent a wrong and he was entitled to ask the Court to enjoin the defendant " not to do a specified act, or to abstain from specified conduct or behaviour " (section 217 (2) Civil Procedure Code). Hence his prayer that " the defendants jointly or in the alternative " be restrained " from taking steps under Ordinance No. 61 of 1942 to acquire the lands described in the Schedule."

Learned counsel also argued that although the Land Commissioner was authorised by section 3 to acquire lands of the description referred to therein, under the Land Acquisition Act, though not under the repealed Ordinance the acquiring

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authority was in fact the Minister and that the action against the Land Commissioner was misconceived. He bases this argument on the fact that sub-section (5) of section 3 of the Land Redemption Ordinance provides that the Land Acquisition Act, with the prescribed modifications, shall apply for the purposes of the acquisition of land which the Land Commissioner under sub-section (4) determines should be acquired. I am unable to uphold that contention. Although the Land Redemption Ordinance makes use of the machinery in the enactment for the compulsory acquisition of land it is the Land Commissioner who is authorised to set that machinery in motion and the determination that any land should be acquired for the purposes of the Land Redemption Ordinance is his and not the Minister's. The words of the section are :

> The Land Commissioner is hereby authorised to acquire on behalf of Government the whole or any part of any agricultural land ; if the Land Commissioner is satisfied etc.,

Sub-Section (5) of the section prescribes that the provisions of the Land Acquisition Act shall apply "where the Land Commissioner has determined that any land shall be acquired for the purposes of this Ordinance." Once the Land Commissioner has made his determination, the Minister has no option under section 5 of the Land Acquisition Act as modified for the purposes of the Land Redemption Ordinance but to make the written declaration prescribed therein. It is the Land Commissioner's determination that should be challenged if it is illegal and it is the Land Commissioner who should be restrained from acting illegally.

I have no doubt that under our law the present action is well founded and that it lies both against the Attorney-General and the Land Commissioner *nomine officii*. It is clear from the general provisions of the Civil Procedure Code governing the institution of actions (sections 5, 6, 8, 217) and those special provisions regulating the institution of actions against the Crown and Public Officers (Chapter XXXI), that an action such as this can be maintained.

In England, unlike in this country, the subject had no right to sue the Crown till the anectment of the Crown Proceedings Act in 1947. For that reason in that country parties dissatisfied with the proceedings of statutory functionaries had to resort to the declaratory action in order to test their legality.

In the case of *Dyson vs. Attorney-General* (1911) 1 K. B. 410) the validity of notices issued by the Commissioners of Inland Revenue under the Finance Act 1910 was tested by asking for a declaratory judgment against the Attorney-General. The Court of Appeal held that such an action lay. The plaintiff prayed in aid the decision of *Hodge vs. Attorney-General* (1839) (3 Y & C. Ex. 342), which was followed by the Court of Appeal. Reference was made in the course of the judgments of the Judges to *Pawlett vs. Attorney-General* (1667), (Hardres' Rep. 465 at p. 469) in which was stated an important principle which we should bear in mind when hearing actions against the Crown in whatever form they are brought. Baron Atkyns said in that case :—

> The party ought in this case to be relieved against the King ; because the King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either, it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him.

The case of *Dyson vs. Attorney-General* (*supra*) is one of great importance especially as it contains some very valuable observations by Farwell, L.J., on actions against Government departments in respect of their illegal acts. They are important enough to be repeated here *in extenso*. He said :-

> But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions. There is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government Depart ments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. Within the present year in this Court alone there have been no less than three such cases. In *Rex vs. Board of Education*, (1910) 2 K. B. 165, the Board, while abandoning by their counsel all argument that the Education Act, 1902, gave them power to pursue the course adopted by them, insisted that this Court could not interfere with them, but that they could act as they pleased. In *In re Weir Hospital* (1910) 2 Ch. 124, the Charity Commissioners were unable to find any excuse or justification for the misaplication of £ 5,000 of the trust funds committed to their care. In *In re Hardy's Crown Brewerty* (1910) 2 K. B. 257 the Commissioners of Inland Revenue, who are entrusted by section 2, sub-section 1, of the Licensing Act, 1904, with the judicial duty of fixing the amount of compensation under the Act, fixed the sum *mero motu* without any inquiry or evidence and without giving the parties any opportunity of meeting objections, and claimed the right so to act without interference by any Court. Bray J., and the Court of Appeal held that they had acted unreasonably and ordered them to pay costs. In all these cases the defendants were represented by the law officers of the Crown at the public expense, and in the present case we find the law officers taking a—

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preliminary objection in order to prevent the trial of a case which, treating the allegations as true (as we must on such an application), is of the greatest importance to hundreds of thousands of His Majesyt's subjects. I will quote the Lord Chief Baron in *Deare vs. Attorney-General* (1 Y w C Ex. at pp. 208). " It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purppse of bringing matters before a Court of Justice when any real point of difficulty that requires judicial decision has occurred." I venture to hope that the former salutary practice may be resumed. If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.

The declaratory action is being resorted to more and more in England with the increase of statutory functionaries and the Courts have been ever ready to exercise their jurisdiction to prevent injustice. It is unnecessary to cite other English cases as *Dyson's* is a leading case.. It is sufficient to say that the words of Farwell, L.J., lay down what should be the attitude of the Courts towards the subject when he seeks relief from the illegal acts of Government Departments.

I now come to point (*b*). Does the provision in section 3 (4) that the determination of the Land Commissioner shall be final preclude the plaintiff from questioning it by way of a regular action ?

In the first place it is necessary to consider what it is that the sub-section declares shall be final. It is the determination that any land which the Land Commissioner is authorised to acquire under sub-section (1) should or should not be acquired. Therefore if the Land Commissioner determines that he should acquire any land which he is not authorised to acquire under sub8 section (1) the requirements of the sub-section (4) are not satisfied and the determination will not be final. This is precisely what the appellant's counsel submits. He contends that by a wrong interpretation of sub-section (1) the Land Commissioner has given himself a jurisdiction which he does not have. Without authority under the sub-section (1) to acquire the lands in question he has determined that they should be acquired. Clearly his determination does not falll within the ambit of sub-section (4). Learned counsel for the Crown contended that finality attached to the Land Commissioner's decision whether he was or was not authorised by sub-section (1) to acquire the lands. That is an astounding proposition to which I cannot assent.

Now, when an Ordinance or an Act provides that a decision made by a statutory functionary to whom the task of making a decision under the enactment is entrusted shall be final, the Legislature assumes that the functionary will arrive at his decision in accordance with law and the rules of natural justice and after all the prescribed conditions precedent to the making of his decision have been fulfilled, and that where his jurisdiction depends on a true construction of an enactment he will construe it correctly. The Legislature also assumes that the functionary will keep to the limits of the authority committed to him and will not act in bad faith or from corrupt motives or exercises his powers for purposes other than those specified in the statute or be influenced by grounds alien or irrelevant to the powers taken by the statute or act unreasonably. To say that the word " final " has the effect of giving statutory sanction to a decision however wrong, however contrary to the statute, however unreasonable or influenced by bad faith or corrupt motives, is to give the word a meaning which it is incapable of bearing and which the Legislature could never have contemplated. The Legislature entrusts to responsible officers the task of carrying out important functions which affect the subject in the faith that the officers to whom such functions are entrusted will scrupulously observe all the requirements of the statute which authorises them to act. It is inconceivable that by isung such a word as " final " the Legislature in effect said, whatever determination the Land Commissioner may make, be it within the statute or be it not, be it in accordance with it or be it not, it is final, in the sense that the legality of it cannot be agitated in the Courts. No case in which such a meaning has been given to the word ' final " was cited to us. The word " final " is not a cure for all the sins of commission and omission of a statutory functionary and does not render legal all his illegal acts and place them beyond challenge in the Courts. The word "final" and the words " final and conclusive " are familiar in enactments which seek to limit the right of appeal ; but no decision of either this Court or any other Court has been cited to us in which those expressions have been construed as ousting the jurisdiction of the Courts to declare in appropriate proceedings that the action of a public functionary who has acted contrary to the statute is illegal.

To read the word " final " in the sense which the learned counsel for the Crown seeks to place upon it would amount to giving the public functionary authority to act as he pleases. It is unthinkable that the Legislature would give such a blank authority to a functionary however highly placed. Such powers are rarely given

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even when the country is at war or is facing a crisis. It must be presumed that the Legislature does not sanction illegal acts on the part of functionaries. If it intends to sanction unauthorised and illegal acts it should say so in plain and unmistakable terms and not use a word of such doubtful import as "final." That the subject should not be harassed by unauthorised action on the part of statutory functionaries in as much the concern of the Legislature as of the Courts and once a piece of legislation has been put on the statute book the Legislature as well as the public looks to the Courts to exercise their controlling authority against illegal and unjust use of the powers conferred thereby, and the Courts will be failing in their legitimate duty if they denied relief against illegal action on the part of statutory functionaries. It was urged by counsel that the word "final" ousted the jurisdiction of the Courts to consider and decide the legality of the Land Commissioner's determination and that it could be challenged only in Parliament. That would impose on Parliament the obligation of construing the statutes it enacts, an obligation which is outside its proper scope and which it is not qualified to discharge. The jurisdiction conferred by the Courts Ordinance on our Courts cannot be taken away except by express and clear language. I know of no formula by which the undoubted right of the Courts, where their jurisdiction is invoked by appropriate proceedings, to construe an enactment and declare its meaning can be taken away.

The interpretation of statutes is the proper function of the Courts and once legislation has been enacted the Legislature looks to the Courts to declare its true meaning and upon that meaning to determine whether the powers entrusted to the creatures of statute have been exceeded or not. The principles governing the exercise of their functions by statutory functionaries have been declared by the Courts in England and other Commonwealth countries and are now well established and in my view afford valuable guidance in the consideration of the questions arising on this appeal. I set them below :

I. A discretion does not empower a statutory body or functionary to do what he likes merely because he is minded to do so — he must in the exercise of his— discretion do, not what he likes, but what he ought. (*Roberts vs. Hopwood*, (1925) A. C. 578 at 613).

II. A statutory body or functionary who has to exercise a public duty by exercising his discretion is not to be regarded in the eye of the law as having exercised his discretion :—

(*a*) if he takes into account matters which the Courts consider not to be proper for the guidance of his discretion (*Rex vs. Vestry of St. Pancras*, (1890) 24 &. B. D. 371 at 375-376.

(*b*) if he takes extraneous matter into account and allows them to influence him (*Rex vs. Brighton Corporation* (1916) 85 L. J., K. B. 1552, 1555).

(*c*) if he misunderstands the law or misconstrues the statute or the section on which he purports to act — *Rex vs. Mayor and Corporation of New-castle-on-Tyne*, (1889) 60 L. T. 963 and *Rex vs. Ormesby Local Board*, (1894) 43 W. R. 96 — *Rex vs. Board of Education*, (1910) 2 K. B. 165 at 170 *Board of Education vs. Rice*, (1911) A. C. 179.

(*d*) if he acts on an error of fact or is prompted by a mistaken belief in the existence of some circumstance of fact. *Smith vs. Macnally*, (1912) 1 Ch. 816, 825.

(*e*) if he acts in bad faith or from corrupt motives (*Short vs. Poole Corporations*, (1926) 1 Ch. 66, 90-91).

(*f*) if he exercises power given by the legislature for one purpose for another or different purpose whether it be fraudulently or dishonestly or not (*Westminister Corporation vs. London* w *North Western Railway*, (1905) A. C. 426, 428, *Municipal Council of Sydney vs. Campbell*, (1925) A.C. 338, 343. *The King vs. Minister of Health Ex p. Davies*, (1929) 1 K. B. 619, *Hanson vs. Radcliffe*, ffi. *D. C.*, (1922) 2 Ch. 490, 500, *Martin vs. Eccles Corporation* (1919) 1 Ch. 387.

(*g*) if the act, though performed in good faith and without the taint of corruption, is so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon him. (*Short vs. Poole Corporation*, (1926) 1 Ch. 66, 91.

(*h*) if he exceeds or abuses his powers or does not keep to the limits of the authority committed to him.

(*i*) if he is unreasonable though acting honestly and in good faith, (*Rex vs. Roberts ex p. Scurr* w *others*, (1924) 2 K. B. 695, *Short vs. Poole Corporation*, (1926) 1 Ch. 66, 90.

It was also pointed out in the course of argument that the Land Commissioner in the exercise, performance or discharge of any power, duty or function conferred or imposed upon or assigned to him " by or under " the Ordinance was subject to the general direction and control of the Minister. The fact that the Minister has "general direction and control" does not absolve the Land Commissioner in the performance of his duties. It should be noted that section 3 (4) provides that questions arising under sub-section (1) should be determined by the Land Commissioner " in the exercise of his individual judgment." In the exercise of a quasi-judicial function the Minister's direction and control have no place. It was so held in the case of *Simms*

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*Motor Units Ltd., vs. Minister of Labour* w—*National Service* (1946) 2 All. E. R. 201. Private instructions given to a specially designated officer or tribunal as to how quasi-judicial functions should be performed are bad. The object of establishing an independent tribunal is to remove the power of decision from the executive and this is clearly defeated if the tribunal acts to order. In the case of *Roncarelli vs. Duplessis* (1952) 1 D. L. R. 680 the Prime Minister and Attorney-General of Quebec who issued an order on the manager of the Quebec Liquor Commission to cancel the licence of Roncarelli a restaurant operator was held liable in damages for issuing an order which he had no power under the Alcoholic Liquor Act, or the Act defining his powers, to issue. In that case reference was made to a number of decisions on the subject of the exercise of discretion by a statutory body having quasi-judicial functions. Among them is the following passage from the judgment of Lord Esher M. R. in the case of *Reg. vs. Vestry of St. Pancras*, (1890) 24 Q. B. D. 371 at 375 :—

> If people who have to exercise a public duty by exercising their discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.

In the instant case the Land Commissioner, as stated above, misconstrued section 3 (1) (*b*) and gave himself a jurisdiction he did not have. The action taken by him in excess of his jurisdiction to acquire the plaintiff's lands which he is in law not entitled to do is illegal and the plaintiff is entitled to the order he seeks.

I shall now deal with point (*d*). It was argued that a mandamus does not lie against the officers and servants of the Crown and that the issue of an injunction is governed by the same consideration. But the correct form of the English rule on this aspect of the law of mandamus is that mandamus does not lie against the servants of the Crown *as such*. Servants of the Crown when discharging statutory functions which they have no authority to discharge except under the statute cannot be said to be discharging those functions *qua* servants of the Crown. Where they derive their powers from the statute and the statute alone the fact that they are servants of the Crown is no bar to a mandamus in respect of their statutory functions. Again where government officers have been constituted agents for carrying out particular duties in relation to the subject, even where those duties are not statutory, if they are under a legal obligation towards the subject, an order of mandamus will lie for the enforcement of those duties (11 Hal. 99). But we were not referred to any case in which it has been so held. The English law governing injunctions against public officers after 1947 is to be found in section 21 of the Crown Proceedings Act which expressly forbids the grant of injunctions against an officer of the Crown only if the effect of granting the injunctions would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown. That section reads :—

> (1) In any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require :-
>
> Provided that :—
>
> (*a*) where in any proceedings aainst the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunctions or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties ; and
>
> (*b*) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is netitled as against the Crown to the land or property or to the possession thereof.
>
> (2) The court shall not in any civil proceedings grant any injunctions or make any order against an officer of the Crown if the effects of granting the injunction or making the order would be to give any relief against the Crown which could not have been ontained in proceedings against the Crown.

Neither our Civil Procedure Code nor any other enactment imposes a prohibition such as is contained in sub-section (2) above. Our Courts are free to entertain any action against the Crown or its officers and there are no fetters imposed by statute on suing the Crown or its officers. In actions of which the Crown or a public officer is a party our Courts are therefore free to make any order it may make between subject and subject. Similarly in the grant of injunctions the Courts are free to act under section 86 of the Courts Ordinance whether the defendant be the Crown or a servant of the Crown or a subject. There is no fetter on their freedom of action as in England.

It was also submitted on behalf of the Crown that the functions of the Land Commissioner under section 3 of the Ordinance are quasi-judicial and that any action in excess of his

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powers should be challenged by way of certiorari and not by action. I am unable to accept this submission either. Certiorari is a remedy which does not exclude other remedies. A similar argument was unsuccessfully advanced in the case of *Cooper vs. Wilson*, (1937) 2 All. E. R. 726. At page 733 Greer L. J. said :—

> Nor do I think that the power which he undoubtedlu possessed of obtaining a writ of certiorari to quash the order for his dismissal prevents his application to the Court for a declaration as to the invalidity of the order of dismissal.

It was observed in the same case that the power of the Court to grant a declaration has been greatly extended in recent years. Such actions are increasing in this country too. With the growth of legislation which affects the rights of the subject and his freedom of section, suits in which the subject seeks redress against illegal acts on the part of statutory functionaries are bound to increase. The courts should not be slow to grant relief when their jurisdiction is properly invoked, and the existence of other remedies is not a sound reason for refusing to adjudicate on a matter rightly brought before them.

The remedy of a regular action is under our law available regardless of whether the illegal action against which relief is claimed is administrative or quasi-judicial. It is therefore unnecessary to discuss at length the distinction between administrative and quasi-judicial acts. It is sufficient for the purpose of this judgment to quote the following passage which had been judicially approved from page 81 of the Ministers' Powers Report (Cmd. 4060) :—

> But even a large number of administrative decisions may and do involve, in greater or less degree, at some stage in the procedure which eventuates in executive action, certain of the attributes of a judicial decision. Indeed generally speaking a quasi-judicial decision is only an administrative decision, some stage or some element of which possesses judicial characteristics.

An action such as the one brought in this case undoubtedly lies to prevent a functionary vested with statutory powers from acting in excess of those powers and taking a step he is not authorised by the statute to take. This principle is firmly established in other parts of the Commonwealth such as Australia and New Zealand.

It is sufficient for the purposes of this judgment to refer to the cases of *Attorney-General (N.S.W.) vs. Trethowan*, (1930-31) 44 Commonwealth Law Reports 394, and *Nireaha Tamaki vs. Baker*, (1901) A. C. 561. In the former case an injunction was granted restraining the President of the Legislative Council, the Attorney-General for the State of New South Wales, the Premier and the other Ministers of the Crown for the State of New South Wales, from presenting to the Governor for royal assent a bill to abolish the Legislative Council passed by both Houses of the New South Wales Legislature without submitting the matter to a referendum as required by section 7 A of the Constitution Act (1920-29). In the latter case the Commissioner of Crown Lands of New Zealand was sued for a declaration that a block of land about 5,184 acres in extent which was along with some other lands which the Governor had notified in the Gazette under section 136 of the Land Act 1892 open for sale or election still remained land owned by natives under their custom and usage and for an injunction against selling or advertising the same.

The following among other issues were tried :-

> (3) Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding ?
>
> (4) Has the Court jurisdiction to inquire whether as a matter of fact the land in dispute herein has been ceded by the native owners to the Crown ?

In deciding the appeal in the plaintiff's favour the Privy Council said :—

> Their Lordships think that the learned judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the respondent from infringing the appellants' rights by selling property on which he leges an interest in assumed pursuance of a statutory authority the conditions of which, it is alleged, have not been co plied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes, and is confined within the four corners of the statutes. The Governor, in notifying that the lands were rural land open for sale, was acting and stated himself to be acting, in pursuance of the 136th section of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of 2 137 of the same Act. If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorised invasion of the appellant's alleged rights.

In England the prerogative writ of mandamus is no longer issued. Instead the High Court is empowered by statute to make an order requiring an act to be done. Section 7 of the Administration of Justice (Miscellaneous) Provisions Act 1938 provides :

> (1) The prerogative writs of mandamus, prohibition and certiorari shall no longer be issued by the High Court.

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(2) In any case where the High Court would, but for the provisions of the last foregoing sub-section, have had jurisdiction to order the issue of a writ of mandamus requiring any act to be done, or a writ of prohibition prohibiting any proceedings or matter, or a writ of certiorrai removing any proceedings or matter into the High Court or any division thereof for any purpose, the Court may make an order requiring the act to be done, or prohibiting or removing the proceedings or matter, as the case may be.

(3) The said orders shall be called respectively an order of mandamus, an order of prohibition and an order of certiorari.

(4) No return shall be made to any such order and no pleadings in prohibition shall be allowed, but the order shall be final, subject to any right of appeal therefrom.

(5) In any enactment references to any writ of mandamus, prohibition or certiorari shall be construed as references to the corresponding order and references to the issue or award of any such writ shall be construed as references to the making of the corresponding order.

In my opinion there is no justification in our country for extending to injunctions the considerations governing the prerogative writ of mandamus. In Ceylon, as in England since 1938, mandamus is a statutory remedy (s. 42, Courts Ordinance), and in our country it was always a mandate in the nature of a writ of mandamus and never a prerogative writ.

For the reasons I have given I would allow the appeal with costs both here and below. I direct that judgment be entered for the plaintiff as prayed for.

Pulle, J.

This appeal raises difficult points of interpretation of Section 3 of the Land Redemption Ordinance, No. 61 of 1942. I am inclined to the opinion that the draftsman had in view the simplest of mortgage transactions by which an owner who has mortgaged a land which is a single physical entity ultimately loses title thereto because it is sold in execution of a mortgage decree or is compelled to transfer it to the mortgagee in satisfaction or part satisfaction of a debt due to him under the mortgage. This case shows that some mortgage transactions can be of a very complex character. The question which has to be determined is whether the language of section 3 can be so made to apply to the facts of the case under appeal as to enable one to say that the 2nd defendant, the Land Commissioner, acted *intra vires* in taking steps to acquire the four allotments of land described in the schedule to the plaint.

The facts are fully stated in the judgment of my Lord, the Chief Justice, and I need not recapitulate them. The broad feature is that the mortgagor, the 3rd defendant, transferred by deed P5 not the entirety of the lands hypothecated by the bonds P1 and P2 but only a portion in satisfaction of the mortgage decree entered on P2. There were five mortgagees on the bond P2 which had been put in suit by one only of the mortgagees named Sockalingam Chettiar in whose favour the hypothecary decree P4 in the usual form had been entered. The transfer P5 was made out to operate as a conveyance of 2/3rds undivided share of the lands scheduled in P5 to Sockalingam Chettiar and as a conveyance of the balance 1/3rd to one Sekappa Chettiar who was one of the mortgagees on the bond P2. The final result of the transaction was that the 3rd defendant saved for himself a portion of the lands mortgaged by P1 and P2 by satisfying the decree in favour of Sockalingam Chettiar and also by obtaining a discharge of the earlier bond P1.

Two arguments of learned counsel for the appellant to the effect that the conditions prescribed by Section 3(1) (*b*) of the Ordinance have not been satisfied ought, in my opinion, to be accepted. The first is that after decree on the mortgage bond was entered in favour of Sockalingam Chettiar alone there was no debt due by the mortgagor to Sekappa Chettiar on the bond P2 although Sekappa Chettiar was a party to it, or on the bond P1 for the obvious reason that Sekappa was not a party to P1. Then in satisfaction of the debt due to Sockalingam Chettiar, represented by the money decree entered in his favour in the mortgage suit, what was transferred to him was an undivided share of the several lands described in the schedule to P5. It seems to me to be clear that section 3 of the Ordinance contemplates neither the mortgage of an undivided share of a land nor the transfer to a mortgage creditor of anything less than a single land or several lands as physical entities. The reasons are elaborated in the judgment of my Lord and I do not think I can usefully add anything to it. The legal effect of the conveyances to Sockalingam Chettiar and Sekappa Chettiar is to place the transfer P5 outside the ambit of section 3 (1) (*b*) from which it results that the Land Commissioner exceeded his powers when he took steps to acquire the lands. This renders it unnecessary for me to deal with the other arguments directed to show that other conditions in paragraph 3 (1) (*b*) have not been satisfied. I would like, however, to add that I am attracted by the second argument that, as all the lands mortgaged by P2 were not transferred by P5,

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the debt which was satisfied by P5 could not be said, within the meaning of section 3 (1) (*b*), to have been secured by a mortgage of the lands conveyed by P5 when, in fact, the debt was secured by mortgage of those lands *and others*. I readily accede to the argument that provisions such as those contained in the Land Reemption Ordinance, which are aimed at taking away lands lawfully vested in a subject because of the accidental circumstances that the title thereto was derived through a person who having mortgaged it did not have the money to pay off the debt, must be strictly construed. That the lands transferred by P5 were liable on the bond P2 for the whole of the debt does not admit of a doubt. But in applying section 3 (1) (*b*) the proper question that the acquiring authority should ask himself is not whether the lands in P5 were security for the debt on P2 but whether the debt was *secured* by a mortgage of the lands in P5. The latter question cannot, in my opinion be answered in the affirmative if the debt was secured not only by a mortgage of the lands in P5 but also by a mortgage of other lands. This rendering of section 3 (1) (*b*) would not violate any canon of construction but rather satisfy the first rule that words must be given their literal meaning.

An examination of section 3 (1) (*a*) reveals that steps can be taken to acquire a single land sold in execution of a mortgage decree, even though not one of the remaining lands has been sold. It is, therefore, argued that if the debt was satisfied, otherwise than by execution by only one of the lands mortgaged being sold by the debtor to the creditor, the same result ought to follow. The question is asked as to why the legislature should make a distinction between a land sold in execution of a mortgage decree and a land which is the subject of a voluntary sale. It was suggested at the argument that one is a forced sale and the other is not. The reason may not be a good one but would it conclude the question in favour of the acquiring authority? Whether the legislature sought to draw a distinction or not must be gathered by the language used in the statute and if upon a plain reading of the section there is such a distinction the court is not free to refuse to give effect to it. The intention of the legislature can only be ascertained by the language used by it.

The remaining questions argued before us relate to the constitution of the action. The Attorney-General is the 1st defendant and as against him the action was not pressed and it has been dismissed with costs. Whether the Land Commissioner could be sued in his official capacity was debated at length. I find myself on this point in agreement with the conclusion reached by my Lord, the Chief Justice, and also with the conclusion that a statutory functionary like the Land Commissioner can be restrained from acting beyond the scope of the powers conferred by a statute. Assuming that the decision to acquire the lands in question could have been challenged by a mandate in the nature of a writ of *certiorari*, the plaintiff was not confined to that remedy and he had the right to institute a regular action to obtain a declalatory decree and an injunction. The provisions in section 3 (4) was not a bar to the action.

I would, therefore, direct that the decree dismissing the action against the 2nd defendant with costs be set aside and that a decree be entered for the substituted plaintiff against the 2nd defendant as prayed for in the plaint with costs here and below.

K. D. DE SILVA, J.

I have had the advantage of reading the judgment prepared by My Lord the Chief Justice which sets out in full the facts relevant to the decision of this appeal.

W. A. Don Elaris Perera the 3rd defendant-respondent by bond No. 391 of 30th September, 1925 (P 1) hypothecated a number of lands, one of which is called Keeriyankalliya Estate, to secure a sum of Rs. 50,000/- which he borrowed from three Chettiars, namely, Sockalingam, Subramaniam and Arunasalam, repayable with interest at 15%. He gave a secondary mortgage of the same lands by bond No. 499 of April, 1930 (P2) to secure a loan of Rs. 25,000/- carrying interest at the same rate which he obtained from five Chettiars, namely, Sockalingam, Subramaniam, Muttiah, Velayuthan and Sekappa. The two first named mortgagees on this bond are two of the mortgagees on the earlier bond P1. According to the terms of P1 and P2 the amount due on each bond was payable to the mortgageses named therein or to any one of them. On a tertiary mortgage of the same lands Elaris Perera borrowed a sum of Rs. 20,000/- from Elaris Dabrera and executed bond No. 2399 of 8th March, 1931 (P3).

In the year 1933 Sockalingam alone put the bond P2 in suit in D.C. Colombo Case No. 7365 and obtained judgment. The decree (P4) in that case was entered on 22nd June, 1933.

By deed No. 4010 of 4th May, 1935 (P5) the 3rd defendant transferred Keeriyankalliya Estate and some of the other lands mortgaged on P1

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and P2 to two of the mortgagees, namely, Sockalingam and Sekappa in the proportion of 2/3 to the former and 1/3 to the latter and their rights passed to the original plaintiff by right of purchase.

The consideration appearing in deed P5 is Rs. 75,000/- and this amount was set off in full satisfaction of the claim and costs due on the decree P4 and the principal and interest due on the mortgage bond P1. By that deed the 3rd defendant also undertook to discharge the tertiary bond P3.

Thereafter the 3rd defendant wrote to the Land Commissioner requesting him to take steps under the provisions of the Land Redemption Ordinance No. 61 of 1942 to acquire the lands conveyed on deed P5. The Land Commissioner after notice to the plaintiff and having considered the objections filed by him made his determination on 12th May, 1947 under section 3 (4) of the Land Redemption Ordinance that Keeriyankalliya Estate be acquired. Thereupon the plaintiff instituted this action against the Attorney-General and the Land Commissioner who are the 1st and 2nd defendants respectively praying for an injunction restraining them from acquiring the land. The 3rd defendant was made a party to the action on an application made by him.

The acquisition was resisted on the following two grounds :- (1) Keeriyankalliya Estate does not come within the category of lands referred to in section 3 (1) (*b*) of the Land Redemption Ordinance (2) The plaintiff was a *bona fide* purchaser for value and therefore the provisions of the Land Redemption Ordinance are not applicable to this land. The defendants while asserting that this land was liable to be acquired under section 3 of that Ordinance contended (1) that the determination of the Land Commissioner under section 3 (4) was final and cannot be questioned in these proceedings (2) that no injunction lay against the Attorney-General and (3) that the 2nd defendant cannot be sued in his official capacity.

It was conceded by the counsel for the plaintiff during the course of the trial that an action for an injunction cannot be maintained against the Attorney-General. The learned District Judge held, *inter alia*, that this land came within the provisions of section 3 (1) (*b*) and dismissed the plaintiff's action with costs.

The main argument addressed to us by Mr. H. V. Perera, *Q.C.*, who appeared for the appellant related to the interpretation of section 3 (1) (*b*). One submission made by him was that as all the lands mortgaged had not been conveyed by deed P5 the Land Commissioner was not entitled to acquire this land. Section 3 (1) (*a*) and (*b*) reads as follows :

> 3. (1) The Land Commissioner is hereby authorised to acquire on behalf of Government the whole or any part of any agricultural land, if the land Commissioner is satisfied that the land was, at any time before or after the date appointed under section 1, but not earlier than the first day of January, 1929, either :—
>
> (*a*) sold in execution of a mortgage decree, or
>
> (*b*) transferred by the owner of the land to any other person in satisfaction or part satisfaction of a debt which was due from the owner to such other person and which was, immediately prior to such transfer, secured by a mortgage of the land.

Where several lands are mortgaged, Mr. Perera argued, that in terms of the rule of interpretation, that words in the singular include the plural, the word " lands " should be substituted for the word " land " in clause (*b*) and that the words " land was " in section 3 (1) should be replaced by the words " lands were." This argument does not commend itself to me. The word "land" in clause (*b*) refers to the " agricultural land " in section 3 (1). Similarly the words " land was " in section 3 (1) have reference to the same 'agricultural land." There can be no doubt on that point.

When the Land Commissioner proceeds to act under section 3 (1) (*b*) he has in mind a particular land which he proposes to acquire. He must satisfy himself that that land is an agricultural land. If it is not of that variety he cannot proceed to acquire it under this Ordinance. Once he is satisfied that it is an agricultural land he must ascertain whether it had been transferred by its owner during the relevant period to any other person in satisfaction or part satisfaction of a debt due from the owner to the transferee. He must further ascertain whether the debt was, immediately prior to the transfer was secured by a mortgage of that land. It is only if all these requirements are fulfilled that the Land Commissioner is entitled to make his determination under section 3 (4) to acquire the land.

Does this land called Keeriyankalliya Estate satisfy these requirements? Admittedly it is an agricultural land. It was also transferred during the relevant period on deed P5 by the owner to Sockalingam and Sekappa. It is stated in the deed P5 itself that the consideration was set off in full satisfaction of the decree P4 and the principal and interest due on the bond P1. Mr. Perera, however, argued that at the time of the execution of the deed P5 no debt was due from the owner to Sekappa because Sockalingam alone had sued on the bond P2 and obtained

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judgment. It is true that once Sockalingam put this bond in suit he alone was entitled to receive payment of the debt. Before the institution of that action the 3rd defendant was entitled to pay the debt to any one of the mortgagees at his discretion. This right of selection he forfeited once Sockalingam filed the mortgage bond action. But that does not mean that he ceased to be indebted to the other mortgagees on P2 or that the mortgagees other than Sockalingam ceased to be his creditors. It is not suggested that in order to obtain the transfer P5 Sekappa paid any consideration other than the amount due to him on the bond P2. Even after the decree P4 was entered there was nothing to prevent Sockalingam from associating with Sekappa in accepting the amount due on that decree. Though the decree was entered the mortgage P2 continued to be effective until it was discharged. It was so held in the case of *Perera vs. Umantenne* 54 N.L.R. 457. In the instant case both bonds P1 and P2 ceased to be effective only on the execution of the deed P5.

Mr. Perera very frankly conceded that if one, of several lands mortgaged, was sold on a mortgage decree during the relevant period the Land Commissioner was entitled to acquire it provided it was an agricultural land. That being so there can be no valid objection to the acquisition of a land under section 3 (1) (*b*) even if that be the only land transferred in satisfaction of the mortgage debt which was secured by the hypothecation of several lands. It does not make any difference that in one case it is a forced sale while in the other it is a voluntary alienation. It may well be that by the enforced sale of one land the full amount due on the decree was realised just as the voluntary sale of one land was in full satisfaction of the debt due on the mortgage.

When several lands are mortgaged each land secures the whole debt. Therefore it cannot be denied that Keeriyankalliya Estate secured the full amounts due on P1 and P2.

Once the Land Commissioner arrived at a correct decision regarding the matters contemplated by section 3 (1) (*b*) his determination to acquire made under section 3 (4) cannot be challenged. In my judgment his decision, that Keeriyankalliya Estate is one which satisfies the requirements of section 3 (1) (*b*), is a correct one.

The other issue raised at the trial, namely, that the Land Commissioner was not entitled to acquire this land because the plaintiff was a *bona fide* purchaser for value has no merit and was not pressed at the hearing of this appeal.

As the plaintiff has failed to establish that this land does not come within the provisions of section 3 (1) (*b*) it is not necessary to deal with the other issues raised in the case. I would therefore dismiss the appeal with costs.

*Appeal allowed.*

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*Present at the Hearing :* Earl Jowitt, Lord Oaksey, Lord Cohen, Lord Keith of Avonholm, Mr. L. M. D. de Silva

## THE COLOMBO APOTHECARIES' COMPANY LIMITED vs. MARTHA AGNES PEIRIS AND OTHERS

From

## THE SUPREME COURT OF CEYLON

*S. C.* 457—*D. C. Colombo* 288/Z

*Privy Council Appeal No.* 25 *of* 1955

*Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered the* 11*th December*, 1956.

*Registration—Gift of premises subject to* fidei commissum *in favour of descendants—Transfer of premises by* fidei commissary *during the life time of the fiduciary—Prior registration of the deed of transfer—Gift not registered—Priority and effect of the deed of transfer—Land Registration Ordinance* 1891, *sections* 38, 39*—Decree in previous case declaring fiduciary entitled to title and possession of the premises as against the transferee—Plea of* res adjudicata.

S gifted by a deed P1 to R his son certain premises reserving to himself a life interest and creating a *fidei commissum* in favour of R's descendants. During the life-time of R, his son L by deed 6 D1 transferred the whole of the premises to D, and the deed was registered. P1 was not registered.

Previous to the present action R had sued D for a declaration of title to and ejectment from the premises. The Supreme Court in that case (No. 11739 D.C. Colombo) held that R was entitled to a declaration of title and possession but deleted a finding by the District Court that 6 D1 was null and void.

The plaintiff as a fidei commissary under P1 filed this action in the District Court for a sale of the premises under the Partition Ordinance. The defendant as successor-in-title to D resisted the claim on the ground that the premises belonged to him by reason of the prior registration of 6 D1 under the Land Registration Ordinance 1891. On appeal to the Supreme Court from a dismissal of the plaintiff's action, the Supreme Court held that the principle of prior regis-

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tration was irrelevant, as the decree in case 11739 D.C. Colombo operated as *res adjudicata* in that it decided that P1 prevailed over 6 D1. On appeal to the Privy Council it was argued that as at the time 6 D1 was registered it did not pass any interest, it was not an instrument coming within the range of documents described in section 38 of the Land Registration Ordinance of 1863, and that in consequence the registration was ineffective at the time it was made and remained ineffective thereafter.

**Held** *:* (1) That the description of instruments contained in section 38 is wide and sufficient to cover instruments which though they are ineffective at the time of the execution may become effective at a later date and that 6 D1 effectively wiped out the provisions of P1 as it was a registered instrument within the terms of section 38.

(2) That the decree of the Supreme Court in case No. 11739 did not amount to *res adjudicata* as that case did not decide the question involved in the present action, namely, whether on the death of R the deed of transfer 6 D1 could be said to be a duly registered instrument passing title. That case merely decided that the deed of gift P1 prevailed over 6 D1 and that it fixed D with notice of *fidei commissum*.

*Delivered by* Mr. L. M. D. de Silva

The plaintiff in this case (a respondent to this appeal) instituted the action in the District Court of Colombo for a sale under the Partition Ordinance (Chapter 56, Legislative Enactments of Ceylon) of certain premises situated in Colombo. He pleaded that he and the first five defendants (also respondents to this appeal) were entitled to the property as co-owners. He further pleaded that the 6th defendant (the present appellant) had no right to the premises and was in wrongful possession thereof.

The learned District Judge in an able and careful judgment held that the respondents had no title to the land and dismissed the action. On appeal the Supreme Court held that the plaintiff-respondent and the first defendant-respondent had certain fiduciary rights to the land under a deed of gift of 1870 creating a *fidei commissum*, and that the second to the fifth defendants-respondents also had had certain rights which they had lost owing to prescriptive possession by the appellant. The Supreme Court entered decree accordingly.

The appellant now asks that the decree of the District Court dismissing the action be restored.

It is common ground that one Solomon Rodrigo was originally the owner of the premises. His sole issue was his son Lorenzo Rodrigo. In 1870 by deed No. 8,550 (referred to in the proceedings as P1) Solomon gifted the premises to Lorenzo, reserving a life interest to himself and creating a *fidei commissum* in favour of Lorenzo's defendants, which, as the deed was executed in 1870, was effective for four generations. Solomon died intestate in 1873. Lorenzo died intestate in 1899 leaving issue a daughter Madalena and a son Lawrenti. Madalena died in 1934 intestate and leaving as issue the 2nd to the 5th defendants-respondents. Lawrenti died in 1939 intestate and leaving as issue the plaintiff-respondent and the 1st defendant-respondent. Lawrenti on 21st December, 1895, when his father Lorenzo was still alive, by deed No. 5249 (referred to in the proceedings as 6D1) transferred the whole of the premises to one Dias. It is not disputed that the interest, if any, in the premises which passed to Dias on 6D1 either at the time of execution of 6D1, or at any time thereafter, has, upon a series of instruments, passed to the appellant. It is convenient before dealing with the rest of the case to examine what interest if any the appellant acquired on this series of instruments.

At the time 6D1 was executed Lawrenti had no title to the whole of the premises which he purported to convey or to any interest at all therein because his father Lorenzo was still alive. The deed 6D1 was registered on the 31st December, 1895. The Deed of Gift No. 8,550 (P1) was not registered at the time and was in fact unregistered at the date of action. Sections 38 and 39 of the Land Registration Ordinance No. 8 of 1863 (re-enacted as sections 16 and 17 of the Land Registration Ordinance 14 of 1891) are to the following effect :

> 38 " From and after the time when this Ordinance shall come into operation, every Deed or other instrument of sale Purchase, Transfer, Assignment or Mortgage, of any land or other immovable property, or of Promise, Bargain, Contract or Agreement, for effecting any such object, or for establishing or transferring any security, interest or encumbrance affecting such land or property (other than a Lease at will or for any period not exceeding one month), or of Contract or Agreement for the future sale or purchase or transfer of any such land or property ; and every Deed or Act of Release, Surrender or Annulment of or affecting any such Deed or other instrument, and the Probate of any Will, and every grant of Administration affecting any such land or property and every Judgment or Order of Court affecting any such land or property shall, if executed made granted or pronounced after the time when this Ordinance shall have come into operation, be registered in the Branch Office of the District or Province in which such land or ........................ property is situate ...............
>
> 39 " Every Deed, Judgment Order or other instrument as aforesaid, unless so

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registered, shall be deemed void as against all parties claiming an adverse interest thereto on valuable consideration, by virtue of any subsequent deed, judgment, order or other instrument, which shall have been duly registered as aforesaid. Provided however that fraud or collusion in obtaining such last mentioned deed, judgment, order or other instrument, or in securing such prior registration, shall defeat the priority of the person claiming thereunder, and that nothing herein contained shall be deemed to give any greater effect or different construction to any deed, judgment, order or other instrument registered in pursuance hereof, save the priority hereby conferred on it."

Parties are agreed (subject to the possibility of the intervention of another principle of law discussed later) that, according to the law of Ceylon, had Lorenzo been dead at the times of execution and registration of 6D1, the deed, by reason of registration, would have passed from Lawrenti to Dias such interest as Lawrenti would have had if both his father Lorenzo and grandfather Solomon had died intestate and the grandfather had not executed deed No. 8,550. The registration of 6D1 would have wiped out the provisions of deed No. 8,550. It is also not disputed that under the law of Ceylon by reason of the application of the doctrine *exceptio rei venditae* any interest which Lawrenti would have inherited from Lorenzo after the execution of 6D1 would pass on 6D1 to the transferee although at the time of execution of 6D1 Lawrenti had had no interest. The question which arises is whether the registration of 6D1 at a time when it passed no interest is sufficient to enable the transferee to defeat the provisons of Deed No. 8,550. It is not disputed that if 6D1 had been registered after the death of Lorenzo (instead of being registered before the death) it would have defeated Deed No. 8,550. Upon this point the learned District Judge said :

> " What I wish to emphasize is, that the same instrument though executed at a time when the grantor had no title, is made use of to complete the title of the grantee ; cannot then, this same instrument, though it had been duly registered before the grantor acquired his title, be made use of to give priority by registration over an earlier deed, which is not registered at all or registered subsequent to the acquisition of such title. My answer to this is in the affirmative.
>
> " If the subsequent instrument can be made use of to give title, why cannot the registration of the same instrument confer priority, provided all the other requirements to confer such priority, are present ; the subsequent acquisition of title would not only give the benefit of such title to the instrument already executed, but would also in my opinion give the grantee the benefit of priority by the registration of that instrument ; the position can however be different if the competing deed had been registered before the subsequent acquisition of title ; but if the competing instrument remained unregistered at the time of the acqisition of title, then, I do not think that the subsequent, but duly registered, instrument prevails over the unregistered deed."

Their Lordships agree. It was argued that as at the time 6D1 was registered it did not pass any interest it was not an instrument coming within the range of the documents described in section 38, and that, in consequence, the registration was ineffective at the time it was made and remained ineffective ever after. Their Lordships cannot accept this argument as the description of instruments contained in section 38 is wide and sufficient to cover instruments which though they are ineffective at the time of execution may become effective at a later date. Moreover 6D1 remained on the register from the time it was registered and was on the register at the point of time of, and after, Lorenzo's death. Their Lordships are of opinion that the character of being a registered instrument at that point of time is not avoided or diminished by reason of the fact that it had been on the register before then.

Both sides referred to the ordinances mentioned above in the course of argument and it was not suggested that the Registration Ordinance 1927 made any difference to the conclusions drawn.

On appeal the Supreme Court did not consider the matters discussed in the preceding paragraph because it thought that the intervention of another principle of law made them irrelevant. It took the view :

> " The main arguments addressed to us on behalf of the 6th defendant was that Lawrenti's purported conveyance 6D1 of 1895 was entitled to prevail over the earlier deed P1 by virtue of prior registration. On this point, the learned Judge held in favour of the 6th defendant. In my opinion, however, the issue of prior registration has no application to the facts of this case. An earlier decree P6 of the District Court of Colombo, which was upheld by this Court on appeal, decided that P1 prevailed over 6D1, and this decision operates as *res adjudicata* against the 6th defendant who is the successor-in-title of the unsuccessful party in those proceedings."

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The decree referred to was the decree in case No. 11,739 of the District Court of Colombo. In that case Lorenzo sued Dias, the transferee on 6D1, for a declaration of title to and ejectment from the premises in question. The original of Deed No. 8,550 was unobtainable for the purposes of case 11,739 and Dias raised the defence that by that deed Solomon had gifted the premises directly to his grandson Lawrenti subject to an interest in Lorenzo which had expired. On secondary evidence the contents of deed 8,550 were established to be what now appears in the document P1, which, as stated earlier, is a conveyance by Solomon to Lorenzo reserving a life interest in Solomon and creating a *fidei commissum* in favour of Lorenzo's descendants. Lorenzo would have been entitled to succeed when it became clear that deed 8,550 conveyed nothing directly to Lawrenti as contended by Dias. There was however a finding that deed 8,550 contained a *fidei commissum* and this finding though correct was purely incidental. Upon appeal the decision that Lorenzo was entitled to a declaration of title and possession was affirmed but a finding by the District Court (unnecessary for Lorenzo's success) that the deed of transfer 6D1 from Lawrenti to Dias was null and void was deleted. The deed was restored to its " pristine condition " and, Lorenzo having died during the pendency of the appeal, the question as to what Dias may have received on 6D1 from Lawrenti by reason of " inheritance " by Lawrenti from Lorenzo was expressly left open by the Supreme Court. This is the very question discussed in previous paragraphs. As it was expressly left open nothing that happened in Case No. 11,739 could have given rise to a plea of *res judicata* upon it.

In the present case the Supreme Court on the question of *res judicata* said :

> " The effect and true meaning of P1 was prominently raised in issue between the parties to those proceedings. The basis of the decree against Dias in favour of Lorenzo was (1) that P1 created a valid *fidei commissum* in favour of Lorenzo and his ' descendants ' and (2) that Lawrenti had, at the time when 6D1 was executed during his father's lifetime, only a contingent fidei commissary interest in the property. It follows that the 6th defendant, as the successor-in-title of the purchaser under 6D1, is bound by the decision that P1 prevailed over 6D1."

It is true that in Case No. 11,739 P1 prevailed and 6D1 did not prevail. The question in controversy there was, whether, as stated by the defendant (in that case) P1 conveyed an interest directly to Lawrenti or whether it did not. When P1 was reconstructed on secondary evidence it was clear that P1 conveyed no such direct interest and consequently 6D1 (in which the transferor was Lawrenti) became totally ineffective during the lifetime of Lorenzo. It was no doubt held that P1 created a *fidei commissum*. That fact is not, and has never been, denied by the appellant in the present case, and the decision that P1 created a *fidei commissum* is not material to the considerations in the present case. The question whether it created a *fidei commissum* is not, and has never been, in controversy in this case. What is in controversy is whether, in the completely altered circumstances prevailing on the death of Lorenzo, 6D1 could be said to be a duly registered instrument passing title. The questions involved in this controversy did not arise (and indeed could not have arisen) in case 11,739. All that can be said of the decision in Case No. 11,739 is that it fixed Dias with notice of the *fidei commissum* but this fact appears to be immaterial for the purpose of their Lordship's decision. It was said for the appellant that under the law of Ceylon notice of a prior deed does not alter the effect of the registration of a subsequent deed. This view has not been challenged and it follows that there is nothing in the decision in Case No. 11,739 which detracts from the normal consequences of the registration of 6D1 discussed in previous paragraphs. Upon the series of instruments referred to in those paragraphs the appellant became entitled to an undivided half share of the premises.

The 2nd to the 5th defendants-respondents claimed the remaining half share of the premises as fiduciaries under the deed of gift P1 on the death of Madalena in 1934. The learned District Judge held that the appellant who had been in possession for 26 years had prescribed to the interests of these respondents. This finding was not disturbed by the Supreme Court and has not been challenged on this appeal.

It follows from what has been said that the plaintiff-respondent has no interest in the premises in respect of which she brought this action. Her action must therefore be dismissed.

Their Lordships will humbly advise Her Majesty that the appeal be allowed, that the decree of the Supreme Court be set aside and that the decree of the District Court be restored. The plaintiff-respondent, who was the only appellant to the Supreme Court and who was the only respondent represented on this appeal, must pay the costs of this appeal and the costs of the appeal to the Supreme Court.

*Appeal allowed.*

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G. A. NISSANKA PROCTOR NOTARY COLOMBO

*Present at the Hearing :* LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN, LORD DENNING AND MR. L. M. D. DE SILVA.

## *FROM THE SUPREME COURT OF CEYLON*

## HERBERT ERNEST TENNEKOON, COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS *vs.* PUTHUPATTI KITNAN DURAISAMY.

*Judgment of the Lords of the Judicial Committee of the Privy Council.*

*Delivered the* 19*th May*, 1958.

*Indian and Pakistani Residents (Citizenship) Act No.* 3 *of* 1949—*Respondent, an applicant for registration as a citizen of Ceylon—Requirements for registration—Sections* 6 *and* 22 *as amended by Section* 4 *of the Indian and Pakistani Residents (Citizenship) (Amendment) Act No.* 37 *of* 1950—*Meaning of " permanently settled in Ceylon " in Section* 22 *(b) of the Act—Onus and method of proof of such intention—Not to be equated with " domicile "—Application for registration after satisfying other requirements only establishes a* prima facie *case, not conclusive evidence, for registration.*

*Appeal to the Privy Council—Right of—Meaning of " civil suits or actions " in Section* 3 *of the Appeals (Privy Council) Ordinance (Cap.* 85)—*Same as Section* 52 *of the Charter of* 1833—*Section* 6 *of the Civil Procedure Code.*

**Held :** 1. That an Indian or a Pakistani resident in Ceylon is entitled to be registered as a citizen of Ceylon, if at the time of his application,

(*a*) he and his family, (if any) possess the residential qualification respectively prescribed by section 3 of the Indian and Pakistani Residents (Citizenship) Act.

(*b*) he satisfies all the relevant conditions laid down in section 6 (2) of the Act.

(*c*) he satisfies the requirement as to " origin " in para. (*a*) or that he is a descendant of such a person.

(*d*) he proves that he has " permanently settled in Ceylon ", that is, he must supply evidence that at the time of his application he has the intention of settling permanently in Ceylon.

2. That the application for citizenship together with compliance of the requirements in (*a*), (*b*) and (*c*) afford a *prima facie* case for registration. It does not amount to conclusive evidence of an intention to settle permanently in Ceylon and entitling him as of right to be registered as a citizen. The Commissioner, after considering all relevant matters, may yet decide that at the time of application the applicant had not a genuine intention to settle permanently in Ceylon. To prove such intention, it is not necessary for the applicant to prove change of domicile.

3. That there is a right of appeal to the Privy Council from an order of the Supreme Court refusing or allowing an application for registration under the Act.

4. That the words " civil suits or actions " in section 3 of the Appeals (Privy Council) Ordinance bears the same meaning as that contained in section 52 of the Charter of 1833. Section 52 of the Charter granted to a subject labouring under a sense of grievance the fundamental right of appealing to the sovereign and did not intend to exclude cases differentiated by reference to the form of proceedings, regardless of the gravity of the result occasioned by them. It is erroneous to limit the words " civil suits or action in section 3 of the Appeals (Privy Council) Ordinance to a " proceeding in which one party sues or claims something from another in regular proceedings ".

*Obiter.* The term " action in the Charter and the Appeals Ordinance is that which is contained in section 6 of the Civil Procedure Code.

**Cases referred to :** *Winans vs. Attorney-General* (1904) A.C. 287.
*Ross vs. Ross* (1930) A.C. 1.
*Thomas vs. The Commissioner for Registration of Indian and Pakistani Residents* ( ) 55 N.L.R. 40.
*Commissioner of Stamps, Straits Settlement vs. Oei Tjong Swan* (1933) A.C. 378.
*Silverline Bus Co., Ltd. vs. Kandy Omnibus Co., Ltd.*, 58 N.L.R. 193 (dissented from).

*Sir Frank Soskie, Q.C.*, with *M. Solomon* for the appellant.

*Walter Jayawardena* with *Sirimevan Amarasinghe* for the respondent.

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Lord Morton

This is an appeal from the Supreme Court of Ceylon. It will be convenient to refer to the appellant as " the Commissioner " and to the respondent as " the applicant ".

On the 29th March, 1951, the applicant applied for registration as a citizen of Ceylon, under Section 4 (1) of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949, hereafter referred to as " the Act ". His application was refused by Mr. Adhihetty, one of the Deputy Commissioners, on the 25th January, 1954, but an appeal by the applicant to the Supreme Court of Ceylon was successful. The Commissioner now appeals from the decision of the Supreme Court, with the leave of that Court.

Before counsel for the Commissioner opened the appeal, counsel for the applicant took a preliminary objection to the jurisdiction of the Board, on the ground that the Supreme Court had no power to give leave to appeal to Her Majesty in Council in this case. Their Lordships held that this objection failed, for reasons which will be stated later.

The main question in the appeal is whether the Deputy Commissioner who dealt with this case was justified in holding that the applicant had failed to prove that he was " permanently settled in Ceylon ", within the meaning of section 22 of the Act (as amended by section 4 of the Indian and Pakistani Residents (Citizenship) (Amendment) Act, No. 37 of 1950).

The Act came into operation on the 5th August, 1949. It makes provision for granting the status of a citizen of Ceylon to Indian and Pakistani residents in Ceylon who are possessed of a special residential qualification, upon the conditions and in the manner therein prescribed. The residential qualification is defined in section 3 as consisting of " uninterrupted residence in Ceylon " immediately prior to the 1st day of January, 1946, for a period of not less than 10 years (in the case of a single person) or 7 years (in the case of a married person) combined with " uninterrupted residence in Ceylon " from the 1st day of January, 1946, until the date of the application for registration. Continuity of residence is to be deemed to be uninterrupted by occasional absences from Ceylon not exceeding twelve months in duration on any one occasion. Section 4 of the Act provides that any Indian or Pakistani resident possessed of this residential qualification " may, irrespective of age or sex exercise the privilege of procuring registration as a citizen of Ceylon for himself or herself, and shall be entitled to make application therefor " in the manner prescribed by the Act. The section further permits the additional registration of wives and of dependant minor children ordinarily resident in Ceylon and, in certain defined circumstances, extends the privilege of procuring registration to widows and orphaned minor children of Indian or Pakistani residents.

Section 6 of the Act (as amended by section 3 of the said Act, No. 37 of 1950) provides as follows :—

" It shall be a condition for allowing any application for registration under this Act that the applicant shall have—

(1) first proved that the applicant is an Indian or Pakistani resident and as such entitled by virtue of the provisions of sections 3 and 4 to exercise the privilege of procuring such registration, or that the applicant is the widow or orphaned minor child of an Indian or Pakistani resident and as such entitled by virtue of those provisions to exercise the extended privilege of procuring such registration : and

(2) in addition, except in the case of an applicant who is a minor orphan under fourteen years of age, produced sufficient evidence (whether as part of the application or at any subsequent inquiry ordered under this Act) to satisfy the Commissioner that the following requirements are fulfilled in the case of the applicant, namely—

(i) that the applicant is possessed of an assured income of a reasonable amount, or has some suitable business or employment or other lawful means of livelihood, to support the applicant and the applicant's dependants, if any ;

(ii) where the applicant is a male married person (not being a married person referred to in paragraph (*a*) of section 3 (2) ), that his wife has been ordinarily resident in Ceylon, and, in addition, that each minor child dependent on him was ordinarily resident in Ceylon while being so dependent ;

(iii) that the applicant is free from any disability or incapacity which may render it difficult or impossible for the applicant to live in Ceylon according to the laws of Ceylon ;

(iv) that the applicant clearly understands that, in the event of being registered as a citizen of Ceylon—

(*a*) the applicant will be deemed in law to have renounced all rights to the civil and political status the applicant has had, or would, but for such registration in Ceylon, have had, under any law in force in the territory or origin of the applicant or the applicant's parent, ancestor or husband, as the case may be, and

(*b*) in all matters relating to or connected with status, personal rights and duties and property in Ceylon, the applicant will be subject to the laws of Ceylon."

Section 22 of the Act (as amended by section 4 of the said Act No. 37 of 1950) defines an " Indian or Pakistani resident " as

" a person—

(*a*) whose origin was in any territory which, immediately prior to the passing of the Indian Independence

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Act, 1947, of the Parliament of the United Kingdom, formed part of British India or any Indian State, and

(*b*) who has emigrated therefrom and permanently settled in Ceylon,

and includes—

(i) a descendant of any such person ;

and

(ii) any person permanently settled in Ceylon, who is a descendant of a person whose origin was in any territory referred to in the preceding paragraph (*a*) ; "

The Act makes provision for the appointment of an officer to be known as the Commissioner for the Registration of Indian and Pakistani Residents, of Deputy Commissioners and of investigating officers. Applications for registration are to be addressed to the Commissioner or a Deputy Commissioner and are to be in a prescribed form containing all relevant particulars and supported by affidavit. Certified copies of documents may also be submitted. Each application is to be referred to an investigating officer for investigation and report, and the Commissioner (or Deputy Commissioner) is to take such report into consideration in dealing with the application. Where he is of opinion that there is a *prima facie* case for allowing the application, he must give public notice that, in the absence of any written objection received by him within a month, an order allowing the application will be made, and, in the absence of any such objection, the application is to be allowed. If any objection is received, an enquiry into the nature of the objection is to be ordered.

Where the Commissioner (or Deputy Commissioner) is of opinion that a *prima facie* case has not been established, he must serve on the applicant a notice setting out the grounds on which the application will be refused and giving the applicant an opportunity within three months to show cause to the contrary. If no cause is shown, an order refusing the application is made. If cause is shown, an enquiry is to be ordered, unless the Commissioner (or Deputy Commissioner) takes the steps he is authorised to take when there is a *prima facie* case for allowing an application (section 9 (3) ').

Such enquiry is to be conducted by the Commissioner or a Deputy Commissioner, who is to have all the powers of a District Court to summon witnesses, compel the production of documents and administer oaths, but the proceedings are to be as far as possible " free from the formalities and technicalities of the rules of procedure and evidence applicable to a court of law ", and may be conducted " in any manner not inconsistent with the principles of natural justice, which to him " (the Commissioner or Deputy Commissioner) " may seem best adapted to elicit proof concerning the matters that are investigated ". At the close of such an enquiry, the Commissioner (or Deputy Commissioner) must either take the steps he is authorised to take whenever there is a *prima facie* case for allowing an application, or make an order refusing the application.

Section 15 of the Act provides that an appeal against an order refusing or allowing an application is to lie to the Supreme Court.

The applicant applied, on the 29th March, 1951, to be registered under the Act as a citizen of Ceylon together with his family, stating in his application that he was a married man, an Indian or Pakistani resident, had been continuously resident in Ceylon during the period of seven years commencing on the 1st January, 1939, and ending the 31st December, 1945, and from the 1st January, 1946, to the date of the application, and making a declaration in the terms of section 6 (2) (iii) and (iv) of the Act. In his supporting affidavit he deposed that he had been born in India on the 1st July, 1912, and had been married in April, 1932, and that he was employed as Head Clerk at Glentilt Estate, Maskeliya, having also a share of Rs. 2,000 in boutique No. 13, Main Street, Maskeliya. In his covering letter he stated that he came to Ceylon in March, 1931, went back to India for his marriage in April, 1932, and returned to Ceylon with his wife in June, 1934, " from which time I am continually residing in Ceylon with my wife and children. My 4 children are all born in Ceylon.

" During the above period of our stay in Ceylon, I had been to India with my family to see my aged parents and relations on 4 occasions and stayed in India not more than 15 days during each trip, and we did not visit India during 1942-49."

The application was supported by a letter from one M. G. E. de Silva, a Justice of the Peace of Maskeliya, who wrote that from the year 1934 the applicant and his family had " been continually resident in Ceylon with the exception of short leaves which amounted to not more than one month on each occasion."

In the course of the investigation, the applicant produced to the investigating officer a certificate dated 18th August, 1951, from the Superintendent of Brunswick Group, Maskeliya, where he had been employed from September, 1934, to September, 1944, stating that " according to Mr. Duraisamy's statement, verified by the Estate records, he and his family had been in continuous residence on this estate, except for short visits to India for about 15 days once in two years."

On the 28th January, 1952, the applicant answered a questionnaire stating that the only

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visit he, his wife and minor children had paid to India or Pakistan since 1st January, 1936--1st January, 1939, was a visit to India in April, 1942, for one month to see his mother and he further declared that he had remitted sums of Rs. 70/- in May, June and July, 1951, to India for his mother. He subsequently stated, in answer to an enquiry from the office of the Commissioner for the Registration of Indian and Pakistani Residents, that these remittances were made under the estate-group scheme on special permit obtained from the Exchange Controller, Colombo, and that he had declared himself on the appropriate forms of application for this purpose, known as " B " forms, to be temporarily resident in Ceylon.

On the 9th September, 1952, R. T. Ratnatunga, a Deputy Commissioner for the Registration of Indian and Pakistani Residents, gave the applicant notice that he had decided to refuse his application for registration unless he showed cause to the contrary within a period of three months. The grounds for such refusal were specified as follows :—

> " You have failed to prove that you had permanently settled in Ceylon ; the contrary is indicated by the fact that, in seeking to remit money abroad, you declared yourself to be temporarily resident in Ceylon."

The applicant replied on the 26th September, 1952, stating the purpose of the remittances to be for the maintenance of his mother and two invalid sisters, and requesting a reconsideration of his case.

The Deputy Commissioner acknowledged this letter on the 9th October, 1952, and stated that an enquiry would be held under section 9 (3) of the Act.

At the enquiry, which was held on the 25th January, 1954, before V. D. Adhihetty, a Deputy Commissioner, the applicant gave evidence substantially confirming his personal history and circumstances as stated in his application. With regard to his visits to India he said that these were not correctly stated in the Superintendent's certificate dated the 18th August, 1951. " The actual visits I paid to India during this period are in June, 1939, May, 1942, and September, 1949. From the time I came to Ceylon in 1939, I have paid 6 visits to India up to date."

As to the remittances to India, his evidence was as follows :—

> " My mother and sister are dependent on me. From 1935 onwards I have been supporting my mother and sister. Before the Exchange Control I used to send Rs. 25/- per month for the maintenance of my mother and sister. I applied to the Controller for a permit in December, 1949. The Controller sent me a General Permit to the Superintendent of the estate, and informed me that I had to remit money through the Estate Group Scheme. Under this permit I sent money to India through the Estate Group Scheme from 1950 March about Rs. 50/- a month. I had a renewal permit from 7th April, 1951, authorising me to send Rs. 70/- a month. Under this permit I sent three sums of Rs. 70/- a month in May, 1951, June, 1951, and in July, 1951. I signed ' B ' Forms under the Estate Group Scheme for the various sums I had remitted to India since 1950 through the Estate Group Scheme, and for each remittance I perfected a ' B ' Form wherein I made a declaration that I was temporarily resident in Ceylon. I ceased sending money from July, 1951, when I came to know definitely that remitting money will affect my Citizenship rights through the Estate Group Scheme. It is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India."

At the end of the enquiry the Deputy Commissioner made an order refusing the application, upon grounds which will be considered later, and the applicant appealed to the Supreme Court of Ceylon. The appeal was first argued before Fernando, A.J., and that learned Judge on the 6th August, 1954, reserved the case for the decision of two or more judges as the Chief Justice should determine.

On the 7th and 8th February, 1955, the appeal was heard by a bench consisting of Gratiaen, J., and Sansoni, J.

On the 18th February, 1955, the Court delivered judgment allowing the appeal with costs and directing the Commissioner to take the appropriate steps under the Act on the basis that a *prima facie* case for registration had been established.

The learned Judges in giving their judgment said :—

> " The main provisions of the Indian and Pakistani Residents (Citizenship) Act, No. 3 of 1949 (hereinafter called ' the Act '), must now be examined with special reference to the qualifications prescribed for acquiring citizenship by registration. Bearing in mind the legislative plan as a whole, we conclude generally that the intention was to admit any Indian or Pakistani residing in Ceylon to the privilege of Ceylon citizenship (if claimed within a stipulated period of time) provided that he satisfied certain tests prescribed by statute for establishing that his association with the Island could not (or could not longer) be objected to as possessing a migratory or casual character.
>
> The main question before us relates to the meaning of the words ' permanently settled in Ceylon ' in Section 22 of the Act (as amended by Section 4 of Act No. 37 of 1950) which defines an ' Indian or Pakistani resident '."

After reading section 22 and dealing with a argument—not relied upon before the Board—as to the effect of the word " emigrate " in the section, the learned Judges continued :—

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"Section 6 (1), read with Section 22, directly raises the question whether an applicant is 'permanently settled in Ceylon'. We therefore propose to postpone our discussion of Section 6 (1) until we have first examined the other special qualifications and conditions for registration prescribed by the Act:

(1) the applicant must possess a minimum qualification of 'uninterrupted residence' as defined in Section 3;

(2) his wife (if he is married) and his minor dependent children (if any) must also possess certain residential qualifications—Section 6 (2) (ii) in its recently amended form;

(3) he must establish a reasonable degree of financial stability—Section 6 (2) (i);

(4) he must be free from any disability or incapacity of the kind referred to in Section 6 (2) (iii);

(5) he must 'clearly understand' the statutory consequence of registration—Section 6 (2) (iv).

One observes in all these requirements an underlying decision to deny Ceylon citizenship to non-nationals whom Parliament for one reason or another would consider unsuitable for that privilege. Hence the insistence on the long and 'uninterrupted' residence of the applicant himself and on the residential qualifications of his immediate family (if any) regarded as a unit; and the further safeguard that his prospects of useful citizenship were not likely to be endangered by poverty or other handicaps. Each of these requirements, if satisfied, would guarantee a more enduring quality to the tie between the new citizen and the country which he has elected to adopt, 'for better, for worse', as his own."

Later, the learned Judges observed:

"An Indian or a Pakistani residing in Ceylon is in our opinion entitled as of right to exercise the privilege of being registered as a citizen of Ceylon if at the time of his application (made within the requisite period of time)

(1) he and his family (if any) possess the residential qualifications respectively prescribed for them by the Act, and he demonstrates his intention to settle permanently in Ceylon by electing irrevocably to apply for registration; and

(2) he satisfies all the other relevant conditions laid down in Section 6 (2) of the Act; and

(3) the requirement as to 'origin' in paragraph (*a*) of the words of the definition is satisfied, or he is at least a descendant of a person whose origin was as aforesaid."

Their Lordships agree with the passages just quoted, subject to one qualification. They think that the Supreme Court has gone too far in using the words "entitled as of right". Section 6 (1) of the Act, read with Section 22, places upon the applicant for registration the burden of proving that he has "permanently settled in Ceylon", and "in addition", of proving the matters set out in Section 6 (2). In order to discharge this burden of proof he must supply evidence that at the time of his application he has the intention of settling permanently in Ceylon. It would appear from the passage just quoted that in the opinion of the Supreme Court an applicant provides *conclusive* evidence of this intention if, having satisfied all the other conditions laid down in the Act, he "demonstrates" it by electing irrevocably to apply for registration. Their Lordships would agree at once that this election, combined with the long and continuous residence in Ceylon which the Act prescribes, and supported as it must be by an affidavit, affords strong evidence that an applicant has permanently settled in Ceylon. The decision to apply for citizenship is one of great importance, especially as it would appear to preclude the applicant from ever thereafter obtaining Indian citizenship—(see Section 5 (3) of the Indian Citizenship Act, 1955, and compare Section 11 of that Act), and the Commissioner should certainly attach great weight to the fact that the applicant has satisfied the conditions set out in paragraphs (1), (2) and (3) in the passage just quoted from the judgment. This fact, taken by itself, is sufficient in their Lordships' opinion to discharge the initial burden of proof which lies upon the applicant and to establish a *prima facie* case for registration as a citizen of Ceylon; but they cannot find that this fact precludes the Commissioner from coming to a decision, after considering all relevant matters, that at the time of his application the applicant had not a genuine intention to settle permanently in Ceylon.

Their Lordships are, however, of opinion that the Supreme Court was clearly right in allowing the appeal of the applicant from the decision of the Deputy Commissioner.

It is plain, from the notice of 9th September, 1952, already quoted, and from the terms of the Order of 25th January, 1954, that the Deputy Commissioner based his refusal of the application entirely upon his view that the applicant had failed to prove that he had permanently settled in Ceylon. In their Lordships' view the approach of the Deputy Commissioner to the determination of this question was wrong in two important respects.

First, he said in the course of his Order—

"Applicant's domicile of origin is clearly India and there is a presumption that this domicile continues, unless the applicant has adopted a Ceylon domicile of choice, that is, in other words, he had permanently settled in Ceylon. The burden of proof that he had changed his Indian domicile or, in other words, that he had permanently settled in Ceylon as required by section 6 read with section 22 of the Act, lies on him."

Their Lordships do not regard the question of proving a "change of domicile" as coming into the matter at all. The burden of proving a change of domicile is indeed a heavy one, as is illustrated by the case of *Winans vs. Attorney-General* (1904) A.C. 287 and many other cases. The Act has made no reference to domicile, but

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has placed upon the applicant the burden of proving that at the time of his application he had an intention to settle permanently in Ceylon. Their Lordships have already expressed their view as to the manner in which that burden of proof can be discharged. They think it likely that the legislature deliberately refrained from any reference to change of domicile, in order to free the Commissioner or Deputy Commissioner (who may not be a lawyer) from the responsibility of investigating a question which, as the Judges of the Supreme Court observed " in most cases would present formidable obstacles even to an experienced Judge trained in the law ".

Secondly, the Deputy Commissioner concluded his Order by saying :—

> " the applicant has admitted that he has made several remittances to India from March, 1950, to July, 1951, through the Estate Group Scheme by perfecting ' B ' forms wherein he declared that he was temporarily resident in Ceylon. The applicant is an educated man and he knew the implications of declaring that he was temporarily resident in Ceylon. There is clear evidence that the presumption referred to above has not been rebutted. On his own admission he was temporarily resident in Ceylon at the date of his application. The application is therefore refused."

In *Ross vs. Ross* (1930) A.C. 1 at page 6 Lord Buckmaster observed " declarations as to intention are rightly regarded in determining the question of a change of domicile, but they must be examined by considering the person to whom, the purposes for which and the circumstances in which they are made, and they must further be fortified and carried into effect by conduct and action consistent with the declared expression ".

In the present case the purpose for which the applicant signed Form " B " is beyond doubt. His mother and crippled sisters were resident in India and dependent on him. He found that under the Estate Group Scheme there would be difficulties in sending remittances to these relatives if he stated in Form " B " that he was permanently resident in Ceylon. Therefore, to quote his evidence " for each remittance I perfected a ' B ' Form wherein I made a declaration that I was temporarily resident in Ceylon . . . it is a fact that I declared myself temporarily resident in Ceylon for the purpose of remitting money to India."

In their Lordships' view documents signed in these circumstances and for this purpose were of little evidential value for the purpose of determining the question before the Deputy Commissioner, especially as they were not " fortified and carried into effect by conduct and action consistent with the declared expression ". Apart from the signature of the " B " Forms no action of the applicant indicated that his residence in Ceylon was of a temporary nature. On the contrary, his conduct throughout pointed strongly to an intention to settle permanently in that country. In these circumstances the Deputy Commissioner was not justified in treating the statement made on the " B " Forms as a sufficient ground for refusing the application. Their Lordships agree with the realistic view taken in similar circumstances by Nagalingam, A.C.J., in the case of *Thomas vs. The Commissioner for Registration of Indian and Pakistani Residents*, 55 N.L.R. 40.

For these reasons the decision of the Deputy Commissioner cannot stand, and the order made by the Supreme Court should be upheld.

Their Lordships now turn to the preliminary objection to their jurisdiction, already mentioned. This objection was based on the Appeals (Privy Council) Ordinance of Ceylon (Cap. 85, Vol. II, Legislative Enactments of Ceylon, p. 420), hereafter referred to as " The Appeals Ordinance ", the relevant parts whereof are the following :—

> " 3. From and after the commencement of this Ordinance the right of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council against the judgments and orders of such Court shall be subject to and regulated by—
>
> (*a*) the limitations and conditions prescribed by the Rules set out in the Schedule, or by such other Rules as may from time to time be made by His Majesty in Council; and
>
> (*b*) such general rules and Orders of Court as the Judges of the Supreme Court may from time to time make in exercise of any power conferred upon them by any enactment for the time being in force."

and

> " Rule 1. Subject to the provisions of these rules, an appeal shall lie—
>
> (*a*) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of five thousand rupees or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of five thousand rupees or upwards ; and
>
> (*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the appeal is one which by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision."

The Supreme Court granted leave to appeal to the Privy Council on the ground that its decision involved a question of " great general or public importance " within the meaning of Rule 1 (*b*). It was conceded before the Supreme Court by the respondent that a question of " great general or public importance " was involved, but it was argued that no appeal lay from its judgment,

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on the ground that an appeal to the Supreme Court under section 15 of the Indian and Pakistani Residents Citizenship Act was not a " civil suit or action in the Supreme Court " within the meaning of section 3 of the Appeals Ordinance. The Supreme Court did not accept this argument. The learned Chief Justice referred to two conflicting lines of decision and allowed the application with some hesitation, observing that " the question that arises for decision is admittedly one which by reason of its great importance should be submitted to Her Majesty in Council for decision ". Mr. Justice Gratiaen said that " it may be conceded that the proceedings " before the Deputy Commissioner " did not at that stage constitute a ' civil suit or action ' " but " had no hesitation in reaching the conclusion that the parties to the appeal were parties so a ' civil suit or action in the Supreme Court '."

It was argued before their Lordships that the learned Judges of the Supreme Court were wrong, that they had not power to grant leave to appeal, and that consequently their Lordships had no jurisdiction to hear the appeal, unless and until an application to Her Majesty for special leave to appeal was successfully made. It is thus necessary to examine whether the proceedings before the Supreme Court were a " civil suit or action " within the meaning of section 3. There has been a conflict of authority in Ceylon upon the point.

The words " civil suit or action " first occur in section 52 of the Charter of 1833, which conferred on the subject a right to appeal to the Sovereign. It is in the following terms :—

> " 52. And We do further grant, ordain, direct, and appoint that it shall be lawful for any person or persons being a party or parties to any civil suit or action depending in the said Supreme Court to appeal to Us, Our heirs and successors in Our or Their Privy Council against any final judgment, decree, or sentence, or against any rule or order made in any such civil suit or action, and having the effect of a final or definitive sentence, and which appeals shall be made subject to the rules and limitations following."

There follow a number of rules and limitations designed among other things to exclude cases considered of insufficient importance to be the subject-matter of an appeal to the Privy Council It is to be observed that the section enabled a person, subject to these rules and limitations, to appeal as of right to the Sovereign. Section 53, which their Lordships think unnecessary to set out here, preserved intact the right of the Sovereign to admit appeals from the subject even where the subject could not appeal as of right.

It was argued before the Supreme Court and their Lordships that a civil suit or action means a proceeding in which one party sues for or claims something from another. No doubt the words are properly applicable to such cases and they are the cases to which the words are most frequently applied. But it is necessary to enquire whether the application of the words as they appear in section 52 of the Charter must be limited to such cases. Their Lordships would make the general observation that section 52 of the Charter was granting to a subject labouring under a sense of grievance the fundamental right of appealing to the Sovereign and that, though it would be natural to exclude from the range of permissible appeals cases of insufficient importance, it would be difficult to imagine an intention to exclude cases differentiated by reference to the form of the proceedings, regardless of the gravity of the result occasioned by them. And as section 3 of the Appeals Ordinance sets out the manner in which " the right of parties to civil suits or actions in the Supreme Court to appeal to His Majesty in Council " is to be regulated, their Lordships do not doubt that the words " civil suits or actions " must be given the meaning which they bore in the Charter of 1833.

The meaning of the words " civil cause " was considered by the Board in the case of *Commissioner of Stamps, Straits Settlements vs. Oei Tjong Swan* (1933) A.C. 378. The Commissioner of Stamps, under an ordinance of the Straits Settlements, had certified the amount of duty payable on the estate of a deceased person. The executor of the deceased appealed to the Supreme Court against the Commissioner's decision and succeeded. An appeal by the Commissioner to the Court of Appeal was dismissed. The Commissioner applied to the Court of Appeal for leave to appeal to His Majesty in Council but leave was refused on the ground that it was not competent to that Court to grant leave. Their Lordships' Board held that this last decision was wrong, and that under the law of the Straits Settlements it was competent for the Court of Appeal to grant leave to appeal. In arriving at a decision the Colonial Charter of 1855 came under their Lordships' consideration. Section 58 is to the following effect :

> " 58. And we do hereby further ordain, that if the East-India Company or any person or persons, shall find him, her, or themselves aggrieved by any judgment, decree, order, or rule of the Court of Judicature of Prince of Wales' Island, Singapore, and Malacca, in any case whatsoever, it shall be lawful for him, her, or them to appeal to us, our heirs, or successors, in our Privy Council, in such manner, and under such restrictions and qualifications, as are hereinafter mentioned ; that is to say, in all judgments, decrees, or determinations made by the said Court of Judicature in any civil cause, the party or parties against whom or to whose

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immediate prejudice the said judgment, decree, or determination shall be or tend, may by his or their petition, to be preferred for that purpose to the said Court, pray leave to appeal to us, our heirs or successors, in our Privy Council, stating in such petition the cause or causes of appeal ; "

then follow some provisions as to stay of execution and security for costs ; and finally, upon such provisions being satisfied, the " party or parties so thinking him, her or themselves to be aggrieved shall be at liberty to prefer and prosecute " the appeal.

Lord Macmillan delivering the judgment of the Board said,

" It is true that the Ordinance in section 80 which deals with appeals from decisions of the Commissioner does not confer a right of appeal to His Majesty in Council. But the Colonial Charter of 1855 provides for leave to appeal being granted by the Court of the Colony from ' all judgments, decrees or determinations made by the said Court of Judicature in any civil cause '. And section 1154 of the Civil Procedure Code, provides that subject to certain conditions ' an appeal shall lie from the Court of Appeal to His Majesty in Council (*a*) from any final judgment or order '. Wider language it would be difficult to imagine. Their Lordships do not think it necessary to repeat the reasons adduced by the Chief Justice against excluding the decision of the Appeal Court in the present instance from the scope of these provisions and content themselves with expressing their agreement. The decision against which the Commissioner sought to obtain leave to appeal was in their Lordships' view not a mere award of an administrative character but a judgment or determination made by the Court in a civil cause within the meaning of the Charter and a final judgment or order within the meaning of section 1154 of the Civil Procedure Code, and as such the Court could competently have granted leave to appeal from it to His Majesty in Council."

Their Lordships interpret the words " wider language it would be difficult to imagine " as applying both to the Charter of 1855 and to section 1154 of the Civil Procedure Code.

The Board was then considering the words " civil cause ", but their Lordships see no good ground for drawing any distinction between these words and " civil action ". They agree with the observations just quoted, and they see no good ground for distinguishing the present case from the case just cited. They propose to follow that case, although the decision was arrived at without the assistance of argument by counsel, and to hold that the Supreme Court had power to grant leave to appeal in the present case. The preliminary objection therefore fails.

Reference was made in the course of the argument to the definition of the word " action " in the Courts Ordinance (Cap. 6, Legislative Enactments of Ceylon, Vol. I, p. 25), and in the Civil Procedure Code (Cap. 86, Legislative Enactments of Ceylon, Vol. II, p. 428), both of which are earlier in date than the Appeals Ordinance. In each of these earlier Ordinances " action " is defined to mean " a proceeding for the prevention or redress of a wrong ". It was argued that the order of the Deputy Commissioner could not be said to be a wrong in the sense that a tort or a breach of contract can be said to be a wrong, as there was nothing illegal in the action of the Deputy Commissioner. On the other hand it was argued that the word " wrong " in the definition has a wider connotation and would include the consequence of an order made by a Commissioner which is wrong though legally made. It is not necessary for their Lordships to decide the point. The Charter was granted long before the two Ordinances mentioned were enacted and, as their Lordships have already pointed out, the words " civil suits or actions " in the Privy Council Appeals Ordinance must bear the same meaning as they bore in the Charter.

In addition to the definition of " action " (contained in section 5) mentioned above the Civil Procedure Code contains the following in section 6 :

" 6. Every application to a court for relief or remedy through the exercise of the court's power or authority or otherwise to invite its interference, constitutes an action ".

This is what their Lordships think is the meaning of " action " in the Charter and in the Appeals Ordinance though, as will have been seen, they do not found their decision on this section.

After the application for leave to appeal to the Privy Council had been granted in the present case a bench of five judges (one of whom dissented) in the case of *Silverline Bus Co., Ltd. vs. Kandy Omnibus Co., Ltd.*, 58 N.L.R. 193, after a very full and careful review of two conflicting lines of authority, decided that an application to the Supreme Court for a writ of *certiorari* was not a " civil suit or action " within the meaning of section 3 of the Appeals Ordinance. Counsel for the Commissioner in the present case did not contend that the decision in the *Silverline* case was wrong : the point actually decided is not before their Lordships, and they have heard no argument upon it. It follows, however, from the views which they have already expressed that they cannot accept the view of Basnayake, C.J., that the words " civil suit or action " in section 3 of the Appeals Ordinance should be limited to " a proceedings in which one party sues for or claims something from another in regular civil proceedings ".

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs of this appeal.

*Dismissed.*

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*Present :* WEERASOORIYA, J. AND H. N. G. FERNANDO, J.

## ROMANIS *vs.* SHERMAN DE SILVA & Co., LTD.

*S.C. No.* 225. *D.C.* (*F*) *Colombo No.* 24834.

*Argued on :* 16th, 17th, 18th and 19th, July, 1957, and 2nd, 3rd, 4th, 5th and 6th September, 1957.
*Delivered on :* 27th January, 1958.

*Sale of Goods Ordinance* (*Chap.* 70). *Section* 50, *Sub-Sections* (2), (3)—*Measure of Damages—Non-delivery of Goods under a contract of sale—Damages not claimed by buyer under sub-contract.*

**Held :** That in assessing damages for non-delivery of goods under a contract of sale where there is an available market, the law does not take into account accidental factors between plaintiff and defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of goods. The measure of damages should be the difference between the market price and the contract price at the time the goods should have been delivered. The absence of a claim for damages against the plaintiff by the buyer under the intermediate contract is not relevant to the question of damages between the plaintiff and the defendant.

**Authorities referred to :** *Rodocanachi vs. Milburn* (1887) 18 Q.B.D. 67.
*William Brothers vs. Edward T. Agius, Ltd.* (1914) A.C. 510.
*Slater vs. Hoyle and Smith, Ltd.* (1920) 2 K.B. 11.
*Patrick vs. Russo-British Grain Export Co., Ltd.* (1927) 2 K.B. 537.

**Not followed :** *Wertheim vs. Chicoutimi* (1911) A.C. 301.
Benjamin : Sale (8 addition) P. 964.

*C. Thiagalingam, Q.C.*, with *J. M. Jayamanne* and *T. Parathalingam* for the defendant-appellant.
*N. K. Choksy, Q.C.*, with *V. A. Kandiah* for the plaintiff-respondent.

WEERASOORIYA, J.

This action was filed by the plaintiff-respondent claiming from the defendant-appellant the sum of Rs. 77,862/- as damages for breach of a contract dated the 21st April, 1950, (P6), under which the defendant had bound himself to supply to the plaintiff on or before the 31st December, 1950, 10,000 lbs. of No. 1 white grade papain at Rs. 6/75 per lb. The contract also provided for the goods being delivered by the seller in airtight tins and " guaranteed on landing at New York " to be equal in quality to a specified sample.

The plaintiff is a limited liability company. The evidence indicates that the plaintiff required the papain for sub-sale to one or more buyers in New York, and that the defendant was so informed at or about the time of the contract. It is common ground that out of the contract quantity only 4,536 lbs. were made available to the plaintiff at Rs. 6/75 per lb. The damages sued for are claimed in respect of the balance 5,464 lbs. computed on the difference per lb. between the contract price and the sum of Rs. 21/- said to represent " the current available market rate " at which the goods could have been obtained after the 31st December, 1950.

Two defences were taken by the defendant to this claim in his answer. The first defence is that the contract as embodied in P6 was subject to a " contemporaneous separate oral agreement constituting a condition precedent to the attaching of any obligation under such contract ", and that such separate oral agreement provided, *inter alia*, that should the market price of the goods rise above Rs. 6/75 per lb. the contract price would be increased by a corresponding amount in respect of any quantity over and above 6,000 lbs. The case for the defendant on this defence is that as he knew that he would be able to supply only about 6,000 lbs. of papain from his own plantations he safeguarded himself against loss from any unexpected rise in the market price in respect of the balance (which he would necessarily have to obtain from other sources) by insisting on this stipulation which, though not reduced into writing, he said was accepted on behalf of the plaintiff by Mr. N. R. de Silva, one of the directors of the plaintiff firm; that the market price subsequently rose from Rs. 6/75 per lb. to Rs. 15/50 per lb. but the plaintiff failed and neglected to comply with the terms of the oral agreement as regards payment and was therefore precluded from maintaining the present action.

The second defence is that in any event " the contract sued on stood rescinded, abandoned and was otherwise concelled in or about the 22nd September, 1950 ", that there was substituted in its place a fresh contract between the parties

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(which too was not reduced into writing) whereunder the plaintiff agreed to pay Rs. 6·75 per lb. for papain produced from the defendant's own property and Rs. 15·50 per lb. for papain obtained by him in the local market for supply to the plaintiff and that the plaintiff failed to take delivery of part of the goods tendered under this new contract.

After trial the learned District Judge rejected both these defences as false, and he gave judgment for the plaintiff in a sum of Rs. 56,006/- with costs. From this judgment the defendant has filed the present appeal. Although one of the grounds of appeal is that the trial Judge was wrong in rejecting the first of these defences, Mr. Thiagalingam who appeared for the appellant stated at the hearing before us that he was not pressing that ground. As regards the rejection by the trial Judge of the second defence, after Mr. Thiagalingam had concluded the appellant's case we saw no reason to take a different view from that of the trial Judge whose findings of fact having a bearing on that defence are amply supported by the evidence. We accordingly intimated to Mr. Choksy who appeared for the plaintiff-respondent that we did not wish to hear him except on the questions of law and fact appertaining to the issue of damages, those being, in our opinion, the only substantial matters arising for decision in this appeal.

In awarding the sum of Rs. 56,006/- as damages the trial Judge went on the basis that section 50 (3) of the Sale of Goods Ordinance (Cap. 70) applied to this contract. He held that Rs. 17/- per lb. fairly represented the market or current price of the goods in December, 1950, or January, 1951, being the time when, in his view, the plaintiff should have started buying against the contract, and he gave the difference per lb. between that price and the contract price on the shortfall of 5,464 lbs. Mr. Thiagalingam strenuously contended that the evidence in the case did not justify a finding that there was an available market for the goods in December, 1950, or January, 1951, or subsequently. But on this point there is not only the evidence of the witness Pilapitiya, to which the Judge has specifically referred in his judgment, but also the evidence of the defendant himself that there was enough papain in the market in December, 1950, and January, 1951, and that the price was Rs. 15/- and Rs. 15/50 per lb.

Mr. Thiagalingam next contended that even if there was an available market at which the plaintiff could have obtained the goods when the defendant defaulted in delivering the balance quantity under the contract, the learned trial Judge was wrong in having recourse to section 50 (3) of the Sale of Goods Ordinance in the special circumstances of this case. Before I deal with the submissions of Mr. Thiagalingam on this aspect of the case it will be necessary to refer briefly to such evidence as there is in regard to the destination of the goods purchased under the contract P6 and the position of the plaintiff *vis a vis* the American buyers.

Mr. Sherman de Silva, the managing director of the plaintiff company, stated that the plaintiff was under contract for the supply to at least one American buyer of 8,000 lbs. of the same grade of papain as formed the subject matter of the contract with the defendant. He also stated that at the time when the defendant defaulted in the performance of his contract P6 the plaintiff had already supplied to the American buyer about 4,000 lbs. under the sub-contract, representing almost the entire quantity which the defendant had given the plaintiff. This included 700 lbs. purchased by the plaintiff from the defendant outside the contract P6 on the 2nd October, 1950, at Rs. 15/50 per lb. which according to Mr. de Silva was the prevailing local market price and which he consented to pay as a special favour in order to enable the defendant to minimise to some extent his losses under the contract P6. Mr. de Silva said that after the defendant defaulted attempts were made by the plaintiff to obtain the shortfall from other quarters but no papain was available until the 26th June, 1951, when the plaintiff entered into the contract P28 with Pilapitiya for the supply of 3,000 lbs. No. 1 white grade papain at Rs. 21/- per lb. The plaint filed in this case is dated the 27th June, 1951, and the amount claimed as damages represented the difference between Rs. 21/- and Rs. 6/75 on 5,464 lbs. Mr. Thiagalingam suggested that the contract P28 was a bogus and collusive transaction intended to bolster up the claim for damages made in the plaint. But although Pilapitiya was called as a witness for the plaintiff and stated that the full quantity mentioned in P28 was supplied by him to the plaintiff and that he received payment at the rate of Rs. 21/- per lb. he does not appear to have been cross-examined on the basis that the transaction was other than a genuine one.

While according to Sherman de Silva he was not able to obtain supplies of the required grade of papain in the local market until June, 1951, the evidence of Pilapitiya and the defendant (to which reference has been made earlier) is that supplies were available in the local market in December, 1950 and January, 1951. Sherman de Silva's evidence as regards the availability of supplies and also the need for entering into the contract P28 is conflicting and unsatisfactory.

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At first he stated that the 3,000 lbs. purchased from Pilapitiya were despatched to New York to fulfil the plaintiff's outstanding obligation under the contract with the American buyer. On a subsequent occasion he appears to have taken up the position that all that was sent to the American buyer was only such quantity as was made available to the plaintiff by the defendant prior to the latter's default, namely, about 4,000 lbs.; and as regards the balance quantity due under the sub-contract, he said that although requested by the plaintiff to purchase it elsewhere against the sub-contract the American buyer was unable to do so, and he did not, therefore, make any claim on the plaintiff for damages.

Mr. Thiagalingam submitted that on this evidence he was entitled to ask the Court to hold that the plaintiff in fact sustained no damages at all by reason of the defendant's default or, if the plaintiff suffered any damages, they were only in respect of the 700 lbs. purchased at the special rate of Rs. 15·50 per lb. He urged that since sub-section 3 of section 50 of the Sale of Goods Ordinance is only a *prima facie* application of the principle laid down in sub-section 2, the evidence of Sherman de Silva enables the Court to estimate in terms of sub-section 2 the loss directly and naturally resulting, in the ordinary course of events, from the defendant's breach of contract without recourse to the method adopted in sub-section 3 of assessing the damages on the difference between the contract price and the market price.

In short, according to learned counsel for the defendant-appellant, in the assessment of the damages to which his client became liable by reason of the breach of contract, the position between the plaintiff and the American buyer in regard to the sub-contract is an extremely relevant consideration. But it seems to me that notwithstanding a degree of plausibility in the arguments adduced by Mr. Thiagalingam, the question of damages has to be answered in the light of certain English decisions which were brought to our notice in the course of the argument and to which I shall refer presently. Section 50 of the Sale of Goods Ordinance, I may state, is in the same terms as section 51 of the English Sale of Goods Act, 1893.

The leading English case as to the assessment of damages for non-delivery of goods under a contract of sale where there is an available market is *Rodocanachi vs. Milburn*, (1887) 18 Q.B.D. 67, and the following passage from the judgment of Lord Esher, M.R., in that case has been repeatedly adopted as correctly stating the law on the point: "It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods". In *William Brothers vs. Edward T. Agius, Ltd.* (1914) A.C. 510, the facts, in so far as relevant for the purpose of the present case, were that a cargo of coal had been sold forward at 16*s*. 3*d*. a ton and the buyer in the expectation of the contract being performed entered into a contract with a third party for the sale of similar goods at 19*s*. a ton. The seller defaulted under the main contract and the market price at the date of the breach was 23*s*. 6*d*. The contention on behalf of the seller that the true measure of the buyer's damages for non-delivery was the difference between the contract price (16*s*. 3*d*.) and the price at which the goods were re-sold (19*s*.) and not the difference between the contract price and the market price (23*s*. 6*d*.) was rejected by the House of Lords which approved the decision in *Rodocanachi vs. Milburn* (*supra*). Again, in *Slater vs. Hoyle & Smith, Ltd.* (1920) 2 K.B. 11, the Court of Appeal, following the decision in *Rodocanachi vs. Milburn* (*supra*), held that the fact that no damages had been claimed by the buyer under the sub-contract for non-delivery was not a good ground for awarding as damages to the buyer, in respect of his seller's breach of contract, anything less than the full difference between the contract price and the market price at the date of the breach.

Mr. Thiagalingam relied strongly on the opinion of the Privy Council delivered by Lord Atkinson in *Wertheim vs. Chicoutimi Pulp Co.* (1911) A.C. 301, as departing from the rule laid down in *Rodocanachi vs. Milburn* (*supra*). But it is to be noted that in Lord Atkinson's own speech in the House of Lords in *Williams Brothers vs. Edward T. Agius, Ltd.* (*supra*) he distinguished the two cases on the ground that the one (Wertheim's case) dealt with a claim for damages for late delivery of goods while the other (Rodocanachi's case) was a claim for damages for non-delivery. Referring to the latter case, Lord Atkinson stated that as an authority it "has been many times recognised and never questioned". As observed, however, in Benjamin on Sale (8th edition, page 964) it is difficult to reconcile Wertheim's case with the principle of Rodocanachi's case, and in *Slater vs. Hoyle & Smith, Ltd.* (*supra*) the Court of Appeal seemed to be of the opinion that Wertheim's case was wrongly decided.

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Having regard to these decisions I am unable to accept the contention of Mr. Thiagalingam as to the measure of damages. The trial Judge has found that there was an available market for the goods at the relevant time. I see no reason to disturb this finding. Applying the decisions which I have discussed (other than Wertheim's case) to this finding it is clear that the measure of damages should be the difference between the market price and the contract price and the fact that plaintiff's American buyer has made no claim against the plaintiff for damages is not relevant to the question of damages as between the plaintiff and the defendant. I do not think that a decision of the case on these lines involves any conflict between sub-sections 2 and 3 of section 50 of the Sale of Goods Ordinance. As observed by Salter, J., in *Patrick vs. Russo-British Grain Export Co., Ltd.*, (1927) 2 K.B. 537, when a seller of goods fails to deliver he should pay to the buyer the value of the goods at the time when they should have been delivered. This, it appears to me, is the normal measure of damages even on the basis of sub-section 2 of section 50 of the Sale of Goods Ordinance. Again, as stated by Salter, J., in the same case, if at the date of the breach there is an open market for the goods then the market price is obviously their value to the buyer. To adopt the market price as the measure of damages in such circumstances, irrespective of any dealings in regard to the goods which the buyer may have had with a third party, is in my opinion not in conflict with sub-section 2 and is in accordance with sub-section 3.

Yet another consideration is that when there is a market for the goods no question of the buyer's loss of profit on the re-sale can arise as it is always open to him to fulfil his obligations under the re-sale and secure his profit by buying the goods in the market. If in such a case the buyer is not entitled to recover damages from a defaulting seller according to the higher profit on the re-sale, but is confined to the market price, it seems unjust, said Lord Esher, M.R., in *Rodocanachi vs. Milburn* (*supra*), that where the re-sale price is less than the market price the re-sale price should govern the case.

Apart from the decisions considered above, Mr. Thiagalingam referred us to several other authorities where in the assessment of damages the price on the re-sale was not regarded as immaterial. But it is not necessary to deal with them individually as they are all cases where there was no available market. Obviously in such a situation a Court would have to look at such other circumstances relating to the entire transaction as would enable the value of the goods to the buyer being ascertained, and a re-sale price may, but not always, be evidence of such value. The decisions in those cases cannot, therefore, be taken to apply to a case where there is an available market for the goods.

There remains to be considered the amount of damages which the plaintiff is entitled to on the basis of the difference between the market price and the contract price. In fixing the market price in December, 1950, or January, 1951, at Rs. 17/- per lb. the trial Judge went on certain evidence given by the witness Pilapitiya, but from the extracts of his evidence which have been quoted in the judgment of the trial Judge it would seem that Pilapitiya was by no means definite that the price at the time was Rs. 17/- per lb., seeing that he has also specifically stated that the price in January, 1951, may have been less than Rs. 17/-, while earlier he had said that in the same month the price was about Rs. 15/- and started moving up to about Rs. 20/- in June. That the price in January, 1951, was about Rs. 15/- per lb. is also the evidence of the defendant.

I do not think, therefore, that the trial Judge was justified on this evidence in fixing the market price in January, 1951, as high as Rs. 17/-, and I fix it at Rs. 15/- per lb. The plaintiff would then be entitled in damages to the difference between Rs. 15/- and Rs. 6/75 (the contract price) on 5,464 lbs., that is to say, a sum of Rs. 45,078/-, which figure will accordingly be substituted for the sum of Rs. 56,006/- awarded as damages in the judgment and decree of the Court below. Subject to this variation the appeal will stand dismissed, but as the defendant-appellant has succeeded in obtaining a substantial reduction in the damages he will have half his costs of appeal paid by the plaintiff-respondent.

H. N. G. FERNANDO, J.
I agree.

*Dismissed subject to variation.*

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*Present :* PULLE, J. AND SANSONI, J.

D. F. ABEYEWARDENA *vs.* REV. SIRI NIVASA *et al.*

*S.C. No. D.C. (F)* 301*M*/54—*D.C. Matara No.* 22666.

*Argued on :* 9th, 14th, 15th and 16th March, 1956.
*Decided on :* 10th May, 1956.

*Landlord and Tenant—Dispossession of tenant—Injuria involving contumelia—Landlord's liability for damages.*

A landlord is not entitled to take possession of the premises he has let to a tenant unless the tenant has vacated the premises or surrendered possession and even if the tenant had agreed to quit.

Such act amounts to a wrongful dispossession which constitutes an *injuria* involving *contumelia* for which damages are payable.

*Sir Lalita Rajapakse, Q.C.*, with *T. B. Dissanayake* for the plaintiff-appellant.
*N. E. Weerasooriya, Q.C.*, with *M. L. S. Jayasekera* for the 1st defendant-respondent.
*M. L. S. Jayasekera* for the 2nd defendant-respondent.

SANSONI, J.

The plaintiff in this action was carrying on the business of a Forwarding Agent at premises Nos. 1011 and 1012, Kadevidiya, Matara. He was a tenant of those premises, first under one Wickremesinghe and later under the second defendant. He had admittedly been paying rent to the second defendant, and it is not in dispute that he was in occupation of the premises on 31st March, 1951. The first defendant is a Buddhist priest and the Principal of a Pirivena which stands on the adjoining premises. The second defendant, as one of the chief Dayakayas of the Pirivena, purchased Nos. 1011 and 1012 in trust for the Pirivena in August, 1949. The plaintiff had also been residing in the premises in question but he ceased to reside there from early March, 1951. He claimed that he remained in occupation of the premises for the purposes of his business.

This action was filed in January, 1952, against both defendants on five causes of action. On the first cause of action the plaintiff complained that on or about 1st April, 1951, while he was still a tenant and in occupation of the premises, the defendants entered the premises and unlawfully dispossessed him. He estimated his damages at Rs. 2,400/- on this cause of action. On the second cause of action, he complained that the defendants after such entry removed and converted to their use motor accessories and spare parts belonging to him worth Rs. 5,000/- ; he claimed this sum and a further sum of Rs. 1,000/- as consequential damages. On the third cause of action he complained that the defendants converted to their own use the engine and other valuable parts of a lorry No. CE 576 belonging to him which was in the said premises ; on this cause of action he claimed the return of the lorry or its value, Rs. 15,000/-, and damages at the rate of Rs. 500/- per mensem from 1st April, 1951. It is not necessary to refer to the other two causes of action because the matters arising under them were adjusted at the beginning of the trial.

The defendants filed separate answers, but their common defence was that they took possession of the premises on behalf of the Pirivena on 1st April, 1951, on the expiration of the plaintiff's tenancy and after the plaintiff had vacated these premises. They further stated in their answers that when the plaintiff vacated the premises he failed to remove lorry No. CE 576, although he was requested to do so ; and they denied that any damages were payable by them. The first defendant claimed in reconvention a sum of Rs. 15,000/- as damages sustained by him by reason of the plaintiff having initiated a false and malicious prosecution against him in Case No. 22995 of the Magistrate's Court of Matara.

After trial, the learned District Judge dismissed the plaintiff's action, save in respect of a sum of Rs. 67·50. This amount had been brought into the Court by the defendants on the fifth cause of action, and the parties had agreed that it should be drawn out of Court by the plaintiff. The first defendant's claim in reconvention was also dismissed and the plaintiff was ordered to pay the defendants half their costs. The learned Judge took the view that the defendants lawfully took possession of the premises on 1st April, 1951, on the termination of the plaintiff's tenancy. He appears to have taken the

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view that the plaintiff had agreed to quit the premises on 31st March, 1951. He does not, however, find that the plaintiff had vacated the premises or surrendered possession of them in any way to the defendants.

On the evidence placed before him I do not see how the learned Judge could have held in favour of the defendants on the first cause of action. It has been proved that on 1st April, 1951, one Wijenaike, a retired Postmaster who had also been associated with the plaintiff in business previously, went to the premises to have them cleaned. He was there till 1 p.m. supervising the cleaning, which was not completed. He then locked the doors of the building and went home to lunch, taking the door keys with him. About an hour later on receiving certain information, Wijenaike went near those premises. He found the main gate locked, although he had not locked that gate when he left the premises at 1 p.m. He saw several priests on the verandah and two lorries belonging to the plaintiff in the garage. He went to the Police Station and complained to the Police at 3-15 p.m. The plaintiff had gone to Deniyaya that day. On his return that night Wijenaike informed him of what had happened, and both of them went to the Headman of Kadevidiya and the plaintiff complained to him.

Now, it is not disputed that the second defendant took possession of these premises on 1st April, 1951, by asking his nephew Dharmasena to go into occupation on that day. The first defendant admits that possession was taken on his own behalf also. Both defendants are therefore jointly liable for the entry. As I said earlier, they sought to justify their action in going into possession on the ground that the plaintiff had earlier agreed to quit the premises on 1st April, 1951, but such agreement, even if proved, does not justify their action. The learned Judge seems to have been greatly influenced by the view he took that Wijenaike had cleaned these premises on behalf of the plaintiff for the benefit of the defendants. I think the opposite conclusion may as easily have been drawn from the fact that the defendants were anxious to move into these premises for the purpose of extending the Pirivena. With great respect, I am unable to take the same view as the learned Judge. Is it if no significance that there were two lorries belonging to the plaintiff standing in the garage at the time the defendants took possession, one of these lorries being fully laden with vegetables which were to be transported to Colombo? Surely this circumstance must have satisfied any reasonable person that the plaintiff had not taken the necessary steps to give up possession, and had no intention of doing so on that day. The keys of the building were not surrendered either, nor does any request appear to have been made for them. The invasion seems to have been well-timed to coincide with Wijenaike's temporary absence from the premises. I would therefore reverse the finding of the learned Judge in regard to the first cause of the action and hold that the defendants unlawfully dispossessed the plaintiff of these premises.

As to the damages which the plaintiff should be awarded on this cause of action, he has not proved that he suffered special damages. Under cross-examination on this point he stated that he was claiming Rs. 2,400/- as damages for the discontinuance of his business, on the basis of the previous year's income from his lorry No. CE 576 which did not ply on the road after 1st April, 1951. Here the plaintiff seems to have been mixing up his claim on the first cause of action with his claim on the third cause of action, for the latter deals with the loss he incurred by having been deprived of the use of lorry No. CE 576. At the same time, there is no doubt that the plaintiff has suffered a wrong because he was illegally dispossessed of these premises by the defendants ; he is entitled to some damages on that account. The wrongful dispossession of the plaintiff by the defendants constituted an injuria involving contumelia, for I am satisfied that the defendants well knew that the plaintiff intended to remain in occupation of these premises, in spite of an alleged agreement to quit by 1st April, 1951. I would award the plaintiff a sum of Rs. 1,000/-.

On the second cause of action the plaintiff claimed the value of motor accessories and spare parts according to amounts which he said were entered in his account books. It was suggested to him, for the defence, that all accessories, spare parts and account books had been removed by him previously to other premises where he was already residing. He insisted, however, that all his account books were still on the premises in dispute on 1st April, 1951. If that were so, it is strange that when he made his complaint to the Headman he made no reference whatever to these books. The learned Judge points out in his judgment that in the Magistrate's Court too the plaintiff made no reference to his books of account, and the first reference ever made to them was on 5th June, 1953, when a notice was sent to the defendants to produce the books at the trial of this action.

After a consideration of the evidence I find it clearly proved that the defendants were always willing, from the time they went into occupation

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of these premises, to allow the plaintiff to remove all articles belonging to him of whatever nature. The Headman made this quite plain in his evidence, for he said that when he spoke to the second defendant's nephew, Dharmasena, and asked that the lorries be released, Dharmasena was quite willing that they should be removed. He added that Dharmasena was prepared to allow the plaintiff to remove any goods that were in the garage. Although the lorry laden with goods was removed, the other lorry CE 576 was not. The Headman stated that he waited for somebody to come and remove that other lorry but nobody came for that purpose. The plaintiff suggested in evidence that lorry CE 576 could not be removed because the tyres had been taken off the wheels, but he did not claim to have seen that himself; he was speaking to some information which his driver is alleged to have conveyed to him, but that driver has not been called as a witness. He later added that it was only on 4th April, 1951, that he was informed that the tyres had been removed, and that until then he had not sent anybody to remove that lorry. It seems obvious that the claim made in regard to the spare parts and accessories is on as shaky a foundation as the claim in regard to the lorry CE 576.

The learned Judge rejected the claim on the second and third causes of action because he was not satisfied that the defendants had converted either the lorry or the spare parts and accessories to their own use. I think the plaintiff has entirely failed to prove that the spare parts and accessories described in the schedule to the plaint were on these premises, and it also seems to me that, for reasons best known to himself, the plaintiff deliberately chose not to remove lorry CE 576, although he had every opportunity to do so.

In the result the plaintiff has failed on the major part of his claim. This action was brought to recover a total sum of Rs. 29,967·50 and continuing damages at Rs. 500/- a month. The plaintiff has succeeded to the extent of only a sum of Rs. 1,000/- and I therefore think that the order of the learned Judge as to costs in the lower Court should stand. I would vary the decree under appeal and give judgment for the plaintiff in the sum of Rs. 1,000/- plus Rs. 67·50, totalling Rs. 1,067·50, but the plaintiff will pay the defendants half their costs in the District Court. Each party will bear his own costs in this Court.

PULLE, J.

I agree.

*Decree varied.*

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*Present :* WEERASOORIYA, J. AND SANSONI, J.

WIJESEKERA *vs.* WELIWITIGODA *et al.*

*S.C. No.* 396. *D.C.* (*F*) *Colombo No.* 211/*Entail.*

*Argued on :* 27th, 28th and 29th January, 1958.
*Delivered on :* 21st March, 1958.

*Legitimacy—Evidence—Statements by deceased—Admissibility under Section* 17 (1), *Section* 18 (3) (*b*), *Section* 21 ; *Section* 18 (3) (*c*), *Section* 32 *of the Evidence Ordinance—Relevancy under Section* 32 (5). *Proof of foreign marriage—Application of presumption* omnia rite esse acta—*Proof under Section* 50 *Evidence Ordinance.*

**Held** : (1) That where the question was whether the child left by a deceased person was his legitimate child by his first marriage and therefore became entitled to certain fidei-commissum property, statements made by him in divorce proceedings against the wife of his second marriage, to the effect that he married his first wife are not inadmissible as admissions under section 18 (3) (*c*), since the person proving them (child by 1st marriage) does not derive her interest in the subject-matter of these proceedings from the maker of the statement. They are relevant under section 32 (5) of the Evidence Ordinance.

(2) That these statements are not of a self-serving nature as they are not in the interest of the person making it.

(3) That the weight and sufficiency of statements as establishing a fact is a matter for the trial Judge to decide.

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(4) That in deciding whether a foreign marriage has been duly proved, the presumption *omnia rite esse acta* could be applied.

(5) That under section 50 Evidence Ordinance, evidence that relatives regarded the respondent as legitimate and conducted themselves accordingly towards the respondent was relevant.

*H. W. Jayawardene, Q.C.*, with *V. W. Vidyasagara* for the petitioner-appellant.
*S. J. V. Chelvanayakam, Q.C.*, with *J. M. Jayamanne* for the 1st respondent.
*C. D. S. Siriwardene* for the 5th respondent.

Weerasooriya, J.

The main question for decision in this appeal is the legitimacy of the 1st respondent Mrs. Virginia Lavinia Weliwitigoda who has been declared by the District Judge of Colombo to be the lawful issue of a marriage contracted by her father Henry Wijesekera with a lady called Agida who died in Madras in about the year 1938.

Henry Wijesekera's mother Mrs. Caroline Wijesekera had by her Codicil No. 2085 dated the 23rd August, 1935, devised to Henry Wijesekera (her eldest son) certain properties at Alston Place and Bankshall Street subject to a *fidei commissum* in favour of his children. It was also provided that on his death the properties shall devolve on his children subject however to a life interest in his wife in respect of a half share should she survive him, and in the event of Henry Wijesekera leaving him surviving no lawful children then, subject to the said life interest, the premises at Alston Place were to devolve on one of Mrs. Caroline Wijesekera's grandsons, Edward, who is the petitioner-appellant and a child of Edwin Wijesekera, while the premises at Bankshall Street were to devolve on another grandson, Rienzie, a child of Albert Wijesekera, both devises being subject, however, to certain benefits in favour of the respective wives of Edward and Rienzie and their issue the nature of which is not material to this appeal. Both Edwin Wijesekera and Albert Wijesekera were dead at the date of the Codicil. Mrs. Caroline Wijesekera died in 1939 and Henry Wijesekera in 1950.

The proceedings from which this appeal arises relate only to the devolution of title to the premises at Alston Place. Those premises were sold on the orders of the District Court of Colombo and the nett sum realised, less certain estate duty charges payable on the estate of Mrs. Caroline Wijesekera, were brought into Court. Thereafter the appellant made an application that he be paid the accrued interest on that sum. The basis of the application is that Henry Wijesekera did not leave surviving him either a lawful wife or lawful issue and that in terms of the Codicil the appellant is entitled to the interest. Of the parties who were made respondents to the proceedings those named as the 1st, 6th and 7th respondents opposed this application. The 1st respondent in those proceedings is also the 1st respondent in this appeal.

The 1st respondent's claim that she is the lawful child of Henry Wijesekera and his wife Agida was upheld by the District Judge. The 6th respondent Maggie Nona is the mother of the 7th respondent Emaline. The 6th respondent claims that she was lawfully married on the 6th October, 1940, to Henry Wijesekera as appears from the marriage certificate 6R1. (This marriage would have been subsequent to the dissolution of the marriage, if any, between Henry Wijesekera and the 1st respondent's mother Agida upon her death in 1938). The 6th respondent's claim too has been upheld by the District Judge. On that finding the 6th respondent has been declared entitled to a half-share of the accrued interest on the sum of money lying in Court. But the claim of the 7th defendant that she is a child of the marriage between Henry Wijesekera and the 6th respondent was rejected by the District Judge. That finding stands as no appeal against it was filed by the 7th respondent. As for the finding in favour of the 6th respondent, which is mainly one of fact, it would appear from the grounds set out in the petition of appeal filed by the appellant that he does not seriously challenge its correctness, and it is not necessary, therefore, to make any further reference to it in this judgment.

Not very long after Henry Wijesekera married the 6th respondent Maggie Nona he filed an action against her for a dissolution of the marriage on the ground of her malicious desertion and adultery. That action was dismissed. The evidence which Henry Wijesekera gave in that case in 1942 was put in evidence by the 1st respondent in these proceedings marked 1R5. According to 1R5 he had said that he was previously married in India, that his wife Agidahamy died in Madras in 1938 and that he had one child by that marriage. Although the fact of the marriage is hotly contested it is common ground that the child referred to in that evidence is the 1st respondent. To use the words of learned

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counsel who appeared for the appellant in the District Court, there is no doubt that Henry Wijesekera looked after her very affectionately. Under cross-examination in the divorce case Henry Wijesekera stated that when he was a small boy he went to the United States of America where he lived for twenty-one years and contracted two marriages, that he returned to Ceylon in 1924 and then met Agidahamy, that as his relations were opposed to his marrying her he took her first to the Federated Malay States and then to India where he married her and where the 1st respondent was born. He admitted that till he married Agidahamy in India he was living with her as his mistress, and that his marriage was not recognised by " his people " as she was not of their caste. Even before he married the 6th respondent in 1940 he lived with her for some time as his mistress.

Mr. Jayawardene who appeared for the appellant at the appeal raised objections both to the admissibility of the evidence given by Henry Wijesekera in the divorce case that he was married to Agidahamy as well as to its weight and sufficiency. Those objections also apply to statements made to the same effect by Henry Wijesekera as testified to by the witness Virginia Peiris and Proctor Welwitigoda who were called by the 1st respondent and whose evidence has been fully accepted by the trial Judge. The objection to the admissibility of these statements was on the ground that they amounted to admissions as defined in section 17 (1) of the Evidence Ordinance and that although made by Henry Wijesekera they may, by virtue of section 18 (3) (*b*), be proved against the 1st respondent (who, it was submitted, derives her interest in the subject matter of the suit from Henry Wijesekera) but cannot be proved by her except as provided in section 21 of the Evidence Ordinance. As regards paragraph (*c*) of that section, Mr. Jayawardene argued that it permitted an admission, if it were relevant otherwise than as an admission (*e.g.* under section 32) being proved only by or on behalf of the person making it and not by any other person. I do not think, however, that Henry Wijesekera is a person from whom the 1st respondent has derived her interest in the subject matter of these proceedings so as to render the statements imputed to him admissions under section 18 (3) (*c*). The argument that the statements amount to admissions therefore fails and it is not necessary to consider the scope of section 21 (*c*). In my opinion the learned District Judge was right in holding that the statements were relevant under section 32 (5) of the Evidence Ordinance.

The objection to the weight or sufficiency of these statements was taken on various grounds. In the first place it was stressed that the marriage is alleged to have been contracted in India and there was no proof of what were the necessary formalities for a valid marriage under Indian law or that those formalities were complied with. The case of *Armitage vs. Armitage* L.R. (1866-67) Equity 343 was cited to show that where the alleged marriage took place in a foreign country the Court insists on evidence that the marriage was duly celebrated according to the legal formalities in force there, and Mr. Jayawardene contended that the same rule would apply in the case of a statement which is admissible under section 32 (5) of the Evidence Ordinance as relating to the fact of marriage. In the case cited, however, the marriage was said to have taken place in New Zealand before it had become a British Colony and, having regard to the primitive conditions which prevailed there, the Court refused to act on a bare statement in the affidavit of the male contracting party asserting the solemnization of the marriage in question. I do not think that this case or the other cases referred to by Mr. Jayawardene in dealing with the particular point under consideration establish any rule as contended for by him. The case of *Goldstone vs. Smith*, (1921-22) 36 T.L.R. 403, to which we were referred by Mr. Chelvanayakam, shows that the presumption *omnia rite esse acta* could be applied in deciding whether the fact of a foreign marriage had been duly proved. All that section 32 (5) requires is that the statement should relate to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship, in any such way, the person making the statement has special means of knowledge, and that the statement should have been made before the question in dispute was raised. The provision is an exception to the rule against hearsay and has been enacted primarily to meet a situation where the matter sought to be established involves remote facts of family history which are incapable of direct proof. In the words of Lord Blackburn in *Sturla vs. Freccia* (1879) 5 Appeal Cases 623 at 641, the ground is " that they were matters relating to a long time past, and that it was really necessary to relax the strict rules of evidence there for the purpose of doing justice ".

It was next argued that the statements should not be acted upon because of their self-serving nature. But when Henry Wijesekera represented that he had been married to Agidahamy and that the 1st respondent was a child of that marriage I do not see that what he stated was

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in his own interest, since under his mother's Codicil he would have been entitled to the life interest in both the properties whether or not he was married to Agidahamy or the 1st respondent was their child. While, on the other hand, if the statements were designed to help the 1st respondent, a question that poses itself is why he should have been so inclined unless it be for the reason that she was the lawful issue of the marriage. These statements can, therefore, be distinguished from the statement which was excluded in *Plant vs. Taylor*, 7 H. & N. 211 (being another of the cases relied on by Mr. Jayawardene) on the ground (among others) that it was obviously in the interest of the person making the same.

It seems to me that the weight and sufficiency of the statements as evidence establishing the fact of Henry Wijesekera's marriage to Agidahamy were matters for the trial Judge to decide. It has not been shown to us that in acting on those statements the learned Judge applied any wrong principle. Moreover, as pointed out by Mr. Chelvanayakam, the case for the 1st respondent does not rest on those statements alone. There is the additional evidence that during the lifetime of Henry Wijesekera his relatives regarded the 1st respondent as his legitimate child and conducted themselves accordingly towards her. This evidence is admissible under section 50 of the Evidence Ordinance and has been accepted by the District Judge. I am also inclined to agree with him that the reference in the Codicil to the wife of Henry Wijesekera was a recognition by Mrs. Caroline Wijesekera that at the date of its execution Agida was married to him.

In my opinion the appeal fails and must be dismissed with costs payable to the 1st respondent and to Maggie Nona, who was the 6th respondent in the proceedings in the Court below but is the 5th respondent to this appeal.

SANSONI, J.
I agree.

*Dismissed.*

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*Present :* SANSONI, J. AND T. S. FERNANDO, J.

## SIRIWARDENA *et al* vs. JAYASUMANA

*S. C. No.* 557/56 *Final—D. C. Kalutara No.* 30327

*Argued on :* 25th March, 1958.
*Decided on :* 2nd April, 1958

*Partition Act, No.* 16 *of* 1951, *sections* 14 *and* 48 (1))—*Interlocutory decree entered without due service of summons on a party—Effect of such decree—Meaning to be given to the words " notwithstanding any omission or defect of procedure "—Does failure to serve summons come within these words.*

**Held** *:* (1) That an interlocutory decree for partition entered under the Partition Act No. 16 of 1951 without due service of summons is bad in law and should be vacated.

(2) That due service of summons on a party is an essential step and does not come within the term " omission or defect of procedure " in section 48 (1) of the act.

**Cases referred to** *: Graig vs. Kanseen* (1943) 1 A. E. R. 108.
*March vs. Marsh* (1945) 62 T. L. R. 20.

*F. W. Obeysekera*, with *G. L. L. de Silva*, for the 8th and 9th defendants-appellants.
*M. L. de Silva*, for the plaintiff-respondent.

SANSONI, J.

The question that arises for decision tn this appeal is the effect that should be given to certain words in section 48 (1) of the Partition Act No. 16 of 1951. The relevant part of that section reads :

" Save as provided in sub-section (3) of this section, the interlocutory decree entered under section 26 and the final decree of partition entered under section 36 shall, subject to the decision on any appeal which may be preferred therefrom, be good and sufficient evidence of the title of any person as to any right, share or interest awarded therein to him and be final and conclusive for all purposes against all persons whomsoever, whatever tight, title or interest they have, or claim to have, to or in the land to which such decrees relate and notwithstanding any omission or defect of pro-

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cedure or in the proof of title adduced before the court or the fact that all persons concerned are not parties to the partition action ; and the right share or interest awarded by any such decree shall be free from all encumbrances whatsoever other than those specified in that decree."

It is not necessary to quote the rest of the section for the purpose of this judgment.

The 8th defendant-appellant who was a party to this action complains that the summons was not duly served on him. It happened that upon a report being made by the Fiscal that the summons could not be served on him because he could not be found, the District Judge ordered that the summons on him should be re-issued to be affixed to the land. On the next returnable date the Fiscal reported that the summons had been served by being so affixed, but the 8th defendant was absent when the case was called in Court. Thereafter the trial took place and interlocutory decree was entered in the absence of the 8th defendant.

Now section 14 of the Act reads : " The provisions of the Civil Procedure Code relating to the service of summons shall apply in relation to the service of summons in a partition action." It is quite clear from the decisions of this Court that where personal service of summons cannot be effected on a defendant, there must be sworn evidence before the Court that the particular defendant is within the Island and is evading service, before substituted service is ordered. There was no such evidence before the Judge in this case, and the order that summons should be affixed to the land was therefore bad. At the inquiry which was held into the application of the 8th defendant that the decree be set aside and he be allowed to file answer, the learned Judge correctly held that summons had not been duly served ; but he also held that section 48(1) did not help the 8th defendant because the section provided that the interlocutory decree shall be final and conclusive " notwithstanding any omission or defect of procedure " and it is the latter finding that is attacked by the 8th defendant.

The question is whether these words apply to a case where summons has not been duly served on a defendant. It is hardly necessary to draw attention to the conclusive effect of a decree entered in a partition action, and to the decisions of this Court under the Partition Ordinance which held that a final decree can be set aside where there has been an irregular service of summons. I find it impossible to hold that section 48 (1) was intended to deprive a party who had not been duly served with summons of the right to claim that the decree had not been properly entered, and should therefore be vacated, in order that his claim might be investigated.

In *Craig vs. Kanseen* (1) Lord Greene, M.R. considered the question whether a failure to serve summons was a mere irregularity, or whether it was something worse which would give the defendant the right to have the order set aside. He said it was beyond question that " failure to serve process where service of process is required is a failure which goes to the root of our conceptions of the roper procedure in litigation. Apart from proper *ex parte* proceedings the idea that an order can validly be made against a man who has no intimation of any intention to apply for it is one which has never been adopted in England. To say that an order of that kind is to be treated as a mere irregularity and not something which is affected by a fundamental vice, is an argument which, in my opinion, cannot be sustained."

The matter has also been dealt with by the Privy Council in *Marsh vs. Marsh* (2) where Lord Goddard dealt with the question of what irregularities will render a judgment or order void or only voidable. He said :- " No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities......... One test that may be applied is to inquire whether the irregularity has caused a failure of natural justice."

I think the principles enunciated in these cases show beyond doubt that due service of summons on a party is an essential step, and does not come within the term " omission or defect of procedure." Those words should be confined to omissions or defects of a much more venial character which it is not necessary for me to categorise here.

I therefore hold that the 8th defendant was entitled to have the interlocutory decree set aside in order that he might file his answer and prove his claim. His Appeal is allowed with costs in both Courts.

The Appeal of the 9th defendant was not pressed and I therefore need not consider it. His appeal is dismissed with costs.

T. S. FERNANDO, J.
I agree.

*Dismissed.*

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*Present :* WEERASOORIYA, J. AND SANSONI, J.

RODRIGO *et al. vs.* RICE.

*S.C. No. 85. D.C. (F) Colombo No. 38237/M.*

*Argued on :* 13th and 16th September, 1957.
*Delivered on :* 17th January, 1958.

*Damages—When Appellate Court will vary award by trial Court. Award of interest in appeal—A matter of discretion.*

**Held :** (1) That an appellate Court should not interfere with an award made by trial Court unless it is satisfied that the Judge in assessing damages applied a wrong principle of law or the amount awarded is subinordinately low or inordinately so high that it must be a wholly erroneous estimate of the damage.

(2) That an award of interest in appeal is a matter in the discretion of the Court. This discretion will not be exercised when the claim is made for the first time in appeal.

**Case referred to :** *Nance vs. British Columbia Electric Railway Co., Ltd.* (1951) A.C. 601.

No appearance for the defendants-appellants.

*E. F. N. Gratiaen, Q.C.*, with *John de Saram* for the plaintiff-respondent in support of the cross-objections filed by the plaintiff.

WEERASOORIYA, J.

This is an appeal by the defendants from the judgment and decree entered against them in the District Court of Colombo for the payment to the plaintiff-respondent of a sum of Rs. 30,000/- as damages resulting from injuries sustained by him in a collision between an omnibus and a taxi-cab in which he was travelling as a passenger. The 1st defendant was the owner of the taxi-cab, which was one of a fleet of motor vehicles used in a taxi-cab service operated by the 2nd defendant.

The accident took place on the 9th May, 1954. The plaintiff is about 30 years of age. He was born in England and is temporarily resident in Ceylon for the purpose of his employment under the Colombo Commercial Company Limited. He is a chartered accountant and draws a salary of approximately Rs. 3,100/- per mensem. Although the injuries sustained by him in the accident did not at first appear to be of a serious nature he had shortly afterwards consulted Mr. Muller, a qualified orthopaedic and plaster surgeon, who diagnosed a mild compression fracture of the fifth and sixth vertebrae. The site of the fracture was in the region of the neck. This condition appears to have been remedied after treatment but two years later when the plaintiff again saw Mr. Muller it was discovered that osteo arthritis of the joint between the vertebrae affected by the fracture had set in, which in the opinion of Mr. Muller was directly attributable to the fracture. According to him the osteo arthritis would result in a progressive deterioration in the plaintiff's physical condition though the actual rate of decline was difficult to assess.

The amount of damages originally demanded by the plaintiff was only Rs. 5,000/-. Three days later another letter was sent claiming damages in the sum of Rs. 50,000/-. As explained by the plaintiff in his evidence, the earlier claim was made before Mr. Muller had discovered that osteo arthritis had set in. The plaintiff's evidence on this point stands uncontradicted.

The trial Judge awarded Rs. 25,000/- as general damages. He also awarded a further sum of Rs. 5,000/- for pain of body and mind, loss of amenities and medical expenses.

In their petition of appeal the defendants ask that in any event the amount awarded as damages should be reduced to the sum of Rs. 5,000/- originally claimed by the plaintiff. Although there was no appearance for the defendants at the hearing of the appeal, the whole case was gone into in view of the cross-objections to the decree filed by the plaintiff by which he sought to have the damages increased to Rs. 50,000/- and an award of interest at the legal rate on the amount of the decree from the date thereof until payment in full.

The trial Judge appears to have accepted without reserve the evidence of the plaintiff and Mr. Muller. The plaintiff, he observed, gave his evidence with candour and restraint. His findings on their evidence are summarised in the following passage from his judgment :—

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"... his (plaintiff's) efficiency is impaired, and his capacity for long seasonal periods of work reduced with a proportionate reduction in the output of his work. What is worse, he is now faced with the prospect of a bleak future, his condition becoming, as Mr. Muller says, progressively worse and his chances of rising in his profession considerably reduced ".

He also found that in the event of the plaintiff's period of residence in Ceylon being terminated by the authorities his condition would be a serious handicap in the way of his obtaining employment in England where the competition for the kind of post he could hold is very high.

It was, no doubt, on these findings that the Judge awarded the sum of Rs. 25,000/- as general damages. Mr. Gratiaen for the plaintiff submitted that this sum is unduly low and should be substantially increased. But while it may be regarded as established that with the osteo arthritis setting in, and provided the progress of the disease takes its expected course, the chances of the plaintiff rising in his profession are likely to be reduced in some way or other, very little material has been placed before the trial Judge as to what this means in terms of rupees and cents. Moreover, there is nothing to indicate that the plaintiff is in any jeopardy in regard to his present employment.

Having regard to the available evidence it seems to me that this is essentially a case where the Judge could have done no more than endeavoured to arrive at a fair estimate of the damages, taking into account all the relevant considerations, and I am not satisfied that he has failed to do this. As was pointed out in the case of *Nance vs. British Colombia Electric Railway Co., Ltd.*, (1951) A.C. 601, an appellate Court is not justified in substituting a figure of its own for that awarded simply because it would have awarded a different figure if it had tried the case in the first instance, and it should not interfere unless it is satisfied either that the Judge in assessing the damages applied a wrong principle of law, or the amount awarded is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage. I do not think, therefore, that the sum awarded as general damages should be increased.

The plaintiff also stated in his evidence that before the accident he was able not only to cope with his normal work at the Colombo Commercial Company Limited but also to undertake additional work (which he attended to after office hours) as the treasurer of the Royal Colombo Golf Club for which he received a salary of Rs. 250/- per mensem. But as a result of his impaired physical condition he had to give up that post. Mr. Gratiaen complained that the learned District Judge had not taken into account the resulting loss of earnings sustained by the plaintiff.

Actual loss of earnings would, of course, come under the heading of special damage and clear evidence of such loss should be adduced as, unlike general damage, it is normally capable of exact computation. Although there is a reference in the judgment to the fact that the plaintiff had to forego the extra Rs. 250/- a month which he got for his work as treasurer of the Golf Club it does not appear that the Judge included anything for loss of earnings in either of the sums awarded by him as damages. But the evidence given by the plaintiff on the point is so vague that I do not see how the trial Judge could have taken it into account in estimating the damages. The following appears to be all that the plaintiff said in regard to that matter :

"In addition to the work I was doing at the Commercial Company I was functioning as the Treasurer of the Royal Colombo Golf Club. I was paid a salary of Rs. 250/- per month for that. Before the accident I was able to cope up with the office work and that work quite easily. I am not doing that work now. I ceased doing that work because I could not cope up with it. I was too tired at the end of my office hours to do any additional work in the evenings. In my experience there are many opportunities for that type of work for all accountants. The remuneration paid for that type of work, when compared with the time devoted to it, is very good. I am unable to undertake that type of work now ".

It is not possible for us to say how long prior to his giving this evidence he had ceased to do that work. There is no reason to assume that he gave it up from the date of his accident because he had stated earlier that after a period of two weeks from the accident he was able to go back to work. From that time onwards (except for a break from September, 1954 to March, 1955, when he was away on furlough) he appears to have been able to attend to his normal work without feeling any ill effects from the accident until about May, 1956, when he made his first claim for damages on the 2nd defendant through his lawyers. But the evidence is not clear whether even then he ceased to be treasurer of the Golf Club, or whether he did not continue to hold the post till some later date. In the circumstances I do not think that a case has been made out for increasing the amount of damages on the ground of the loss of earnings alleged to have been sustained by the plaintiff.

There remains to be considered the question of interest. No claim for interest was made

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either in the plaintiff's pleadings or at the trial. Mr. Gratiaen pressed this claim before us on the submission that the appeal was a frivolous one instituted purely with a view to postpone payment of what is due to the plaintiff under the decree. I would not, however, go so far as to say that the appeal is entirely without any arguable merit. Even if the interest claimed can be awarded under section 192 of the Civil Procedure Code (a question which I do not decide) it would be a matter in the discretion of the Court, and I do not think that this is a case for the exercise of that discretion in favour of the plaintiff, especially as the claim was made for the first time in appeal.

The appeal of the defendants is dismissed with costs. I also dismiss the cross-objections filed by the plaintiff.

SANSONI, J.
I agree.

*Dismissed.*

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*Present :* BASNAYAKE, C.J., DE SILVA, J., AND SINNETAMBY, J.

## MERCANTILE BANK OF INDIA LTD., vs. DE SILVA AND COMMISSIONER OF ESTATE DUTY

*S. C. No.* 257—*D. C. Galle, No. X.* 1773 (*with Application No.* 159).

*Argued and Decided on :* 21st January, 1958.

*Estate Duty Ordinance,* (*Cap.* 187) *Proceeds of execution sale under decree lying in deposit with Government Agent as required by section* 296 (4) *of the Civil Procedure Code—Has Commissioner of Estate Duty power to issue notice under section* 55 *of the Estate Duty Ordinance to Court to pay as directed in such notice.*

**Held** *:* That section 55 of the Estate Duty Ordinance Cap. 187 has no application to money lying to the account of any suit. The Commissioner of Estate Duty has no authority in law to issue a notice under that section to a Court or Judge.

*Walter Jayawardene,* with *Neville Wijeratne* for the plaintiff-appellant in S. C. No. 257 and in support of Application No. 159.

*V. Tennakoon,* S. C. C., with *B. C. F. Jayaratne,* C. C., for the 2nd defendant-respondent in S. C. No. 257 and for the Application No. 159.

No appearance for 1st defendant-respondent.

BASNAYAKE, C.J.

The question that arises for decision in this case is whether the Commissioner of Estate Duty has authority in law to give notice under section 55 (1) of the Estate Duty Ordinance requiring the District Judge of the District Court of Galle to pay, as directed in the notice hereinafter set-out, a sum of Rs. 26,165/90 out of the money lying in deposit with the Government Agent on account of this section.

It is urged on behalf of the appellant that the Commissioner of Estate Duty has no such authority. The grounds submitted in support of the appellant's contention are as follows :

(*a*) the money is not in the custody of the District Judge as an individual,
(*b*) the District Court is not a legal person,
(*c*) the District Court was not about to pay any money to an executor for or on account of the estate of the deceased,,
(*d*) the District Court did not hold any money for or on account of the estate of the deceased,
(*e*) the District Court did not have authority from some other person to pay any money to an executor for or on account of the estate of the deceased,
(*f*) the District Court was not liable to pay for or on account of the estate of the deceased money which, if paid to an executor, is bound to be credited by him to that estate

The material facts shortly are as follows : The appellant the Mercantile Bank of India sued and obtained judgment against the adminis-

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tratrix of the Estate of the deceased Liyana Peeris Mendis for a sum of Rs. 117,026/-. In execution of the decree a total sum of Rs. 36,750/87 was recovered. This amount was deposited with the Government Agent to the account of the case as required by section 296 of the Civil Procedure Code.

On 9th March, 1956 the Commissioner of Estate Duty issued the following notice :—

"*Ceylon Estate Duty*"
Charge No. ED/9550
Collection File No. AJ/10275

*Notice under Section 55 of the Estate Duty Ordinance (Cap. 187)*

To The District Judge,
District Court, Galle.

Whereas the sum of Rupees Twenty Six Thousand One Hundred and Sixty Five and Cents Ninety (Rs. 26,265·90) being the amount of Estate Duty with interest thereon at 4 per cent per annum from 12th January, 1953 to date of payment and accrued interest Rupees (Rs.............) payable by Mrs. E. Dolly Nona de Silva, Dadalla, Galle, the executor of the estate of L. P. Mendis (deceased), is in default, and whereas it appears to me to be probable that you :

(1) owe or are about to pay money to the executor for or on account of the deceased abovenamed ;

or (2) hold money for or on account of the said estate ;

or (3) have authority from some other person to pay certain sums of money to the said executor for or on account of the said estate ;

or (3) have authority from some other person to pay certain sums of money to the said executor for or on account of the said estate ;

or (4) are liable to pay for or on account of the said estate money which if paid to the executor is bound to be credited by him to that estate.

I, L. G. Gunasekera, Deputy Commissioner of Estate Duty by virtue of the powers vested in me under section 55 of the Estate Duty Ordinance (Cap. 187) do hereby require you to pay to me at the Estate Duty Office of the Department of Income Tax, Estate Duty and Stamps, Colombo, any such moneys referred to above, not exceeding the said amount of the estate duty in default.

2. This Notice shall apply to all such monies referred to above which are in your hands or due from you or about to be paid by you at the date of the receipt of this notice, or come into your hands, or become due from you, or are about to be paid by you at any time within a period of THIRTY DAYS AFTER THAT DATE.

*Monies now lying in deposit in D.C. Galle, Case Nos. X-1356, X-1773 & S-1445 being amounts realized by the sale of lands belonging to the Estate of the abovenamed deceased.

(Sgd.) L. G. GUNASEKERA
Deputy Commissioner of Estate Duty.
Department of Income Tax,
Estate Duty & Stamps,
Colombo, 9th March, 1956."

Learned counsel's submissions are in our view sound and must be upheld. The law requires that money received by Fiscal's officers at execution-sales should be paid into the office of the Government Agent (section 296 (4) C. P. C.). Such monies remain in deposit with the Government Agent until they are paid out on an order of Court (section 297 C. P. C.). The Court has power to make such an order under section 350 of the Civil Procedure Code. Section 55 has no application to money lying to the account of any suit and the Commissioner has no authority in law to issue a notice under that section to a Court or Judge.

The appeal must therefore be allowed. We accordingly set aside the order if the learned District Judge and allow the appeal with costs both here and in the court below.

In application No. 159 the same relief is sought as on this appeal. As we have allowed the appeal, to the hearing of which no objection has been taken by the respondent, we make no order on this application as it is not necessary to do so.

DE SILVA, J.
I agree.

SINNETAMBY, J.
I agree.

*Appeal allowed.*

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*Present :* L. W. de Silva, A.J.

## MOHAMED IBRAHIM *vs.* INSPECTOR OF POLICE, KAHAWATTE.

*S.C. No.* 706/1957—*M.C. Ratnapura No.* 60204.

*Argued and Decided on :* 1st October, 1957.

*Criminal Procedure Code (Chap.* 16), *Section* 306 (1)—***Requisites of a judgment—Duty of Magistrate to give reasons for his decision. In recording evidence Magistrate to comply with Section*** 298 (3) ***Criminal Procedure Code.***

**Held** : (1) That the omission by a Magistrate to give reasons for his decision occassioned a failure of justice. A mere outline of the case for the prosecution and the defence is not a sufficient compliance with section 306 (1) of the Criminal Procedure Code.

(2) That in recording evidence it is the duty of the Magistrate to comply with the requirements of section 298 (3) of the Criminal Procedure Code.

**Cases referred to :** *Thuraiya vs. Pathaimany* (1939) 15 C.L.W. 119.

***G. P. J. Kurukulasooriya*** with ***F. C. Perera*** for the 1st accused-appellant.
***E. H. C. Jayatileke,*** Crown Counsel for the Attorney-General.

L. W. De Silva, A.J.

The appellant was convicted after trial on two charges framed under sections 315 and 314 of the Penal Code and sentenced to six months rigorous imprisonment and to pay a fine of Rs. 75/- respectively.

Learned counsel for the appellant has pointed out that the judgment of the Magistrate contains only a mere outline of the case for the prosecution and the defence without reasons being given for the decision. He has referred me to section 306 (1) of the Criminal Procedure Code (Cap. 16) :—

> " The judgment shall be written by the District Judge or Magistrate who heard the case and shall be dated and signed by him in open Court at the time of pronouncing it, *and in cases where appeal lies shall contain the point or points for determination, the decision thereon, and the reasons for the decision.*"

Learned counsel has asked for a new trial before another Magistrate and has brought to my notice the case of *Thuraiya vs. Pathiamany*, 15 C.L.W. 119, where Nihill, J. Observed :

> " A mere outline of the case for the prosecution and the defence embellished by such phrases as ' I accept the evidence for the prosecution,' ' I disbelieve the defence,' is by itself an insufficient discharge of the duty cast upon a Magistrate by section 306 (1) of the Criminal Procedure Code."

I am unable to take any other view of the present case. The judgment has the heading " Reasons " (though none has been given) and covers nearly four pages of typescript. Three and a half pages are devoted to a racital of the facts. Then comes the following concluding paragraph :—

> " There is not the slightest doubt on the evidence that the three accused had pelted stones and probably got some stones themselves in return. I have also not the slightest doubt in accepting the evidence of the prosecution witnesses that in the course of the stone throwing the 1st accused flung the bottle of acid at Dorai Rajah. I accept the evidence of the prosecution witnesses and find the 1st accused guilty on counts 2 and 3 and convict him. I find him not guilty on count 1 and acquit him on that count."

Learned Crown Counsel was unable to support the judgment. Nowhere has the Magistrate given any reasons for his conclusions, nor does he appear to have considered the evidence given by the appellant and his witnesses. The learned Magistrate's omission to state the reasons for his decision has deprived the appellant of his fundamental right to have his conviction reviewed by this Court and has thus occasioned a failure of justice. Without such reasons, it is impossible for this Court to Judge whether the finding is right or wrong. I therefore set aside the convictions and sentences and order a new trial.

There is one other matter to which I should refer. In recording evidence, the Magistrate should comply with the requirements of section 298 (3) of the Criminal Procedure Code. For the identification of witnesses, particulars as to the race, occupation, age, place of residence, full name, etc. of *each* witness are always necessary and no exception should be made.

*Set aside.*

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*Present :* WEERASOORIYA, J. AND SANSONI, J.

## REV. M. BUDDAHARAKKHITA THERA *vs.* WIJEWARDENE *et al.*

*Applications* 459 *and* 460—*D.C. Colombo No.* 7338/*L.*

*Argued on :* 12th and 13th February, 1958.
*Delivered on :* 19th February, 1957.

*Appeal to Privy Council—Final leave to appeal granted—Failure to serve on respondent list of documents considered necessary for due hearing of appeal within time prescribed—Application for extension of time—Proctor's negligence in regard to sending notices—Should time be granted.*

*Appellate Procedure* (*Privy Council*) *Order—Rules* 10, 18 *and* 25—*Is the requirement to give notice of necessary documents under Rule* 10 *mandatory—Does the failure to give such notice alone entitle the opposing party for a declaration under Rule* 25 *that appeal should stand dismissed.*

**Held :** (1) That where the failure to comply with rule 10 of the Appellate Procedure (Privy Councils) Order of 1921, which requires the appellant to serve on the respondent within ten days of the grant of final leave to appeal a list of all documents necessary for the due hearing of the appeal, was due to the negligence of the Proctor for the appellant, no extension of time should be granted by the Supreme Court.

(2) That the said rule 10 is mandatory, not directory.

(3) That where an application for extension of the time allowed under rule 10 is refused, there is no other alternative but to grant a declaration under rule 25 that the appeal stands dismissed for non-prosecution.

*Application* 459 *for extension of time :*

*D. N. Pritt, Q.C.*, with *E. B. Wickremanayake, Q.C.*, *George Samarawickrema* and *Prins Gunasekera* for the applicant-appellant.

*H. V. Perera, Q.C.*, with *E. F. N. Gratiaen, Q.C.*, and *W. D. Gunasekera* for the respondents.

*Application* 460 *to have plaintiff-appellant's appeal to Privy Council to stand dismissed :*

*H. V. Perera, Q.C.*, with *E. F. N. Gratiaen, Q.C.*, and *W. D. Gunasekera* for the applicant-defendants.

*D. N. Pritt, Q.C.*, with *E. B. Wickremanayake, Q.C.*, *George Samarawickrema* and *Prins Gunasekera* for the respondent.

WEERASOORIYA, J.

The plaintiff in this case obtained final leave on the 28th August, 1957, to appeal to Her Majesty in Council from the judgment and decree of this Court. One of the steps to be taken thereafter by the plaintiff in terms of Rule 10 of the Appellate Procedure (Privy Council) Order, 1921 (hereinafter referred to as "the Order") was to serve on the defendants within ten days a list of all the documents which he considered necessary for the due hearing of the appeal. Although the last date for taking this step was the 7th September, 1957, it is common ground that the list was not posted to the defendants until the 11th September, 1957, and received by them on the following day under protest.

Arising from the plaintiff's non-compliance with Rule 10 these two applications have been made by the plaintiff and defendants respectively. The plaintiff's application is under Rule 18 of the Order for an extension of the time allowed under Rule 10. The defendants on the other hand apply under Rule 25 of the rules in the Schedule to the Appeals (Privy Council) Ordinance (Cap. 85) for a declaration that the appeal stands dismissed for non-prosecution. Rule 25 provides for such a declaration being made where an appellant having obtained final leave to appeal fails to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the record to England.

Although the affidavits filed in support of the plaintiff's application for an extension of time are not clear on the point, Mr. Senaweera his proctor who gave evidence before us has explained how the delay in furnishing the defendants with the list specified in Rule 10 was occasioned. According to Mr. Senaweera he fell ill on the 6th September, 1957, and for that reason he was unable to attend his office at Hulftsdorp from the 7th to the 10th September. On the 7th September the plaintiff met him at his residence and informed him that a list of documents had

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to be furnished to the other side on that very day and instructed him to take the necessary steps. Mr. Senaweera does not appear even then to have become alive to the provisions of Rule 10, but he states that he typed out a notice to the defendants and signed it and sent it by his servant boy to his clerk at Hulftsdorp with an oral message that it should be despatched by express post on the same day. He refers to one notice having been typed, signed and sent by him, and how this single document could possibly have served as a notice to the three defendants (who lived at three different addresses) has not been explained. Mr. Senaweera, satisfied, no doubt, that he had performed his good deed for the day, appears to have rested thereafter. He remained in that state of quiescence until the 11th September when he attended office, and on discovering that the notices had not yet gone took action to have them despatched on that day, but disingenuously dating them as on the 7th September, 1957. He does not appear to have been sufficiently mindful of his client's interests even to the extent of questioning his clerk about the despatch of the notice sent to him on the 7th September when the clerk saw him at his residence on the 9th September in connection with some other business. Why the clerk should have failed to carry out his instructions if he did in fact receive the requisite notices on the 7th September has not been explained.

Enough has been said, I think, to show that Mr. Senaweera was lacking in candour in the evidence he gave, and even on that evidence he has displayed a high degree of negligence in regard to the sending of the notices. His negligence must, of course, be deemed to be the plaintiff's negligence.

Under Rule 18 of the Order, the Court may for good cause extend the time allowed by the Order for doing any act notwithstanding that the time has expired. If the plaintiff can rely only on the circumstances which resulted in the delay as deposed to by Mr. Senaweera, it would be impossible to say that good cause has been shown for granting an extension of time. It was held in *Samel Appuhamy vs. Peter Appuhamy*, 52 N.L.R. 496, which also was a case of a failure to comply with Rule 10, that "good cause" was not made out as the applicant had not shown that throughout he had exercised due diligence in prosecuting his appeal and that the failure to comply with the rules was occasioned by some circumstance beyond his control or of his legal advisers. We were invited by Mr. Pritt who appeared for the plaintiff to treat this ruling as nothing more than an expression of opinion amounting to an *obiter dictum*, but it seems to me, on the contrary, that it represents the *ratio decidendi* of the case.

Even if in an appropriate case it is possible to take into account certain extraneous circumstances as constituting a good cause for an extension of time notwithstanding that the applicant has been guilty of negligence in not taking within the prescribed time a necessary step towards the prosecution of his appeal, the only circumstances relied on in the present case are that it is an important one and that the failure has caused no prejudice to the defendants. While it may be assumed that the case is an important one to the parties, and even if no prejudice is shown to have been caused to the defendants by the failure, I am unable to take the view that these circumstances, separately or cumulatively, constitute a good cause.

Mr. Pritt also contended that the provisions of Rule 10 are directory and not mandatory, inasmuch as there is nothing in the rule or in any other rule under the same Order to indicate that non-compliance with Rule 10 is fatal to the appellant proceeding further with his appeal. But apart from no authority having been cited to us for the view that a law which imposes a time limit for the doing of an act is to be construed as otherwise than mandatory, it seems to me that Rule 25 of the rules in the Schedule to The Appeals (Privy Council) Ordinance under which the defendants have made their application, provides the sanction for the due compliance by an appellant of Rule 10 of the Order. Rule 25 implies that it is for the appellant to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the record to England under pain of having his appeal dismissed for non-prosecution. It cannot be doubted, I think, that the steps required to be taken under Rule 10 are necessary steps, and it was so conceded by Mr. Pritt. The very fact that special provision is made in the Order for an extension of time being specially obtained for doing an act notwithstanding that the time specified has expired is, to my mind, a further indication that Rule 10 is a mandatory provision.

I hold, therefore, that no good cause under Rule 18 of the Order having been shown, the extension of time applied for by the plaintiff cannot be granted, and it is refused. But Mr. Pritt contended that even if that application is refused it does not necessarily follow that the application of the defendants must be granted. In his submission a declaration under Rule 25 in the Schedule to The Appeals (Privy Council) Ordinance can be made only for non-prosecution of the appeal, and a single omission resulting in

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a short delay cannot have the effect of rendering the plaintiff guilty of non-prosecution of his appeal. I am unable to agree. Where in consequence of our refusal to extend the time allowed under Rule 10 of the Order, the further prosecution of the appeal by the plaintiff is necessarily brought to a standstill I do not see that we can do otherwise than grant a declaration under Rule 25 that the appeal stands dismissed for non-prosecution (without express Order of Her Majesty in Council) and I declare accordingly.

The defendants will be entitled to the costs of their application under Rule 25 which are fixed at Rs. 525/-. They will also be entitled to the costs (as taxed by the Registrar) already incurred by them in connection with the plaintiff's appeal to Her Majesty in Council. I make no order as regards costs in the application of the plaintiff under Rule 18.

SANSONI, J.

*Application for extension of time refused*
*Appeal stands dismissed for non-prosecution.*

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*Present :* WEERASOORIYA, J. AND SANSONI, J.

## H. W. MENDIS SILVA *vs.* THE CEYLON INSURANCE COMPANY LIMITED

*S. C. No. (F)* 114—*D. C. Colombo No.* 34320/*M*

*Argued on :* 6th and 7th February, 1958.
*Decided on :*

*Damages against Insurance Company—Lorry running off the road due to steering rod giving way—Serious damage, to lorry—Claim resisted by Company—Defence that 1 damage not caused by " accidental, external means " , 2 false answer in proposal, 3 failed to take all reasonable precautions to safeguard from loss or damage and to maintain in efficient condition in breach of condition of Policy—Dismissal of action.*

*Judicial Notice, of what matters can Court take—Burden of Proof—Where it lies in these cases. Motor Traffic Act, No.* 14 *of* 1957, *Section* 36.

**Held :** (1) That where a lorry ran off the road by accident when the steering rod gave way and was damaged when it collided with a log, the case fell within the phrase " accidental, external means ".

(2) That where the answer to the question in a proposal for insurance of a lorry, " maximum carrying capacity " of vehicle ", was stated to be 3½ tons when the licensing authority had under section 36 of the Motor Traffic Act, specified in the license only two tons as the maximum payload which may be carried, and where there was evidence that this authorised capacity in the license is sometimes less than the actual carrying capacity of the vehicle at the discretion of the Commissioner of Motor Transport, it cannot be said that the answer has been proved to be false. The burden is on the Insurance Company to prove that a particular answer is false.

(3) That the Court cannot take Judicial notice of the fact that, if there are any smooth tyres on a motor vehicle, the vehicle is un-road-worthy or was not in efficient condition. It is a matter to be established by the evidence of an expert speaking to the facts of the particular case.

(4) That it is unsafe to infer that the mechanism of a motor vehicle had not been in an efficient condition, merely because it failed to function just before the accident occurred.

*Wigmore on Evidence* :—" The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is : (1) Is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know ? and (2) Is it certain and indisputable ? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence ".

*E. F. N. Gratiaen, Q.C.*, with *S. C. E. Rodrigo* and *John de Saram* for the Plaintiff-appellant.

*E. B. Wickramanayake, Q.C.*, with *H. Wanigatunge* for the Defendant-respondent.

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SANSONI, J.

The plaintiff insured his Chevrolet lorry bearing No. CY 4144 with the defendant company upon a Policy of Insurance dated 26th May, 1954. When the lorry was being driven to Trincomalee on 8th August, 1954 by the plaintiff's driver it ran off the road and was seriously damaged. The lorry was thereafter towed to Colombo, and the cost of repairing it was estimated by Rowlands Ltd. at Rs. 5093/73.

The plaintiff brought this action to recover Rs. 9000/-, further damages at Rs. 10/- a day from 8th September, 1954, and a sum of Rs. 150/- as towing charges. The defendant company, after negotiations with the plaintiff, denied its liability in any sum whatsoever. After trial the learned District Judge dismissed the plaintiff's action, upholding the defence on three grounds: they were (1) because the damage to the lorry was not caused by "accidental, external means", (2) because the plaintiff had given a false answer in the proposal by stating that the "maximum carrying capacity of the vehicle" was 3½ tons and not 2 tons, (3) because the plaintiff failed to "take all reasonable precautions to safeguard from loss or damage and to maintain in efficient condition" the insured lorry, in breach of condition 5 of the Policy.

At the hearing of the appeal Mr. Gratiaen who appeared for the plaintiff-appellant limited his claim to Rs. 5,243/73 being the estimated cost of repairing the lorry plus the towing charges. Mr. Wikramanayake who appeared for the defendant-respondent did not attempt to support the learned Judge's finding on the first ground which I have set out. It is clear from the evidence that the lorry ran off the road by accident when the steering rod gave way, and was damaged when it collided with a log; the case therefore fell within the phrase "accidental, external means". If the attention of the learned Judge had been drawn to such cases as *Winspear vs. Accidental Insurance Company* (1880) 6 Q.B.D.42, and *Lawrence vs. Accidental Insurance Company* (1881) 7 Q.B.D. 216, his decision on this point would have been different.

With regard to the second ground, Mr. Gratiaen conceded that since the proposal was the basis of the contract, the statements in the proposal had to be true if the contract was not to be avoided. It was submitted, however, that upon a fair and reasonable construction the answer "3½ tons" was the true answer to the question "maximum carrying capacity of vehicle"; or that, at the lowest, the question was ambiguous and should therefore be construed against the insurers. The learned Judge's view was that the maximum carrying capacity of a vehicle is neither more nor less than the payload of 2 tons which the licensing authority had specified in the licence as the maximum load which may be carried on the lorry, under Section 36 of the Motor Traffic Act No. 14 of 1957. If the question in the proposal can and does in fact mean *only* what the learned Judge thought it meant, there is no doubt as to the falsity of the answer given by the plaintiff. But the evidence of the witnesses Nelson and Wettasinghe, called by the plaintiff and the defendant company respectively, shows that the authorised pay-load mentioned in the licence is sometimes at the discretion of the Commissioner of Motor Transport, fixed at a lower figure than the total weight of the goods which the vehicle is capable of carrying; and that a lorry such as this, with a "wheel base of 161" can carry 3½ tons of goods. Their evidence is not very clear on some matters, but it was for the defendant company to show that the particular answer was false. If the information which the insurers were seeking to obtain by the particular question in the proposal was in regard to the pay-load, I find difficult to understand why the question was not asked in those plain terms. Even if the question as framed does not refer only to the maximum load that the vehicle was built to carry, it can well bear that meaning also. I do not therefore consider that the answer given to the question was shown to be false.

I come now to the third ground on which the learned Judge held against the plaintiff. Condition 5 of the Policy which I have set out requires the plaintiff to maintain the vehicle in efficient condition: this means that the plaintiff had to take reasonable precautions "to make the vehicle or keep the vehicle road-worthy—that is, in an efficient condition for the purpose for which it was going to be used, namely, to run upon the roads"—see *Brown vs. Zurich General Accident and Liability Insurance Ltd.*, (1954) 2 Ll. L. rep. 243.

In order to show that there had been a breach of this condition the defendant company relied on the evidence of its representative Zahir who had inspected the lorry at the scene of the accident on 12th August 1954. This witness stated that he then found that of the six tyres on the lorry (for it had six wheels) the three on the off side were worn smooth and two of them were in a worse condition than the third. As the learned trial Judge has accepted the evidence of this witness as to the condition of these three tyres I shall consider the case on that footing I do not, however, see that the necessary or

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proper conclusion to be drawn from this finding of fact is that this lorry was not in an efficient condition. It is significant that although the plaintiff called the witness Nelson who had been an engineer of Rowlands Ltd., for about 30 years, and the defendant company called the witness Wettasinghe who had been an Examiner of motor vehicles for 25 years, neither of these witnesses was asked for his opinion as to whether the three tyres of this lorry rendered it un-road-worthy. Even the witness Zahir does not express such an opinion.

Can it be said that the Court should take judicial notice of the fact that if there are any smooth tyres on a motor vehicle, the vehicle is un-road-worthy? I do not think so. Perhaps in an extreme case, where all the tyres of a vehicle are smooth, the answer may be easier to give. But what if, of the six tyres, only one or two or three tyres are smooth? Is the vehicle to be considered un-road-worthy in all these instances? And if not in all, then in how many? The particular clause of the policy does not, of course, require the vehicle to be maintained in perfect condition but only in an efficient condition.

In considering the question whether the Court can take judicial notice of this matter, I would refer to the following observations in Wigmore on Evidence (3rd edition) Vol. 9 at section 2580. " Judicial notice is a judicial short cut, a doing away, in the case of evidence, with the formal necessity for evidence, because there is no real necessity for it. So far as matters of common knowledge are concerned, it is saying there is no need of formally offering evidence of those things, because practically everyone knows them in advance, and there can be no question about them. The rule in this respect is well stated on 15 R.C.L. 1057 as follows: " It may be stated generally with regard to the question of what matters are properly of judicial cognizance that, while the power of judicial notice is to be exercised with caution, Courts should take notice of whatever is or ought to be generally known within the limits of their jurisdiction, for justice does not require that Courts profess to be more ignorant than the rest of mankind. This rule ennumerates three material requisites: (1) The matter of which the Court will take judicial notice must be a matter of common and general knowledge. The fact that the belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by everyone. Courts take judicial notice of those things which are common knowledge to the majority of mankind, or to those persons familiar with the particular matter in question. But matters of which Courts have judicial knowledge are uniform and fixed, and do not depend upon an uncertain testimony; as soon as circumstances becomes disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognised (2) A matter properly a subject of judicial notice must be " known "; that is, well established and authoritatively settled, not doubtful or uncertain. In every instance the test is whether sufficient notoriety attaches to the fact involved as to make it safe and proper to assume its existence without proof. In harmony with that view it has been said that Courts must " judicially recognise whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life " . . . (I need not quote the third requisite because it is not material in this case).

" The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is: (1) Is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know and (2) Is it certain and indisputable? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence ".

Mr. Wickramanayake submitted that the conclusion of the learned Judge, drawn from the condition of the three worn tyres, that the lorry was un-road-worthy, is a question of fact which should not be interfered with in appeal. I have already said that I accept the learned Judge's finding of fact that three tyres on this lorry were smooth, but the question that now arises is the proper inference to be drawn from that fact. The difference, as pointed out in *Benmax vs. Austin Motor Co. Ltd.*, (1955) A.C. 370 is between the perception of facts and the evaluation of facts, and I think this Court is in a position to judge whether the inference of the lorry being in an un-road-worthy condition was the proper inference to be drawn from the specific fact found by the learned Judge. I do not think the learned Judge could take judicial notice of the fact that a lorry with three such tyres was not in an efficient condition. It seems to me to be a matter to be established by the evidence of an expert speaking to the facts of the particular case, for " the subject-matter of inquiry is such that inexperienced persons

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are unlikely to prove capable of forming a correct judgment upon it without such assistance.

The learned Judge has also found that the defects in the steering mechanism of the lorry showed that the lorry was not maintained in efficient condition. Here again there is a total absence of any evidence, expert or otherwise, as to the condition of the steering mechanism at or before the time of the accident. I think it is dangerous to infer that the mechanism had not been in efficient condition merely because it failed to function just before the accident occurred. It is true that no major repairs had been done to the lorry since the plaintiff purchased it second-hand in 1946, but what was the need for them if the lorry was working satisfactorily? Minor repairs were effected when required, and the lorry was serviced from time to time, and I do not see that the plaintiff failed to observe condition 5 by failing to look for defects which were not apparent.

For these reasons I would set aside the judgment appealed from and give judgment for the plaintiff in a sum of Rs. 5,243/73 and costs in both Courts.

WEERASOORIYA, J.

I agree.

*Set aside.*

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*Present :* GUNASEKARA, J.

## ELIZABETH A. PAUL & OTHERS *vs.* GEVERAPPA REDDIAR

*(R/E) C.R.* 55/1957. *C.R. Colombo No.* 60124.

*Argued on :* 6th August, 1957.
*Delivered on :* 17th January, 1958.

*Lease of grass land and buildings as a single unit—Right of lessee to claim protection of the Rent Restriction Act—Can the lessee be ejected from the grass land.*

Where property consisting of highland with buildings thereon and a grassfield is let as a single unit at a single rent, the real question is not whether what was let consisted of property to which the Act did not apply as well as property to which it did, but whether it consisted of buildings with appurtenant land or land with appurtenant buildings. This is a question of fact.

*Felix Dias* with *H. D. Perera* for plaintiffs-appellant.

*T. Arulananda* for defendant-respondent.

GUNASEKARA, J.

This appeal arises out of an action brought by the appellants for the ejection of the respondent from certain property that they had let to him on a contract of monthly tenancy and for the recovery of rent alleged to be in arrear and damages for overholding. The tenancy began on the 10th July, 1951, and was terminated on the 31st October, 1955, by a notice to quit given to the respondent on the 5th September, 1955. The rent stipulated in the contract, which was in writing, was Rs. 150/- a month, but the Rent Control Board purported to fix the authorised rent at Rs. 102·33 a month. The main issue at the trial was whether the property was one to which the Rent Restriction Act applied. It was contended for the appellants that it did not constitute "premises" within the meaning of the Act and therefore the respondent was not protected by the Act. The learned Commissioner of Requests answered this issue and all the subsidiary issues against the appellants and dismissed the action with costs.

In a document acknowledging the receipt of rent for the period 10th July to 31st August, 1951, the appellants describe the demised property as—

> " the following premises :
> (*a*) No. 5 (Dairies Two)
> (*b*) No. 5A (Front Room) and
> (*c*) Grassland excluding the following
>     (*a*) Five houses bearing Nos. 5B, 5C, 5D, 5E and 5F.
>     (*b*) 6 Blocks of Vegetable Garden and
>     (*c*) 6 Huts in the Grassfield ".

According to the evidence given by the 1st appellant the entire extent of the land that was

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let was $4\frac{1}{2}$ acres, and a little more than a quarter of an acre of this was high land while the rest was grass field. The buildings described as Nos. 5 and 5A stood on the high land.

At the hearing of the appeal it was conceded by the learned counsel for the appellants that the high land and the buildings standing on it were " premises " within the meaning of the Act and therefore the Act applied to them. He maintained, however, that the rest of the property, consisting of what was described in the receipt as grass land, was not " premises " and was therefore not property to which the Act was applicable; and that though there was a single contract between the parties it did not relate solely to property to which the Act applied but to other property as well. On this ground it was claimed that the appellants were entitled to have the respondent ejected from that portion of the demised property which consisted of grass land.

I am unable to accept this contention. The property may be capable of division into different lots some of which would consist mainly or solely of buildings and others solely of land with no buildings on it. Though it may be capable of being so divided into new units, what was actually let was a single unit at a single rent and not several units consisting of the lots into which the property could be divided. It seems to me that the real question is not whether what was let consisted of property to which the Act did not apply as well as property to which it did, but whether it consisted of buildings with appurtenant land or land with appurtenant buildings. This is a question of fact, and the learned Commissioner, who inspected the property at the request of both parties, has answered it in favour of the respondent. He has held that it was the intention of the parties that " the premises were to be used primarily for the purpose of a dairy " and that " the grass land merely came into it as an adjunct ", and also that " the grass field portion yields no income and the predominant and striking character of the parcels leased are the dairy buildings ". There appears to be no ground for disturbing this finding of fact. It follows that the learned Commissioner's finding that the respondent is entitled to the protection of the Act must be affirmed and the appeal fails.

The appeal is dismissed with costs.

*Dismissed.*

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*Present :* SINNETAMBY, J.

## B. FRANCIS FERNANDO *vs.* VINCENTINA FERNANDO

*S.C. No.* 873/1957—*M.C. Gampaha Case No.* 23238.

*Argued on :* 24th February, 1958.
*Decided on :* 11th March, 1958.

*Maintenance Ordinance—Order made under Section 2—Decree for divorce subsequently—Order for alimony in wife's favour—Application by wife to enhance order under Section 2 after decree for divorce—Is she entitled to make such application.*

**Held** : That a divorced wife is entitled to make an application under section 10 of the Maintenance Ordinance to enhance an order of maintenance obtained by her under section 2 prior to divorce.

*A. L. Jayasuriya* with *Norman Abeysinghe* for defendant-appellant.
*Carl Jayasinghe* with *A. C. Krishnarajah* for applicant-respondent.

SINNETAMBY, J.

This is an appeal by a husband against an order of the Magistrate made under section 10 of the Maintenance Ordinance enhancing the amount of maintenance payable by him to his wife. It would appear that after the order for maintenance was made there was entered in the District Court of Gampaha a decree for divorce in which an order for the payment of alimony amounting to Rs. 80/- was made in favour of the wife. The application for enhancement under section 10 was made subsequent to the decree in the divorce case. The appeal was pressed only on the ground that as by the decree of the District Court the applicant ceased to be a wife she was not entitled to invoke the provisions of the Maintenance Ordinance.

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I should at this stage mention that a preliminary objection was taken to the appeal on the ground that the order of the Magistrate was under section 10 of the Ordinance and in view of the express provisions of section 17 the appellant was not entitled to prefer this appeal. In my opinion the preliminary objection is entitled to succeed but in view of the importance of the questions raised I propose to deal with the case in revision.

Two cases were referred to by the learned Magistrate in the course of his order, viz. *Pieris vs. Pieris*, 45 N.L.R. 18, and *Fernando vs. Amerasena*, 45 N.L.R. 25. In *Pieris vs. Pieris* (*supra*) a decree for separation had been entered and it was held that the wife was entitled to bring a maintenance case claiming maintenance for herself and her child. In *Fernando vs. Amerasena* (*supra*) the claim was by a divorced wife in respect of her legitimate child for which an order for maintenance had been made in the divorce proceedings: no claim was made on behalf of the " wife ". The difficulty the learned Magistrate had was that in the present case the application is made by a wife who had been divorced and was no longer a " wife " in the eyes of the law.

Even if one confines oneself to a strict interpretation of the words used in the Ordinance it becomes clear that an application under section 10 for enhancement can be made by a " wife " who has, in the period intervening between the order for maintenance in her favour and the application for enhancement, been divorced.

It is section 2 of the Ordinance which enables a wife to obtain an order in her favour. At that stage she has to be a *wife* in order to succeed. It is not necessary, however, for the purposes of this case to decide whether a " wife " who has obtained a decree for divorce can thereafter apply for maintenance under this section. An order once made in favour of a wife continues to be in force, at least so far as the provisions of the Maintenance Ordinance are concerned, until it is cancelled under section 5 or under section 10. It would appear on a first reading of these sections that an order under section 5 can only be made against a *wife* on the application of a *husband* as the section expressly uses the words " wife " and " husband ". Indeed, having regard to the provisions of section 5 intrinsically there is much to be said in favour of this interpretation. Section 10, may be advisedly, avoids using the words " wife " and " husband " and provides that any " *person* receiving or ordered to pay a monthly allowance " may apply for cancellation or alteration. It would thus be reasonable to hold that once an order for maintenance under section 2 has been made in favour of the wife it continues in force until it is cancelled or varied under section 10 irrespective of all other considerations and irrespective of whether there has since come into existence a decree for divorce. In my opinion it is open to a divorced " wife " to apply for enhancement under section 10 just as much as it is open to a divorced husband to apply under it for a cancellation.

Section 10 of the Ordinance permits an order to be made " on proof of a change in the circumstances." A decree for divorce would certainly be a change in the circumstances and if in the divorce case the husband is found to be the guilty spouse surely that should not place him in a position of advantage and claim that the decree for divorce *ipso facto* wipes out the order for maintenance. Similar though somewhat different provisions of the Summary Provisions (Married Women) Act of 1895 were interpreted in the case of *Bragg vs. Bragg*, 41 Times L.R. 8. Section 5 of this Act provides " that the husband shall pay the applicant . . . a weekly sum ", etc. Section 4 provides that only a " married woman " can make the application. Section 7 which corresponds to our section 10 provides that a Court of Summary Jurisdiction may upon fresh evidence vary or cancel the order. This is subject to this proviso :

> " If any married woman upon whose application an order shall have been made under this Act " and so on, " shall voluntarily resume cohabitation with her husband or shall commit an act of adultery, such order shall, upon proof thereof, be discharged."

In appeal the Court held that the decree for divorce does not *ipso facto* discharge the order for maintenance and that an order of discharge in an appropriate case can only be obtained by an application under section 7 of the Act. This case favours the construction I have placed on section 10 of our Ordinance.

I am accordingly of the view that a divorced wife is entitled to make an application under section 10 of the Ordinance to enhance an order of maintenance obtained by her prior to divorce under section 2. The order of the learned Magistrate is affirmed. The appellant " husband " will pay the respondent the costs of this application.

*Affirmed.*

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