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 LVI

WITH A DIGEST

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Appeal—Plea of Autrefois Acquit—*Right of Appeal against order of Magistrate rejecting plea—Criminal Procedure Code, section* 338 (1).

The accused-appellant was charged in the Magistrate's Court with causing grievous hurt. Counsel for the defence raised before the Magistrate a plea of *autrefois acquit*, but this plea was not upheld and the Magistrate directed that the trial should proceed. The accused appellant thereupon appealed to the Supreme Court from this order.

Held : That an appeal lies to the Supreme Court only from a judgment or final order pronounced by a Magistrate's Court, and an interlocutory order rejecting a plea of *autrefois acquit* raised *in limine* and directing that the trial should proceed is not an appealable order.

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Held : (1) That entrusting the charge of a temple by a Society, which founded it, to a monk provisionally by deed intending to effect a permanent transfer and dedication at some later time, is not, in the absence of evidence that the intention was carried out, sufficient to divest the Society of its rights and to prevent the Society from subsequently entrusting the control and management of the temple to persons other than those mentioned in the document.

(2) That where the plaintiffs are the owners, and therefore the trustees of some of the allotments of land upon which a temple stands, they have no right to be declared trustees of the entire land, but they are entitled to regain the rights of possession and management of which they have been deprived by the unlawful acts of the defendants.

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In an application for registration under the Indian and Pakistani Residents (Citizenship) Act, it is not imperative that the applicant should prove a change of domicile in order to establish an intention to settle permanently in Ceylon.

Where statements are made in a document by an applicant regarding temporary residence in Ceylon, they are of no evidential value if they have been made incorrectly or without a proper understanding of them.

That the date at which an applicant must establish that " he is an Indian or Pakistani resident " as defined in Section 22 is the date of the application and not the date on which the Act came into operation, namely, 5th August, 1949.

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An application for citizenship under the Indian and Pakistani Residents (Citizenship) Act cannot be refused solely on the ground that the applicant had failed to prove the abandonment of the domicile of origin. Proof of change of domicile is not necessary to establish intention of permanent settlement in Ceylon.

But where the Commissioner dismisses the application after taking into consideration other circumstances, such as the birth and the education of the applicant's children, on which he could reasonably have concluded that there was no intention to settle permanently, the Court of Appeal will not interfere with the order.

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The plaintiff-respondent filed an action claiming damages from defendant-appellant for defaming him. After the case was fixed for trial, the plaintiff sought to amend the plaint by particularizing certain named individuals to whom the defamatory words had been published. The names of these persons were not stated in the plaint, although they had appeared in the list of witnesses. The trial judge after hearing the objections of the defendant-appellant allowed the amendment and ordered the plaintiff-respondent to pay the costs of the amended answer, if it became necessary, and the defendant-appellant to pay the costs of the hearing. The trial judge also refused the defendant-appellant's application to stay the proceedings until the appeal to the Supreme Court was decided.

It was contended in appeal for the defendant-appellant that the trial judge should not have allowed the amendment, as only those persons whose names are mentioned in the plaint can be called to prove the defamatory statements.

It was also contended that the order on the defendant to pay costs of the hearing was wrong because it amounted to penalizing the defendant-appellant for an omission committed by the plaintiff-respondent and that such an order was contrary to Section 93 of the Civil Procedure Code.

It was further contended (though not finally pressed) that the trial judge should have granted a postponement of the trial fixed for September and as he had not postponed the trial he had not exercised the discretion vested in him by Section 93.

Held : (1) That there is no rule of law which prohibits persons who are not named in the plaint from being called as witnesses. It is sufficient if the plaintiff complies with the provisions of Section 121 Civil Procedure Code by filing a list of witnesses within a reasonable time before the trial with notice to the opposite side. A person whose name does not appear on the list of witnesses cannot be called except with the leave of Court and in special circumstances only (Section 175 C.P.C.)

(2) That Section 93 of the Civil Procedure Code gives the judge a discretionary power to amend a plaint which may be exercised *ex mero motu* or upon the application of one of the parties. This power is subject to the limitations placed by Section 46 (2) of the Civil Procedure Code, namely that no amendment should be allowed which would have the effect of converting an action of one character into an action of another or inconsistent character. The discretion should be exercised judicially. In this case the judge has not exceeded the powers under Section 93 and has properly exercised the discretion vested in him by the section.

(3) The power to order costs of hearing into an application to amend, where it is resisted by the opposing party is contained in Section 211 of the Civil Procedure Code, and the judge in ordering the defendant appellant to pay costs of the hearing and the plaintiff-respondent to bear the costs of the amended answer quite rightly and properly exercised the power given to him under Sections 211 and 93—respectively.

(4) In regard to an application for postponement of a trial the Chief Justice expressed the view that it should be by writing as required by section 91 (1) of the Civil Procedure Code. Sinnetamby, J. is of the view that the section is only directory and not imperative, and an application may be made *ore tenus.* (Edd.)

Per BASNAYAKE, J.—" The mode of approach of an appellate Court to an appeal against an exercise of discretion is regulated by well established principles. It is not enough that the Judges composing the appellate Court consider that, if they had been in the position of the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the Judge has acted illegally, arbitrarily or upon a wrong principle of law or allowed extraneous or irrelevant considerations to guide or affect him, or that he has mistaken the facts, or not taken into account some material consideration. Then only can his determination be reviewed by the appellate Court."

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Held : (1) That a Judge making an order under sections 325 and 377 of the Civil Procedure Code must indicate in his order that he has considered the evidence exhibited or adduced and that he is satisfied that the material facts of the petition are *prima facie* established and that he is of opinion that on the footing of these facts the petitioner is entitled to the remedy or to the order in his favour.

(2) That at the hearing of the petition after the interlocutory order the judgment-creditor is not relieved of the burden of satisfying the Court that the obstruction or resistance complained of was occasioned by the judgment-debtor or by some person at his instigation.

(3) That section 377 (*b*) does not cast the burden on the judgment-debtor, nor has it the effect of imposing on him the burden of leading evidence to the contrary before the judgment-creditor has proved his case.

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Agreements to sell land were executed at Dondra, where the defendant resides, a place within the local limits of jurisdiction of the District Court of Matara. The land which is the subject matter of the agreement is situated within the jurisdiction of the District Court of Tangalle. The District Judge of Tangalle sits at Hambantota where this action was instituted.

A preliminary objection to the jurisdiction of the Court was taken and the learned District Judge held that the Court had jurisdiction to hear and determine the action as it was an action in respect of land within the meaning of section 9 (*b*) of the Civil Procedure Code. The defendant appealed.

Held : That the action was not one in respect of land, and therefore did not fall within the ambit of section 9 (*b*) of the Civil Procedure Code. The District Judge of Tangalle sitting at Tangalle or at Hambantota had no jurisdiction to try the action.

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Held : (1) That grounds of appeal submitted to the Court of Criminal Appeal should not be vague, but should contain sufficient particulars of the matters to which objection is taken. The grounds which relate to the admission of irrelevant evidence must set out the items of irrelevant evidence, those relating to misdirection must specify the misdirection. If a wrong decision of any question of law is alleged, the wrong decision should be specifically stated.

(2) That the mere fact that the trial Judge in the exercise of the powers vested in him under section 165 of the Evidence Ordinance, put a large number of questions to a witness, even if the number is greater than the number put by the prosecution or the defence, is not a ground for quashing a conviction. The Appeal Court will quash a conviction only if the appellants satisfy it that the fact that the Judge put so many questions resulted in a miscarriage of justice.

(3) That where the appellant complains of non-direction on facts, he must satisfy the Court that the omission resulted in a miscarriage of justice.

(4) That although section 136 of the Evidence Ordinance imposes on the Judge the duty of asking the party proposing to give evidence of any fact in what manner any particular fact, if proved, would be relevant, or not, this Court will, when considering a complaint that the appellant has been prejudiced by the admission of irrelevant evidence, take into account the fact that such evidence has not been objected to by the appellant at the time at which it was given or has been elicited by the appellant or his counsel.

(5) That in an appeal from a conviction in a case where irrelevant evidence has been introduced, it is the duty of the Court under section 167 of the Evidence Ordinance to cast aside the evidence which ought not to have been admitted and then consider whether there still remains sufficient evidence to support the conviction. If there is sufficient admissible evidence to justify the conviction, it will uphold it. Section 167 applies equally to civil as well as to criminal cases.

(6) That the proper time for the Judge to rule on the admissibility of evidence is when a party proposes to give evidence of any fact and not before. (Section 136 Evidence Ordinance). "Where defending counsel proposes to object to evidence of any fact appearing in the depositions being tendered at the trial, he should inform counsel for the prosecution of such intention. Then the proper course for counsel for the prosecution is to refrain from referring to the evidence in his opening, and that the issue should be decided at the appropriate moment in the case when the evidence is tendered. It is, as a general rule, undesirable that the argument on admissibility should be heard and the issue decided before the case is opened.

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Criminal Procedure

Privy Council—Criminal Procedure—Perjury—Appellant convicted for giving false evidence in criminal trial in the Supreme Court—Section 440 (1) Criminal Procedure Code—Powers of the Commissioner of Assize thereunder—Section 188 Penal Code.

The appellant who was one of the accused in a trial for murder in the Supreme Court was acquitted as the sole witness G had contradicted the evidence he had given in the Magistrate's Court.

G was subsequently charged under section 439 (1) of the Criminal Procedure Code for having given false evidence, and he pleaded guilty to the charge. Before deciding on the appropriate sentence, the Commissioner heard evidence of witnesses including that of the appellant. The Commissioner concluded that the appellant was deliberately lying and having convicted him, sentenced him to three months' rigorous imprisonment.

It was contended on behalf of the appellant (1) that the gist of the accusation was not made clear to the appellant, and that he was not given an opportunity of giving reasons against summary measures being taken. (2) that the Commissioner had wrongly exercised the power under Section 440 (1) of the Criminal Procedure Code in setting up a subsidiary criminal investigation against the appellant, whereas it should only be exercised against a witness who has committed perjury in the course of his evidence in the case being tried.

(3) that the Commissioner had not exercised judicially the discretion and that the case was not a proper one for Section 440.

Held : That in the circumstances of this case there was no substance in submission (1).

(2) That the power conferred under Section 440 (1) was properly exercised in relation to the evidence given in the course of the trial against G in respect of the sentence, and, therefore, cannot be considered as initiating a subsidiary criminal investigation.

(3) That there was no merit in submission (3).

Per LORD SOMERVELL OF HARROW—"From its nature the power (under Section 440 (1)) is one which should only be used when the judge is clear beyond doubt"—to take the words used by Lord Oaksey in Subramaniam's case—that the witness has given false evidence as defined."

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Three deeds of gift conveying certain lands were signed by a deceased person in the presence of the notary and witnesses. After the deceased had signed one of the deeds the notary and the witnesses went to another room out of the view of the deceased and there the notary and the witnesses signed the deeds.

Held : That section 2 of the Prevention of Frauds Ordinance requires that the notary and the witnesses should sign an instrument requiring their attestation at the same time as the maker of the instrument and in his presence. The requirement of the section is not satisfied if the notary and the witnesses sign the deed at another place and at some other time. The deeds in question were, therefore, of no force or avail in law.

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In June 1947, shares to the value of Rs. 100,000 were registered in the name of the plaintiff's wife on consideration paid by her father.

In November 1951, a firm of proctors, acting for the father, wrote a letter to plaintiff's wife to the effect that they were instructed to state that she held the shares in trust for the father and that she must pay him the dividends she had received in respect of those shares.

In September 1954, the father died.

On the issue whether the deceased intended a gift of the shares to the plaintiff's wife, or whether plaintiff's wife held them in trust for the deceased, the defendants, the executors of the deceased, sought to produce this letter as evidence against the plaintiff.

The learned District Judge held that the letter was inadmissible and rejected it.

On an appeal from this decision it was held :—

(1) That the letter was inadmissible under section 32 of the Evidence Ordinance as :—

(*a*) It did not contain the very words used by the deceased but was only a narration by the writer of what he had gathered from a communication made to his firm by the deceased.

(*b*) The statements in the letter did not fall within any one of the eight subdivisions of section 32 of the Evidence Ordinance.

(2) That the statement of facts contained in the letter was hearsay and could not be admitted to proof under sections 6, 7, and 8 (2), 9 and 14 of the Evidence Ordinance as the facts declared to be relevant by those sections must be proved by direct evidence and not by hearsay.

(3) That the declaration made by the deceased in November, 1951, could not be used under section 84 of the Trusts Ordinance for the purpose of showing the state of mind of the deceased at the time the shares were registered in the name of the plaintiff's wife, as it was not made contemporaneously with the regi stration, but long after.

Per BASNAYAKE, C.J.—" Before I part with this judgment, there is one other matter to which I wish to refer, and that is the fact that D1 has not been filed of record but was tendered to us for reference at the hearing by learned Counsel for the appellants. The procedure regarding the tendering of documents in evidence is prescribed by section 154 of the Civil Procedure Code, the explanation of which is relevant to the matter under consideration.....I would commend section 154 and more especially its explanation to all judges of first instance in Civil proceedings."

Income Tax

Income Tax—Hangars erected on requisitioned land by Naval and Military authorities—Option given to owners of land to purchase such buildings—Purchase of hangars by respondent from the authorities after obtaining the right of option from the owners—Subsequent sale of hangars by respondent at a price above the purchase price—Is it taxable as profits from a trade—Meaning of the term " Trade " in Income Tax Ordinance (C. 188 ; sections 6 (1) (a) ; 2)—Principles relating to review of decisions of the Board of Review by the Supreme Court.

The Naval and Military authorities had erected ten hangars on a requisitioned land, which belonged to the respondent's wife and others under an agreement, the owners of the land were given the option of purchasing the buildings or alternatively compensation for any damage done to the land. The respondent having obtained the rights of the owners purchased the hangars and sold them at a profit of Rs. 144,000/-.

The Commissioner of Income Tax charged a tax on this amount as being profits arising from a trade within the meaning of section 6 (1) (*a*) and section 2 of the Income Tax Ordinance (C. 188). Section 2 defined trade as follows :—" trade " includes every trade and manufacture and every adventure and concern in the nature of trade.

The respondent contended before the Commissioner—

(1) That there was no buying and selling ; the improvements accrued to the soil, and what he got was compensation.

This was an isolated transaction and profits are of a casual and non-recurring nature.

(2) The profit is capital accretion.

The Commissioner dismissed the appeal holding that the transaction was an adventure in the nature of trade. The Board of Review on appeal reversed the decision of the Commissioner, and on a case stated the Supreme Court affirmed the decision of the Board of Review.

On appeal to the Judicial Committee of the Privy Council.

Held : (1) That the respondent was not liable to be taxed in terms of section 6 (1) (*a*) and section 2 of the Income Tax Ordinance as the amount received by him was in the nature of compensation. The word " adventure " suggests a man going

out to seek the fortune sought to be taxed. Here the materials disposed of had been placed on the land and something had to be done about them ".

(2) That an isolated transaction can be an adventure in the nature of trade and it is not necessary that it should relate to ordinary articles of commerce, such as linen, brandy, paper, and so on.

Per LORD SOMERVELL—" The position of a Court in appeal by way of case stated by the Board of Review is sufficiently similar to the position of a court here (England) on a Case, Stated by Special or General Commissioners to make the English decisions helpful."

" The court should interfere if the Commissioners had acted without any evidence or upon a view of the facts which could not reasonably be entertained ".

Kandyan Law

Kandyan Deed of Gift executed in favour of donee one year and four months after donees' marriage—Is it a donation or transfer for valuable consideration.

A deed, purporting to be a deed of gift, executed between parties subject to Kandyan Law, stated that the donor " for and in consideration of the natural love and affection " which he had for the donee, his daughter, and " for and in consideration of the marriage " of the donee, conveyed property to her " by way of dowry ".

The marriage had already taken place one year and four months before the deed was executed.

After the death of the donee, the donor revoked the gift.

The learned District Judge decided that the revocation was ineffective as the deed was not a donation, but a transfer for consideration, namely the marriage.

On appeal from this decision it was held that the deed was a deed of gift and could be revoked as :—

(1) There was no evidence that the deed was given in pursuance of a promise made before the marriage.

(2) The marriage was not the consideration for the deed but was merely an occasion for the exercise of the donor's generosity.

Land

Encroachment on Land—Dispute over correct position of boundary—Plan made for purposes of another action tendered in evidence—Probative value of such Plan—Quantum of evidence required to prove an encroachment.

The Plaintiffs filed action claiming that the 2nd and 3rd plaintiffs were entitled to a divided portion out of a land called Konavalai, and stated that the defendant had by shifting the position of certain boundary stones encroached on the plaintiffs' land.

In support of their case the plaintiffs tendered in evidence a plan made for the purpose of another action filed by the plaintiffs against certain third parties in respect of a dispute over a water-course leading to plaintiffs' land.

Held : (1) That as neither the present defendant nor his predecessors in title were parties to the action for which purpose the plan was made, and since there was nothing to indicate that they even were aware of that action or that the plan was being made, the evidential value of the plan in this action was very little.

(2) The correct test to be applied to the evidence in such a case was whether or not the encroachment had been established on a balance of probabilities. It is a wrong test to look for conclusive proof in such a case.

Land Acquisition

Land Acquisition Act No. 9 of 1950, sections 16 (1) (d) and 20—Compensation determined by acquiring officer—Appeal to the Board of Review—Acquiring officer posting cheque for amount determined by him to claimant pending appeal—Acceptance of cheque—Does such acceptance preclude the Board of Review from hearing appeal.

Held : (1) That the acceptance by the claimant of payment of the amount of compensation determined by the acquiring officer under section 16 (1) (*d*) of the Land Acquisition Act No. 9 of 1950 is no bar to the hearing by the Board of Review of the claimant's appeal under section 20 of the Act.

(2) That where the acquiring officer has already paid the amount of compensation by him on the claimant consenting to accept it on its being tendered and where the amount of compensation is increased in appeal the acquiring officer need tender only the difference between the amount already paid by him and the amount determined in appeal.

(3) That only deductions authorised by the Act may properly be made from the compensation payable to a claimant.

Per BASNAYAKE, J.—" We wish therefore to make it clear that in our opinion neither section 35 nor any other section of the Act has the effect of taking away the right of appeal of a claimant under section 20 or precluding the Board from hearing an appeal on the ground that the claimant has accepted the compensation tendered and paid by the acquiring officer, whether such acceptance be with or without qualification. A right of appeal given by statute is not lost by the party on whom it is conferred except where the statute makes express provision in that behalf.

Act No. 9 of 1950 sections 5, 6, 36, 37 and 62.

Land Redemption Ordinance No. 9 of 1942

Land Redemption Ordinance, No. 9 of 1942—Sections 3 (1) (b), 3 (4),3 (5), 5 (1)—Land acquisition Act, No. 9 of 1950, Sections 5, 6, 36, 37, (a), 62 (1)—Acquisition of land without authority—Minister's declaration—Its validity—Can it be question in a suit against the Attorney-General—When is determination by the Land Commissioner 'not final'—Meaning to be given to the expression "conclusive evidence" in section 5 (2) of the Land Acquisition Act—Evidence Ordinance, Section 4 (3).

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Plaintiff's failure to appear in court—Decree nisi made absolute—Does such decree operate as res judicata—Civil Procedure Code sections 34, 84, 184, 188, 206, 207, and 406.

Held : (1) That a 'paraveni nilakaraya' is not the owner of his holding. His *nindalord* is the owner.

(2) That the Land Commissioner had no authority under Section 3 (1) (*b*) of the Land Redemption Ordinance No. 9 of 1942 to acquire lands transferred by a 'nilakaraya' in satisfaction of a debt due on a mortgage of his rights in such holding.

(3) That the Land Commissioner's decision that the lands so sold should be acquired is not final within the meaning of section 3 (4) of the Ordinance, as he has, by a wrong construction of the expression "owner" and "land" in section 3 (1) (*b*), given himself a jurisdiction he did not have.

(4) That where there is no valid determination by the Land Commissioner, the Minister can make no declaration under section 5 (1) of the Land Acquisition Act as modified for the purposes of the Land Redemption Ordinance and, therefore the declaration he has made in respect of the lands is a nullity and does not have the conclusiveness given by Section 5 (2) to a valid declaration. Consequently, the legality of such a declaration can be questioned in a suit filed against the Attorney-General.

(5) That the publication of a void order under section 36 of the Land Acquisition Act authorising the acquiring officer to take possession of a land does not have the effect of vesting that land in Her Majesty as provided in section 37 (*a*) of the Act.

(6) That a decree absolute dismissing an action under section 84 of the Civil Procedure Code does not operate as *res judicata*.

(The majority view expressed in Samichi vs. Peiris 16 N. L. R. 257 that Section 207 and similar Sections of the Civil Procedure Code do not embody the whole law as to *res judicata* in Ceylon disapproved.)

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Master and Servant

Master and servant—Appellant, headmaster employed by Respondent—Letters written by appellant indicating intention to leave school—Notice, terminating service—Recovery of damages for wrongful Dismissal.

The appellant, a head-master, wrote to the respondent, the Manager, his employer three letters. In the first, dated 18th June, 1952, he stated that he had in mind to leave the respondent's school "as early as possible" and that he had written to several schools for a post as teacher. In the second letter 2nd July, 1952, he wrote "sometimes I will be able to give notice of leaving on the 1st if I could obtain the privileges I am asking for." In the third letter dated 1st August, 1952, the appellant stated : "about my leaving I made arrangements. I am willing" and also "However the matter may be I am not willing to stay back." The respondent on the 9th August, called for applications for the post of a head-teacher in the school.

In an action by the appellant for wrongful dismissal :

Held : That the letters of 2nd July and 1st August constituted a notice given by the appellant terminating his employment on 1st September, 1952, and that the question of reasonable period of notice by the employer terminating employment did not arise under these circumstances. The appellant could not claim damages for wrongful dismissal.

Per WEERASOORIYA, J.—"Under the Roman Dutch Law, which governs the case, no special form of notice is required for the termination of a contract of service between employer and employee. It is self-evident, however, that the party wishing to terminate the contract should communicate his intention to the other party in unambiguous terms, giving reasonable notice of termination where the contract itself does not provide for a specified period of notice or the matter is not regulated by custom. What is reasonable notice will depend on the circumstances of each case."

Negligence—Master and servant—Extent of servant's duty to examine roadworthiness of car belonging to Master.

Pleadings—New cause of action put forward in appeal—Not pleaded in plaint.

Plaintiff, a passenger in defendant's omnibus, was injured when the omnibus toppled over an embankment. At the time of the accident the omnibus was driven by the defendant's driver acting within the scope of his employment.

Plaintiff sued the defendant on his vicarious liability for the driver's negligence in driving an omnibus with a set of defective spring blades and/or in driving an omnibus in an unroadworthy condition.

The accident occurred because the spring blades broke throwing the steering gear out of control. The evidence disclosed that there was an old crack in the spring blades, but the driver could not have known it unless he dismantled the omnibus and examined it.

Held : (1) Affirming the decision of the District Court, that the driver's failure to make such an examination would not constitute negligence.

In appeal, the plaintiff submitted that the defendant was liable for its own negligence in that it had failed in its duty to plaintiff to take all reasonable care to provide an omnibus in good order and safe condition to carry passengers.

Held further (2) That the Supreme Court would not permit such a case to be put forward at this stage because this was a new cause of action which was not pleaded in the plaint.

Minor

Minor—Application by guardian for permission of court to sell minor's immoveable property—Permission granted with a further direction that if guardian failed to execute transfer " after moneys are deposited, then the Secretary is authorised to sign the transfer "—Is such an order valid—Civil Procedure Code, section 332—When is it applicable.

Held : (1) That a guardian who seeks the authority of the Court to sell immovable property belonging to a minor is not bound to sell once the authority is granted.

(2) That the fact that the guardian, having completed negotiations to sell a minor's immovable property, obtains the authority of the Court gives the Court no authority to compel him to sell any more than it has authority to compel the purchaser to buy.

(3) That there is no provision of the Civil Procedure Code which authorises a Judge to make an order to the effect that if the guardian of the minor failed to execute the transfer, the Secretary of the Court should execute it.

(4) That section 332 of the Civil Procedure Code does not apply to an application by a guardian for authority to sell immovable property belonging to a minor.

Muslim Law

Muslim Law—Kaikuli—Marriage Agreement stipulating gift of property by father of wife to husband and wife absolutely in consideration of marriage—Provision for liquidated damages for breach of agreement—Acknowledgment in the deed of agreement by husband of a sum of Rs. 4,500/- being cash dowry paid in consideration of marriage—Claim by wife to recover the amount as Kaikuli.

Under a deed of agreement between the appellant husband, the respondent, wife, and her father, the appellant agreed to marry the respondent within a prescribed period. In consideration of the marriage the respondent's father agreed to convey as a gift absolute certain properties to the appellant and the respondent. The deed also provided for damages for breach of any of its terms. One of the recitals of the deed contained an acknowledgment by the respondent of a receipt of Rs. 4,500/- " being cash dowry paid to him on 20th January, 1952 in consideration of the marriage." The respondent instituted an action in the Quazi Court claiming Rs. 4,500/- which she alleged was paid as Kaikuli.

Held : That the respondent was entitled to recover the money as the payment was in the nature of Kaikuli.

Per SANSONI, J.—" Kaikuli has often been described as dowry, so that the expression " Cash dowry in consideration of the marriage " used in the deed is an apt description of this payment if it was made as Kaikuli.

Notaries Ordinance

Section 30 (12)—*Meaning of the word " attest " and " duly ".*

Penal Code

Section 188.

Penal Code, Section 414—*Charge of mischief by injury to public road—Characteristics of a public road within the meaning of the section.*

The accused was convicted of committing the offence of mischief by erecting a barbed wire fence across a public road, an offence punishable under Section 414 of the Penal Code. According to the evidence the public road in question was a cart track for use by the workmen of the Irrigation Department. Cultivators of the adjoining fields also had free access to it and had been so used for fourteen years.

Held : That the conviction should be quashed as the road cannot be said to be a '*public road*' within the meaning of Section 414 of the Penal Code, for the reason that the public were not entitled to use it, although they may have been permitted to use it, if occasion had arisen for it.

E. WALTER DE SILVA AND ANOTHER *vs.* P. D. F. AMARASEKERA, SUB-INSPECTOR OF POLICE ... 47

Penal Code

Penal Code, section 298—Charge of causing death by driving car rashly—Additional Magistrate deciding to try summarily under section 152 (3) of the Criminal Procedure Code and recording part of the evidence—Postponement—Trial resumed and continued by another Additional Magistrate while Additional Magistrate who decided to try summarily holds office—Conviction—Regularity of procedure factors to be taken into consideration before assuming jurisdiction as District Judge.

The appellant was charged with causing the death of a boy by driving a car rashly, an offence punishable under section 298 of the Penal Code. The Additional Magistrate decided to try him summarily under section 152 (3) of the Criminal Procedure Code on the ground (1) Facts simple (2) More expeditions, and after recording the medical evidence and the evidence of the Examiner of Motor Cars he postponed the trial for another date. The trial was resumed before another of the Additional Magistrates, who after continuing the case for two further dates convicted the accused and sentenced him to two years' rigorous imprisonment. The Additional Magistrate who decided to try summarily held office during the relevant period.

Held : (1) That it was irregular for the Additional Magistrate who convicted the appellant to have acted on the evidence recorded by the Additional Magistrate who decided to try summarily as the former could not be said to have succeeded the latter as indicated by section 292 of the Criminal Procedure Code.

(2) That in deciding whether a Magistrate should assume jurisdiction as a District Judge, the serious nature of the charge is in itself an important factor, which must not be lost sight of.

(3) That offences of causing death by rash or negligent acts often involve difficult questions and ordinarily should not be tried summarily by invoking the provisions of section 152 (3) of the Criminal Procedure Code.

Per T. S. FERNANDO, J.—" Middleton, J. in that case made the following observations which I would respectfully repeat here and which Magistrates can with advantage bear in mind " :—

" I should say that any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of law, fact or evidence, and double theory of circumstances, or any difficult question of intention or identity or in which the punishment ought really to exceed two years is one that is not properly triable summarily. There may of course be other circumstances which would negative the propriety of a summary trial and which will have to be dealt with as they arise."

PREMADASA *vs.* INSPECTOR OF POLICE, PELIYAGODA 72

Perjury

Appellant convicted for giving false evidence in criminal trial in the Supreme Court—Sections 440 (1) Criminal Procedure Code—Powers of Commissioner of Assize thereunder.

See Criminal Procedure 19

Pleadings

Action for defamation—Application by plaintiff for amendment of plaint—Objected to by defendant—Application allowed after hearing—Costs.

See Civil Procedure 1

New cause of action put forward in appeal—Not pleaded in plaint.

See Master and Servant 110

Possessory Action

Possessory Action—Plaintiff in exclusive possession of part of a larger land—Purchsae of undivided share in larger land by defendants who own adjoining land—Defendants cutting down fence trees separating their land from land in dispute—Complaint to Police who warn against breach of peace—Later attempt by defendants to erect hut—Complaint to Police—Application by Police to Magistrate's Court to bind over defendants and their men to keep peace—Withdrawal of application on defendants' undertaking not to enter land pending civil action which plaintiff undertook to file within two months—Meanwhile plaintiff constructing huts and placing watchers on land—Institution of possessory action by plaintiff in pursuance of undertaking—Is possessory action, the proper remedy—Remedy of uti possidetis—Is it available—Prescription Ordinance, Section 4—Meaning of " dispossession ".

Plaintiff claimed that he possessed a part of a larger land as a separate entity for over 25 years. 1st and 2nd defendants (wife and husband) were the owners of the land adjoining it. In 1945, the 1st defendant purchased an undivided share in the larger land and instituted a partition action which she withdrew on 7-6-1951. On 13-6-51, the defendants cut the barbed wire and the trees on the fence that separated their land from the land in question. The plaintiff complained to the Police and the Village Headman to whom the defendants admitted that they cut the fence because they said they erected it. The Police advised the parties to get their rights adjudicated in a Court of Law.

On 22-6-1951, the 2nd defendant and several others entered the land at night and commenced to construct a hut thereon. The Police, who were informed, warned them against a breach of the peace and instituted proceedings in the Magistrate's Court to bind them over to keep the peace.

These proceedings were withdrawn by the Police on the undertaking given by the 2nd defendant and his men that they would not enter the land pending civil action which the plaintiff undertook to file within two months. In the meantime, *viz.*, on 23-6-51 the plaintiff constructed two huts on the land and placed watchers thereon.

In pursuance of the said undertaking, the plaintiff instituted an action praying for a possessory decree, which the defendant resisted on the ground *inter alia* that the plaintiff was not entitled to a possessory decree as plaintiff was already in possession of the disputed land and that the mere cutting down of the fence and the attempt to construct a hut did not amount to dispossession of the plaintiff. The learned District Judge held in favour of the plaintiff and the defendants appealed.

Held : (1) That the acts of the defendants amounted to a dispossession of the plaintiff within the meaning of Section 4 of the Prescription Ordinance, because on both occasions, plaintiff was by fear of superior force compelled to seek the aid of the Police and refrain from entering the land.

(2) That the word ' dispossession ' in Section 4 of the Prescription Ordinance bears the meaning of "put out of possession", "deprived of possession " or " ouster." Any act which prevents a person from exercising his rights of possession would be a deprivation of his possession or an ouster of him.

(3) That the essence of the possessory action lay in unlawful possession committed against the will of the plaintiff and neither force nor fraud is necessary.

(4) That Section 4 of the Prescription Ordinance does not exclude the Roman remedy of *uti possidetis* or the Roman Dutch remedy of *Mandament van Maintenue*, which gives a right of action in cases of mere disturbance of or threat to possession so that the plaintiff may continue in his possession quiet and undisturbed.

Per BASNAYAKE, C.J.—From the foregoing it is clear that there is no binding decision of this Court that an action under section 4 of the Prescription Ordinance cannot be maintained unless the plaintiff had had possession for a year and a day.

PERERA *vs.* WIJESURIYA AND JANE NONA (*Appeal No.* 411) JANE NONA *vs.* WIJESURIYA AND PERERA (*Appeal No.* 412) 33

Prescription

Prescription Ordinance, Sections 6 and 8—Written application to Municipal Council for supply of electricity—Conditions of supply and payment embodied therein—Action to recover arrears for electricity supplied—Plea of prescription—Is the action prescribed in six years or eight years.

On a written application (P 1) which the defendant signed on a fifty cents stamp containing (*a*) conditions under which electricity is supplied (*b*) an undertaking by the defendant to pay the monthly charges for consumption of electricity at certain prescribed rates, the Municipal Council of Negombo supplied electricity to the defendant.

In an action instituted by the Council to recover arrears due for electricity supplied on the said application :

Held : (1) That the writing P 1 constituted a written promise within the meaning of Section 6 of the Prescription Ordinance and therefore the claim became prescribed in six years.

MUNICIPAL COUNCIL OF NEGOMBO *vs.* W. BENEDICT FERNANDO 26

Prevention of Frauds Ordinance

Section 2—*See Deed* 108

Public Officer

Public officer—Action for damages—Vel Vidane appointed under Irrigation Ordinance No. 32 of 1946—Is he a public officer within the meaning of section 461 of the Civil Procedure Code.

Held : That a Vel Vidane appointed under the Irrigation Ordinance No. 32 of 1946 is a public officer within the meaning of section 461 of the Civil Procedure Code.

Per BASNAYAKE, J.—" Although the mode of selection of a vel vidane is election by the majority of registered proprietors of the division [section 25 (1)], he is appointed by the Government Agent [section 25 (4)] and is liable to be retired or dismissed by him (section 26). He has public duties to perform (section 29) and may receive such remuneration for his services as the Government Agent (section 31) may award ".

EDIRIWEERA *vs.* WIJESURIYA 71

Public Servant

Position of public officers in Ceylon.

See Public Service Commission 40

Public Service Commission

Public Service Commission—Appointment of cultivation officer in Irrigation Department—Such officer working under supervision of Government Agent—Interdiction and dismissal of officer after inquiry by Office Assistant to Government Agent—Appeal to Public Service Commission—Government Agents' authority to dismiss challenged—Plea that proper authority to dismiss was Director of Irrigation—Admittedly powers vested in Public Service Commission of dismissal and disciplinary control of officers in Irrigation Department delegated to Director of Irrigation—Validity of orders of dismissal by Government Agent and Public Service Commission while delegation in force—Right of a person dismissed from public offic to seek declaration from competent court that dismissal wrong—Crown's right to plead that right to dismiss at pleasure is its prerogative—Position of public officers in Ceylon.

The Ceylon (Constitution and Independence) Orders-in-Councils, 1946 *and* 1947. *Sections* 57, 60, 61.

Plaintiff was appointed a village Cultivation Officer in the Irrigation Department in which capacity he worked under the supervision of the Government Agent, North Central Province. In September, 1953, the Government Agent interdicted him from service and framed charges against him. These charges were inquired into by the Office Assistant and the Government Agent informed the plaintiff that he was dismissed from Service from the date of interdiction.

Plaintiff appealed to the Public Service Commission on the ground that the dismissal was null and void as the Government Agent had no authority to interdict or to dismiss him as it was the Director of Irrigation alone who had the power to do so.

The Public Service Commission, after considering the charges and the evidence led, decided that the plaintiff should be dismissed as from the date of his appeal.

The plaintiff, thereafter, sued the Attorney-General for a declaration (1) that his dismissal was not according to law (2) that notwithstanding the purported dismissal, he was still a public servant entitled to emoluments and pension rights.

The defendant resisted the action on the following grounds :—

(1) that the dismissal by the Government Agent was lawful.
(2) that the dismissal by the Public Service Commission was lawful.
(3) that the Court had no jurisdiction to grant the declaration asked for or to inquire into or hear or determine the legality or the propriety of the dismissal.
(4) that the plaintiff cannot maintain this action because he held office at the pleasure of the Crown.
(5) that the plaintiff had no cause of action to sue him.

The learned District Judge dismissed the plaintiff's action, and the plaintiff appealed.

Held : (1) That by section 60 of the Ceylon Constitution and Independence) Orders-in-Council, 1946, the appointment, transfer, dismissal and disciplinary control of public officers are vested in the Public Service Commission constituted under section 58 of the said Order-in-Council.

(2) That section 61 empowers the Public Service Commission by order published in the Gazette to delegate to any public officer, subject to conditions as may be specified in the order, any of the said powers vested in the Public Service Commission.

(3) That in Ceylon, the condition that a public officer holds office during the pleasure of Her Majesty's pleasure has become a matter of written law by virtue of Section 57 of the Ceylon (Constitution and Independence) Order-in-Council. The same legislative instrument provides for the appointment and dismissal of public officers. Effect must be given to it as a whole and is not possible to ignore any part of it.

(4) That admittedly, the delegation of powers in respect of the officers of the Irrigation Department to which the plaintiff belonged, was to the Director of Irrigation and not to the Government Agent concerned, and hence his order dismissing the plaintiff was of no effect in law.

(5) That the order of dismissal made by the Public Service Commission on appeal by the plaintiff from an unauthorised and illegal decision while the delegation of its power to the Director of Irrigation was still in force, was of no effect in law, as it had no power to make the order at the time it was made.

(6) That when a delegation under the said Section 61 is made to any public officer, the Public Service Commission becomes an appellate body, whose decision in appeal is declared to be final. Such delegation denudes the Commission of its powers which cannot be exercised without a formal revocation of the delegation by publication of an order to that effect in the Government Gazette.

(7) That a public officer to whom powers of the Public Service Commission are delegated must exercise them by himself and not redelegate the delegated power.

(8) That under our law it is open to a person to seek to obtain from a competent Court a declaration as the one prayed for by the plaintiff in this case.

(9) That when an act of dismissal of a public officer is challenged in appropriate proceedings, the Crown cannot succeed on a plea that the right to dismiss at pleasure is a prerogative of the Crown. It must establish that the removal is warranted by law and it has been done in accordance with the procedure prescribed by law.

Per BASNAYAKE, C.J.—" The above cases and others too numerous to cite here including the case of *R. Venkata Rao vs. Secretary of State for India* (*supra*) read with *Reilly vs. The King* (1934) A.C. 176 at 179, lay down the following principles :—

(*a*) that the implied term of service of civil servants of the Crown that their tenure of office is at pleasure can be impaired only by statute or by express agreement ;
(*b*) that rules as to procedure on dismissal, notice, term of office and the like, have no legal effect unless they have the force of law or are expressly incorporated in the contract of service. Where they are expressly incorporated in the contract of service, or have the force of law, they prevail.

SILVA *vs.* ATTORNEY-GENERAL 40

Rei Vindicatio

Rei vindicatio—Need for examination of documentary title of parties—Land Settlement Ordinance (Cap. 319), *Section* 8—*Conclusive effect of Settlement Order issued thereunder—Plea of exceptio rei venditae et traditae—Is it available to a purchaser as against a vendor in whose favour a Settlement Order has subsequently been made ?*

The plaintiff instituted this action for a declaration of title to land, ejectment and damages, pleading that the defendants were in unlawful possession of it.

The land in question had been the subject-matter of a Settlement Order made under the Land Settlement Ordinance (Cap. 319) and published in the Government Gazette of 19/7/1940, whereby four persons A, T, U and D were declared entitled to the land in certain proportions. Plaintiff claimed that he had obtained transfers from T, U and D of their respective shares in the land in 1953 and a similar transfer from A in 1954. The defendants stated that in 1938, prior to the Settlement Order, A had transferred the land to one Udupihilla who in turn had transferred it to the 2nd and 3rd defendants in 1949, and that the latter had made a transfer in favour of the 1st defendant and one Uussain Kandu.

The learned District Judge held that the Settlement Order in favour of A enured to the benefit of the 1st defendant to the extent of A's share, and further, that the 1st defendant had acquired prescriptive title to the land.

Held: (1) That upon the publication of the Settlement Order in the Government Gazette on 19/7/1940, all rights which any persons other than A, T, U and D had in the land were wiped out, including any rights which Udupihilla may have had upon his purchase from A, and by virtue of Section 8 of the Land Settlement Ordinance (Cap. 319) the Order became conclusive proof of the title of the persons in whose favour it was made.

(2) That the benefit of the Settlement Order declaring A entitled to a proportion of the land could not be claimed by the 1st defendant; the plea of *exceptio rei venditae et traditae* is not available to a purchaser as against a vendor in whose favour a Settlement Order was made under the Land Settlement Ordinance after the purchase was completed.

(3) In a *rei vindicatio* action the Court should first examine the documentary title of the parties before adjudicating on an issue of prescriptive title.

KARUNADASA *vs.* ABDUL HAMEED 24

Res Judicata

Distinction between our law and the English law

See Land Redemption Ordinance 81

Seduction

Seduction, action for damages for—Corroboration—Effect of a false denial by defendant of opportunity for intimacy—When may such denial amount to corroboration of plaintiff's story—Trial judge's duty in cases where law requires corroboration.

In an action for damages for seduction the learned District Judge regarded the two following matters as constituting corroboration of the plaintiff's case.

(*a*) An exercise book, marked and admitted, despite objection by defendant's counsel, in cross-examination of the defendant, suggesting that it had been used for the purpose of teaching arithmetic when the plaintiff visited him for receiving tuition in that subject from him, and that it contained the defendant's handwriting. It was not produced or referred to by the plaintiff or any of her witnesses nor had it been included in the list of documents relied on by the plaintiff.

(*b*) A letter D1, when shown to the plaintiff, she positively denied that she wrote it or that it was in her handwriting. On the next date of trial, she admitted it, giving an explanation that D1 was only the 3rd page of the letter she wrote to the defendant. The trial Judge accepted her explanation and came to the conclusion that the defendant had interpolated one Sirisoma's name in a letter written to himself. It was clear from the plaintiff's evidence that she wrote letter D1 after her mother had discovered her pregnancy. The findings of the learned trial Judge were that the defendant falsely denied (1) that the exercise book was in defendant's handwriting (2) that letter D1 was written to him.

Held: (1) That the exercise book was not corroborative, since it was not established that the book contained the plaintiff's writing or had ever been in her possession. If it had been proved to contain the writings of both parties, it may have established at least an opportunity for intimacy, in which event, the false denial by the defendant of his writing therein may have been sufficient corroboration within the principle laid down in *Dawson vs. McKenzie* 45 S. L. R. 473.

(2) That letter D1 was not corroboration because it was written far too late and there was no independent testimony in support of the suggestion that the defendant had tampered with it. The defendant's denial, therefore, was merely a contradiction of the plaintiff's evidence that she wrote the letter to him.

Per H. N. G. FERNANDO, J.—(*a*) " The effect of a false denial of an opportunity for intimacy was thus stated by Lord Dunedin in the same case :— " Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in an element of suspicion. That is, that the circumstances and the locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statements been made ".

(*b*) " I should like to observe in passing, that in cases where the law requires corroboration, Judges of first instance should endeavour to specify the matters in evidence which are relied upon as being corroborative and to state whether or not these matters have been established at the trial ".

Question as to when a false denial by a defendant in a seduction case may properly be considered to lend corroboration to a woman's story discussed.

UDUWAGE ALIAS GAMAGE SOMASENA *vs.* UDUWAGE KUSUMAWATHIE 64

Service Tenures Ordinance

Paraveni Nilakaraya—Nature of his rights and those of a nindalord.

See Land Redemption Ordinance 81

Specific Performance

Sale—Specific performance—Agreement by vendors to sell shares in property to purchaser—Agreement providing for refund of deposit to purchaser and payment of liquidated damages by either party in the event of failure to complete sale by executing deed of transfer—Refusal by two of the vendors to execute deed of transfer—Action by purchaser to compel defaulting vendors to transfer their shares—Principles governing specific performance—Distinction between Roman-Dutch Law and English Law.

The appellant, the purchaser, and the respondents, the vendors, entered into a notarial agreement under which the respondents agreed to transfer their shares in immovable property. The agreement provided that in the event of the appellants willing to complete the sale and the respondents failing, refusing or neglecting to execute or cause to be executed a deed of transfer of the shares in the property, the respondents were to refund the appellants' deposit, and also to pay him a prescribed sum as liquidated damages. If the purchaser refused to complete the sale, he was obliged to pay the vendors the prescribed amount as liquidated damages, and was entitled to a refund of the deposit.

Two of the vendors refused to execute the deed of conveyance in terms of the agreement, and the purchaser filed action seeking a decree to compel the defaulting vendors to execute a deed of transfer of their shares.

Held : (1) That in Ceylon, Roman-Dutch Law and not English Law applies to a claim for specific performance of an agreement to sell immovable property.

(2) That under the Roman-Dutch Law every party who is ready to carry out his term of the contract *prima facie* enjoys a legal right to demand performance of the other party subject only to the overriding discretion of the Court to refuse the remedy in the interests of justice in particular cases.

(3) That in this case this *prima facie* right is excluded by the terms of the contract, in particular the terms providing for liquidated damages in the event of either party failing to complete the sale.

(4) That it was not nec ssary for all the vendors to default in the completion of the sale to bring into operation the clause in the agreement relating to liquidated damages. Refusal or failure by one vendor to execute or cause to be executed the deed of transfer was sufficient.

ABDEEN *vs.* THAHEER AND OTHERS 58

Supreme Court

Power of Commissioner of Assize under section 440 (1) of Criminal Procedure Code.

See Criminal Procedure 19

Surety

Surety—Absence of accused on trial date—Notice on surety to show cause why bond should not be forfeited—Surety's statement that accused remanded in a case pending against him elsewhere—Order forfeiting bond on the ground that surety should have informed court of the remand on trial date—Obligations of a surety—Criminal Procedure Code, Section 411.

The petitioner entered into a bond as surety for the appearance of an accused person in Court. On the trial date, *viz.*, 2-6-58, the accused was absent and the Court noticed the petitioner to show cause why her bond should not be forfeited. She stated that the accused had been remanded on 2-6-58 in a case pending against him in the Magistrate's Court of Puttalam. Without holding that this statement was false, the learned Magistrate made order forfeiting Rs. 1,000/- out of the security furnished by her.

Held : That, in the circumstances, the order of forfeiture was wrong, as the failure of the accused to appear on the 3rd June was due to causes beyond his control and not attributable to any desire on his part to evade trial. There is no default of the accused for which the surety can be held responsible.

Per H. N. G. FERNANDO, J.—" If the Magistrate meant that the petitioner should have been present herself on June 3rd in order to furnish information as to the whereabouts of the accused, I think the answer is that a surety does not undertake any such obligation. The obligation of a surety relates to the appearance of the accused person on the due date, and the surety's bond must be forfeited if no good cause is shown for the failure of the accused to appear."

ANULAWATHIE PERERA AND WILSON FERNANDO *vs.* GRERO, INSPECTOR OF POLICE, COLOMBO ... 78

Urban Councils Ordinance No. 61 of 1939

Criminal Procedure Code—Continuing offence—By-laws relating to markets of Bandarawela Urban Council, Nos. 3 and 22—Appellant charged under, for occupying market stall without license from Chairman—Conviction and fine, but no order imposing continuing fine, as provided in by-law 22—Appeal—Dismissal—Chairman, testifying moving court to issue notice on appellant to show cause why con tinuing fine should not be imposed—Inquiry without a charge—Chairman testifying in presence of appellant of latter's continuing contravention—No evi-

dence by appellant—Order imposing continuing fine —Correctness of procedure followed—Urban Councils Ordinance No. 61 of 1939, Sections 166, 167 and 229.

The appellant was charged with having occupied a stall in the Bandarawela Public Market without being the holder of a license from the Chairman, U. C. and was convicted under by-law No. 22 of the by-laws relating to markets made by the Bandarawela Urban Council and published in Gazette 8,806 of 31-10-1941. This by-law was in the following terms :—

" Every contravention of any of these by-laws shall be punishable with a fine not exceeding fifty rupees and in case of a continuing contravention, with an additional fine not exceeding twenty-five rupees for every day during which the contravention is continued after a conviction thereof by a court of competent jurisdiction or after service of a notice from the chairman or an officer authorised by the chairman directing attention to such contravention."

An appeal taken from the conviction was dismissed, and thereafter, the Chairman, in terms of the by-law aforesaid filed a motion in Court and moved that the appellant be noticed to show cause why a continuing fine should not be imposed for continuing to occupy the stall notwithstanding the said conviction. On the day of inquiry, the Court without framing a charge or reading out of a charge recorded the evidence of the Chairman in the presence of the appellant (who gave no evidence) and made order imposing a fine of Rs. 25/- a day from the date of the said conviction—

Held : (1) That under the provisions of Sections 166, 167 and 229 of the Urban Councils Ordinance No. 61 of 1939, the continuing contravention of a by-law is an offence and shall be triable summarily by a Magistrate.

(2) That, therefore, when the appellant appeared in Court in response to the notice served on him, the Magistrate should have framed or read out of a charge and observed the other provisions of the Criminal Procedure Code relating to summary offences, treating the matter as an institution of new proceedings. The order imposing the continuing fine could not be sustained in the circumstances.

Uti Possidetis

When is remedy available.

Words and Phrases

Present : BASNAYAKE, C.J., AND SINNETAMBY, J.

WIJEWARDENE vs. LENORA

S. C. No. 72—D. C. Colombo, No. 40751/M with Application 295

Argued on : 25th, 26th and 27th August, 1958.
Delivered on : 10th September, 1958.

Civil Procedure—Pleadings—Action for Defamation—Application by plaintiff for amendment of plaint—Objected to by defendant—Application allowed after hearing—Costs—Order on defendant and plaintiff—Powers of court to permit amendment—Sections 93, 46 *Civil Procedure Code—Exercise of discretion thereunder—Limits of—Circumstances under which an Appellate Court may interfere—Costs—Court's power to order costs—Sections* 93, 211 *Civil Procedure Code—Proper mode of application for postponement of trial—Section* 80 *Civil Procedure Code.*

The plaintiff-respondent filed an action claiming damages from defendant-appellant for defaming him. After the case was fixed for trial, the plaintiff sought to amend the plaint by particularizing certain named individuals to whom the defamatory words had been published. The names of these persons were not stated in the plaint, although they had appeared in the list of witnesses. The trial judge after hearing the objections of the defendant-appellant allowed the amendment and ordered the plaintiff respondent to pay the costs of the amended answer, if it became necessary, and the defendant-appellant to pay the costs of the hearing. The trial judge also refused the defendant-appellant's application to stay the proceedings until the appeal to the Supreme Court was decided.

It was contended in appeal for the defendant-appellant that the trial judge should not have allowed the amendment, as only those persons whose names are mentioned in the plaint can be called to prove the defamatory statements.

It was also contended that the order on the defendant to pay costs of the hearing was wrong because it amounted to penalizing the defendant-appellant for an ommission committed by the plaintiff-respondent and that such an order was contrary to Section 93 of the Civil Procedure Code.

It was further contended (though not finally pressed) that the trial judge should have granted a postponement of the trial fixed for September and as he had not postponed the trial he had not exercised the discretion vested in him by Section 93.

Held : (1) That there is no rule of law which prohibits persons who are not named in the plaint from being called as witnesses. It is sufficient if the plaintiff complies with the provisions of Section 121 Civil Procedure Code by filing a list of witnesses within a reasonable time before the trial with notice to the opposite side. A person whose name does not appear on the list of witnesses cannot be called except with the leave of Court and in special circumstances only (Section 175 C.P.C.).

(2) That Section 93 of the Civil Procedure Code gives the judge a discretionary power to amend a plaint which may be exercised *ex mero motu* or upon the application of one of the parties. This power is subject to the limitations placed by Section 46 (2) of the Civil Procedure Code, namely that no amendment should be allowed which would have the effect of converting an action of one character into an action of another or inconsistent character. The discretion should be exercised judicially. In this case the judge has not exceeded the powers under Section 93 and has properly exercised the discretion vested in him by the section.

(3) The power to order costs of hearing into an application to amend, where it is resisted by the opposing party is contained in Section 211 of the Civil Procedure Code, and the judge in ordering the defendant appellant to pay costs of the hearing and the plaintiff-respondent to bear the costs of the amended answer quite rightly and properly exercised the power given to him under Sections 211 and 93—respectively.

(4) In regard to an application for postponement of a trial the Chief Justice expressed the view that it should be by writing as required by section 91 (1) of the Civil Procedure Code Sinnetamby, J. is of the view that the section is only directory and not imperative, and an application may be made *ore tenus*. (Edd.)

Per BASNAYAKE, J.—" The mode of approach of an appellate Court to an appeal against an exercise of discretion is regulated by well established principles. It is not enough that the Judges composing the appellate Court consider that, if they had been in the position of the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the Judge has acted illegally, arbitrarily or upon a wrong principle of law or allowed extraneous or irrelevant considerations to guide or affect him, or that he has mistaken the facts, or not taken into account some material consideration. Then only can his determination be reviewed by the appellate Court."

Cases cited : *Pillay vs. Naidoo* (1916) W. L. D. 151.
Roberts vs. Hopwood, (1925) A. C. 578 at 613.
Seneviratne vs. Candappa, 20 N. L. R. 69 at 61.
Clarapede vs. Commercial Union Association, 32 W. R. 263.
Cassim Lebbe vs. Natchiya et al, 21 N. L. R. 205.
Re Trufort ; Trafford vs. Blane, 53 L. Times Reports (N. S.) 498.
Tildesley vs. Harper, 39 L. T. Reports, N. S. 552, 10 Ch. Div. 393.
Clear vs. Clear, (1958) 1 W. L. R. 467.
Sharp vs. Wakefield, (1891) A. C. 173 at 179.
Wickins vs. Wickins, (1918) 265 at 272.
Blunt vs. Blunt, (1943) A. C. 517 at 525.
Lovell vs. Lovell, (1950) 81 Commonwealth Law Reports 513.

C. Thiagalingam, Q.C., with *P. Navaratnarajah, V. Arulambalam* and *Dunstan de Alwis*, for defendant-petitioner in Application No. 295 and for the defendant-appellant in Appeal No. 72.

H. V. Perera, Q.C., with *Izadeen Mohamed* and *H. D. Thambiah* for the plaintiff-respondent in Application No. 295 and for the plaintiff-respondent in Appeal No. 72.

Basnayake, C.J.

At the conclusion of the hearing of this appeal we made order dismissing the appeal with costs and intimated to counsel that we would deliver our reasons in writing on a later date, and we accordingly do so. We also made order dismissing the application for revision but reserved our order for costs.

The questions that arise for decision on this appeal are whether the discretion of the learned District Judge was properly exercised :—

(*i*) in permitting the amendment of the plaint, and

(*ii*) in ordering the defendant-appellant to pay the costs of the inquiry into the application for the amendment of the plaint.

Shortly the facts are as follows :— On 25th May, 1957 the plaintiff instituted this action against the defendant alleging that the defendant wrongfully, unlawfully, falsely and maliciously spoke and published of and concerning the plaintiff certain defamatory words specified in the plaint and that by reason of the said defamatory words his good name and reputation had been injured and he had thereby sustained damage which he assessed at Rs. 100,000/-.

Paragraphs 3 and 4 of the plaint read as follows :—

"3. At a largely attended meeting held in the afternoon of Sunday the 17th February, 1957 at Kukulnape in Mirigama in the course of a speech made in the presence and within the hearing of many members of the public the defendant wrongfully, unlawfully, falsely and maliciously spoke and published of and concerning the plaintiff the defamatory words underlined in the following passage from her said speech to wit :—

සමහරු අමරසිංහ වෙදමහත්තයා හුසුදුසු වෙද මහතෙක් යැයි කියනවා. ඔහු අටසැරයක් පේල්වූ බව කිවේ බොරුවක්, ඔහු සම්පූර්ණ වැදගත් වෙද මහතෙක් ය. අවුරුදු තුනක් උගන්වන්ට හොඳ නම් ඇයි උප දේශක සභාවට හොඳ නැත්තේ.

අමරසිංහ වෙද මහතා පේල් කළේ ලෙනෝරා මහතාගේ පුද්ගලික වෛරයක් නිසාය. තමන්ගේ දරුවන් හදන්නට දෙමව් පියන් දනගන්ට ඕනෑය.

An English translation of this passage is given in schedule 'A' hereto with the words complained of underlined.

"4. The said words mean that the plaintiff being an examiner of Ayurvedic Students dishonourably, dishonestly and corruptly 'failed' that is to say deliberately deprived Ayurvedic Physician Amerasinghe of the qualifying marks in his examination owing to personal malice and hatred."

The defendant states in paragraph 4 of her answer filed on 26th July, 1957 :—

"4. The defendant further states that on the occasion referred to she did address a meeting of about 200 persons and as a Minister of State dealt with some of the questions raised therein."

The case was fixed for trial on 21st January, 1958. On that day counsel on both sides stated that the case was a very long one and that consecutive days should be fixed for the trial. On 22nd January, 1958 the Court refixed the case for trial on 1st, 2nd, 3rd, 4th and 5th September. On

24th March, 1958 the Proctor for the plaintiff filed the following motion :—

" I move to amend the plaint as follows :—
(1) To delete paragraph 3 and insert in its place the following paragraph :—

'3. On 17th February, 1957 at a Public Meeting held at Kukulnape in Mirigama the defendant falsely and maliciously spoke and published of the plaintiff to G. Jakolis of Kukulnape, Pallawalla, (2) S. A. Perera of Kuligedera, Kotadeniyawa, (3) S. M. A. D. Perera of No. 15 Campbell Place, Colombo, and (4) G. William Ekanayake of Aluthepola, Minuwangoda, and divers other persons whose names are at present unknown to the Plaintiff the words following in the Singhalese language that is to say :—

සමහරු අමරසිංහ වෙද මහත්තයා තුසුදුසු වෙද මහතෙක් යැයි කියනවා. ඔහු අට සැරයක් පේල්වූ බව කිවේ බොරුවකි. ඔහු සම්පූර්ණ වැදගත් වෙද මහතෙක් ය. අවුරුදු තුනක් උගන්වන්ට හොඳ නම ඇයි උප දේශක සභාවට හොඳ නැත්තේ.

අමරසිංහ වෙද මහතා පේල් කලේ ලෙනෝරා මහතාගේ පුද්ගලික වෛරයක් නිසාය. තමන්ගේ දරුවන් හදන්නට දෙමව් පියන් දුනගන්ට ඕනෑ.

An English Translation of this passage is given in Schedule 'A' hereto with the words complained of underlined.'

2. To delete paragraph 4 and insert in its place the following paragraph :—

'4. By the said words the defendant meant and was understood to mean that the Plaintiff being an examiner of Ayurvedic Students dishonourably, dishonestly and corruptly 'failed' that is to say deliberately deprived Ayurvedic Physician Amarasinghe of the qualifying marks in his examination owing to personal malice and hatred'."

The Court thereupon noticed the defendant's proctors for 9th May. On 9th April, 1958 the plaintiff filed the following further motion :—

" With reference to the order of Court dated 24th March, 1958 to issue notice on the defendant for 9th May, 1958 I beg to submit that the defendant's Proctors have already taken notice of the amendment and that they have made an endorsement that they object. In the circumstances I move that the Court be pleased to order the defendant's Proctors to file their objection, if any, on 9th May, 1958. I shall inform the Defendant's Proctors after the order is made."

On this application the Court made order " Mention on 9th May, 1958 with notice to the defendant's Proctors " and vacated the order issuing notice of the application for the amendment of the plaint, as it appeared from the motion of 9th April that they had already received notice and intended to oppose the application to amend the plaint. On 9th May counsel for the respective parties appeared and counsel for the defendant stated that he objected to the application. The hearing of the objection was thereupon fixed for 12th June, 1958. On 27th May, 1958 the plaintiff's Proctor filed a third motion in which he moved to add to the proposed amended paragraph 3 of the plaint the name of P. Rajapakse. The inquiry commenced on 12th June and was adjourned for 17th and 18th June. It was concluded on the latter date.

The learned Judge delivered his order on 9th July, 1958 allowing the application and declaring the plaintiff entitled to the costs of the hearing and ordering him to pay to the defendant the costs of the amendment of the answer in case it became necessary to amend it in consequence of the amendment of the plaint. and fixed 24th July, 1958 as the date for such amendment. But up to the time of the hearing of this appeal the answer has not been amended.

Being dissatisfied with the order of the learned District Judge the defendant appealed therefrom on 18th July, 1958 and on 21st July made an application to the District Judge that as she had appealed against the order of the Court dated 9th July, 1958 it would not be in the interests of the parties concerned to proceed to trial until the appeal is decided and moved that the case be taken off the trial roll. On the memorandum in writing of the motion itself the plaintiff's Proctor stated that he objected to the application. On 24th July the defendant's application was heard and on 28th July, 1958 the learned Judge made order refusing it. There has been no appeal from that order. On 31st July, 1958 the defendant filed a petition in this Court in which she invited this Court :—

(*a*) to revise the order of the District Judge of 9th July, 1958, and

(*b*) to direct a stay of proceedings pending the hearing and determination of the appeal filed on 18th July.

When that application came on for hearing we ordered notice on the respondent for 25th August and directed that the appeal from the order of 9th July, 1958 be listed on the same day.

The contention of counsel for the appellant is that the learned District Judge was wrong in law in making the amendments set out in the plaintiff's application. The argument before the District Judge at the hearing of the application for amendment appears to have proceeded on the basis that the plaintiff would in law be precluded from calling as witnesses the persons named in the amended paragraph 3 of the plaint and proving that they heard the alleged defamatory words unless their names were stated in the plaint even though their names appeared in the list of witnesses filed by the plaintiff on 6th January, 1958, notice of which the defendant had received. It appears to have been assumed that the English Law is the law of Ceylon in this respect. I am unable to find any ground for that assumption. Nor has learned counsel satisfied me that the English law is applicable in Ceylon. Learned counsel was unable to refer us to any provision of the Civil Procedure Code or the Evidence Ordinance or to any decision of this Court which supported his contention that witnesses whose names are not mentioned in the plaint cannot be called to prove defamatory statements made in their hearing. Learned counsel for the respondent confessed that he was unaware of any such law.

Learned counsel for the appellant cited to us the following passage from page 304 of The Law of Defamation in South Africa by Manfred Nathan (1933) :—

> " In slander, the plaintiff, if he relies on publication to particular persons, must plead the names of all such persons as are known to him."

The above statement is based on the case of *Pillay vs. Naidoo* (1916 W. L. D. 151). It would appear from the judgment in that case that in South Africa there is no such provision as section 121 of our Civil Procedure Code which makes it obligatory on the plaintiff to file a list of witnesses within a reasonable time before the trial with notice to the opposite side. Under our Code no witness whose name is not on the list of witnesses can be called on behalf of a party except with the leave of the Court and that in special circumstances only (s. 175). Section 40 of the Code prescribes the requisites of a plaint. That section does not prescribe a special rule in the case of a plaint in an action for defamation. I am unable to see any basis on which the South African rule of pleading can be introduced into Ceylon. The rules of pleadings are prescribed by the Civil Procedure Code and I do not think it is open to us to add to those rules by judicial authority except in the circumstances provided in section 4.

The learned District Judge has amended the plaint on the application of the plaintiff in the exercise of the power vested in him by section 93 of the Civil Procedure Code which reads :—

> " At any hearing of the action, or at any time in the presence of, or after reasonable notice to, all the parties to the action before final judgment, the court shall have full power of amending in its discretion, and upon such terms as to costs and postponement of day for filing answer or replication, or for hearing of cause, or otherwise, as it may think fit, all pleadings and processes in the action, by way of addition, or of alteration, or of omission. And the amendments or additions shall be clearly written on the face of the pleadings or process affected by the order ; or if this cannot conveniently be done, a fair draft of the document as altered shall be appended to the document intended to be amended, and every such amendment or alteration shall be initialled by the Judge."

This section confers on the Court a wide discretion to amend all pleadings. The words " as it may think fit " and " it thinks fit " in the section do not enable the Court to do what it chooses. Those words create a discretionary power which must be exercised according to the principles applicable to the exercise of such a power (*Roberts vs. Hopwood*, (1925) A. C. 578 at 613).

Except in a case where the plaint is returned to the plaintiff for amendment under section 46 of the Code it is the Court alone that can amend a plaint once it is filed and not the plaintiff. The motion filed by the plaintiff's Proctor does not show that the fact was appreciated, for his motion reads " I move to amend the plaint as follows." The power given to the Court by section 93 may be exercised *ex mero motu* or upon the application of one of the parties. It would be unsafe to lay down any rules as to the limits of the exercise of the discretion vested in the Judge by that section. Nevertheless pronouncements of this Court and of the Superior Courts in England afford some guidance in its exercise. It has been stated by this Court (*Seneviratne vs. Candappa*, 20 N. L. R. 60 at 61) quoting with approval the observations of Brett M. R. in *Clarapede vs. Commercial Union Association* (32 W. R. 263) that amendment should be allowed if it can be made without injustice to the other side " however negligent or careless may have been the first

omission, and however late the proposed amendment." In the later decision of *Cassim Lebbe vs. Natchiya et al*, 21 N. L. R. 205, Shaw J., stated:—

> "The general rule with regard to amendments of pleadings which has been laid down by this Court in previous cases is that an amendment which is *bona fide* desired should be allowed at any period of the proceedings, if it can be allowed without injustice to the other side, and in most cases conditions as to costs will ensure no prejudice being caused to the other side."

In the English case of *Re Trufort*; *Trafford vs. Blanc*, 53 L. Times Reports (N. S.) p. 498 cited by learned counsel for the appellant Kay J., cites an observation of Bramwell, L.J., in *Tildesley vs. Harper* (39 L. T. Reps., N. S. 552 — 10 Ch. Div. 393) wherein he states :—

> "My practice has always been to give leave to amend, unless I am satisfied that the party applying was acting *mala fide*, or that by his blunder he had done some injury to his opponent which could not be compensated for by costs or otherwise."

The recent English case of *Clear vs. Clear* (1958) 1 W. L. R. 467 also contains some useful observations of Hodson, L.J., on this topic :—

> "The mere fact that delay would be caused by—serving him is not of itself, in my judgment, a sufficient ground for not granting an adjournment in order that an amendment may be made and the necessary steps taken. On the other hand, I am not prepared to say that in every case where the parties come to trial, one knowing nothing of the circumstances in which the other side is asking for discretion, and finding the evidence for the first time at the hearing, leave to amend must be given *ex debito justitiae*. It is quite true the courts have gone a long way in civil actions in saying that leave to amend will always be granted where injustice will not thereby be done, and where any injustice which is temporarily done can be remedied by costs, but it must always be remembered that there is a discretion to be exercised judicially in this case, and in this matrimonial jurisdiction very often the exercise of the discretion is peculiarly difficult. It would, I think, be wrong to say that, where a party had merely lain by and waited so to speak for the evidence to fall into his or her lap at the trial, the amendment must necessarily be given."

An examination of the provisions of Chapter VII of the Civil Procedure Code discloses that the power conferred by section 93 is subject to one limitation. Section 46(2) provides that before a plaint is allowed to be filed, the Court may refuse to entertain it for any of the reasons specified therein and return it for amendment *provided that no amendment shall be allowed which would have the effect of converting an action of one character into an action of another or inconsistent character.* If before a plaint is allowed to be filed an amendment which would have the effect of converting an action of one character into an action of another or inconsistent character is not permitted, the power conferred on the Court by section 93 for amending the plaint after it is filed cannot be greater. It must be read subject to the limitation that an amendment which has the effect of converting an action of one character into an action of another or inconsistent character cannot be made thereunder. Apart from that limitation the discretion vested in the trial Judge by section 93 is unrestricted and should not be fettered by judicial interpretation. Unrestricted though it be, it must be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour. Its exercise must be uninfluenced by irrelevant considerations, must not be arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to discharge his office ought to confine himself (*Sharp vs. Wakefield*, (1891) A. C. 173 at 179).

The mode of approach of an appellate Court to an appeal against an exercise of discretion is regulated by well established principles. It is not enough that the Judges composing the appellate Court consider that, if they had been in the position of the trial Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. It must appear that the Judge has acted illegally, arbitrarily or upon a wrong principle of law or allowed extraneous or irrelevant considerations to guide or affect him, or that he has mistaken the facts, or not taken into account some material consideration. Then only can his determination be reviewed by the appellate Court.

Now where such a wide discretion has been given to a subordinate Court the appellate Court should be careful not to restrict it by laying down rules which the Legislature has not prescribed. In this connexion the words of Swinfen Eady M. R. in *Wickins vs. Wickins*, (1918) p. 265 at 272, quoted with approval by Viscount Simon in *Blunt vs. Blunt*, (1943) A. C. 517 at p. 525, bear repetition :—

> "Where Parliament has invested the Court with a discretion which has to be exercised in an almost inexhaustible variety of delicate and difficult circumstances, and where Parliament has not thought fit to define or specify any cases or classes of cases fit for its application, this Court ought not to limit or restrict that discretion by laying down rules within which alone the discretion is to be exercised, or to place greater fetters upon the Judge of the Divorce Division than the Legislature has thought fit to impose."

In the instant case I am satisfied that the learned Judge has not exceeded the powers given to him by section 93 and that he has properly exercised the discretion vested in him by that section.

I shall now come to the second question for decision. Counsel for the appellant contended that she should not have been ordered to pay the costs of the hearing of the application to amend the plaint, because such an order amounts to making her to pay the costs occasioned by the omission of the plaintiff, and he maintained that the order for costs is contrary to the provisions of section 93. That section gives the Court full power to amend in its discretion all pleadings and processes of Court by way of addition, or of alteration, or of omission, as it may think fit upon such terms as to costs and postponement of day for filing answer or replication, or hearing of cause, or otherwise, as it may think fit. The terms are to be imposed upon the defaulter, *i.e.*, the party seeking the amendment, only when an amendment is made. The object of conferring on the Court the power to impose terms is to enable it to compensate the innocent party in respect of costs already incurred and any additional expenditure which may be occasioned by the amendment. The power to order the costs of the hearing into an application to amend is not contained in Section 93 for it does not—empower the Court to cast in costs the person who unsuccessfully moves the Court to amend his pleadings. The power to order the costs of the hearing into an application to amend where it is resisted by the opposing party is to be found in section 211 of the Code which reads :—

> "The Court shall have full power to give and apportion costs of every application and action in any manner it thinks fit, and the fact that the court has no jurisdiction to try the case is no bar to the exercise of such power;
>
> Provided that if the court directs that the costs of any application or action shall not follow the event, the court shall state its reasons in writing."

In the instant case as the costs followed the event the learned Judge did not give reasons for his order that the defendant should pay the costs of the inquiry. In the order for costs the learned Judge has quite rightly acting under section 211 ordered the defendant to pay the costs of the hearing while ordering the plaintiff under section 93 to bear the costs of the amended answer, if any. His discretion as to costs has been properly exercised under both provisions of the Code.

There is one other matter which must be dealt with in this judgment as it was strenuously argued at length though not finally pressed by learned counsel who intimated to us in the course of the respondent's reply that he was not pressing his case for a postponement of the trial and that he was ready to go on with it. He contended that the learned Judge should have granted a postponement of the trial fixed for 1st-5th September, and that as the learned Judge had not postponed the trial he had not exercised the discretion vested in him by section 93. The application for amendment was made in March and heard in June. The learned Judge's order was made on 9th July. No application was made to the learned Judge before or after 9th July for a postponement nor was there any material before him to show that the defendant was unable to get ready for trial in the time between 9th July and 1st September. No—material was placed before him for the purpose of satisfying him that in consequence of the amendment made on 9th July more time was necessary for the defendant to prepare for the trial. Learned counsel relied on the following passage in his address to the Judge as containing an application to him for a postponement :—

> "This application of the plaintiff must be refused. Whether it is refused or not, all costs of the dates for which the case is fixed for trial must be paid by the plaintiff. Costs always do not follow the event. Court may give judgment to one party and give costs to the other. The whole application of the plaintiff lacks *bona fides*."

I am unable to find therein any indication whatsoever of an application for a postponement. Learned counsel stressed that the fact that the learned Judge has not referred to the question of postponement in his order indicated that he had not exercised his discretion in regard to the matter. It is true that the learned Judge has not discussed in his judgment the reason for not imposing a term as to postponement of the trial when making the amendment. Although it does not appear from the judgment or order of the trial Judge how he has reached the result embodied in his order, upon the facts the order is not manifestly unreasonable or plainly unjust. It is only where upon the facts the order is manifestly unreasonable or plainly unjust that the appellate Court may infer that in some way there has been a failure to exercise the discretion vested in the trial Judge. In such a case although the nature of the error is not manifest, the exercise of the power confided in the Judge may be reviewed on the ground that he has not exercised his discretion, *Lovell vs. Lovell*, (1950) 81 Commonwealth Law Reports p., 513. In my opinion upon the facts of this case there is no

justification for inferring that the Judge did not exercise his discretion when he refrained from imposing a term as to postponement of the trial when amending the plaint. If the defendant desired a postponement of the trial she should have made an application in that behalf. Section 80 of the Civil Procedure Code provides that after the day for the hearing and determination of the action is fixed the Court may subsequently on application made by either party, and after hearing both parties, or after proof of notice of motion to the absent party, direct that the day for the hearing of any case shall be advanced or deferred. No such application has been made at any time after January, 1958.

In this connection learned counsel's attention was drawn to section 91 (1) of the Civil Procedure Code which reads :—

> "Every application made to the court in the course of an action, incidental thereto, and not a step in the regular procedure, shall be made by motion by the applicant in person or his advocate or proctor, and a memorandum in writing of such motion shall be at the same time delivered to the Court."

He submitted that it was the practice in the District Court of Colombo for counsel to apply for postponement of trials without a memorandum in writing as required by section 91 (1) being filed. Such a practice is contrary to the provisions of sections 80 and 91 (1) of the Code and should not in my view be continued. Counsel for the respondent pointed out in the course of his argument a further obstacle in the way of the appellant. She had not raised the point about the postponement in the petition of appeal.

In regard to the costs of the application for revision I see no ground for departing from the usual rule that costs should follow the event.

Sinnetamby, J.

I have seen the judgment prepared by my Lord the Chief Justice and I agree with the order that he proposes to make. I should like, however, to make a few brief observations in regard to certain matters which it seems to me it is not necessary to decide to arrive at the conclusions we have reached. In regard to these matters I find that I hold views which, with all respect, are not in complete accord with those held by my Lord the Chief Justice.

On the question of the power of the Court of Appeal to review an order made by a Court of first instance in the exercise of its discretion, I agree generally with the principles enunciated but I would add that where the Trial Court has expressed no views and given no reasons for making such an order it is in my opinion within the province of the Court of Appeal to bring its independent judgment to bear on the facts and to make an appropriate order which it is within the jurisdiction of the trial court to make but which it omitted to make. In the present case learned Counsel for the appellant submitted that he had made an application for the postponement of the hearing in the event of the amendment being allowed. The trial Judge has made no reference to it in his order which means that the date originally fixed would stand. Learned Counsel stated that when he made the application the learned Judge interposed with the remark "How do you know that I am going to allow the amendment". I see no reason to reject the statement made by learned Counsel having regard to the somewhat unintelligible note of Counsel's address, which my Lord the Chief Justice has quoted in his judgment and having regard also to the fact that Counsel's statement was not contradicted by the other side.

Learned Counsel for the appellant at the commencement of the hearing of the appeal strenuously urged that an order postponing the dates of trial should be made by this Court and speaking for myself I was disposed to give it favourable consideration for reasons which it is unnecessary to recapitulate as it is now only of academic interest. On a subsequent date in view of certain submissions made by learned Counsel for the respondent, learned Counsel for the appellant withdrew his application for a postponement and stated that he had advised his client to proceed with the trial on the dates fixed.

In regard to the scope of sections 80 and 91 of the Civil Procedure Code I agree that where there is both the opportunity and the time available an application for the postponement of the hearing should always be made by motion but there are occasions when this cannot be done and in such cases the *cursus curiae*, if I may speak from personal experience, has been to permit an application to be made *ore tenus*. Such a situation, for instance, would arise if on a date of trial an issue not covered by the pleadings is framed and accepted : then the party who is thus taken by surprise has always been permitted to apply *ore tenus* for a date. In any event I take the view that the provisions of section 91 of the Civil Procedure Code are

only directory and not imperative. Failure to comply strictly with its terms does not carry with it the penalty of disentitling the Court to entertain an application or of invalidating all orders made in respect of it.

In regard to the question of whether the plaintiff without amending his plaint would have been entitled to call a witness not mentioned expressly in the plaint as a person to whom publication of the defamatory statement was made, I do not think it necessary to express an opinion. Both sides in the lower Court took the view that without the amendment such a witness could not be called and this view appears to have found favour with the trial Judge also. The matter was not fully argued before us in view of the opinion we held that irrespective of the answer to that question the amendment should be allowed. I, therefore, refrain from expressing any views on the matter.

Dismissed

IN THE PRIVY COUNCIL

Present at the Hearing: LORD MORTON OF HENRYTON, LORD TUCKER, LORD COHEN, LORD DENNING, MR. L. M. D. DE SILVA

HERBERT ERNEST TENNEKOON, COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS vs. MURUGAPILLAI PANJAN

Privy Council Appeal No. 23 of 1956.

Delivered on: 19th May, 1958.

Citizenship—Registration under Indian and Pakistani Residents (citizenship) Act No. 3 of 1949—Sections 4 (1) 6 (1), 22—Onus on the applicant to prove permanent settlement—Not necessary to prove change of domicile—Evidential value of statements by applicant regarding temporary residence—Relevant date.

In an application for registration under the Indian and Pakistani Residents (Citizenship) Act, it is not imperative that the applicant should prove a change of domicile in order to establish an intention to settle permanently in Ceylon.

Where statements are made in a document by an applicant regarding temporary residence in Ceylon, they are of no evidential value if they have been made incorrectly or without a proper understanding of them.

That the date at which an applicant must establish that "he is an Indian or Pakistani resident" as defined in Section 22 is the date of the application and not the date on which the Act came into operation, namely, 5th August, 1949.

Cases cited: *Tennekoon vs. Duraisamy*, 55 C. L. W. 81; 59 N. L. R. 481.

Sir Frank Soskice, Q.C., with *M. Solomon*, for the appellant.
C. S. Barr-Kumarakulasinghe, with *Mrs. Kshama Fernando*, for the respondent.

LORD MORTON OF HENRYTON.

This is an appeal from the Supreme Court of Ceylon. It will be convenient to refer to the respondent as "the Applicant."

On the 26th May, 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 on the 14th August, 1953, but an appeal by the applicant to the Supreme Court of Ceylon was successful. The appellant now appeals from the decision of the Supreme Court with the leave of that Court.

It is convenient to observe at once that the decision of the Commissioner refusing the application was given five months before the decision of the Deputy Commissioner in the case of *Tennekoon vs. Duraisamy*, judgment in which has just been delivered by their Lordships' Board; but the judgement of the Supreme Court allowing the appeal of the applicant in the present case was delivered a week after the judgment of that Court in *Duraisamy's* case. The applicant in the present case did not raise any preliminary objection to the jurisdiction of the Board.

The relevant provisions of the Act have already been set out in the judgment of the Board in *Duraisamy's* case, and need not be repeated. The

question in the present case is whether the Commissioner who heard the case (Mr. V. L. Wirasinha) 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 facts in the present case are as follows :—

The applicant applied to be registered under the Act as a citizen of Ceylon on the 26th May, 1951, stating in his application that he was a single man, an Indian resident and had been continuously resident in Ceylon during the period of ten years commencing on the 1st January, 1936, and ending on the 21st 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 at Thathamangalam Village, Trichy district, on the 3rd January, 1924, that he was the manager of Letchumypathy Stores, Koslanda, and that he had resided at Iruwanthampola, Koslanda, from 1936 to 1942, at Egodawatha Estate, Koslanda, from 1942 to 1947, and at Letchumypathy Stores, Koslanda, from 1947 to date.

The application was supported by various letters or certificates speaking as to the said applicant's good character and length of—residence in Ceylon. There was however no contemporary documentary evidence as to his residence in Ceylon from 1936 to 1947 but only letters of recent date.

On the 4th April, 1952, the applicant, in answering a questionnaire submitted to him, stated that he had an interest in certain property in India, being entitled to a ¼ share of the estate of his father (who was still living) that he had paid visits of one month each to India in 1946 and 1947 to see his parents and that he had remitted money to India but was not certain how many times.

The Investigating Officer reported on the application as follows :—

" Residence from 1936 (1st Jan.) to date of application.

" 1936 to 1942.—The applicant says that he was at Iruwanthampola Estate with his relations. There is no documentary evidence to show that he was actually living in Ceylon and not in India. The three letters (P 7, 8 and 9) are intended by the applicant to prove his residence during the period 1936 to 1942. In my opinion this evidence is highly unreliable.

" From 1942 to 1947.—The applicant says that he was working at a boutique at Egodawatte Estate, Koslanda. He says that he was there from August 1942, to July, 1947. Unfortunately that boutique is now closed down.

" From September, 1947, to the date of his application, he has been at Letchumy Stores, Iruwanthampola. I have examined the books and I have found that he has resided at the above residence during this period.

" Visits to India. He has made two visits to India, in 1946 and 1949, to see his parents. Both visits lasted a month each.

" Interests in India.—He is entitled to ¼ share of his father's property which is worth Rs. 2,000. His parents are now permanently residing in India and the applicant says that they do not desire citizenship as asked for (*vide* p. 3). Remittances. The applicant has remitted money to India but he does not know the exact amount or the occasions he has remitted. He has remitted Rs. 76 in 1951.

" Interests in Ceylon.—He is now the Manager of Letchumy Stores. He has contributed Rs. 2,034-10 towards his business in 1951 July."

The applicant gave further details of the—remittance of Rs. 76 in a letter written to the Investigating Officer on the 23rd July, 1952. In this he stated that he had sent to his parents in India Rs. 15 on the 31st January, 1950, Rs. 15 on the 28th February, 1950, Rs. 23 on the 31st May, 1950, and Rs. 23 on the 30th June, 1950, and that these remittances had been made under a General Permit dated the 18th December, 1949, issued under the Defence (Finance) Regulations. This General Permit, which was enclosed in the letter, was in fact a permit issued by the Controller of Exchange, granting anthority for the applicant to remit to India a total sum of Rs. 336 in monthly instalments extending from January, 1950, to April, 1951. In the formal application for this permit made by the applicant on the 24th August, 1949, and signed by him, he had declared himself to be temporarily resident in Ceylon, had stated that his father,mother, two brothers and sister were dependents, that during the period 1st July, 1948, to 31st March, 1949, he had been regularly remitting Rs. 25 per month to each of them and that the purpose of the remittance sought to be authorised was " Home Expenses at India."

It is common ground that the form so signed, though marked " Form M.O." was the same in all relevant particulars as the " Form B " referred to in *Duraisamy's* case.

On the 9th October, 1952, C. M. Agalawatte, 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 :—

(1) 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 ;

(2) that you were resident in Ceylon during the period 1st January, 1936, to July, 1947, without absence exceeding 12 months on any single occasion."

The applicant replied by his proctor on the 8th November, 1952, that he had been unaware of the implications of the declaration made by him to the Department of Exchange Control, that he had since his first arrival in Ceylon treated—Ceylon as his permanent hiome and that such had been his intention at the time he made his application for registration as a citizen of Ceylon, and for these reasons requesting the holding of an enquiry.

The applicant's application for registration as a citizen of Ceylon was accordingly referred for inquiry.

At the enquiry, which was held on the 7th July, and the 29th July, 1953, before V. L. Wirasinha, Commissioner for the Registration of Indian and Pakistani Residents, the applicant produced documents and called evidence to show that he had been continuously resident in Ceylon for the required period. It would appear from the Commissioner's Order that he accepted this evidence. The applicant himself gave evidence in support of his application, stating in the course of his evidence that he had not made any—remittances to India before obtaining the permt from the Controller of Exchange, that the Rs. 76 he had remitted had been sent to his father in order to assist in the payment of certain medical expenses and that since then he had not made any remittances With regard to the declaration made by him that he was temporarily resident in Ceylon, the applicant's testimony was that he did not know the meaning of what he signed, as the form was in English, a language which he did not understand.

At the said enquiry there was also received in evidence, at the instance of the applicant, a copy of the evidence given in another case by A. H. Abeynaike, Deputy Controller of Exchange, Colombo. The said Abeynaike deposed that the form of application of the 24th August, 1949, in which the applicant had declared that he was temporarily resident in Ceylon was a form drafted " on the initiation of the Controller of Exchange," from whom under the Defence (General) Regulations a permit is required for the remittance of moneys abroad. The said Abeynaike further deposed that his own practice in the Department was normally to accept without further investigation declarations made by persons temporarily resident in Ceylon as to who their dependants abroad are, but that declarations from persons permanently resident in Ceylon he would test further, requiring proof of necessity and obligation.

At the end of the enquiry the Commissioner made an order refusing the application, upon grounds which will be considered later, and the applicant appealed to the Supreme Court.

The appeal was first argued before Swan, J., and that learned Judge, on the 14th October, 1954, referred it to a fuller Bench. Thereafter it was argued before a Bench consisting of Gratiaen, J., and Sansoni, J., together with the appeal in *Duraisamy's* case. On the 25th February, 1955, Gratiaen, J., delivered the judgment of the Court in the following terms :—

" This appeal came up before us on a reference by Swan, J., and was argued before us together with a similar appeal—S.C. No. 517/54 Application No. J 154. It is not denied that if the judgment pronounced by us on 18th February, 1955, be correct, the appellant for the same reasons is entitled to succeed on this appeal. We accordingly allow the appeal for the same reasons as those contained in our connected judgment and direct the Commissioner to take appropriate steps under section 14 (7) of the Act on the basis that a *prima facie* case for registration has been established to the satisfaction of this Court. The appellant is entitled to the costs of this appeal."

The appeal S.C. No. 517/54 Application No. J 154 there mentioned is the appeal in *Duraisamy's* case, and their Lordships' comments upon the judgment of the Supreme Court in that case apply equally to the present case. In the present case also they are of opinion that the Supreme Court was clearly right in allowing the appeal.

It is plain that the 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 Commissioner to the determination of this question was wrong in the two important respects, which they mentioned and discussed in their judgment in *Duraisamy's* case in regard to the Deputy Commissioner' decision in that case. The Commissioner thought, wrongly, that the applicant had to prove a change of domicile, and he attached far too much weight to the statement as to temporary residence in Ceylon made by the applicant in the form which he signed. Their Lordships' observations on these two matters in *Duraisamy's* case apply equally, *mutatis mutandis*, to the present case; but the statement as to temporary residence made by the applicant in the present case is of even less evidential value than the statements made by Mr. Duraisamy, for two reasons. First, the applicant was illiterate and the form was filled in English—a language with which the applicant was unfamiliar—by someone else. Secondly, it is obvious that the applicant, or the person who filled in the form for him, did not fully understand the vital question 7. That question, and the answer to it, were as follows :—

7. Nationality :—

If not a Ceylon National—

(*i*) State aggregate period of residence in Ceylon : 20 years—Twenty years.

(*ii*) If aggregate period of residence in Ceylon exceeds 10 years state whether temporarily or permanently resident in Ceylon ; Temporarily

(*iii*) If temporarily resident in Ceylon state country of permanent residence and permanent address in that country ; M. Panjan Letchimipathy Store, Iruwanthampola Estate, Koslanda.

Thus, although the applicant stated, in answer to question 7 (*ii*) that he was temporarily resident in Ceylon, in answer to question 7 (*iii*) he gave an address in Ceylon thereby indicating that he was permanently resident in that country.

One more matter should be mentioned in regard to the Commissioner's Order. He expressed himself as follows :—

> " It is pertinent to inquire by what date an applicant should have permanently settled in Ceylon. Only Indians or Pakistani residents can procure registration under the Act. In terms of Section 22 of the Act, no Indian or Pakistani is a Indian or Pakistani resident unless he ' has emigrated ' from his country of origin and ' permanently settled in Ceylon ' or unless he is the descendant of such a person, or unless, being himself of Indian or Pakistani origin, he is a person ' permanently settled in Ceylon.' The point is whether an applicant or an ancestor of his should have permanently settled in Ceylon at least by the date of coming into operation of the Act, or whether it is sufficient that he had permanently settled in Ceylon by the date of his application. The Indian and Pakistani (Citizenship) Act No. 3 of 1949, was the result of negotiations between the Governments of India and Ceylon relating to a body of persons whose origin was in India and who had permanently settled in Ceylon. What was in issue was the status of a fairly large number of Indian and Pakistani residents who were already permanently settled in Ceylon and the Act was designed to benefit that body of persons. I am of opinion therefore that what the Act requires is that an applicant should have permanently settled in Ceylon not merely by the date of his application, but at any rate by the date of coming into operation of the Act, namely 5th August, 1949."

In their Lordships' opinion the provisions of the Act, and in particular the use of the present tense in section 6 (1), make it reasonably clear that an applicant must prove that he is " an Indian or Pakistani resident," as defined in section 22, at the date of the application. If the relevant date had been the coming into operation of the Act, there would surely have been an express reference to that date in section 6 (1).

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's cost of this appeal. *Dismissed.*

Present : T. S. Fernando, J.

RAMANATHA VYTHINATHAN vs. THE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS

S. C. No. 913 of 1954—*Citizenship Application No. C.* 2183

Argued on : 25th July, 1958.
Decided on : 25th August, 1958.

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Application for Citizenship—Refusal by Commissioner on the ground of absence of proof in change of Domicile—Misdirection—Also because circumstances disproving applicant's intention of permanent settlement in Ceylon—Exercise of discretion by Commissioner.

An application for citizenship under the Indian and Pakistani Residents (citizenship) Act cannot be refused solely on the ground that the applicant had failed to prove the abandonment of the domicile of origin. Proof of change of domicile is not necessary to establish intention of permanent settlement in Ceylon.

But where the Commissioner dismisses he application after taking into consideration other circumstances, such as the birth and the education of the applicant's children, on which he could reasonably have concluded that there was no intention to settle permanently, the Court of appeal will not interfere with the order.

Cases cited : *Tennekoon vs. Duraisamy*, 59 N. L. R. 481.

C. Shanmuganayagam, for the applicant-appellant.
E. R. de Fonseka, Crown Counsel for the respondent.

T. S. FERNANDO, J.

The appellant's application for registration of his wife, his four minor children and himself as citizens of Ceylon under the provisions of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, was refused by the Commissioner, and the reasons for the refusal are to be found in the latter's order of 6th April, 1954. This appeal canvasses the correctness of the order of refusal.

The only question at issue at the inquiry which preceded the refusal of the application was whether the applicant had permanently settled in Ceylon. In deciding this question the Commissioner believed he had to decide whether the applicant had abandoned his domicile of origin. This very question has since been the subject of decision by their Lordships of the Privy Council in *Tennekoon vs. Duraisamy*, (1958) 59 N. L. R. 481. In that case, Lord Morton of Henryton in delivering the opinion of the Judicial Committee stated that the question of proving a "change of domicile" did not come at all into the matter of a decision as to whether an applicant for registration as a citizen had permanently settled in Ceylon. In the light of that decision it is now beyond controversy that the Commissioner had misdirected himself on the point, and, if the Commissioner's order of refusal rested purely on his determination that the applicant had not established that he had abandoned his domicile of origin, this appeal must be allowed and the Commissioner directed to take the other steps indicated in the Act on the basis that the applicant has made out a *prima facie* case for registration.

My attention has however been drawn to the evidence recorded at the inquiry in regard to the place of birth of all four children of the applicant and particularly to the evidence relating to their education. The dates of birth of the four children are given as 30th April, 1933, 10th February, 1943, 25th November, 1944 and 8th January, 1947 respectively. Sathiyawageswaran, the eldest, was the only child living in 1942 and it would appear that, although he was for a short period of time in a school in Ceylon, he was taken to India in 1942, *i.e.*, when he was about 9 years of age. Although he came back in 1947 along with the applicant's wife and the three younger children, he returned to India for his education because—to use the applicant's own words—" he could not fit suitably into the scheme of studies in a Ceylon school. The girl Nagalakshmi is said to have been in Ceylon since 1947, *i.e.*, from the time she was four years of age and has never been to a school in Ceylon. The applicant testified that this girl was sent to a school in India for a short time. She must therefore have been sent to school in India when she was quite tiny. No reason has been advanced as to why she was not sent to a school in Ceylon where primary education is compulsory. The third child, Ramanathan was sent to a school in India from the time he was about 6 years of age. He was in school in India even at the time of the inquiry, and one reason given for choosing a school in India for this boy was that there was no suitable living accommodation for him in Ceylon. Two other reasons offered were (1) that the applicant's father wished that the child should remain with him and (2) that, as he has not learnt any English, he cannot " fit into a secondary school " in Ceylon. In regard to the youngest child, the boy Krishnan, there is no explicit evidence that he is in school in India or in Ceylon. The application for foreign exchange made by the applicant himself on 17th June, 1948 shows, however, that the money was required, *inter alia*, for the education of his 3 children. The applicant is not an uneducated man and has been for many years a clerk in Colombo mercantile establishments. As the girl was on the applicant's evidence in Ceylon from 1947 onwards, the clear implication of the statements in the application for exchange is that the youngest child was also being educated in India.

With these facts before him, the Commissioner has stated that, even if he were to disregard the declarations made by the applicant in his applications for foreign exchange that he was tempo-

rarily resident in Ceylon, he should still regard permanent settlement in Ceylon as not having been proved. Assuming that the statements made by the applicant in the applications to the Exchange Controller were factually incorrect, the question which I have to ask myself appears to be whether there was material before the Commissioner on which he could reasonably have come to the conclusion that the applicant had failed to establish the fact of permanent settlement. I must remind myself that in *Duraisamy's* case (1958) 59 N. L. R. 481, their Lordships of the Privy Council, while expressing the opinion that election to apply for registration combined with long and continuous residence affords strong evidence that an applicant has permanently settled in Ceylon, nevertheless stated that they cannot find that the combination of election and long and continuous residence 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. The question was one primarily for decision by the Commissioner, and, on the facts relating to the children he has stated that he would have expected a person who has settled in Ceylon permanently to have reconciled himself to putting up with any difficulties involved in the birth and education of his children in Ceylon rather than arrange that these things should take place in India, possibly at greater expense to himself. I am quite unable to say that the Commissioner has misdirected himself on the point involved and, as I am also unable to say that in the state of the facts before him his decision is one which he could not fairly or reasonably have reached, the correct course for me, sitting in appeal, to take is to decline to interfere with the order of refusal. The appeal is accordingly dismissed with costs which I fix at Rs. 105/-.

Dismissed.

Present : H. N. G. FERNANDO, J. AND T. S. FERNANDO, J.

K. VAJIRAWANSA THERO *vs.* (1) P. H. ABRAHAM SILVA AND OTHERS.

S.C. 191-193 (*Inty*) 1955. *D.C. Kegalle No.* 8036.

Argued on : 25th, 26th and 27th June, 1957.
Decided on : 21st March, 1958.

Society for advancement of Buddhasasana—Property bought for Buddhist temple—Promise to dedicate and transfer—Sanghika Property—Failure to do so, but entrusted monks with management of temple—Does it divest the Society of its rights—Failure to join all entitled to legal rights on land on which temple stands—Effect—Action for Possession, Control, and Ejectment.

Held : (1) That entrusting the charge of a temple by a Society, which founded it, to a monk provisionally by deed intending to effect a permanent transfer and dedication at some later time, is not, in the absence of evidence that the intention was carried out, sufficient to divest the Society of its rights and to prevent the Society from subsequently entrusting the control and management of the temple to persons other than those mentioned in the document.

(2) That where the plaintiffs are the owners, and therefore the trustees of some of the allotments of land upon which a temple stands, they have no right to be declared trustees of the entire land, but they are entitled to regain the rights of possession and management of which they have been deprived by the unlawful acts of the defendants.

C. P. Gunaratne with *B. S. C. Ratwatte* for the 1st and 2nd defendants-appellants in 193 and 1st and 2nd defendants-respondents in 191 and 192.

H. W. Jayawardene, Q.C., with *P. Ranasinghe* for the 3rd defendant-appellant in 192 and 3rd defendant-respondent in 191 and 193.

H. V. Perera, Q.C., with *C. V. Ranawake* for the 4th defendant-appellant in 191 and 4th defendant-respondent in 192 and 193.

A. L. Jayasuriya with *A. B. Perera* and *J. C. Thurairatnam* for the plaintiffs-respondents in all the appeals.

H. N. G. FERNANDO, J.

The nine plaintiffs in this action claimed a declaration that certain lands forming part of the premises of the Bodhirajaramaya, situated in the district of Kegalle, be declared property subject to a charitable trust, for a vesting order

vesting the property in the plaintiffs as trustees, and for the ejectment therefrom of the four defendants. The claim was based on the following averments :—that a Society known as the Sasana Abhiwardana Society was formed about 1908 for the purpose of founding an institution for the advancement of the Buddha Sasana and the residence and maintenance therein of Buddhist monks ; that certain members of the Society had purchased certain lands (now forming part of the premises of the Institution) in furtherance of the objects of the Society, that these lands were donated to the Society and constitute an extent of 3 acres, 2 roods and 32 perches ; that the buildings and improvements on the lands were erected by the Society from private and public subscriptions ; that at a meeting held on September 25th, 1949, one E. M. Appuhamy, the Vice-President, was authorised to convey the right title and power vested in the Society in and over the land to the plaintiffs as trustees ; and that in pursuance of this resolution E. M. Appuhamy by deed P 29 of 14th and 15th January, 1950, constituted and appointed the plaintiffs and one K. T. S. de Silva as trustees.

The 1st defendant in his answer denied that the Sasana Abhiwardana Society had any legal rights to the temple, although he admitted that the Society did in fact supervise, look after and improve the temple. He also denied the right of the plaintiffs to be trustees of the temple or to sue as such. In addition the 1st defendant pleaded that the premises are Sanghika property by virtue of a dedication to the Sangha ; that the control, management and supervision belonged to the Viharadhipati, and that the 1st defendant was appointed an agent by the present Viharadhipati. The answer of the 2nd defendant was substantially to the same effect. The 3rd defendant's answer did not touch upon the averments in the plaint. The 4th defendant admitted that the Sasana Abhiwardana Society bought the land and put up the building on which the Bodhirajaramaya now stands, but he too relied on an alleged dedication to the Sangha and on the rights of the Viharadhipati and of the 1st defendant under him.

The question whether there had been a dedication in 1930 and whether the premises were Sanghika property was the principal one raised at the trial by the defence. The learned District Judge has in my opinion given convincing reasons for rejecting the plea that there had been a dedication.

The evidence for the plaintiffs was that the monk who was first placed in charge of the temple was one Dharmakirti Pada Thero and that he remained in charge of the temple at the instance of the Society for two years from 1909 leaving Dhamma Kusala Thero whom the Society accepted as Viharadhipati. Thereafter, according to the plaintiff, Dhammadinna, the pupil of Dhamma Kusala, administered the temple as Adikari under the authority of Dhamma Kusala. The defence called no witnesses to controvert this version of the early history of the temple, and indeed the case for the defence was only that a dedication took place in 1930. It is common ground that preparations for such a dedication were put in hand and that the permission of the Governor (then necessary under section 41 of the Buddhist Temporalities Ordinance, 1906) was sought to enable the Society to transfer the temple property to Dhamma Kusala. The necessary licence from the Governor was however withheld and in the result the document D9 which was signed on 13th March, 1930, by the Society and Dhamma Kusala and his pupil Dhammadinna was not a transfer, but only a promise to transfer within three years, after obtaining a permit from the Governor. In the meantime, however, this deed did purport to deliver charge of the temple premises to the two monks. In so far also as the monks themselves were concerned, they would I think be bound by the recital in the deed that the premises belonged to the members of the Society, and it would not be open to any of the present defendants, if they base any claim under Dhamma Kusala, to deny the Society's title.

The apparent basis of the defendants' claim is that Dhammadinna was the chief pupil of Dhamma Kusala and that Dhammadinna is the *de facto* Viharadhipati, having succeeded Dhamma Kusala. There is nothing in the evidence adduced for the defence to support the claim in the pleadings that Dhammadinna was the chief pupil of Dhamma Kusala, and that being so, I see no reason to question the opinion expressed in the judgment that even if there has been succession to the temple under the rule of Sisyanu Sisya Paramparawa, it would be one Aththakusala and not Dhammadinna who would be entitled to succeed.

The learned District Judge has carefully considered the contention that a dedication did in fact take place on 14th March, 1930. I need refer only to a few of the circumstances which support his finding. In the first place the licence of the Governor not having been obtained for a transfer of the property, even the deed P9 is entitled a deed " promising to dedicate ". One Mrs. Badhrawathie Fernando, a daughter of Carnolis de Silva (a founder member of the Society), had appeared at the meeting and publicly protested against a dedication. Further

as the Judge remarks, it is unlikely that learned priests present at the ceremony would have accepted as an absolute dedication what was in terms only a promise to dedicate. Even if the monks imagined that there was to be a dedication, it can hardly be said that the members of the Society who had executed P9 could possibly have had an intention of immediate dedication when they were quite aware of the opposition on the part of the family of one of the founder members and holders of the legal title as well as the lack of the Governor's licence for the transfer of the land. The learned Judge also rejects the version that the ceremony of dedication was completed by the pouring of water upon a rock inscription, and I see no reason to doubt the correctness of his views that this ceremonial would not have been a proper substitute for the established custom of pouring water into the hands of the donee. In the result it seems clear that all that took place on the 14th March, 1930, was that the Society entrusted the charge of the temple to Dhamma Kusala provisionally, intending to effect a permanent transfer and dedication at some later time. There is no evidence that this intention was ever carried out. No authority was cited to us in support of the view that a document like P9 was sufficient to divest the Society of all its rights and to prevent the Society from subsequently entrusting the control and management of the temple to persons other than those named in the document.

The learned Judge has also accepted the evidence for the plaintiff that the Society appointed one Dhammavilasa in 1935 with the approval of Dhamma Kusala to manage the temple affairs and that when the 1st defendant originally interested himself in the temple, he did so under the authority of Dhammavilasa, the Society's nominee. I need only add in passing that there was ample evidence for the Judge's opinion that the 1st defendant took forcible possession of the premises in April, 1950, and now seeks to shelter under alleged authority from an alleged incumbent.

For the o reasons I am in agreement with the findings of the learned Judge that the premises remained *gihi santhaka* and that the rights of management and control including the right to nominate a monk to supervise the temple, were, despite the events of 14th March, 1930, still vested in the Society.

It is necessary at this stage to refer to the various deeds affecting the land on which the premises of the Bodhirajaramaya are situated. By P2 of 1904 one Kiriappu conveyed a land called Udamullahena of about 8 lahas to Dambadeniyage Don John Appu and Kankantantri Carnolis Silva. By P3 of 1909 one Ran Kira conveyed an undivided half share of a land called Panuambagahamullahena of 8 kurunies to Idris Silva. By P4 of 1911 one Kuda Ridi conveyed to Abraham Silva the 1st plaintiff, a liyadda of one laha in extent. By P5 of 1918 Andy Perera conveyed the remaining portion of a land called Nikagolawatte of 5 kurunies excluding 1 laha previously sold, to five persons, Isanhamy, Andris Silva, Justin Perera, James Perera Goonewardena and W. M. Wijetunge. The 4th transferee on P5 as well as the sons of the 1st and 2nd transferees respectively, subsequently sold an undivided 3/5 part of Nikagolawatte to the 1st plaintiff by P7 of 1949. Similarly by P8 of 1949 one Entin Silva, the son of Idris Silva the transferee on P3, conveyed the undivided half share of Panuambagahamullahena to the 1st plaintiff. The effect of these transactions was that the 1st plaintiff by these means acquired title to all the lands, save Udamullahena conveyed on P2 and a 2/5 share of the land conveyed by P5. It would seem that the plaintiffs are faced with no difficulty in regard to the outstanding 2/5 share of the land dealt with in P5 for the reason that the owners of those outstanding shares, namely, Justin Perera and W. M. Wijetunge, are signatories to the deed P29 upon which the nine plaintiffs based their claim to be trustees and by which the lands in question were transferred to the trustees. The only issue raised by the defendants affecting the question of title pure and simple was issue No. 35 which challenged the right of the plaintiffs to maintain the action on the ground that the heirs of Carnolis Silva the transferee on P2 had not joined in P29 and were not parties to the action. In the absence of any issue concerning the 1/2 share which Dambadeniyage Don John Appu acquired under P2, I do not feel called upon to consider whether that share is outstanding, but would note that it is possible that one William de Alwis Goonetilleke, a signatory to P29, was the heir of Don John Appu.

The learned District Judge has apparently answered issue No. 35 in favour of the plaintiffs notwithstanding the fact that the heirs of Carnolis Silva have certainly not divested themselves of their legal title and it is necessary to consider what effect this circumstance has on the plaintiff's case. The evidence, which the learned District Judge has accepted without question, was to the effect that one of the moving spirits behind the plan to form the Sasana Abhiwardana Society and to fulfil its pious objects was Carnolis Silva himself. The evid-

ence of Mrs. M. W. R. de Silva, daughter of Carnolis Silva, was to the effect that her father died in 1928, that the temple in question was founded by her father with the collaboration of the plaintiff, and that the Society controlled the temple and looked after its properties. Clearly then, questions of legal title apart, the interest which Carnolis had in the land was subject to his own avowed intention that the land be utilised for the religious purposes in which the Society was interested. It would seem also from her evidence that the members of her family had never set up any claim inconsistent with their father's intention or with the religious uses to which Carnolis had in fact put the land. There is nothing in the evidence to controvert the position taken on behalf of the plaintiffs that for many years before the death of Carnolis the land had in fact been used and occupied for religious purposes and was therefore the subject of a religious trust. If the plaintiffs action had been for a declaration of title, the fact that title to some portion of the land is outstanding in the heirs of Carnolis Silva would undoubtedly be fatal to their claim. But in my understanding the action is not in essence one for such a declaration. Indeed the plaint contains no prayer regarding title but is restricted to a claim for a declaration that the land and premises, including the movables thereon, be declared to constitute a charitable trust and that the plaintiffs are entitled to the management, control and administration as its lawful trustees.

The term " trustee " is so defined in the Trusts Ordinance that it is applicable only to a person in whom the legal ownership of property is vested. While, therefore, it is probably correct that under the various deeds to which I have already referred the plaintiffs can properly claim to be owners and therefore the trustees of some of the allotments of land upon which the temple premises stand, they have no right to be declared trustees of the entire land because of the fact that the heirs of Carnolis Silva are still the legal owners of a portion. Nor would it serve any useful purpose to declare the plaintiffs to be the trustees of the portion to which they have title since that would not suffice to give them the effective control, which they seek of the temple and its appurtenances.

As stated earlier, however, the case for the defendants has been that there was in fact a dedication in 1930 by the then owners of the property, that is the Sasana Abhiwardana Society. Even if the Society was not the legal owner at that time, there is ample material on record to show that the owners of the lands had in fact entrusted to the Society the right to possess, manage and control the lands and buildings for the purpose of maintaining thereon a religious institution. The defendants who base their claim on an alleged divesting of ownership and control by the Society are in my opinion estopped from denying that at the least the Society had the right, on behalf of those interested in the trust, to possession and management of the premises. All that the plaintiffs now seek to do is to regain the rights of possession and management of which they have been deprived by the unlawful acts of the defendants. Just as a tenant is entitled to recover possession from persons who have disturbed his possession without the necessity of making the landlord a party to the proceedings, (Wille-Landlord and Tenant in South Africa—4th Edition, p. 145), the plaintiffs, to whom the Society had conveyed its admitted rights of management and possession, have a status to maintain this action for the assertion and recovery of those rights. If and when the heirs of Carnolis Silva desire to assert their own title or to deny the existence of the trust, any decree in favour of the plaintiffs in this action will of course not bind those heirs. While therefore the device of adding the heirs as defendants, particularly at the stage when issue 35 was raised, might or should have been adopted with a view to securing some conclusive determination of questions of legal ownership and trusteeship, the present plaintiffs can rightly ask as against the defendants, that they are entitled to possession and control and for ejectment of those who have disturbed their rights.

The fact that one of the trustees named in P29 is not a party to the action does not prejudice the plaintiff's case. There is nothing in the evidence to controvert the explanation that that individual declined to accept the office of trustee.

In the result I would dismiss these appeals with costs and affirm the judgment and decree in D.C., Kegalle No. 8036 subject to the modification that the decree be amended by substitution for the 3rd, 4th and 5th paragraphs thereof of the following:—

" It is further ordered and decreed that the plaintiffs abovenamed be and they are hereby declared entitled to the management, control and administration of the said premises.

" It is further ordered and decreed that the defendants, their agents and servants be ejected from the said land and buildings and premises and the plaintiffs be placed in possession thereof."

T. S. FERNANDO, J.

I agree.

Dismissed.

Present : PULLE, J., AND WEERASOORIYA, J.

FERNANDO vs. DE SILVA

S. C. No. 274—D. C. (F) Balapitiya No. 572/M

Argued on : 8th July, 1958.
Decided on : 9th September, 1958.

Master and servant—Appellant, headmaster employed by Respondent—Letters written by appellant indicating intention to leave school—Notice, terminating service—Recovery of damages for wrongful Dismissal.

The appellant, a head-master, wrote to the respondent, the Manager, his employer three letters. In the first, dated 18th June, 1952, he stated that he had in mind to leave the respondent's school " as early as possible " and that he had written to several schools for a post as teacher. In the second letter 2nd July, 1952, he wrote " sometimes I will be able to give notice of leaving on the 1st if I could obtain the privileges I am asking for." In the third letter dated 1st August, 1952, the appellant stated : " about my leaving I made arrangements. I am willing " and also " However the matter may be I am not willing to stay back." The respondent on the 9th August called for applications for the post of a head-teacher in the school.

In an action by the appellant for wrongful dismissal :

Held : That the letters of 2nd July and 1st August constituted a notice given by the appellant terminating his employment on 1st September, 1952, and that the question of reasonable period of notice by the employer terminating employment did not arise under these circumstances. The appellant could not claim damages for wrongful dismissal.

Per WEERASOORIYA, J.—" Under the Roman Dutch Law, which governs the case, no special form of notice is required for the termination of a contract of service between employer and employee. It is self-evident, however, that the party wishing to terminate the contract should communicate his intention to the other party in unambiguous terms, giving reasonable notice of termination where the contract itself does not provide for a specified period of notice or the matter is not regulated by custom. What is reasonable notice will depend on the circumstances of each case.

Sir Lalitha Rajapakse, Q.C., with *C. V. Ranawake*, and *D. E. V. Dissanayake*, for the plaintiff-appellant.

A. L. Jayasuriya, with *M. Markhani*, for the defendant-respondent.

WEERASOORIYA, J.

The plaintiff-appellant was the Headmaster of a school of which the defendant-respondent is the Manager, and he seeks in these proceedings to recover from the defendant a sum of Rs. 10,000 as damages on two causes of action. On the first cause of action a sum of Rs. 5,000/- is claimed for wrongful dismissal of the plaintiff on or about the 2nd September, 1952, from the post of Head-master. On the second cause of action a further sum of Rs. 5,000/- is claimed for humiliation and disgrace inflicted on the plaintiff by the defendant on the occasion of the alleged wrongful dismissal.

After trial the learned District Judge rejected both claims and dismissed the action with costs. Hence the present appeal by the plaintiff. The appeal against the rejection of the claim on the second cause of action was not pressed by Sir Lalitha Rajapakse who appeared for the—appellant, and the only matter on which we reserved judgment was in regard to the claim under the first cause of action.

Although the defendant's answer contained only a bare denial of the averments in the plaint, at the trial the position taken up by him on the first cause of action was that he did not dismiss the plaintiff but the plaintiff terminated his services after giving notice which was accepted by the defendant.

It would appear that for some time prior to August, 1952, feelings between the two parties were strained. In the letter D1 dated the 18th June, 1952, the plaintiff complained that the defendant was working against him. He also stated that he had in mind to leave the defendant's school " as early as possible " and that he had written to several schools applying for a post as head teacher or an assistant teacher. In D3 of the 2nd July, 1952, the plaintiff reiterated his decision to leave and added :—" Sometimes I will be able to give notice of leaving on the 1st If I could obtain the privileges I am asking for ". My intention is to conduct a teachers' swabasha newspaper while running my tutory also. If I am successful in these I think I will be able to give you notice on the 1st." This letter was followed

up by D4 dated 1st August, 1952, in which the plaintiff stated :—" About my leaving I made arrangements. I am willing," and having then said that his wife was against his leaving he continues :—" However the matter may be I am not willing to stay back."

The substantial point for decision is whether the letters D1, D3 and D4, read together, amounted to a notice given by the plaintiff on the 1st August, 1952, terminating his employment under the defendant. The learned trial Judge has answered that question in the affirmative, and if the letters can reasonably be so construed we would have no ground for reversing in appeal the finding of the trial Judge.

Under the Roman Dutch Law, which governs the case, no special form of notice is required for the termination of a contract of service between employer and employee. It is self-evident, however, that the party wishing to terminate the contract should communicate his intention to the other party in unambiguous terms, giving reasonable notice of termination where the contract itself does not provide for a specified period of notice or the matter is not regulated by custom. What is reasonable notice will depend on the circumstances of each case.

In the letter D3 dated the 2nd July, 1952, to which I have already referred the plaintiff stated that if he is successful in making certain arrangements he hoped to be able to give the defendant notice " on the 1st." The arrangements are those mentioned in the extract from D3 reproduced earlier. I think that " the 1st " means the 1st of August, 1952. That the plaintiff was able to make the arrangements referred to is confirmed in the next letter D4, dated the 1st August, 1952. In this letter too the plaintiff has stated that he was not prepared to stay on. The precise meaning of this letter is best given in the words of the plaintiff himself who on being questioned about it said : " I wrote the letter indicating that I was leaving school but intending not to leave." But any mental reservation on the part of the plaintiff would not avail him if the letter can reasonably be regarded as a notice of termination of his employment under the defendant. The learned trial Judge has held that D4 taken in conjunction with D3 amounted to such notice. That these two letters constitute a notice given by the plaintiff on the 1st August, 1952, of the termination of his employment does not, in my opinion, admit of any doubt. The only uncertainty (for which the plaintiff alone is responsible) would appear to be in regard to the period of the notice as given. As appears from the " discontinuance " form P7 the defendant has treated the period of the notice as one month, *i.e.*, from the 1st August (when D4 was received) to the 31st August, 1952. On the 9th August, 1952, he advertised the post of head teacher in his school as vacant and called for applications—(P8). The school was then in vacation and was not re-opening till the 2nd of September, 1952. The plaintiff thereupon wrote the letter P9 dated the 11th August, 1952, to the Education Officer, Galle, stating that he " did not give notice to discontinue the Headmastership " of the school. Curiously enough, this letter was not sent to the defendant as one would expect the plaintiff to have done if the action of the defendant in calling for applications for the vacant post of Headmaster had taken him by surprise. It is also significant that although the advertisement did not disclose the reason why the post had fallen vacant the plaintiff stated in P9 that he did not give notice of discontinuance.

In my opinion the letters D3 and D4 may reasonably be construed as a notice given by the plaintiff on the 1st August, 1952, that he was terminating his employment with effect from the 1st September, 1952. The plaintiff in his evidence did not suggest what other construction may be given to those letters.

Sir Lalitha Rajapakse for the plaintiff has submitted that in the case of the employment of a head teacher of a school the reasonable period of notice should be at least three months. That may well be so, but I do not think it is necessary to decide the point since the plaintiff himself elected to give a shorter period of notice which the defendant accepted, as he was entitled to do.

I am unable to say that the learned trial Judge came to a wrong conclusion in regard to the construction of the letters D1, D3 and D4, and I would dismiss the appeal with costs.

PULLE, J.

I agree. In the course of the argument I felt some doubt whether the plaintiff's letter D4 in particular of 1st August, 1952, was a valid notice of termination of the contract of service, because the actual date of termination was not specifically mentioned. I agree with my brother Weerasooriya that it is not possible to say that having

regard to the letters D1, D3 and D4 the learned trial Judge was wrong in holding that the plaintiff had terminated his contract of service. If an employee gives notice to an employer in such terms and under such circumstances that the employer could reasonably construe it as a month's notice, as in this case, an action for unlawful dismissal would not lie.

Appeal Dismissed.

Privy Council Appeal No. 27 of 1957

Present : VISCOUNT SIMONDS, LORD COHEN, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW, MR. L. M. D. DE SILVA.

DON THOMAS SAMARATUNGA vs. THE QUEEN

From
THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 23RD APRIL, 1958.

Privy Council—Criminal Procedure—Perjury—Appellant convicted for giving false evidence in criminal trial in the Supreme Court—Section 440 (1) *Criminal Procedure Code—Powers of the Commissioner of Assize thereunder—Section* 188 *Penal Code.*

The appellant who was one of the accused in a trial for murder in the Supreme Court was acquitted as the sole witness G had contradicted the evidence he had given in the Magistrate's Court.

G was subsequently charged under section 439 (1) of the Criminal Procedure Code for having given false evidence, and he pleaded guilty to the charge. Before deciding on the appropriate sentence, the Commissioner heard evidence of witnesses including that of the appellant. The Commissioner concluded that the appellant was deliberately lying and having convicted him, sentenced him to three months rigorous imprisonment.

It was contended on behalf of the appellant (1) that the gist of the accusation was not made clear to the appellant, and that he was not given an opportunity of giving reasons against summary measures being taken. (2) that the Commissioner had wrongly exercised the power under Section 440 (1) of the Criminal Procedure Code in setting up a subsidiary criminal investigation against the appellant, whereas it should only be exercised against a witness who has committed perjury in the course of his evidence in the case being tried.
(3) that the Commissioner had not exercised judicially the discretion and that the case was not a proper one for Section 440.

Held : (1) That in the circumstances of this case there was no substance in submission (1)

(2) That the power conferred under Section 440 (1) was properly exercised in relation to the evidence given in the course of the trial against G in respect of the sentence, and, therefore, cannot be considered as initating a subsidiary criminal investigation.

(3) That there was no merit in submission (3).

Per : LORD SOMERVELL OF HARROW—" From its nature the power (under Section 440 (1)) is one which should only be used when the judge is clear beyond doubt "—to take the words used by Lord Oaksey in Subramaniam's case—that the witness has given false evidence as defined. "

Cases cited : *Chang Hang Kin vs. Sir Francis Piggott* (1909) A.C. 312.
In re Pollard (1868) L.R. 2. P.C. 106.
Subramaniam vs. The Queen 53 C.L.W. 61/57 N.L.R. 409.
Andris vs. Juanis 2 N.L.R. 74.
Ahmath vs. Silva 22 N.L.R. 444.
Dassanayake vs. Horana 47 N.L.R. 47.
Banda vs. Sada 17 N.L.R. 510 at 512.

Dingle Foot, Q.C., with *Joseph Dean and Miss D. Phillips*, for the appellant.
T. O. Kellock, for the respondent.

LORD SOMERVELL OF HARROW

This is an appeal by special leave from an Order of a Commissioner of Assize of the Supreme Court of Ceylon sentencing the appellant to three months rigorous imprisonment for having given false evidence during the course of a criminal trial. The Order was made under the powers conferred by Section 440 (1) of the Criminal Procedure Code. That Section reads as follows :

" 440.—(1) If any person giving evidence on any subject in open Court in any judicial proceeding under this Code gives, in the opinion of the Court before which the judicial proceeding is held, false evidence within the meaning of Section 188 of the Penal Code it shall be lawful for the Court, if such Court be the Supreme Court, summarily to sentence such witness as for a contempt of the Court to imprisonment, either simple or rigorous, for any period not exceeding three months or to fine such witness in any sum not exceeding two hundred rupees ; or if such Court be an inferior Court to order such witness to pay a fine not exceeding fifty rupees and in default of payment of such fine to undergo rigorous imprisonment for any period not exceeding two months. Whenever the power given by this Section is exercised by a Court other than the Supreme Court the Judge or Magistrate of such Court shall record the reasons for imposing such fine.

(2) Any person who has undergone any sentence of imprisonment or paid any fine imposed under this section shall not be liable to be punished again for the same offence.

(3) Any person against whom any order is made by any court other than the Supreme Court under sub-section (1) of this section may appeal to the Supreme Court and every such appeal shall be subject to the provisions of this Code.

(4) In lieu of exercising the power given by this section the court may if it thinks fit transmit the record of the judicial proceeding to the Attorney-General to enable him to exercise the powers conferred on him by this Code or proceed in manner provided section 380.

(5) Nothing in this section contained shall be construed as derogating from or limiting the powers and jurisdiction of the Supreme Court or the Judges thereof.

Section 188 of the Penal Code is as follows :

" 188. Whoever, being legally bound by an oath or affirmation, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give ' false evidence '.

" Wherever in any Ordinance, the word ' perjury ' occurs, such Ordinance shall be read as if the words ' giving false evidence ' were therein used instead of the word ' perjury '.

" *Explanation* 1.—A statement is within the meaning of this section whether it is made verbally or otherwise.

" *Explanation* 2.—A false statement as to the belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

" Illustrations . . . . . "

In Supreme Court Case No. 10 before the same Commissioner the appellant had been indicted with one Yothan Singho, the latter with attempting to murder one Peiris Singho and the appellant with aiding and abetting. In the non-summary proceedings before the Magistrate, one Gunatilleke had given evidence that he was employed by the appellant and that the appellant had given him and Yothan Singho arrack and a club and had directed them to go and kill Peiris Singho.

At the trial Gunatilleke while continuing to say that he was in the appellant's employment said that the rest of his evidence as summarised above was fabricated. He said that he had given his earlier evidence at the request of Peiris Singho's wife and that he had been promised Peiris Singho's daughter Kusumawathie in marriage if he gave this false evidence. He produced two documents which he said had been given him by Peiris Singho's wife containing the false evidence.

The case against the appellant had been based on Gunatilleke's evidence as given in the Magistrate's Court. There was no other evidence against him : the learned Commissioner therefore directed the jury to acquit the appellant and this was done, the case proceeding against Yothan Singho, who ultimately pleaded guilty.

The learned Commissioner directed the Clerk of Assize to prepare an indictment against Gunatilleke under Section 439 of the Criminal Procedure Code which reads as follows :

" 439. (1) If in the course of a trial in any District Court or of a trial by jury before the Supreme Court any witness shall on any material point contradict either expressly or by necessary implication the evidence previously given by him at the inquiry before the Magistrate, it shall be lawful for the presiding Judge, upon the conclusion of such trial, to have such witness arraigned and tried on an indictment for intentionally giving false evidence in a stage of a judicial proceeding. In a trial before the Supreme Court the indictment shall be prepared and signed by the Registrar, and the accused may be tried by the same jury. In a trial in a District Court the indictment shall be prepared and signed by the secretary of such court.

(2) At such trial it shall be sufficient to prove that the accused made the contradictory statements alleged in the indictment, and it shall not be necessary to prove which of such statements is false.

(3) The presiding Judge may, if he considers expedient, adjourn the trial of such witness for such period as he may think fit, and may commit such witness to custody or take bail in his own recognizance or with sureties for his appearance. In the Supreme Court such adjourned trial shall be before the same or any other jury as the Judge shall direct."

Gunatilleke pleaded guilty.

The learned Commissioner wanted to hear evidence with regard to what he called 'the background' with a view to deciding on the appropriate sentence. If the statement made to the Magistrate was fabricated Gunatilleke had sworn false evidence incriminating an innocent man to further a love affair. If that evidence was true his evidence at the trial might have been due to a desire to shield the appellant, whom everyone had described as his master, as a result of or in hope of some payment. The learned Commissioner might have left Gunatilleke to give or call evidence in mitigation if he so desired. His counsel made various statements on instructions to the effect that his evidence just given at the trial was the truth. The learned Commissioner decided himself to have witnesses called and ordered that Peiris Singho, Punchi Nona his wife, Kusumawathie his daughter, and the appellant should be called. The wife and daughter both denied that they had written the documents produced by Gunatilleke or that there was any truth in his story of his possible marriage with the daughter. The daughter said that Gunatilleke was employed by the appellant.

The appellant then gave evidence being examined by Crown Counsel, and in the course of his examination he was asked a number of questions by the learned Commissioner. The learned Commissioner came to the conclusion that he was deliberately lying, in particular in saying that Gunatilleke had never been his servant, that he did not know him, though he had once seen him in the bazaar, and that he did not know his name until he gave evidence evidence against him. It was in respect of this evidence that the sentence appealed from was imposed.

In *Chang Hang Kiu v. Sir Francis T. Piggott* (1909) A.C. 312 this Board considered an Ordinance of Hong Kong in similar terms to Section 440 (1) of the Ceylon Criminal Procedure Code. It was laid down that before an order was made under such a provision the gist of the accusation must be made clear to the witness and he must be given an opportunity of giving reasons against summary measures being taken. The witnesses also fails.

in that case had not been given such an opportunity and the appeal was allowed. This decision assimilated the procedure to that laid down by the Board for ordinary contempt of Court *In re Pollard* (1868) L.R. 2 P.C. 106.

It was submitted for the appellant that neither of the above conditions were satisfied. The only basis for this submission was that the nature of the charge which had already been indicated in general terms was particularised with regard to one specific point after the appellant had been clearly given an opportunity to give reasons against summary measures being taken. In their Lordships' opinion this point fails.

It was further submitted that the learned Commissioner had done that which was held to be wrong in *Subramaniam v. The Queen* (1956) 1 W.L.R. 456. The appellant in that case was a witness in a murder trial. The learned trial Judge came to the conclusion as the evidence was called that there had been a conspiracy between the accused man, the appellant and the police to suppress evidence. He came to the conclusion that the evidence as given did not justify leaving the case to the jury whom he directed to bring in a verdict of not guilty. This was on March 15th.

Later on that day and on March 16th and 18th the learned Judge called the appellant and others whom he suspected. The appellant and others were represented by Counsel. Medical evidence was called on behalf of one of those suspected. The appellant was sentenced on March 18th. There were other unsatisfactory features as appear from the Record but it was in these circumstances that Lord Oaksey in delivering the Judgment of the Board used these words.

> "In their Lordships' opinion the course taken by the commissioner was misconceived. The summary power conferred by section 440 (1) is one which should only be used when it is clear beyond doubt that a witness in the course of his evidence in the case being tried has committed perjury. It was, in their Lordships' opinion, never intended that in the exercise of the power under section 440 (1) in the course of a criminal trial a subsidiary criminal investigation should be set on foot not against the prisoner charged but against the witnesses in the case. If such an investigation is necessary it can and should be set on foot under section 440 (4)."

Nothing of the kind took place in the present appeal. The evidence was given in the course of the trial, in relation to sentence. This point

The appellant further submitted that the learned Commissioner's discretion had not been judicially exercised and that the case was not a proper one for section 440. Their Lordships have carefully considered the points made sub sidiary to the points already considered and are satisfied that there is no substance in them. The learned Commissioner regarded the matter as clear beyond doubt. He saw and heard the witness and there was clearly material on which he could be so satisfied.

Their Lordships were referred to a number of cases in Ceylon in which this Section has been considered. In some cases it is said it should not be used where there is a conflict of testimony (see Bonser, C.J., in *Andris v. Juanis* 2 N.L.R. 74. *Ahamath v. Silva* 22 N.L.R. 444. *Dassanayaka v. Horana* 47 N.L.R. 47).

From its nature the power is one which should only be used when the Judge is " clear beyond doubt "—to take the words used by Lord Oaksey in Subramaniam's case—that the witness has given false evidence as defined. Subject to that over-riding principle their Lordships adopt what was said by Wood Renton, C.J., in *Banda v. Sada* 17 N.L.R. 510, 512.

" The true interpretation of the scope of section 440 of the Criminal Procedure Code appears to be this. The Legislature has left the Courts quite free as a matter of law to deal under that section with any form of ' false evidence ' within the meaning of section 188 of the Penal Code, and if we attempt to fetter that discretion by rigid general rules as to the class of cases in which it may or may not be exercised, we shall be acting rather in a legislative than in a judicial capacity, and running the risk of paralysing the operation of a statutory power, the maintenance of which in full working order is essential to the administration of justice in this country. But there is ancient and sound authority for the proposition that ' all things that are lawful are not expedient, ' and we have every right to consider ourselves, in the exercise of our original jurisdiction, and in the exercise of our appellate jurisdiction (entitled) to inquire whether this statutory power can be safely exercised in any particular case that has come before us. "

Their Lordships regret that the respondent who successfully opposed the appeal was not represented for the assistance of the Board when the petition for leave to appeal was heard.

For the reasons which have been stated their Lordships have humbly advised Her Majesty that this appeal be dismissed.

Dismissed.

Present : WEERASOORIYA, J. AND SANSONI, J.

THANABALASINGHAM SABARATNAM *vs.* SINNATHAMBY MANICKAM *et al*

S.C. No. (F) 888/L—D.C. Point Pedro No. 5283

Argued on : 18th, 19th and 20th February, 1958.
Decided on : 26th February, 1958.

Encroachment on Land—Dispute over correct position of boundary—Plan made for purposes of another action tendered in evidence—Probative value of such Plan—Quantum of evidence required to prove an encroachment.

The Plaintiffs filed action claiming that the 2nd and 3rd plaintiffs were entitled to a divided portion out of a land called Konavalai, and stated that the defendant had by shifting the position of certain boundary stones encroached on the plaintiffs' land.

In support of their case the plaintiffs tendered in evidence a plan made for the purpose of another action filed by the plaintiffs against certain third parties in respect of a dispute over a water-course leading to plaintiffs' land.

Held : (1) That as neither the present defendant nor his predecessors in title were parties to the action for which purpose the plan was made, and since there was nothing to indicate that they even were aware of that action or that the plan was being made, the evidential value of the plan in this action was very little.

(2) The correct test to be applied to the evidence in such a case was whether or not the encroachment had been established on a balance of probabilities. It is a wrong test to look for conclusive proof in such a case.

C. Thiagalingam, Q.C., with *C. Chellappah*, for the defendant-appellant.
C. Renganathan with *M. Shanmugalingam* for the plaintiff-respondents.

SANSONI, J.

The Plaintiffs brought this action claiming that the 2nd and 3rd plaintiffs were entitled to a divided portion in extent 4 lachams out of the land called Konavalai. They complained that the defendant on 3rd October 1955 wrongfully turned the soil of a portion in extent about 7 kulies, removed the boundary stones and a Murunkku tree on the southern boundary, and fixed the stones further north thereby encroaching on the plaintiffs' land to that extent.

The defendant denied that he had encroached on the plaintiffs' land. He claimed to be the owner of a divided portion in extent 2 lachams out of the land called Konavalai Thoddam situated to the south of the plaintiff's land. He further claimed that the northern boundary of his land was well defined by boundary stones sunk long ago.

The portion in dispute was demarcated on a plan made for the purpose of this case by Surveyor Seevaratnam in June 1956. According to that plan lot 1 is admittedly the plaintiffs' land while lot 3 is the land claimed by the defendant. Lot 2 which lies between them is the portion in dispute. Lot 1 is 3 lachams 15 29/32 kulies, lot 2 is 86/32 kulies and lot 3 is 1 lacham 7 10/32 kulies. It was agreed by Counsel at the hearing of the appeal that there are 16 kulies to a lacham. It is thus seen that lot 1 is 3/32 kulies short of 4 lachams which the plaintiffs say is the extent of their land: also that the defendant's lot 3 is 8 22/32 kulies short of 2 lachams which the defendant says is the extent of his land, and that is only a little more than the extent of lot 2 which is in dispute. It is quite true to say that the extents given in the deeds are only approximate, but they are not to be ignored in arriving at a decision of this dispute.

The wrongful acts complained of are siad to have taken place on 3rd October, 1955 at noon. The witness Balasubramanium, who is the brother of the 2nd plaintiff, claimed to have seen the defendant removing 2 boundary stones which he said had been planted in the ground to mark the southern boundary of lot 1. He has said that he also saw the Murunkku tree already uprooted and lying on the ground; he described it as a tree about a foot in girth. He informed his father Kandavanam at about sunset and they informed the Headman on the following morning. The Headman went to the spot and questioned the defendant who denied the allegations made against him. The defendant offered to show the Headman the stones which formed the boundary of his land, and the ground was accordingly dug up because the stones were buried underground. The Headman's opinion was that the stones had been buried there for a long time because of the state of the ground. With regard to the tree the ground was dug up where it was said to have stood, and there were no traces of any roots. It is quite obvious that the Headman's evidence was accepted by both parties as setting out the facts correctly, and the learned trial Judge formed the opinion that the Headman's evidence was very much in favour of the defendant. He also felt that, in view of that evidence, the defendant's version probably represented the truth. In considering the probabilities the learned Judge also seemed to doubt Balasubramanium's story that the stones and the tree were removed in broad daylight.

The learned Judge, however, in a subsequent passage in the judgment adopted a different attitude in regard to this part of the case. He thought that even a Headman could not say whether a boundary stone had been planted recently or not, and that it was possible for a tree to be removed with all its roots in such a way that there would be no trace of any roots. The test he applies at this stage was not the test of probability, but whether the Headman's evidence had conclusively established that the defendant had not removed the stones and the tree. I do not think such a test was the correct one to apply. The balance of probabilities was undoubtedly in the defendant's favour, and the learned Judge applied the wrong test when he looked for conclusive proof of the defendant's case.

The change of attitude adopted by the Judge is due to the way in which he regarded a plan of 1948 which the plaintiffs produced. That plan was also made by Mr. Seevaratnam for the purpose of an action filed by these plaintiffs against certain third parties. The plaintiffs had complained in that action that some of those parties had wrongfully destroyed a part of a watercourse leading from a well lying to the north of the plaintiffs' land to the western portion of that land. The plan was made in order to depict the watercourse, the well, and the lands lying to the north of the plaintiffs' land. What purported to be the entirety of the plaintiffs' land and a well and a watercourse lying to the south of that land were also shown. It must be remembered that neither the present

defendant nor his predecessors-in-title were parties to that action, nor is there anything to show that they even knew of such an action, or that the plan in question was being made. The learned Judge has decided the present dispute on the evidence afforded by the plan, holding that on the surveyor's evidence lots 1 and 2 tally with the land shown as the plaintiffs' land in that plan except for a difference of 2 kulies even though there was no superimposition of one plan on the other. In coming to this decision he makes 2 other points in regard to that plan, namely, that the father of the present defendant was the 3rd defendant in the earlier action, and that at that time there was no dispute in regard to the location of the southern boundary of the plaintiffs' land.

I do not think either of these two points is relevant to establish what is the correct boundary between the lands of the plaintiffs and the defendant respectively. The most that can be said is that the attitude of the plaintiffs in this action is consistent with their attitude in the earlier action in so far as it relates to the boundary in dispute. But here it must be remarked that at no time during the present dispute have the plaintiffs claimed that part of their southern boundary was composed of a ridge and a water-course. Yet it is only these two features that are shown in the plan of 1948 as defining the southern boundary. Both in the evidence of Kandavanam and of another witness Ponnambalam called by the plaintiffs the only boundary marks spoken to are two stones and a Murunkku tree. No witness claimed that the watercourse or a ridge were part of the southern boundary. Nor is this a matter for surprise when one considers the evidence of the surveyor and the Headman. They have stated that such water-courses are destroyed when the cultivation season is over, and the same thing is done in the case of ridges. It would be most unsafe therefore to treat such ridges and water-courses as features marking the boundary of the land. It was pointed out by Mr. Renganathan that the defendant's vendor had admitted under cross-examination that there used to be a ridge and a water channel forming the southern boundary of the plaintiffs' land. But this witness certainly did not admit that he was referring to the ridge and the water channel depicted in the plan of 1948 : that plan was not shown to him, and I am not disposed to construe his answers as though he was speaking with that plan before him.

There is just one other matter which was mentioned on behalf of the appellants. The learned Judge seems to have thought that the extent of lots 1 and 2 in the plan of 1956 was 2 kulies more than the extent of the plaintiffs' land depicted in the plan of 1948, and he has directed that the southern boundary of the plaintiffs' land be fixed according to the southern boundary in the plan of 1948. The reverse is the case, and the defendant would suffer more if this were done than if the southern boundary were fixed according to the southern boundary of lot 2. But it is not necessary to consider this point any further in view of the opinion I have formed on the rest of the case.

The evidence clearly points to the boundary stones lying between lots 1 and 2 as fixing the correct southern boundary of the plaintiffs' land. The plaintiffs therefore must fail in this action. The judgment and decree appealed against are set aside and the plaintiffs' action is dismissed with costs in both Courts.

WEERASOORIYA, J.
I agree.

Set aside.

Present : WEERASOORIYA, J. AND SANSONI, J.

KARUNADASA *vs.* ABDUL HAMEED

S.C. No. (F) 810/L.—D.C. Matale No. L 519

Argued on : 30th January, 1958.

Decided on : 10th February,, 1958.

Rei vindicatio—Need for examination of documentary title of parties—Land Settlement Ordinance (Cap. 319), Section 8—Conclusive effect of Settlement Order issued thereunder—Plea of exceptio rei venditae et traditae—Is it available to a purchaser as against a vendor in whose favour a Settlement Order has subsequently been made ?

The plaintiff instituted this action for a declaration of title to land, ejectment and damages, pleading that the defendants were in unlawful possession of it.

The land in question had been the subject-matter of a Settlement Order made under the Land Settlement Ordinance (Cap. 319) and published in the Government Gazette of 19/7/1940, whereby four persons A, T, U and D were declared entitled to the land in certain proportions. Plaintiff claimed that he had obtained transfers from T, U and D of their respective shares in the land in 1953 and a similar transfer from A in 1954. The Defendants stated that in 1938, prior to the Settlement Order, A had transferred the land to one Udupihilla who in turn had transferred it to the 2nd and 3rd defendants in 1949, and that the latter had made a transfer in favour of the 1st defendant and one Hussain Kandu.

The learned District Judge held that the Settlement Order in favour of A enured to the benefit of the 1st defendant to the extent of A's share, and further, that the 1st defendant had acquired prescriptive title to the land.

Held : (1) That upon the publication of the Settlement Order in the Government Gazette on 19/7/1940, all rights which any persons other than A, T, U and D had in the land were wiped out, including any rights which Udupihilla may have had upon his purchase from A, and by virtue of Section 8 of the Land Settlement Ordinance (Cap : 319) the Order became conclusive proof of the title of the persons in whose favour it was made.

(2) That the benefit of the Settlement Order declaring A entitled to a proportion of the land could not be claimed by the 1st defendant ; the plea of *exceptio rei venditae et traditae* is not available to a purchaser as against a vendor in whose favour a Settlement Order was made under the Land Settlement Ordinance after the purchase was completed.

(3) In a *rei vindicatio* action the Court should first examine the documentary title of the parties before adjudicating on an issue of prescriptive title.

Cases referred to : *Dissanayake vs. Dingihamy* (1935) 17 C.L. Rec : 83.
Periacaruppen Chettiar vs. Messrs. Proprietors and Agents Ltd (1946) 47 N.L.R. 121.

S. B. Yatawara for the plaintiff-appellant.

T. B. Dissanayake for the 1st defendant-respondent.

SANSONI, J.

The land in dispute in this action is 2 roods in extent. It was the subject of a settlement order dated 11th November, 1939 made under the Land Settlement Ordinance Cap. 319. That order was published in the Government Gazette of 19th July 1940, and by virtue of section 8 of the Ordinance it became conclusive proof of the title of the persons in whose favour it was made.

By the order 4 persons named Ausadanaide, Tikirihamy, Ukkuamma and Dingiriamma, were declared entitled to the land in the proportion of 1/3, 1/6, 1/6 and 1/3 respectively. Ausadanaide transferred his 1/3 share to the plaintiff in 1954, and the other 3 persons transferred their shares also to the plaintiff in 1953. The plaintiff brought this action in September 1954 for declaration of title, ejectment and damages, pleading that the defendants were in unlawful possession of the land.

The case for the defendants was that Ausadanaide had transferred this land to one Udupihilla in 1938, and Udupihilla in 1949 had transferred it to the 2nd and 3rd defendants, who in turn transferred it to the 1st defendant and Hussain Kandu. In the answer of the 1st defendant it was pointed out that Hussain Kandu had transferred his ½ share to the 1st defendant's children and that they were necessary parties to the action : they have not, however, been noticed or added as parties to this action.

The issues framed at the trial raised questions regarding the effect of the settlement order, due registration of the deeds, and prescription. After trial, the learned District Judge held that the 1st defendant had acquired prescriptive title to the land. He also held that the settlement order in favour of Ausadanaide to the extent of 1/3 shares enured to the benefit of the 1st defendant. On the evidence the question of due registration of the deeds relied on by the plaintiff does not arise for consideration.

With great respect to the learned Judge I think his approach to the matters in dispute between the parties was erroneous. It has been said before, and I think it will bear repetition, that in a *rei vindicatio* action it is highly dangerous to adjudicate on an issue of prescription without first going into and examining the documentary title of the parties (1935) 17 C.L. Rec. 83. Yet in this case the learned Judge has paid no heed to the conclusive effect of the settlement order, and has instead considered only the question of possession. If he had directed himself correctly he would have seen that on 19th July 1940 all rights which any other persons had in this land were wiped out by the settlement order, including any rights which Udupihilla may have had upon

his purchase from Ausadanaide. And since the rights of the 4 persons in whose favour the settlement order had been made were purchased by the plaintiff before September 1954 when this action was brought, the burden lay upon the defendants to prove that they had acquired prescriptive title to this land. It was not necessary for the plaintiff to rely on possession because his title, apart from prescription, was unimpeachable.

If the learned Judge had approached the case in this way, I think he would have scrutinized more closely the evidence of possession which was led on behalf of the defendants. One fact which stands out quite clearly on that evidence is that the soil of this land is very infertile, and it is also water-logged. Possession of such a land would therefore not be easy, and the evidence led by the defendants to show that efforts were made to grow paddy, coconuts and plantains on it, also shows that those efforts were not successful.

Now according to the first defendant, the purchase by Udupihilla in 1938 was really on behalf of one Unambuwa, who planted the land with plantains and possessed it in that way. Since Udupihilla did not part with the land till 1949 it was essential to examine whether there was any truth in the suggestion that during those eleven years plantains were grown on the land. The second defendant who bought the land from Udupihilla claimed to speak to Udupihilla's possession, but in cross-examination he admitted that he had never been to the land until he went there shortly before his purchase. He was forced to admit that when he said that Udupihilla possessed the land he was only going by the deeds and by what he had heard. Another witness called by the defendants was the Village Headman who first said that Udupihilla possessed the land but immediately afterwards added that when Udupihilla owned it no work was done on it. He left no doubt as to what he meant, when he added that no one made any attempts to plant plantains on this land, and he therefore contradicted the first defendant. In this state of the evidence it is apparent that there was no possession by Udupihilla, and the learned Judge was in error when he held the contrary.

Even as regards the second defendant's possession, which the learned Judge has also found as a fact, there is some doubt, because while the second defendant said that he planted plantains and coconuts, the Village Headman's evidence contradicted that, and the first defendant has also said that no coconuts were planted on this land. All that the second defendant seems to have done was to grow paddy on one occasion. But whether the second defendant possessed the land or not does not really affect the case, because even if he did (and that is a matter which has been far from proved) his possession could only have begun in 1949.

I am unable to agree with the learned Judge when he says that the benefit of the settlement order in favour of Ausadanaide to the extent of $\frac{1}{3}$ can be claimed by the first defendant, for it has been held that the plea of *exceptio rei venditae et traditae* is not available to a purchaser as against a vendor who obtained a settlement order after the purchase was made—*see Periacaruppen Chettiar vs. Messrs Proprietors and Agents Ltd.* (1946) 47 N.L.R. 121. The first defendant therefore has no title whatever to the land in dispute.

For these reasons I would set aside the judgment appealed against and enter judgment for the plaintiff as prayed for with costs in both Courts, save that damages will be as agreed upon at the trial.

WEERASOORIYA, J.

I agree.

Set aside.

Present : SANSONI, J., AND SINNETAMBY, J.

THE MUNICIPAL COUNCIL OF NEGOMBO vs. W. BENEDICT FERNANDO

S. C. (F) 539/M—D. C. Negombo 18412.

Argued on : 23rd May, 1958.
Decided on : 3rd June, 1958.

Prescription Ordinance, Sections 6 and 8—Written application to Municipal Council for supply of electricity—Conditions of supply and payment embodied therein—Action to recover arrears for electricity supplied—Plea of prescription—Is the action prescribed in six years or eight years.

On a written application (P 1) which the defendant signed on a fifty cents stamp containing (*a*) conditions under which electricity is supplied (*b*) an undertaking by the defendant to pay the monthly charges for consumption of electricity at certain prescribed rates, the Municipal Council of Negombo supplied electricity to the defendant.

In an action instituted by the Council to recover arrears due for electricity supplied on the said application :

Held : (1) That the writing P 1 constituted a written promise within the meaning of Section 6 of the Prescription Ordinance and therefore the claim became prescribed in six years.

Distinguished : *Municipal Council, Kandy vs. Abeysekera*, 31 N. L. R. 366.

Cases referred to : *Municipal Council Kandy vs. Abeyesekera*, (1930) 31 N. L. R. 366.
Horsfall vs. Martin, (1900) 4 N. L. R. 70.
de Silva vs. Don Louis, (1881) 4 S. C. C. 89.
Rodrigo vs. Jinasena, (1931) 32 N. L. R. 322.
Assan Cutty vs. Brooke Bond, (1934) 36 N. L. R. 169.
Campbell & Co., vs. Wijesekere, (1920) 21 N. L. R. 431.
Walker Sons & Co., Ltd. vs. Kandyah, (1919) 21 N. L. R. 317.
Urban District Council, Matale vs. Sellaiyah, (1931) 33 N. L. R. 14.

H. W. Jayawardene, Q.C., with *G. T. Samarawickrema*, and *C. P. Fernando*, for the plaintiff-appellant.

Ronald Perera, for the defendant-respondent.

SANSONI, J.

The Municipal Council of Negombo sued the defendant to recover the sum of Rs. 537/37 which was said to be due on account of electricity supplied by the Council to the defendant during the period April to August,1954. The Council pleaded that the defendant by his agreement dated 26th January, 1954 (which was filed with the plaint) contracted for the supply of electricity to him and agreed to pay its charges for such supply. The defendant filed answer pleading that the claim was prescribed, and asking for one year's time to liquidate the amount found due in the event of the plea of prescription failing.

At the trial the only issue suggested was whether the plaintiff's claim was prescribed. The only witness called was the accountant of the Council who stated in evidence that the amount claimed was due : he also produced the written application which the defendant had signed upon a 50 cents stamp. This application is a lengthy document containing the conditions under which electricity is supplied. It also contained an undertaking by the defendant to pay the monthly charges for consumption of electricity at the rates prescribed in the relevant tariff.

The learned District Judge dismissed the plaintiff's action, rejecting the submission that the claim fell under section 6 ; he held that the claim was in respect of a book debt, and fell under section 8 of the Prescription Ordinance (Cap. 55). He followed the decision in *Municipal Council Kandy vs. Abeyesekera*, (1930) 31 N. L. R. 366, a case in which the Kandy Municipality claimed money due for the supply of electric current and for the hire of electric lamps. Dalton, J., held in that case that the debt was a book debt. There is a superficial resemblance between that case and the present one, but I think that a closer examination of the facts reveals that the decision of Dalton, J., does not apply to the case now under consideration. In that case the only question which was considered was whether the section applicable was section 9 (now section 8), as the defendant there pleaded, or whether section 8 (now section 7) or section 11 (now section 10) applied, as the plaintiff there urged. It will be seen at once that the question whether the present section 6 applied was not specifically considered by the learned Judge. The reason may be that the plaintiff in that case relied only on sections 8 and 11 (present sections 7 and 10) as being applicable to the case. I have examined the record in that case and I find that the only document relied on was a letter written to the Electrical Engineer of the Kandy Municipal Council by the defendant requesting him to supply 56 lamps for a pirith tent, and stating that he would deposit the payment on hearing from the Engineer. I think the writing sued upon in the present case is easily distinguishable.

I do not regard that decision as authority for the proposition that every claim by a supplier of electricity to recover the charges due to him is a book debt. Each case must be considered in the light of the facts proved and the basis upon which the particular claim was presented in Court. I do, however, respectfully dissent from

that part of the judgment of Dalton, J., where the learned Judge says : " Whether or not such a contract as we have under consideration was a written or unwritten contract, within the meaning of either section 7 or section 8, there is no doubt that section 9 provides specially for actions on certain classes of contract. As Moncreiff, J., pointed out in *Horsfall vs. Martin*, (1900) 4 N. L. R. 70, certain claims referred to in section 9 must be prosecuted within one year from the date at which they became due, whether they are based upon written promises or not. It will not therefore be sufficient here merely to ascertain whether the agreement was in writing or not." The learned Judge overlooked the earlier case of *de Silva vs. Don Louis*, (1881) 4 S. C. C. 89, in which three judges decided that a claim due on a written contract fell under section 7 (now section 6) and not under section 8 (now section 7), even though the claim was in respect of rent which is specifically provided for in section 8 (now section 7). The particular passage in *Horsfall vs. Martin*, (1900) 4 N. L. R. 70, which Dalton, J., cited has been criticised and dissented from in later judgments, such as *Rodrigo vs. Jinasena*, (1931) 32 N. L. R.322 and *Assan Cutty vs. Brooke Bond*, (1934) 36 N. L. R. 169. In *Rodrigo vs. Jinasena*, (1931) 32 N. L. R. 322, Maartensz, A.J., applied the principle laid down in *de Silva vs. Don Louis*, (1881) 4 S. C. C. 89 to a case where goods were sold and delivered upon an agreement in writing and held that section 7 (now section 6) and not section 9 (now section 8) applied in such a case. The same principle was also applied in *Campbell & Co., vs. Wijesekere*, (1920) 21 N. L. R. 431.

The learned District Judge does not seem to have had his attention drawn to these decisions for he has quoted the passage in the judgment of Dalton, J., as supporting his conclusion that " claims contemplated under section 8 must be prosecuted within one year from the date at which they become due, whether they are based on written promises or not." It is thus clear that he was basing himself on an erroneous view of the binding effect of that judgment.

It only remains for me to find whether the writing P1 signed by the defendant falls within section 6 which relates to actions " upon any written promise, contract, bargain or agreement or other written security." I do not see how it can be regarded as anything short of a written promise, though no definite sum is mentioned. The promise was, at the stage it was made, only an offer in writing, but it became a binding promise when the Council accepted the offer and supplied electricity on the faith of the promise.

If the conditions laid down by de Sampayo, J., in *Walker Sons & Co., Ltd. vs. Kandyah*, (1919) 21 N. L. R. 317, that the written contract contemplated in section 6 must have a certain degree of formality applies to a written promise also, it passes that test too, for it is a formal document signed by the defendant upona 50 cents stamp. Whether that test which de Sampayo, J., prescribed in the case of a written contract also applies in the case of a written promise I do not decide, but I would point out that Lyall Grant, J., in *Urban District Council Matale vs. Sellaiyah*, (1931) 33 N. L. R. 14, held that a letter which had no particular formality attaching to it could constitute a written promise.

For these reasons I would set aside the judgment under appeal and give judgment for the plaintiff as prayed for with costs in both Courts.

SINNETAMBY, J.
I agree.

Set aside.

Present : GUNASEKARA, J. AND SANSONI, J.

MOHAMED CASSIM MARIKAR SHARIFFDEEN *vs.* MOHAMED SAHEED MARIKKAR RAHUMA BEEBI

S.C. No. 2 of 1957—Board of Quazis Appeal No. 93

Argued on : 19th and 22nd September, 1958
Decided on : 29th September, 1958.

Muslim Law—Kaikuli—Marriage Agreement stipulating gift of property by father of wife to husband and wife absolutely in consideration of marriage—Provision for liquidated damages for breach of agreement—Acknowledgment in the deed of agreement by husband of a sum of Rs. 4,500/- being cash dowry paid in consideration of marriage—Claim by wife to recover the amount as Kaikuli.

Under a deed of agreement between the appellant husband, the respondent, wife, and her father, the appellant agreed to marry the respondent within a prescribed period. In consideration of the marriage the respondent's father agreed to convey as a gift absolute certain properties to the appellant and the respondent. The deed also provided for damages for breach of any of its terms. One of the recitals of the deed contained an acknowledgment by the respondent of a receipt of Rs. 4,500/- " being cash dowry paid to him on 20th January, 1952 in consideration of the marriage. " The respondent instituted an action in the Quazi Court claiming Rs. 4,500/- which she alleged was paid as Kaikuli.

Held : That the respondent was entitled to recover the money as the payment was in the nature of Kaikuli.

Per SANSONI, J.—" Kaikuli has often been described as dowry, so that the expression " Cash dowry in consideration of the marriage " used in the deed is an apt description of this payment if it was made as Kaikuli.

Cases cited : (1871) *Vanderstraaten* 162.
Meera Saibo vs. Meera Saibo (1916) 2 C.W.R. 263.

Sir Lalita Rajapaksa, Q.C., with *A. M. Ameen* and *M. T. M. Sivardeen* for the respondent-appellant.

M. Rafeek, for the petitioner-respondent.

SANSONI, J.

This is an appeal from an order made by the Board of Quazis directing a husband to pay his wife a sum of Rs. 4,500/-.

A marriage had been arranged between these parties and on 21st January, 1952 a deed of agreement was executed by both of them and the father of the wife. By that deed the appellant (whom I shall refer to as the husband) agreed to marry the respondent (whom I shall refer to as the wife) within 8 months ; the latter's father agreed to give his daughter in marriage within that period, and he also agreed to convey " as a gift absolute and irrevocable " to the husband and the wife certain lands as dowry in consideration of that marriage. Each party further agreed to pay Rs. 5,000/- as liquidated damages in the event of failure to carry out any condition of the deed.

One of the recitals in the deed contains an acknowledgment by the husband of the receipt of a sum of Rs. 4,500/- " being cash dowry paid to him on the 20th day of January, 1952 in consideration of the marriage. " Although this recital is not a term of the agreement, it helps us to decide the true nature of this payment.

The wife applied to the Quazi Court claiming the repayment of the sum of Rs. 4,500/- which she said was paid as Kaikuli. The husband, however, contended that this sum was not repayable as it was paid to him as Stridanum and not as Kaikuli. After hearing evidence the Quazi ordered the husband to return the sum of Rs. 4,500/- to the wife. It is not clear from his order what view he took as to the nature of the payment, nor does he lay particular stress on the credibility of any of the witnesses.

The Board of Quazis in appeal rejected the argument that the payment was a *quid pro quo* for the marriage. They held that the property in the money did not pass absolutely to the husband as it was given by the bride's father to the husband as a marriage settlement and as Kaikuli. In the course of their order they say : " In our view the term ' cash dowry ' in the deed could be construed to be intended by the parties to mean Kaikuli. The term Kaikuli is a concept familiar to Muslims and is generally an incident of the marriage contract. When money is given as dowry the nature of the legal transaction corresponds to the definition of Kaikuli " I am in entire agreement with the view taken by the Board and my reasons can be set out very briefly.

At the argument before us it was not suggested that the recital in the deed did not accurately set out the nature of the payment, and when the deed is examined it will be seen that a clear distinction is drawn between the character of the transaction relating to the lands and the payment of the sum of Rs. 4,500/-. While the lands were to be conveyed as an absolute and irrevocable gift, the money is nowhere described as a gift to the husband but merely as a sum already paid to him as cash dowry.

Further, it has been customary—and the custom has been recognised by this Court as far back as 1871 (1871) Vanderstraaten 162 for the bride's father to make a payment of a sum of money called Kaikuli to the bridegroom which is held by the bridegroom in trust for the bride. Kaikuli has often been described as dowry, so that the expression " cash dowry in consideration of the marriage " used in the deed is an apt description of this payment if it was made as Kaikuli.

The recital in the deed, as I have pointed out, merely refers to this sum as having been paid to the husband. This statement is consistent with the true character of Kaikuli, which is a marriage gift made to the bride by her father, and is merely handed to her husband to be controlled and managed by him during the subsistence of the marriage—see *Meera Saibo vs. Meera Saibo* (1916) 2 C.W.R. 263. There is no rule that such a gift cannot be made some time before the marriage takes place. Although more than one year elapsed in this case between the payment and the marriage, I do not see that any objection can be raised on that ground.

The omission to describe the payment as Kaikuli, and the absence of a reference to the amount of Kaikuli in the marriage certificate, therefore signify nothing.

I would therefore dismiss this appeal with costs.

GUNASEKARA, J.

I agree.

Dismissed.

Present : T. S. FERNANDO, J.

LEELASENA *vs.* NADARAJAH (CHAIRMAN U. C. BANDARAWELA)

S.C. No. 900 *of* 1956—*M.C. Badulla-Haldummulla* 21813

Argued on : 16th November, 1956.
Decided on : 20th December, 1956.

Criminal Procedure Code—Continuing offence—By-laws relating to markets of Bandarawela Urban Council, Nos. 3 *and* 22*—Appellant charged under, for occupying market stall without license from Chairman—Conviction and fine, but no order imposing continuing fine, as provided in by-law* 22 *—Appeal—Dismissal—Chairman. thereafter moving court to issue notice on appellant to show cause why continuing fine should not be imposed—Inquiry without a charge—Chairman testifying in presence of appellant of latter's continuing contravention—No evidence by appellant—Order imposing continuing fine—Correctness of procedure followed—Urban Councils Ordinance No.* 61 *of* 1939, *Sections* 166, 167 *and* 229.

The appellant was charged with having occupied a stall in the Bandarawela Public Market without being the holder of a license from the Chairman, U. C. and was convicted under by-law No. 22 of the by-laws relating to markets made by the Bandarawela Urban Council and published in Gazette 8,806 of 31-10-1941. This by-law was in the following terms :—

> " Every contravention of any of these by-laws shall be punishable with a fine not exceeding fifty rupees and in case of a continuing contravention, with an additional fine not exceeding twentyfive rupees for every day during which the contravention is continued after a conviction thereof by a court of competent jurisdiction or after service of a notice from the chairman or an officer authorised by the chairman directing attention to such contravention. "

An appeal taken from the conviction was dismissed, and thereafter the Chairman, in terms of the by-law aforesaid filed a motion in Court and moved that the appellant be noticed to show cause why a continuing fine should not be imposed for continuing to occupy the stall notwithstanding the said conviction. On the day of inquiry, the Court without framing a charge or reading out of a charge recorded the evidence of the Chairman in the presence of the appellant (who gave no evidence) and made order imposing a fine of Rs. 25/- a day from the date of the said conviction—

Held : (1) That under the provisions of Sections 166, 167 and 229 of the Urban Councils Ordinance No. 61 of 1939, the continuing contravention of a by-law is an offence and shall be triable summarily by a Magistrate.

(2) That, therefore, when the appellant appeared in Court in response to the notice served on him, the Magistrate should have framed or read out of a charge and observed the other provisions of the Criminal Procedure Code relating to summary offences, treating the matter as an institution of new proceedings. The order imposing the continuing fine could not be sustained in the circumstances.

Cases referred to : *Punchihewa vs. Nicholas Appuhamy* (1920) 8 C.W.R. 247.
Ebert vs. Perera 23 N. L. R. 362.

Walter Jayawardena with him *G. P. J. Kurukulasuriya*, and *M. M. Kumarakulasingham* for the accused-appellant.

K. C. Nadarajah, for the complainant-respondent.

T. S. FERNANDO, J.

On 11th January 1956 the accused-appellant in this case was charged in the Magistrate's Court with using and occupying on 1st January, 1956 a stall in the Bandarawela public market, without being the holder or the servant or agent of the holder of a licence issued by the Chairman of the Urban Council, in contravention of by-law 3 of the by-laws relating to Markets made by the

Bandarawela Urban Council and published in Gazette 8806 of 31-10-1941, thereby committing an offence punishable under by-law 22 of the said by-laws. The accused was convicted of the said offence on 15th February, 1956 and sentenced to pay a fine of Rs. 50/-. He appealed to this Court, but his appeal was dismissed on 11th May, 1956.

After the record was returned to the Magistrate's Court, the proctor for the complainant, the Chairman of the Urban Council, filed a motion in court on 15th June, 1956 and moved that the accused be noticed to show cause why a continuing fine in terms of by-law 22 of the aforesaid by-laws should not be imposed on him. Thereafter on a date fixed for inquiry, the Chairman testified in the presence of the accused that the latter was continuing since the date of the conviction to occupy the stall without the authority of a licence notwithstanding the conviction. The accused neither gave nor called any evidence, and the learned Magistrate, after hearing counsel on his behalf, made order on 14th August, 1956 imposing a fine of Rs. 25/- per day as from 15th February, 1956 till the accused vacates or is ejected from the stall.

The present appeal is from this order of 14th August, 1956 and it raises the interesting question of the appropriate procedure to be followed where a person continues after a conviction the act that constituted the contravention of the law which was the subject of that conviction. Learned counsel for the appellant submits that the proceedings taken in the Magistrate's court of noticing the accused following upon a motion of the original complaint and holding an inquiry thereafter are not recognised and warranted by law and that the correct procedure to have followed would have been the institution of fresh proceedings in respect of the continuing contravention in the manner indicated in the Criminal Procedure Code. On the institution of proceedings in that manner the Court will observe the same procedure as in the case of any other summary trial. He submits that, apart from any other defect in the procedure followed, the failure to frame a charge is fatal to the legality of the continuing fine imposed on the appellant in this case. I am of opinion that the contention of counsel is sound and that the procedure followed in this case is not warranted by law.

It was contended in the Magistrate's court that the application for the imposition of a continuing fine should have been made in the Magistrate's court at the time of the original conviction or, at any rate, in the Supreme Court at the time the appeal was argued. This contention was rightly rejected by the learned Magistrate. Reference might be made in this connection to the judgment of Schneider A.J., in the case of *Punchihewa vs. Nicholas Appuhamy* (1920) 8 C.W.R. 247 in which the validity of an order made by a Magistrate imposing a continuing fine at the time of conviction a person for an offence under section 13 of the Housing and Town Improvement Ordinance, No. 19 of 1915, came up for consideration in the Supreme Court. The relevant words appearing in the said section 13 are " shall be liable on summary conviction to a fine not exceeding three hundred rupees, and to a daily fine of twenty five rupees for every day on which the offence is continued after conviction. " It may be noted that there is a difference between section 13 of the Housing and Town Improvement Ordinance and the by-law we are concerned with in the present appeal in that the latter provides for the imposition of a continuing fine not only where a contravention is continued after a conviction but also after service of a written notice from the Chairman or an officer authorised by the Chairman directing attention to such contravention. As no question, however, arises in this case of the service of such a written notice by the Chairman or an officer authorised by him, the case is not distinguishable from *Punchihewa vs. Nicholas Appuhamy* (supra) on the point that the continuance of the contravention was itself an offence. Schneider, A.J., in dealing with the point, stated that " the fine for the offence of not bringing the building into conformity with the approved plan after the conviction cannot be imposed until it has been proved to the satisfaction of the court that the accused failed after the conviction to bring the building into conformity with the approved plan. The offence can only be committed after the conviction, and any conviction in respect of that offence would be illegal until there is proof before the court of the commission of the offence. " It is possible that the prosecution had this decision in mind when it refrained from applying for the imposition of a continuing fine at the time a conviction was entered against the accused on 15th February, 1956. Schneider, A.J. did not have occasion to state in the case referred to above what procedure was proper in the case of a prosecution in respect of a continuing contravention except to indicate that the failure to bring the building into conformity with the approved plan after the conviction was itself an offence. The question therefore remains whether

the procedure actually adopted by the prosecution in invoking the aid of the court by motion to obtain an order for a continuing fine has any legal sanction.

By-law 22 of the by-laws in question is in the following terms :—

> "Every contravention of any of these by-laws shall be punishable with a fine not exceeding fifty rupees, and, in the case of a continuing contravention, with an additional fine not exceeding twenty five rupees for every day during which the contravention is continued after a conviction thereof by a court of competent jurisdiction or after service of a written notice from the Chairman or an officer authorised by the Chairman directing attention to such contravention."

These by-laws have been made under the power conferred on the Urban Council by section 166 of the Urban Councils Ordinance, No. 61 of 1939. Section 167 of the same Ordinance enacts that every contravention of the by-laws shall be an offence under the Ordinance, and section 229 provides that every such offence shall be triable summarily by a Magistrate. If every contravention of by-law 3 is an offence, then a continuing contravention is also an offence. Before any sentence can lawfully be imposed in respect of that offence there was a requirement that the offence be tried. The Magistrate was therefore required, *inter alia*, to comply with the provisions of section 187 of the Criminal Procedure Code in respect of framing or reading out of a charge. There was a failure in this case to frame any charge at all and to observe the other provisions of the Code relevant to the trial of a summary offence, and I am of opinion that the steps taken in the Magistrate's court on and after 6th July, 1956 when the accused appeared in response to the notice served on him are without authority and cannot support the order appealed against.

Learned counsel for the respondent argued that there has only been a procedural irregularity and that such irregularity has not occasioned a failure of justice. He submitted that section 425 of the Criminal Procedure Code be utilised to maintain the order of the learned Magistrate. It is not possible to accede to this argument in view of the decision of a Divisional Bench of this Court in *Ebert vs. Perera* (1922) 23 N.L.R. 362 which held that the omission to frame a charge is not an irregularity which is covered by the said section 425. I therefore set aside the order imposing a fine of Rs. 25/- a day as from 15th February, 1956.

Present : BASNAYAKE, C.J., AND SINNETAMBY, J.

MARTHELIS APPUHAMY *vs.* JUWANIS PERERA

S. C. 143—*D. C. Panadura P.* 224

Argued on : 5th and 8th September, 1958.
Decided on : 8th September, 1958.

Evidence Ordinance—Need to observe its provisions even in partition cases.

Held : That it is important that even in a partition action evidence that is not relevant according to the provisions of the Evidence Ordinance should not be admitted.

J. A. L. Cooray, for 10th defendant-appellant.
Norman Abeyesinghe, for plaintiff-respondent.

BASNAYAKE, C.J.

It is regrettable that we have now to send this case back for a re-trial 12 years after it was first instituted, but it is unavoidable as the learned trial Judge has not examined the title of all the parties interested in the land sought to be partitioned.

It is imperative that in a partition action the duty imposed by section 4 of the Partition Ordinance (this being an action instituted before 1951) should be carried out by the trial Judge. We therefore set aside the proceedings in the case on and after the 22nd February, 1954 and send the case back to the lower Court directing the District Judge to try the case *de novo*. The proceedings disclose that evidence of genealogy has been admitted without due regard to the provisions of the Evidence Ordinance. It is important that even in a Partition action evidence that is not relevant according to the provisions of the Evidence Ordinance should not be admitted. At the retrial this should be borne in mind by the learned Judge.

We leave it to the trial Judge to award the costs of the appeal and of the abortive trial in the lower court in accordance with the final decision in the case.

SINNETAMBY J.

I agree.

Retrial ordered.

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

PERERA *vs.* WIJESURIYA AND JANE NONA (*Appeal No.* 411)
JANE NONA *vs.* WIJESURIYA AND PERERA (*Appeal No.* 412)

S. C. 411-412—*D. C. Panadura* 2836.

Argued on : 19th, 20th, 21st, and 22nd February, 1957.

Decided on : 28th August, 1957.

Possessory Action—Plaintiff in exclusive possession of part of a larger land—Purchase of undivided share in larger land by defendants who own adjoining land—Defendants cutting down fence trees separating their land from land in dispute—Complaint to Police who warn against breach of peace—Later attempt by defendants to erect hut—Complaint to Police—Application by Police to Magistrate's Court to bind over defendants and their men to keep peace—Withdrawal of application on defendants undertaking not to enter land pending civil action which plaintiff undertook to file within two months—Meanwhile plaintiff constructing huts and placing watchers on land—Institution of possessory action by plaintiff in pursuance of undertaking—Is possessory action, the proper remedy—Remedy of uti possidetis—Is it available—Prescription Ordinance, Section 4—Meaning of " dispossession ".

Plaintiff claimed that he possessed a part of a larger land as a separate entity for over 25 years. 1st and 2nd defendants (wife and husband) were the owners of the land adjoining it. In 1945, the 1st defendant purchased an undivided share in the larger land and instituted a partition action which she withdrew on 7-6-1951. On 13/6/51, the defendants cut the barbed wire and the trees on the fence that separated their land from the land in question. The plaintiff complained to the Police and the Village Headman to whom the defendants admitted that they cut the fence because they said they erected it. The Police advised the parties to get their rights adjudicated in a Court of Law.

On 22-6-1951, the 2nd defendant and several others entered the land at night and commenced to construct a hut thereon. The Police, who were informed, warned them against a breach of the peace and instituted proceedings in the Magistrate's Court to bind them over to keep the peace. These proceedings were withdrawn by the Police on the undertaking given by the 2nd defendant and his men that they would not enter the land pending civil action which the plaintiff undertook to file within two months. In the meantime, *viz* on 23-6-51 the plaintiff constructed two huts on the land and placed watchers thereon.

In pursuance of the said undertaking, the plaintiff instituted an action praying for a possessory decree, which the defendant resisted on the ground *inter alia* that the plaintiff was not entitled to a possessory decree as plaintiff was already in possession of the disputed land and that the mere cutting down of the fence and the attempt to construct a hut did not amount to dispossession of the plaintiff. The learned District Judge held in favour of the plaintiff and the defendants appealed.

Held : (1) That the acts of the defendants amounted to a dispossession of the plaintiff within the meaning of Section 4 of the Prescription Ordinance, because on both occasions, plaintiff was by fear of superior force compelled to seek the aid of the Police and refrain from entering the land.

(2) That the word ' dispossession ' in Section 4 of the Prescription Ordinance bears the meaning of " put out of possession ", deprived of possession " or " ouster. " Any act which prevents a person from exercising his rights of possession would be a deprivation of his possession or an ouster of him.

(3) That the essence of the possessory action lay in unlawful possession committed against the will of the plaintiff and neither force nor fraud is necessary.

(4) That Section 4 of the Prescription Ordinance does not exclude the Roman remedy of *uti possidetis* or the Roman Dutch remedy of *Mandament van Maintenue*, which gives a right of action in cases of mere disturbance of or threat to possession so that the plaintiff may continue in his possession quiet and undisturbed.

Per BASNAYAKE, C.J.—From the foregoing it is clear that there is no binding decision of this Court that an action under section 4 of the Prescription Ordinance cannot be maintained unless the plaintiff had had possession for a year and a day.

Dissented from : *Pattirigey Carlina Hamy vs. Nugegodage Charles Silva*, 5 S.C.C. 140.

Authorities cited : *Savigny* (Possession) p. 2.
Voet Book XLI 2-12. *Voet Book* XLIII, 17-3.
Van de Linden (Juta's Translation) p. 100.

G. P. J. Kurukulasuriya for the 2nd defendant-appellant in S. C. 411 and the 2nd defendant-Respondent in S. C. 412.

N. E. Weerasooriya, Q.C., with *Titus Goonetilleke*, for the 1st defendant-appellant in S. C. 412 and 1st defendant-respondent in S. C. 411.

H. V. Perera, Q.C., with *A. C. Gooneratne* and *E. Gooneratne*, for the plaintiff-respondent in both appeals.

BASNAYAKE, C.J.

This is an appeal from a decree under section 4 of the Prescription Ordinance declaring the plaintiff entitled to be restored to the possession of an allotment of land called Delgahawatte in extent about 1½ acres.

Learned counsel for the 1st defendant contended firstly that the plaintiff had not been dispossessed of her land and secondly that even if the plaintiff had been dispossessed, having at the date of the action regained possession, she is not entitled to maintain this action.

Shortly the facts are as follows : The land in dispute was once a part of a larger land known as Delgahawatte several acres in extent. For over 25 years it has been in the possession of the plaintiff and has been a separate entity of about 1½ acres in extent with barbed wire fences all round. Adjoining it on the west is the plaintiff's land and on the south the land of the defendants.

In October, 1945 the first defendant who is the wife of the second defendant purchased some undivided shares in the larger land Delgahawatte. On 6th June, 1946 she instituted a partition action in respect of that land naming the plaintiff as the 1st defendant to that action. About 7th June, 1951 the partition action was withdrawn. On 13th June, 1951 the defendants cut the barbed wire and the trees of the fence that separated their land from the land in question. The plaintiff informed the Police and the Village Headman, both of whom visited the land and observed that the fence had been cut. The defendants admitted to the Headman that they had cut the fence to take earth from the land in dispute. The second defendant also claimed the right to cut the fence on the ground that he had erected it. The Police advised the rival parties to submit their dispute for adjudication by a Court of law, and to abstain from the exercise of any rights in respect thereof in the meanwhile. Thereafter nothing untoward occurred till 22nd June, 1951 when the 2nd defendant and several others entered the land at about 9-30 at night and with the aid of powerful lights commenced to construct a hut thereon. The plaintiff again informed the Police who came immediately and took steps to prevent a breach of the peace. Some of those assisting the 2nd defendant were reconvicted criminals. They were warned against a breach of the peace and proceedings were instituted in the Magistrate's Court the very next day to have the wrongdoers bound over to keep the peace. The proceedings dragged on till 28th July, 1951 when the application to have them bound over was withdrawn in view of an undertaking given by the 2nd defendant and his associates not to enter the land pending civil legal proceedings by the plaintiff. The record by the Magistrate of the understanding reached on that day reads as follows :—

> " It is agreed that respondents 1-6 will remain within the present fence on Lot No. 10. It is further agreed that neither these respondents nor anyone else on their behalf will (not) enter Lot 10 on the southern side of the fence pending the decision of this matter in a suitable civil action. It is also further agreed that neither the respondents nor Wijesuriya will interfere with the existing fences as they stood today. Mr. Wijesuriya undertakes to bring an appropriate civil action to assert his rights to that portion of Lot 10 or any portion thereof, within two months from today. If this action is not brought within two months or is not prosecuted with due diligence, it is agreed that this present agreement would cease to have any binding force on the respondents.
>
> " The respondents 7-10 are outsiders. They are severally warned not to enter this land or take any part in these transactions hereafter. "

While these proceedings were pending on 23rd June the plaintiff erected two mud huts on the land and placed her agents therein. The plaintiff's son giving evidence for her said :

> " We have been in possession even today and for many years. Our complaint is that on 13th June, 1951 the defendants forcibly entered our land and cut our fence, and thereafter on 22nd June, 1951 they once again forcibly entered our land. This action is to prevent the defendants from doing so again. There were no mud huts on the disputed portion before. "

The events of 13th and 22nd June are not seriously disputed. The second defendant claimed that he was asserting the 1st defendant's rights over the land.

The learned District Judge has held that the land in dispute was not held in common and that the plaintiff was in exclusive possession of it for over a year and a day prior to the 13th June, 1951. He answered in favour of the plaintiff the following issues framed at the trial :—

(1) Was the plaintiff in possession of the land depicted in Plan No. 1263 dated 28th January, 1952 which is the same as Lot 10A in Plan No. 1647 of 28th January, 1952 for over a year and a day prior to 13th June, 1951 ?

(2) If so, is the plaintiff entitled to a possessory decree in respect of the said land ?

I shall now deal with the submissions on law of learned counsel for the appellant. Learned counsel submitted that the cutting down of the fence and the attempt to erect a hut on the land did not amount to dispossession of the plaintiff. He submitted that they were acts of trespass and did not entitle the plaintiff to a decree under section 4 of the Prescription Ordinance. He cited the case of *Pattirigey Carlina Hamy vs. Nugegodagey Charles de Silva* (5 S.C.C. 140) in support of his submission. In that case Burnside C.J., who delivered the judgment of this Court stated :—

> " It is clear that the dispossession referred to in this section (s. 4) consists of an amover or deprivation of possession, or in another word well known to the law, ' an ouster '. Acts which merely amount to a trespass without ' ouster ' do not amount to dispossession. "

The defendant in that case in the absence of the plaintiff entered his land and erected a fence separating the portion on which he lived from the rest and plucked the nuts of the portion so separated. The plaintiff thereafter did not receive the fruits of the separated portion. On this material it was held that the acts of the defendant did not amount to dispossession of the plaintiff. With great respect I find myself unable to agree with that decision.

In the first place it is necessary to ascertain the content and meaning of the expression " dispossession " in section 4 of the Prescription Ordinance.

Under the Roman Law the remedies against unlawful disturbance or deprivation of immovable property were the interdicts of *Uti possidetis* and *Unde vi*. The former interdict was issued when a person's possession was disturbed. The corresponding Roman Dutch remedy was known as *Mandament van Maintenue*. The latter interdict was issued when a person was unlawfully deprived of his possession of immovable property either by violence, fraud or any other means. The corresponding Roman Dutch remedy was known as *Mandament van Spolie*. As our section 4 uses only the expressions " dispossessed " and " dispossession " and does not expressly refer to " disturbance ", the question arises whether the Roman Dutch remedy of *Mandament van Maintenue* (*uti possidetis* of Roman Law) is caught up by it or not. If it is not, can a person whose possession is disturbed seek that remedy ? The answer to the question whether a person who is not deprived of but is only disturbed in his possession is entitled to seek the remedy provided by the section depends on the meaning of the word " dispossessed " in the context. The ordinary meaning of the word " dispossessed " is " to put out of possession ", " to deprive of possession ", and " to oust ".

Next it is necessary to ascertain when a person can be said to be " put out of possession " or " deprived of possession " or " ousted ". What is possession ? Savigny (on Possession, page 2) defines it thus :

> " By the possession of a thing, we always conceive the condition, in which not only one's own dealing with the thing is physically possible, but every other person's dealing with it is capable of being excluded. "

Possession in this connexion is defined by Voet in Book XLI, Tit. 2, Section 12, of his Pandects. He says :

> " Possession is kept (i) By mind and body together ; or (ii) Even by the mind alone, so much so that, although another has seized possession by stealth in the absence of the possessor, nevertheless the earlier possessor does not cease to possess until, being aware that the other has made an entry, he has not had the courage to go back into possession, because he fears superior force. In such a case he who seized possession appears to possess rather by force than by stealth. "

Any act which prevents a person from exercising his rights of possession would be a deprivation of his possession or an ouster of him. In that sense the defendants' acts amount to a dispossession of the plaintiff, because on both occasions she was by fear of superior force compelled to seek the aid of the Police and refrain from entering on the land. Section 4 also speaks of a " restoration of such possession. " The question of restoration of possession does not arise unless a person has been deprived of it. It would appear therefore that the word " dispossession " bears in section 4 of the Ordinance the meaning of " put out of possession " or " deprived of possession " or " ouster. "

There is a difference of opinion among the writers on Roman Dutch Law as to whether actual violence of a physical nature was necessary for the *Mandament van Spolie*, but the better view is that neither force nor fraud is necessary. The essence of the action lay in unlawful dispossession. This is the view adopted in the leading South African case on this point (*Nino Bonino vs. De Lange*, (1906) T.S. 120), which holds that the essence of the remedy of *Spolie* lies in unlawful dispossession committed against the will of the plaintiff and neither force nor fraud is necessary. Our section 4 seems to adopt this view for it gives the remedy thereunder to "any person who shall have been dispossessed of any immovable property otherwise than by process of law." Section 4 therefore affords no authority for an action on the lines of *uti possidetis* or *Mandament van Maintenue*. Does it exclude such an action? I think not. Section 3 indicates that the Prescription Ordinance did not intend to take away a person's right to bring an action for the purpose of being quieted in his possession of immovable property. The purpose of the Roman remedy of *uti possidetis* and the Roman Dutch remedy of *Mandament van Maintenue* was to give a right of action in cases of mere disturbance of or threat to possession so that the plaintiff may continue in his possession quiet and undisturbed.

Voet defines disturbance of possession in Book XLIII, Tit. 17, Section 3. He says:

> "This interdict is granted against those who maintain that they also have possession, and who under that pretext disturb one who abides in possession. They may do this by bringing force to bear upon him, or by not allowing the possessor to use at his discretion what he possesses, whether they do so by sowing, or by ploughing, or by building or repairing something or by doing anything at all by which they do not leave the free possession to their opponent. This applies whether they do these things by themselves, or bid them to be done by their agent or household, or ratify the act when done, in the same way as that in which I have said in my title on 'The Interdict as to Force and Force with Arms' that this rule holds good with the interdict against force."

The next question is whether the plaintiff must fail merely because she regained possession on the 23rd June and was at the time the action was brought in possession of the land. I think not. As stated above, the remedy is designed to prevent persons taking the law into their own hands. Although the plaintiff got back her possession on the 23rd she was entitled on the facts of this case to institute an action against the person who dispossessed her on 13th and 22nd June and ask for a decree against that person for the restoration of her possession. Without such a decree she is likely to be deprived of her possession once more by the defendants who have agreed not to enter on the land only until the dispute as to possession is decided by a competent Court of civil jurisdiction. If there is a dispute as to title that must be fought in a separate action. The maxim is *spoliatus ante omnia restituendus est* and the fact that she has been able to enter on the land and remain there by virtue of the undertaking given by the defendants not to enter on it themselves pending the action, is no ground for refusing the plaintiff the decree she is declared by the statute to be entitled to on the facts established in this case.

Though the question does not arise for decision in this case, I wish to refer to another aspect of section 4 which was argued before us. Does it require that the plaintiff at the time of dispossession should have possessed for a year and a day? There are decisions of this Court which regard the proviso to the section as importing into our section the requirement of a year and a day's possession as in the case of the Roman Dutch remedy of *Mandament van Complainte*. The words of the proviso are "Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases." Now what are the requirements applicable to possessory cases. *Complainte* required a year and a day's possession but not the other two remedies of *Mandament van Maintenue* and *Spolie*. Neither of the Roman Law remedies of *uti possidetis* and *unde vi* required a year and a day's possession. I am therefore not inclined to regard the proviso as introducing the requirement of a year and a day's possession of *Mandament van Complainte* especially because the special procedure of that remedy had in later years fallen into desuetude. Then what are the other requirements referred to in the proviso? They cannot be the procedural requirements of the Roman Dutch Law as the Roman Dutch procedure has since the procedural enactments of the early days of the British ceased to be in force. The only requirements common to all possessory cases following dispossession were that the possession of the plaintiff should have been obtained *nec vi, nec clam, or nec precario*. That requirement runs through all the *Mandaments—Complainte, Maintenue*, and *Spolie*—and even the Roman Law remedies of *unde vi* and *uti possidetis*. In the case of *Goonewardena vs. Pereira*, 5 N.L.R. 320, Bonser, C.J., stated:

> "As regards possession for a year and a day, speaking for my own part, I am not prepared to assent to the proposition that, where there is an ouster by violence of the person who is in possession of the property,

anything more is required to be proved by him than that he was in possession and that he was violently ousted."

As no reasons are given for the opinion it is not clear on what the opinion is founded. Neither section 4 nor the remedy of *Spolie* requires that the ouster should be by violence. Wendt, J., the other member of the Bench expressed no opinion on the question of the requirement of possession for a year and a day.

In the later case of *Abdul Aziz vs. Abdul Rahim*, 12 N.L.R. 330 (a judgment of a Bench of three Judges), Hutchinson, C.J., expressed the following view :

"The Roman-Dutch law requires the plaintiff in a possessory action to have had quiet and undisturbed possession for a year and a day ; and the requisites of 'possession' are the power to deal with the property as he pleases, to the exclusion of every other person, and the *animus domini*, i.e., the intention of holding it as his own."

Here too no reasons are given for the opinion that a year and a day's possession is a pre-requisite to a possessory action. Middleton, J., quotes the following passage from Kotze's translation of Van Leeuwen :

"Possession is only a bare and naked apprehension and detention of a thing with the intention of using it as one's own. It consists in this that a person having so possessed anything or right for a year and a day is entitled to retain the possession until somebody else who disputes his possession has lawfully established his right of property."

This passage occurs in the chapter on Possession and Prescription and refers to the old period of prescription for a year and a day. The passage itself indicates that the erudite commentator is not dealing with the possessory action ; but with rights of property, for, he says that the possessor who has had a year and a day's possession is entitled to retain the possession until someone has lawfully established his right of property. He is not here dealing with the right of a person who has been dispossessed without legal process to be restored to possession. The passage is therefore not an authority for the proposition that possession for a year and a day is a pre-requisite to a possessory action. Middleton, J.'s statement later on in his judgment that the right to bring a possessory action depends on *proof of possession for the time limited* finds no support among the writers cited by him, nor is it supported by section 4 of our Ordinance. Wood Renton J. the other Judge who formed the Bench did not deal with the question of possession for a year and a day as it did not arise for decision in the case ; but confined himself to the real issue, viz., the nature of possession necessary to enable a dispossessed person to institute an action under section 4.

In the later case of *Silva vs. Dingiri Menika et al*, 13 N.L.R. 179, where the question whether a year and a day's possession was necessary to enable a dispossessed person to institute a possessory action arose, Hutchinson, C.J., and Middleton, J. two of the Judges who decided the case of *Abdul Aziz vs. Abdul Rahim* (*supra*) held that it was not necessary. No reference was made to their judgments in Abdul Aziz's case, but reference was made to the judgment of Laurie, J. in the case of *Perera vs. Fernando* (1892) 1 S.C.R. 329, where he held that possession for a year and a day was necessary to enable a dispossessed plaintiff to institute an action under section 4. He relied on Van der Linden for his view. In the passage referred to Van der Linden speaks of *Mandament van Complainte*. He says (Juta's translation, page 100) that several legal proceedings with regard to possession have been introduced in the practice of Holland. He then goes on to enumerate the proceedings of *Mandament van Immissie*, *Mandament van Maintenue*, and thirdly *Mandament van Complainte*, and describes the last named thus :—

"3. To recover lost possession. This is called Writ of *Complainte* (*Mandament van Complainte*). In order to obtain this remedy a person must have been in quiet and peaceful possession for more than a year and a day, and must have been ousted within the year. For the benefit of persons who have been ousted from possession with violence, we have adopted in our practice the remedy of the Canon Common Law known as the Writ of *Spolie Mandament van Spolie*.

Van der Linden therefore affords no authority for saying that in an action under section 4 possession for a year and a day must be proved.

From the foregoing it is clear that there is no binding decision of this Court that an action under sub-section 4 of the Prescription Ordinance cannot be maintained unless the plaintiff had had possession for a year and a day.

The appeals are dismissed with costs.

Pulle, J.

The appeals of the two defendants which arise out of an action instituted on the 24th August, 1951, relate to a land called Delgahawatta of the extent of 1 A. 1 R. 38 P. shewn on a plan, marked P2, and dated the 28th January, 1952. The plaintiff sought a possessory decree alleging that she had possession of the land in

her own right for over a year and a day, that the defendants on the 13th June, 1951, entered the land after cutting down the live fence which formed its northern boundary and that on the 22nd June, 1951, they attempted forcibly to construct a hut on the land. The first defendant is the wife of the second. The defence was that the first defendant was by right of purchase on a deed marked D 17, dated 12th October, 1945, the owner of certain undivided interests in a land called Delgahawatta of the extent 16 A. 2 R. 37 P. shewn on the plan dated 18th May, 1946, marked D 2, and that in lieu of those undivided interests she was in possession of lot 10 in that plan and that the portion in respect of which the plaintiff sought a possessory decree was itself an undivided portion of lot 10. A point of law pressed both in the trial court and in appeal is pleaded by each of the defendants as follows :—

> " The plaintiff is not entitled to maintain a possessory action against this defendant as she is in possession of the interests claimed by her in this action. "

It may be stated that the evidence called by the defence amounted to an allegation of forcible deprivation of possession of the defendants by the plaintiff's agents from the land which is the subject matter of this action.

The principal issue which was tried was whether the plaintiff was in possession of the land depicted in P 2 (which is identical with lot 10 A in another plan D 1 also prepared for this case at the instance of the defendants) for more than a year and a day prior to 13th June, 1951.

The learned trial Judge's findings on all the material questions of fact were in favour of the plaintiff. He was quite satisfied on the evidence that for several years prior to the conveyance D 17 of 1945 in favour of the 1st defendant the plaintiff had exclusive possession of the lot in dispute without acknowledging any rights of co-ownership in either the defendants or anyone else. There was ample evidence to support his findings and I see no reason to differ from them. All that remains to be considered is the submission on behalf of the appellants that even if one accepts all the evidence called for the plaintiff the learned Judge was wrong in granting a possessory decree. The argument was based principally on the case *Pattirige Carlina Hamy vs. Magegodagey Charles de Silva* (1883) 5 S.C.C. 140 which is to the effect that acts which merely amount to trespass without ouster, do not amount to dispossession for the purpose of section 4 of the Prescription Ordinance. The defendants say that it is a pre-requisite to the passing of a decree under section 4 that a plaintiff should have lost possession and that in the present case there was no question of restoration of possession because the plaintiff, when she came to court, was already in possession.

It is submitted on behalf of the plaintiff that there was a dispossession such as contemplated by section 4, and that, in any event, the plaintiff was disturbed in her possession and that under the common law, she was entitled to be quieted in possession.

For the purpose of dealing with the submissions on behalf of both parties it is necessary to state in some detail the events which led up to the institution of the present action.

To the north of the portion of Delgahawatta which is in dispute is another portion of land of the same name in the occupation of the defendants. A live fence separated the two portions and this was admittedly cut by the first defendant on 13th June, 1951. When the village headman to whom a complaint was made on the same day went to the land the first defendant stated that the fence had been put up by her and that she cut it " as it was necessary to take the clay for the construction of the house. " Throughout the trial the defendants strenuously maintained that the portion in dispute was never in the possession of the plaintiff and that the fence was erected by them to protect some plantain bushes and to prevent theft from a building standing on the portion to the north of the fence. An incident of a more serious character occurred on the night of 22nd June, 1951. A party of people, of whom some were reconvicted criminals entered with lights the portion in dispute in the company of the second defendant and commenced to build a hut. On a complaint made by the plaintiff's son the Inspector of Police, Mount Lavinia, arrived at about 10 p.m., and saw the second defendant and nine others putting up a cadjan hut. He feared a breach of the peace and moved the Magistrate's Court on the 23rd June, 1951, for an order binding over the second defendant and nine others—to keep the peace. The application was withdrawn on the 28th July, 1951, in view of what is recorded in those proceedings as an " agreement " entered into by the parties. The second defendant and five others agreed not to enter the portion in dispute " pending the decision of this matter in a suitable civil action, " which civil action was to be filed by the plaintiff within two months reckoned from 28th July, 1951. It was further provided, " If this action is not brought within

2 months or is not prosecuted with due diligence, it is agreed that this present agreement would cease to have any binding force on the respondents."

The attempt of the defendants to put up forcibly a hut on the disputed portion was frustrated by the counter action of the plaintiff who started to erect two mud-huts on the 23rd June, and placed watchers in them. The plaintiff's position is that, but for the events which occurred on the 13th and 22nd June, her possession was complete and undisturbed. Her son who gave evidence stated :

> "We have been in possession even today and for many years. Our complaint is that on the 13th June, 1951, the defendants forcibly entered our land and cut our fence. Thereafter on 22nd June, 1951, they once again forcibly entered our land. The action is to prevent the defendants from doing so again."

Referring to the attempt of the defendants to build a hut on the night of 22nd June, 1951, the witness said :

> "The defendants tried to put up a hut that could not be completed when the police came on the scene and they were asked not to proceed with the work. There was nothing to demolish. It was in the process of being made when they abandoned it and went."

It was strongly urged on us that on this evidence, the plaintiff could not claim to have been dispossessed" within the meaning of section 4 of the Prescription Ordinance and was, therefore, not entitled to the relief provided by that section.

There appears to be some force in the submission on behalf of the defendant that the plaintiff cannot maintain that, at the date of the action, she stood dispossessed, in the sense of having suffered an ouster, and that she required a decree of court to be restored to possession. But I think this argument fails in the light of the very special circumstances in which the action was instituted. Even prior to the conveyance D 17, in favour of the first defendant, the plaintiff was in secure possession of the lot in dispute. It was fenced on the north, west and south and the land immediately to the east is admittedly the plaintiffs. On the 13th June, 1951, the defendants used force by cutting the fence on the north which was nothing less than a symbolic act of annexation. When the plaintiff complained to the authorities, the defendants did not desist but went a step further. With the aid of some criminals, they dug up the ground a few days afterwards and attempted to build a hut. It is time that the plaintiff herself began to build two huts, but in the proceedings taken in the Magistrate's Court the plaintiff had to agree to remain on her land with an assurance that she would not be turned out of it, if within two months she filed a civil action to vindicate her rights. In other words the acts of the defendants resulted in her having to vindicate that the forcible ouster which began on the 13th June and culminated on the 22nd June was wrong and to ask that she be restored to the fullness of the possession she enjoyed without any disturbance prior to 13th June. If, as it has turned out to be, that the defendants did not have a single day's possession of the lot in dispute prior to 13th June, 1951, and by their acts compelled the plaintiff to assert and prove in a Court of Law that she was not liable to suffer forcible eviction at their hands, then it seems to me that the remedy of a possessory suit granted by the *Roman-Dutch Law*, recognised by Section 4 of the Prescription Ordinance is available to the plaintiff.

If the opinion which I have just expressed is erroneous, I would hold that the equivalent of the possessory remedy "*uti possidetis*" is available to the plaintiff to be quieted in possession against acts of disturbance. In the case of *Pretapetantrige Miguel Perera vs. Gangeboda Valage Sobana* (1883) 6 S.C.C. 61 Burnside, C.J., states—

> "Possessory actions in this colony rest upon the addicts *unde vi* and *uti possidetis* of the Roman Law as adopted by the Dutch Law, the former relating to the forcible deprivation of possession, the latter to the disturbance of possession.

Voet says in Book 43, Title 17, Section 3, (*vide* The Selective Voet, 6th Volume, p. 497, by Percival Gane) of *uti possidetis* :

> "This interdict is granted against those who maintain that they also have possession and who under that pretext disturb one who abides in possession. They may do this by bringing force to bear upon him or by not allowing the possessor to use at his discretion what he possesses, or by ploughing or by building or repairing something or by doing anything at all by which they do not leave the free possession to their opponent."

The foregoing is in large part an apt description of the acts committed by the defendants and in my opinion the plaintiff is entitled to ask a Court to provide her with a remedy by which she could remain in peaceful possession of her land, unmolested and undisturbed by the defendants taking the law into their own hands.

The defences taken are entirely without merit and I would dismiss the two appeals with costs.

Appeals Dismissed.

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

SILVA *vs.* ATTORNEY-GENERAL

S.C. No. 785—D.C. Colombo, No. 39746/M

Argued on : May 21, 22, 23, 26, 29 and 30, 1958.
Decided on : November 14, 1958.

Public Service Commission—Appointment of cultivation officer in Irrigation Department—Such officer working under supervision of Government Agent—Interdiction and dismissal of officer after inquiry by Office Assistant to Government Agent—Appeal to Public Service Commission—Government Agents' Authority to dismiss Challenged—Plea that proper authority to dismiss was Director of Irrigation—Admittedly powers vested in Public Service Commission of dismissal and disciplinary control of officers in Irrigation Department delegated to Director of Irrigation—Validity of orders of dismissal by Government Agent and Public Service Commission while delegation in force—Right of a person dismissed from public office to seek declaration from competent court that dismissal wrong—Crown's right to plead that right to dismiss at pleasure is its prerogative—Position of public officers in Ceylon.

The Ceylon (Constitution and Independence) Order-in-Councils. 1946 *and* 1947. *Sections* 57, 60, 61.

Plaintiff was appointed a village Cultivation Officer in the Irrigation Department in which capacity he worked under the supervision of the Government Agent, North Central Province. In September, 1953, the Government Agent interdicted him from service and framed charges against him. These charges were inquired into by the Office Assistant and the Government Agent informed the plaintiff that he was dismissed from Service from the date of interdiction.

Plaintiff appealed to the Public Service Commission on the ground that the dismissal was null and void as the Government Agent had no authority to interdict or to dismiss him as it was the Director of Irrigation alone who had the power to do so.

The Public Service Commission, after considering the charges and the evidence led, decided that the plaintiff should be dismissed as from the date of his appeal.

The plaintiff, thereafter, sued the Attorney-General for a declaration (1) that his dismissal was not according to law (2) that notwithstanding the purported dismissal, he was still a public servant entitled to emoluments and pension rights.

The defendant resisted the action on the following grounds :—

(1) that the dismissal by the Govt. Agent was lawful.
(2) that the dismissal by the Public Service Commission was lawful.
(3) that the Court had no jurisdiction to grant the declaration asked for or to inquire into or hear or determine the legality or the propriety of the dismissal.
(4) that the plaintiff cannot maintain this action because he held office at the pleasure of the Crown.
(5) that the plaintiff had no cause of action to sue him.

The learned District Judge dismissed the plaintiff's action, and the plaintiff appealed.

Held : (1) That by section 60 of the Ceylon (Constitution and Independence) Orders-in-Council, 1946, the appointment, transfer, dismissal and disciplinary control of public officers are vested in the Public Service Commission constituted under section 58 of the said Order-in-Council.

(2) That section 61 empowers the Public Service Commission by order published in the Gazette to delegate to any public officer, subject to conditions as may be specified in the order, any of the said powers vested in the Public Service Commission.

(3) That in Ceylon, the condition that a public officer holds office during the pleasure of Her Majesty's pleasure has become a matter of written law by virtue of Section 57 of the Ceylon (Constitution and Independence) Order-in-Council. The same legislative instrument provides for the appointment and dismissal of public officers. Effect must be given to it as a whole and is not possible to ignore any part of it.

(4) That admittedly, the delegation of powers in respect of the officers of the Irrigation Department to which the plaintiff belonged, was to the Director of Irrigation and not to the Government Agent concerned, and hence his order dismissing the plaintiff was of no effect in law.

(5) That the order of dismissal made by the Public Service Commission on appeal by the plaintiff from an unauthorised and illegal decision while the delegation of its power to the Director of Irrigation was still in force, was of no effect in law, as it had no power to make the order at the time it was made.

(6) That when a delegation under the said Section 61 is made to any public officer, the Public Service Commission becomes an appellate body whose decision in appeal is declared to be final. Such delegation denudes the Commission of its powers which cannot be exercised without a formal revocation of the delegation by publication of an order to that effect in the Government Gazette.

(7) That a public officer to whom powers of the Public Service Commission are delegated must exercise them by himself and not redelegated the delegate power.

(8) That under our law it is open to a person to seek to obtain from a competent Court a declaration as the one prayed for by the plaintiff in this case.

(9) That when an act of dismissal of a public officer is challenged in appropriate proceedings, the Crown cannot succeed on a plea that the right to dismiss at pleasure is a prerogative of the Crown. It must establish that the removal is warranted by law and it has been done in accordance with the procedure prescribed by law.

Per BASNAYAKE, C.J.—The above cases and others too numerous to cite here* including the case of *R. Venkata Rao vs. Secretary of State for India* (*supra*) read with *Reilly vs. The King*, (1934) A.C. 176 at 179, lay down the following principles :—

(*a*) that the implied term of service of civil servants of the Crown that their tenure of office is at pleasure can be impaired only by statute or by express agreement ;

(*b*) that rules as to procedure on dismissal, notice, term of office and the like, have no legal effect unless they have the force of law or are expressly incorporated in the contract of service. Where they are expressly incorporated in the contract of service, or have the force of law, they prevail.

* (1) *Smyth vs. Latham*, (1833) 9 Bing 692, 131 E.R. 778.
(2) *De Dohse vs. The Queen*, (1886) 3 T.L.R. 114.
(3) *Shenton vs. Smith*, (1895) A.C. 229.
(4) *Dunn vs. The Queen*, (1896) 1 Q B. 116.
(5) *Young vs. Adams*, (1898) A.C. 469.
(6) *Young vs. Waller*, (1898) A.C. 661.
(7) *Re Hales*, (1918) 34 T.L.R. 341 affd. 589.
(8) *Denning vs. Secretary of State for India in Council*, (1920) 37 T.L.R. 138.
(9) *Venkata Rao vs. Secretary of State for India*, (1937) A.C. 248.
(10) *Lucas vs. Lucas and High Commissioner for India*, (1943) 2 A.E.R. 110.
(11) *Rodwell vs. Thomas*, (1944) 1 K.B. 596.
(12) *Terrell vs. Secretary of State for Colonies* (1953) 2 Q B. 482.
(13) *Inland Revenue Commissioners vs. Hambrook*, (1956) 1 All E.R. 807.

Cases cited : *Ruth vs. Clarke* (1890) 25 L.R. Q.B.D. 391 : *Blackpool Corporation vs. Locker*, (1948) I.K.B. 349. *Ladamuttu Pillai vs. The Attorney-General* 59 N.L.R. 313, 55 C.L.W. 59 : *Greenville-Murray vs. Earl of Clarandon* (1869) L.R. 9. Eq. 11, 19.; *Gould vs. Stuart* (1896) Ac. 5751 ; *Williamson vs. The Commonwealth* (1907) 5 C.L.R. 174 ; *Lucy vs. The Commonwealth* (1923) 33 C.L.R. 229 ; *Rangachari vs. Secretary of State for India in Council*, (1937) A.I.R. (P.C.) 27 ; *Reilly vs. The King* (1944) A.C. 176 at 179. *Robertson vs. The Minister of Pensions* (1949) I.K.B. 227 at 231.

Walter Jayawardene with *Felix Bhareti* and *Neville Wijeratne* for the plaintiff-appellant.

A. C. Alles, Deputy Solicitor-General with *H. L. de Silva, Crown Counsel*, and *P. Naguleswaram, Crown Counsel*, for the defendant-respondent.

BASNAYAKE, C.J.

This is an action against the Attorney-General by a servant of the Crown who has been dismissed from the Public Service by the Public Service Commission. He asks for a declaration—

(*a*) that he has not been dismissed from the Public Service according to law, and

(*b*) that notwithstanding the purported dismissal of him by the Public Service Commission, he is still a public servant and entitled to his emoluments and pension rights as a servant under the Crown.

The following facts are not in dispute. The plaintiff held an appointment in the public service in the capacity of a village cultivation officer in the Irrigation Department. At the time of his dismissal he received a salary of Rs. 2,520/- per annum. From about 1st April, 1951, the plaintiff worked in his capacity of a village cultivation officer in the District of Anuradhapura under the supervision of the Government Agent of the North Central Province.

On or about 30th September, 1953, the Government Agent interdicted the plaintiff from the discharge of his duties as a village cultivation officer, and on 1st October, 1953, framed charges against him. On 9th December, 1953, the Government Agent directed the Office Assistant of the Anuradhapura Kachcheri to inquire into the charges. The inquiry was accordingly held by the Office Assistant on 9th and 10th December, 1953. On 27th February, 1954, the Government Agent wrote the following letter to the plaintiff dismissing him from the Public Service :—

" With reference to the inquiry held on 9-12-53 and 10-12-53 on the charges framed against you in my letter No. I.C. of 1-10-53 and amended by my letter No. PA/RWS/61/IIP of 21-11-53, the following is the verdict of the Inquiring Officer on the charges framed against you :—

Charge (*a*) Guilty.
,, (*b*) Technically guilty with a recommendation that it be condoned in view of the circumstances.
,, (*c*) Guilty.
,, (*d*) Guilty.
,, (*e*) Guilty.

2. You are dismissed from the Public Service with effect from the date of interdiction namely 30th September, 1953. "

The plaintiff thereupon appealed to the Public Service Commission by his petition dated 27th April, 1954 (P2). In that petition he took up the ground that the Government Agent had no authority either to interdict him or dismiss him and that it was the Director of Irrigation alone who could do so. He submitted that the dismissal was null and void and asked that he be reinstated in the public service with effect from 30th September, 1953.

The decision of the Public Service Commission on the plaintiff's appeal was conveyed by the following letter (P3) dated 27th August, 1954 :—

" I am directed to inform you that the Public Service Commission has considered the charges against you and the evidence led in support of these charges and your defence. The Public Service Commission has decided that you should be dismissed from 27th February, 1954. Any salary withheld during the period of interdiction should be forfeited. "

The defendant resists the plaintiff's action on a number of grounds. He maintains—

(*a*) that the dismissal by the Government Agent was lawful,

(*b*) that the dismissal by the Public Service Commission was lawful,

(*c*) that the plaintiff had no cause of action to sue him,

(*d*) that the Court has no jurisdiction to grant the declarations sought by the plaintiff,

(*e*) that the Court has no jurisdiction to inquire into or hear or determine the legality or the propriety of the acts or orders or decisions of the Government Agent or Office Assistant or the Public Service Commission,

(*f*) that the plaintiff cannot maintain this action because he held office at the pleasure of the Crown.

At the trial no oral evidence was produced by either side. The documents P1, P2 and P3 were tendered in evidence by the plaintiff and the documents D1 and D2—the Gazettes of 5th February, 1948 and 4th October, 1949—by the defendant.

The following issues were agreed on by the parties :—

1. Were the charges framed against the plaintiff by the Government Agent, N.C.P. on or about 1-10-53 framed without authority and were they for that reason without effect in law ?

2. Was the dismissal of the plaintiff by the Government Agent, N.C.P. made without authority, and for that reason without effect in law ?

3. Did the Public Service Commission in dismissing the plaintiff on or about 27-8-54 act—

(*a*) in appeal upon the inquiry and order of dismissal of the G.A. ?

or (*b*) by virtue of its original power ?

4. If issues 1, 2 and 3 are answered in favour of the plaintiff, is the decision of the Public Service Commission to dismiss the plaintiff null and void ?

5. If issue 3 is answered in favour of the Crown is the order of dismissal bad in law for the reason that no charges were framed against the plaintiff by the Public Service Commission and that no opportunity was given to the plaintiff to be heard by the Public Service Commission ?

6. Does the plaint disclose any cause of action against the Crown ?

7. Is it competent to the Court to entertain an action for a declaration contained in prayer (*a*) or in (*b*) of the plaint?

8. If issue 7 is answered in favour of the plaintiff should the Court in the exercise of its discretion grant either or both of the declarations referred to in issue 7?

The learned District Judge dismissed the plaintiff's action holding that—

(*a*) the charges framed against the plaintiff by the Government Agent were framed without authority and were for that reason without effect in law,

(*b*) the dismissal of the plaintiff by the Government Agent was made without authority, and for that reason was without effect in law,

(*c*) the dismissal of the plaintiff by the Public Service Commission should be regarded as having been made under section 60 (1) of the Ceylon (Constitution) Order in Council 1946,

(*d*) the decision of the Public Service Commission to dismiss the plaintiff was not null and void,

(*e*) the order of dismissal was not bad in law for the reason that no charges were framed against the plaintiff by the Public Service Commission and that no opportunity was given to the plaintiff to be heard by the Public Service Commission,

(*f*) the plaint does not disclose a cause of action against the Crown,

(*g*) in the circumstances of this case it is not competent to the Court to entertain an action for a declaration contained in prayer (*a*) or (*b*) of the plaint.

This is a convenient point at which to examine the provisions of our law governing the appointment of servants of the executive departments of the Government. By section 60 of the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947 (hereinafter referred to as the Order in Council), the appointment, transfer, dismissal and disciplinary control of public officers are vested in the Public Service Commission constituted under section 58. Section 61 of the Order in Council empowers the Commission by Order published in the Gazette to delegate to any public officer, subject to such conditions as may be specified in the Order, any of the powers vested in the Public Service Commission by section 60. That section also confers on any person dissatisfied with any decision made by any public officer under any power delegated by the Commission a right of appeal to it. In the instant case admittedly the Government Agent, Anuradhapura, was not the person to whom the Commission had delegated its power of dismissal in respect of the officers of the Irrigation Department to which the accused belonged. The delegation in respect of them was to the Director of Irrigation. Admittedly the order of the Government Agent dismissing the appellant was made without any legal authority in that behalf and is therefore of no effect in law. It is also admitted that the Director of Irrigation, the officer to whom the power had been delegated, has made no order dismissing the appellant.

The order of dismissal against which the appellant complains is the order made by the Public Service Commission when he appealed to it from the unauthorised and illegal decision of the Government Agent. In that appeal he urged that the Government Agent had no power to dismiss him and that the order of dismissal was null and void and invited the Public Service Commission to set aside the order and to reinstate him with effect from 30th September, 1953. The order made on 27th August, 1954 on this appeal was as follows:—

> ". . . . the Public Service Commission has considered the charges against you and the evidence led in support of these charges and your defence. The Public Service Commission has decided that you should be dismissed from 27th February, 1954. Any salary withheld during the period of interdiction should be forfeited."

The Public Service Commission made this order while the delegation of its power in respect of the appellant to the Director of Irrigation was still in force. The Public Service Commission having delegated under section 61 its power to dismiss had no power in law while the delegation was in force to dismiss the appellant. When a delegation is made under section 61 of the power of appointment, dismissal and disciplinary control of public officers to any public officer the Public Service Commission by operation of that section automatically becomes an appellate body whose decision in appeal is declared to be final. It is unthinkable that a tribunal or body should in the same matter be both an original and an appellate tribunal or body. It is clear from the enact-

ment that when the Order in Council gave the Public Service Commission power to delegate its functions and constituted it the body to which appeals from the person exercising the delegated authority may be taken it did not intend that the appellate body should, by usurping the functions of the delegate, be able to deprive the public officer of the benefit of the right of appeal given to him by the Order in Council. It is idle to seek to define the word delegate apart from the context in which it occurs. In this context especially in view of the fact that an appeal is allowed to the delegating authority from the decision of the delegated authority delegation of its functions by the Public Service Commission to a public officer results in the substitution of the public officer for the Public Service Commission. The delegation denudes the Public Service Commission of the powers delegated and they cannot be exercised by the Public Service Commission without a formal revocation of the delegation and resumption of the powers delegated. As the Order in Council requires that the delegation should be by Order published in the Government Gazette the revocation of that Order should also be by Order published in the Government Gazette. *Ruth vs. Clarke* (1890) 25 L.R., Q.B.D. 391, was cited by learned counsel for the Crown in support of the general proposition that an authority empowered by a statute to delegate its functions may, notwithstanding the delegation, continue without revoking the delegation to exercise the functions which it has delegated. I do not think that that case lays down such a broad proposition. That it does not is evident from the following words in the judgment of Lord Coleridge: "Unless, therefore, it is controlled by statute, the delegating power can at any time resume its authority."

Whether the delegation denudes the delegating authority of its powers or not and whether the delegating authority may resume its powers and if so the time at which and the manner in which it may resume the delegated powers depend on the terms of the legislative instrument under the authority of which the delegation is made. In the case of *Blackpool Corporation vs. Locker*, (1948) 1 K.B. 349, it was held that having regard to the provisions of the legislative instrument under which a delegation had been made it was not open to the delegating authority to exercise the delegated powers. Scott, L.J. observed at page 377.

> "In any area of local government, where the Minister had by his legislation transferred such powers to the local authority, he, for the time being, divested himself of those powers, and, out of the extremely wide executive powers, which the primary delegated legislation contained in reg. 51, para 1, had conferred on him to be exercised at his discretion, retained only those powers, which in his sub-delegated legislation he had expressly or impliedly reserved for himself."

In the instant case, as stated above, the Public Service Commission was free to revoke its delegation by Order published in the Government Gazette by virtue of section 15 of the Interpretation Ordinance although the empowering section itself, as in the case of the English Statute referred to in the case of *Rath vs. Clarke* (*supra*), does not confer a power to revoke a delegation once made. The expression delegated legislation which is familiar in the field of subsidiary legislation is apt to mislead one in the consideration of the topic of delegated powers. What is called delegated legislation is really not delegated legislation, for Parliament cannot and does not delegate its powers to anyone else. What is called the power of delegated legislation is the authority conferred by the Legislature on a statutory body to make subordinate laws on certain specified matters. In some cases these laws are given the effect of the statute itself, in others they are not. No analogy can therefore be drawn from the meaning that that expression has acquired in the field of law making. The order of the Public Service Commission dismissing the appellant is, therefore, of no effect in law as it had no power to make that order at the time it made it.

Before I leave this part of the judgment I wish to point out that a public officer to whom the powers of the Public Service Commission are delegated must exercise them himself and not redelegate the delegated power. *Delegata potestas non potest delegari* and *delegatus non potest delegare* are well established maxims. It would appear from the document P1 that the Government Agent when he made the unauthorised order of dismissal was unaware not only of the fact that he had no power to make the order dismissing the appellant but also of the fact that he was not free to redelegate any delegated powers to anyone. For, according to his letter to the appellant quoted above, that is what he purported to do.

What I have said above disposes of the above grounds (*a*) and (*b*) raised by the defendant. It is clear that the dismissal by the Government Agent was of no effect in law and that the dismissal by the Public Service Commission was also of no legal effect.

In regard to grounds (*c*), (*d*), and (*e*), it is sufficient to say that under our law it is open

to a person to seek to obtain from a competent court a declaration such as the one sought by the appellant in this case. It has been so laid down in a number of decisions of this Court. It is sufficient to refer to the case of *Ladamuttu Pillai vs. The Attorney-General*, 59 N.L.R. 313. It is too late in the day to re-agitate the question of the power of the Courts to declare in a suitably framed action a right or status or the right of the subject to have access to the Courts for the purpose of obtaining such a judgment. Such actions for declaration are not unknown in other parts of the Commonwealth.

Even in the case of a Patent Office tenable during good behaviour it has been held in the case of *Grenville-Murray vs. Earl of Clarendon*, (1869) L.R. 9 Eq. 11, 19, that it was for the Courts and not the Crown to decide whether or not the office holder had been guilty of a breach of "good behaviour." Lord Romilly, M. R., observed in that case—

> "Unquestionably if he (the plaintiff) had been appointed to an office by Act of Parliament or by patent from the Crown, which was to be held as long as he behaved himself properly, then I might have to go into the fact of whether the removal of the gentleman was justified—whether the acts proved to have been done by this gentleman were such as warranted his removal."

In regard to ground (*f*), the appellant does not contend that the Crown has no right to dismiss a public officer except for cause. His contention is that the authority who is empowered by law to exercise the power of dismissal has not dismissed him and that he is in law still a member of the public service. I have already held that this contention is sound and that the appellant is entitled to succeed. Even where the tenure of office of a public officer is declared to be a tenure subject to the pleasure of the Crown it has been held that the statutory provisions or express terms of contract governing the tenure of office and the right to dismiss cannot be ignored but must be given their effect. Since the case of *Shenton vs. Smith*, (1895) A.C. 229, there has been no serious attempt to get back to the old theory that the right to dismiss at pleasure is a prerogative of the Crown. It is now settled that the right where it is not declared by statute is an implied term of the engagement. The basis of this implied term appears to be the interests of public policy or public good. The right to remove a public officer from office and the procedure for his removal must not be confused. The right to remove depends on the terms of the appointment. If it is subject to removal for cause, the cause for which the removal can be effected must exist. The right to remove at pleasure must be exercised by the person authorised by law to exercise that power and the procedure for removal where such procedure is prescribed by legislative instrument must be strictly observed. Similarly the right to remove for cause must, where the procedure is prescribed by legislative instrument, be exercised in strict accordance with the prescribed procedure. When the act of dismissal is challenged by appropriate proceedings in a court of law the Crown cannot succeed unless it is established that the removal is warranted by law and it has been done in accordance with the procedure prescribed by law. It is sufficient to refer in this connexion to the cases of *Gould vs. Stuart*, (1896) A.C. 575; *Williamson vs. The Commonwealth*, (1907) 5 C.L.R. 174; *Lucy vs. The Commonwealth*, (1923) 33 C.L.R. 229; and *Rangachari vs. Secretary of State for India in Council*, (1937) A.I.R. (P.C.) 27.

In *Gould's* case the plaintiff who was a clerk in the Civil Service was dismissed by the Government without following the procedure prescribed in the Civil Service Act 1884. It was contended for the Crown that the Act did not create any exception to the rule that Civil Servants of the Crown held office only during pleasure and that the Act did not either expressly or by implication change the Civil Servant's tenure of office. It was further contended that final dismissal under the Act could co-exist with dismissal at pleasure and that an express authority to inflict the one did not imply that the other was abolished. These contentions were rejected by the Privy Council which held that provisions which were manifestly intended for the protection and benefit of the officer must be given their effect even though they are inconsistent with the term that the Crown may put an end to the contract of service at its pleasure.

In *Williamson's* case it was held that the power of dismissal under the Commonwealth Public Service Act 1902 must be exercised strictly and that an officer who had been dismissed without being first suspended as required by the Act who had been wrongfully dismissed and damages were awarded to the officer. Higgins J. after examining the provisions of the Commonwealth Public Service Act, 1902, stated:

> "In short, if there be no suspension for the charges, the officer cannot be furnished with a copy of the charges 'on which he is suspended'; and unless he be furnished with such a copy, there is no power to appoint a Board of Inquiry; and if there be no valid Board of Inquiry, the power of the Governor-General to dismiss does not arise. It may be thought that the officer

suffers no harm in not being suspended. I am not sure that he is not prejudiced, especially if—as the parties assume—a suspended officer is entitled to pay during suspension, in the event of his not being dismissed. But, prejudiced or not, suspension on the charges for which he is dismissed is made a condition precedent to dismissal. Powers of dismissal under this Act, like powers of expulsion under partnership and other agreements, must be exercised strictly as prescribed."

Lucy's case was an action for damages for wrongful dismissal by an officer of the Postal Department of South Australia. It was held by Knox C.J., and Isaacs, Higgins, and Starke JJ., that his dismissal was contrary to the Statute governing his employment and that he was entitled to damages, the measure of damages being the same as that in an action for wrongful dismissal. In the course of his judgment Starke J. observed :

"The relation between the Crown and its officers is contractual in its nature. Service under the Crown involves, in the case of civil officers, a contract of service—peculiar in its conditions, no doubt, and in many cases subject to statutory provisions and qualifications—but still a contract (*Gould vs. Stuart* (*supra*)). And, if this be so, there is no difficulty in applying the general law in relation to servants who are wrongfully discharged from their service."

In *Rangachari's* case the plaintiff was dismissed contrary to the provision of a statute which reads—

"But no person in that service (the Civil Service of the Crown) may be dismissed by any authority subordinate to that by which he was appointed."

The Privy Council held that the dismissal was bad. Lord Roche who delivered the judgment of the Board observed—

"The purported dismissal of the appellant on 28th February, 1928 emanated from an official lower in rank than the Inspector-General who appointed the appellant to his office. The Courts below held that the power of dismissal was in fact delegated and was lawfully delegated to the person who purported to exercise it. Counsel for the respondent candidly expressed a doubt as to the possibility of maintaining this view and indeed it is manifest that if power to delegate this power could be taken under the rules, it would wipe out a proviso and destroy a protection contained not in the rules but in the section itself. Their Lordships are clearly of opinion that the dismissal purporting to be thus ordered in February was by reason of its origin bad and inoperative. Their Lordships have most anxiously considered whether some relief by way of declaration to this effect should not be granted. It is manifest that the stipulation or proviso as to dismissal is itself of statutory force and stands on a footing quite other than any matters of rule which are of infinite variety and can be changed from time to time. It is plainly necessary that this statutory safeguard should be observed with the utmost care and that a deprivation of pension based upon a dismissal purporting to be made by an official who is prohibited by statute from making it rests upon an illegal and improper foundation."

Learned counsel for the Crown placed great reliance on the case of *R. Venkata Rao vs. Secretary of State for India*, (1937) A.C. 248. In my view it is of no avail to the Crown in the instant case. Venkata Rao sought to recover from the Secretary of State for India Rs. 15,000/- as damages for wrongful dismissal. The Privy Council while refusing to order the Secretary of State to pay damages stated in no uncertain terms that the rules governing dismissal must be scrupulously observed. Although damages were refused the Board's criticism of the wrongful action of the Government was severe. It stated :

"They regard the terms of the section as containing a statutory and solemn assurance that the tenure of office, though at pleasure, will not be subject to capricious or arbitrary action, but will be regulated by rule. The provisions for appeal in the rules are made pursuant to the principle so laid down. It is obvious, therefore, that supreme care should be taken that this assurance should be carried out in the letter and in the spirit, and the very fact that government in the end is the supreme determining body makes it the more important both that the rules should be strictly adhered to and that the rights of appeal should be real rights involving consideration by another authority prepared to admit error, if error there be, and to make proper redress, if wrong has been done. Their Lordships cannot and do not doubt that these considerations are and will be ever borne in mind by the governments concerned and the fact that there happen to have arisen for their Lordships' consideration two cases where there has been a serious and complete failure to adhere to important and indeed fundamental rules, does not alter this opinion. In these individual cases mistakes of a serious kind have been made and wrongs have been done which call for redress."

Without a knowledge of the entire background of the Indian law against which the above decision was given I find great difficulty in reconciling the refusal to grant redress with the severe strictures passed on the Government. Under our law a person who has been so grievously wronged as Venkata Rao appears to have been, can undoubtedly obtain redress from the Courts. In this respect our law seems to be more in accord with that of Australia than with that of England and India,

The above cases and others too numerous to cite here including the case of *R. Venkata Rao vs. Secretary of State for India* (*supra*) read with *Reilly vs. The King*, (1934) A.C. 176 at 179, lay down the following principles :—

(*a*) that the implied term of service of civil servants of the Crown that their tenure of

office is at pleasure can be impaired only by statute or by express agreement;

(*b*) that rules as to procedure on dismissal, notice, term of office and the like, have no legal effect unless they have the force of law or are expressly incorporated in the contract of service. Where they are expressly incorporated in the contract of service or have the force of law they prevail.

In this connexion it will not be out of place to quote here the words of Lord Atkin in *Reilly'a* case :

> " Orde, J's judgment in the Supreme Court seems to admit that the relation might be at any rate partly contractual; but he holds that any such contract must be subject to the necessary term that the Crown could dismiss at pleasure. If so, there could have been no breach".
>
> " Their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine ' for cause ' it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded. "

That the Courts in England are now definitely getting away from the old view that the implied term of termination at pleasure in contracts of service under the Crown can only be impaired by statute or regulation having statutory force is evident from the following observations of Denning, J. (now Lord Denning) in *Robertson vs. Minister of Pensions*, (1949) 1 K.B. 227 at 231 :

> " But those cases must now all be read in the light of the judgment of Lord Atkin in *Reilly vs. The King* (*supra*). That judgment shows that, in regard to contracts of service, the Crown is bound by its express promises as much as any subject. The cases where it has been held entitled to dismiss at pleasure are based on an implied term which cannot, of course, exist where there is an express term dealing with the matter. "

In this country tenure of office during the pleasure of the Crown was till 1946 an implied term of the contract of service. In that year the following clause was introduced into the Ceylon (Constitution) Order in Council 1946 :

> " Save as otherwise provided in this Order, every person holding office under the Crown in respect of the Government of the Island shall hold office during His Majesty's pleasure. " (s. 57).

Since then the condition that a public officer holds office during Her Majesty's pleasure is a matter of written law. The same paramount legislative instrument prescribes the conditions of tenure and provides for the appointment and dismissal of public officers. Like any other legislative instrument effect must be given to it as a whole and it is not permissible to ignore any part of it. In the instant case the body authorised by law to dismiss the appellant has not done so. The provisions of the legislative instrument governing dismissal not having been followed the appellant has not been legally dismissed by the authority empowered in law to do so.

For the above reasons the appeal is allowed with costs both here and below and the appellant is declared entitled to the declaration he seeks.

Pulle, J.
I agree.

Appeal Allowed.

Present : T. S. Fernando, J.

E. WALTER de SILVA AND ANOTHER *Vs.* P. D. F. AMARASEKERA,
Sub-Inspector of Police

S. C. No. 917 — 1957—*M. C. Kurunegala* 31856

Argued on : 5th December, 1957.

Decided on : 18th December, 1957.

Penal Code, Section 414—*Charge of mischief by injury to public road—Characteristics of a public road within the meaning of the section.*

The accused was convicted of committing the offence of mischief by erecting a barbed wire fence across a public road, an offence punishable under Section 414 of the Penal Code. According to the evidence the public road in question was a cart track for use by the workmen of the Irrigation Department. Cultivators of the adjoining fields also had free access to it and had been so used for fourteen years.

Held : That the conviction should be quashed as the road cannot be said to be a '*public road*' within the meaning of Section 414 of the Penal Code, for the reason that the public were not entitled to use it, although they may have been permitted to use it, if occasion had arisen for it.

Colvin R. de Silva (with him, *M. M. Kumarakulasingham* and *Daya Vitanage*) for the accused-appellants.

H. L. de Silva, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The accused in this case have been convicted of the offence of mischief by injury to a public road, punishable under section 414 of the Penal Code. The act constituting the mischief was the erection of a barbed wire fence across the road, and the accused did not contest the evidence that such a fence was erected by them or at their instance or that the erection of the fence made the road impassable for carts. They have taken up the position that they are not guilty of the offence alleged as the fence was not erected across a *public road.*

There does not appear to be any local case relating to the interpretation of section 414, but this section is identical with section 431 of the Indian Penal Code, and it is permissible to look for some guidance on the point in Commentaries on the Indian Penal Code. In a discussion of the meaning of a *public way* appearing in section 279 of the Indian Code (same as section 272 of the Ceylon Code), it is stated in Gour's Penal Law of India (6th ed., Vol. 2, p. 1150) that "the chief characteristic of a public way is that over it all persons have an equal right to pass, such a way must be distinguished from a way . . . . for the benefit of a class or community or one limited to the inhabitants of two or three villages only, which is not a public way, though the public may be permitted to use it . . . . . So the fact that a defined and definite number of persons had the right to use the way does not make it a public way to which all the citizens are entitled". The commentators appear to think that the expression "public road" in Section 414 has been used to convey the same meaning as a "public way" in section 272.

The road referred to in this case has been described in the evidence as an Irrigation road constructed and maintained by the Irrigation Department and leading to and ending at a regulator controlling the flow of water in a field channel. It appears principally to be a cart track for use by the workmen of the Irrigation Department, but adjoining field owners appear to have free access to and over it. It has been in use for about fourteen years. Witnesses have described it as a public road, but such a description by witnesses is of no real value as the question whether the road was public or not was one for determination upon evidence by the Magistrate. Under cross-examination these same witnesses conceded that the roadway was open only to cultivators and workmen of the Irrigation Department. Upon this evidence I do not consider that the road can be said to be a public road within the meaning of section 414 of the Penal Code as the general public were clearly not entitled to use it although it is quite possible they may have been permitted to use it if occasion had ever arisen for them to attempt to use it. I should add that the conclusion I have reached has also the merit that it does not violate the *eiusdem generis* rule the application of which appears to be appropriate in interpreting the words "any public road", bridge, navigable river or navigable channel" in section 414.

In the view I have taken of the evidence and of the meaning of section 414, I am of opinion that the conviction of the accused has to be quashed. I make order accordingly and direct that they be acquitted.

Appeal allowed.

Present : BASNAYAKE, C.J. (President), GUNASEKARE, J., AND SINNETAMBY, J.

THE QUEEN vs. A. NIMALASENA DE ZOYSA

Appeal No. 51 *of* 1958 *with Application No.* 68 *of* 1958
S. C. No. 61—*M. C. Balapitiya* 19561

Argued on : 9th, 10, 11, 12 and 13th June, 1958.

Decided on : 25th August, 1958.

Court of Criminal Appeal—Grounds of appeal—Need to give sufficient particulars—Trial Judge questioning witnesses at undue length—Irrelevant matter introduced without objection—When will the court interfere with a conviction—Powers of the court.

Non-direction, complaint of—What the appellant has to establish—Duty of judge at trial by jury relating to questions arising on evidence—Duty of Counsel—Course to be adopted by defence counsel when he proposes to object to evidence of any fact appearing in the depositions being tendered at trial—Evidence Ordinance, sections 136, 165 *and* 167—*Criminal Procedure Code, section* 244 (1) (*a*).

Held : (1) That grounds of appeal submitted to the Court of Criminal Appeal should not be vague, but should contain sufficient particulars of the matters to which objection is taken. The grounds which relate to the admission of irrelevant evidence must set out the items of irrelevant evidence, those relating to misdirection must specify the misdirection. If a wrong decision of any question of law is alleged, the wrong decision should be specifically stated.

(2) That the mere fact that the trial Judge in the exercise of the powers vested in him under section 165 of the Evidence Ordinance, put a large number of questions to a witness, even if the number is greater than the number put by the prosecution or the defence, is not a ground for quashing a conviction. The Appeal Court will quash a conviction only if the appellant satisfy it that the fact that the Judge put so many questions resulted in a miscarriage of justice.

(3) That where the appellant complains of non-direction on facts, he must satisfy the Court that omission resulted in a miscarriage of justice.

(4) That although section 136 of the Evidence Ordinance imposes on the Judge the duty of asking the party proposing to give evidence of any fact in what manner any particular fact, if proved, would be relevant, or not, this Court will, when considering a complaint that the appellant has been prejudiced by the admission of irrelevant evidence, take into account the fact that such evidence has not been objected to by the appellant at the time at which it was given or has been elicited by the appellant or his counsel.

(5) That in an appeal from a conviction in a case where irrelevant evidence has been introduced, it is the duty of the Court under section 167 of the Evidence Ordinance to cast aside the evidence which ought not to have been admitted and then consider whether there still remains sufficient evidence to support the conviction. If there is sufficient admissible evidence to justify the conviction, it will uphold it. Section 167 applies equally to civil as well as to criminal cases

(6) That the proper time for the Judge to rule on the admissibility of evidence is when a party proposes to give evidence of any fact and not before. (Section 136 Evidence Ordinance). " Where defending counsel proposes to object to evidence of any fact appearing in the depositions being tendered at the trial, he should inform counsel for the prosecution of such intention. Then the proper course for counsel for the prosecution is to refrain from referring to the evidence in his opening, and that the issue should be decided at the appropriate moment in the case when the evidence is tendered. It is, as a general rule, undesirable that the argument on admissibility should be heard and the issue decided before the case is opened.

Per BASNAYAKE, C.J.—" The section quoted above gives the Judge a wide power. In order to discover or to obtain proper proof of relevant facts he may ask any questions he pleases in any form, at any time, about any fact whether relevant or irrelevant. This power extensive though it be has limits, but those limits cannot be precisely defined. The trial Judge himself is the best arbiter of how and when he may exercise it. In its exercise a Judge should be careful not to usurp the functions of the prosecution or the defence. He should also so regulate his interpositions as not to hamper the conduct of the case by counsel for the prosecution or the defence. The fact that neither the parties nor their agents are entitled to make any objection to any question by the Judge or to cross-examine any witness upon any answer given in reply to his questions is a matter which calls for caution in the exercise of this power ".

PER GUNASEKERA, J.—" In a case in which inadmissible evidence induces a jury to accept evidence that has been properly admitted the sufficiency of the latter to justify the decision is dependent on the former. Therefore, in such a case as the present one, where the inadmissible evidence could have induced the acceptance of the admissible evidence, the court is not in a position to say that independently of the inadmissible evidence there was " sufficient evidence to justify the decision "of the jury. What this expression contemplates is not evidence which may or may not be true, but evidence that is demonstrably true or evidence that can be demonstrated to have been accepted by the court of trial without being influenced by inadmissible evidence to arrive at that finding ".

Cases referred to : *Wyman*, 13 Cr. App. R. 163 at 165
Jack Fielding, 22 Cr. App. R. 211.
Abrath vs. Northern-Eastern Railway (1883) 11 &. B. D. 440 at 453
Rex vs. Thegis (1901) 2 N. L. R. 10.
The King vs. Pila 15 N. L. R. 453.
The King vs. Appu Sinno 22 N. L. R. 353.
Abdul Rahim vs. Emperor (1946) A. I. R. A. I. R. (P. C.) 82
Kottaya vs. Emperor (1947) A. I. R. (P. C.) 67.
Stirland (30 Cr. App. R. 40 at 55).
Framroze Patel, 35 Cr. App. R. 62 at 65.
Zielinski (34 Cr. App. R. 193).

Colvin R. de Silva, with *W. E. M. Abeysekera* and *V. G. B. Perera* (assigned) for accused-appellant.

E. R. de Fonseka, *Crown Counsel*, for the Attorney-General.

BASNAYAKE, C.J.

The appellant Nimalasena de Zoysa, a lad of 16 years and 3 months, attending Revata Vidyalaya in Balapitiya, was convicted of the offence of murder of D. Dayananda alias Linter de Zoysa another lad of 19 years attending the same school. This appeal is from that conviction.

Shortly the relevant facts are as follows : The deceased was a son of Simeon Zoysa, a carpenter, who at the relevant time lived in the village of Galwehera. The appellant is a son of Aladin Zoysa of the same village, who at the material time lived about quarter of a mile away from Simeon Zoysa's house. The appellant and the deceased lived with their respective parents. The other neighbours who were witnesses at the trial are Mendis Senanayake the headman of Galwehera and Pitahandi Rucial Nona. The evidence discloses that on 9th May 1957, the date of this offence, about 3-15 p.m., the appellant came to the garden adjoining the deceased's and called him by name. The deceased answered the appellant's call and left with him informing Gickson Mendis, a relation (he was married to the deceased's father's cousin) and a carpenter by occupation, who happened to be working in his house at the time, that he was going to cut reeds. Round about 3-30 p.m., the two lads were seen by Rucial Nona going in the direction of a village called Vilegoda, the appellant carrying a katty like P1. As the deceased had not returned by 6 p.m., his father Simeon Zoysa inquired from Rucial Nona, his nearest neighbour, whether she had seen the deceased that afternoon. He learnt from her that she had seen the two lads going together in the direction of Vilegoda, the appellant carrying a katty like P1. Search parties went in different directions to look for the missing lads. The search went on till about 9-30 p.m., but it proved fruitless. Then two members of one of the search parties Wilman Zoysa and Gickson Mendis decided to inform the Police about the disappearance of the two lads. They went to the Kosgoda Police Station and Wilman Zoysa made a statement regarding the missing lads. At about 10-30 p.m., before his statement was concluded the appellant was brought to the Police Station by the headmen of Galwehera and Hegalla. His father accompanied them.

It would appear that in consequence of certain information received by the headman of Galwehera from the appellant's father that night he decided to go to the house of Rosalin Zoysa to search for the appellant. But he first went to the headman of Hegalla as Rosalin Zoysa lived in his division, and with him proceeded to her house at about 10-30 p.m. There they found the appellant. He was dressed in a white sarong and white shirt. Both shirt and sarong were stained with human blood. The headman of Hegalla arrested the appellant and took him to the Kosgoda Police Station where he was detained. In consequence of certain information disclosed by the appellant in his statement to the Police, the headman of Hegalla, Sergeant Silva, and Police Constable Dharmaratne left for a place called Miniranwalawatta in a jeep taking with them the appellant who had offered to point out the place to which he threw the katty P1. The place was not accessible by road and the party had to halt the jeep some distance away and walk through a cinnamon plantation to get there.

There the appellant pointed out the place to which he had thrown the katty, which was recovered. It was among a mass of "pamba" creepers. He also pointed out the place where the body of the deceased was. It was in a Crown land adjoining Miniranwalawatta and six feet from the place from which the katty was recovered.

In his petition of appeal the appellant has set forth three grounds of appeal and submitted 33 further grounds subsequently but within the prescribed time. Learned counsel for the appellant at the outset intimated to us that he would confine his argument to grounds 7, 8, 9, 13, 14, 17 and 32 of the further grounds of appeal. Those grounds are as follows :—

"7. The learned trial Judge has permitted such indirect and direct evidence of an inadmissible character relating to a confession alleged to have been made by me to the Police and this prejudiced my defence.

"8. It is respectfully submitted that the general conduct of the case by the trial Judge in the course of the examination of witnesses prejudiced my defence. In this connection it is respectfully submitted that several leading questions at material points in the case were put by the learned trial Judge which prejudiced my defence.

"9. The learned trial Judge has erred it is respectfully submitted in his directions on the law of circumstantial evidence.

"13. It is respectfully urged that the learned trial Judge's remanding my father to Fiscal's custody in the presence of the jury and in its hearing prejudiced my defence and caused a miscarriage of justice.

"14. It is respectfully urged that the learned Judge permitted evidence to be led that I pointed out the place where the katty was. The learned Judge has failed to direct the jury carefully in regard to the evidence of the Police Officer on this point and has permitted much inadmissible evidence to be led on this point.

"17. It is also submitted respectfully that the conduct of the case by the trial Judge prevented me from placing my defence properly before the jury.

"32. The learned trial Judge permitted much inadmissible evidence to be led in the case and directed the jury on the subject matter of admissible evidence. It is respectfully mentioned that the admission of evidence regarding a mango tree and the creepers thereon was a circumstance regarding which the jury should at least have been correctly directed."

The grounds which relate to the admission of irrelevant evidence and misdirection do not set out the items of irrelevant evidence or the specific misdirections. We have repeatedly stated from this Bench that grounds of appeal should contain sufficient particulars of the matter to which objection is taken, otherwise there would be cast upon this Court the burden of scanning the evidence and the summing-up in order to ascertain what are the matters to which objection is taken. The petition of appeal in the instant case is a good example of how grounds of appeal should not be stated. Below are some of the obvious examples of improperly set out grounds :—

"7. The learned trial Judge has permitted much indirect and direct evidence of an inadmissible character relating to a confession alleged to have been made by me to the Police and this prejudiced my defence.

"9. The learned trial Judge has erred it is respectfully submitted in his directions on the law of circumstantial evidence.

"10. The learned trial Judge has, it is respectfully submitted, erred in his directions on the burden of proof.

"11. It is respectfully urged that the summing-up of the learned Judge was lopsided and failed to bring out the features of my case favourable to my defence.

"32. The learned trial Judge permitted much inadmissible evidence to be led in the case, and directed the jury on the subject matter of admissible evidence."

It does not seem to be sufficiently realised that the appellate powers of this Court are circumscribed by the statute constituting it and that the right of appeal granted by the Court of Criminal Appeal Ordinance is a limited right, and is not so wide as that conferred by the Criminal Procedure Code on those convicted in Magistrates' Courts and District Courts. The scheme of our Court of Criminal Appeal Ordinance is in the main the same as that of the corresponding English Act and section 5 of our Ordinance which prescribes the powers of this Court is, except for the power to order a retrial, substantially the same as the corresponding provision of the English Act. It has been said time and again both here and by the Courts of Criminal Appeal in England and elsewhere that the grounds of appeal should not be vague and general but specific, that if misdirection is alleged the misdirection must be specified, and that if a wrong decision of any question of law is alleged the wrong decision should be specifically stated. It would be sufficient to refer to two of the better known expressions of opinion on this point by the English Court. They are the observations of Darling, J. and Du Parcq, J. which have been cited with approval in subsequent cases.

"The Court wishes it to be understood that in future substantial particulars of misdirection or of other objections to the summing-up must always be set

out in the notice of appeal or sent to the Registrar of the Court of Criminal Appeal with the notice of appeal, even if the transcript of the shorthand note of the trial has not then been obtained. Such particulars must not be kept back until within a few days of the hearing of the appeal. If counsel has a genuine grievance regarding a summing-up he knows substantially what it is as soon as the summing-up is finished, and can certainly specify his general objection when he settles the notice of appeal." (Darling, J. in *Wyman*, 13 Cr. App. R. 163 at 165).

"It has been said many times in this Court that particulars must be given in the grounds of appeal. If misdirection is complained of, it must be stated whether the alleged misdirection is one of law or fact, and its nature must also be stated. If omission is complained of, it must be stated what is alleged to have been omitted. It is not only placing an unnecessary burden on the Court to ask it to search through the summing-up and the transcript of the evidence to find out what there may be to be complained of, but it is also unfair to the prosecution, who are entitled to know what case they have to meet." (Du Parcq, J. in *Jack Fielding*, 22 Cr. App. R. 211).

The grounds argued by learned counsel may be classified under the following heads :—

(*a*) admission of inadmissible evidence (7, 13, 32),
(*b*) conduct of the case by the trial Judge to the prejudice of the appellant (8, 17),
(*c*) misdirection (9, 32), and
(*d*) non-direction (14).

It would be convenient to dispose of heads (*b*), (*c*) and (*d*) before dealing with head (*a*). In the grounds which fell under head (*b*) it is urged that the learned trial Judge put questions to the witnesses which prejudiced the defence. Section 165 of the Evidence Ordinance empowers a Judge to ask any question he pleases. The material portion reads :—

"The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question :

"Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved ;....."

It would appear from the transcript of the proceedings that the learned trial Judge has asked a very large number of questions. Learned counsel for the appellant stated from the bar that the trial Judge had asked as many as 282 questions while counsel for the prosecution and the defence had asked 218 and 286 questions respectively.

The section quoted above gives the Judge a wide power. In order to discover or to obtain proper proof or relevant facts he may ask any question he pleases in any form, at any time, about any fact whether relevant or irrelevant. This power extensive though it be has limits, but those limits cannot be precisely defined. The trial Judge himself is the best arbiter of how and when he may exercise it. In its exercise a Judge should be careful not to usurp the functions of the prosecution or the defence. He should also so regulate his interpositions as not to hamper the conduct of the case by counsel for the prosecution or the defence. The fact that neither the parties nor their agents are entitled to make any objection to any question by the Judge or to cross-examine any witness upon any answer given in reply to his questions is a matter which calls for caution in the exercise of this power.

In the instant case there is no complaint that the learned Judge usurped the functions of the prosecution or of the defence or that his interpositions hampered the examination and cross-examination of witnesses. The mere fact that the trial Judge has put a large number of questions to a witness, even if the number is greater than that put by the prosecution or the defence, is not a ground for quashing a conviction. The appellant must satisfy us that the fact that the Judge put so many questions resulted in a miscarriage of justice. In the instant case the Court is not satisfied that the multiplicity of the questions asked by the trial Judge resulted in a miscarriage of justice.

Learned counsel did not press the ground under head (*c*). He has constrained to admit that the direction on circumstantial evidence was both adequate and correct. In regard to head (*d*) the non-direction complained of is not made clear in ground 14.

Where an appellant complains of non-direction on facts he must satisfy the Court that the omission resulted in a miscarriage of justice. In this connexion it would not be out of place to refer to the observations of Brett, Master of the Rolls, in the case of *Abrath vs. Northern-Eastern Railway* (1883) 11 Q. B. D. 440 at 453 though those observations were made in a civil case.

"It is no misdirection not to tell the jury everything which might have been told them : there is no misdirection unless the Judge has told them something wrong, or unless what he has told them would make

wrong that which he has left them to understand. Nondirection merely is not misdirection, and those who allege misdirection must shew that something wrong was said or that something was said which would make wrong that which was left to be understood."

The Court is not satisfied that in the instant case there is non-direction amounting to misdirection and that the omissions from the summing-up referred to by learned counsel in the course of his address have resulted in a miscarriage of justice.

Under head (*a*) learned counsel invited our attention to those parts of the evidence of Gickson Mendis, Wilman Zoysa, Mendis Senanayake the headman of Galwehera, and Simeon Zoysa, which he submitted were irrelevant and prejudicial to the case of the appellant. He also took objection to the evidence of Police Sergeant Edwin Silva as to the identity of the katty P1.

To quote all the passages in the evidence to which learned counsel has taken exception would make this judgment unduly long. Only the more important of them are therefore set out below :—

"Gickson Mendis

Cross-Examination :

293. *Q.* After you met the village headman at the Police Station did you meet Simeon the same night ?
A. I met Simeon the same night after meeting the headman.

To Court :

294. *Q.* Where ?
A. In his house.
295. *Q* By that time they had come to know that the body had been found ?
A. I brought him the information which I got from the Police Station and conveyed it to the deceased's father.

Cross-Examination—contd.

296. *Q.* Thereafter did you see Simeon leaving the house ?
A. He fainted off on receiving the information.

Wilman Zoysa

Examination-in-chief :

566. *Q.* While you were still there the two headman brought the accused to the Police Station ?
A. Yes, they came along with the accused's father.
567. *Q.* When did you first learn that the deceased had been killed ?
A. At the Police Station.
568. *Q.* Did you come and give that information to anybody after that ?
A. I came home and gave the information.

Court :

569. *Q.* The deceased's family ?
A. Yes.

Exam.—contd.

570. *Q.* You gave the information to Simeon's wife ?
A. I told not only to Simeon's wife but to all the others also.
571. *Q.* What time did you go to Simeon's home after you left the Police Station ?
A. About 10-30 or 11 p.m.
572. *Q.* When you went to the house was Simeon there ?
A. No.
573. *Q.* You gave the information to Simeon's wife ?
A. Yes.
574. *Q.* She started crying and wailing ?
A. Yes.
579. *Q.* Did you receive information that the deceased had been killed by somebody when you were there at the Kosgoda Police Station ?
A. Yes.
580. *Q.* At what time did you get information as to the place of death ?
A. About 10 p.m.
581 *Q.* Thereupon did you make any statement to the Police at the time ?
A. I had not concluded my statement to the Police when I got the information.

Court :

582. *Q.* It was when your statement was being re-recorded that the other party came to the Police ?
A. Yes.
583. *Q.* And it transpired that the deceased had been killed ?
A. Yes.

Cross-examination—contd.

609. *Q.* At the Police Station did you learn where the dead body was ?
A. Yes.

To Court :

610. *Q.* Before you left the Police Station you knew the name of the land on which the deceased's body was found ?
A. Yes.
611. *Q.* That night ?
A. Yes.
612. *Q.* What is the name ?
A. Miniranwalawatta.

Mendis Senanayake

629. *Q.* On the 9th of May last year you went with accused's father to the house of the V.H. of Hegalla ?
A. Yes.
630. *Q.* Having taken the V.H. of Hegalla you went to the house of one Rosalin Zoysa ?
A. Yes.
633. *Q.* At the house of Roslin Zoysa you found the accused there ?
A. Yes.

To Court :

653. *Q.* Can you tell us whether at any time that night Simeon fainted off in your house ?
A. Yes.
654. *Q.* That was about what time ?
A. About 10-30 p.m.
655. *Q.* That was before you left for the house of the village headman of Hegalla in search of him ?
A. Yes.

Cross-examination :

656. *Q.* Can you say that at the time Simeon fainted that you and Simeon were the only people in your house ?
A. No.
657. *Q.* Who were the other people who were in your house at the time Simeon fainted ?
A. Darlin Vedamahattaya, Aladin Zoysa the father of the accused, and Charlin Gunaratne the brother of Darlin Vedamahattaya.
658. *Q.* That is all ?
A. Yes, and my children also.
659. *Q.* Did you take any action when Simeon fainted in your house ?
A. As he fell Charlin Gunaratne held him, and I asked Charlin to have Simeon removed immediately.

Sergeant Edwin Silva

To Foreman :

1001. *Q.* On that day did the deceased's father identify the katty ?
A. Yes.

To Court :

1002. *Q.* You had to find out from whose house this katty was taken ?
A. Yes.
1003. *Q.* In the course of your investigation, you learnt that this katty was one belonging to the house of the accused ?
A. Yes.
1004. *Q.* On what date did you come to learn of that ?
A. That same day before the Magistrate came. I recorded the statement in regard to the identity of the katty from Aladin, father of the accused.
1006. *Q.* The only step you took in regard to the identity of the katty was to show it to the father of the accused and to record his statement ?
A. And the accused."

In the opinion of the Court the evidence of Gickson Mendis and Wilman Zoysa that they learnt at the Police Station that the deceased had been killed and that Simeon fainted on being given the news is irrelevant. The evidence of the headman of Galwehera that the father of the deceased fainted in his house is also irrelevant. The Court is also of opinion that Edwin Silva's answer to questions 1004 and 1006 have the effect of introducing hearsay as the appellant's father was not called to give evidence at the trial. At the same time it must be pointed out that the evidence to which learned counsel took exception in this Court was either elicited by defending counsel in cross-examination or, when not elicited by the defence, allowed to pass without objection. Although section 136 of the Evidence Ordinance imposes on the Judge the duty of asking the party proposing to give evidence of any fact in what manner any particular fact if proved would be relevant or not, this Court will when considering a complaint that the appellant has been prejudiced by the admission of irrelevant evidence take into account the fact that such evidence has not been objected to by the appellant at the time at which it was given or has been elicited by the appellant or his counsel. What importance it would attach to such omission to object or the fact that the defence itself is responsible for eliciting the irrelevant evidence would depend on the circumstances of each case. The progress of a trial would be considerably hindered if the Judge had to inquire from counsel whenever a question is asked how the fact that is sought to be elicited is relevant. It is therefore necessary that counsel on either side should make every effort to keep their examination and cross-examination strictly within the limits prescribed by the Evidence Ordinance and ask no questions that will bring out irrelevant facts. At the same time they should be vigilant and actively assist the Judge in the task of keeping evidence within the limits of relevancy as laid down in the Evidence Ordinance by bringing to his notice any question of his opponent that is likely to introduce irrelevant facts. The Legislature recognising the difficulty of altogether excluding the introduction of irrelevant evidence in the course of a trial has enacted a useful provision in section 167 of the Evidence Ordinance. It reads :—

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

This section applies equally to civil as well as criminal trials. It has never been doubted in this country that in the case of criminal trials it applies to trials by jury as well as to trials by Judge alone *Rex vs. Thegis* (1901) 2 N. L. R. 10 ; *The King vs. Pila* 15 N. L. R. 453 ; *The King vs. Appu Sinno* 22 N. L. R. 353. In the case of *The King vs. Pila* (supra) Lascelles, C.J. observed at p. 458 :—

> " There can be no question but that this Court, under section 167 of the Evidence Ordinance, has power to uphold the conviction, if we are of opinion that the evidence improperly admitted did not affect the result of the trial."

In the case of *Rex vs. Thegis* (supra) Shaw, J. said :—

> " In my opinion, therefore, section 167 of the Evidence Ordinance applies to the present case, and we have the power to uphold the verdict on the admissible evidence should we think the circumstances warrant it."

The doubt which at one time existed in India whether the corresponding provision of the Indian Evidence Act which is word for word the same as our section applies to trials by jury has been set at rest by the Privy Council. It is sufficient for the purpose of this appeal to refer to the cases of *Abdul Rahim vs. Emperor* (1946) A. I. R. (P. C.) 82 and *Kottaya vs. Emperor* (1947) A. I. R. (P. C.) 67. In the former case Lord Macmillan who delivered the opinion of the Board stated at p. 85 :—

> " The first question submitted relates to the effect of the misreception of evidence. It has been found by the High Court that in the present case material evidence was improperly admitted. What are the powers and what is the duty of the High Court in such circumstances ? It was contended for the appellant that the evidence improperly admitted might have so seriously prejudiced the minds of the jury as to have brought about a failure of justice and that he was entitled on a new trial to have the verdict of a jury on proper evidence. To this submission section 167, Evidence Act, in their Lordships' opinion affords a complete and conclusive answer. The improper admission of evidence is thereby expressly declared not to be a ground of itself for a new trial. The Appellate Court must apply its own mind to the evidence and after discarding what has been improperly admitted decide whether what is left is sufficient to justify the verdict. If the Appellate Court does not think that the admissible evidence in the case is sufficient to justify the verdict then it will not affirm the verdict and may adopt the course of ordering a new trial or take whatever other course is open to it. But the Appellate Court if satisfied that there is sufficient admissible evidence to justify the verdict is plainly entitled to uphold it."

In the latter case at which the former decision does not appear to have been cited Sir John Beaumont who delivered the opinion of the Board (p. 71) observed :—

> " The position therefore is that in this case evidence has been admitted which ought not to have been admitted, and the duty of the Court in such circumstances is stated in section 167, Evidence Act, which provides :
>
> > ' The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.'
>
> " It was therefore the duty of the High Court in appeal to apply its mind to the question whether, after discarding the evidence improperly admitted, there was left sufficient to justify the convictions. The Judges of the High Court did not apply their minds to this question because they considered that the evidence was properly admitted, and their Lordships propose therefore to remit the case to the High Court of Madras, with directions to consider this question. If the Court is satisfied that there is sufficient admissible evidence to justify the convictions they will uphold them. If, on the other hand, they consider that the admissible evidence is not sufficient to justify the convictions, they will take such course, whether by discharging the accused or by ordering a new trial, as may be open to them."

It would appear from the cases cited above that the duty of the Court is to cast aside the evidence which ought not to have been admitted and then consider whether there still remains sufficient evidence to support the conviction. Applying this rule to the facts of the instant case, and casting aside the irrelevant evidence which should not have been admitted, there is sufficient evidence to justify the decision of the jury. Learned counsel for the appellant to whom we afforded the opportunity of addressing us on the question whether this Court was empowered to act under section 167 did not argue that it had no power to do so ; but he contended that this Court should in a case where evidence had been improperly admitted act in the same way as the Court of Criminal Appeal in England. To accede to that contention would amount to ignoring section 167. It would be wrong to do so. The Court of Criminal Appeal in England has not the power which this Court has of ordering a new trial ; but it would appear from the following observation of Viscount Simon in the case of *Stirland* (30 Cr. App. R. 40 at 55) that even in England the Court does not quash a conviction merely on the ground of misrepresentation of evidence.

> " It has been said more than once that a Judge when trying a case should not wait for objection to be taken to the admissibility of the evidence, but should stop such questions himself (see Ellis 5 Cr. App. R. 41 at p. 62 ; (1910) 2 K. B. 746 at 764). If that be the Judge's duty, it can hardly be fatal to an appeal founded on admission of an improper question that counsel failed at the time to raise the matter. No doubt, as Bray, J., said at pp. 61 and 763 of the respective reports in the same case, the Court must be careful in allowing an appeal on the ground of reception of inadmissible evidence when no objection has been made at the trial by the prisoner's counsel. The failure of counsel to object may have a bearing on the question whether the accused was really prejudiced. It is not a proper use of counsel's discretion to raise no objection at the time in order to preserve a ground of objection for a possible appeal. But where, as here, the reception or rejection of a question involves a principle of exceptional public importance, it would be unfortunate if the failure of counsel to object at the trial should lead to a possible miscarriage of justice."

There is one other matter that should be adverted to. After the jury had been empanelled but before the opening address for the prosecution, counsel for the defence indicated to the learned trial Judge that he wished to take

certain objections to the indictment in the absence of the jury. In the course of his submissions he stated that he would object to Crown Counsel referring in his opening address to the jury to a confession made by the appellant to his father Aladin Zoysa. After hearing the submissions of counsel for the defence and the prosecution the learned trial Judge informed counsel of the course he proposed to take. He said :—

> " What I propose to do is this, to call the father into the witness box now and give my ruling on the admissibility of that evidence. If I rule that his evidence is admissible, I propose to allow Crown Counsel to open on that part of the case to the jury. If I hold against the Crown on the point, I will direct Crown Counsel not to open on that matter."

The appellant's father and the headman of Galwehera were then affirmed and examined-in-chief, cross-examined, and re-examined, and also questioned by the learned trial Judge. At the end of their examination the learned Judge ruled that the counsel for the Crown should not in his opening address refer to the appellant's confession to his father. The appellant's father was not eventually called as a witness by either the prosecution or the defence.

The course adopted in the instant case is unusual. When the defence proposes to object to evidence of any fact appearing in the depositions being tendered at the trial it has been the practice for quite a long time for defence counsel to indicate it to counsel for the Crown so that he may exercise his discretion as to whether he should omit any reference in his opening address to the item of evidence to which the defence proposes to object. It has been a good working rule and it is not clear why the usual course was not adopted in this instance. The proper time for the Judge to rule on the admissibility of evidence is when a party proposes to give evidence of any fact and not before. Section 136 (1) of the Evidence Ordinance reads :—

> " When either party proposes to give evidence of any fact, the Judge may ask the party proposing to give the evidence in what manner the alleged fact, if proved, would be relevant, and the Judge shall admit the evidence if he thinks that the fact, if proved, would be relevant, and not otherwise."

Section 244 (1) (*a*) of the Criminal Procedure Code, which prescribes the duty of the Judge in a trial by jury, lays it down that it is the duty of the Judge to decide all questions of law arising in the course of a trial and especially all questions as to the relevancy of the facts which it is proposed to prove and the admissibility of evidence. This provision lends support to section 136 (1) of the Evidence Ordinance and emphasises the rule that questions as to relevancy of evidence may properly be dealt with only at the point of time at which a party proposes to elicit the oral evidence or tender any documentary evidence.

The instant case illustrates the danger of ruling on the admissibility of evidence before the appropriate stage is reached. It resulted in the admission of hearsay evidence and the father of the appellant not being called as a witness though he had material evidence to give. The relevancy of a fact has to be determined against the background of other relevant facts which the prosecution has led in evidence. It is both difficult and unsafe to rule on the relevancy of evidence *in vacuo* as it were.

The procedure that has been followed all this time has not only long-standing practice to commend it but is also what our law enjoins. Although in England Criminal Procedure is not governed entirely by statute as in our country, the procedure adopted is the same. Comparatively recent attempts in that country to depart from the established procedure have been disapproved by the Court of Criminal Appeal as in the case of *Framroze Patel*, 35 Cr. App. R. 62 at 65, where Byrne, J. adopting with approval the headnote to *Zielinski* (34 Cr. App. R. 193) said :—

> " Where defending counsel has informed counsel for the prosecution that he intends to object to the admissibility of certain evidence, it is, as a general rule, undesirable that the argument on admissibility should be heard and the issue decided before the case is opened. The proper course is for counsel for the prosecution to refrain from referring to the evidence in his opening, and that the issue should be decided at the appropriate moment in the case when the evidence is tendered."

The appeal is accordingly dismissed, and the application refused.

GUNASEKERE, J.

I find myself unable to agree with the majority of the court on the principal questions of law that are discussed in the judgment that has been prepared by my Lord the Chief Justice.

It is the unanimous view of the court that on several points inadmissible evidence has been admitted. The admission of every such item of evidence necessarily involved a wrong decision of a question of law and therefore, in terms of section 5 of the Court of Criminal Appeal Ordi-

nance, the court must decide whether it considers "that no miscarriage of justice has actually occurred". The case for the prosecution rested mainly on the evidence given by Gickson Mendis, Rucial Nona and Police Constable Dharmaratne and the evidence of the presence of "a few small stains" of human blood on the shirt and sarong that the appellant was wearing at the time of his arrest. The credibility of each of these three witnesses was challenged by the defence and it cannot be demonstrated that the jury would have accepted their testimony even if the inadmissible evidence had not been placed before it. Although according to the case for the prosecution the appellant was arrested within a few hours after the commission of the alleged murder there is no evidence that the blood-stains were too fresh to have been caused long before the deceased's death. Nor does it appear that they were too large or too many to be such blood-stains as might be found on the clothing of any villager without his being able to explain them, by recalling for instance a particular occasion on which he was stung by a mosquito or was pricked by a thorn or bitten by a leech.

Before the court can say that no substantial miscarriage of justice has actually occurred it must consider the possible effect on the minds of the jury both of the inadmissible evidence and of the order, of which the appellant complains, committing his father Aladin Zoysa to the custody of the fiscal.

After the jury had been empanelled and before the case for the prosecution was opened, the counsel for the defence requested that the jury should be asked to retire as he proposed "to take certain objections to the indictment". In reply to a question from the presiding Judge as to how the jurors would be affected by legal submissions he said that his legal submissions "would be covering certain factual matters". The jury were then asked to retire. They did so at 11-45 a.m. and returned shortly after 12-50 p.m. It appears that the learned Judge then said in their hearing "Let the accused's father be kept in fiscal's custody until this case is over."

It is not unlikely that the jury would have inferred that what led to this order were "factual matters" discussed in their absence. Nor could they have failed to notice that the man who was to be kept in custody was described not by name, but by reference to his relationship to the appellant. Subsequently, although Aladin Zoysa was not examined as a witness, the prosecution adduced evidence indicating that, at a time when no prosecution witness had any information as to what had happened to the deceased, Aladin Zoysa gave the village headman of Galwehera information that led him to cause the village headman of Hegalla to arrest the appellant. No doubt the object of this evidence was merely to introduce and explain the relevant fact of the arrest; but it was not necessary for that purpose and was therefore not admissible under section 9 of the Evidence Ordinance on that ground. On the other hand it could have had, and most probably did have, the unintended effect of suggesting to the jury that Aladin Zoysa who was not being called as a witness and who had been committed to the custody of the fiscal after some proceedings held in their absence, was in a position to give incriminating evidence against his son if only he could be persuaded to place public duty before private interest and disclose what he knew.

In addition to this inadmissible evidence as to the part played by Aladin Zoysa in the events that led to the prisoner's arrest the jury had before them inadmissible hearsay to the effect that Aladin stated to Police Sergeant Edwin Silva that the katty P1 "was one belonging to the house of the accused". It may well be that this inadmissible evidence induced the jury to accept Rucial Nona's evidence that she had seen a similar katty in the appellant's hands at about 3-30 p.m. and evidence of Police Constable Dharmaratne that he found the katty P1 at a place pointed out by the appellant as a place to which the appellant had thrown it.

Prejudice could also have been caused by the evidence elicited from Wilman Zoysa in his examination-in-chief as to the information that he claimed to have obtained at the police station. The passages from that evidence that are quoted in the judgment of my Lord the Chief Justice could not fail to suggest to the jury that the appellant or his father or both had stated at the police station that the deceased had been killed by the appellant.

For these reasons it is not possible, in my opinion, for the court to hold "that no miscarriage of justice has actually occurred", and the appeal must therefore be allowed.

Application of the provisions of section 167 of the Evidence Ordinance can lead to no different result.

I do not think that "sufficient evidence" means "evidence which if believed would be sufficient". It seems axiomatic that evidence can be sufficient to justify a decision only if it is true and not if it is false. Therefore, before the court can say that "there was sufficient evidence to justify the decision" the credibility of that evidence or the fact that its acceptance by the jury was not influenced by the inadmissible matter must be demonstrable from the record.

In a case in which inadmissible evidence induces a jury to accept evidence that has been properly admitted the sufficiency of the latter to justify the decision is dependent on the former. Therefore, in such a case as the present one, where the inadmissible evidence could have induced the acceptance of the admissible evidence, the court is not in a position to say that independently of the inadmissible evidence there was "sufficient evidence to justify the decision" of the jury. What this expression contemplates is not evidence which may or may not be true, but evidence that is demonstrably true or evidence that can be demonstrated to have been accepted by the court of trial without being influenced by inadmissible evidence to arrive at that finding. I therefore see no inconsistency in the views expressed by the learned Judges who decided the three Ceylon cases cited by my Lord the Chief Justice and no conflict between those views and the two Privy Council decisions.

In my opinion, the conviction of the appellant and the sentence passed on him must be set aside and the court must order a new trial.

Appeal dismissed.

Present at the Hearing : LORD OAKSEY, LORD MORTON OF HENRYTON, LORD KEITH OF AVONHOLM, LORD BIRKETT, MR. L. M. D. DE SILVA.

Privy Council Appeal No. 20 *of* 1956

ABDUL CADER ABDEEN vs. ABDUL CAREEM MOHAMED THAHEER AND OTHERS

From
THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DELIVERED THE 11TH FEBRUARY, 1958.

Sale—Specific performance—Agreement by vendors to sell shares in property to purchaser—Agreement providing for refund of deposit to purchaser and payment of liquidated damages by either party in the event of failure to complete sale by executing deed of transfer—Refusal by two of the vendors to execute deed of transfer—Action by purchaser to compel defaulting vendors to transfer their shares—principles governing specific performance—Distinction between Roman-Dutch Law and English Law.

The appellant, the purchaser, and the respondents, the vendors, entered into a notarial agreement under which the respondents agreed to transfer their shares in immovable property. The agreement provided that in the event of the appellants willing to complete the sale and the respondents failing, refusing or neglecting to execute or cause to be executed a deed of transfer of the shares in the property, the respondents were to refund the appellants' deposit, and also to pay him a prescribed sum as liquidated damages. If the purchaser refused to complete the sale, he was obliged to pay the vendors the prescribed amount as liquidated damages, and was entitled to a refund of the deposit.

Two of the vendors refused to execute the deed of conveyance in terms of the agreement, and the purchaser filed action seeking a decree to compel the defaulting vendors to execute a deed of transfer of their shares.

Held : (1) That in Ceylon, Roman-Dutch Law and not English Law applies to a claim for specific performance of an agreement to sell immovable property.

(2) That under the Roman-Dutch Law every party who is ready to carry out his term of the contract *prima facie* enjoys a legal right to demand performance of the other party subject only to the overriding discretion of the Court to refuse the remedy in the interests of justice in particular cases.

(3) That in this case this *prima facie* right is excluded by the terms of the contract, in particular the terms providing for liquidated damages in the event of either party failing to complete the sale.

(4) That it was not necessary for all the vendors to default in the completion of the sale to bring into operation the clause in the agreement relating to liquidated damages. Refusal or failure by one vendor to execute or cause to be executed the deed of transfer was sufficient.

(*Delivered by* LORD KEITH OF AVONHOLM)

This is an appeal from a judgment of the Supreme Court of Ceylon (Gratiaen, J., Pulle, J. and Sansoni, J.) reversing the judgment of the District Court (Sinnethamby, D.J.). The respondents were not represented before their Lordships' Board.

The case arises out of a contract of purchase and sale dated 3rd October, 1947, of certain house property in Colombo. The appellant is the purchaser. The vendors were seven joint owners of 151 shares out of 192 undivided shares of this land. The joint owners of the other 41 shares were four minors who were not parties to the contract. Their curators were subsequently authorised by the Court to sell their shares. Of the seven part joint owners, parties to the contract, five executed, on 2nd January, 1948, an appropriate deed of conveyance in the appellant's favour. The other two refused to execute any conveyance and give vacant possession because they could not get another house. On 17th March, 1948, the appellant commenced proceedings in the District Court of Colombo seeking a decree against these two vendors to execute in his favour a conveyance of their share of the premises in question. Before these proceedings were taken one of the recusant vendors had transferred his share to his minor children without valuable consideration and they were accordingly made parties to the proceedings. The District Judge held that this transfer was ineffective to interfere with the purchaser's rights. This is not now in question in the case.

The only question before the Board is whether the appellant is entitled to enforce specific performance against the recusant defendants. The District Court held he was. The Supreme Court held he was not. The question falls to be determined on the language of the contract considered in the light of the Roman-Dutch law ruling in Ceylon in the matter of specific performance.

The contract, which should be quoted substantially in full, is as follows :—

" This Agreement is made Third day of October, One thousand Nine hundred and Forty-seven between Abdul Careem Mohamed Thaheer [and six others] all of No. 43, Barnes place, in Colombo, in the Island of Ceylon (hereinafter called and referred to as ' the said vendors ' which term as herein used shall where the context so requires or admits mean and include the said Abdul Careem Mohamed Thaheer [and the six others], their and each of their respective heirs, executors and administrators) of the one part and Abdul Cader Abdeen of Colombo aforesaid (hereinafter called and referred to as ' the said Purchaser ' which term as herein used shall where the context so requires or admits mean and include the said Abdul Cader Abdeen, his heirs, executors and administrators) of the other part.

Whereas the vendors are seised and possessed of or otherwise well and sufficiently entitled jointly to an undivided One-hundred and Fifty-one upon One-hundred and Ninety-two (151/192) parts or shares from and out of all those premises in the Schedule hereto particularly described.

And whereas Zainul Abdeen, Umma Faiza, Hussain Lafir and Abdul Careem Mohamed Abdul Cader, (minors,) all of No. 43, Barnes Place aforesaid are jointly entitled to the remaining Forty-one upon One-hundred and Ninety-two (41/192) parts or shares from and out of the said premises in the said schedule hereto particularly described.

And whereas the vendors have agreed to sell and to cause to be sold and the Purchaser has agreed to buy the said premises in the said Schedule hereto particularly described at the price and upon the terms and conditions hereinafter set forth.

Now this Agreement witnesseth as follows :—

1. The vendors will sell and cause to be sold and the Purchaser will subject expressly to the provisions of clauses 4 and 5 hereof buy the said premises in the said Schedule hereto particularly described together with all and singular the rights, privileges, easements, servitudes and appurtenances whatsoever thereto belonging or appurtenant thereto or used or enjoyed therewith.

2. The price shall be the sum of Rupees Ninety-two Thousand (Rs. 92,000/-) of which a sum of Rupees Twelve thousand Five hundred (Rs. 12,500/-) by way of deposit has been paid to the vendors by the purchaser (the receipt whereof the said vendors do hereby admit and acknowledge) and the balance shall be paid on the date the purchase is completed.

3. The sale shall be completed on or before the 31st day of December, 1947, by the Purchaser :

(*a*) tendering to the Vendors for execution at the office of Mr. John Wilson, Proctor and Notary, 365, Dam Street, Colombo, a transfer in the customary form of the said premises hereby agreed to be sold in favour of the Purchaser or his nominee or nominees the same to be attested by the Purchaser's or his nominee or nominee's Notary. The Vendors in and by the said Deed of Transfer shall warrant and defend the title to the said One-hundred and Fifty-one upon One-hundred and Ninety-two (151/192) parts or shares of the said premises in the said Schedule hereto particularly described and enter into other usual covenants.

(*b*) paying to the Vendors and depositing to the credit of curatorship proceedings in the District Court of Colombo relating to the estates of the said minors the balance purchase price of Rupees Seventy-nine thousand Five-hundred (Rs. 79,500/-) and thereupon the vendors shall execute and cause to be executed at the cost and expense of the Purchaser the Deed of Transfer in favour of the Purchaser or his nominee or nominees as aforesaid.

4. Vacant possession of the said premises in the said schedule hereto particularly described shall be given by the Vendors to the Purchaser at least one day prior to the execution of the said Deed of Transfer.

5. The Vendors shall deduce to the satisfaction of the said Mr. John Wilson a good and indefeasible title to the said premises in the said schedule hereto particularly described.

6. The Purchaser shall give to the Vendors at least 7 days' notice of the date on which the Purchaser intends to complete the sale so as to enable the Vendors to give to the Purchaser vacant possession as aforesaid of the said premises in the said schedule hereto particularly described.

7. In the event of the Purchaser dying prior to the said 31st day of December, 1947, these presents shall stand cancelled and determined and the Vendors shall forthwith pay to the legal representatives of the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-).

8. In the event of the Purchaser being ready and willing to complete the said sale in terms hereof and Vendors failing, refusing or neglecting to execute and cause to be executed the said Deed of Transfer as aforesaid then and in such case the Vendors shall repay forthwith to the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-) together with interest thereon at five per centum per annum from the date hereof to date of payment and shall also pay to the Purchaser a sum of Rupees Fifteen-thousand (Rs. 15,000/-) as liquidated and ascertained damages and not as penalty.

9. In the event of the Vendors deducing a good and indefeasible title to the satisfaction of the said Mr. John Wilson and being ready and willing to execute or cause to be executed prior to the 31st day of December, 1947, the said Transfer and to give vacant possession as aforesaid and the Purchaser failing, refusing or neglecting to complete the purchase as aforesaid the Purchaser shall pay to the Vendors a sum of Rupees Fifteen-thousand (Rs. 15,000/-) as liquidated and ascertained damages and not as penalty and the Vendors shall refund to the Purchaser the said deposit of Rupees Twelve-thousand Five-hundred (Rs. 12,500/-)."

In the admirable judgment of Mr. Justice Gratiaen, there appears this passage, which their Lordships entirely accept :

" In this country, the right to claim specific performance of an agreement to sell immovable property is regulated by the Roman-Dutch law, and not by the English law. It is important to bear in mind a fundamental difference between the jurisdiction of a court to compel performance of contractual obligations under these two legal systems. In England, the only common law remedy available to a party complaining of a breach of an executory contract was to claim damages, but the Courts of Chancery, in developing the rules of equity, assumed and exercised jurisdiction to decree specific performance in appropriate cases. Under the Roman-Dutch law, on the other hand, the accepted view is that every party who is ready to carry out his term of the bargain *prima facie* enjoys a legal right to demand performance by the other party ; and this right is subject only to the over-riding discretion of the Court to refuse the remedy in the interests of justice in particular cases."

Proceeding from this starting point the learned Judge reaches the conclusion that the *prima facie* right of the purchaser to demand specific performance is excluded by the terms of the contract between the parties, particularly by clause 8, which he holds constitutes a substituted obligation and the sole obligation upon the vendors in the event of the failure to secure a conveyance of the whole property to the purchaser by reason of any of the contingencies contemplated by the parties in clause 8. He continues in a further passage which their Lordships would again quote in full :—

" It is only in the absence of agreement to the contrary that the Roman-Dutch law confers on a purchaser under an executory contract the right to select one of two alternative legal remedies under the Roman-Dutch law, namely, specific performance or damages. But we have here a categorical stipulation that if the primary obligation is not fulfilled for any reason whatsoever, two specified sums shall immediately become due. To my mind, the stipulated return of the deposit, being part of the purchase price, necessarily implies that the primary obligation to sell is then to be regarded as having come to an end. This negatives an intention that the purchaser could still demand, if he so chose, specific performance. It is also significant that, when one considers the relevant issue of mutuality, clause 9 provides that, should the purchaser default for any reason, he would, though liable to pay an agreed sum to the vendors as liquidated damages, be entitled to a refund of his earlier deposit. Clause 9 equally denies to the ' vendors ' by necessary implication the alternative legal remedy of specific performance."

In his very full and able argument for the appellant Mr. Chapman urged that clause 8 stipulated not for an alternative or substituted method of performance of the contract but only for damages for breach of the contract and that this was no bar to a decree for specific performance. For reasons, however, which do not materially differ from those which found favour with Mr. Justice Gratiaen their Lordships are unable to accept the contention for the appellant. Their Lordships will state these reasons shortly under four heads.

First where the right in general of a party to insist on specific performance of his contract or to claim damages is so clear under the Roman-Dutch law, their Lordships have difficulty in appreciating why the parties should introduce into the contract the detailed and meticulous provisions of clauses 8 and 9 merely to fix the amount of damages in the event of the Court

finding itself unable or unprepared to give decree of specific performance.

Secondly the general framework of the contract suggests that clauses 7, 8 and 9 were designed to introduce modifications of what would otherwise be, subject to certain minor conditions, the unqualified obligation to sell or cause to be sold the property in question. Clause 7 is a clear modification of the legal consequences ordinarily following on a contract of sale, and clauses 8 and 9 are capable of a similar interpretation. Each of the clauses relates to a specific event or events which may follow the signing of the contract and provides for the consequences to follow thereon.

Thirdly clause 8 makes no distinction between failure, refusal, or neglect to execute or cause to be executed the deed of transfer. The same consequences are to follow from any of these events. Failure might have proceeded, though in this case it did not, from the refusal of the Court to sanction and authorise a sale by the curators of the minor part-owners. In such an event the purchaser's only remedy would be under clause 8. The view of the Supreme Court was that this was a substituted obligation on the vendors who having undertaken to cause a transfer to be executed would be liable to pay to the purchaser the agreed sum of damages. Their Lordships see no reason to dissent from this view and it is impossible in their opinion to differentiate between such a failure and a refusal of one of the parties to execute a transfer which it is to be noted again results in a failure of the other vendors to cause a transfer to be executed.

Lastly clause 8 provides that on the occurrence of any of the events contemplated the vendors shall repay "forthwith" to the purchaser the deposited sum with interest at the rate of five per centum per annum. This in their Lordships' view points strongly to the construction that in the events contemplated the bargain for a sale has come to an end and has been replaced by the pecuniary stipulations in the clause. It is further significant, as Mr. Justice Gratiaen points out, that there is a corresponding mutuality of obligation on the purchaser in clause 9 in the event of his failing, refusing or neglecting to complete the purchase.

It remains to notice a contention which may not have been submitted to the Supreme Court but which was pressed before their Lordships' Board. It is expressed in the sixth ground of appeal as follows:—

> "Because even if Clause 8 be so construed as to mean that the purchaser's sole remedy upon default by the vendors was the recovery of the sum named therein as liquidated damages yet the default contemplated and, indeed, so expressed, was a default by all the vendors rendering them all jointly and severally liable, and not by only some of them for which all the vendors (*i.e.* those in default and those who were not) were to be liable."

In their Lordships' view this point fails at the outset because in fact there was a failure on the part of all the vendors, as has already been indicated, either to execute or "to cause to be executed" the deed of transfer. But their Lordships think that in any event a refusal or failure by one vendor would be sufficient to bring the clause into operation.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

Appeal dismissed.

Present at the Hearing: Lord Reid, Lord Tucker, Lord Somervell of Harrow, Lord Denning, Mr. L. M. D. de Silva.

Privy Council Appeal No. 3 of 1957

CECIL ALEXANDER SPELDEWINDE, COMMISSIONER OF INCOME TAX vs. CYRIL SHIRLEY DE ZOYSA

From
THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Delivered the 19th March, 1958.

Income Tax—Hangars erected on requisitioned land by Naval and Military authorities—Option given to owners of land to purchase such buildings—Purchase of hangars by respondent from the authorities after obtaining the right of option from the owners—Subsequent sale of hangars by respondent at a

price above the purchase price—Is it taxable as profits from a trade—Meaning of the term "Trade" in Income Tax Ordinance (C. 188); *sections* 6 (1) (*a*); 2,—*Principles relating to review of decisions of the Board of Review by the Supreme Court.*

The Naval and Military authorities had erected ten hangars on a requisitioned land, which belonged to the respondent's wife and others under an agreement, the owners of the land were given the option of purchasing the buildings or alternatively compensation for any damage done to the land. The respondent having obtained the rights of the owners purchased the hangars and sold them at a profit of Rs. 144000/-.

The Commissioner of Income Tax charged a tax on this amount as being profits arising from a trade within the meaning of section 6 (1) (*a*) and section 2 of the Income Tax Ordinance (C. 188). Section 2 defined trade as follows :— "trade" includes every trade and manufacture and every adventure and concern in the nature of trade.

The respondent contended before the Commissioner.

(1) That there was no buying and selling; the improvements accrued to the soil, and what he got was compensation.

This was an isolated transaction and profits are of a casual and non-recurring nature.

(2) The profit is capital accretion.

The Commissioner dismissed the appeal holding that the transaction was an adventure in the nature of trade. The Board of Review on appeal reversed the decision of the Commissioner, and on a case stated the Supreme Court affirmed the decision of the Board of Review.

On appeal to the Judicial Committee of the Privy Council.

Held : (1) That the respondent was not liable to be taxed in terms of section 6 (1) (*a*) and section 2 of the Income Tax Ordinance as the amount received by him was in the nature of compensation. "The word "adventure" suggests a man going out to seek the fortune sought to be taxed. Here the materials disposed of had been placed on the land and something had to be done about them".

(2) That an isolated transaction can be an adventure in the nature of trade and it is not necessary but it should relate to ordinary article of commerce, such as linen, brandy, paper and so on.

Per LORD SOMERVELL—"The position of a Court in appeal by way of case stated by the Board of Review is sufficiently similar to the position of a court here (England) on a Case, Stated by Special or General Commissioners to make the English decisions helpful."

"The court should interfere if the Commissioners had acted without any evidence or upon a view of the facts which could not reasonably be entertained".

Cases referred to : *Edwards vs. Bairstow* (1956) A.C. 14.

(*Delivered by* LORD SOMERVELL OF HARROW)

This is an appeal from a judgment of the Supreme Court of Ceylon dated 29th May, 1956, dismissing an appeal on a Case Stated by the Board of Review under section 74 of the Income Tax Ordinance (C. 188). Under that section the decision of the Board of Review is final with a proviso that either party may apply to the Board to state a case on a question of law.

The question before the Board was whether a sum of Rs. 144,000 is liable to income tax as profits within the meaning of section 6 (1) (*a*) of the Ordinance :—

Section 6 (1). For the purposes of this Ordinance, "profits and income" or "profits" or "income" means

(*a*) the profits from any trade, business, profession, or vocation for however short a period carried on or exercised.

Trade is defined by section 2 :—

"trade" includes every trade and manufacture and every adventure and concern in the nature of trade.

Section 6 (1) (*h*) was at one time relied on but the Case Stated raises only the issue under 6 (1) (*a*).

The position of a court in an appeal by way of Case Stated by the Board of Review is sufficiently similar to the position of a court here on a Case Stated by Special or General Commissioners to make the English decisions helpful.

This matter has been recently considered by the House of Lords in *Edwards vs. Bairstow* (1956) A.C. 14. That case also dealt with an isolated transaction. The Commissioners had found that the transaction was not an adventure in the nature of trade. A case was stated; under section 149 of the Income Tax Act as under section 74 of the Ordinance the appeal could only

succeed if the court was satisfied that the finding was erroneous in point of law. The House of Lords reversed the decision of the Commissioners.

Lord Simonds said that the court should interfere if the Commissioners had acted without any evidence or upon a view of the facts which could not reasonably be entertained. Lord Simonds in that case failed to find in the facts any item which pointed to the transaction not being an adventure in the nature of trade.

Lord Radcliffe after saying that it was for the courts to lay down the meaning to be given to the words " trade, manufacture, or concern in the nature of trade " continued : " But that being said, the law does not supply a precise definition of the word ' trade ' : much less does it prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances. In effect it lays down the limits within which it would be permissible to say that a ' trade ' as interpreted by section 237 of the Act does or does not exist. But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other." In such cases the decision is final unless it is clear from some statement in the case itself that the commissioners have misdirected themselves.

There is some difference of wording between the United Kingdom code and the Ordinance but the above principles are, in their Lordships' opinion applicable and it remains to consider how to apply them to the present case. The facts as found may be summarised as follows.

The respondent's wife was owner of a four acre block of land at Boosa, and had an undivided share in some surrounding land with other co-owners. These lands were requisitioned during the war and the Admiralty erected ten hangars and other buildings thereon. It was the policy of the Naval and Military authorities to give owners of requisitioned land the option of " purchasing " buildings erected thereon. If this option was not exercised the requisitioning authority could themselves remove the buildings and pay compensation for any damage done to the land. The respondent came to an arrangement with the co-owners for surrendering to him their rights in the option above referred to and their rights to compensation for damages. Having this authority as also the authority of his wife for the land which she owned and for the other land he negotiated with the authorities and an agreement was come to on 26th April, 1948, for the handing over to the respondent of nine of the ten hangars for Rs. 90,000. About this time the Ceylon Government decided to acquire the lands for the use of a railway but at the time of the agreement the land was still under requisition and therefore the property of the respondent's wife and the other co-owners. There was a demand for these hangars in India and after some troubles the respondent received Rs. 279,000 for the nine hangars. After agreed deductions this left a profit of Rs. 144,000.

The respondent was assessed on this sum and appealed to the Commissioner under section 71 (2) of the Ordinance. The respondent contended

1. There was really no buying and selling—the improvements accrued to the soil and what the appellant got was compensation.

2. This was an isolated transaction and the profits are of a casual and non-recurring nature.

3. If 1 and 2 fail, the profit is a capital accretion.

Contention (2) is based on the wording of section 6 (1) (*h*) which no longer has to be considered although argument was based as will appear on the transaction being an isolated one. The first contention of the Assessor dealt with this point. His second was :

This was definitely an adventure in trade—the appellant set himself to do this business : section 6 (1) (*a*) applies. The Commissioner decided that the transaction was an adventure in the nature of trade and dismissed the appeal. In considering the contention that this was a capital accretion the Commissioner said this could only be based on the respondent's ownership of the land and he was not the owner. The respondent appealed to the Board of Review which by a majority reversed the Commissioner's decision. The Board of Review attached to the Case Stated their reasons.

The majority thought the Commissioner had not given sufficient importance to the fact that the assessee's wife owned the larger portion of the land on which the hangars were built. They referred to section 21 of the Ordinance which provides that the assessable income of a married woman shall be deemed to be part of the assessable income of her husband except under certain

conditions which did not exist in the present case.

Later they say this :—

> "the option to purchase was an accretion to the land of the assessee's wife. If the assessee had not exercised the option and purchased the hangars he would have received compensation for the damage to the land. Such compensation would not be taxable. The fact that by exercising the option he has received more than what he would have received by way of compensation cannot render what he has received taxable."

The word "adventure" suggests a man going out to seek the fortune sought to be taxed. Here the materials disposed of had been placed on his wife's land and something had to be done about them. The majority of the Board of Review accepted English decisions to which they refer as establishing that an isolated transaction could be an adventure in the nature of trade. The Supreme Court disagreed with this and upheld the decision of the Board of Review on the ground that an isolated transaction could not be within section 6 (1) (*a*). On this issue their Lordships prefer the view taken by the Board of Review, although the Board was wrong in so far as they held that for an isolated transaction to be such an adventure, it must relate to an ordinary article of commerce.—linen, brandy, paper and so on. (See *Edwards vs. Bairstow.*) It is however the other circumstances relied on by the Board of Review which have led their Lordships to their conclusion that the appeal should be dismissed. They are not deciding that they would necessarily have come to the same conclusion if they had been sitting as a Board of Review but that there is here a combination of circumstances in which it could not be said to be wrong to arrive at the conclusion appealed against.

Their Lordships will humbly advise Her Majesty that the appeal be dismissed and the appellant will pay to the respondent the costs of the appeal.

Appeal dismissed.

Present : H. N. G. FERNANDO, J. AND SINNETAMBY, J.

UDUWAGE *alias* GAMAGE SOMASENA vs. UDUWAGE KUSUMAWATHIE MINOR BY HER NEXT FRIEND SURAGE PODINONA

S. C. (*F*) 158 1957—*D. C. Avissawella No.* 7676/*M*

Argued on : 29th and 30th September, 1958.
Decided on : 18th November, 1958.

Seduction, action for damages for—Corroboration—Effect of a false denial by defendant of opportunity for intimacy—When may such denial amount to corroboration of plaintiff's story—Trial judge's duty in cases where law requires corroboration.

In an action for damages for seduction the learned District Judge regarded the two following matters as constituting corroboration of the plaintiff's case.

(*a*) An exercise book, marked and admitted, despite objection by defendant's counsel, in cross-examination of the defendant, suggesting that it had been used for the purpose of teaching arithmetic when the plaintiff visited him for receiving tuition in that subject from him, and that it contained the defendant's handwriting. It was not produced or referred to by the plaintiff or any of her witnesses nor had it been included in the list of documents relied on by the plaintiff.

(*b*) A letter D1, when shown to the plaintiff, she positively denied that she wrote it or that it was in her handwriting. On the next date of trial, she admitted it, giving an explanation that D1 was only the 3rd page of the letter she wrote to the defendant. The trial Judge accepted her explanation and came to the conclusion that the defendant had interpolated one Sirisoma's name in a letter written to himself. It was clear from the plaintiff's evidence that she wrote letter D1 after her mother had discovered her pregnancy. The findings of the learned trial Judge were that the defendant falsely denied (1) that the exercise book was in defendant's handwriting (2) that letter D1 was written to him.

Held : (1) That the exercise book was not corroborative, since it was not established that the book contained the plaintiff's writing or had ever been in her possession. If it had been proved to contain the writings of both parties, it may have established at least an opportunity for intimacy, in which event, the false denial by the defendant of his writing therein may have been sufficient corroboration within the principle laid down in *Dawson vs. McKenzie* 45 S. L. R. 473.

(2) That letter D1 was not corroboration because it was written far too late and there was no independent testimony in support of the suggestion that the defendant had tempered with it. The defendant's denial, therefore, was merely a contradiction of the plaintiff's evidence that she wrote the letter to him.

Per H. N. G. FERNANDO, J.—(*a*) " The effect of a false denial of an opportunity for intimacy was thus stated by Lord Dunedin in the same case :—" Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and the locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statements been made ".

(*b*) "I should like to observe in passing, that in cases where the law requires corroboration, Judges of first instance should endeavour to specify the matters in evidence which are relied upon as being corroborative and to state whether or not these matters have been established at the trial ".

Question as to when a false denial by a defendant in a seduction case may properly be considered to lend corroboration to a woman's story discussed.

Cases referred to : *Per Fisher, C.J. in Grange V. Perera* 31 N. L. R. 85 at page 86.
Ponnammah vs. Seenitamby 22 N. L. R. page 205.
D. D. Somapala vs. Muriel Sirr, 55 N. L. R. 247.
Vedin Singho vs. Mency Nona 51 N. L. R. 209.
Poggenpoel vs. Morris, N. O. 1938 C. P. D. 90.
Van der Merwe vs. Nel (1929) T. P. D. 551.
King vs. Baskerville, (1916) 2 K. B. 58.
Thomas vs. Jones (1921) 1 K. B. 22.
Dawson vs. McKenzie 45 S L. R. 473.
Macpherson De Waal, J.P. 23 R. 785.
Florence vs. Smith, 50S L. R. 776.
Jones vs. Thomas (1934) 1 K. B. 323.
(1934) 1 K. B. 323 at page 331.
Warawita vs. Jane Nona 58 N. L. R. 111.
K. Dharmadasa vs. P. G. Gunawathy 59 N. L. R. 501.

H. W. Jayawardena, Q.C., with *T. Parathalingam*, for the defendant-appellant.

Neville de Jacolyn, for the plaintiff-respondent.

H. N. G. FERNANDO, J.

The learned District Judge has, in this action for seduction been much impressed by the evidence of the plaintiff, but I am reluctantly compelled to interfere with the finding in her favour.

The corroboration that is required in a case of this nature is either independent testimony, or some circumstance, showing or tending to show that the allegation of the plaintiff is true. " The corroboration required must, in my opinion, be corroboration in some material particular, that is to say, (*a*) by evidence as to some fact or state of things pertaining to the view that the relationship or conduct of the parties supports the allegation of the plaintiff that it resulted in sexual intercourse, or (*b*) by evidence as to conduct or action on the part of the defendant which constitutes an acknowledgement by him that the situation and relationship between him and the plaintiff was such as the plaintiff deposes to ". Per Fisher, C.J. in *Grange vs. Perera* 31 N. L. R. 85 at page 86. I should like to observe in passing ing, that in cases where the law requires corroboration, Judges of first instance should endeavour to specify the matters in evidence which are relied upon as being corroborative and to state whether or not these matters have been established at the trial. In the present case, two matters appear to have been regarded by the learned Judge as constituting corroboration.

The plaintiff had alleged that she used to visit the defendant's house for the purpose of receiving tuition in Arithmetic from him ; this was of course denied by the defendant. In the course of cross-examination he was shown an exercise book in which sums had been worked out, and he denied the suggestion that the book had been used for the purposes of teaching the plaintiff and that it contained his writing. The book was admitted and marked despite objection by counsel for the defence. This exercise book (P2) had not been produced or referred to by the plaintiff nor any of her witnesses, nor had it been included in the list of documents relied on by the plaintiff. Hence the finding of the learned Judge that the book contained items in the defendant's handwriting cannot help the plain

tiff's case, for the reason that there is no proof whatever that the book belonged to the plaintiff or had ever been in her possession. So long as such proof was wanting, the question whether the defendant had or had not written in it was irrelevant, and his denial, however false, of an irrelevant allegation, could not worsen his position. I must hold therefore that the book (P2) is not a document which corroborates the plaintiff's story.

The other matter regarded by the learned Judge as being corroborative is of a somewhat strange nature. At an early stage of her cross-examination, the plaintiff stated positively that she had not written any letter to the defendant; a while later, when she was shown a letter D1, she said neither the handwriting on it nor the signature was hers. On the next date of trial, however, the plaintiff said that she had written one letter to the defendant and claimed that D1 was that letter. The first line of D1 indicates that it is a letter written to one Sirisoma, and not to the defendant, but the plaintiff gave an explanation to the effect *inter alia*, that D1 was only the third page of the letter she had written.

The Judge accepted this explanation and came to the conclusion that the defendant had interpolated Sirisoma's name in a letter written to himself. It is not necessary for me to examine the correctness of this finding of fact, because, even if that finding was sound, D1 does not constitute proper corroboration. On the plaintiff's own version, D1 was written after the alleged intimacy had ceased and after the defendant had denied paternity of the child which the plaintiff was carrying.

Even if a letter alleging intimacy between the writer and the recipient can be considered as being a former statement of the writer for the purposes of section 157 of the Evidence Ordinance, such a former statement would not be corroboration if made after the time of conception and after intimacy had admittedly ceased; *Ponnammah vs. Seenitamby* 22 N. L. R. page 205. It is clear from the plaintiff's evidence that if she did write D1 to the defendant she did so only after her mother had discovered the pregnancy and the defendant had rejected the suggestion of a marriage.

I have now to consider an argument based upon the findings of the learned Magistrate, *firstly* that the defendant had falsely denied his handwriting on the exercise book P2, and *secondly* that he had interpolated the name of some third party in the paper D1 in order to suggest that the third party was the father of the plaintiff's child. The argument is that this conduct of the defendant, brings the case within that class referred to by Rose C.J. in *D. D. Somapala vs. Muriel Sirr*, 55 N. L. R. 247 where " any false denial by the defendant may properly be considered to land some corroboration to the woman's story ".

Reference was made in that judgment to an earlier observation of Basnayake, J. (as he then was) in the case of *Vedin Singho vs. Mency Nona* 51 N. L. R. 209 " that even a false statement by the defendant may in certain circumstances afford the necessary corroboration ". It would seem that the observations which I have just cited are often relied upon in seduction and maintenance cases, for which reason it is interesting to refer back to earlier decisions upon which these observations appear to have been based. Both Rose, C.J. and Basnayake, J. referred to the South African case of *Poggenpoel vs. Morris, N. O.* 1938 C. P. D. 90. In that action there was independent testimony that the man had been seen alone with the woman in an unoccupied house on more than one occasion. This testimony, coupled with the defendant's false denial of its truth, was held to be sufficient corroboration of the woman's version of the seduction. The decision was reached without difficulty upon the authority of *Van der Merwe vs. Nel* (1929) T. P. D. 551 in which the whole question of corroboration was fully examined. De Waal, J. P. first referred to the well-known observations as to the meaning of corroboration expressed in the English cases of *King vs. Baskerville*,(1916) 2 K. B. 58 and *Thomas vs Jones* (1921) 1 K. B. 22.

He said thereafter " it is quite clear from the authorities that opportunity for seduction taken by itself is no corroboration ", and referred to the Scottish case of *Dawson vs. McKenzie* 45 S. L. R. 473 from which he cites the following observations of Lord Kinnear:—" I think we reach the question whether the bare statement of the pursuer herself, coupled with evidence of opportunity in the sense that both were together in circumstances in which connection was not impossible, is sufficient to prove the pursuer's case. It is not proved that they were alone together in such circumstances as to give rise to suspicion or reproach, and there is no evidence of opportunity in any other sense than that it was not physically or morally impossible that connection might have taken place, and the result therefore is that there is no evidence on which

the Court can proceed other than the pursuer's own statement, which, of course, is not enough ".

The effect of a false denial of an opportunity for intimacy was thus stated by Lord Dunedin in the same case :—" Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, thatt he circumstances and the locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statements been made ". It would appear that Lord Dunedin was here stating a principle enunciated in the earlier Scottish case of *Macpherson* 23 R. 785. De Waal, J. P. held that there had been no opportunity for intimacy on a certain day, that the false denial by the defendant of that opportunity amounted to corroboration, and that all the incidents taken together and viewed in the light of the incident on that particular day forced one to the conclusion that the plaintiff's story is to be believed.

The case of *Florence vs. Smith*, 50 S. L. R. 776 another Scottish case was also referred to by de Waal, J. P. In that case, there was no direct corroboration of the pursuer's version of intimacy at or about the time of conception, but there was independent corroboration of an act of gross familiarity between the parties at a date six weeks after the date of conception. The false denial of this subsequent intimacy taken together with the evidence of that intimacy itself was held to be sufficient corroboration. Lord Dundas had said in that case " Now there is a series of recent decisions to the effect that where a defender falsely denies some fact bearing materially upon the crucial issue in dispute, that denial may turn the scale against him, in an otherwise doubtful case, by giving a complexion to the case different from that which the Court might but for such denial have put upon it ". Although that observation is made in general terms one should I think take note of the fact that it was made in a case where the false denial in question was as to a highly relevant matter, namely a subsequent act of familiarity established by independent testimony. More precisely, the false denial of the act of gross familiarity justified the inference that the familiarity led to intercourse on the subsequent occasion, which intercourse would be corroboration of the pursuer's evidence of the prior intercourse.

It is unfortunate that reports of the Scottish cases to which I have referred are not available to us, but the opinions expressed in those judgments have been approved in the English Courts as well and the opinion of Lord Dunedin which I have cited, was cited also by Lawrence, J. in the Court of Appeal in *Jones vs. Thomas* (1934) 1 K. B. 323. In that case the only item of evidence the Court of Appeal thought worthy of serious consideration as corroboration, was the proved fact that the appellant had spoken to the respondent (the woman) on two occasions shortly after the alleged act of intimacy, coupled with the false denial by the appellant to the respondent's father of the alleged meetings on those occasions. It was held however that the appellants untruthful statement to the respondent's father as to meetings after the alleged time of conception cannot be regarded as corroboration within the dictum of Lord Dunedin. Lawrence, J. in disposing of the matter said ; " There is no doubt that any untrue statement by a person when accused of an offence gives rise to some suspicion, but there is no authority which suggests that every untrue statement by an alleged father is corroborative of the mother's evidence, and the Court of Session expressly disclaimed any such view " (1934) 1 K. B. 323 at page 331.

Lord Hewart, L.C.J. after referring to the Scottish case of *Dawson vs. McKenzie* 45 S. L. R. 473 said ; " It is only when the untrue statements are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother that they can be regarded as corroborative evidence ". No attempt was made to define the nature of such an untrue statement or the circumstances in which it should be made. But I have little doubt that there cannot have been an intention to include *any* untrue statement, for in one of the Scottish cases, that of *Macpherson* 23 R. 785 the Lord Justice Clerk had said ; " No corroboration can be derived from the evidence of the defendant which shows he is not speaking the truth. If his evidence is not to be believed it must be taken out of the case altogether and the case be treated as if he had not been examined " 23 R. 785. Indeed, this very aspect of the matter is referred to at the end of the judgment of Lawrence, J. in *Jones vs. Thomas* (1934) 1 K. B. 323.

In *Warawita vs. Jane Nona*, 58 N. L. R. 111 the defendant had falsely denied certain facts,

established by independent testimony which showed the existence of an opportunity for intimacy. With respect I agree with Sansoni, J. that the untruthful denial of facts which would otherwise have been merely equivocal gave those facts a different complexion. It is useful to consider why such a conclusion is valid. Evidence of a mere opportunity for intimacy, as distinct from evidence which creates a strong suspicion of intimacy is not corroboration. It does not justify the inference that intimacy took place, because it is equally consistent with the " innocence " of the occasion. In such circumstances, if the defendant says in evidence ; " I admit there was opportunity, but I deny any intimacy ", then the adverse inference will not be drawn against him. But if instead he says " There was never an opportunity ", and this denial is held to be false in the face of independent testimony, he can then not rely on the possibility consistent with his innocence, and there remains only the possibility consistent with guilt.

My examination of the decisions which have come to my notice shows that in fact the principle as stated by Lord Dunedin in *Dawson vs. McKenzie* 45 S. L. R. 473 has not been applied except in the particular type of case referred to in his dictum and with which he was concerned, namely the case where there is a false denial of an opportunity for intimacy. While it may well be that the principle can be properly extended to other false denials, I doubt whether such an extension has yet been made. In the recent case of *K. Dharmadasa vs. P. G. Gunawathy* 59 N. L. R. 501 my brother Fernando declined to apply the principle in a situation where the defendant had abduced false evidence in an attempt to impute paternity to some other person. In the present case too, one of the matters relied upon is not substantially different ; here the defendant gave evidence ; which was held by the learned District Judge to be false, in an attempt to show that the letter which he produced was written, not to him but to one Sirisoma. That letter was not corroboration because it was written far too late, and there was no independent testimony in support of the suggestion that the defendant had tampered with the letter. His denial of the receipt of it was therefore merely a contradiction of the plaintiff's evidence that she wrote the letter to him. Similarly, the exercise book was not corroborative, since it was not established that the book contained the plaintiff's writing or had ever been in her possession. If it had been proved to contain the writings of both parties it may have established at least an opportunity for intimacy, in which event the false denial by the defendant of his writing thereon may have been sufficient to bring the case within the principle I have considered. But as there was no proof that it contained the plaintiff's writing the book cannot in any sense be regarded as evidence even of an " innocent " visit by the plaintiff to the defendant's house. Hence the falsity of the defendant's evidence with regard to this book is of no consequence.

For these reasons I would set aside the judgment and decree and dismiss the plaintiff's action with costs in both courts.

SINNETAMBY, J.
I agree

Appeal allowed.

Present : BASNAYAKE, C.J., DE SILVA, J., AND SINNETAMBY, J.

THE MUNICIPAL COMMISSIONER vs. ARCHBISHOP OF COLOMBO AND OTHERS

Application for a Writ of Prohibition on the Land Acquisition Board of Review.

(*Appln.* 323)

Argued on : 20th February, 1958.
Decided on : 13th March, 1958.

Land Acquisition Act No. 9 of 1950, *sections* 16 (1) (*d*) *and* 20—*Compensation determined by acquiring officer—Appeal to the Board of Review—Acquiring officer posting cheque for amount determined by him to claimart pending appeal—Acceptance of cheque—Does such acceptance preclude the Board of Review from hearing appeal.*

Held : (1) That the acceptance by the claimant of payment of the amount of compensation determined by the acquiring officer under section 16 (1) (*d*) of the Land Acquisition Act No. 9 of 1950 is no bar to the hearing by the Board of Review of the claimant's appeal under section 20 of the Act.

(2) That where the acquiring officer has already paid the amount of compensation by him on the claimant consenting to accept it on its being tendered and where the amount of compensation is increased in appeal the acquiring officer need tender only the difference between the amount already paid by him and the amount determined in appeal.

(3) That only deductions authorised by the Act may properly be made from the compensation payable to a claimant.

Per BASNAYAKE, J.—" We wish therefore to make it clear that in our opinion neither section 35 nor any other section of the Act has the effect of taking away the right of appeal of a claimant under section 20 or precluding the Board from hearing an appeal on the ground that the claimant has accepted the compensation tendered and paid by the acquiring officer, whether such acceptance be with or without qualification. A right of appeal given by statute is not lost by the party on whom it is conferred except where the statute makes express provision in that behalf.

E. F. N. Gratiaen, Q.C., with *Walter Jayawardena*, for the petitioner.
H. V. Perera, Q.C., with *Edmund J. Cooray* and *E. B. Vannitamby*, for the 1st respondent.
H. W. Jayawardene, Q.C., with *Miss Maureen Seneviratne*, for the 2nd to 7th respondents.

BASNAYAKE, C.J.

The only question for decision on this application is whether acceptance by the claimant of payment of the amount of compensation which the acquiring officer has determined under section 16 (1) (*d*) of the Land Acquisition Act, No. 9 of 1950 (hereinafter referred to as the Act), is a bar to the hearing by the Board of Review (hereinafter referred to as the Board) of the claimant's appeal under section 20 of the Act.

Shortly the material facts are as follows : The petitioner the Municipal Commissioner of Colombo who is also an acquiring officer within the administrative limits of the Municipal Council of Colombo held an inquiry under section 9 of the Act into the market value of Lot 1 in P.P.A. 3298 in Maradana claimed by the 1st respondent the Roman Catholic Archbishop of Colombo (hereinafter referred to as the 1st respondent). On 6th October 1954 he made his award under section 16 of the Act determining that in his opinion a sum of Rs. 261,820/- should be allowed as compensation for the acquisition. On 20th October 1954 the 1st respondent whose claim under section 7 of the Act was Rs. 434,944/31 being dissatisfied with the offer appealed under section 20 to the Board. About 1st November 1954 the petitioner directed that a cheque for Rs. 260,976/25 drawn in favour of the 1st respondent be posted to him together with a voucher. On 3rd November 1954 the Municipal Treasurer sent the following letter :—

I enclose herewith cheque for Rs. 260,976/25 together with Voucher No. 9433. Kindly perfect and return the voucher early.

On 9th November 1954 the 1st respondent returned to the petitioner the voucher duly receipted together with a letter the text of which is as follows :—

This is to acknowledge receipt of your memo. No. 2304 dated 3-11-54 together with the Voucher No. 9433 and a cheque for Rs. 260,976/21.

The voucher with the receipt on the reverse is returned herewith.

It would appear from the petitioner's affidavit that thereafter, it is not clear when, he without any intimation to the 1st respondent, informed the Board that he had received payment of the amount tendered to him according to the award and that he would not therefore be entitled to receive any further sum on account of compensation. I can find no authority in the Act for such a communication to the Board by an acquiring officer and in my opinion it was unwarranted.

When the 1st respondent's appeal came up for hearing before the Board on 26th October 1956 the Chief Valuer who represented the petitioner took a preliminary objection to the hearing of the appeal on the ground that by receiving payment of the amount of compensation determined by the petitioner, the 1st respondent must be deemed to have waived or abandoned his appeal to the Board. On 16th November 1956 the Board quite rightly over-ruled the objection and directed that the appeal be listed for hearing. On 25th June 1957 the petitioner filed the present application for a Writ of Prohibition on the Board. On 28th June 1957 notice was ordered on the respondents. On 12th September 1957 the application came up for hearing before my brother H. N. G. Fernando who reserved the matter under section 48 of the Courts Ordinance for the decision of more than one Judge of this Court. The matter has accordingly come before this Court on an order made by me under section 48A of the Courts Ordinance.

We have no doubt whatsoever that the 1st respondent did not lose his right of appeal when he accepted the cheque sent to him by the petitioner. We cannot escape the feeling that the petitioner paid the amount of compensation he had determined to the 1st respondent in the belief that its acceptance would deprive him of his right of appeal. We can find no other explanation for his conduct in sending the cheque after the appeal had been lodged and, thereafter,

through his spokesman before the Board, raising the objection that the 1st respondent had forfeited his right of appeal by his acceptance of it. The conduct of the petitioner is deplorable.

Learned counsel for the petitioner relied on section 35 of the Act in support of his contention that the Board was precluded from hearing the appeal after the acceptance of the compensation by the 1st respondent. That section provides that where compensation for the acquisition of any land or servitude has been or is deemed to have been paid in accordance with the provisions of the Act no further claim against the Government for compensation for the acquisition shall be allowed.

He argued that the appeal was a claim for further compensation and the Board had no power to allow it even if they formed the conclusion that the 1st respondent's claim should be allowed. We are unable to accept this submission of learned counsel. Section 27 provides that where an award is made under section 16 the acquiring officer shall tender the amount of compensation allowed in the award to each person who is entitled to it and where in appeal the amount of compensation is varied he shall tender the amount determined by the appellate body. If the person entitled to receive compensation consents to receive it when tendered the acquiring officer is required to pay it to him. The section is obscure and does not expressly provide for the case in which the amount of the compensation determined by the acquiring officer in his award under section 16 is paid to a claimant who consents to accept it when tendered as required by that section and thereafter the amount determined by the acquiring officer is increased in appeal. Clearly the Legislature does not intend that the acquiring officer should tender and pay once more the amount he has already paid the claimant on his consenting to accept the amount tendered by him in accordance with his award. Where the acquiring officer has already paid the amount of compensation awarded by him on the claimant consenting to accept it on its being tendered and where the amount of compensation is increased in appeal the acquiring officer need only tender after the decision in appeal the difference between the amount already paid by him and the new amount determined in appeal.

Section 27 does not authorise the acquiring officer, in the event of an appeal, to refrain from tendering the amount determined by him in his award under section 16 and withhold its payment till the decision in appeal where the claimant consents to receive it. He must tender the amount after he has made his award and pay it to the claimant if he consents to receive it regardless of whether there is an appeal or not. In the instant case if the 1st respondent were to succeed in his appeal the acquiring officer need tender to him and pay, if he consents to receive it, only the difference between the amount already paid by him and the amount determined in appeal as sufficient compensation for the land acquired.

We observe that the acquiring officer has deducted from the amount of compensation already paid a certain sum in respect of rates payable by the 1st respondent. Such a deduction is not prescribed in the Act. Only deductions authorised by the Act may properly be made from the compensation payable to a claimant.

We are informed by learned counsel for the petitioner that the present application was in the nature of a test case. We wish therefore to make it clear that in our opinion neither section 35 nor any other section of the Act has the effect of taking away the right of appeal of a claimant under section 20 or precluding the Board from hearing an appeal on the ground that the claimant has accepted the compensation tendered and paid by the acquiring officer, whether such acceptance be with or without qualification. A right of appeal given by statute is not lost by the party on whom it is conferred except where the statute makes express provision in that behalf.

The application is refused with costs which we fix in respect of the 1st respondent at 100 guineas and in respect of the 2nd respondent, the Board, at 75 guineas.

DE SILVA, J.

I agree.

Application refused.

Present : BASNAYAKE, C.J., AND DE SILVA, J.

PETER EDIRIWEERA vs. SARISAPPU WIJESURIYA

S. C. No. 219—*D. C. Hambantota No.* 182

Argued and Decided on : 19th February, 1958.

Public officer—Action for damages—Vel Vidane appointed under Irrigation Ordinance No. 32 *of* 1946,—*Is he a public officer within the meaning of section* 461 *of the Civil Procedure Code.*

Held : That a Vel Vidane appointed under the Irrigation Ordinance No. 32 of 1946 is a public officer within the meaning of section 461 of the Civil Procedure Code.

Per BASNAYAKE, J.—" Although the mode of selection of a vel vidane is election by the majority of registered proprietors of the division [section 25 (1)], he is appointed by the Government Agent [section 25 (4)] and is liable to be retired or dismissed by him (section 26). He has public duties to perform (section 29) and may receive such remuneration for his services as the Government Agent (section 31) may award ".

Cases referred to : *De Silva vs. Ilangakoon*, 57 N. L. R. 457.
Revati Mohan Das vs. Jatindra Mohan Ghosh and others, (1934) A. I. R.
Tampoe vs. Murukasu, 1 Current Law Reports 107.

Sir Lalita Rajapakse, Q.C., with *E. A. G. de Silva*, for the defendant-appellant.

H. W. Jayawardene, Q.C., with *C. V. Ranawaka* and *P. Ranasinghe* for the plaintiff-respondent.

BASNAYAKE, C.J.

That is an action in which the plaintiff seeks to recover a sum of Rs. 918/- as damages from the defendant a vel vidane. The plaintiff's allegation is that he suffered the damages claimed by him in consequence of the defendant's action in " wrongfully and unlawfully in breach of his duty as vel vidane " manipulating the pipes supplying water to the paddy fields irrigated by the Wile-Ela scheme so as to deprive his field known as Bankolothmulla of sufficient water during the Yala season of 1951 and the Maha of 1951-52.

It would appear from the evidence of the Irrigation Engineer who, at the relevant period, was in charge of the Irrigation scheme in which the plaintiff's paddy field is situated that the plaintiff's field was irrigated from a channel known as Wile-Ela which irrigated about 150 acres of paddy fields. The plaintiff complained to him on three or four occasions that his field did not receive sufficient water. He inspected the field and observed that it was true, and he formed the opinion that the plaintiff did not receive enough water because the pipes that fed the water to the fields were not properly operated and that although there was sufficient water to supply all the 150 acres the plaintiff did not get enough on account of the action of the defendant in keeping open, for a full day, certain pipes that should be kept closed for half the day.

The only question that arises for decision on this appeal is whether the defendant who is a vel vidane should have been given notice of this action under section 461 of the Civil Procedure Code. The learned District Judge has found as a fact that notice of action has not been given. He holds as a matter of law that notice of action under section 461 need only be given to a public officer who has acted " in good faith and with an honest intention of getting the law into force ". He further holds that notice of action need not have been given in the instant case as malice is alleged. Learned counsel for the appellant relied on the decision of this Court in the case of *De Silva vs. Ilangakoon*, 57 N. L. R. 457.

Learned counsel for the respondent did not, in view of the decision of this Court in that case, seek to support the learned District Judge's view that notice under section 461 of the Civil Procedure Code was not necessary where malice is alleged ; but he maintained that notice was necessary only in respect of an *act* purporting to be done by a public officer in his official capacity. He submitted that in the instant case plaintiff's complaint was not of an *act* of the defendant but of an omission by him. He further submitted that the word " act " does not in the context of section 461 include an omission. Learned counsel relied on the case of *Revati Mohan Das vs. Jatindra Mohan Ghosh and others*, (1934) A. I. R. Privy Council p. 96. That was an action on a mortgage. One of the defendants was the com-

mon manager of an estate appointed under the Bengal Tenancy Act, 1885. It was contended that the manager, being a public officer, was entitled to notice under section 80 of the Indian Civil Procedure Code and that no such notice having been given the action could not be instituted. The Privy Council observed (pp. 97-98)—

> " Their Lordships do not suggest that a claim based upon a breach of contract by a public officer may not in many cases be sufficient to entitle him to notice under the section, but they are unable for the reasons already given, to agree with the learned Judges that the omission by respondent 1 to pay off the mortgage was such a breach."

The decision of the Privy Council has no application to the instant case where it is clear that it was the act of the defendant in manipulating the water pipes in such a way as to deprive the plaintiff of sufficient water that caused him the damages he claims. The evidence of the Irrigation Engineer leaves no room for doubt that the defendant deliberately left open for a full day pipes which should have been closed for half the day. It is clear the plaintiff suffered injury not through any omission of the defendant but through his deliberate act in keeping open the pipes for a full day when he should have closed them for half the day.

Learned counsel also contended that a vel vidane is not a public officer. He relied on the Irrigation Ordinance No. 32 of 1946. It was decided by this Court in the case of *Tampoe vs. Murukasu*, 1 Current Law Reports 107, that an irrigation headman appointed under Ordinance No. 10 of 1901 is a public officer within the meaning of that expression in section 461 of the Civil Procedure Code. If a vel vidane could properly be regarded as a public officer under the Irrigation Ordinance of 1901 he is more so under the present Ordinance No. 32 of 1946. Although the mode of selection of a vel vidane is election by the majority of registered proprietors of the division [section 25 (1)] he is appointed by the Government Agent (section 25 (4)) and is liable to be retired or dismissed by him (section 26). He has public duties to perform (section 29) and may receive such remuneration for his services as the Government Agent (section 31) may award.

The appellant is entitled to succeed. We allow his appeal with costs and set aside the judgment of the learned District Judge and dismiss the plaintiff's action with costs.

DE SILVA, J.
I agree.

Dismissed with costs.

Present : T. S. FERNANDO, J.

P. H. PREMADASA vs. K. S. DE SILVA, INSPECTOR OF POLICE, PELIYAGODA

S. C. No. 267 *of* 1958—*M. C. Colombo* 48185/C

Argued on : 13th October, 1958.
Decided on : 21st October, 1958.

Penal Code, section 298—*Charge of causing death by driving car rashly—Additional magistrate deciding to try summarily under section* 152 (3) *of the Criminal Procedure Code and recording part of the evidence—Postponement—Trial resumed and continued by another Additional magistrate while Additional magistrate who decided to try summarily holds office—Conviction—Regularity of procedure factors to be taken into consideration before assuming jurisdiction as District Judge.*

The appellant was charged with causing the death of a boy by driving a car rashly, an offence punishable under section 298 of the Penal Code. The Additional Magistrate decided to try him summarily under section 152 (3) of the Criminal Procedure Code on the ground (1) Facts simple (2) More expeditions, and after recording the medical evidence and the evidence of the Examiner of Motor Cars he postponed the trial for another date. The trial was resumed before another of the Additional Magistrates, who after continuing the case for two further dates convicted the accused and sentenced him to two years' rigorous imprisonment. The Additional Magistrate who decided to try summarily held office during the relevant period.

Held : (1) That it was irregular for the Additional Magistrate who convicted the appellant to have acted on the evidence recorded by the Additional Magistrate who decided to try summarily as the former could not be said to have succeeded the latter as indicated by section 292 of the Criminal Procedure Code.

(2) That in deciding whether a Magistrate should assume jurisdiction as a District Judge, the serious nature of the charge is in itself an important factor which must not be lost sight of.

(3) That offences of causing death by rash or negligent acts often involve difficult questions and ordinarily should not be tried summarily by invoking the provisions of section 152 (3) of the Criminal Procedure Code.

Per T. S. FERNANDO, J.—" Middleton, J. in that case* made the following observations which I would respectfully repeat here and which Magistrates can with advantage bear in mind " :—

" I should say that any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of law, fact or evidence, and double theory of circumstances, or any difficult question of intention or identity or in which the punishment ought really to exceed two years is one that is not properly triable summarily. There may of course be other circumstances which would negative the propriety of a summary trial and which will have to be dealt with as they arise."

Cases referred to : *Kandiah vs. D. R. O. Pallai*, (1948) 49 N. L. R. 503.
Silva vs. Silva (1904) 7 N. L. R. 182.

E. F. N. Gratiaen, Q.C., (with him, *E. A. G. de Silva*) for the accused-appellant.
N. Tittawella, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The appellant, a Police constable, has been convicted by the Magistrate on a charge of causing the death of a boy by driving a car rashly, an offence punishable under section 298 of the Penal Code and sentenced to undergo two years' rigorous imprisonment, the Magistrate observing that he had no power to impose any sentence in excess of that term. Learned counsel on his behalf has canvassed the correctness of the conviction on facts, but, in view of two procedural defects which are indicated below and the order I propose to make on this appeal, it is neither necessary nor desirable that I should express any opinion here on the disputed questions of fact.

The first irregularity in procedure arose in the following circumstances. After a report in terms of section 148 (1) (*b*) of the Criminal Procedure Code had been filed in court by the Police, the Additional Magistrate before whom this case came up, acting under the provisions of section 152 (3) of the same Code, decided on 15th January 1958 to try the offence summarily. The medical evidence and the evidence of the Examiner of Motor Cars was recorded by this Magistrate on 5th February 1958 and the trial was postponed for 26th February 1958. No evidence was recorded on the day for which the case was postponed, and on 18th March 1958 the trial was resumed before another of the Additional Magistrates and continued on the 20th of March and the 25th of March. The appellant was convicted on the 25th of March and the reasons for the conviction were pronounced on the following day. It is not disputed that the Magistrate who decided to try the case summarily held the office of Additional Magistrate from 4th July 1957 till 2nd June 1958. In view of this circumstance it does not appear that the Additional Magistrate who convicted the appellant can be said to have succeeded the Additional Magistrate who decided to try the case summarily so as to enable the former to act on the evidence recorded by the latter as indicated in section 292 of the Criminal Procedure Code.

The second irregularity in procedure relates to the very decision to try the case summarily. The reasons for the Magistrate's decision to try the case summarily have been set down as " 1. Facts simple ; 2. More expeditious." As Nagalingam, J. observed in *Kandiah vs. D.R.O. Pallai*, (1948) 49 N. L. R. 503 it should be remembered that the simple character of the facts and law involved in a case are not the only factors which govern a decision as to whether a Magistrate should assume jurisdiction as a District Judge. The serious nature of the charge is in itself an important factor which must not be lost sight of. The learned Magistrate does not seem to have given his mind to this aspect of the question. In fact the sentences imposed by him show that he regarded the offences as very grave ones." I am informed that there is no reported case in which this Court has expressed an opinion that an offence punishable under section 298 of the Penal Code may properly be tried summarily. Prior to the enactment of Ordinance No. 13 of 1938 this offence was triable only by the Supreme Court, and it was only by the amendment introduced by section 41 (7) of that Ordinance that even a District Court was empowered to try this offence. I do not think it reasonable to infer that the legislature in 1938 contemplated the probability of the average case of manslaughter by rashness or negligence being tried summarily by a Magistrate. Offences of causing death by rash or negligent acts often involve difficult questions and ordinarily should not, in my opinion, be tried summarily by invoking the provisions of section 152 (3) of the Criminal Procedure Code. This

* Sec. 7 N. L. R. 182.

very case demonstrates the undesirability of a summary trial in cases of this nature. The identity of the driver of the motor vehicle at the time of the accident and the circumstances in which the accident is said to have occurred were questions in dispute between the parties and, as the protracted trial shows, were not capable of speedy determination.

The decision to try the case summarily appears to have flowed from a perusal by the learned Magistrate of the Police report filed in the case. I have perused this report myself and fail to find anything therein from which the Magistrate could reasonably have inferred that the facts were simple or that the case could be disposed of expeditiously.

In the old case of *Silva vs. Silva* (1904) 7 N. L. R. 182 this Court held that the purpose of recording the reasons for the Magistrate's opinion that the offence may properly be tried summarily by him was to enable this Court to be satisfied as to the validity of the opinion and the propriety of the assumption of jurisdiction. Middleton, J. in that case made the following observations which I would respectfully repeat here and which Magistrates can with advantage bear in mind :—

> " I should say that any case which cannot be tried shortly and rapidly in point of matter and time, which involves any complexity of law, fact or evidence, and double theory of circumstances, or any difficult question of intention of identity or in which the punishment ought really to exceed two years is one that is not properly triable summarily. There may of course be other circumstances which would negative the propriety of a summary trial and which will have to be dealt with as they arise."

Applying the tests above indicated I have no doubt that this was not a case that was properly triable summarily. As happens not infrequently, the short cut adopted has failed in its purpose. I would set aside the conviction, and direct that non-summary proceedings be taken in this case. In view of the length of time that has elapsed since the date of the offence it is hoped that the non-summary proceedings will be completed with expedition.

Set aside.

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

PERERA vs. PERERA AND OTHERS

S. C. No. 398—*D. C. (F) Gampaha No.* 147/*G & C*

Argued on : 4th, 5th and 6th November, 1958.
Decided on : 12th December, 1958.

Minor—Application by guardian for permission of court to sell minor's immoveable property—Permission granted with a further direction that if guardian failed to execute transfer " after moneys are deposited, then the Secretary is authorised to sign the transfer "—Is such an order valid—Civil Procedure Code, section 332,—*When is it applicable.*

Held : (1) That a guardian who seeks the authority of the Court to sell immovable property belonging to a minor is not bound to sell once the authority is granted.

(2) That the fact that the guardian, having completed negotiations to sell a minor's immovable property, obtains the authority of the Court gives the Court no authority to compel him to sell any more than it has authority to compel the purchaser to buy.

(3) That there is no provision of the Civil Procedure Code which authorises a Judge to make an order to the effect that if the guardian of the minor failed to execute the transfer, the Secretary of the Court should execute it.

(4) That section 332 of the Civil Procedure Code does not apply to an application by a guardian for authority to sell immovable property belonging to a minor.

Cases referred to : *Mustapha Lebbe vs. Martinus*, 6 N. L. R. 364.
Girigorishamy vs. Lebbe Marikar, 30 N. L. R. 209 (three Judges).

C. D. S. Siriwardene, for the 3rd respondent-appellant.

N. E. Weerasooria, Q.C., with *Carl Jayasinghe* and *S. D. Jayasundera*, for the purchaser-respondent.

BASNAYAKE, C.J.

This is an appeal by the mother of two minor children who is also their guardian *ad litem* in the proceedings in which this appeal is preferred. The appellant and her husband, the petitioner-respondent, gifted to their two minor children by deed No. 39883 of 26th March 1954 a land known as Ambagahalanda in extent 17 acres 2 roods and 24 perches. This gift was subject to the life interest of the donors and a mortgage in favour of Olive Sylvia de Alwis Seneviratne of Thalgasmote, Veyangoda. The life interest of the donors was first leased and later sold by deed No. 4868 of 30th July 1955.

On 21st December 1955 the father of the minors applied to the District Court for authority to sell the land by private treaty and pay off the principal and interest due on the mortgage and deposit the balance of the proceeds of sale in Court. The minor children were named as respondents and their mother was appointed guardian *ad litem* and their father curator. The Court granted permission to sell the land for Rs. 30,000/- to one U. P. Jan Singho (hereinafter referred to as the purchaser), who was willing to buy the land for Rs. 30,005/- and take upon himself all burdens and liabilities in respect of the land upon payment to him of a sum of Rs.15,000/- for the payment of certain liabilities in respect of the land specified by him.

On 16th March 1956 the learned District Judge made the following order :—

> " Issue deposit order in favour of U. P. Jan Singho to deposit in court the sum of Rs. 15,005/- for the credit of the minors the 2nd and 3rd respondents, by 27/3. Petitioner to execute a transfer of the land described in the schedule to the petition subject to all mortgages, leases and encumbrances of whatsoever nature and kind on or before 20/4. If petitioner does not do so after moneys are deposited then the Secretary of this Court is authorised to sign the transfer."

On 19th March 1956 the sum of Rs. 15,005/- was deposited in the Kachcheri and on 20th March 1956 the receipt was produced in Court.

On 2nd May 1956 the purchaser moved the Court for an order on the Secretary of the District Court to execute the deed of transfer, and the Secretary was directed to do so and a transfer was accordingly executed.

On 6th April 1957 the mother of the minors applied through her proctor to have the order directing the Secretary to execute the deed of transfer set aside. The learned Judge after hearing counsel on behalf of the parties refused the application. This appeal is from that order.

Now in the instant case the minors were the owners of the land in question by virtue of the gift they had received from their parents. A sale of immovable property of which they are owners either by them or by their guardian without the authority of the District Court does not bind them (*Mustapha Lebbe vs. Martinus*, 6 N. L. R. 364 ; *Girigorishamy vs. Lebbe Marikar*, 30 N. L. R. 209 (three Judges).

The question that arises for decision in this case is whether a guardian who seeks the authority of the Court to sell immovable property belonging to a minor is bound to sell once the authority is granted. I am of opinion that a guardian like any other vendor of immovable property cannot be compelled to sell a minor's immovable property merely because he has negotiated a sale of it. The fact that the guardian having completed negotiations to sell a minor's immovable property obtains the authority of the Court, gives the Court no authority to compel him to sell any more than it has authority to compel the purchaser to buy.

The Court was wrong in making the order to the effect that if the guardian of the minors, their father, failed to execute the transfer the Secretary should execute it. There is no provision of the Civil Procedure Code which authorises a Judge to make such an order. The only section of the Code which authorises a Court or an officer appointed in that behalf to execute a conveyance

is section 332. That section does not apply to an application by a guardian for authority to sell immovable property belonging to a minor. It applies only to a case where a decree commanding a person to grant, convey, or otherwise pass from himself any right to, or interest in, any property as provided in section 217 (D) of the Code has been entered and the judgment-debtor neglects or refuses to comply with such decree (s. 331).

In the instant case the learned Judge does not purport to act under sections 331 and 332 nor has there been even an attempt to adopt the procedure prescribed in those sections. The former section provides that if the decree is for the execution of a conveyance and the judgment-debtor neglects or refuses to comply with the decree, the decree-holder may prepare the draft of a conveyance and apply to the Court by petition to have the draft served on the judgment-debtor. And in terms of the latter section the Court is required thereupon to cause the draft and a copy of the petition to be served on the judgment-debtor through the Fiscal together with a notice in writing stating that his objections, if any, thereto should be made within the time fixed by the Court in that behalf and will be considered and determined on a date to be named in the notice. The decree-holder is also required to tender a duplicate of the draft to the Court for execution, supplying a stamp of the proper amount if a stamp is required by law. It is only on proof of such service that the Court or such officer as it appoints in that behalf is empowered on the appointed day, if no objections are made, to proceed to execute the duplicate so tendered.

It is not necessary to discuss the cases cited by learned Counsel for the parties to this appeal as the law applicable has been examined with reference to the Roman-Dutch Law writers and the previous decisions of this Court in the two cases cited above.

The appeal of the appellant is allowed with costs both here and below, and the order of the learned District Judge authorising the Secretary of the District Court to execute a conveyance on behalf of the minors is set aside.

PULLE, J.

I agree.

Set aside.

Present : BASNAYAKE, C.J., AND SINNETAMBY, J.

SILVA vs. PELIS

S. C. No. 89—*D. C. Hambantota, No. L.* 462

Argued and Decided on : 29th August, 1958.

Jurisdiction—Action for enforcing agreement to sell land—Can the Court within the local limits of whose jurisdiction the land is situate, hear and determine such action when defendant resides and agreement sought to be enforced was executed outside its jurisdiction—Civil Procedure Code, section 9 (*b*).

Agreements to sell land were executed at Dondra, where the defendant resides, a place within the local limits of jurisdiction of the District Court of Matara. The land which is the subject matter of the agreement is situated within the jurisdiction of the District Court of Tangalle. The District Judge of Tangalle sits at Hambantota where this action was instituted.

A preliminary objection to the jurisdiction of the Court was taken and the learned District Judge held that the Court had jurisdiction to hear and determine the action as it was an action in respect of land within the meaning of section 9 (*b*) of the Civil Procedure Code. The defendant appealed.

Held : That the action was not one in respect of land and therefore did not fall within the ambit of section 9 (*b*) of the Civil Procedure Code. The District Judge of Tangalle sitting at Tangalle or at Hambantota had no jurisdiction to try the action.

H. W. Jayawardene, Q.C., with *G. T. Samarawickreme* and *N. R. M. Daluwatte* for the defendant-appellant.

E. B. Wikremanayake, Q.C., with *V. J. Martyn* for the plaintiff-respondent.

BASNAYAKE, C.J.

This is an action to enforce two agreements to sell, No. 15346 of 30th March 1940 and No. 15494 of 5th June 1940. Each agreement is to sell ten acres out of the lot that would be allotted to the promissors in D. C. Tangalle Partition Action No. 3199. It is sufficient to quote the terms of the first of them which are as follows :—

" This is the Agreement to sell entered into on the 30th day of March, 1940, between Samararatnappuli Kodikara Kankanage Podihamy Weerasinghe Magam Pattuwe Vidana Aratchige Siyoris Pelis and Samararatnappuli Kodikara Kankanage Podihamy Weerasinghe Magam Pattuwe Vidana Aratchige Gunawathie all of Dondra in Wellaboda Pattu of Matara being parties of the first part and Kalubadanage Nadoris Silva of Nakulugamuwa in West Giruwa Pattu of Hambantota District being party of the second part.

" The party of the first part do hereby agree to transfer ten acres extent to the party of the second part within two months of the entering of the final Decree in case No. 3199 of the District Court of Tangalla from the lot that would be allotted to the first party out of the subject matter in the said case and described in the schedule below for a sum of Rupees Four Hundred (Rs. 400/-) and subject to the condition herein contained and further that the ten acres extent hereby agreed to be sold be surveyed by a Surveyor and a Plan thereof be made.

" Conditions above referred to

" That out of the consideration Rs. 400/- a sum of Rs. 200/- be paid at the execution of these presents and the balance Rs. 200/- be paid at the time of signing the transfer deed in favour of the party of the second part.

" That the party of the first part shall pay survey fees, assessment charge and all other costs due in the said case No. 3199 in respect of the said premises.

" That survey fees for surveying and preparing a plan of the said ten acres be also paid by the party of the first part.

" And that the parties of the first and second parts do hereby for themselves, their heirs, executors, administrators and assigns firmly bind for due performance of the condition herein contained."

The plaintiff instituted this action at Hambantota and he averred in his plaint that during the pendency of Partition Case No. 3199 in the District Court of Tangalle, the defendant Weerasinghe Magam Pathuwe Vidana Arachchige Siyoris Pelis, his sister Gunawathie, and Samararatnappuli Kodikara Kankanage Podihamy by deeds Nos. 15346 and 15494 dated 30th March 1940 and 5th June 1940 respectively agreed to transfer to the plaintiff a total extent of 20 acres out of the lot that would be allotted to them on the Final Decree within two months of its being entered. Final Decree in the Partition Action was entered on 24th November 1954 and the defendant was allotted lot P in extent 46 acres and 34 perches. The plaintiff had requested the defendant to execute a transfer and convey to him the extent of 20 acres out of the extent allotted to him but the defendant had failed and neglected to comply with his request. The plaintiff says that a cause of action has accrued to him to sue the defendant for a decree ordering him to execute a transfer in his favour in respect of 20 acres of the land in question, and on the failure of the defendant to do so prays that the Court be pleased to execute a deed in his favour conveying 20 acres out of the said land.

As a preliminary issue the question of jurisdiction of the Court was tried. The following was the issue that was framed :—" Has this court jurisdiction to hear and determine this action ? " The learned District Judge held that the Court had jurisdiction to entertain the action on the ground that it fell within the ambit of section 9 (*b*) of the Civil Procedure Code. This is not an action in respect of land. It is an action for the enforcement of an agreement to

sell land. In the instant case the agreement was executed at Dondra where the defendant resides, a place outside the jurisdiction of the District Court of Tangalle. Hambantota where this action has been instituted is a place at which the District Judge of Tangalle sits. A Court has jurisdiction to try an action where within the local limits of its jurisdiction—

(*a*) a party defendant resides, or

(*b*) the land in respect of which the action is brought lies or is situate in whole or in part, or

(*c*) the cause of action arises, or

(*d*) the contract sought to be enforced was made.

The District Judge of Tangalle sitting either at Tangalle or Hambantota therefore had no jurisdiction to try this action.

We accordingly allow the appeal with costs in both Courts. The plaintiff's action will stand dismissed.

SINNETAMBY, J.

I agree.

Appeal allowed.

Present : H. N. G. FERNANDO, J.

M. ANULAWATHIE PERERA AND MIRISSAGA WILSON FERNANDO vs. C. M. GRERO, INSPECTOR OF POLICE, COLOMBO

S. C. Application 235, 1958
In the matter of an application in Revision in M. C. Colombo South Case No. 80505

Argued on : 12th November, 1958.

Decided on : 11th December, 1958.

Surety—Absence of accused on trial date—Notice on surety to show cause why bond should not be forfeited—Surety's statement that accused remanded in a case pending against him elsewhere—Order forfeiting bond on the ground that surety should have informed court of the remand on trial date—Obligations of a surety. Criminal Procedure Code, Section 411.

The petitioner entered into a bond as surety for the appearance of an accused person in Court. On the trial date, *viz.*, 2-6-58, the accused was absent and the Court noticed the petitioner to show cause why her bond should not be forfeited. She stated that the accused had been remanded on 2-6-58 in a case pending against him in the Magistrate's Court of Puttalam. Without holding that this statement was false, the learned Magistrate made order forfeiting Rs. 1,000/- out of the security furnished by her.

Held : That, in the circumstances, the order of forfeiture was wrong, as the failure of the accused to appear on the 3rd June was due to causes beyond his control and not attributable to any desire on his part to evade trial. There is no default of the accused for which the surety can be held responsible.

Per H. N. G. FERNANDO, J.—" If the Magistrate meant that the petitioner should have been present herself on June 3rd in order to furnish information as to the whereabouts of the accused, I think the answer is that a surety does not undertake any such obligation. The obligation of a surety relates to the appearance of the accused person on the due date, and the surety's bond must be forfeited if no good cause is shown for the failure of the accused to appear."

E. A. G. de Silva, in support.

M. Hussein, Crown Counsel, for the respondent.

H. N. G. FERNANDO, J.

The petitioner had entered into a bond as surety for the appearance of the accused in Case No. 80505 M.C. Colombo South. The case had been fixed for trial on 3rd June 1958. The accused failed to appear on that date, and the Magistrate forthwith issued a Warrant for the arrest of the accused and also noticed the petitioner. On 6th June, the petitioner appeared and was asked to show cause why her bond should not be forfeited. She then stated that the accused had been remanded on 2nd June 1958 in a case pending against him in the Magistrate's Court of Puttalam : her position presumably was that the accused's failure to appear on 3rd June was due to the fact that he had on the previous day been remanded into custody at Puttalam. The Magistrate does not hold that the petitioner's allegation was false, but he considers that the petitioner should have informed him of the remand so that he might have issued notice on the Jail authorities at Puttalam to produce the accused before him. On this latter ground, the Magistrate has forfeited Rs. 1,000/- out of the security furnished by the petitioner.

With respect, I think the Magistrate has taken an unrealistic view of the matter. If he meant that he should have been informed of the Puttalam remand in time to enable him to secure the attendance of the accused on the fixed date of trial (June 3rd, 1958), that was expecting the impossible : the Puttalam remand is stated to have been ordered only on 2nd June. If the Magistrate meant that the petitioner should have been present herself on June 3rd in order to furnish information as to the whereabouts of the accused, I think the answer is that a surety does not undertake any such obligation. The obligation of a surety relates to the appearance of the accused person on the due date, and the surety's bond must be forfeited if no good cause is shown for the failure of the accused to appear. In other words, *the surety guarantees only the conduct of the accused, and not his own conduct.* If the conduct of the accused, namely his failure to appear, is excusable, then there is no default of the accused for which the surety can be held responsible.

Upon the facts stated to the Magistrate on June 6th by the petitioner, which were not contradicted either before him or in this Court, the failure of the accused to appear on 3rd June was due to causes completely beyond his control and was not attributale to any desire on his part to evade trial in the Colombo case. That being so, there was no default on his part for which the petitioner was vicariously liable. I would therefore quash the order of forfeiture made against the petitioner.

Order quashed.

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

THURAISINGHAM AND ANOTHER vs. KANAGARATNAM AND OTHERS

S. C. No. 794—D. C. Jaffna, No. 10875

Argued and Decided on : 15th February, 1957.

Civil Procedure Code, sections 325 and 377 (b)—Petition for obstruction to Fiscal—What order Court should make—Inquiry after Interlocutory order—Burden of proving obstruction or resistence—Does section 371 (b) cast any burden on judgment—debtor before petitioner proves his case.

Held : (1) That a Judge making an order under sections 325 and 377 of the Civil Procedure Code must indicate in his order that he has considered the evidence exhibited or adduced and that he is satisfied that the material facts of the petition are *prima facie* established and that he is of opinion that on the footing of these facts the petitioner is entitled to the remedy or to the order in his favour.

(2) That at the hearing of the petition after the interlocutory order the judgment-creditor is not relieved of the burden of satisfying the Court that the obstruction or resistance complained of was occasioned by the judgment-debtor or by some person at his instigation.

(3) That section 377 (*b*) does not cast the burden on the judgment-debtor, nor has it the effect of imposing on him the burden of leading evidence to the contrary before the judgment-creditor has proved his case.

R. Manikkavasagar, for 5th and 6th defendants-appellants.
S. Sharvananda, for plaintiffs-respondents.

BASNAYAKE, C. J.

This is an appeal by the 5th and 6th respondents to an action under section 325 of the Civil Procedure Code. The allegation is that when the writ officer went to execute the writ the 5th and 6th respondents, who are the son and wife respectively of the judgment debtor, pushed the writ officer out of the premises and prevented him from delivering possession thereof. At the hearing of the petition under section 325 of the Civil Procedure Code, the learned trial Judge ruled " that the onus is on the 5th and 6th respondents ". It is not clear what he had in mind when the learned Judge made this order. Section 325 of the Civil Procedure Code provides that a petition under that section should be dealt with by the Court in accordance with the alternative (*b*) of section 377. That section read with section 325 provides that in the matter of a petition under section 325 if the Court is satisfied on the evidence exhibited or adduced that the material facts of the petition are *prima facie* established, and is of opinion that on the footing of those facts the petitioner is entitled to the remedy, or to the order in his favour, for which the petition prays then the Court shall accordingly make an interlocutory order appointing a day for the determination of the matter of the petition, and intimating that the respondent will be heard in opposition to the petition if he appears before the Court for that purpose on the day so appointed.

The order of the Judge does not show that he considered the evidence exhibited in the affidavit and was satisfied that the material facts were *prima facie* established and was of opinion that on the footing of those facts the petitioners were entitled to the remedy they sought, for his order reads :

" Order "

" (1) Vide order of 28-2-55 and J.E. of 20-5-55.

(2) Enter Interlocutory Order under Section 377 (*b*) and issue returnable 1-7-55."

A Judge making an order under section 325 must indicate in his order that he has considered the evidence exhibited or adduced and that he is satisfied that the material facts of the petition are *prima facie* established and that he is of opinion that on the footing of those facts the petitioner is entitled to the remedy, or to the order in his favour.

At the hearing of the petition after the interlocutory order the judgment-creditor is not relieved of the burden of satisfying the Court that the obstruction or resistance complained of was occasioned by the judgment-debtor or by some person at his instigation. Section 377 (*b*) does not cast that burden of the judgment-debtor nor has it the effect of imposing on him the burden of leading evidence to the contrary before the judgment-creditor has proved his case.

The only evidence called by the judgment-creditor alleging the obstruction is the evidence of the Udaiyar who stated in cross-examination that the 5th and 6th respondents obstructed him, but there is no evidence to show that they did so at the instigation of the judgment-debtor. The relationship of the 5th and 6th defendants-appellants to the judgment-debtor may give rise to a suspicion that they resisted at his instigation ; but in a proceeding under section 325 it is not sufficient to create a suspicion. It must be established by evidence that the resistance was occasioned by them at the instigation of the judgment-debtor. There is no such evidence in the instant case.

We therefore set aside the order committing the 5th and 6th defendants-appellants to jail and allow the appeal : but without costs.

PULLE, J.

I agree.

Appeal allowed.

Present : BASNAYAKE, C.J., PULLE, J., AND DE SILVA, J.

HERATH vs. THE ATTORNEY-GENERAL AND ANOTHER

S. C. 152—*D. C. Colombo* 7184

Argued on : December 5, 9, 10, 11, 13, 19, and 20, 1957.
Decided on : March 6, 1958.

Land Redemption Ordinance, No. 9 *of* 1942—*Sections* 3 (1) (b), 3 (4), 3 (5), 5 (1)—*Land acquisition Act, No.* 9 *of* 1950, *Sections* 5, 6, 36, 37, (a), 62 (1)—*Acquisition of land without authority—Minister's declaration—Its validity—Can it be questioned in a suit against the Attorney-General—When is a determination by the land Commissioner not final '—Meaning to be given to the expression ' conclusive evidence in Section* 5 (2) *of the Land Acquisition Act—Evidence Ordinance, Section* 4 (3).

Paraveni Nilakaraya—Nature of his rights and those of a nindalord—Service Tenures Ordinance. Sections 24 *and* 25.

Resjudicata—Distinction between our law and the English law—Scope of this doctrine in our law

Plaintiff's failure to appear in court—Decree nisi made absolute—Does such decree operate as res judicata—Civil Procedure Code sections 34, 84, 184, 188, 206, 207, *and* 406.

Held : (1) That a ' paraveni nilakaraya ' is not the owner of his holding. His *nindalord* is the owner.

(2) That the Land Commissioner had no authority under Section 3 (1) (*b*) of the Land Redemption Ordinance No. 9 of 1942 to acquire lands transferred by a ' nilakaraya ' in satisfaction of a debt due on a mortgage of his rights in such holding.

(3) That the Land Commissioner's decision that the lands so sold should be acquired is not final within the meaning of section 3 (4) of the Ordinance, as he has, by a wrong construction of the expression " owner " and " land " in section 3 (1) (*b*), given himself a jurisdiction he did not have.

(4) That where there is no valid determination by the Land Commissioner, the Minister can make no declaration under section 5 (1) of the Land Acquisition Act as modified for the purposes of the Land Redemption Ordinance and, therefore the declaration he has made in respect of the lands is a nullity and does not have the conclusiveness given by Section 5 (2) to a valid declaration. Consequently, the legality of such a declaration can be questioned in a suit filed against the Attorney-General.

(5) That the publication of a void order under section 36 of the Land Acquisition Act authorising the acquiring officer to take possession of a land does not have the effect of vesting that land in Her Majesty as provided in section 37 (*a*) of the Act.

(6) That a decree absolute dismissing an action under section 84 of the Civil Procedure Code does not operate as *res judicata*.

[The majority view expressed in Samichi vs. Peiris 16 N. L. R. 257 that Section 207 and similar Sections of the Civil Procedure Code do not embody the whole law as to res judicate in Ceylon disapproved.]

(1) *Per* BASNAYAKE, C.J.—" Apart from legal concepts even laymen in the Kandyan provinces will not regard the *nilakaraya* as the owner of the *nindagama* The difference between ownership and possession is so clearly ingrained in the minds of the people in the Kandyan Provinces that the lands of a *nindagama* are spoken of as lands of the *nindalord* and not of the nilakaraya. They would speak of *nindagama* lands as lands belonging to the Dalada Maligawa or Sri Maha Bodhi or Ridi Vihare or to such and such a family ".

(2) Though, where the statute does not require that a declaration should contain a caption, an incorrect caption to a declaration which is legal in all respects, does not vitiate such a declaration, it is important that public functionaries charged with the responsibility of making statutory declarations, especially when they have far reaching consequences, should exercise extreme care in making them and they should not leave room for the impression that the declarant failed to give his mind to the document he was signing. For if it can be established that the declarant signed a document of the contents of which he was not aware he cannot be said to have discharged the function entrusted to him by the statute.

(3) This Court has always regarded the requirement that a publication should be made in English, Sinhalese and Tamil as imperative. Failure to publish in all three languages has been regarded as vitiating the publication.

For a brief reference to the system of land tenure under the Kandyan Kings See p 88—90

H. V. Perera, Q.C., with *G. T. Samarawickrame*, and *G. L. L. de Silva*, for the Plaintiff-Appellant.

V. Tennakoon, Senior Crown Counsel, with *A. Mahendrarajah, Crown Counsel*, for the 1st Defendant-Respondent.

T. P. P. Goonetilleke, with *S. Sharvananda*, and *R. D. B. Jayasekera*, for the 2nd Defendant-Respondent.

BASNAYAKE, C.J.

It was agreed at the hearing of this appeal that the decision on the questions of law which are common to this appeal and the appeal in the case of *Ladamuttu Pillai vs. Attorney-General and others* (S.C. Minitues of 31-1-58)* which was argued earlier should be regarded as equally binding in this case. As the judgment in that case was delivered on 31st January last, only the following questions need be decided for the purposes of this appeal :—

(*a*) whether a praveni nilakaraya is the owner of the lands comprised in his share of the praveni panguwa within the meaning of the expression " owner " in section 3 (1) (*b*) of the Land Redemption Ordinance, No. 61 of 1942,

(*b*) whether the legality of a declaration by the Minister under section 5 (1) of the Land Acquisition Act, No. 9 of 1950, as modified for the purpose of the Land Redemption Ordinance, can be canvassed by way of a suit against the Attorney-General,

(*c*) whether the plaintiff is precluded by the Order of the Minister under section 36 of the Land Acquisition Act from seeking the relief he claims, and

(*d*) whether the dismissal on 23rd October, 1953, of the plaintiff's action No. L. 3632 against the Land Commissioner and the Assistant Government Agent, Nuwara Eliya, in the District Court of Kandy, operates as *res judicata* and bars this action.

In the instant case no oral evidence was led by either side at the trial. The plaintiff and the Attorney-General the 1st defendant, who will hereinafter be referred to as the Attorney-General, by agreement tendered without proof the documents on which they relied. The trial proceeded on the pleadings, the admissions of Counsel, and the documents relied on by the parties.

The material facts are as follows : The 2nd defendant P. B. Attanayaka of Dumunumeya in Hanguranketa was one of the praveni or paraveni nilakarayas of the kapu panguwa belonging to the Pattini Dewale of Hanguranketa. His share of the panguwa consisted of the two lands, described in the Schedule to the plaint, of a total extent of 2 acres 1 rood and 27 perches.

On 26th May, 1926, by 1D4 he mortgaged as security for a loan of Rs. 1,500/- to Udawattege Don Allis Perera Appuhamy (hereinafter referred to as Allis Perera) a field Walliwela kumbura and a highland Huludorawatta. His rights in those lands were thus described in the deed—

I, the undersigned Attanayaka Kapugeder aMantilaka Mudiyanselage Punchi Banda Attanayake, Kapurala of Damunumeya in Diyatilaka Korale of Udahewaheta by right of purchase upon the annexed deed of transfer No. 1112 dated 9-12-1909 and attested by E. D. W. Siebel, Notary Public, (bearing Registration References G. 83/255-256 0. 16/338, 339) *being in possession of*

(1) All that field Walliwela kiyana kumbura.....
(2) All that land called Huludorawatta.....

On 5th March, 1931, by 1D5 the 2nd defendant transferred to Allis Perera, the mortgagee in consideration of a sum of Rs. 2,400/- being the amount of the principal and the accrued interest on the mortgage debt the two lands mortgaged by him and which he again described as lands possessed by him by virtue of the deed referred to in 1D4. Allis Perera gifted Walliwela kumbura and Huludorawatta to his daughter Florence Letitia Premawathie Gunasekara (P26). She sold them to Daluwattage Solomon Sumanaweera (P25) who sold them to the plaintiff (P21) on 28th October, 1946.

On 14th March, 1947, the plaintiff was directed by a notice under section 7 (1) of the Land Redemption Ordinance (P1) signed by an Assistant Land Commissioner to furnish to the Land Commissioner a return. The notice reads as follows :—

You are hereby directed under section 7 (1) of the Land Redemption Ordinance, No. 61 of 1942, to furnish to the Land Commissioner before the (29th) Twenty-ninth day of March, 1947, a return, on the form sent

*55 C. L. W. p. 59.

herewith, in respect of the land known as (1) Walliwela Kumbura and (2) Huludorawatta situated in the village of Hanguranketa in Diyatilake Korale of Uda Hewaheta in the District of Nuwara Eliya, Central Province.

2. Please attach to the return a plan of the land to enable the verification of such extent of the land as may be mentioned in the return.

3. If the space in the form sent herewith is found to be insufficient, the entry of the particulars should be continued in an annex.

4. The return should be sent to the abovementioned office in an envelope addressed to the Land Commissioner and marked with the letters " L.R.O."

5. It should be noted that section 7 of the afore-said Ordinance provides that any person who, when required to furnish a return, or any information or explanation, or any evidence under that section, fails or refuses to furnish such return, information, explanation or evidence, or knowingly furnishes a return containing any particulars which are false or any information or explanation which is false, shall be guilty of an offence and shall on conviction be liable to be a fine not exceeding one hundred rupees.

6. If you have any objections to the acquisition of the said land, please state your objections in writing.

He complied with the Assistant Land Commissioner's notice and in forwarding the return on 22nd March, 1947, wrote the following letter :—

With reference to your letter No. L.R.O./A.P.L. 1736 of the 14th instant, I return herewith the form in duplicate sent therewith duly completed together a copy of the registers of encumbrances and rough sketch showing the position of the lands as I possess on other plans.

I strongly object to the acquisition of these lands on the following grounds.

1. Though these lands are purchased in my name they are held by me in trust for my brother W. B. Herath. Half of the purchase money was supplied by him. On receipt of the balance I have to transfer the lands to him. At present all the members of my family are resident together in my house. After my brother marries in the near future he wishes to live separately by putting up a house on these lands. My said brother owns no other immovable property.

2. According to the encumbrances I do not think that the original owner is capable of maintaining these properties.

In the event of a compulsory acquisition I claim on behalf of my said brother Rs. 5,000/- at which the lands were purchased plus all costs incurred, up to date.

On 16th January, 1950, he received the following notice signed by a Government Surveyor (P3) :—

" I, P. Arampu, being a person acting under the written authority of Mr. A. C. L. Abeyesundere, Assistant Land Commissioner, do hereby give you notice, that I shall on the 25th day of January, 1950, at 8 a.m. enter the above-mentioned land together with servants and workmen and do all such acts as may be necessary for the purpose of making a survey of that land. I therefore request you or your representative to be present at the survey of the land and to make to me such representations regarding the survey of the land as you may desire.

You are requested to meet me at the above-mentioned land at 8 a.m. on the said date to point out the land to me. "

Thereupon on 28th February, 1950, the plaintiff wrote to the Land Commissioner the letter P4 which is as follows :—

" With reference to your memo No. L.R.O./A.P.L. 1735 of the 14th March, 1947, I beg to lay the following facts for your kind and sympathetic consideration :

The Forms in duplicate referred to in the above memo of yours were duly perfected and forwarded to your address together with the Register of Encumbrances, a rough Sketch, of the property, and my objection to the acquisition of the said land under registered post on the 22nd March, 1947, but no acknowledgment has been made.

Further in 1948, I interviewed your honour and explained that this property belongs to " Pathini Dewale " of Hanguranketha which is subject to the " Rajakariya " of the Buddhist Temporalities Society, which is clearly proved by the two Documents I handed over to your honour at the interview.

On the consultation with my Council he too advised me that the Redemption Ordinance does not apply on the properties of the Buddhist Temporalities Society.

Furthermore let me mention you Sir, that this Claimant is owning some more properties of his own.

It was not queried up this date and on the 16th of January last the said land was surveyed by a Government Surveyor named Mr. P. Arampu.

I shall be very much grateful to you if you will kindly cause an Investigation and enlighten me on the subject as to why it was surveyed.

Thanking you in anticipation of an early reply. "

The documents referred to in the above letter are the Public Trustee's acknowledgment of the notice required to be given under section 27 of the Buddhist Temporalities Ordinance in respect of any transfer of interest in any temple land. They read as follows :—

(P7)

To : Sirimalwatte Heratmudiyanselage Ran Banda Herath Damunumeeya, Hanguranketa.

The receipt is hereby acknowledged of your notice dated 19th November, 1946, under section 27 of the Buddhist Temporalities Ordinance, Chapter 222, relating to the transfer in your favour subject to services to the Hanguranketa Pattini Devale of the paraveni

pangu tenant's interest in the land called Walliwela, situated at Hanguranketa in the District of Nuwara Eliya.

Colombo, December 21, 1946.

(P8)

To : Sirimalwatte Heratmudiyanselage Ran Banda Herath Damunumeeya, Hanguranketa.

The receipt is hereby acknowledged of your notice dated November 19, 1946, under section 27 of the Buddhist Temporalities Ordinance, Chapter 222, relating to the transfer in your favour subject to services to the Hanguranketa Pattini Devale of the paraveni pangu tenant's interest in the land called Huludorawatta situated at Damunumeya in the District of Nuwara Eliya.

Colombo, December 21, 1946.

The following letter (P5) was received from the Acting Land Commissioner in reply to P4 :—

With reference to your letter dated 28-2-50, I have the honour to inform you that the land in question has been surveyed for acquisition for the purposes of the above Ordinance.

2. Please furnish detailed particulars of the properties which belong to the applicant.

On the receipt of letter P5 the plaintiff appears to have consulted his lawyers. On 15th November, 1950, the plaintiff's proctor wrote the following letter to the Land Commissioner :—

(P9)

With reference to your letter of the above number dated the 11th instant, I have been instructed by my client Mr. R. B. Herath to inform you that he objects to the acquisition of the lands claimed by the applicant on the ground that the applicant is the owner and is possessed of the following lands :—

1. Weuliyaddewatte in which the applicant resides at present

2. Weuliyadde Kumbura which adjoins land No. 1

3. Weuliyaddemullewatte which the applicant's son now resides

4. Yathakmalpekumbura of 2 pelas

5. Dambuyaddehena situate at Karalliyade

6. Shares in the paddy fields known as Kotagepitiyeyaya and Mapanakumbureyaya

7. Weuliyaddewatte.

The applicant has also transferred a number of lands to his children and has also disposed of several other lands to outsiders.

He is the trustee of Hanguranketha Potgul Vihare and has furnished security for the due performance of his services as such trustee in land.

The applicant is not a person who is in need of any assistance and is in receipt of a considerable income which is quite sufficient or more than is necessary for the maintenance of himself and his family.

I shall therefore thank you to kindly stay all further proceedings in this matter.

The plaintiff's objection to the acquisition of the two lands and his furnishing a list of the lands owned by the 2nd defendant seem to have had no effect. Neither he nor his proctor received from the Land Commissioner a reply to the letter P9. Instead he received from the Assistant Government Agent, Nuwara Eliya, the following letter forwarding the notices published in the Government Gazette under section 7 of the Land Acquisition Act No. 9 of 1950.

(P10)

30-8-1951

I have the honour to forward herewith, in Sinhalese, Tamil and English, a Gazette extract of my Notice under Section 7 of the Land Acquisition Act, No. 9 of 1950, published in the Government Gazette No. 10,285 of 24-8-51 in the above connection.

(P11)

The English notice which is the only one produced in these proceedings reads as follows :—

I, Eardley Godfrey Goonewardene, Assistant Government Agent of the Nuwara Eliya District, do hereby give notice under section 7 of the Land Acquisition Act, No. 9 of 1950, that—

(1) it is intended to acquire under the said Act, for the purposes of the Land Redemption Ordinance, No. 61 of 1942, the land described in the schedule hereto,

(2) claims for the compensation for the acquisition of such land may be made to me, and

(3) every person interested in such land shall—

(*a*) appear, personally or by agent duly authorized in writing, before me at the Nuwara Eliya Kachcheri, on October 4, 1951, at 10-30 a.m., and

(*b*) notify to me in writing, on or before September 27, 1951, the nature of his interests in the land, the particulars of his claim for compensation the amount of compensation, and the details of the computation of such amount.

Schedule

Preliminary Plan No. P.P.A. 1,684 Village—Hanguranketa

Lot	*Name of Land*	*Description*	*Name of Claimant*	*Extent* A. R. P.
1.	Walliwelakumbura Assessment No. 105	Paddy Field	R. B. Herath Ananda Transport Service, Hanguranketa	1. 2. 31
2	do.	do.	do.	0. 0. 4
3.	do.	do.	R. B. Herath Ananda Transport Service, Hanguranketa and Hanguranketa Pattini Dewale (Trustee : A. B. Pannanwela, Basnayake Nilame, Talatu Oya)	0. 0. 16
4.	Huludorawatta Assessment No. 106	Chena	R. B. Herath Ananda Transport Service, Hanguranketa	0. 0. 8
5.	do.	do.	R. B. Herat, Ananda Transport Service, Hanguranketa, and Hanguranketa Pattini Dewale (Trustee : A. B. Pannanwela, Basnayake Nilame, Talatu Oya)	0. 0. 13
6.	do.	do.	do.	0. 1. 35
			Total ...	2. 1. 27

I have quoted in full the correspondence between the officers of Government and the plaintiff produced at the trial as they show the plaintiff's *bona fides* and that from the very outset he took up the stand that the two lands in question were not lands that fall within the ambit of section 3 (1) (*b*) of the Land Redemption Ordinance. His representations do not seem to have received the careful attention they deserved. For if they, especially the representation that the Pattini dewale was the owner of the land that the Government sought to acquire, had been examined more closely, all these years of litigation might have been avoided.

As all the plaintiff's protests and efforts to have the threatened acquisition of these two lands stayed were of no avail he appears to have decided after he received P11 to seek the assistance of the Courts in defending his rights. On 23rd June, 1952, his proctor filed in the District Court of Kandy a plaint (P22a) against the Land Commissioner and the Assistant Government Agent of Nuwara Eliya in which he asked for—

(*a*) a declaration that the lands in question are not liable to be acquired under the provisions of the Land Redemption Ordinance,

(*b*) an injunction restraining the Assistant Governemnt Agent from proceeding with the acquisition.

On 8th July, 1953, more than a year after the institution of the action the Land Commissioner and the Assistant Government Agent filed a joint answer (P22d) denying the allegations of the plaintiff that the lands do not fall within the category of lands the Land Commissioner was authorised to acquire under the Land Redemption Ordinance. They also took the plea that the Court had no jurisdiction to hear the action and prayed its dismissal. The plaintiff having failed to appear on the day fixed for the hearing of the action, on 23rd October, 1953, the Court entered decree nisi under section 84 of the Civil Procedure Code dismissing the plaintiff's action (P23). The plaintiff appeared within the pres-

cribed time and showed cause for his non-appearance but was not successful and the decree became absolute.

The acquisition proceedings seem to have gone on despite the plea of the plaintiff in paragraph 3 of his plaint that "the continuance of the acquisition will cause loss and damage to the plaintiff", and in January, 1953, while the action was pending the plaintiff received the following letter from the Assistant Government Agent, Nuwara Eliya :—

I have the honour to forward herewith a Notice in accordance with Section 10 (1) (*a*) of the Land Acquisition Act, No. 9 of 1950 in connection with the above acquisition.

I, Victor Alexander Justin Senaratne, Assistant Government Agent of the Nuwara Eliya District, do hereby give notice under Section 10 (1) (*a*) of the Land Acquisition Act, No. 9 of 1950, that in respect of your claim or dispute relating to any right, title or interest to, in or over the land described in the schedule hereto which is to be acquired or over which a servitude is to be acquired, my decision is as follows :—

"Mr. R. B. Herath Ananda Transport Service, Hanguranketa, is declared entitled to the land subject to the 'kapu services' which are due on all the lots in the schedule below to the Trustee of the Hanguranketa Pattini Dewale."

I hereby declare that unless you make a written application to me within fourteen days of the receipt of this notice, for reference of your claim or dispute for determination to the District Court/Court of Requests, my decision shall be final.

Schedule

Lots 1, 2, 3, 4, 5 and 6 in Preliminary Plan No. A. 1684, land called Walliwelakumbura (lots 1-3) and Huludorawatta (lots 4, 5, 6) in extent acres 2, roods 1, perches 27.

It is not clear why the acquiring officer proceeded with the acquisition while the plaintiff's challenge of his right to acquire was still pending in the District Court of Kandy. That challenge was in the following terms :—

The plaintiff pleads that the said lands do not fall within any of the categories of lands that are liable to be acquired under the said Ordinance and that the acquisition of them in excess of the powers unlawful and is a denial of the rights of the plaintiff who holds the said lands by payment of dues and or performance of services to the Pattini Dewale at Hanguranketha.

The other steps in the acquisition proceedings followed and the plaintiff received from the Assistant Government Agent, Nuwara Eliya, the following letter dated 19th March, 1953, (P14) and the award (P15) annexed to it :—

(P14)

I have the honour to forward herewith my Notice of Award made under Section 16 of the Land Acquisition Act No. 9 of 1950 in connection with the acquisition of the above land for the purposes of the Land Redemption Ordinance, No. 61 of 1942.

(P15)

I, Victor Alexander Justin Senaratne, Assistant Government Agent of the Nuwara Eliya District in the Central Province of the Island of Ceylon make the following award :—

1. Every person referred to in column I hereunder shall be entitled to the interest specified in the corresponding entry in column II

I	II
Name and address of person entitled to compensation	Nature of interest in land to be acquired
1. Mr. R. B. Herath Ananda Transport Services, Hanguranketa	By Right of Purchase
2. Trustee, Hanguranketa Pattini Dewale (Mr. A. B. Pananwela, Basnayake Nilame, Talatu Oya)	By Kapu Services (Rajakariya) due to the Dewale

2. The total amount of the claims for compensation for the acquisition of the land or servitude is Rupees Fifteen thousand only.

3. The sum of Rupees Three thousand three hundred and thirty only shall be paid by the Government of the said Island for the acquisition of the said land by way of compensation to the said persons, each person to be paid the amount specified below against his name.

Names of persons entitled to Compensation	*Amount of Compensation*
1. Mr. R. B. Herath	Rs. 3,108.50
2. Trustee, Hanguranketa Dewale	Rs. 221.50

On 8th March, 1954, the Divisional Revenue Officer of Uda Hewaheta placed the 2nd defendant in possession of the lands and reported to the plaintiff as follows :—

(P16)

This is to inform you that I have handed over lots 1 and 6 in P.P.A. 1684 acquired under the L.R.O. to the applicant Mr. P. B. Attanayake of Damunumeya today.

2. In this connection your reference is requested to my letter of even number dated 13-2-54.

The plaintiff next received from the Assistant Government Agent, Nuwara Eliya, the following letter of March 23, 1954 :—

(P17)

With reference to my letter No. LD. 1051 dated 19-3-1953 forwarding my Notice of Award under Section 16 of the Land Acquisition Act No. 9 of 1950, I have the honour to request you to receipt the annexed voucher for Rs. 3,108.50 on a -/06 cts. stamp duly witnessed by a responsible person and to return same early to enable me to tender you the amount of my Award by cheque.

The plaintiff did not comply with the request contained in the letter P17 and he did not return the voucher. It is produced in these proceedings marked P18. As his action in the District Court of Kandy had been dismissed for default of his appearance and his further representations to the Land Commissioner and the Assistant Government Agent had been unsuccessful he decided once more to seek his legal remedy and on 9th April, 1954, he wrote the following letter to the Land Commissioner with a copy to the Assistant Government Agent, Nuwara Eliya :—

(P19)

I have the honour to inform you that I am instructed by my Lawyers to file action for the recovery of the property known as Walliwela Kumbura in the above acquisition for the purpose of the Land Redemption Ordinance No. 61 of 1942 Lots 1-6 in PPA. 1684 No. LD. 1051.

I understand that the A.G.A. Nuwara Eliya has given instruction to the D.R.O. Uda Hewaheta to harvest the crop of the above property referred to.

As the property is under litigation I wired the A.G.A. Nuwara Eliya to suspend the Paddy pending the decision of the action. Further I beg to state that I will hold you responsible for damage to the value of the paddy harvest.

Please acknowledge the receipt of this letter and take immediate steps.

His request was turned down by the following letter :—

(P20)

With reference to your letter of 9-4-54, I have the honour to inform you that I regret that your request cannot be complied with.

The plaintiff purchased the rights he claims in the lands in question for Rs. 5,000/- on 28th October, 1946, but he has been offered as compensation only a sum of Rs. 3,108/50 on 19th March, 1953. These proceedings do not show why the plaintiff has been offered less than the purchase price. His claim was Rs. 15,000/-. As all his attempts to stop his lands from being acquired were in vain, and as his action against the Land Commissioner failed owing to default of his appearance on the date of trial, he had to resort to the Courts to obtain relief.

On 1st May, 1954, the plaintiff instituted the present action against the Attorney-General in which he challenges the authority of the Land Commissioner to acquire the lands in question, and asks—

(*a*) that he be declared entitled to them and to possess them,

(*b*) that he be restored to and quieted in possession of them, and

(*c*) that the 2nd defendant be ejected therefrom.

The Attorney-General in his answer states—

(*a*) that the Pattini Dewale of Hanguranketa is not the " owner " of the lands within the meaning of the term in the Land Redemption Ordinance.

(*b*) that upon the determination by the Land Commissioner to acquire the lands the Minister made a declaration under section 5 (1) of the Land Acquisition Act as modified,

(*c*) that the Minister made an order under section 36 of the Land Acquisition Act and that the order was published in the Gazette.

He contends that—

(*a*) the lands fall within the description of lands which are liable to be acquired under the Land Redemption Ordinance,

(*b*) the declaration made by the Minister under the Land Acquisition Act is conclusive proof that the lands are needed for a purpose which is deemed to be a public purpose,

(*c*) it is not open to the plaintiff to canvass in these proceedings the question whether the lands fall within the categories of lands which are liable to acquisition under the Land Redemption Ordinance,

(*d*) until the order under section 36 of the Land Acquisition Act is set aside the plaintiff is not entitled to the relief he claims,

(*e*) the dismissal of the plaintiff's action in D.C. KANDY case No. L. 3632 operates as *res judicata*.

It is admitted by the Attorney-General that the lands in question form part of the *kapu panguwa* of the Pattini Dewale and that the nilakarayas of that panguwa of whom the plaintiff is one are liable to render services to the

Dewale in respect of the land held by them. There is no evidence as to what the services are. The sannasa or grant under which the lands in question were given to the Dewale has not been produced, nor has any evidence as to any special custom governing the tenure of these lands been placed before the Court. It was assumed at the hearing of this appeal that these lands are held on the usual tenure of Dewalagama lands and that the services are personal services rendered to the Dewale.

The learned trial Judge held—

(*a*) that the lands in question formed a part of the kapu panguwa belonging to the Pattini Dewale of Hanguranketa,

(*b*) that the plaintiff was by virtue of deed No. 6032 of 28th October, 1946, entitled to possess them,

(*c*) that the Land Commissioner purported to acquire them under the Land Redemption Ordinance, and that the Crown took possession of them on 8th March, 1954,

(*d*) that the lands fall within the category of lands liable to be acquired under the Land Redemption Ordinance,

(*e*) that the plaintiff is not the owner of the lands in question,

(*f*) that the lands have vested absolutely in the Crown,

(*g*) that the decision in the D.C. Kandy Case No. L. 3632 is not *res judicata*.

It would be helpful if a brief reference is made to the system of land tenure under the Kandyan Kings before the questions arising on this appeal are discussed. In this judgment I shall for the sake of convenience refer to the grantee of a gama (village) be it a nindagama, viharagama or dewalagama, as the nindalord.

A village or gama in respect of which services (rajakariya) were performed are of four kinds, viz., gabadagama, nindagama, viharagama, and dewalagama. A gabadagama is a royal village which was the exclusive property of the Sovereign. The Royal Store or Treasury was supplied from the gabadagama, which the tenants had to cultivate gratuitously in consideration of being holders of praveni panguwas. A nindagama is a village granted by the Sovereign to a chief or noble or other person on a sannasa or grant. Similarly, a village granted by the Sovereign to a vihare is a viharagama and to a dewale is a dewalagama. Each gama or village consisted of a number of holdings or minor villages. Each such holding or minor village was known as a panguwa. Each panguwa consisted of a number of fields and gardens. Panguwas were of two kinds, viz., praveni or paraveni panguwa and maruwena panguwa. A praveni panguwa is a hereditary holding and a maruwena panguwa is a holding given out to a tenant for each cultivation year or for a period of years. The holder of a panguwa was known as a nilakaraya. They were of two kinds: Praveni or paraveni nilakarayas, and maruwena nilakarayas. The praveni nilakarayas are generally those who were holders of panguwas prior to the Royal Grant and the ninda lord is not free to change them. They were free to transmit their lands to their male heirs, but were not free to sell or mortgage their rights. They were obliged to perform services in respect of their panguwas. The services varied according as the ninda lord was an individual, a vihare or a dewale. In the case of vihares or dwales personal services were such as keeping the buildings in repair, cultivating the fields of the temple, preparing the daily dana, participating in the annual procession, and performing services at the daily pooja of the vihare or dewale. In the scheme of land tenure the panguwa though consisting of extensive lands is indivisible and the nilakarayas are jointly and severally liable to render services or pay dues. Though the panguwa was indivisible, especially after a praveni nilakaraya's right to sell, gift, devise, and mortgage his panguwa came to be recognised, the practice came into existence of different persons who obtained rights from a nilakaraya occupying separate allotments of land for convenience of possession. The maruwena nilakaraya though known as a tenant-at-will held on a tenancy which lasted at least for one cultivation year at a time. Unlike the praveni nilakaraya he could be changed by the ninda lord; but it was seldom done. He went on year after year, but was not entitled to transmit his rights to his heirs. On the death of a maruwena tenant his heirs are entitled to continue only if they receive the tenancy. Though in theory maruwena tenure was precarious, in fact it was not so. So long as he paid his dues the ninda lord rarely disturbed him. Besides the praveni and maruwena panguwas in a nindagama, viharagama or dewalagama, there were also lands owned absolutely by the ninda lord both ownership and possession being in him.

Under the Kandyan Kings and during the early British period there were also lands held by nilakarayas directly under the Sovereign. The holders of these lands were not free to gift, sell, bequeath or mortgage their rights. Their rights

were transmissible only to their male heirs and the possession reverted to the State on the failure of the male heirs or breach of the Conditions of Tenure. The rights of the State in respect of such lands called in early British legislation "Service Parveny Lands" were declared by Regulation 8 of 1809 thus :

> Whereas there is reason to believe that abuses prevail with respect to the Lands called Service Parveny Lands, in prejudice of the Rights of Government, and to the impoverishment of Families holding the said Lands.
>
> His Excellency The Governor in Council deems it necessary to declare, conformably to the ancient Tenure of the said Lands, and it is hereby declared accordingly—
>
> 1st. That all such Lands are held, as in former times, immediately under Government :
>
> 2ndly. That the privilege of succeeding thereto is in the Male Heirs only, of those who die possessed of such Lands, and that the same revert to His Majesty's use on failure of such Male Heirs or breach of the Conditions of Tenure :
>
> 3rdly. That the same are not capable of alienation by Gift, Sale, Bequest or other Act of any party, or of being charged, or incumbered with any Debt whatsoever :
>
> 4thly. That the said Lands, are not liable to be sold by virtue of any Writ of Execution or other legal process of any Court or Courts in this Island :

The Service Praveni Lands Succession Ordinance of 1852, however, extended to female heirs the right of succession to persons who die possessed of service praveni lands. It also declared that service praveni lands were capable of alienation, gift, sale, devise or other act or of being charged or encumbered with any debt Similar legislation was not enacted in respect of service tenure lands not owned by the State due by a ninda lord. The Service Tenures Ordinance which applies to such lands did not give the nilakaraya power to sell, gift, devise, or mortgage his panguwa but provided for the commutation of his services by a money payment and imposed a period of limitation of one year in respect of the recovery of arrears of personal services and two years in the case of commuted dues. The right to recovery of services or dues if not enforced for ten years was to result in the loss for ever of the ninda lord's rights and on the nilakaraya becoming the owner (section 24). The Ordinance also deprived the proprietor of the right to proceed to ejectment against the nilakaraya (section 25) on his failure to render personal services or dues. He was permitted to recover the value of the services by seizure and sale—

(*a*) of the crop or fruits of the panguwa, or failing them,

(*b*) of the personal property of the nilakaraya, or failing both

(*c*) by the sale of the panguwa, subject to the personal services, or commuted dues in lieu thereof.

The proceeds of sale have to be applied in payment of the amount due to the proprietor, and the balance, if any, is to be paid to the evicted nilakarayas. If there is a prior encumbrance upon the holding the balance is to be applied to satisfy such encumbrance. Despite these far-reaching changes the character of the ninda lord or proprietor remained the same. In course of time it seems to have been assumed, though no express legislative provision in that behalf was made, that the nilakarayas of a nindagama, viharagama or dewalagama had the same rights of alienation, gift, and mortgage as the holder of a service praveni land.

Though the nilakaraya's rights in respect of his holding became enlarged in the course of time it was never at any time doubted that the ninda lord was the owner of the soil and the legislation relating to service tenure lands recognised that position of the ninda lord and did not alter but preserved it. Sections 21 and 27 of the Buddhist Temporalities Ordinance refers to the nilakarayas as "temple tenants" (section 21) and speaks of the transfer of "a paraveni pangu tenant's interest in any land held of a temple" (section 27), and gives implied legislative recognition to the alienability of a nilakaraya's rights and not the land. It leaves no doubt as to what the praveni nilakaraya may transfer. Section 54 of the Partition Act No. 16 of 1951 also proceeds on the footing that the nilakaraya is not the owner of his panguwa, for, it provides "Every praveni nilakaraya shall, for the purposes of this Act, *be deemed* to be a co-owner of the praveni panguwa of which he is a shareholder". Today the ninda lord stands in the shoes of the Royal Grantor subject to the restrictions or conditions imposed by the sannasa or grant and the nilakarayas continue as tenants of the grantee, though with far greater rights than they ever enjoyed under the Kandyan Kings. Despite the extension of their rights the nilakarayas had to render services or pay commuted dues to the

ninda lord. If ever the line of succession of the nilakarayas of a panguwa became extinct the possession of the land would revert to the ninda lord. As the nilakaraya was free to sell his rights the ninda lord was free in course of time by purchase to enlarge his rights of ownership, by adding to his rights those of the nilakaraya.

It is not clear why the Service Tenures Ordinance refers to the ninda lord as proprietor and not as owner. The same expression is used in the Partition Act No. 16 of 1951. Now to my mind there is no difference between the expressions proprietor and owner in the context in which the former expression is used. The Oxford dictionary defines " proprietor " as one who holds something as property ; one who has the exclusive right or title to the use or disposal of a thing ; an owner. Webster's dictionary defines the expression thus : " One who has the legal title or exclusive right to anything, whether in possession or not ; an owner." The ninda lord is the owner of his service lands without possession and the nilakaraya is the possessor of those lands without ownership. The writers on Jurisprudence, both ancient and modern, bring out clearly the difference between the concepts of ownership and possession. For the purpose of this judgment it is sufficient to quote a passage from Salmond, one of the modern writers. (Salmond on Jurisprudence, 11th Edn. p. 302.)

> No man is said to own a piece of land or a chattel, if his right over it is merely an encumbrance of some more general right vested in some one else.....In its full and normal compass corporeal ownership is the right to the entirety of the lawful uses of a corporeal thing. This compass, however, may be limited to any extent by the adverse influences of *jura in re aliena* vested in other persons. The right of the owner of a thing may be all but eaten up by the dominant rights of lessees, mortgagees, and other encumbrancers. His ownership may be reduced to a mere name rather than a reality. Yet he none the less remains the owner of the thing, while all the others own nothing more than rights over it. For in him is vested that *jus in re propria* which, were all encumbrancers removed from it, would straightway expand to its normal dimensions as the *universum jus* of general and permanent use. He, then, is the owner of a material object, who has a right to the general or residuary use of it, after the deduction of all special and limited rights of use vested by way of encumbrance in other persons.

How true these words are of the ninda lord and the nilakaraya. The latter cannot be said to be the owner of the land as his rights are merely an encumbrance of a general right vested in the ninda lord and the ninda lord whose rights are reduced to merely the receipt of personal services or commuted dues is none the less the owner of the land. Apart from legal concepts even laymen in the Kandyan provinces will not regard the nilakaraya as the owner of the nindagama. The difference between ownership and possession is so clearly ingrained in the minds of the people in the Kandyan Provinces that the lands of a nindagama are spoken of as lands of the ninda lord and not of the nilakaraya. They would speak of nindagama lands as lands belonging to the Dalada Maligawa or Sri Maha Bodhi or Ridi Vihare or to such and such a family. In the instant case the reference in the mortgage bond (1D4) to the mortgagor " being in possession of " the lands referred to therein by virtue of the deed recited and the absence of any reference to title are significant and to my mind indicate that the mortgagor and the notary realised the difference between the rights of the ninda lord and the nilakaraya.

Learned Counsel for the Crown has not been able to cite a single decision of this Court in support of his contention that a nilakaraya of a service panguwa is its owner. In fact the decisions of this Court are the other way. They hold that a nilakaraya is not the owner and that it is not competent for him to institute a partition action as he is not the owner of the land of which he is in possession. The first of these decisions is the case of *Jotihamy vs. Dingirihamy*, (1906) 3 Bal. Reports 67. In that case Wendt, J. observed—

> Now the *dominium* in Service Tenures land is generally regarded as vested in the person usually described as proprietor of the *Nindagama*, or the overlord, while the *Nilakarayo* are similarly spoken of as tenants. I do not of course forget that the interests of a Paraveny Nilakaraya cannot be determined against his will by a proprietor although upon the non-performance of services judgment can be recovered for damages and the interest of the tenant sold up and so brought to an end. But I do not see that this makes a tenant an owner ; he cannot therefore claim partition of the land.

This case was followed by *Kaluwa vs. Rankira* (1907) 3 Bal. Reports 264, which is also an action for the partition of nindagama land. One of the defences set up was " that the plaintiff cannot maintain the action because he is not an ' owner ' within the meaning of section 2 of the Partition Ordinance 10 of 1863, as the land is subject to Rajakaria Services ". Hutchinson, C.J. was invited by the plaintiff-appellant to hold that the case of *Jotihamy vs. Dingirihamy* (*supra*), a decision of two Judges (Wendt, J. and Middleton, J.) was wrong. But he declined to do so as he thought the decision was right.

The next decision is the case of *Appuhamy vs. Menike*, 19 N.L.R. 361, which was an action brought by a praveni nilakaraya of a panguwa of the Dodampe Nindagama for the partition of certain lands appertaining to his panguwa. The proprietors of the nindagama intervened and disputed the right of the plaintiff to bring an action for partition. That case was heard by a Bench of three Judges. Two of the Judges agreed with the decision in *Jotihamy vs. Dingirihamy* (*supra*) while De Sampayo, J. dissented from the view that a praveni nilakaraya is not the owner of his holding but agreed that he could not compel a partition. As stated above, to-day a nilakaraya can institute a partition action, though he is not the owner of his panguwa, by virtue of the special provisions (sec. 54 *et seq*) in the Partition Act No. 16 of 1951.

I am in respectful agreement with the previous decisions of this Court cited above and the opinion formed by the majority of the Judges in *Appuhamy vs. Menika* (*supra*). I must confess I am unable to follow the view taken by De Sampayo, J. If a praveni nilakaraya cannot bring an action for partition it can only be on the ground that the land does not belong to him for if it does he is entitled to compel a partition. The relevant words of section 2 of the repealed Partition Ordinance which was considered in that case are " When any landed property shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property....." If it is not rights of ownership that the ninda lord has what are his rights ? A ninda lord can gift, sell, or mortgage his nindagama, his heirs can inherit it, or his rights can be sold in execution against him, (*Tillekeratne vs. Dingey Hamy*, Ramanathan 1860-61-62, p. 114). A nindagama can be acquired by prescription (*C. P. Samarasinghe vs. Radage Weerapulia and others*, 5 S.C.C. 40) by establishing that a person has enjoyed the ninda lord's rights over every component part of the nindagama for the prescribed period.

In the course of his judgment in *Samarasinghe's* case, Clarence, A.C.J. observed—

> The entry in the services tenures commutation register, though conclusive against the tenants on the question of tenure, is not conclusive against anybody on the question—Who is the owner of the nindagama ?

It appears from the judgment in that case that the fact that the ninda lord is the owner of the nindagama was never in doubt or dispute. Our legislation has always assumed that the ninda lord is the owner of the nindagama and in the decisions of this Court too the ninda lord has always been regarded as the owner of the service lands of the nindagama and the praveni nilakaraya as his tenant. However extensive the rights of a praveni nilakaraya may have become in the course of time still he never became the owner of his holding ; he remained a nilakaraya.

I shall now turn to section 3 (1) (*b*) of the Land Redemption Ordinance. It speaks of agricultural land " 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." In the instant case the transfer was by the praveni nilakaraya of his interests in the holding of which as I have said above he is not the owner. It was not the land that was transferred, but the right to possess and enjoy it with the attendant rights of a praveni nilakaraya subject to the rendering of services or payment of commuted dues. The debt was not due from the owner but from his tenant the 2nd defendant. The debt of the praveni nilakaraya the 2nd defendant was not secured by a mortgage of the land but by a mortgage of the 2nd defendant's rights as praveni nilakaraya. It will therefore be seen that section 3 (1) (*b*) has no application whatsoever to the transactions evidenced by deeds 1D4 and 1D5. The Land Commissioner had therefore no authority under section 3 (1) (*b*) of the Land Redemption Ordinance to acquire the lands. His determination that the lands should be acquired is not one to which sub-section (4) applies as the determination which is declared by that provision to be final is a determination in a case in which " he is authorised by sub-section (1) to acquire the lands ". The meaning and effect of sub-section (4) has been discussed in my judgment in *Ladamuttu Pillai vs. Attorney-General* (*supra*). In this case too the Land Commissioner's decision is not final as he has by a wrong construction of the expressions " owner " and " land " in section 3 (1) (*b*) given himself a jurisdiction he did not have. I think I should take this opportunity of referring to the case of *Bogolle Punchirala and others vs. Kadapatwehera Ding and others*, 6 S.C.C. 157 (which was not cited in my previous judgment) wherein a similar matter under the Service Tenures Ordinance was decided. In that case it appeared that the Service Tenures Commissioners had travelled outside their powers and entered in the register they were authorised to make under the Ordinance

particulars which they were not required to determine or enter in the register. The defendants claimed that their determination of the matters they were not empowered by the Ordinance to determine was not final and conclusive as the finality and conclusiveness conferred on their determination by section 9 of the Service Tenures Ordinance did not extend to the determinations made outside the scope of their authority. This Court upheld their submission.

There is a further circumstance which appears in document P15 which cannot be allowed to pass unnoticed. The acquiring officer appears to have acquired the interests of the dewale as well. His act is clearly illegal. The praveni nilakaraya did not, and could not in law, transfer to his creditor the rights of the ninda lord, the dewale, nor did he purport to do so. The authority granted by section 3 (1) (*b*) is to acquire land transferred by the owner in satisfaction or part satisfaction of a debt which was due from the owner and was immediately prior to such transfer secured by a mortgage of the land. The ninda lord owned no debt, his rights were not secured by a mortgage, he did not transfer his rights to the 2nd defendant. Clearly the Land Commissioner had no authority to acquire the ninda lord's rights and his determination to acquire his rights being illegal cannot be final.

The result of this intrusion on the rights of the ninda lord is that the dewale has been illegally deprived of its rights to the services it received in respect of these lands of the kapu panguwa and the 2nd defendant who possessed the lands under a tenure which obliged him to render services or pay commuted dues is now in occupation of them by virtue of the permit given to them by the Crown without any such obligation. The Land Commissioner's action in acquiring the interests of the nilakaraya and the dewale are both illegal and must be declared null and void.

I shall now deal with the question whether the legality of a declaration under section 5 (1) of the Land Acquisition Act as modified for the purpose of the Land Redemption Ordinance can be canvassed in these proceedings. The Land Redemption Ordinance adapts the machinery of the Land Acquisition Act for the purpose of acquisition under the Ordinance. Provision for such adaptation is made in section 3 (5) of the Ordinance, the relevant portion of which reads

> Where the Land Commissioner determines under sub-section (4) that any land shall be acquired, the purpose for which that land is to be required shall be deemed to be a public purpose, and the provisions of the Land Acquisition Act, subject to the exceptions, substitutions and modifications set out in the First Schedule, shall apply for the purposes of the acquisition of that land....."

We are here concerned with the modified sub-sections (1) and (2) of section 5 of the Land Acquisition Act. They read as follows :—

> (1) Where the Land Commissioner determines that any land shall be acquired for the purposes of the Land Redemption Ordinance, the Minister shall make a written declaration that such land is needed for a purpose which is deemed to be a public purpose and will be acquired under this Act, and shall direct the acquiring officer of the province or district in which such land is situated to cause such declaration in the Sinhalese, Tamil and English languages to be published in the Gazette and exhibited on some conspicuous places on or near such land.
>
> (2) A declaration made under sub-section (1) in respect of any land shall be conclusive evidence that such land is needed for a purpose which is deemed to be a public purpose.

It would appear from the copy of the declaration 1D1 that the Minister purporting to act under section 5 of the Land Acquisition Act on 10th May, 1951, made the following declaration :—

> Declaration under Section 5 of the Land Acquisition Act, No. 9 of 1950.
>
> Whereas the Land Commissioner has determined that the land described in the Schedule hereto shall be acquired for the purpose of the Land Redemption Ordinance, No. 61 of 1942 :
>
> Now therefore, I, Dudley Shelton Senanayake, Minister of Agriculture and Lands, do hereby declare under section 5 (1) of the Land Acquisition Act, No. 9 of 1950 (read with section 3 (5) of the said Ordinance as amended by section 62 of that Act) that the said land is needed for a purpose which is deemed to be a public (*sic*) and will be acquired under that Act.

In the first place the caption to the declaration is inaccurate. The text of the declaration shows that it is not one which purports to be made under section 5 of the Land Acquisition Act, but one which purports to be made under section 5 (1) of the Land Acquisition Act as modified for the purposes of the Land Redemption Ordinance. Though, where the statute does not require that a declaration should contain a caption, an incorrect caption to a declaration which is legal in all respects, does not vitiate such a declaration, it is important that public functionaries charged with the responsibility of making statutory declarations, especially when they have far reaching consequences, should exercise extreme care in making them and they should not leave room for

the impression that the declarant failed to give his mind to the document he was signing. For if it can be established that the declarant signed a document of the contents of which he was not aware he cannot be said to have discharged the function entrusted to him by the statute.

It would appear from the recital that the foundation of the declaration is the determination of the Land Commissioner under section 3 (4) of the Land Redemption Ordinance. I have shown above that the lands in question are not lands the Land Commissioner is authorised by section 3 (1) (*b*) to acquire and that his determination is in consequence not final and that it being not a determination which he is authorised to make under the statute is bad in law and does not afford the Minister legal authority to make the declaration he has made. Where there is no valid determination under that Ordinance the Minister can make no declaration under section 5 (1) of the Land Acquisition Act as modified and therefore the declaration he has made in respect of the lands in the instant case is a nullity and is of no effect in law and is therefore not the statutory declaration contemplated in section 5 (1).

Where the declaration which purports to be made under section 5 (1) is a nullity it does not become "conclusive evidence" of the fact that the land is needed for a purpose which is deemed to be a public purpose; because it is only a valid declaration that is given that effect by the Act. The opening words of section 5 (2) make the position clear. They are "A declaration made under sub-section (1)", *i.e.*, a declaration validly made under that sub-section, and not "A declaration which purports to be made under sub-section (1)" though not validly made thereunder. Similarly the publication of an invalid declaration in the Gazette will not be "conclusive evidence" of the fact that a declaration under sub-section (1) was duly made, for sub-section (3) also provides that the publication of a *declaration under sub-section* (1) in the Gazette shall be conclusive evidence of the fact that *such* declaration was duly made. An invalid declaration has the same effect as if no declaration was ever made and cannot be acted on and confers no authority for taking the steps consequential on a valid declaration under the Land Acquisition Act as modified and does not therefore have the conclusiveness given by section 5 (2) to a valid declaration.

There is a further inaccuracy in the declaration in that it states that the land will be acquired under the Land Acquisition Act. The acquisition is under the Land Redemption Ordinance; but the legislature has authorised the use of the machinery of the Land Acquisition Act as modified for the purposes of the Land Redemption Ordinance. It is the failure of the acquiring officer to appreciate the fact that the authority for the acquisition of lands for the purposes of the Land Redemption Ordinance is in that Ordinance itself that has led him to acquire the rights of the dewale when he had no authority to do so. The copy of the declaration produced by the Attorney-General 1D1 is in English alone. Neither copies nor originals of the Sinhalese and Tamil declarations have been produced nor is there any evidence that the Minister ever made them. I am of the view that sub-section (1) of section 5 of the Act requires the Minister to make a declaration in each of the three languages and the requirements of the section are not satisfied if he does not do so.

Sub-section (1) of section 5 further requires the Minister to direct the acquiring officer of the province or district in which the land which is to be acquired is situated to cause such declaration in the Sinhalese, Tamil and English languages to be published in the Gazette and exhibited in some conspicuous places on or near the land. There is no evidence that such a direction was given nor is there any evidence that the acquiring officer of the province or district in which the land is situated caused the declaration to be published in the Gazette in Sinhalese and Tamil. Learned Counsel for the Crown tendered at the trial, not the Gazette in which the declaration was published, but an extract from the Government Gazette certified by an Assistant Land Commissioner (1D2) in which the declaration appears in the English language alone. This Court has always regarded the requirement that a publication should be made in English, Sinhalese and Tamil as imperative. Failure to publish in all three languages has been regarded as vitiating the publication. The cases of *H. Foenander vs. M. Ugo Fernando*, 4 S.C.C. 113, and *Dias vs. A. G. A. Matara*, 3 N.L.R. 175, are two of the cases that take that view. Apart from the fact that the declaration is invalid for the reason that the condition precedent to the making of the declaration is absent, these other defects, I have pointed out above also affect its validity.

I shall now deal with the contention of learned Counsel for the Attorney-General that sub-section (2) of section 5 of the Act as modified precludes the plaintiff from questioning in these

proceedings the legality of a declaration made by the Minister, whether or not his action is within the powers confided in him by the legislature. No decision of this Court or of any Superior Court in any other part of the Commonwealth was cited in support of his contention. The sub-section embodies a rule of evidence and not a rule of law. In the instant case the plaintiff is not seeking to produce counter evidence to prove that the land is not needed for a purpose which is deemed to be a public purpose; but he is questioning the legality of the declaration and the words "conclusive evidence" do not preclude him from doing so. The expression "conclusive evidence" which is familiar in the law of England and the United States though used in some of our statutes when a rule of evidence is sought to be enacted is not used in our Evidence Ordinance which uses the expression "conclusive proof". The former expression is used in the same sense as the latter and I for one think the latter expression is more precise and for that reason the better expression. The effect of the words "conclusive proof" in the Evidence Ordinance is thus stated therein (section 4 (3),:

> When one fact is declared by this Ordinance to be conclusive proof of another, the Court shall on proof of the one fact regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it.

Here it is not sought to lead evidence to disprove the declaration made by the Minister. Learned Counsel's contention is not sound and cannot be upheld.

Even if the declaration had been a declaration *intra vires* of the statute its imperfections are so many that it cannot be received even for the purpose for which section 5 (2) declares it to be "conclusive evidence".

The rule of construction applicable to provisions which declare the declaration or certificate of a person who is not before Court conclusive evidence of a fact is stated thus by Viscount Dunedin in the case of *Penrikyber Navigation Colliery Co. vs. Edwards*, (1933) A.C. 28 at 38

> I think that a provision which gives this effect to a certificate of a person who is not before the Court, and makes it conclusive against the evidence of competent witnesses who are, is, if any provision ever is, one which must be applied strictly, and must be limited to an exact compliance with its terms.

As the question whether the declaration in question may be admitted as conclusive evidence of the fact that the lands referred to in the plaint are needed for a purpose which is deemed to be a public purpose does not arise for decision on this appeal it is not necessary to discuss the matter further.

Learned Counsel for the Attorney-General contended that the Order made by the Minister under section 36 of the Land Acquisition Act was in the way of the plaintiff and that he could not succeed unless and until that Order is set aside. That contention would be sound only if the Order he had made is one which the Minister was entitled to make under the Act and he had complied with its requirements in doing so. But the Order in the instant case is one which he had no power in law to make and in the making of which he has not complied with the requirements of the Act. There being no valid declaration under the modified section 5 (1) of the Act, the the acquiring officer had no authority in law to proceed under section 6 and the subsequent sections. The legal authority to proceed under these provisions flows only from a valid declaration under modified section 5 (1). All the steps taken by the acquiring officer and the Minister are therefore null and void and the position in law is as if both of them had taken no action under the statute and as if no Order under section 36 was ever made. The publication of a void Order under section 36 authorising the acquiring officer to take possession of a land does not have the effect of vesting that land in Her Majesty as provided in section 37 (*a*) of the Act. No question of setting aside the Order therefore arises. There being no Order under section 36 in existence in law the Land Commissioner had no power to alienate the two lands in question under section 5 (1) of the Land Redemption Ordinance. That being the case the 2nd defendant's possession is illegal and he is liable to be ejected from the two lands.

I now come to the plea of *res judicata* taken by the Attorney-General. It was raised in paragraph 7 of the amended answer filed on 8th September, 1954, which reads—

> 7 (*a*) The plaintiff sued the Land Commissioner and the Assistant Government Agent, Nuwara Eliya in action No. L. 3632 of the District Court of Kandy for a declaration that the lands described in the plaint in this action are not liable to be acquired under the provisions of the Land Redemption Ordinance and for an injunction restraining the said Assistant Government Agent from proceeding with the acquisition of the said lands.
>
> (*b*) The said action was dismissed with costs.

(*c*) The defendant pleads that the decision in the said case is *Res Adjudicata* of the matters in issue in the present action between the plaintiff and the Crown, and that accordingly the plaintiff cannot maintain this action against the Crown.

Shortly the facts relevant to this plea are as follows :—On 23rd June, 1952, the plaintiff instituted an action against the Land Commissioner and the Government Agent of Nuwara Eliya the Acquiring Officer. In his plaint he alleged

(3) The plaintiff pleads that the said lands do not fall within any of the categories of lands that are liable to be acquired under the said Ordinance and that the acquisition of them is in excess of the powers unlawful and is a denial of the rights of the plaintiff who holds the said lands by payment of dues and or performance of services to the Pattini Dewale at Hanguranketa.

(4) The continuance of the proceedings for acquisition will cause loss and damage to the plaintiff.

(5) A cause of action has therefore accrued to the plaintiff to sue the defendant for a declaration that the said lands are not liable to be acquired under the provision of the Land Redemption Ordinance and for an injunction prohibiting the 2nd defendant from carrying on any further the proceedings to acquire the lands.

He asked—

(*a*) for a declaration that the lands and premises more fully in the Schedule at the foot hereof are not liable to be acquired under the provisions of the Land Redemption Ordinance.

(*b*) for an injunction restraining the 2nd defendant abovenamed from proceeding any further with the said acquisition until the final determination of this action.

The defendants filed a joint answer denying all the allegations of the plaintiff except that the lands are subject to performance of services to the Pattini Dewale of Hanguranketa. They also pleaded that the Court had no jurisdiction to hear and determine the action. The plaintiff having failed to appear on 13th October, 1953, the day fixed for the hearing of the action, it was dismissed under section 84 of the Civil Procedure Code. His attempt to show cause for his non-appearance was unsuccessful.

I shall examine the features of the two actions before discussing the question whether the plaintiff's present action is barred by the dismissal of the Kandy case.

The present action is against the Attorney-General and the 2nd defendant. The Kandy case was against the Land Commissioner *nomine officii* and E. G. Goonewardene, Assistant Government Agent, Nuwara Eliya. In the present action the plaintiff seeks a declaration of title to the lands in question and in addition to it or in the alternative a declaration of his right to their possession and to have the 2nd defendant ejected therefrom. In the Kandy case the plaintiff sought a declaration that the lands in question were not liable to be acquired and asked for an injunction restraining the Assistant Government Agent from proceeding with the action. The plaintiff bases both actions on the ground that the Land Commissioner has no authority in law to acquire the lands.

This is a convenient point to discuss the scope of the doctrine of *res judicata*. It has its origin in the Roman Law where it is stated thus : *Res Judicata dicitur, quae finem controversiarum pronunciatione judicis accipit, quod vel condemnatione vel absolutione contingit* (Digest XLII, Tit. I, Sec. 1). Scott translates it into English thus : " By *res judicata* is meant the termination of a controversy by the judgment of a Court. This is accomplished either by an adverse decision, or by discharge from liability." (The Civil Law, Vol. 9, p. 228.) Hukm Chand expresses the view that this doctrine is founded upon the maxim *nemo debet bis vexari pro una et eadem causa*, which is itself an outcome of the wider maxim, *interest reipublicae ut sit finis litium* (Hukm Chand, Res Judicata, 1894 Edn., p. 5). The Roman doctrine which has been adopted in Roman Dutch Law as well cannot be extended to cases not falling within its ambit except by legislation. Voet defines it in almost the same terms as the Digest : *Res Judicata est, quae finem controversiarum pronunciatione judicis accepit, absolutione vel condemnatione* (Voet, Bk XLII, Tit. I, Sec. 1). Gane renders it into English thus (Vol. 6, p. 297) : " A *res judicata* is a matter in which an end has been put to disputes in a declaration of a Judge by absolution or adverse judgment." In our legal system the doctrine being one that appertains to the field of civil procedure provisions against parties being vexed twice for the same cause of action and provisions designed to prevent interminable litigation between parties have been enacted in our Civil Procedure Code. Similar though not the same provisions exist in the Indian Civil Procedure Code. The provisions of our Code in my opinion go beyond the scope of the doctrine as understood in Roman and Roman Dutch Law. The early English decisions adopted the doctrine as understood in Roman Law. This is clearly shown in the following observations of Lord

Romilly in *Jenkins vs. Robertson* (1867 L.R. 1 H.L. (Sc. Ap.) p. 117): "*Res Judicata* by its very words, means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly. In my opinion, *res judicata* signifies that the Court has, after argument and consideration, come to a decision on a contested matter." Some of the early English cases adopt Vinnius's definition of *res judicata*. In *Hunter vs. Stewart* (4 De G.F. and J. 176, (1861) 45 E.R. 1151) Lord Westbury cited with approval the following passage from his commentary on the Institutes (Lib. IV, Tit. XIII, S. 5): "*Exceptio rei judicatae non aliter agenti obstat quam si eadem quaestio inter easdem personas revocetur, itaque ita demum nocet, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.*"

As the English decisions I have cited set out the basic principles of the law of *res judicata*, it is unnecessary to refer to later English decisions for in England the law of *Res Judicata* is treated as a branch of the law of estoppel. In our law the subject of *res judicata* appertains to the province of civil procedure properly so called. In seeking the aid of English decisions for the solution of our problems of *res judicata* we have to bear in mind this fundamental difference between the two systems. In India too the subject has been dealt with in the same way as we have dealt with it; but when referring to Indian decisions we should not forget that almost from the earliest times statutory provision had been made in that country for barring actions on the ground of *res judicata*. In the result of the decisions of the Indian Courts and of the Privy Council in appeal from those Courts were more concerned with interpreting the relevant statutes than in expounding the principles of *res judicata*. Nevertheless some of the judgments contain valuable discussions of the principle.

In this country our Civil Procedure Code very properly makes provision to ensure the observance of the doctrine of *res judicata* and the maxims *nemo debet bis vexari pro una et eadem causa* and *interest reipublicae ut sit finis litium*. The provisions are sections 34, 207, and 406. In the case of *Samichi vs. Pieris*, 16 N.L.R. 257, which was heard by a bench of three Judges two of the Judges refused to uphold the contention that the whole of our law of *res judicata* is to be found in sections 34, 207, and 406 of the Civil Procedure Code. Lascelles, C.J. observed: "The law of *res judicata* has its foundation in the civil law, and was part of the common law of Ceylon long before Civil Procedure Codes were dreamt of. But even if these sections contain an exhaustive statement of the law on this point, I cannot see that there is anything in them which is inconsistent with the principles which have been followed in the English, Indian, and American Courts." Wood Renton, J. observed in the same case: "It is suggested that the principles of English and Indian law as to *res judicata* are excluded by section 207 of the Civil Procedure Code. I see no reason to alter the opinion which I have already expressed in various other cases that section 207 and similar sections of the Civil Procedure Code do not embody the whole law as to *res judicata* in Ceylon." The dissenting Judge, Pereira, J., took the view that our law of *res judicata* was in the Civil Procedure Code and that we cannot go outside it.

With the greatest respect to the two most eminent Judges who formed the majority I find myself unable to agree that theirs is the proper approach to the interpretation of a Code. The principles of interpretation applicable to a Code are stated in the case of *Bank of England vs. Vagliano Brothers*, (1891) A.C. 107. In that case Lord Halsbury stated at page 120: "I am wholly unable to adopt the view that where a statute is expressly said to codify the law, you are at liberty to go outside the Code so created, because before the existence of that Code another law prevailed."

In the same case Lord Herschell made the following remarks at page 144:—

> "My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.
>
> "If a statute, intended to embody in a code a particular branch of the law, is to be treated

in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions, dependent upon a knowledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence. I am of course far from asserting that resort may never be had to the previous state of the law for the purpose of aiding in the construction of the provisions of the code. If, for example, a provision be of doubtful import, such resort would be perfectly legitimate. Or, again, if in a code of the law of negotiable instruments words be found which have previously acquired a technical meaning, or been used in a sense other than their ordinary one, in relation to such instruments, the same interpretation might well be put upon them in the code. I give these as examples merely; they, of course, do not exhaust the category. What, however, I am venturing to insist upon is, that the first step taken should be to interpret the language of the statute, and that an appeal to earlier decisions can only be justified on some special ground."

As stated earlier *res judicata* is dealt with in Roman Dutch Law, a matter of Civil Procedure, as an "exceptio" which expression is used in the sense of a special defence or a special plea. Voet defines it thus: "Now an exception is the shutting out of an action which is available in strict law." (Bk XLIV, Tit. I, S. 2, Gane Vol. 6 p. 337.) *Res Judicata* is an exception that must be pleaded and tried. I shall now examine the relevant provisions of our Code.

The first section that merits consideration is section 34. It provides as follows:—

"(1) Every action shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but a plaintiff may relinquish any portion of his claim in order to bring the action within the jurisdiction of any Court.

(2) If a plaintiff omits to sue in respect of, or intentionally relinquishes any portion of, his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. A person entitled to more than one remedy in respect of the same cause of action may sue for all or any of his remedies; but if he omits (except with the leave of the Court obtained before the hearing) to sue for any of such remedies, he shall not afterwards sue for the remedy so omitted."

The Attorney-General does not claim that the plaintiff is barred by section 34 (2) from bringing his present action. The Kandy case was brought while the acquisition was threatened and before the lands were actually acquired and the plaintiff is not now seeking to sue for a remedy he omitted to seek in the Kandy case, nor is he seeking to enforce a claim he relinquished then.

The next provision that calls for attention is section 207. It reads:

"All decrees passed by the Court shall, subject to appeal, when an appeal is allowed, be final between the parties; and no plaintiff shall hereafter be non-suited.

Explanation. Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the action, because, on the passing of the final decree in the action, a *res adjudicata*, which cannot afterwards be made the subject of action for the same cause between the same parties."

The first question that needs consideration is whether the expression "all decrees" includes decrees entered under section 84. Now section 207 occurs in a chapter which has a heading "Judgment and Decree" and makes elaborate provision regarding the pronouncing of judgment, the drawing up of decrees. Section 184 provides that upon the evidence which has been duly taken or upon the facts admitted in the pleading or otherwise and after the parties have been heard either in person or by their pleaders judgment shall be pronounced in open Court after notice to the parties. Section 188 provides that as soon as the judgment is pronounced a formal decree bearing the same date as the judgment shall be drawn up by the Court in the form No. 41 in the First Schedule or to the like effect specifying in precise words the order which is made by the judgment in regard to the relief granted or other determination of the action. The succeeding sections make elaborate provisions regarding decrees in respect of immovable property, movable property, interest, specific performance, payment by instalments, set off, mesne profits, accounts etc.

Section 206 provides that the decree or certified copy thereof shall constitute the sole primary evidence of the decision or order passed by the Court. The preceding provisions of the Chapter in which section 207 occurs to my mind show

that the decrees spoken of in that section are decrees drawn up by the Court under section 188 after judgment has been pronounced in the manner contemplated in sections 184, 185, 186 and 187. Such decrees are final between the parties subject to appeal. Section 207 will therefore apply only to decrees pronounced after there has been an adjudication on the merits of a suit and not to decrees entered under section 84.

Section 84 of the Civil Procedure Code under which the plaintiff's action was dismissed provides that if the plaintiff fails to appear—

(*a*) on the day fixed for the appearance and answer of the defendant, or
(*b*) on the day appointed—

(i) for the filling of the answer, or
(ii) for the filling of replication, or
(iii) for the hearing of the action, and

if the defendant on the occasion of such default of the plaintiff to appear is present in person or by proctor, and does not admit the plaintiff's claim, and does not consent to postponement of the day for the hearing of the action, the Court shall pass a decree *nisi* in the Form No. 21 in the First Schedule, or to the like effect, dismissing the plaintiff's action, which said decree shall, at the expiration of fourteen days from the date thereof, become absolute, unless the plaintiff shall have previously, on some day of which the defendant shall have notice, shown to the Court good cause, by affidavit or otherwise, for his non-appearance.

Assuming for the moment that the action had been rightly dismissed does the dismissal operate as *res judicata*. Clearly there has been no judgment in the sense contemplated in section 184 of the Code. In this connexion Spencer Bower's observation at page 19 of his treatise on *Res Judicata* is apposite and bears repetition.

> Obviously, there is *prima facie* no decision in civil any more than in military warfare, where the attacking party sounds a retreat for strategic purposes. His retirement may indicate a perilous or even disastrous position for the moment, but there is no battle, and no "decision"; indeed, his very object in declining the former is to escape the latter. This was the effect of the old common law non suit, in which the plaintiff voluntarily withdrew from the contest at the trial for the express purpose of avoiding any judgment, and reserving his liberty to bring a fresh action. It is true that, in the Supreme Court, this ancient right of a plaintiff, and several, analogous rights, both in law and in equity, to abandon his claim are either abolished or qualified, but the authorities on the old practice are still very useful as illustrations of the principle now under discussion.

In the case of *Brandlyn vs. Ord*, (1738) 1 Atk. 571, 26 E.R. 359, it was held by Lord Hardwicke that a bill dropped for want of prosecution is never to be pleaded as a decree of dismissal in bar to another bill. The view I have taken of section 207 of the Code is in accord with the basic concepts of *Res Judicata*. A decree of dismissal under section 84 or the Civil Procedure Code does not in my opinion operate as *Res Judicata* and the learned District Judge is right in so holding.

I shall now discuss the meaning of the words "no plaintiff shall hereafter be non-suited". Non-suit is an old English common law procedure no longer in force in England. When the plaintiff failed to make out a legal cause of action or renounced it owing to the discovery of some error or defect in it or failed to support his pleadings by any evidence after the matter had so far proceeded when the stage of the verdict had been reached the Judge ordered a non-suit. A non-suited plaintiff might on paying all costs recommence his action. A procedure somewhat akin to non-suit is to be found in section 406 which reads as follows :—

> (1) If, at any time after the institution of the action, the Court is satisfied on the application of the plaintiff (*a*) that the action must fail by reason of some formal defect, or (*b*) that there are sufficient grounds for permitting him to withdrawn from the action or to abandon part of his claim with liberty to bring a fresh action for the subject-matter of the action, or in respect of the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit.
>
> (2) If the plaintiff withdraw from the action, or abandon part of his claim, without such permission he shall be liable for such costs as the Court may award, and shall be precluded from bringing a fresh action for the same matter or in respect of the same part.

I now come to the explanation to section 207. According to it for a matter to be *res adjudicata* the previous action which is pleaded as a bar to the subsequent action must be—

(*a*) for the same cause of action, and
(*b*) between the same parties.

In the "same cause" is included every right to property, or to money, or to damages, or to relief of any kind which *can* be claimed, set up or put in issue between the parties upon the cause of action for which the action is brought. The

instant case and the Kandy case are not between the same parties. The relief now claimed could not have been claimed in the Kandy case and the matters in issue except one are not the same.

Before I conclude I wish to observe that I find myself unable to appreciate the attitude of the Crown in raising the plea of *res judicata* in the instant case. In the amended answer in the Kandy case the officers of the Crown who were represented by the Crown Proctor and who must undoubtedly have acted on the advice of the Crown legal adviser took the plea that the Court had no jurisdiction to hear and determine the action. If the legal advisers of the Crown were satisfied of the soundness of that plea, and I must assume that they were so satisfied, then the decree of dismissal of the action was one made without jurisdiction. It is settled law that a judgment or decree of a Court acting without jurisdiction does not operate as *res judicata*. Why then did the Crown being satisfied that the Court had acted without jurisdiction raise the plea of *res judicata* in the instant case? We have had no explanation from the learned Counsel appearing for the Attorney-General. In this connexion I wish to repeat the remarks of the Lord Chief Baron in the case of *Deare vs. Attorney-General* (1 Y. and C. Ex. p. 208) quoted by me in the citation from the judgment of Farewell, L.J. in *Ladamuttu's* case (*supra*) :

> 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 purpose of bringing matters before a Court of Justice when any real point of difficulty that requires judicial decision has occurred.

As this is the fourth appeal in which we have been called upon to decide whether a statutory functionary has acted within the ambit of his powers I wish to state that where statutory functionaries are vested with extraordinary powers such as those granted under the Land Redemption Ordinance they should show the greatest care in exercising such powers entrusted to them by the legislature in the faith that they would regard them as a sacred trust and show the greatest consideration to the rights of the citizen. They should always give close attention and due consideration to the representations of those affected by the exercise of such powers, ever mindful of the fact that it is not every citizen that has the means to assert his rights in the Courts if the functionary does not treat their representations with the consideration they deserve. In the instant case it would seem that in establishing his claim the plaintiff has had to spend more than the compensation he has been offered. The greater the powers entrusted to a statutory functionary the greater should be the care with which they are exercised.

I allow the appeal with costs and direct that decree be entered as prayed for with costs.

DE SILVA, J.
I agree.

PULLE, J.

Three distinct matters have been raised in this appeal and the decision of any one of them in favour of the defendants, who are the respondents, would conclude the appeal in their favour. The learned trial Judge held that although the 2nd defendant was the *paraveni nilakaraya* of the lands in question he was none the less the owner for the purpose of satisfying the requirements of section 3 (1) (*b*) of the Land Redemption Ordinance, No. 61 of 1942. He also held that a declaration made by the Minister of Agriculture and Lands dated the 10th May, 1951, under the provisions of the First Schedule to the Land Redemption Ordinance, as amended by section 62 (1) of the Land Acquisition Act, No. 9 of 1950, ruled out even the possibility of challenging the proceedings taken to acquire the lands on the ground that the Land Commissioner had exceeded his powers under section 3 (1) (*b*) of the Land Redemption Ordinance. He did not, however, uphold the plea raised by the Crown that the decree in D.C. Kandy Case No. 3632 dismissing an action instituted by the plaintiff in 1952 operated as *res judicata*.

In the case of *Appuhamy et al. v. Menike et al.* (19 N.L.R. 361) a Bench of three Judges held that a *paraveni nilakaraya* claiming an undivided share in a panguwa of a nindagama was not entitled under the Partition Ordinance, No. 10 of 1863, to bring a suit for the partition of the land. Section 2 which lays down the prime condition for the institution of a partition action reads :

"When any landed property shall belong in common to two or more owners, it is and shall be competent to one or more of such owners to compel a partition of the said property ;.....".

The submission on behalf of the appellants in that case was that, although they and the defen-

dants were *paraveni nilakarayas*, the panguwa "belonged" in common to them and that the appellants came within the description of "one or more of such owners". The reasons for holding against the appellants are stated differently in the three judgments. Nevertheless, I am compelled to come to the conclusion that the only basis on which the decision can be interpreted is that the paraveni tenants could not bring themselves within the scope of section 2, whatever each of the learned Judges thought was a good ground for denying their claim to be owners. I fail to see why if they were owners they should have been, in the face of the clear provisions of the section, refused the right to put an end to the common ownership and why two of the Judges should regard the indivisibility of the services due to the overlord as the only obstacle to a physical division of a panguwa or to a sale. I have had the advantage of reading in advance the judgment of my Lord, the Chief Justice, and I fully concur in the reasons given by him that a *paraveni nilakarayas* cannot for the purposes of section 3 (1) (*b*) of the Land Redemption Ordinance, be regarded as an "owner".

If it be correct that the 2nd defendant cannot bring himself under section 3 (1) (*b*) of the Land Redemption Ordinance, then I see no difficulty in holding that the steps taken to acquire the lands and vest title thereto in the Crown are of no avail in law. The preamble to the modified form of section 5 of the Land Acquisition Act, No. 9 of 1950, which is incorporated as an amendment to the First Schedule to the Land Redemption Ordinance reads :

"Where the Land Commissioner determines that any land shall be acquired for the purposes of the Land Redemption Ordinance, the Minister shall make a written declaration.....".

To my mind a valid declaration by the Minister is dependent on a valid determination by the Land Commissioner and that an invalid determination vitiates the steps taken thereafter to put in motion the machinery of acquisition for the ultimate vesting of title to the lands in the Crown.

On the issue of *res judicata* the facts are fully set out in the judgment of my Lord, the Chief Justice, and I need not repeat them. It is common ground that at the time D. C. Kandy Case No. 3632 was filed title to the lands in question was in the plaintiff. The plaint alleged in effect that two statutory functionaries one the Land Commissioner and the other the Assistant Government Agent had done acts, purporting to act under the law, which were not within their powers and the plaintiff asked for a declaration that the lands were not liable to be acquired under the Land Redemption Ordinance and for an injunction restraining the 2nd defendant who was the acquiring authority from taking further steps to acquire the lands. The two defendants denied the allegations of illegality and in paragraph 6 of their joint answer they stated :

"Further answering these defendants state that the Court has no jurisdiction to hear and determine this action."

The occasion to formulate issues did not arise as the action was dismissed for default of appearance. That the dismissal of the action was a bar to a fresh action against one or other of the parties on the same cause of action, assuming that the District Judge had jurisdiction to try case No. 3632 on its substantive merits, is plain enough. If the Court had no jurisdiction to grant relief to the plaintiff as against the defendants in case No. 3632 I fail to see how the decree in that case can operate as *res judicata*, if the plaintiff afterwards seeks relief against the proper parties in the proper forum.

In my opinion the plea of *res judicata* fails substantially for the reason that the parties in the two actions are different. I cannot bring myself to hold that the defendants in case No. 3632 defended it as agents of the Crown. The complaint against them was that under colour of office they were doing or had done acts unwarranted by law. It was open to the Attorney-General to have got himself substituted in place of the Land Commissioner or the Assistant Government Agent. Had he done so his position in the present case would have been almost impregnable. I agree with the learned District Judge that the plea of *res judicata* fails.

In the result the appeal should be allowed with costs both here and below.

Present : GUNASEKARA, J. AND SANSONI, J.

KUMARIHAMY vs. KIRIHAMY

S. C. 843/56 *F.—D. C. Kandy No. P.* 4661

Argued on : 22nd and 23rd September, 1958
Decided on : 7th Aprit, 1959.

Kandyan Deed of Gift executed in favour of donee one year and four months after donees' marriage—Is it a donation or transfer for valuable consideration.

A deed, purporting to be a deed of gift, executed between parties subject to Kandyan Law, stated that the donor " for and in consideration of the natural love and affection " which he had for the donee, his daughter, and " for and in consideration of the marriage " of the donee, conveyed property to her " by way of dowry ".

The marriage had already taken place one year and four months before the deed was executed.

After the death of the donee, the donor revoked the gift.

The learned District Judge decided that the revocation was ineffective as the deed was not a donation, but a transfer for consideration, namely the marriage.

On appeal from this decision it was held that the deed was a deed of gift and could be revoked as :—

(1) There was no evidence that the deed was given in pursuance of a promise made before the marriage.

(2) The marriage was not the consideration for the deed but was merely an occasion for the exercise of the donor's generosity.

Distinguished : *Kandappa vs. Charles Appu et al* (1926) 27 N.L.R. 433.
Cases Followed : *Ram Menika vs. Banda Lekam* (1912) 15 N.L.R. 407.

T. B. Dissanayake, for the 1st to 7th and 10th Defendants-Appellant.

N. E. Weerasooria, Q.C., with *B. S. C. Ratwatte*, for the Plaintiff-Respondent.

GUNASEKARA, J.

This is an appeal from a decree for partition in an action instituted under the Partition Act, No. 16 of 1951. The subject of the decree is a piece of land known as Kahatagahagodawatta, 7 acres and 29 perches in extent, depicted as lots 1 to 7 in a plan (marked X) that was made for the purpose of the action.

It appears that Kahatagahagodawatta was sold and transferred by the Crown on the 18th May, 1863, to a person named Kirihamy and that his title eventually devolved on the 1st defendant on the 29th November, 1901. The property is described in the Crown grant and in later deeds as being 6 acres 2 roods and 26 perches in extent and is so described in the schedule to the plaint. On the 25th February, 1928, Kirihamy sold and transferred to Tikiri Banda Nugawela, by the deed P9, a defined extent of 2 acres 2 roods and 25 perches out of this property. According to the case for the plaintiff the portion so transferred is represented by lot 7 in the plan X, though that lot is only 2 acres, 1 rood and 11 perches in extent. On the 19th December, 1932, by the deed P1, the 1st defendant conveyed to his daughter Punchi Etana " an undivided two acres in extent towards the West ", and the plaintiff claims that she has succeeded to Punchi Etana's title and that this interest has accordingly devolved on her. On the 7th September, 1934, by the deed 1 D13, the 1st defendant conveyed the rest of the property to the children of his daughter Ukku Etana (the 2nd defendant) subject to a life-interest in her favour. Subsequently, in 1944, an extent of 3 roods was compulsorily acquired by the Crown for a public cemetery. According to the case for the plaintiff the portion so acquired is that depicted as lot 6 in the plan X, the extent of which however is 3 roods and 14 perches.

The learned District Judge has made order allotting lot 6 to the Crown and lot 7 to the 8th to 14th defendants as the heirs of Tikiri Banda Nugawela, and declaring the plaintiff to be en-

titled to an " undivided extent of 2 acres from the west out of lots 1, 2, 3, 4 and 5 " and the 3rd to 7th defendants (who are the children of the 2nd defendant) entitled to " the balance extent of 2 acres 4 perches " subject to a life interest in favour of the 2nd defendant. The 1st to 7th defendants and the 10th defendant have appealed against this order.

It is manifest that the portion that was acquired for a cemetery was not owned in common by the Crown and the plaintiff or any other person. Nor was the defined portion that was sold to Tikiri Banda Nugawela owned in common by his heirs and the plaintiff or any of the other parties to the action. The learned Judge's order in respect of lots 6 and 7 therefore cannot stand and must be set aside.

Punchi Etana, the grantee on 19-12-32 P1, was the wife of one Don Pieris, whom she had married on the 10th August, 1931. The deed purports to be a deed of gift. It describes the 1st defendant as the donor and his daughter Punchi Etana as the donee, and states that the donor " for and in consideration of the natural love and affection " which he has for the donee and " for and in consideration of the marriage " of the donee conveys certain property to her " by way of dowry ". Punchi Etana died on the 23rd December, 1935, and on the 29th July, 1936, by the deed 1 D7, the 1st defendant purported to revoke the deed P1. The learned District Judge holds that it is irrevocable and that the purported revocation is not valid.

The 1st defendant and Punchi Etana were persons governed by Kandyan Law, under which, subject to certain exceptions, donations are revocable. The ground of the learned District Judge's finding that the deed P1 is irrevocable is that it falls within the principle of the decision in *Kandappa vs. Charles Appu et al*, (1926) 27 N.L.R. 433 that " where the parents give a deed as dowry before or at the time of marriage, or even after marriage, if it be in pursuance of a promise made before marriage the deed should be regarded as a deed for valuable consideration and so irrevocable " : or, in other words, that such a deed is irrevocable not for the reason that it is a donation of a kind that is an exception to the rule as to revocability, but because it is not a donation at all. There is no evidence that the deed P1, which was executed 1 year and 4 months after the grantee's marriage, was given in pursuance of a promise made before marriage. It is, therefore, not within the principle of the decision in *Kandappa vs. Charles Appu et al*, (1926) 27 N.L.R. 433 but " it is a deed of gift in the real sense of the term, as there is no consideration in law but a mere inducement or motive actuating the donor to exercise his generosity ". The mere fact that the deed describes the gift as " dowry " can make no difference, for, in the words of Pereira, J. in *Ram Menika vs. Banda Lekam*, (1912) 15 N.L.R. 407 " a dowry may be a spontaneous and freewill gift by a parent to the contracting parties ". For these reasons I hold that the deed P1 was validly revoked by the deed 1 D7.

The order made by the learned District Judge must be set aside and the plaintiff's action must be dismissed. The plaintiff must pay the appellant's costs in this Court and the Court below.

SANSONI, J.
I agree.

Dismissed.

Present : BASNAYAKE, C.J., AND DE SILVA, J.

MENDIS AND OTHERS vs. PARAMASWAMI

S. C. 139—*D. C. Colombo* 35730

Argued on : 15, 16, 17 and 23 January, 1958.
Decided on : 13 March, 1958.

Evidence—Registration of shares in name of daughter on consideration paid by father—Statement made during his lifetime by deceased father to third party that shares were held by her in trust for him—Relevancy under sections 6, 7, 8 (2), 9 *and* 14 *of the Evidence Ordinance and admisibility under section* 32 *of the Evidence Ordinance—Relevancy of declarations showing state of mind for the purpose of section* 84 *of the Trusts Ordinance.—Procedure regarding tendering of documents in evidence in Civil proceedings —Section* 154 *of the Civil Procedure Code.*

In June 1947, shares to the value of Rs. 100,000 were registered in the name of the plaintiff's wife on consideration paid by her father.

In November 1951, a firm of proctors, acting for the father, wrote a letter to plaintiff's wife to the effect that they were instructed to state that she held the shares in trust for the father and that she must pay him the dividends she had received in respect of those shares.

In September 1954, the father died.

On the issue whether the deceased intended a gift of the shares to the plaintiff's wife, or whether plaintiff's wife held them in trust for the deceased, the defendants, the executors of the deceased, sought to produce this letter as evidence against the plaintiff.

The learned District Judge held that the letter was inadmissible and rejected it.

On an appeal from this decision it was held :—

(1) That the letter was inadmissible under section 32 of the Evidence Ordinance as :—

(*a*) It did not contain the very words used by the deceased but was only a narration by the writer of what he had gathered from a communication made to his firm by the deceased.

(*b*) The statements in the letter did not fall within any one of the eight sub-divisions of section 32 of the Evidence Ordinance.

(2) That the statement of facts contained in the letter was hearsay and could not be admitted to proof under sections 6, 7, and 8 (2), 9 and 14 of the Evidence Ordinance as the facts declared to be relevant by those sections must be proved by direct evidence and not by hearsay.

(3) That the declaration made by the deceased in November, 1951, could not be used under section 84 of the Trusts Ordinance for the purpose of showing the state of mind of the deceased at the time the shares were registered in the name of the plaintiff's wife, as it was not made contemporaneously with the registration, but long after.

Per, "BASNAYAKE, C.J.—"Before I part with this judgment, there is one other matter to which I wish to refer, and that is the fact that has not been filed of record but was tendered to us for reference at the hearing by learned Counsel for the appellants. The procedure regarding the tendering of documents in evidence is prescribed by section 154 of the Civil Procedure Code, the explanation of which is relevant to the matter under consideration.....I would commend section 154 and more especially its explanation to all judges of first instance in Civil proceedings."

C. Thiagalingam, *Q.C.*, with *N. Kumarasingham*, and *V. Arulambalam*, for the Executors-defendants-appellants.

H. V. Perera, *Q.C.*, with *S. Sharvananda*, and *Miss Maureen Seneviratne* for the plaintiff-respondent.

BASNAYAKE, C.J.

The only question for decision on this appeal is whether a letter (in these proceedings the original is referred to as D1a and the office copy as D1) sent by Messrs. Julius & Creasy, a firm of Proctors, to the plaintiff's wife on 28th November, 1951, can be admitted in evidence for the purpose of proving the fact that when the deceased Arumugam Sangarapillai (hereinafter referred to as the deceased) paid the consideration of one hundred thousand rupees for Times of Ceylon shares numbered 118,581 to 127,960 transferred to the plaintiff's wife, he did not intend to pay such consideration for her benefit. The document produced is an office copy of the letter and reads as follows :—

28th November, 1951

Mrs. P. Paramasamy,
c/o Dr. P. Paramasamy,
D. M. O., Rambodde.

M/L/NT. 1019.

Dear Madam,

Times of Ceylon, Ltd.

We understand from Mr. A. Sangarapillai that you hold shares numbered 118,581 to 127,960 of the Times of Ceylon, Ltd., in Trust for him and that two Dividends paid to you in respect of these shares have not been paid to him. We shall be glad if you will please forward these warrants either to us on Mr. Sangarapillai's behalf or to him direct. If the warrants have

already been cashed kindly send us a cheque for the equivalent thereof without delay as Mr. Sangarapillai requires moneys urgently.

The matter arises for decision in this way. In the course of the cross-examination of the plaintiff, Counsel for the defendants put to him the following questions :—

Q. You know that in the Times of Ceylon Ltd., there are shares worth a lakh of rupees registered in your wife's name ?
A. Yes.

Q. Who paid for these shares ?
A. Mr. Sangarapillai.

Q. When ?
A. I do not know the exact date, it was somewhere in 1946 or 1947. He did not tell me about it.

Q. When did you come to know about i t ?
A. When my wife was given a certificate, she brought it and when she was putting it in her wardrobe she told me that it was given to her as a present.

Q. Were you asked any question as to what your wife told you ?
A. I was asked when it was given.

Q. Did I ask you as to what she told you ?
A. That was a connected answer.

Q. Did I ask you what your wife told you ?
A. No.

Cross-examining Counsel at this stage made an application that the portion of the witness's answer in which he states that his wife mentioned it was a gift should be deleted. The learned District Judge refused to allow this application. The trial was then adjourned for the next day. Before commencing his cross-examination on that day Counsel showed the witness document D1 and asked him whether he had seen the original of it. The witness said he had. The plaintiff's Counsel then objected to its production on the ground that its contents were inadmissible. He maintained that it was not admissible under section 32 of the Evidence Ordinance and the defendants' Counsel maintained that it was admissible under section 32 (2) of that Ordinance. The plaintiff's Counsel also submitted that subsequent conduct or statements made by the deceased (in November 1951) are not admissible to prove the nature of a transaction that took place in June, 1947. The defendants' Counsel maintained that the Evidence Ordinance did not exclude evidence of subsequent conduct.

The learned District Judge held that the document was not admissible under section 32 (2) of the Evidence Ordinance. He also held that—

> " the conduct and statement of Sangarapillai evidenced by the document D1 and D1a are so far separated as to be inadmissible in his favour to rebut the presumption of a gift. They are also for the same reason inadmissible in favour of the defendants his Executors for the said purpose. I therefore reject the documents D1 and D1a."

The present appeal is from that decision. Before examining the question for decision I shall set out the facts briefly. The defendants are the Executors of the deceased who died on the 18th of September, 1954. The plaintiff is his son-in-law. He has instituted this action to recover a sum of Rs. 57,400/- which he alleges that the deceased owed him at the time of his death. It is common ground that shares to the value of Rs. 100,000/- in the Times of Ceylon Company, Ltd., were in June, 1947, registered in the name of the plaintiff's wife and that the deceased paid the consideration for them. The defendants claim that the deceased did not intend to benefit the plaintiff's wife when he paid for the shares and that she held the shares in trust for him till his death. The plaintiff claims that the shares were gifted to his wife by the deceased. By his last will which has been admitted to probate the deceased left these shares to the plaintiff 's wife. It would be sufficient for the purpose of this judgment to refer to issues 23 and 24 which are as follows :—

" 23. Did the late Mr. Sangaralingam Pillai pay the Times of Ceylon, Ltd., a sum of Rs. 100,000/- for shares in the Times of Ceylon, Ltd., registered in the name of the plaintiff's wife ?

24. (*a*) Did the plaintiff's wife hold such shares in trust for Sangaralingam Pillai until an adjustment of accounts between plaintiff and plaintiff's wife on the one hand and Mr. Sangaralingam Pillai on the other, or

(*b*) Was the allotment of such shares to plaintiff's wife in the nature of gift to plaintiff and his wife ? "

To succeed in their claim that the plaintiff's wife held the shares in trust for the deceased during his lifetime the defendants must prove that the transaction falls within the ambit of section 84 of the Trusts Ordinance. In the instant case they must prove—

(*a*)that Times of Ceylon shares to the value of Rs. 100,000/- were transferred to the plaintiff's wife in or about June, 1947.

(*b*) that the consideration was paid by the deceased, and

(*c*) that he did not intend to pay such consideration for the benefit of the plaintiff's wife.

(*a*) and (*b*) are admitted, but (*c*) is denied. The burden of establishing (*c*) is on the defendants. In order to discharge this burden they propose to produce D1 as evidence of a statement made by the deceased that he did not intend to benefit the transferee when he paid the consideration for the shares.

It would appear from D1—

(*a*) that the deceased communicated with the firm of Julius & Creasy orally or in writing before D1 was written.

(*b*) that in the communication or communications made by the deceased he created in the mind of the person or persons who received them the impression—

(i) that the plaintiff's wife held Times of Ceylon shares numbered 118,581 to 127,960,

(ii) that she held those shares in trust for the deceased,

(iii) that two dividends had been paid to the plaintiff's wife,

(iv) that she had not paid them to the deceased,

(v) that the deceased wanted the dividend warrants or if they had been realised the amount of such dividends paid to him.

As learned Counsel for the defendants contended both in the Court below and here that D1 is admissible under section 32 of the Evidence Ordinance it is necessary in the first place to examine that contention. In the instant case the defendants are seeking to establish the truth of the facts stated in D1 by producing it in evidence. The document does not contain the *ipsissima verba* of the deceased but as stated above a narration by its writer of what he had gathered from a communication or communications made to his firm by the deceased.

Now section 32 is the only section of the Evidence Ordinance which permits the proof of relevant facts contained in statements made by deceased persons. The type of evidence permitted by the section is known as hearsay evidence. A statement of relevant facts cannot be admitted under the section unless the statement consists of the very words of the deceased person and comes within any one of the cases (1) to (8) of that section. Now D1 cannot be admitted in evidence for the reason that it does not contain a statement made by the deceased. Apart from that, the statements in the letter do not fall within any one of the eight cases in section 32.

Learned Counsel for the defendants also contended that D1 was relevant under sections 6, 7, 8 (2), 9 and 14 of the Evidence Ordinance. The facts declared to be relevant by those sections must be proved by direct evidence. They do not permit the admission of hearsay evidence which can be admitted only under section 32. Now clearly the writer does not claim that he personally knows the matters referred to in D1. They are matters communicated to his firm by the deceased. Their truth cannot therefore be proved by the writer's evidence.

The further question whether declarations made by the deceased in November, 1951, were relevant for the purpose of establishing the fact that the deceased did not, in June, 1947, intend to benefit the plaintiff's wife when he paid the consideration for the shares in question was argued in the Court below and decided by the learned District Judge against the defendants. I agree with the conclusion of the learned District Judge, but not for the reasons given by him. It would appear from the language of section 84 of the Trusts Ordinance that the state of mind that is relevant for the purposes of that section is the state of mind the person paying the consideration had at the time he paid it. That state of mind must be established by contemporaneous statements or declarations. Statements made long after the transaction are not relevant. Under our Evidence Ordinance evi-

dence may be given in any suit of the existence or non-existence of every fact in issue, and of such other facts as are declared to be relevant by that Ordinance and of *no others*. (Section 5.) Unless a fact is declared to be rel vant by a section of the Evidence Ordinance, no evidence of it can be given and there is no section which declares D1 to be relevant.

Before I part with this judgment there is one other matter to which I wish to refer, and that is the fact that D1 had not been filed of record but was tendered to us for reference at the hearing by learned Counsel for the appellants. The procedure regarding the tendering of documents in evidence is prescribed in section 154 of the Civil Procedure Code, the Explanation of which is relevant to the matter under consideration. The relevant portion of it reads—

> " If, however, on the document being tendered the opposing party objects to its being admitted in evidence, then commonly two questions arise for the Court—
>
> " Firstly, whether the document is authentic— in other words, is what the party tendering it represents it to be ; and
>
> " Secondly, whether, supposing it to be authentic, it constitutes legally admissible evidence as against the party who is sought to be affected by it.
>
> " The latter question in general is matter of argument only, but the first must be supported by such testimony as the party can adduce. If the Court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a *prima facie* case of authenticity, and is further of opinion that the authentic document is evidence admissible against the opposing party, then it should admit the document as before.
>
> " If, however, the Court is satisfied that either of those questions must be answered in the negative, then it should refuse to admit the document. Whether the document is admitted or not, it should be marked as soon as any witness makes a statement with regard to it ; and if not earlier marked on this account, it must, at latest, be marked when the Court decides upon admitting it."

I would commend section 154 and more especially its Explanation to all Judges of first instance in civil proceedings.

DE SILVA, J.
I agree.

Dismissed with costs.

Present : T. S. FERNANDO, J.

BANDA vs. PURASINGHA (SUB-INSPECTOR OF POLICE, WELIGAMA).

S. C. No. 143 *of* 1958—*M. C. Matara* 50271

Argued on : 13th and 16th October, 1958.
Decided on : 24th October, 1958.

Appeal—Plea of Autrefois Acquit—*Right of Appeal against order of Magistrate rejecting plea—Criminal Procedure Code, section* 338 (1).

The accused-appellant was charged in the Magistrates Court with causing grievous hurt. Counsel for the defence raised before the Magistrate a plea of *autrefois acquit*, but this plea was not upheld and the Magistrate directed that the trial should proceed. The accused-appellant thereupon appealed to the Supreme Court from this order.

Held : That an appeal lies to the Supreme Court only from a judgment or final order pronounced by a Magistrate's Court, and an interlocutory order rejecting a plea of *autrefois acquit* raised *in limine* and directing that the trial should proceed is not an appealable order.

Per T. S. FERNANDO, J.—" The Magistrate should have continued the trial and after its conclusion forwarded the record to this Court as an appeal had been filed against his order rejecting the plea."

K. C. Nadarajah, with *N. K. Rodrigo*, for the appellant.

N. Tittawella, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The accused-appellant and another were charged in the Magistrate's Court with causing grievous hurt to a man named Gallison Silva. Counsel for the defence raised before the Magistrate a plea of *autrefois acquit*, but this plea was not upheld. The accused-appellant has appealed to this Court from the order of the Magistrate dated 28th October, 1957, rejecting the plea. Learned Counsel for the appellant now concedes that he is unable to press this appeal. The order appealed from is legally unexceptionable, and the appeal must be dismissed. An appeal lies to this Court only from a judgment or final order pronounced by a Magistrate's Court, and an interlocutory order rejecting a plea of *autrefois acquit* raised *in limine* and directing that the trial should proceed is obviously not an appealable order. The Magistrate should have continued the trial and after its conclusion forwarded the record to this Court as an appeal had been filed against his order rejecting the plea. The decision to postpone the trial till this Court had time to consider an interlocutory appeal has resulted in delaying the trial of a case which had already been delayed to the point of exasperation.

When the appeal was filed on 7th November, 1957, the Magistrate believing that a continuation of the trial will result in delaying the appeal ordered the petition of appeal to be forwarded to this Court immediately. The petition, however, reached this Court only on 3rd March, 1958. It came before me for hearing on October 13th, after the lapse of seven months. It is found that the appeal is not competent, and the next step is for the Magistrate to continue the trial. The date of the alleged offence is said to be 6th October, 1956, so that the trial of an offence triable summarily is to commence more than two years after its commission. The facts indicated above give some idea of the rate of progress of criminal trial in this country, but it is only fair by the accused in this case to say that the delay in its disposal has been occasioned more by the slothfulness of the prosecution than by any tactics adopted by the defence.

The prosecution really commenced on 20th October, 1956, when a report was filed by the Police against the appellant and five others, all Police Constables, alleging that they had committed the offences of grievous hurt on and wrongful restraint of Gallison Silva. The case was numbered 46586 and, after three calling dates, the trial commenced on 29th January, 1957, when the evidence of a doctor was recorded. On the date of the resumption of the trial, Crown Counsel stated to Court that the first offence should have been one punishable under Section 317 instead of one under Section 316 of the Penal Code as stated in the charge sheet because the weapon or weapons used were batons which when used as weapons of offence were likely to cause death! It is not possible to understand why no attempt was made to have the charge amended if Crown Counsel's position was correct. The procedure followed was to stay the trial and to file a fresh report in Court alleging against the same six accused persons offences of rioting and grievous hurt (Section 317). The charge of wrongful restraint was dropped at this stage.

When the fresh report was filed, a new case numbered 47936 was commenced, and the non-summary inquiry which began on 30th April, 1957, was continued on seven different dates, and concluded on 20th July, 1957. On this date the prosecution closed its case, and the learned Magistrate discharged four of the accused as the evidence did not in his opinion warrant further proceedings against them. The Magistrate made an order discharging the appellant and the remaining accused on the ground that a charge of an offence under Section 317 of the Penal Code had not been made out as no evidence was led by the prosecution that police batons when used as weapons of offence were likely to cause death! The avowed purpose of abandoning the summary trial in Case No. 46586 was to prosecute an offence punishable under Section 317 as batons were considered by the prosecution to be weapons likely to cause death. Notwithstanding that avowed purpose no attempt was made during the long course of the non-summary inquiry to further that purpose. The accused in the present case are now called upon through no fault of their own to defend themselves on the original charge after they have appeared in Court represented by Counsel on at least twelve occasions. If I had the power to order the prosecution to pay costs, I would have considered it my duty to order the prosecution to pay the costs of the appellant and the other accused in respect of all twelve days.

Dismissed

Present : BASNAYAKE, C.J., AND DE SILVA, J.

EMALIA FERNANDO vs. CAROLINE FERNANDO AND OTHERS

S. C. 454 (*L*)—*D. C. Panadura* 3795

Argued on : 22nd January, 1958.
Decided on : 14th February, 1959.

Deed of Gift signed by maker in presence of notary and witnesses—Notary and witnesses not signing in presence of maker but signing later—Requirements of Prevention of Frauds Ordinance, section 2—Notaries Ordinance, section 30 (12).—Meaning of the words "attest" and "duly"

Three deeds of gift conveying certain lands were signed by a deceased person in the presence of the notary and witnesses. After the deceased had signed one of the deeds the notary and the witnesses went to another room out of the view of the deceased and there the notary and the witnesses signed the deeds.

Held : That section 2 of the Prevention of Frauds Ordinance requires that the notary and the witnesses should sign an instrument requiring their attestation at the same time as the maker of the instrument and in his presence. The requirement of the section is not satisfied if the notary and the witnesses sign the deed at another place and at some other time. The deeds in question were, therefore, of no force or avail in law.

Cases followed : *Punchi Banda vs. Ekanayake* 4 S.C.C. 119.
Wright vs. Wakeford 128 E.R. 310. 4 Taunt 213.

Cases referred to : *Hudson vs. Parker* 163 E.R. 948.

H. W. Jayawardene, Q.C., with *S. D. Jayasundera*, for the Plaintiff-Appellant.

Walter Jayawardene, with *D. R. P. Goonetileke*, and *L. Mututantri*, for the 1st 4th, 5th, 6th and 7th Defendants-Respondents.

D. R. P. Goonetileke, for the 2nd and 3rd Defendants-Respondents.

BASNAYAKE, C.J.

The only question that arises for decision in this appeal is whether section 2 of the Prevention of Frauds Ordinance requires that the notary and the witnesses should sign an instrument requiring their attestation at the same time as the maker of the instrument and in his presence.

Shortly the facts are as follows : Boniface Fernando, who died on 18th June, 1953, executed on 13th June, 1953, three deeds of gift No. 6430, 6431 and 6432, conveying certain lands to the plaintiff his wife. The deeds were executed by the deceased in room No. 14 in the Fernando Memorial Hospital in Wellawatte in the presence of the notary and the witnesses, but they did not sign them in his presence. After the deceased signed the deeds the notary and the witnesses went to the resident doctor's consulting room which was a little distance away from the room of the deceased and out of his view and there the notary and the witnesses signed the deeds. The doctor describes the situation of the consulting room thus : " You get out of Room No. 14, turn left along the corridor, walk 3 or 4 steps, and turn right and enter my consultation room. It is on the other side of the passage. It is an independent room. Anybody in my room is not visible to people in Room No. 14."

All the copies of the deeds were, between the date of their execution and 5th July, 1953, lost from the notary's office before the duplicates were sent to the Registrar of Lands and before they were tendered for registration.

Admittedly the deeds were not signed by the witnesses and the notary in the presence of the deceased. Learned Counsel for the appellant contended that there was no legal requirement that the notary and the witnesses should sign in the presence of the maker of the instrument ; but he was unable to cite any decision of this Court in support of his contention.

The material portion of section 2 of the Ordinance reads as follows :—

"No sale, purchase, transfer, assignment, or mortgage of land or other immovable property.....shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her *in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses.*"

An instrument for effecting a sale etc., of immovable property to be of force or avail in law must be—

(*a*) in writing, and

(*b*) signed by the party making it, or by some person lawfully authorised by him,

(*c*) in the presence of a licensed notary public and two or more witnesses present at the same time, and

(*d*) its execution must be duly attested by the notary and the witnesses.

(*a*) and (*b*) need not be considered for the purpose of the instant case. (*c*) requires that the person signing the deed should do so in the presence of the notary and the witnesses who shall be present at the same time. It is necessary that the witnesses and the notary should not only be present but should also see the party making the instrument sign it and be conscious of the act done (see *Hudson vs. Parker*, 163 E.R. 948, 1 Rob Ecc. 12). The effect of the words "in the presence of" is that they should be present not only in body but also in mind. As the effect of the words "in the presence of a licensed notary public and two or more witnesses present at the same time" is that witnesses should not only be bodily present but should also see the party making the instrument sign it and be conscious of that act, the statute is not satisfied if the witnesses are intoxicated or are of unsound mind or are blind or asleep (*Hudson vs. Parker* (*supra*)).

If as learned Counsel contends the section requires no more than that the party executing the deed should sign it in the presence of the witnesses and the notary and that witnesses and notary may sign the deed in proof of their presence at any time thereafter and at any place and not necessarily in the presence of the party signing the deed, it would have been sufficient for the legislature to have said "in the presence of a licensed notary public and two or more witnesses present at the same time" and it was unnecessary to enact the words "and unless the execution of such writing, deed, or instrument be *duly* attested by such notary and witnesses."

The words "and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses" must surely impose an additional requirement. In construing a statute effect must be given to every word in it and no words are to be treated as surplusage unless in attempting to give a meaning to every word we should make the enactment unintelligible. The words "and unless" indicate the importance attached to the attestation by the notary and the witnesses. What is the true meaning of this requirement? The instrument must be "duly attested" by the notary and the witnesses. Now what is the meaning of the word "attest"? It is defined in Sweet's Law Dictionary (1882) thus:

"To attest is literally to witness any act or event, but the term is now exclusively applied to the signature or execution of a document. When A executed a deed in the presence of B, and B signs his name on the document as a token of his having witnessed A's execution, B is said to attest the execution. The terms is even more commonly applied to wills than to deeds. A clause called an attestation clause is generally written at the foot of the instrument as a declaration by the attesting witness that the instrument was signed or executed in his presence."

The word "duly" must also in this context be given its force and effect. It means in due manner, order, or form. Its effect is that the notary and the witnesses must at the proper time and place sign the instrument as proof of the fact that they were present and saw its maker sign the instrument. The requirement of the section is not satisfied if the notary and the witnesses sign the deed at another place and at some other time. They must sign it then and there in the presence of the maker. The signing by the maker in the presence of the notary and the witnesses and the attestation by the notary and the witnesses are one and the same transaction to be carried out at one and the same time and place.

I find support for the view I have formed in the English case of *Wright vs. Wakeford*, 4 Taunt. 213, 128 E.R. 310. It was there held that the signing of the instrument by the attesting witnesses must be contemporaneous with the signing by the person executing it and part of the same transaction. In that case the words the Court was called upon to construe are "attested by two or more credible witnesses".

I am reinforced in my view by the fact that any other construction of this section will promote and not prevent fraud. The declared object of the Ordinance being " to provide more effectually for the prevention of frauds and perjuries " its provisions should be so construed as to give effect to that object and not so as to defeat it.

Learned Counsel for the appellant contended that the requirement of the Notaries Ordinance in regard to the attestation of documents is not relevant to a consideration of the true meaning of the section. I am unable to agree that the provisions of the Notaries Ordinance are irrelevant to a consideration of the meaning of section 2 of the Prevention of Frauds Ordinance. I think in giving effect to the word " duly " we should take into account provisions of law which regulate the execution of documents required to be notarially attested. Section 30 (12) of the Notaries Ordinance provides that a notary " shall not authenticate or attest any deed or instrument unless the person executing the same and the witnesses shall have signed the same in his presence and in the presence of one another, and unless he shall have signed the same in the presence of the executant and of the attesting witnesses ". Section 30 (20) requires the notary to state in his attestation that the deed was signed by the party making it and the witnesses in his presence and in the presence of one another.

The view I have expressed above is in accord with the decision of this Court in the case of *Punchi Baba vs. Ekanayake*, 4 S.C.C. 119, in which this Court expressed the view that section 2 of the Prevention of Frauds Ordinance required that the notary and the witnesses should sign in the presence of the maker and at the same time and that a deed not so signed was not valid.

In my opinion the learned District Judge is right in holding that the deeds are of no force or avail in law.

The appeal is therefore dismissed with costs.

de Silva, J.
I agree.

Appeal dismissed.

Present : Sansoni, J. and Sinnetamby, J.

K. L. JAYANHAMY—(Plaintiff-Appellant)

vs.

THE PANADURA MOTOR TRANSIT CO., LTD.,—Defendant-Respondent

S. C. 134/58 *F—D. C. Badulla* 13248
Argued on : 24th April, 1959
Decided on : 4th May, 1959

Negligence—Master and servant—Extent of servant's duty to examine roadworthiness of car belonging to Master.

Pleadings—New cause of action put forward in appeal—Not pleaded in plaint.

Plaintiff, a passenger in defendant's omnibus, was injured when the omnibus toppled over an embarkment. At the time of the accident the omnibus was driven by the defendant's driver acting within the scope of his employment.

Plaintiff sued the defendant on his vicarious liability for the driver's negligence in driving an omnibus with a set of defective spring blades and/or in driving an omnibus in an unroadworthy condition.

The accident occurred because the spring blades broke throwing the steering gear out of control. The evidence disclosed that there was an old crack in the spring blades, but the driver could not have known of it unless he dismantled the omnibus and examined it.

Held: (1) Affirming the decision of the District Court, that the driver's failure to make such an examination would not constitute negligence.

In appeal, the plaintiff submitted that the defendant was liable for its own negligence in that it had failed in its duty to plaintiff to take all reasonable care to provide an omnibus in good order and safe condition to carry passengers.

Held further (2) That the Supreme Court would not permit such a case to be put forward at this stage because this was a new cause of action which was not pleaded in the plaint.

Distinguished: *Cabral vs. Alberatne* (1955) 57 N.L.R. 368.

Cases followed: *Marshall vs. London Passenger Transport Board* (1936) 3 A.E.R. 83.
Esso Petroleum Co., Ltd., vs. Southport Corporation (1956) A.C. 218.

K. Shinya, with *A. A. de Silva*, for the plaintiff-appellant.

Sam P. C. Fernando, for the defendant-respondent.

SANSONI, J.

The plaintiff was travelling in an omnibus belonging to the defendant and driven by a driver employed by the defendant. Near the 127th mile post on the Wellawaya-Haputale road the omnibus ran off the road into an embankment, toppled over, and came to rest on its side. The plaintiff was seriously injured and he brought this action against the defendant to recover a sum of Rs. 10,000/- as damages.

The cause of action set out in the plaint is that the omnibus was driven rashly and/or negligently by the defendant's driver acting within the scope of his employment. The particulars of rashness and negligence given in the plaint were that the omnibus was driven (1) at an excessive speed, (2) with a set of defective spring blades, (3) without a sufficient or proper look-out (4) without due care or regard for the passengers (5) without a satisfactory or efficient braking system and/or in an unroadworthy condition and (6) without taking such action as was necessary to prevent the omnibus running off the road.

After trial the learned District Judge found that the accident occurred because the offside front spring main blade broke. The evidence of the Examiner of motor vehicles showed that when a blade breaks, the steering mechanism goes out of order, and the vehicle cannot be controlled. The Sub-Inspector of Police who visited the scene of the accident found the spring blade broken in two and fallen about 28 feet away from where the omnibus toppled over.

The only question that remained for decision was whether there had been negligence on the part of the driver in driving a vehicle which was not roadworthy because it had a defective spring blade. This position could not be substantiated as the Examiner of motor vehicles stated that although he found an old crack in the spring

blade the existence of that crack could not have been discovered unless the omnibus had been dismantled and examined. I agree with the learned Judge that the failure on the part of an omnibus driver to do this would not constitute negligence. As none of the other particulars of rashness or negligence was established on the evidence led at the trial the learned Judge was perfectly correct when he dismissed the plaintiff's action.

It was, however, submitted to us for the plaintiff, who appealed against the order of dismissal, that the defendant should have been held liable for negligence because it owed a duty to the plaintiff, who was a passenger in the omnibus, to take all reasonable care that the omnibus was in good order and in a safe condition to carry passengers when it was used for that purpose, and it had failed to perform this duty. Reliance was placed on the decision in *Cabral vs. Alberatne* (1955) 57 N.L.R. 368. In that case a motor truck belonging to the defendant ran off the road into the plaintiff's house and damaged it. The accident occurred because the steering rod had become detached from the joint where it met the tie-rod; this mechanical defect had developed suddenly in the course of the journey and taken the driver unawares. The maxim *res ipsa loquitur* was applied by the Court and the plaintiff was awarded damages. Learned Counsel for the appellant submitted to us that both in that case and in this the action was framed on the basis that the vehicle in question was driven negligently, and we should follow that decision and hold the defendant liable for the negligence of the driver.

So far as the present action is concerned, I think it would be wrong to do so for the reason that negligence on the part of the driver has been disproved, and the only ground upon which the plaintiff sought to make the defendant liable was that of vicarious liability for the negligent driving of its servant. The actual ground on which the defendant in *Cabral vs. Alberatne* (1955) 57 N.L.R. 368 was held liable was that the defendant had been negligent in permitting an unroadworthy vehicle to be driven on the road. The point does not appear to have been taken there that this was a new cause of action which was not pleaded in the plaint, and that decision is therefore of no assistance on this particular aspect of the argument.

We must certainly refuse to permit such a case to be put forward at this stage, because no such case appears in the plaint. The objection to this course is clearly explained by Lord Wright, M. R. in *Marshall vs. London Passenger Transport Board* (1936) 3 A.E.R. 83. It is that there will be set up "a new cause of action involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury, and the only point of similarity would be that the plaintiff had suffered certain injuries."

Another authority for the view I am taking is the decision of the House of Lords in *Esso Petroleum Co., Ltd., vs. Southport Corporation* (1956) A.C. 218. Where the only cause of action pleaded is that the defendant's servant had been negligent, and it is sought to make the defendant liable only on the ground of vicarious responsibility for the acts and default of the servant, it is not open to the plaintiff to claim that the defendant is liable upon some other charge of negligence that has not been pleaded. It, therefore, does not lie in the mouth of the plaintiff at this stage to urge that the defendant has been guilty of negligence in allowing its omnibus to be driven on the road in a defective condition.

I would, therefore, dismiss this appeal with costs.

SINNETAMBY, J.

I agree.

Appeal dismissed with costs.

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