THE
CEYLON LAW WEEKLY

A CONSOLIDATED DIGEST

(IN FOUR PARTS)

OF

VOLUMES I TO L

(1931 TO 1954.)

PART I

(ABATEMENT — CRIMINAL PROCEDURE CODE)

COMPILED BY

68918

B. P. PEIRIS, O.B.E., LL.B., (Lond.)
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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 judgements of local interest.

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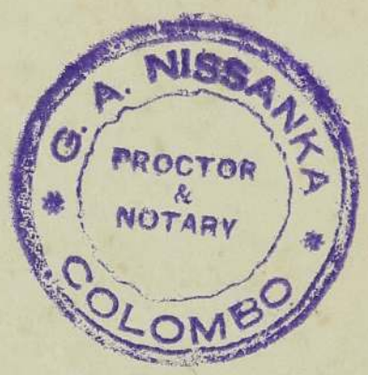

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DIGEST

ABATEMENT

See also under **CIVIL PROCEDURE CODE**

Partition action by two plaintiffs—Order of abatement in an earlier partition action instituted by one of the plaintiffs in respect of the same land—Is the order of abatement a bar to the present action—Civil Procedure Code, Section 403.

JAYASEKERA & ANOTHER *vs.* SAMARANAYAKE ... .. XXI 121

Order of abatement of appeal for failure to serve on respondent personally notice of tendering security for costs—Appeal lies from order.

CARLINA *vs.* SILVA ... ... XXXI 71

Abatement of appeal—Failure to conform to Civil Appellate Rules 1938 and Section 755 of Civil Procedure Code.

ABRAHAM *vs.* FERDINANDO XLIII 109

Order of abatement—Civil Procedure Code, Sections 396 and 403—Effect of abatement of action—Action by lessee for ejectment of trespasser—Earlier action by lessor against same trespasser—Abatement of lessor's action after institution of action by lessee—Is lessee's action barred by order of abatement—*Lis pendens*—Registration of Documents Ordinance, Sections 11 (1) and 11 (3)—Commencement of trial—Should some only of issues be disposed of before completion of trial.

The appellant, a lessee under a notarial lease of 1946 from one V, sued the defendant for ejectment from the property leased. The defendant claimed that he was the owner on a title superior to that of V, the lessor. It was established by evidence in the course of the trial that before the execution of the lease in favour of the appellant, the lessor V, had instituted a *rei vindicatio* action in 1944 for the recovery of the same property. Before trial V died and an order of abatement under Section 396 of C.P.C. was made in 1948. The appellant had instituted the present action before the order of abatement. After the trial commenced defendant's counsel raised additional issues arising from evidence already led to the effect that the order of abatement made in the action by V, was binding on the appellant and had the effect of precluding him from maintaining this action against the defendant. The learned District Judge on being invited to decide these as preliminary issues held against the appellant.

Held: (1) *That Section* 403 *of the Civil Procedure Code, which sets out the consequences of an order under Section* 396 *of the same Code, does not prevent the appellant from maintaining this action, which he had instituted in his own right previous to the order of abatement.*

(2) *That Section* 403 *directly affects only those persons, who while they are precluded from instituting separate proceedings in the same cause of action, nevertheless enjoy the alternative right of having the order of abatement vacated in order that the original action may be proceeded with.*

(3) *That even if the earlier action by V had proceeded to trial and terminated in a decree in favour of the defendant, such decree would not have been binding on the appellant, unless, the defendant relying on the decree in bar of the appellant's remedy, had proved that the* lis pendens *had been duly registered in the earlier action.*

(4) *That after a trial has commenced for the determination of all the issues of fact and law, which properly arise, it should not be interrupted at a later stage for the intermediate disposal of some only of the issues.*

SOOTHIRETNAM *alias* SOTHIPILLAI AND ANOTHER *vs.* ANNAMMAH ... ...L 35

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See also under **PENAL CODE**

Abetment of forgery—Is sanction of Attorney-General necessary to enable of private party to prosecute.

VANDER POORTEN *vs.* VANDER POORTEN & ANOTHER ... ... XXXI. 77

Abetment—offer of bribe to public officer as motive or reward for doing an act not within his official power to perform.

TENNAKOON *vs.* DISSANAYAKE... XXXIX 49

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ACCEPTANCE

See also under **DEED, DONATION, MINOR, ROMAN-DUTCH LAW.**

Acceptance of oral gift.

PUBLIC TRUSTEE *vs.* UDURUWANA XLII 17

Gift subject to fidei commissum—Muslim minors—Acceptance by mother of minors—validity.

NOORUL MUHEETE *vs.* LEYANDUN XLII 86

ACCIDENT INSURANCE

See under **INSURANCE**

ACCOMPLICE

See under **DECOY.**

ACCOUNT STATED

Account stated in following terms " All accounts looked into today and there is due from me to Mana Muna Ana Rs. 11,982.29 " is a contract within the meaning of 91 of Evidence Ordinance and parol evidence cannot be given to rescind or neutralize the terms of the account stated.

It is not essential to an account stated that there should be an express agreement to pay—Circumstances in which an agreement to pay is implied.

MARIKAR *vs.* STRONG ... ... II. 257

Account stated—Sections 8, 9 and 13 of the Prescription Ordinance No. 22 of 1871.

Held: (i) *That a promise to pay though not set down in words in the document itself if it is implicit in the writing is not a case of a promise " by words only " within the meaning of Section* 13 *of the Prescription Ordinance.*

(ii) *That it is not possible to exclude from Section* 8 *of the Prescription Ordinance an implicit promise on the ground that in the absence of a writing the admission of parol evidence of the account stated would render Section* 13 *nugatory.*

SILVA *vs.* SILVA ... ... III. 4

What is an account stated.

JOHN RODGER *vs.* L. C. DE SILVA XLIX. 18

ACQUIESCENCE

Acquiescence during the progress of the infringing act, or of steps necessarily leading to it, will bar a legal right only where it amounts to an encouragement to do the act or take steps, in the belief or expectation that the right does not exist or has been abandoned (" standing by ") or is such as to raise an inference that the parties have acted upon an agreement inconsistent with the right asserted.

KARUNARATNE BANDARA *vs.* ALADIN XXVII. 103

ACTIO DE EVICTIONE

See under **EVICTION**

ACTIO INJURIARUM

The actio injuriarum is much wider in its scope than the action for malicious prosecution known to the English Law.

DISSANAYAKE *vs.* GUNARATNE ... XI. 12

ACTION

— **against the Crown**—*see under* **Crown**
— **Quia Timet**—*see under* **Quia Timet**
— **in forma pauperis**—*see under* **Civil Procedure Code**
— **for nullity of marriage**—*see under* **Husband** *and* **Wife**
— **for damages**—*see under* **Damages**
—**for right of way**—*see under* **Right of Way** *and* **Servitude**
— **for malicious arrest**—*see under* **Malicious Arrest**
— **under summary procedure**—*see* **Civil Procedure Code**
—**for use and occuption**—*see under* **Use** *and* **Occupation**
— **value of**—*see under* **Stamp Ordinance**
— **for declaration of title**—*see under* **Rei Vindicatio**

Withdrawal of action with liberty to institute fresh action on prepayment of costs of former action—Second action cannot be brought without complying with the condition.

LILAWATHI *et al vs.* UKKUWA VIDANE II. 158

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Does action lie against the manager or the principal of a school for refusal to issue a leaving certificate.

Held: *That no action lies against the manager or the principal for refusal to issue a school leaving certificate to a pupil.*

MENDIS *et al vs.* PUNCHIHEWA *et al* II. 363

Conveyance of sale executed by a judgment-debtor—Action to have it set aside as being in fraud of creditors—Judgment-debtor not made a party to it—Action dismissed as judgment-debtor not added.

Held: *That where, without making the judgment-debtor a party, an action is brought to set aside a conveyance made by him as being in fraud of creditors it is not proper to dismiss it on the ground that the judgment-debtor has not been joined as a party but the correct course is to give the plaintiff an opportunity of adding him as a party.*

SILVA *vs.* SILVA ... ... III. 103

Action to enforce debt due under a foreign judgment—How is the judgment to be proved.

MOHIDEEN MARIKAR AND THREE OTHERS *vs.* KOWLA UMMA ... ... XII. 44

Action in Ceylon—Action at same time in foreign Court between same parties—matters in dispute substantially same—power of Supreme Court to stay proceedings in Ceylon.

RAMAN CHETTIAR *vs.* VYRAVAN CHETTIAR XVI. 65

A Court has inherent power to lay by a case pending the decision of an action in another Court affecting the question at issue.

SELVADURAI *vs.* RAJAH AND ANOTHER XVI. 90

Action—Settlement of—Agreement to reconvey land embodied in terms of settlement and accepted by Court—Terms not embodied in formal decree and not executed before Notary—Terms of settlement are binding on the parties.

PERNANDO *vs.* COOMARASWAMY XVII. 1

Action to recover money paid to a Public Officer in his official capacity—Action must be against the Crown.

FONSEKA *vs.* LEIGH CLARE ... XVII. 100

Action—How should value of action be determined for the purposes of stamping.

SAMYNATHAN *vs.* ATUKORALE XVII. 114

Action for instituting malicious civil proceedings—What must plaintiff prove.

COORAY *vs.* FERNANDO ... XX. 74

Matrimonial action—Scope of—

SENADIPATHY *vs.* SENADIPATHY XXIII 1

Action—Dismissal owing to plaintiff's failure to appear—Plaintiff given permission by Commissioner of Requests to institute fresh action upon paying costs of previous action—Must costs be paid before institution of fresh action—Civil Procedure Code, Section 823.

An action in the Court of Requests was dismissed for non-appearance of the plaintiff. The Court later granted the plaintiff permission to institute a fresh action " upon the plaintiff paying the costs of the previous action." The fresh action, which was duly instituted, was dismissed on the ground that the condition precedent to its institution had not been complied with.

Held: (i) *That the only authority for permitting the institution of a fresh action was Section* 823 (5) *of the Civil Procedure Code.*

(ii) *That under that Section payment into Court is a condition precedent to the institution of the action.*

(iii) *That where the order was not in the terms of the Section, the wording of the former should if possible, be reconciled with the wording of the latter.*

JAMEELA UMMA *vs.* ABDUL AZEEZ XXXI. 74

Action—Institution of—where agreement was to refer differences to arbitration.

WIJAYANARAYANA *vs.* THE GENERAL INSURANCE CO., LTD. .. XXXII. 57

Action—by one co-owner against another—Necessary parties.

PERERA *vs.* PODI SINGHO AND ANOTHER XXXII. 61

Action by fidei comisarii against purchaser from fiduciarius.

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MUDALIYAR WIJETUNGE *vs.* DUWALAGA ROSSIE *et al* .. .. XXXII. 108

Action—for definition of boundaries—jurisdiction of Court of Requests.

CHANDRANAYAKE HAMINE *et al vs.* GUNASEKERA *et al* .. XXXIII. 4

Action—for declaration of title to land appurtenant to Vihare by bhikku in charge though not rightful incumbent.

PUNCHIRALA *vs.* DHAMMANANDA THERO XXXIII. 53

Action for damages for wrongful search of house.

RAMIAH *vs.* RAYNER .. XXXIII. 81

Action—for declaration that deed is null and void—Title of transferor based on fictitious transaction—Can evidence be led to contradict statement in attestation clause that consideration had been received.

PENDERLAIN *vs.* PENDERLAIN XXXVII. 35

Abandonment of action—by Counsel—How far binding on client.

WARNASURIYA *vs.* LUCY NONA *et al* XXXVIII. 92

Public servants' right to office—not enforceable by action.

VALLIPURAM *vs.* POSTMASTER-GENERAL XXXIX. 1

Action for definition of boundaries—when does it lie.

PONNA *vs.* MUTHUWA AND ANOTHER XLI. 62

Judgment of Foreign Court—Does an action lie on it in other Courts—Principles of International Law.

The judgment of a Foreign Court of competent jurisdiction is, in accordance with the principles of private international law, regarded in other courts as *prima facie* evidence of a debt at common law and an action lies for the recovery of the debt so adjudged subject to such defences as may be raised by the debtor at the trial.

NARAYANSWAMI *vs.* MARIMUTTUPILLAI XLI. 112

Compromise, of action—Terms of Settlement—Subsequent discovery by one party that fulfilment contrary to law—Application to set aside settlement—Other party fulfilling terms undertaken by him—Judgment for party fulfilling—Prejudice to party not taken into consideration by Court—Duty of Court in recording terms of settlement—Need to give effect to intention of parties by rectifying terms recorded or reading into them implied agreement—Equitable considerations applicable in such circumstances.

Plaintiff sued the defendants jointly and severally for the recovery of Rs. 2,500 due on a promissory note. The defendants, while admitting the execution of the note, pleaded in their answer that they had discharged the debt by securing the allotment of 25 shares of the total value of Rs. 2,500 in a private company called " Newton's Ltd." in accordance with a contemporaneous agreement between the parties.

At the trial the parties settled their dispute in the following among other terms. (*a*) that the plaintiff disclaimed all right, title and interests in the said 25 shares allotted to him, that he would have no further claim in the Company, that he would give a writing on or before 7-2-49 to be considered by the Board of Directors of the said Company requesting the Company to buy over all his interests in the said shares.

(*b*) that when all the necessary papers aforesaid are executed and sent over to the Company on or before 7-2-49 the defendants would become liable in the amount claimed on the note to the plaintiff and for the payment of which six weeks' time would be given to the defendants.

A decree was entered accordingly and the plaintiff performed his part of the obligation. The defendants, however, later discovered that Newton's Ltd., was precluded by its Articles of Association from holding shares on its own business and applied to Court for a declaration that the purported settlement was null and void in that ground.

The plaintiff claimed the sum of Rs. 2,500 on the ground that he had complied with his part of the consent decree and the learned District Judge made order in his favour.

The defendant appealed.

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Held: (1) *That the learned District Judge erred in making the order as the effect of his order is that the plaintiff would not only succeed in recovering the money advanced to the defendants, but also retain the shares for which he had admittedly not paid.*

(2) *That from the recorded settlement it is clear that the substantial agreement between the parties was that the plaintiff should have a decree for the payment of money advanced on the note, provided that he agreed to take the necessary steps to transfer the shares to a person nominated and selected by the defendants for the purpose.*

(3) *That, in equity, the Court is entitled and in duty bound to give effect to the intention of the parties either by rectifying the terms of the recorded settlement or by reading into those terms an implied agreement to the effect that the plaintiff should in the circumstances implement the true purpose of the agreement by transferring the shares to any person nominated by the defendants.*

Per GRATIAEN, J.—Indeed, I venture to suggest that some responsibility attaches in such cases to the trial Judge himself, whose duty it is to enter a decree in accordance with the terms of settlement; that responsibility involves a duty to ensure that the decree so passed is embodied in language which, while giving full effect to the intentions of the litigants, is at the same time capable of enforcement should the necessity arise.

NEWTON *et al vs.* SINNADURAI .. XLV. 89

ACTIO REDHIBITORIA

Misrepresentation by vendor.

MARTINUS *vs.* PERERA ... ... II. 287

ADMINISTRATORS

See under **EXECUTORS AND ADMINISTRATORS.**

ADMISSION

Admission by Solicitor-General that Customs Ordinance binds the Crown—Privy Council cannot be bound on a question of Law by an admission which involves an erroneous construction of the Ordinance.

ATTORNEY-GENERAL OF CEYLON *vs.* A. D. SILVA ... ... XLIX. 7

ADOPTION OF CHILDREN

Ordinance No. 24 of 1941.

Application by mother for custody of child—Child not adopted by respondent in accordance with Ordinance—Applicant entitled to custody.

ABEYWARDENA *vs.* JAYANAYAKE *et al* XLIX. 72

ADVOCATE

On the following motion filed by the Solicitor-General this application was listed for hearing, after notice to the accused. The accused was absent and unrepresented; but he sent a letter protesting his innocence.

In the Supreme Court of the Island of Ceylon.

In the matter of Solomon Victor Ranasinghe, Advocate. Whereas Solomon Victor Ranasinghe, presently of Welikada Jail, having been duly admitted and enrolled an Advocate of the Court, was after trial before a Criminal Session of the said Court, holden at Colombo on the 2nd day of September, 1931, found guilty of the offence of Criminal Breach of Trust.

I move that the said Solomon Victor Ranasinghe be under the provisions of § 19 of Ordinance No. 1 of 1889 be removed from the said office of Advocate, and that notice as provided by the said Section of the said Ordinance do issue calling upon him to show cause within such time as may be fixed by this Court, why he should not be removed from the said office of Advocate.

(Sgd.) S. OBEYSEKERA,
Solicitor-General.

Colombo, 28th September, 1931.

Held: *That the conviction and sentence passed upon the respondent is sufficient and prima facie evidence that he is guilty of the crime charged against him and that as no cause was shown to the contrary he could be removed from his office of an Advocate of the Supreme Court.*

Solomon Victor Ranasinghe in *re* § 19 of "The Courts Ordinance of 1889 and 1901." I. 47

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Admission by counsel for accused—Does it vitiate a conviction.

Held: *That the fact that the Counsel for the accused makes an admission does not vitiate a conviction where the admission does not prejudice the accused.*

REX *vs.* SINNATHAMBY ... III. 131

Advocate—Application for Re-admission.

The applicant, who was an Advocate of the Supreme Court was convicted in 1920 of the offence of cheating and was sentenced to undergo rigorous imprisonment for 3 years. Thereafter, his name was struck off the roll of Advocates. In 1926 the applicant applied to be re-admitted on the ground that since his release from prison " he had led an honest life and had endeavoured to conduct himself in all his undertakings, commercial and social, in a manner which he submitted fitted him for reinstatement in his profession."

This application was refused as the Court thought that it was too prematurely made. The applicant renewed his application ten years later.

Held: *On the material before the Court the applicant had redeemed the past and that it would be unjust to prevent him from admission.*

In the matter of the application of CHARLES CHRISTOPHER JACOLYN SENEVIRATNE VI. 123

Appearance of counsel to apply for postponement—Subsequent withdrawal of counsel from proceedings on refusal of postponement—Is action *Inter partes.*

DE MEL AND OTHERS *vs.* SUGUNASEKERA AND OTHERS. ... ... XIV. 164

Advocate—admission by—must be clear as to terms and made with consent of parties.

PUNCHIBANDA *vs.* PUNCHIBANDA AND OTHERS. ... ... XXI. 16

Advocate cross-examining witnesses at inordinate length.

REX *vs.* LIONEL BANDARA WEGODAPOLA. XXI. 21

An advocate convicted of a criminal offence is not fit to belong to the profession of advocates.

IN *Re* KANDIAH. ... ... XXV. 87

The proper time to notify to Court appearance of counsel is as soon as the case is called and before the accused has been called upon to plead.

REX *vs.* PONNASAMY ... ... XXVI. 99

The necessity for an assignment of counsel for the purpose of conducting an appeal involves the necessity of seeing that it will be possible for the counsel to be present at the hearing.

GALOS HIRAD AND ANOTHER *vs.* REX XXVIII. 97

Insult to counsel does not amount to contempt of Court.

P. D. SHAMDASANI *vs.* EMPEROR XXX. 97

Assigned counsel—Duties of—when defences of accused conflict.

REX *vs.* PUNCHI BANDA AND TWO OTHERS XXXIII. 110

Counsel—absent on trial date—Accused defended by assigned counsel—Conviction of accused—validity—miscarriage of justice.

REX *vs.* PERERA .. .. XXXIV. 35

Advocate—Compromise of action by—without consent of client—General authority given in proxy to compromise—Its scope.

ARUNASALAM *vs.* ARUMUGAM MUTTATHAMBY AND OTHERS ... XXXV. 8

Application by counsel for postponement—Refusal of application—Abandonment of action by counsel—How far binding on client.

Where, on a refusal of an application for a postponement, plaintiff's counsel withdrew from the action without any express dissent at the time from the plaintiff, and it appeared that the trial Judge had not improperly exercised his discretion in refusing the postponement.

Held: *That the abandonment of the action by counsel was binding on the client.*

WARNASURIYA *vs.* LUCY NONA *et al* XXXVIII. 92

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Advocate disbarred on conviction of series of offences involving gross fraud—Application for re-enrolment after interval of thirteen years refused.

The petitioner, a member of the English Bar, who was also an Advocate of the Supreme Court of Ceylon, was disbarred on conviction of the offences of forgery, cheating and abetment of cheating. His application for re-enrolment made after an interval of thirteen years was refused, having regard to the nature of the offences of which he had been proved guilty.

It was further held that it was the duty of the Registrar of the Supreme Court to have reported forthwith to the Inn to which the petitioner belonged the fact that he had been struck off the roll in Ceylon.

IN *Re* BATUWANTUDAVE ... ... XLII. 7

Advocate—Conviction of offences involving gross moral turpitude—Name struck off the roll of advocates—Redemption of character—Application for re-admission—Principles which apply.

The petitioner, who was an Advocate, was convicted in 1931 of two offences involving gross moral turpitude and was sentenced to terms of imprisonment in respect of both. While he was serving his earlier sentence, the Supreme Court made order that his name should be struck off the roll of Advocates. After his discharge from prison, the petitioner served under various employers in positions involving trust and responsibility. He in 1951 applied for re-admission to the profession on the ground that he had, during the intervening years, qualified himself for re-instatement.

Held: (1) *That the petitioner had by his conduct, over a long period of years, proved himself to be a fit and proper person for re-enrolment as a member of the Bar.*

(2) *That the petitioner had afforded cogent proof that he had redeemed the character which he had once lost.*

Per GRATIAEN, J.—"All of them (Judicial decisions) remind us that this Court, in dealing with these applications, must not be influenced either by punitive or by sympathetic considerations. Our duty must be measured by the rights of litigants who may seek advice from a professional man admitted or re-admitted to the Bar by the sanction of the Judges of the Supreme Court. It is also measured by the right of the profession, whose trustees we are, to claim that we should satisfy ourselves that re-enrolment will not involve some further risk of degradation to the reputation of the Bar."

IN *Re* S. V. RANASINGHE ... ... XLV. 26

Advocate—Undertaking conduct of defence of accused person and arranging and receiving part fee without having been previously instructed by Proctor—Professional misconduct—Contravention of rules made by Bar Council—Does such conduct amount to malpractice within the meaning of Section 17 of the Courts Ordinance.

The respondent, an Advocate of the Supreme Court, entered into discussions with a remand prisoner in the gaol, as a result of which he undertook to conduct his defence, arranged what his fee should be and received a sum of money in part payment of it without having been previously instructed by a Proctor.

Held: *That the respondent was guilty of professional misconduct amounting to malpractice within the meaning of Section* 17 *of the Courts Ordinance.*

Per ROSE, C.J.—"Quite apart from these Rules, however, it must surely be regarded as a basic assumption that any person who is admitted as an Advocate in Ceylon understands the implications of the division of the legal profession into the two branches of Advocate and Proctor. In any country which recognises and adopts such a division, every Advocate on his admission must, in my view, be taken to have agreed to be bound by the practice and tradition of the profession in this regard, and should not be heard to say that he personally, through lack of thought or percipience, is unaware of them. Moreover, the law itself recognises and underlines the significance of the division of the profession by providing that a lay client on the one hand cannot be sued by an Advocate for his fees, and on the other cannot sue the Advocate for their return or for damages for negligence in the event of his affair being mishandled. *Munasinghe vs. Pereira* 27 N. L. R. 76. His remedies and his liabilities are confined to the Proctor for the simple and compelling reason that there is, in the eye of the law, no privity of contract between the lay client and the Advocate."

IN *Re* AN ADVOCATE ... ... XLVI. 56

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Counsel—right of—to sum up case for accused.

WIJESINGHE *vs.* THE ATTORNEY-GENERAL L. 32

AFFIDAVIT

Affidavit to be used in Criminal Court—To be sworn before whom.

REX *vs.* IYASAMY WIJEYERATNAM XXII. 1

Affidavit—how proved ?

REX *vs.* IYASAMY WIJEYERATNAM XXII. 1

Affidavit—Statements false to the knowledge of Magistrate—Refusal by Magistrate to administer oath—Remedy.

Held: (i) *That if a Justice of the Peace honestly believes that an affidavit, which it is proposed to swear before him is false, he may decline to administer an oath.*

(ii) *That if it can be shown that he had no reasonable and probable cause for his belief, he may be required to do his duty by an application for* mandamus.

(iii) *A Magistrate specially gazetted to hear a criminal case on a particular day has the power to administer an oath in support of an affidavit.*

SARAM *vs.* SRI SKANDA RAJAH ... XXVI. 108

Affidavit—Statements unsworn annexed to in support—Weight to be attached in legal proceedings—Need to be on oath.

In support of his averments in an affidavit to the effect that he could not file an appeal before the lapse of the prescribed period owing to illness, the petitioner annexed two unsworn statements from an Ayurvedic physician and the Village Headman.

Held: *That such statements should have been on oath.*

APPUHAMY *vs.* PUHCHIRALA ... XLIII. 64

Admissibility of affidavit in *Certiorari* proceedings.

MUDANAYAKE *vs.* SIVAGNANASUNDRAM XLV. 49

AGENCY

See under **PRINCIPAL AND AGENT**

AGE OF MAJORITY ORDINANCE

Sections 2 and 3—No inconsistency between these Sections and Muslim Law relating to attainment of majority before 21.

ASANAR *vs.* ABDUL HAMEED XXXVIII. 97

Age of Majority Ordinance—effect of—on rights of Muslims in the matter of marriage.

ABDUL CADER *vs.* RAZIK *et al* ... XLIII. 60

AGREEMENT

Agreement to reconvey land—Enforcement by third party in whose favour a stipulation is made.

JINADASA *vs.* SILVA ... ... II. 49

Agreement to cut and remove trees on a land.

Held: *That an agreement to cut and remove trees is enforceable though it is not notarially attested.*

BALAPPU *vs.* SILAWATHIE *et al* ... II. 111

Agreement in the nature of a mortgage—Transfer of land in consideration of money advanced to the transferors to purchase it with stipulation that transferee may sell it and distribute the proceeds in a specified manner—Construction of deed.

Held: *That the deed created a security for money advanced, which in certain events imposed upon the creditor duties and obligations in the nature of trusts.*

SAMINATHAN CHETTY *vs.* VANDER POORTEN ... ... II. 123

Agreement—Express provision that the decision of one party on certain matters provided for in the agreement shall be binding on the other—Is such a provision vaild?

Held: (i) *That an agreement to the effect that in case of a dispute between the parties to a contract the decision of one of them shall be accepted by the other is good and valid.*

(ii) *That the doctrine that a person ought not to be a Judge in his own cause does not apply to agreements to the*

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effect that disputes arising out of a contract shall be submitted to the decision of one of the parties thereto.

SATHASIVAM *vs.* ATHAHARIYA AND ANOTHER ... ... VI. 86

Planting agreement—Death of grantor of agreement—Sale of land by Fiscal in execution of a writ against the heirs of the grantor—Existence of agreement made known to those present at the sale. Are the purchasers bound by the agreement?

Held: *That the purchaser was bound by the agreement and was bound to pay compensation for the improvements effected by the plaintiffs.*

AGOSTINU APPUHAMY AND ANOTHER *vs.* CAROLINE HAMINE ... ... VII. 129

An agreement to make a gift of land by way of dowry is enforceable although it is not notarially attested.

THAMBY LEBBE AND ANOTHER *vs.* JAMALDEEN ... ... VIII. 99

Agreement of lease of paddy field—Land situated in Eastern Province—Agreement not notarially attested—Is such agreement enforceable—Ordinances No. 7 of 1840 and No. 21 of 1887.

Held: (i) *That the provisions of Ordinance No.* 7 *of* 1840 *were applicable to this agreement and that it was unenforceable as it was not notarially attested.*

(ii) *That Ordinance No.* 21 *of* 1887 *did not apply to this agreement.*

SUBRAMANIUM *vs.* VISWANATHAN ... VIII. 137

Conditional transfer of land—Agreement to re-purchase within one year from the date of sale—Value payable on re-purchase being the amount of consideration for the transfer plus interest thereon at eighteen per centum per annum—Is such agreement a transfer or a mortgage—Is the vendor entitled to a reconveyance after the period stipulated in the transfer—Principles governing the vendor's right to a reconveyance after the stipulated period.

Held: (i) *That no matter what name or designation the parties give to a contract or transaction, the Court will inquire into the substance of the transaction and give effect to what it finds its true substance or nature to be.*

(ii) *That* prima facie *the Court assumes that the nature of a transaction is such as it purports to be, and the onus is upon the person who asserts that it is something different to prove that fact.*

(iii) *That each case must depend upon its own facts, and that no general rule can be propounded which can meet them all.*

DE SILVA *vs.* DE SILVA ... ... IX. 61

Conditional transfer—Right to a re-transfer—Is such right movable or immovable property—Civil Procedure Code, Sections 276, 282 *and* **344—Effect of failure to sell immovable property in the manner prescribed by the Code for the sale of such property.**

Held: (i) *That the right was movable property.*

(ii) *That the defendant-respondent's right of action against the transfer on the deed was one* in personam.

(iii) *That the sale of immovable property in the manner prescribed by the Code for the sale of movable property was an illegality and not an irregularity.*

ALAHAKOON AND ANOTHER *vs.* DIAS XI. 155

Deed of transfer subject to a promise to re-transfer in favour of vendor when called upon within four years—Deed not signed by vendee—Can the vendor enforce the promise to re-transfer.

Held: *That an agreement embodied in a deed of transfer to re-transfer a land in favour of a vendor within a stipulated period is enforceable although the vendee has not signed the deed.*

SARDIYA *vs.* RANASINGHE HAMINE XIV. 97

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

DIAS *vs.* SILVA ... ... XVI. 75

Transfer of land reserving the right to repurchase within limited period—Deed not signed by vendee—Vendee is bound by agreement.

BABUN SINGHO *vs.* SEMANERIS SINGHO *et al* ... ... XVI. 83

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Agreement to reconvey land—Embodied in terms of settlement of action and accepted by the Courts—Terms of settlement not embodied in formal decree—Agreement not executed in presence of Notary—The Agreement embodied in terms of settlement and accepted by Court is binding on the parties and the party failing to carry out the terms is liable in damages.

FERNANDO *vs.* COOMARASWAMY ... XVII. 1

An agreement to re-transfer a land need not be signed by the person obliged to re-transfer.

NANDUWA AND ANOTHER *vs.* JUNGA AND TWO OTHERS ... ... XXVII. 1

Transfer of land by notarial deed—Contemporaneous non-notarial agreement by vendee to re-transfer land to vendor—Trust—Enforceability of non-notarial document.

A vendor transferred certain lands by deed. At the time of the execution of the deed, the vendee signed a non-notarial document agreeing to re-transfer the lands to the vendor within four years on payment of a certain sum of money. No mention was made, in the deed, of the agreement to re-transfer. On payment of the agreed sum within four years, the vendee refused to re-transfer the lands. No condition was established to show that the whole beneficial interest of the vendor had not been transferred by the deed. No circumstances were proved which could bring the case within the provisions of the Trusts Ordinance relating to constructive trusts.

Held: *That the non-notarial document was of no force or avail at law.*

SAIYA NONA *vs.* KARTHELIS APPUHAMY ... ... XXX. 72

Informal agreement relating to land—Defendant placed in possession by plaintiff. Plaintiff not the owner of the land—Action for use and occupation—Can action be maintained.

The plaintiff placed the defendant in possession of a land under an informal agreement to which the defendant was a party. The defendant received benefit from his possession. The plaintiff was not the owner of the land.

Held: (i) *That as the defendant received the benefit of his possession, he was bound to pay a reasonable amount for use and occupation of the land.*

(ii) *That such amount can be recovered by action.*

(iii) *That the action was available to the plaintiff, although he was not the owner of the land, as he had placed the defendant in possession.*

ELIYATHAMBY *vs.* KANDIAH ... XXXII. 5

Transfer of land by deed—non-notarial agreement by vendee to re-transfer—Refusal to re-transfer—Enforceability of non-notarial agreement.

ELIYA LEBBE *vs.* ABDUL MAJEED XXXIV. 107

Transfer of immovable property by deed subject to parol arrangement that transferee would hold the property in trust and would later reconvey—Enforceability of such agreement to reconvey.

VALLIAMMAI ATCHI *vs.* ABDUL MAJEED ... ... XXXV. 1

Transfer of property reserving right to a re-transfer—Assignment of right to third party—Has assignee right to claim re-transfer.

MUHANDIRAM *vs.* ABDUL SALAM XXXVI. 8

Agreement by parties to dispute that decision of person appointed to settle matters should be final and conclusive—Can decision be canvassed.

SAMERAKOON AND ANOTHER *vs.* DIAS ABEYSINGHE ... ... XXXIX. 31

Transfer of land subject to oral agreement to transfer to third party on payment of a sum of money—Can third party enforce such oral agreement.

APPUHAMY *vs.* UKKU BANDA ... XLI. 43

Agreement to transfer immovable property in consideration of marriage—Must be notarially attested.

NOORUL HATCHIKA *vs.* NOOR HAMEEM *et al* ... ... XLI. 65

Agreement—Cultivation of land in Anda—No evidence of duration of contract or of land being chena or paddy—Enforceability—Section 2 of the Prevention of Frauds

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Ordinance (Chaper 57)—Exception to—Section 3 (1) of the Ordinance—What must be proved.

The plaintiff alleged that on an informal agreement with the defendant, he had undertaken to cultivate jungle land and to give the defendant a share of the produce.

The plaintiff further alleged that in breach of the agreement the defendant appropriated the whole of the produce and claimed Rs. 500 as damages. The defendant denied any such agreement and contended that the plaintiff was a labourer employed to clear chena land, for which he had been paid his wages.

The Commissioner found that the plaintiff was not a labourer and that there was an informal agreement by the parties to share the produce of the land. There was no evidence as to the date and duration of the agreement or that the land was chena or paddy.

Held: (i) *That the agreement was obnoxious to Section 2 of the Prevention of Frauds Ordinance.*

(ii) *That in order to succeed in his claim the plaintiff must establish his case as one coming within the exception referred to in Section 3 (1) of the Ordinance.*

(iii) *That a plea under Section 3 (1) can only succeed on proof—*

(a) *that the land is a paddy field or chena land.*

(b) *that the informal contract or agreement was for a period not exceeding twelve months; and*

(c) *that the consideration of such contract or agreement is that the cultivator is to give the owner a share of the crop or produce.*

W. Ukku Banda *vs.* M. Tikiri Banda XLIV. 9

Agreement or compromise affecting immovable property—Must it be embodied in a formal order of Court.

Vallipuram *vs.* Kanadipillai ... XLVI. 92

ALIENATION IN FRAUD OF CREDITORS

See under **FRAUDULENT ALIENATION.**

ALIEN ENEMY

See under **ENEMY.**

ALIMONY

See under **DIVORCE.**

AMENDMENT OF PLEADINGS

See under **CIVIL PROCEDURE CODE** *and* **PLEADINGS.**

ANALYST

Right of accused person to have analyst present in Court to testify to contents of report made by him.

Perera and Another *vs.* Dharmaratne XXXII. 31

ANIMUS INJURANDI

Publication of Report of Special Commissioner in newspaper—Publication in the public interest.

M. G. Perera *vs.* A. V. Peiris and Another ... ... XXXIX. 42

ANNUAL VALUE

When may the actual rent paid for a building be taken as a criterion for determining the annual value.

Soysa *vs.* Colombo Municipal Council XVIII. 113

ANSWER

See under **CIVIL PROCEDURE CODE** *and* **PLEADINGS.**

APPEAL (CIVIL)

for stamping of appeal *see under* STAMP ORDINANCE.

Stay of proceedings pending an Interlocutory Appeal—When such stay may operate.

Held: *That an interlocutory appeal does not stay the proceedings in an action unless an application is made for the purpose and allowed.*

Mohamedo *vs.* Ibrahim ... ... I. 318

Appeal—Failure to tender stamps for certificate of appeal in time.

Held: *That an appeal cannot be admitted where stamps for the certificate of appeal have not been tendered in time.*

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RAMALINGAM PILLAI *vs.* WIMALARATNE *et al* ... ... II. 410

All parties to the action not made respondents—Can persons who neither appear nor file answer at the trial be dropped—Section 770 of the Civil Procedure Code—Mistake in decree.

Held: (i) *That the 2nd and 3rd defendants should have been made respondents to the appeal.*

(ii) *That as the decree had been wrongly drawn up the case was one in which the discretionary powers given to the Court by Section 770 of the Civil Procedure Code should be exercised.*

RAMASAMY CHETTIAR *vs.* MOHAMADU LEBBE MARIKAR ... ... VII. 64

Appeal—Non-joinder of necessary party—Section 770 Civil Procedure Code—Mortgage bond action against principal and surety—Judgment against surety by default—Should the surety be a party to an appeal by the principal against an *inter partes* **order against him.**

Held: (i) *That the 2nd defendant was a necessary party to the case.*

(ii) *That the case was not one in which relief under Section 770 of the Civil Procedure Code could be granted.*

S. A. J. DE S. WICKRAMASOORIYA *vs.* M. RAJALIAS DE SILVA ... VIII. 29

Appeal from Court of Requests—Can question of law be argued in an appeal on the facts.

JOSEPH NADAR *vs.* ASIRWATHAM ... IX. 107

Rejection of appeal—Does it operate as an adjudication of points raised in the appeal.

Held: *That the rejection of an interlocutory appeal for failure of the appellant to comply with the provisions of the Stamp Ordinance does not amount to an adjudication on any points raised in the appeal.*

BALA SUBRAMANIAM *vs.* VALIAPPA CHETTIAR ... ... XI. 87

Interlocutory Appeal—Does not lie against the admission or rejection of evidence only.

BALA SUBRAMANIAM *vs.* VALIAPPA CHETTIAR ... ... XI. 87

Interlocutory Appeal—rejected for non-compliance with Stamp Ordinance—Supreme Court is free to consider, in the final appeal, the points raised in the interlocutory appeal.

BALA SUBRAMANIAM *vs.* VALIAPPA CHETTIAR ... ... XI. 87

Court of Requests—order setting aside a judgment by default—Does an appeal lie from such an order.

BARON APPUHAMY *vs.* TIVANAHAMY XII. 19

Court of Requests—Leave to appeal—Application to Supreme Court not filed within seven days—Leave granted by the Supreme Court—Objection taken at the hearing on the ground that appeal did not lie as the application for leave to appeal had been filed out of time—Has the Supreme Court power to vacate its order granting leave to appeal—Is the appeal in order.

Held: (i) *That the application to the Supreme Court for leave to appeal was made out of time.*

(ii) *That the order granting leave to appeal by the Supreme Court was not valid, as the application for leave had been entertained* per incuriam.

(iii) *That, in the circumstances, the Court had power to vacate the order granting leave.*

MOHAMED BAI *vs.* MRS. DIYAWA AND TWO OTHERS ... ... XII. 20

Appeal—Revocation of proxy granted to Proctor—Petition of appeal not signed by the Proctor who was Proctor on record on the day petition filed—Is this fatal to the appeal—Relief—Meaning of the words "some .....Proctor" in Section 755 of the Civil Procedure Code.

Held: (i) *That the petition of appeal should have been signed by the Proctor on the record, who was Mr. Van Rooyen.*

(ii) *That the words "some..... Proctor" in Section 755 of the Civil Procedure Code mean the Proctor whose proxy is on record when the appeal is filed.*

(iii) *That, in the circumstances, no relief should be granted to the appellant.*

Per MAARTENSZ, J.—"The *ratio decidendi* in the old cases, with which I respectfully agree, was that this Court cannot recognise

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two Proctors appearing for the same party in the same case."

SILVA *vs.* CUMARANATUNGA ... XII. 112

Court of Requests—Appeal—Action for an order to erect masonry blocks in lieu of the stones buried so as to constitute boundary marks and to repair dam at joint expense—Alternative claim for damages—Is the action one concerning an interest in land—Section 13 of Court of Requests Amendment Ordinance No. 12 of 1895—Leave to appeal not obtained.

Held: *That as no interest in land is directly involved and no title to land is challenged, the action was one of pure demand and damage under Section* 13 *of the Court of Requests Amendment Ordinance No.* 12 *of* 1895, *and therefore, leave to appeal should have been obtained.*

PONNAMBALAM AND ANOTHER *vs.* MURUGESU AND ANOTHER ... ... XIII. 112

Appeal—Is a judgment-creditor who successfully claimed concurrence a necessary party to an appeal from an order adjudicating the claims of competing judgment-creditors.

A and B claimed concurrence in the proceeds of an execution sale lying to the credit of case No. 10050 D.C., Negombo of which C was the judgment-creditor. The learned District Judge found that A and B were entitled to concurrence while C was not entitled to it. C appealed but failed to make A a party to the appeal.

Held: *That A was a necessary party to the appeal and the failure to join him as a party was fatal to the appeal.*

VEERAPPA CHETTIAR *vs.* NAGAMUTTU XIV 24

Appeal—Failure to indicate that a party was made a respondent in his personal capacity as well as in his capacity of guardian-ad-litem.

Held: (i) *That the appeal was not properly constituted.*

(ii) *That in the circumstances it was not open to the Supreme Court to grant relief.*

BABY *vs.* TIKIRI DURAYA AND ANOTHER ... ... XIV. 144

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

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

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

SINNAN CHETTIAR AND OTHERS *vs.* MOHIDEEN ... ... XV. 47

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

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

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

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

MOHAMED HASSAN *vs.* ABDUL WAHID AND MOHAMED MARIKAR ... XV. 61

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

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

NANDIRIS SILVA *vs.* ARTHUR DE ZOYSA AND ANOTHER ... ... XV. 104

Appeal—Preliminary objection—Failure to give appellant prior notice—Is respondent entitled to costs.

Held: *That, where a respondent to an appeal raises a preliminary objection in the Supreme Court without prior notice to the appellant, it is desirable to follow the English*

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practice of not allowing costs in dismissing the appeal.

PUNCHIMENIKA AND OTHERS *vs.* SIMON *alias* SAINERIS AND OTHERS XVIII. 111

Circumstances in which Appeal Court will entertain an objection which was not taken in Lower Court.

GNANAMPIKAIAMMAI *vs.* CANDIAH XX. 115

The Appeal Court will not interfere in a case where the Judge of original jurisdiction has properly exercised his discretion.

ABRAHAM *vs.* ALWIS ... ... XXI. 10

Preliminary objection—Appeal—Failure to deposit security on the day specified in notice—Absence of reference to costs of serving notice of appeal in notice served—Is it fatal?

Held: *That the notice given was not in compliance with Section 756 of the Civil Procedure Code, and, therefore, the appeal could not be entertained.*

SULAIMAN AND OTHERS *vs.* WILEGODA XXVI. 15

Once a document is admitted in evidence without any objection being raised by the opposite party, no objection can be taken to its reception in appeal.

HUSSAIN *vs.* THE OPALAGALLA TEA AND RUBBER ESTATES LTD. ... XXVII. 77

A question which was not expressly raised in the Trial Court may be taken in appeal when it can be brought under one of the issues framed.

THAMBU *vs.* ARULAMPIKAI AND ANOTHER XXVIII. 40

There is a right of appeal from a decision on any of the matters (*a*) to (*d*) in the proviso to Section 8 of the Rent Restriction Ordinance.

UMMUL MAROOFA *vs.* LEAFF XXIX. 1

Appellate Courts' power to review Trial Judge's view involving demeanour of witness.

YUILL *vs.* YUILL ... XXIX. 97

Failure to raise issue at trial—Right to raise it in appeal.

PEMA AND OTHERS *vs.* JINALANKARA TISSA THERO ... ... XXXI. 43

Preliminary objection—One petition of appeal by several defendants who had given separate proxies to the same Proctor and who acted jointly—Should the appeal be regarded as one for purposes of Stamping—Civil Procedure Code, Sections 754 and 755.

Appellants Nos. 1—11 were defendants in a suit for ejectment and were represented by one Proctor who duly filed his proxy. From the answer filed it appeared that appellant No. 12 was interested in the property and was duly added as a defendant. He elected to be represented by the same Proctor (who filed proxy) and to abide by the answer of the defendants already filed.

Judgment was entered for plaintiff and all defendants appealed. The same Proctor acting for all the defendants filed one petition of appeal which bore a stamp sufficient to cover only one appeal.

In the Supreme Court a preliminary objection to the hearing of the appeal was taken on the ground that the petition was improperly stamped inasmuch as the stamp affixed was sufficient to cover only one appeal although, in fact, there were two appeals before the Court. This objection was upheld and the defendants appealed to the Privy Council.

Held: (i) *That in the circumstances there was only one appeal before the Court.*

(ii) *That as soon as the added-defendant gave his proxy to the Proctor who was acting for the other defendants and threw in his lot with them by adopting their defence, he became a joint defendant with them for all purposes.*

Per LORD GODDARD: " As this is enough to dispose of this appeal their Lordships do not propose to express any opinion as to whether it is open to the Supreme Court, once the petition has been accepted by the Court of first instance, to take or give effect to an objection as to the sufficiency of the stamp, nor as to whether by the combined effect of Sections 756 and 839 it may not be possible for a *bona fide* mistake as to the stamp required to be remedied and thus perhaps avoid a miscarriage of justice. They say no more than that both points appear susceptible for considerable argument and that it would be an unfortunate and probably unintended result of the Stamp Ordinance if a litigant should be debarred from

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an appeal on a ground which is from a practical point of view capable of easy remedy without injustice to anyone.

KARUNAPEJJALAGE BILINDI AND OTHERS *vs.* WELLAWA ATTADASSI THERO XXXI. 70

Appeal lies from order of abatement of appeal made for failure to serve on respondent personally notice of tendering security for costs of appeal.

CARLINA *vs.* SILVA ... ... XXXI. 71

When showed Appeal Court interfere with findings of fact.

KARTHELIS APPUHAMY *vs.* SIRIWARDENA XXXI. 86

Appeal lies to Supreme Court from decision of District Court under § 28 of the Patents Ordinance.

FARBRIDGE *vs.* REGISTRAR OF PATENTS XXXII. 7

Appeal lies to Supreme Court from order of District Judge regarding a claim under § 20 of the Waste Lands Ordinance No. 1 of 1897.

VANDER POORTEN AND OTHERS *vs.* THE SETTLEMENT OFFICER XXXII. 16

Appeal lies from order refusing postponement of trial.

RAMUPILLAI *vs.* ZAVIER AND ANOTHER XXXII. 42

Admittance of documents in appeal.

ENDRIS DE SILVA AND ANOTHER *vs.* ARNOLIS ... ... XXXIII. 39

No appeal lies from order of Magistrate in maintenance proceedings refusing to vacate an order dismissing application for maintenance.

LEELAWATHIE *vs.* HENDRICK XXXIII. 40

No appeal lies from an order of the Court of Requests setting aside a judgment entered by default.

MOHAMEDU *et al vs.* MARIKKAR XXXV. 39

Appeal against order for costs—Power of Supreme Court to entertain.

SUNDARAM AND ANOTHER *vs.* GONSALVES XXXVII. 57

Distinction between 'Final' appeal and 'Interlocutory' appeal—Civil Appellate Rules 1938.

Held: *That an appeal from an order made in an application for alimony pending the decision of an appeal against a decree for judicial separation is an 'interlocutory' appeal within the meaning of the Civil Appellate Rules* 1938.

Per DIAS, S.P.J.—" A 'Final judgment' means a judgment awarded at the end of an action which finally determines or completes the action, and a 'Final appeal' is an appeal from such judgment. On the other hand, an 'Interlocutory judgment' is a judgment in an action at law given upon some defence, proceeding or default which is only intermediate, and does not finally determine or complete the action. An 'Interlocutory appeal' is an appeal from such a judgment."

JAN SINGHO *vs.* ABEYWARDENE AND ANOTHER ... ... XLII. 92

Failure to conform to Civil Appellate Rules 1938, Section 4 (*b*)—Abatement—Section 755 Civil Procedure Code—Petition of appeal by appellant in person—Duty imposed on Secretary or Chief Clerk.

Where the appellant failed to conform to Section 4 (*b*) of the Civil Appellate Rules 1938 and to Section 755 of the Civil Procedure Code but pleaded that as he personally conducted the case in the original Court it was the duty of the Secretary of the Court to advise him on the law and procedure relating to appeal.

Held: *That no such duty was imposed by law and that under Section* 755 *of the Civil Procedure Code the Secretary or Chief Clerk of the Court was obliged only to set forth the material statements and grounds of appeal which the appellant wished to state in the form of a petition of appeal, and to have the petition attested by him after the appellant had signed it.*

ABRAHAM *vs.* FERDINANDO ... XLIII. 109

Right of appeal from orders made by District Court under Land Acquisition proceedings.

WALLOOPILLAI *vs.* MANDERS, GOVERNMENT AGENT, SABARAGAMUWA PROVINCE XLVI. 49

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Mixed question of fact and law—cannot be raised for the first time in appeal.

JAFFERJEE *vs.* THE ATTORNEY-GENERAL XLVII. 17

Trial Judges findings based largely on his impression of the demeanour of parties—when may Appellate Courts interfere.

SATHAR *vs.* BOGSTRA *et al* ... XLVII. 53

APPEAL (CRIMINAL)

Criminal Procedure Code, § 191—Order of discharge in case summarily triable.

Time within which appeal may be filed.

Held: *That where an appeal from an order of discharge in a case summarily triable was not filed within ten days the fact that the appeal has the sanction of the Attorney-General does not bring it with in the longer period allowed by* § 338 (2). *A sanction that is not necessary cannot regularise an appeal that is otherwise out of time.*

POLICE SERGEANT BANDA *vs.* DALPADADU ... ... I. 2

Criminal Procedure Code § 157—Order under—not appealable.

SAWARIAMMA *vs.* ARUMUGAM ... I. 231

Aggregate fines on all counts amounting to more than Rs. 25.00—Accused has an appeal both on the law and on the facts, irrespective of question whether he is appealing from only one portion of the conviction.

FERDINANDO (EXCISE INSPECTOR) *vs.* MUDALIHAMY ... ... I. 297

Petition of Appeal signed by Proctor—application by Proctor to withdraw appeal.

Held: *That the Proctor of an appellant in a criminal case cannot withdraw the appeal even although he has signed the petition of appeal.*

ABDUL CARIM *vs.* MOULANA AND OTHERS I. 380

Criminal Procedure Code—Section 156—Order under—not appealable.

FERNANDO *vs.* FERNANDO ... ... I. 403

Criminal Procedure Code § 337—Appeal under—cannot be entertained unless requisite sanction of Attorney-General has been obtained.

PILLAI *vs.* DEWANARAYANE *et al* ... II. 115

Criminal Procedure Code § 418—Appeal lies against a refusal to vacate an order under § 418, made without hearing the person affected thereby.

PERERA *vs.* ALLAN JURIS AND ANOTHER IV. 6

Proceeding in revision before final decision by Police Magistrate—Appeal from decision after final order.

Held: *That where a case had been heard by the Supreme Court in the exercise of its powers in revision before a final order had been made by the Magistrate the parties are not entitled to be heard regarding the matter already adjudicated on by the Supreme Court a second time in appeal after the final order even if there is a right of appeal.*

ABDUL MAJEED *vs.* CASSIM HADJIAR IV. 52

Criminal Procedure Code, Sections 325 (1) and 338—Is an order made under Section 325 (1) an appealable order.

Held: *That an order made under Section* 325 (1) *of the Criminal Procedure Code is not an order from which an appeal under Section* 338 *lies.*

RASAK *vs.* CASSIM ... ... VIII. 75

An appeal lies in a case in which the Magistrate discharges the accused. on an erroneous view of the law that the charge cannot be proceeded with, without the sanction of the Attorney-General.

DHARMALINGAM CHETTY *vs.* VADEIREL CHETTY AND ANOTHER ... IX. 3

Appeal out of time—Supreme Court has power to treat it as an application in revision.

THE KING *vs.* SEEMAN *alias* SEEMA IX. 76

Computation of time within which a criminal appeal should be preferred.

JONES *vs.* AMARAWEERA ... ... XV. 18

Appeal from acquittal—In what circumstances should such appeal be allowed—Criminal Procedure Code, Section 336.

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Held: *That an appeal from an acquittal on a question of fact should only be allowed to succeed in very exceptional cases, and where it is perfectly clear to the appeal tribunal that the finding of the inferior Court is erroneous.*

VAN ROOYAN (INSPECTOR OF POLICE) *vs.* VYTHILINGAM ... ... XIX. 86

Does appeal lie from order for Crown Costs and compensation.

KANDIAH *vs.* RAMALINGAM AND OTHERS XXXVI. 65

Dismissal of appeal—When will reinstatement of appeal be allowed.

ELO SINGHO *vs.* JOSEPH ... XXXVII. 49

Retaining stolen property—Charge under Section 394 of Penal Code—Accused acquitted—Order made for return of stolen property to lawful owner—Can accused appeal from such order—Criminal Procedure Code—Sections 335, 338 and 413.

The accused was charged with retaining stolen property and acquitted. Order was then made for the return of the property to its lawful owner. The accused appealed from that order.

Held: *That the accused had no right of appeal from the order as the order was made after his acquittal and after the conclusion of the case to which he was a party.*

RANASINGHE *vs.* JUSTIN ... XL. 43

Principles on which Privy Council will interfere.

DHARMASENA *vs.* THE KING ... XLIII. 1

Criminal case—appeal by Crown to Privy Council—Right of Board to entertain appeal.

ATTORNEY-GENERAL OF CEYLON *vs.* K. D. J. PERERA ... ... XLVIII. 42

Appeal—Simple hurt and robbery—Witness disbelieved by Magistrate who had the advantage of seeing him in the witness box—Questions of fact—When will appellate tribunal interfere?

The appellant was charged with, and convicted of the offences of simple hurt and robbery. The evidence of the appellant's supporting witness W was disbelieved by the Magistrate, who, in his judgment, pointed out that he " had the advantage of seeing W in the witness box."

Held: (i) *That an Appellate Judge must approach his duty, in these circumstances, with the* " prima facie " *presumption that this advantage has not unconsciously been abused.*

(ii) *That the initial advantage normally enjoyed by a Judge of first instance over an appellate tribunal is outweighed, when the reasons recorded by him* (i.e., *the Judge of first instance*) *for rejecting the evidence of witnesses are eminently unsatisfactory.*

Per GRATIAEN, J.—" The Judiciary in this country already enjoys a reputation for appreciating instinctively that the colour of a man's skin is quite irrelevant to an assessment of his credibility. That reputation does not stand in need of self-advertisement, and a Judge who protests too vehemently that he always acts judicially runs the risk of appearing to " protest too much."

NAGU *vs.* SANGARALINGAM ... XLIX. 70

APPEAL (GENERAL)

No right of appeal unless it is expressly given.

TILLEKEWARDENA *vs.* OBEYESEKERA I. 112

Where appeal lies, a writ of prohibition is not available.

EMMANUEL *vs.* FERNANDO (INSPECTOR OF POLICE) ... ... II. 33

Appeal in Insolvency proceedings—Not governed by Civil Appellate Rules.

DIAS *vs.* PALANIAPPA CHETTIAR ... II. 138

Appeal Court should be slow to interfere with discretion of Trial Judge.

MUTTU MOHAMMADO *vs.* RAMASAMY CHETTY *et al* ... ... II. 317

There is no appeal to the Supreme Court from an order made by the District Judge under the Notaries Ordinance No. 1 of 1907 refusing to make order for the issue of a certificate to practice as a Notary.

IN *Re* GODAMUNE ... ... V. 54

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Order postponing action. Is it an appealable order?

An application was made for revision of an order of a District Judge postponing an action, pending the decision of an appeal which he considered as having an important bearing on the case. A preliminary objection was taken that as the order made was appealable the application should be rejected.

Held: *That application could not be entertained as the order sought to be revised was an appealable one.*

AMEEN *vs.* RASHEED ... ... VI. 8

An appeal cannot be made the occasion of setting up a claim which was not put forward in the plaint in the Lower Court.

RAMUPILLAI *vs.* SOMASUNDARAM ... IX. 1

Appeal rejected in error—On error being brought to the notice of the Court, the appeal can be restored to the list.

SINNAPOO *vs.* THEIVANAI AND ANOTHER IX. 80

Point not taken in petition of appeal—When can it be raised at the hearing of the appeal.

Held: *An appellant is not precluded from raising in appeal a point not stated in the petition of appeal where it does not involve the consideration of facts which were not before the Trial Judge.*

RAYMOND *vs.* WIJEWARDENA AND OTHERS X. 1

Appeal—There is no right of appeal from an inferior tribunal to a superior tribunal unless expressly given.

KANAGASUNDARAM *vs.* PODI HAMINE XIX. 53

There is no right of appeal from the decision of a tribunal to the Supreme Court unless such right is expressly given.

JOSEPH VANDER POORTEN AND TWO OTHERS *vs.* THE SETTLEMENT OFFICER XXII. 85

Appeal Court—Principles which should guide it in dealing with appeals on questions of fact.

Held: *That an Appellate Court will not interfere with the decision of the Trial Judge on a question of fact unless it has been plainly and clearly proved that the decision was wrong.*

THARMALINGAM CHETTY *vs.* PONNABALAM XXIII. 57

Power of Appellate Court to interfere with Trial Judge's finding.

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM ... XLVIII. 1

Order under Section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—No appeal lies.

SIVAN PILLAI *vs.* COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS ... ... XLIX. 17

APPEALS (PRIVY COUNCIL) ORDINANCE

See also under **PRIVY COUNCIL.**

Appeal to Privy Council—Rule 2 of Schedule 1 of the Appeals (Privy Council) Ordinance No. 31 of 1909—What is requisite notice—The Ceylon (State Council Elections) Order-in-Council 1931—Dismissal of election petition by Judge appointed under Article 75—Does an appeal lie to the Privy Council from such an order?

Held: (i) *That a mere notice by a petitioner that he is appealing against the order does not satisfy the requirements of Rule 2 of Schedule 1 of the Appeals (Privy Council) Ordinance No. 31 of 1901. It is absolutely necessary that an intimation of the day on which the petitioner will move the Supreme Court should be in the notice.*

(ii) *That an order made by an Election Judge appointed under Article 75 of the Ceylon (State Council Elections) Order-in-Council 1931 is not an order made by the Court within the meaning of Section 2 of Ordinance No. 31 of 1909. Hence no appeal to the Privy Council lies from a judgment or order of an Election Judge.*

WIJESEKERA *vs.* COREA ... ... I. 159

Conditional leave to appeal to the Privy Council—Rules in Schedule I of Ordinance No. 31 of 1909—Rule 1 (*a*)—*Meaning of expression* final judgment.

The applicant one of the executors of a last will appealed to the Supreme Court

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from an order made by the District Judge in a proceeding for the Judicial settlement of certain accounts filed by him upon the orders of the Court. It was not the final account of his administration. Several issues were framed and all these were fully answered by the District Judge, with the exception of one which was as follows:— "Has the said executor fraudulently and negligently failed to recover mortgage bonds and other debts of the estate?"

The District Judge considered and dealt with the case of one bond and made order requiring the executor to file a detailed list showing what action he had taken with regard to the other bonds. An appeal was lodged against the order of the District Judge and his order was affirmed subject to a slight variation in regard to his finding on one of the issues and in regard to the order for costs.

Held: *That the order in appeal was a "final judgment" within the meaning of Rule* 1 (a) *of the Rules in the Schedule to Ordinance No.* 31 *of* 1909.

MOHAMED SHERIFF *vs.* MUTTU NATCHIA I. 263

Application for conditional leave to appeal —Failure to give notice within the prescribed time.

Held: *That the Supreme Court has no power to extend the prescribed period for giving notice of application for conditional leave to appeal to the Privy Council.*

That notice to Proctors of the opposite party who are not authorised in the proxy to receive such notice does not amount to compliance with the Rules.

TARRANT AND ANOTHER *vs.* MARIKAR II. 373

Application for conditional leave to appeal to the Privy Council—Service of notice of application.

Held: *That service of notice on the Attorney of a party to a suit does not constitute adequate service.*

FRADD *vs.* FERNANDO ... ... II. 452

Test for deciding whether the interest of the application for leave to appeal is over Rs. 5,000.

Held: *That in ascertaining whether the interest of an applicant for leave to appeal to the Privy Council is of the value of Rs.* 5,000 *or upwards the Court should look at the judgment as it affects the interest of the party who is prejudiced by it and who seeks to relieve himself from it by appeal.*

THEVAGNANASEKARAM *vs.* KUPPAMMAL AND OTHERS ... ... II. 486

Application for conditional leave to appeal to the Privy Council—Does proxy granted by Attorney of party confer sufficient authority on Proctor to take the action required by the Privy Council Appeal Rules.

Held: *That a proxy granted by the Attorney of the applicant for leave to appeal does not confer sufficient authority on a Proctor to validly perform the acts required by Rules 2 and 6 of the Privy Council Appeal Rules.*

ANNAMALAY CHETTY *vs.* THORNHILL III. 81

Leave to appeal to Privy Council in a criminal case—Principles guiding the granting of such leave.

THE KING *vs.* ATTYGALLA AND ANOTHER VI. 41

Conditional leave to appeal to Privy Council. Rules 2, 5 and 5*A* framed under Ordinance No. 13 of 1909—Validity of notice served.

Where a notice of an application for conditional leave to appeal to the Privy Council was served, without the intervention of Court, on an Attorney who was specially authorised by the party to be noticed to accept legal processes and notices.

Held: (i) *That the notice had not been properly served.*

(ii) *That the appellant should have applied to Court for leave to serve notice on the Attorney.*

WIJESEKERE *vs.* NORWICH LIFE ASSURANCE CO. ... ... VI. 121

Circumstances in which the Privy Council will interfere where injustice is alleged on the ground that the jurors in a case tried by jury were open to objection.

ALEXANDER KENNEDY *vs.* THE KING VII. 107

Application to the Supreme Court for leave to appeal—Should the day on which such leave would be applied for, be intimated in the notice of the application given to the respondent—Ordinance No. 31 of 1909 Schedule 1 Rule 2—Computation of time

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within which notice to be given—Are Sundays and Public Holidays excluded.

Held: (i) *That a notice of an intended application for leave to appeal to the Privy Council given under Rule 2 of the Rules in Schedule 1 of Appeals (Privy Council) Ordinance No. 31 of 1909, need not specify the day on which such leave would be applied for.*

(ii) *That in computing the period of thirty days prescribed in Rule 2, no days included in a vacation of the Supreme Court shall be reckoned unless the Court otherwise directs.*

PATHMANATHAN *vs.* THE IMPERIAL BANK OF INDIA ... ... VIII. 47

Appeal to the Privy Council—Point not dealt with by the decree of the Supreme Court—Can it be raised in the Privy Council—In what circumstances will the Privy Council not grant an adjournment of an appeal to enable the appellant to present a petition for special leave to appeal so as to enable him to appeal on a question not dealt with by the decree of the Supreme Court.

Held: *That it was too late for the appellant to seek to found any case on the earlier decree.*

DASSENAIKE *vs.* DASSENAIKE *alias* V. M. GILIMALE ... ... X. 75

An appellant cannot, in an appeal before the Privy Council, raise questions which should have been put in issue at the trial.

DHAMMANANDA *vs.* DON DAVITH RANASINGHE AND OTHERS ... ... X. 78

Service of notice of appeal on Incorporated Bank—How effected.

Held: (i) *That the notice sent by post was not served on the Bank, as it had not been sent to its Registered Office.*

(ii) *That the notice served by the Fiscal was not validly served, as the appellant had failed to obtain an order, under Rule 5A of the Privy Council Appeal Rules, that the notice be served on the Attorney of the Bank.*

DE FONSEKA *vs.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA XII. 35

Appeal—Privy Council—Notice of intention to make an application for conditional leave to appeal—Should application be filed only after notice has reached the respondent.

On 8th June, 1938, the plaintiff's Proctor sent by post a letter to the defendant intimating to him the plaintiff's intention to appeal to the Privy Council, and forwarded therewith the copy of an application he intended to file. On the same day, after posting the letter, the plaintiff's Proctor filed the application. The respondent received the letter after the application had been filed. Objection was taken to the application on the ground that the notice did not comply with Rule 2 of the Privy Council Appeal Rules as the application had been filed at the time the notice reached the respondent.

Held: *That the notice was in order.*

BALA SUBRAMANIAM PILLAI *vs.* VALLIAPPA CHETTIAR... ... ... XII. 57

Privy Council—Leave to appeal to—Action value at Rs. 500—Can leave be granted.

Held: (i) *That the applicant was not entitled to leave, as his claim was less than Rs. 5,000/- in value;*

(ii) *That the claim to the incumbency of the Vihare, is not a question of "great general or public importance" within the meaning of Rule 11 (b) of the Rules in Schedule 1 to the Privy Council Appeals Ordinance.*

PEMARATNA THERA *vs.* INDASARA THERA XIII. 9

Rules 5 and 6 of Privy Council Appeal Rules—Application under Rule 5 for a notice to be served on the respondents of intended application for leave to appeal—Applicant's proxy signed by Attorney—Is the proxy bad?

Held: *That the proxy granted by applicant's duly appointed Attorney satisfied the requirements of Rule 6 of the Privy Council Appeal Rules.*

MUTTUCARUPPEN CHETTIAR *vs.* MOHAMED SALIM AND OTHERS... ... XIII. 49

Conditional leave to appeal to Privy Council—Same defendant appearing in personal and representative capacity—Notice of intention to appeal signed without addition of representative capacity—Is the notice in order.

Held: *That the notice contained sufficient indication of defendant's intention to*

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appeal in all the characters which she had in the action.

CREASY, E. B. *vs.* GOONERATNE *nee* FERNANDO AND OTHERS ... XIII. 71

Appeal to Privy Council—Security for costs of appeal—Security by hypothecation of immovable property—Bond executed before Registrar of the Supreme Court—Is the security valid?

Held: (i) *That the security had not been properly tendered.*

(ii) *That the application for final leave to appeal to the Privy Council could not be granted in the circumstances.*

KADIJA UMMA *vs.* MOHAMED SULAIMAN AND OTHERS ... ... XIV. 1

Privy Council—Appeal on question of fact—Duty of appellant.

Held: *That where the appellant in an appeal to the Privy Council in a civil case contends that the findings of fact in the Courts below are erroneous, it is incumbent on him to satisfy their Lordships without any shadow of doubt that such findings are erroneous.*

EBRAHIM LEBBE MARIKAR *vs.* ARULAPPA PILLAI ... ... XIV. 121

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

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

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

SOKKALAL RAM LAL *vs.* NADER AND FOUR OTHERS ... ... XV. 80

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

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

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

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

WIJESINGHE HAMINE AND ANOTHER *vs.* EKANAYAKE AND OTHERS ... XVII. 68

The Appeals (Privy Council) Ordinance—Rules 1 (*a*) and 2 of the Schedule—Meaning of the expression "final judgment" in that Rule—Computation of time within which leave to appeal should be made—Supreme Court (Vacation) Ordinance, Section 8.

Held: (i) *That no days included in a vacation of the Supreme Court shall be reckoned in the computation of the time within which an application for leave to appeal to the Privy Council has to be made.*

(ii) *That the expression "final judgment" in Rule* 1 (a) *of the Schedule to the Appeals (Privy Council) Ordinance means an order which finally disposes of the rights of the parties.*

(iii) *The decision of the Supreme Court affirming the decision of the District Court allowing an application to execute a decree of the Supreme Court is not a "final judgment" within the meaning of that expression in Rule* (1) (a) *of the Rules in the Schedule to the Appeals (Privy Council) Ordinance.*

PALANIAPPA CHETTIAR AND TWO OTHERS *vs.* MERCANTILE BANK OF INDIA AND OTHERS XXIII. 13

Appeals (Privy Council) Ordinance, Section 3 and Rule 1 of the Schedule—Proceedings under Section 10 of the Waste Lands Ordinance No. 1 of 1897—Decision of the Supreme Court that there is no right of appeal from a decision of the District Court under Section 20 of the Waste Lands Ordinance No. 1 of 1897—Is there a right of appeal to the Privy Council from such decision—Final judgment—Meaning of.

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Held: (i) *That a judgment of the Supreme Court declaring that there is no right of appeal from the decision of the District Court in a proceeding under Section* 20 *of the Waste Lands Ordinance No.* 1 *of* 1897 *is a final judgment for the purposes of Rule* 1 (a) *of the Schedule to the Appeals (Privy Council) Ordinance.*

(ii) *That a proceeding under Section* 20 *of the Waste Lands Ordinance No.* 1 *of* 1897 *is not a civil suit or action for the purpose of Section* 3 *of the Appeals (Privy Council) Ordinance and that parties to such proceedings have no right of appeal to the Privy Council.*

VANDERPOORTEN *vs.* THE SETTLEMENT OFFICER ... ... XXIV. 14

Application for leave to Appeal—Rule 1 of the Rules in the Schedule to the Appeals (Privy Council) Ordinance.

Held: (i) *That in ascertaining the value of the action for the purposes of Rule* 1 (a) *of the Schedule to the Appeals (Privy Council) Ordinance the judgment must be looked at as it affects the interests of the party who is prejudiced by it and who seeks to relieve himself of it by appeal.*

(ii) *That the mere fact that a decision is in conflict with another decision of the Supreme Court does not make the question involved a matter of great general or of public importance.*

(iii) *That where there has been no fraud on the part of the appellant and where he has not consented to an undervaluation for the purpose of obtaining an advantage he should be allowed to prove the value of his claim for the purpose of bringing himself within Rule* 1 *of the Rules in the Schedule to the Appeals (Privy Council) Ordinance.*

SETHA *vs.* MUTTUWA AND OTHERS XXIV. 68

Section 3 and Rule 1 (*b*) of the Schedule—Application for a Writ of Certiorari on the Judge of an Election Court—Order refusing to issue a Writ—Is an application for a Writ of Certiorari a civil suit or action for the purposes of Section 3.

Held: *That an application for a Writ of Certiorari is a civil action for the purposes of Section* 3 *of the Appeals (Privy Council) Ordinance.*

A. E. GOONESINGHE (APPLICANT) XXIV. 81

Decision of the Supreme Court on a case stated under the Omnibus Service Licensing Ordinance No. 47 of 1942—Does appeal lie as of right to the Privy Council.

Held: *That an appeal does not lie as of right to the Privy Council from the decision of the Supreme Court on a case stated under the Omnibus Service Licensing Ordinance No.* 47 *of* 1942.

THE K.V. MOTOR TRANSIT CO. *vs.* THE C.R. OMNIBUS CO. ... XXVI. 112

Privy Council Appeals (Orders) Rules 10 and 18—Failure to serve list of documents on respondents within prescribed time—Absence of record from Registry—Application for extension of time.

Held: *That the absence from the Supreme Court Registry (during the period prescribed for service) of a part of the record containing documents needed for the preparation of the list of documents required to be served under Rule* 10 *of the Privy Council Appeals (Orders) should be regarded as a good cause for granting an application for extension of time under Rule* 18.

DE FONSEKA *vs.* THE CHARTERED BANK AND OTHERS ... ... XXVII. 100

Appeal to Privy Council on question of valuation and allocation of allotments under Partition Ordinance—Not proper subjects for appeal.

NARAYAN CHETTIAR AND OTHERS *vs.* KALIAPPA CHETTIAR AND OTHERS XXXI. 109

Leave to appeal—Issue of Writ of Certiorari quashing order of Textile Controller cancelling textile dealer's licence under Defence Control of Textiles Regulations—Does an appeal lie from order issuing such Writ—Rule 1 (*a*) and (*b*) of Schedule to Appeals (Privy Council) Ordinance (Chap. 85).

The petitioner, the Controller of Textiles, made order under Regulation 62 of the Defence (Control of Textiles) Regulations, revoking two licences granted to the respondent to deal in textiles. The respondent successfully applied to the Supreme Court for a Writ of Certiorari to quash the said order of revocation. The petitioner applied for conditional leave to appeal to the Privy Council from the order allowing the Writ. There was evidence that property affected by the order of revocation was over Rs. 5,000.

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Held: *That, in the circumstances, the petitioner was entitled to leave to appeal to the Privy Council.*

THE CONTROLLER OF TEXTILES *vs.* MOHAMED AND CO. ... ... XXXVI. 40

Application for conditional leave to appeal —Order of abatement set aside by Supreme Court and case remitted to Lower Court for trial—Does such order amount to "final judgment" within the meaning of Rule 1 (*a*) of the Schedule to the Appeals Privy Council) Ordinance (Chap. 85).

Held: *That a judgment of the Supreme Court vacating an order of abatement made by a District Judge, and remitting the case to the Lower Court for further proceedings, is not a final judgment within the meaning of Rule* 1 (*a*) *of the Schedule to the Appeals (Privy Councils) Ordinance (Chap.* 85).

FERNANDO AND OTHERS *vs.* CHITTAMBARAM CHETTIAR ... ... XXXVI. 42

Application for conditional leave to appeal —Notice of intended appeal to parties—Failure to notify one of the parties—Errors in notices to others—Appeals (Privy Council) Ordinance, Rule 2 of the Schedule.

Held: (1) *That the failure to serve notice on one of the parties to the action, (although no relief was asked for and was not represented) is a fatal non-compliance with the provisions of Rule* 2 *of the Schedule to the Appeals (Privy Council) Ordinance.*

(2) *Strict compliance with the provisions of Rule* 2 *is required and no indulgence can be granted in respect of errors in notices to the parties.*

NAGALINGAM *vs.* THANABALASINGAM XL. 75

Application for leave to appeal from final judgment of Supreme Court—Appeals (Privy Council) Ordinance, Cap. 85, Rules I and 3—Is the Crown bound by Rule 3 (*a*).

Held: *That the Crown is not bound by the provision in Rule* 3 (*a*) *of the Appeals (Privy Council) Ordinance as the Rule does not state expressly that the right of the Crown is affected by it and does not appear by necessary implication that the Crown is bound by it.*

THE ATTORNEY-GENERAL *vs.* VALLIAMMA ATCHI ... ... XL. 77

Conditional leave to appeal—Notice of intended application given and received by Proctors not duly authorised by respective parties at time of such notice—Proctors subsequently authorised—Validity of notice —Notice signed by person holding Power of Attorney—Validity—Can applicant alter the ground on which leave is sought after fourteen days from date of judgment.

Held: (i) *That a notice of an intended application for leave to appeal to the Privy Council, given or received by a Proctor before such Proctor is duly authorised for the purpose, is bad.*

(ii) *That an applicant cannot be permitted to alter his ground of appeal after the lapse of fourteen days from the date of judgment.*

Per WIJEYEWARDENE, C.J.—" There remains for consideration the validity of the " notice " signed by the defendant " by his Attorney." It is contended by the plaintiff that that notice too is bad as a notice could be signed only by a party or by a Proctor for a party empowered to act under the Ordinance. This contention is based on Rule 6 of the Order which states, " A party to an application under the Ordinance.....shall, unless he appears in person, file in the Registry a document in writing appointing a Proctor of the Supreme Court to act for him in connection therewith..... " It is, however, not difficult to take the view that Rule 6 applies only to what has to be done in Court and not to a notice of " an intended application " referred to in Rule 2 in Schedule 1 to the Ordinance and not given with the assistance of the Court. Such a view of the law has the merit of not placing unnecessary technical difficulties in the way of a party wishing to appeal to His Majesty in Council. If that view is correct, the party required to serve notice may do so by a writing signed by him " by his Attorney," as that is permissible under the common law and there is nothing in Rule 5 to shew that the right under the common law has been taken away."

VAN DER POORTEN *vs.* VAN DER POORTEN *et al* ... ... XLI. 23

Leave to appeal—Rule 1 (*a*) of the Rules of Appeals (Privy Council) Ordinance (Cap. 85)—Meaning of "Final judgment."

In an application by one Don Vincent Algama, the provisional trustee of the

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Rajamaha Vihare, under Section 32 of the Buddhist Temporalities Ordinance for a Writ requiring the applicant and another to deliver to him possession of the property of the Vihare, the Supreme Court set aside the order of the District Court and granted the application on the ground that Section 32 of the Ordinance covered *de facto* Viharadhipatis or those who claim to be Viharadhipatis, and directed the District Court " to proceed with " the case.

The applicant sought leave to appeal to the Privy Council from the judgment of the Supreme Court but was opposed by the provisional trustee on the ground that the decision of the Supreme Court was not a " final judgment " within the meaning of that expression in Rule 1 (*a*) of the Privy Council Appeal Rules.

Held: *That the judgment of the Supreme Court is a "final judgment" within the meaning of Rule* 1 (*a*)*; for the judgment holds that the case is one in which the applicant's request for a Writ should be granted. It finally disposed of the matters in dispute between the parties, leaving only the act of issuing the Writ to be done by the District Judge.*

Per BASNAYAKE, J.—" It would be unwise to define the expression ' final judgment ' in the abstract. Whether a judgment of this Court is final or not has to be determined by an examination of the facts and circumstances of each case."

BUDDHARAKKITA THERA *vs.* ALGAMA AND SANGARAKKITA THERA ... XLIII. 93

Rule 1 (*a*) of Rules set out in Schedule—Action between landlord and tenant—Right to possession—Value—Test.

Held: *That for the purpose of an application for conditional leave to appeal to the Privy Council, the value of an action by the landlord against his tenant for ejectment must be determined by the rental reserved by the contract of tenancy.*

SUBBIAH PILLAI *vs.* FERNANDO ... XLIV. 45

Privy Council—Appeal to—Deposit of security for costs before grant of conditional leave—Withdrawal of Appeal—Notice to Privy Council—Communication by Registrar of Privy Council to Registrar of Supreme Court—Order appeal stands dismissed—Request to bring before Supreme Court for steps to terminate proceedings—Can appellant ask for refund of deposit before order terminating proceedings—Respondents' right to ask for costs—Judicial Committee Rules—Rule 32.

In pursuance of a written notice by the appellant that he desired to withdraw his appeal, the Registrar of the Privy Council notified by letter the Registrar of the Supreme Court that by virtue of Rule 32 of the Judicial Committee Rules 1925 the appeal stands dismissed as from the date of his letter without further order and further proceeded to say " I have accordingly to request you to be good enough to bring this communication before the Lordships of your Court in order that the necessary steps may be taken to terminate proceedings.

The appellant thereafter made application to have refunded to him the sum of Rs. 3,000 deposited with the Registrar by way of security before final leave to appeal was granted.

Held: (1) *That in view of the communication addressed to the Registrar of the Supreme Court the appellant should make an application for an order terminating proceedings before asking for a refund of the desposit money.*

(2) *That the respondent will be entitled at such application to ask for an order for costs in his favour.*

VANDER POORTEN *vs.* VANDER POORTEN *et al* ... ... XLIV. 47

Privy Council—Appeal to—Conditional leave granted—Defendant's failure to act under Rule 10 of the Appellate Procedure (Privy Council) Order 1921—Application by defendant for extension of time under Rule 18—No justifiable reason for defendant's inordinate delay—Meaning of "for good cause" in Rule 18.

The defendant after obtaining conditional leave to appeal to the Privy Council did not serve on the plaintiff a list of documents necessary for the hearing of the appeal within ten days after the leave to appeal as was required by Rule 10 of the Appellate Procedure (Privy Council) Order 1921, but did so only after a month and twelve days. Even after the plaintiff's Proctor had furnished him with the relevant documents, the defendant did not take any step to lodge with the Registrar a list of the documents relied on by the parties. He thereafter applied under Rule 18 of the Order for an

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extension of time to comply with the requirements of Rule 10 stating that his failure was due to his Proctor's inability to have access to the record of the case.

Held: (1) *That there was no substance in the excuse and the defendant's application should be refused, and the appeal should stand dismissed for non-prosecution.*

(2) *That when the time allowed by the Rules contained in the Appellate Procedure (Privy Council) Order* 1921 *for doing any act necessary for prosecuting an appeal to the Privy Council has already expired, the Court should not grant an extension of time for the doing of that act unless the applicant can show that he has throughout exercised due diligence in prosecuting his appeal, and that his failure to comply with the Rules was occasioned by some circumstance beyond the control of himself and his legal advisers.*

C. M. SAMUEL APPUHAMY *vs.* E. M. PETER APPUHAMY ... ... XLIV. 88

Application for conditional leave to appeal —Contract—Money due to petitioner under—Amount below Rs. 5,000—Objections to application—Monetary limit below Rs. 5,000 —Notice of intended application bad due to failure to state specific ground of appeal in notice—Appeals (Privy Council) Ordinance (Chapter 85)—Schedule Rules 1, 2—Scope of.

The petitioner instituted an action against the respondent to recover a sum of Rs. 2,250 under an agreement to pay the petitioner at the rate of Rs. 150 per month, and an additional sum that would become due at that rate from the date of action till date of decree and for legal interest.

The Lower Court entered judgment on 3rd November, 1950, and the amount due to the petitioner on this date was under Rs. 5,000. On appeal to the Supreme Court the decree was set aside on 3rd March, 1953. The petitioner on 11th March, 1953, served a notice on the respondent stating that he was applying for leave to appeal to Her Majesty in Council against the judgment of the Supreme Court and that the application would be filed within 30 days of the judgment.

The respondent objected to the application for conditional leave to appeal on two grounds:—(1) that the minimum monetary limit prescribed by Rule 1 (*a*) of the Schedule to the Appeals (Privy Council) Ordinance has not been reached (2) that the notice of the intended application was bad in law as it did not set out the grounds upon which the intended application was to be made.

In regard to the first ground, it was urged on behalf of the petitioner (*a*) that for the purpose of determining the value in dispute the amounts payable to the petitioner subsequent to the date of the decree of the Lower Court and up to the date of the decree of the Supreme Court should be taken into consideration. If so, the amount would be over Rs. 5,000 (*b*) alternatively the appeal involved indirectly some civil right amounting to or of the value of Rs. 5,000 or upwards within the meaning of Rule 1 (*a*).

Held: (1) *That the petitioner is not entitled to rely upon the amounts that may accrue after the decree of the Lower Court in order to satisfy the monetary limit of Rule* 1 (*a*).

(2) *That although the amount at stake in the action is under Rs.* 5,000, *the action raises the question of the existence and validity of the contract between the parties and the settlement of that question affects the rights and liabilities of the parties beyond the sum of Rs.* 5,000 *and the appeal involves a civil right of the value of over Rs.* 5,000.

(3) *That Rule* 2 *is satisfied if an intending appellant gives notice to the opposite party within the prescribed period of* 14 *days of his intention to proceed further with the litigation. The Rule does not require that a person should specify in advance the grounds on which he intends to base his application to appeal to Her Majesty in Council.*

DE SILVA *vs.* HIRDRAMANI LTD. XLIX. 65

Conditional leave to appeal—Estate Duty Ordinance, Section 40—Appeal to District Court from Commissioner's determination to District Court—Appeal to Supreme Court from decree of District Court—Is there a right of appeal to Privy Council from judgment of Supreme Court—Appeals (Privy Council) Ordinance (Cap. 85) Section 3.

Held: *That a final judgment pronounced by the Supreme Court on an appeal from a decree of the District Court (passed under Section* 40 *of The Estate Duty Ordinance) is a judgment pronounced in "a civil suit or action" within the meaning of Section* 3 *of the Appeals (Privy Council) Ordinance (Cap.* 85) *and consequently there is a right of*

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appeal from such judgment to the Privy Council.

THE ATTORNEY-GENERAL *vs.* V. RAMASWAMI IYENGAR AND ANOTHER L. 46

ARBITRATION

Award filed in presence of Proctors—Parties to the case not noticed—Is it sufficient compliance with the requirements of Section 685 of the Civil Procedure Code.

Held: (1) *That the decree was bad inasmuch as due notice of the filing of the award had not been given to the parties as required by Section* 685 *of the Civil Procedure Code.*

(2) *That it is essential that there should be a due observance of all the formalities before a Court proceeds to give judgment according to an award.*

PICHE AND ANOTHER *vs.* MOHAMADU XIII. 59

Procedure to be adopted when an oral application is made by the arbitrator for an extension of the returnable date.

PERIYATHAMBY *vs.* RASIA ... XXII. 68

Agreement to refer differences between parties to arbitration—Can action be instituted before such reference.

WIJAYANARAYANA *vs.* GENERAL INSURANCE CO., LTD. ... ... XXXII. 57

Arbitration Ordinance § 7—Party is entitled to have an order staying an action until matters in difference between the parties have been referred to arbitration.

WIJAYANARAYANA *vs.* GENERAL INSURANCE CO., LTD. ... ... XXXII. 57

Reference to arbitration—Enforcement of award—Award invalid for want of jurisdiction—Duty of Court.

EKANAYAKE *vs.* THE PRINCE OF WALES CO-OPERATIVE SOCIETY LTD. XXXIX. 57

Arbitration—Court acting as arbitrator.

Plaintiff sued defendants, who are co-owners, for recovery of damages for depriving plaintiff of his share of a crop of paddy. Defendants denied the claim. At the trial parties agreed to " refer all matters in dispute to the final arbitration of the Court and the Court is to make its order after inspection of the place."

The Court inspected the land and ordered the plaintiff to be placed in possession of a portion of the field cultivated by one of the defendants.

Held: *That in making its order the Court exceeded the authority given to it by the parties.*

MUDALIHAMY *vs.* APPUHAMY AND OTHERS XXXIX. 103

Reference to arbitration in general terms—No record of desire of parties to arbitrate—Validity of award.

GIRIGORIS *et al vs.* PUNCHI SINGHO *et al* XL. 25

Dispute between Co-operative Society and past officer of Society—Power to refer to compulsory arbitration.

SIRISENA *vs.* REGISTRAR OF CO-OPERATIVE SOCIETIES ... ... XLI. 1

Arbitration—Reference to, without complying with provisions of Civil Procedure Code—Sections 676, 677 and 678.

Held: (1) *That a reference to arbitration made without complying with the provisions of Sections* 676 *and* 677 *of the Civil Procedure Code is bad in law.*

(2) *If parties nominate two or more arbitrators, provision should be made for a difference of opinion among the arbitrators.*

DE SILVA *vs.* PERERA ... ... XLIV. 69

Arbitration—Reference to, without complying with provisions of Civil Procedure Code—Section 676.

Held: *That a reference to arbitration which does not strictly comply with the provisions of Section* 676 *of the Civil Procedure Code is bad, and that an award made under such a reference is invalid.*

Per BASNAYAKE, J.—" It is clear from the provisions of Chapter LI of the Civil Procedure Code that a *lis* may be taken away from the jurisdiction of the Courts to an arbitrator only in strict conformity with the prescribed procedure. But there appears to be a good deal of laxity in the trial Courts in the matter of reference to arbitration. It is eminently necessary that Judges and pleaders alike should consult the Code when taking any step thereunder."

MADASAMY *vs.* AMINA ... XLV. 40

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ARREST

for **MALICIOUS ARREST** *See under that heading.*

Civil matter—Process Server arresting after sunset—liability.

BADURDEEN *vs.* DINGIRI BANDA *et al* I. 74

Illegal arrest—Evidence discovered in the course of —How far admissible.

BASTIANSZ (EXCISE INSPECTOR) *vs.* PUNCHIRALA ... ... I. 281

Powers of arrest of Excise Officers.

THE KING *vs.* GUNASEKERA AND TWO OTHERS ... ... IX. 40

Warrant issued under § 219 of Civil Procedure Code—Warrant not complying with formalities prescribed by law—Arrest under warrant is unlawful.

GUNAWARDENA *vs.* GUNATILLAKE XII. 122

Arrest by private person—Evidence discovered by reason of arrest—Admissible.

DE SILVA *vs.* LIYORIS SINGHO ... XVI. 52

Warrant *ex facie* **defective—person taken into custody under such warrant cannot be said to be in lawful custody.**

SITTAMPARAMPILLAI *vs.* MURUGAN XIX. 118

Warrant *ex facie* **defective—Process Server executing such warrant cannot be said to be acting in the discharge of his public functions.**

SITTAMPARAMPILLAI *vs.* MURUGAN XIX. 118

Warrant of arrest—Bailable offence—Failure to endorse warrant as required by Section 51 of the Criminal Procedure Code—Legality—Is obstruction to execution of such warrant justifiable—Penal Code Sections 183, 220, 344 and 314—Village Communities Ordinance, Section 90.

Magistrate's duty when the only charge proved was one within exclusive jurisdiction of the Village Tribunal—Discharge of accused on a legal point before complainant led all evidence—Does appeal from such discharge require sanction of Attorney-General under Section 336 of the Criminal Procedure Code.

Held: (1) *That where a warrant of arrest in respect of a bailable offence did not contain an endorsement as prescribed by Section* 51 *of the Criminal Procedure Code the warrant was invalid.*

(2) *That convictions under Sections* 183, 220 *and* 344 *of the Penal Code cannot be sustained against the accused who obstructed the execution of such warrant.*

(3) *That where the only charge proved against the accused is one triable exclusively by the Village Tribunal, the Magistrate without acquitting the accused should refer the parties to such Tribunal.*

(4) *That where the accused were discharged on a legal point before the complainant had tendered all his evidence, the Magistrate had no power to enter an order of acquittal under Section* 190 *of the Criminal Procedure Code.*

(5) *That no sanction of the Attorney-General is necessary to appeal from such an order.*

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS XX. 77

Arrest—Transport of timber by accused on permit—Refusal of Forest Guards to allow them to proceed—Is such conduct legal—Does it amount to illegal arrest.

SINNALEBBE AND ANOTHER *vs.* KANDIAH XXXII. 84

Warrant issued in India for execution in Ceylon—Validity.

DIAS BANDARANAIKE *vs.* KANTHASWAMY XXXV. 28

Arrest without warrant—Excise offence—when is arrest illegal.

MURIN PERERA *vs.* WIJESINGHE... XLIII. 8

Arrest—Without warrant—Power of police.

MUTTUSAMY *et al vs.* INSPECTOR OF POLICE, KAHAWATTA ... XLIV. 33

Unlawful arrest—admissibility of evidence obtained in the course of an unlawful arrest and search.

PONNUDURAI *vs.* JALALDEEN ... XLV. 28

ASSIGNMENT

of decree—*see under* **DECREE.**

of mortgage bond—*see under* **MORTGAGE**

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In the case of persons subject to Thesawalamai, an assignee who takes an assignment of the interests of a surviving spouse in a chose in action takes the assignment subject to the rights of the administrator to claim the whole property for the purposes of administration.

CHELLIAH *vs.* OTHERS *vs.* SINNATHAMBY and OTHERS ... ... X. 116

ASSOCIATION

See also under **BENEVOLENT ASSOCIATION.**

Association—Unincorporated—Action against.

BARRIEL SILVA *vs.* LOW COUNTRY PRODUCTS ASSOCIATION ... IX. 13

Mutual Provident Association—Liability to income tax of income from loans to members.

THE COMMISSIONER OF INCOME TAX *vs.* THE PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION ... XVII. 11

ATTORNEY

Manager holding limited Power of Attorney—How far may he bind the principal—Construction of Power of Attorney.

ADAIKAPPA CHETTIAR *vs.* THOS. COOK & SON LTD. ... ... II. 88

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

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

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

FERNANDO *vs.* RANASINGHE ... XVI. 139

Attorney—When cannot Attorney exercise statutory functions for principal.

IN *Re* MRS. VIVIENNE GOONEWARDENE XXIV. 3

Power of Attorney—Execution by Purdanishin lady behind Purdah while Notary stood outside—Is it entitled to presumption under Section 85 of the Evidence Ordinance.

Deed attested in British India—Declaration of due execution by Notary attesting—Is evidence necessary to prove signature of Notary or identity of executant.

Evidence—True copy of a copy of original Power of Attorney not issued by Registrar-General of Ceylon, but by a Registering Officer under the Indian Registration Act, 1908—Is it admissible without evidence of due execution.

Held: (1) *That a Power of Attorney executed by a Purdanishin lady behind the Purdah, while the Notary stood outside the Purdah, could not be regarded as a Power of Attorney (executed before a Notary) entitled to the presumption under Section* 85 *of the Evidence Ordinance.*

(2) *That, where there is a declaration by the Notary attesting a deed in British India to the effect, that such deed was duly executed, an affidavit or other evidence verifying the signature of the Notary, or the identity of the executant is unnecessary.*

(3) *That a document (not being a certified copy issued by the Registrar-General of Ceylon under the Powers of Attorney Ordinance,) purporting to be a "true copy" of a copy of an original Power of Attorney, copied by a Registering Officer in a book kept under the Indian Registration Act* 1908, *without evidence of its execution and genuineness, is inadmissible in evidence.*

SREENIVASARAGHAVA IYENGAR *vs.* JAINAMBEEBEE AMMAL AND OTHERS XXXIV. 1

Attorney executing deed—Power of Attorney unregistered—Validity of conveyance.

NADARAJAH *et al vs.* THILLAIRAJASWARI *et al* ... ... XXXVII. 60

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Attorney holding a general Power of Attorney can institute an action on behalf of his principal.

LANKA ESTATES AGENCY LTD. *vs.* W. M. P. COREA ... ... XLV. 33

ATTORNEY-GENERAL

Sanctioning appeal—Sanction not required by law—Time within which appeal may be filed.

POLICE SERGEANT BANDA *vs* DALPADADU ... ... I. 2

Refusing sanction to appeal—When will Supreme Court hear the case in revision.

OSSEN *vs.* PONNIAH (EXCISE INSPECTOR) *et al* ... ... I. 246

APONSU *vs.* MALALASEKERE ... XV. 106

Attorney-General's right of reply against accused who calls no evidence on his behalf.

KING *vs.* ROMANIS PERERA AND THREE OTHERS ... ... XIII. 83

Sanction of Attorney-General is not required for an appeal from order discharging an accused.

JINORIS FONSEKA *vs.* MENDIS FERNANDO XV. 99

Attorney-General should be made a party to an appeal under 31 of the Stamp Ordinance.

PUNCHIMAHATMAYA *vs.* THE COMMISSIONER OF STAMPS ... ... XVI. 74

Attorney-General has no power under the Criminal Procedure Code to frame a fresh indictment in respect of a charge withdrawn in pursuance of the exercise of the Court's Powers of amendment under Section 172 of the Code.

REX *vs.* EMANIS ... ... XVIII. 99

An action for the recovery of money deposited in the Post Office Savings Bank should be brought against the Trustees of the Bank and not against the Attorney-General.

ARNOLIS HAMY *vs.* THE ATTORNEY-GENERAL ... ... XIX. 58

Sanction of prosecution by private party.

VANDER POORTEN *vs.* VANDER POORTEN AND ANOTHER ... ... XXXI. 77

Power of Attorney-General—To give directions in respect of trials held by Magistrate in respect of non-summary offences.

ATTORNEY-GENERAL *vs.* SRI SKANDARAJAH XLVII. 1

AUCTIONEER

Auctioneer displaying customers' furniture free of charge—Commission charged only for the sale—Does he carry on the business of storing furniture.

GUNASEKERA *vs.* MUNICIPAL REVENUE INSPECTOR ... ... XLVI. 59

AUDI ALTERAM PARTEM

LIPTONS LTD. *vs.* GUNASEKERA XXXIV. 22

AUTREFOIS ACQUIT

An acquittal for theft is a bar to a prosecution for criminal misappropriation of the same subject matter.

CANAGASINGHAM VANNIAH *vs.* MEYADIN BAWA ... ... I. 29

Offence under Excise Ordinance—Case withdrawn owing to absence of the decoy a witness for the prosecution—Accused recharged—Plea of *autre fois* acquit—Is it sustainable in the circumstances?—Conviction based on the uncorroborated evidence of a decoy.

Held: (1) *That to set up the plea of* autre fois *acquit or convict there must have been a previous trial, in which some final order has been passed, whether of conviction or acquittal.*

(2) *That a conviction cannot be based on the uncorroborated evidence of a decoy.*

EKANAYAKE (EXCISE INSPECTOR) *vs.* FONSEKA ... ... I. 310

Can accused who is discharged on a charge of grievous hurt plead *autre fois* acquit when charged for simple hurt in the same proceedings.

Held: *That he cannot plead* autre fois *acquit.*

JULIHAMY *vs.* FERNANDO *et al* ... II. 95

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Is acquittal on a charge under Section 5 of Ordinance No. 13 of 1907 for cruelty to an animal a bar to a prosecution on the same facts under Section 412 of the Penal Code for killing the same animal.

Where an accused was charged under Section 5 of Ordinance No. 13 of 1907 for cruelly stoning to death a bull and was later charged under Section 412 of the Penal Code for killing the same bull.

Held: *That the previous acquittal was no bar to the second prosecution.*

JOHN *vs.* PIRA AND OTHERS ... VI. 38

Criminal Procedure Code, Section 172—Discharge of the accused on the charges on which he was tried and a fresh charge framed simultaneously—Is such procedure tenable in law.

Held: *That the Magistrate was entitled in law to do what he did and that the plea of* autre fois *acquit could not prevail.*

D. J. A. ABEYSINGHE (REVENUE INSPECTOR, M.C., KANDY) *vs.* D. P. K. CHARLES APPUHAMY ... VIII. 6

Discharge under § 191 of the Criminal Procedure Code, even though the Judge calls it an acquittal, cannot support a plea of *autre fois* acquit.

REX *vs.* WILLIAM ... ... XXIV. 115

Conviction under repealed regulation—Conviction quashed—Subsequent conviction under proper regulation—plea of *autre fois acquit*.

WILBERT PERERA *vs.* JOHORAN XXXIII. 55

Is plea available when there has been no adjudication upon the merits of the earlier charge.

FERNANDO *vs.* RAJASOORIYA ... XXXIII. 80

Accused "discharged" after close of prosecution and defence counsel had stated that no evidence would be called—Fresh charge.

SOLICITOR-GENERAL *vs.* ARADIEL XXXIX. 17

Criminal Procedure Code, Sections 148 (*b*) 190, 191 and 331—Proceedings initiated under Section 148 (*d*)—Prosecution not ready on trial date—Application for postponement refused—Prosecution not leading evidence—Order discharging accused—Subsequent proceedings against accused on identical charges—Plea of *autre fois* acquit—is the accused entitled to the plea of.

After several postponements the trial of the accused was fixed for 11-1-52. On this date the prosecution applied for a date on the ground that one of its witnesses was not present, but the learned Magistrate acting under Section 289 (5) of the Criminal Procedure Code refused the application. The prosecutor, thereupon stated that he could not proceed with the case and the Magistrate made order discharging the accused.

On 22-2-1952, the present proceedings were initiated against the accused on the identical charges and he was found guilty after trial. The accused appealed.

Held: *That the order of discharge made by the learned Magistrate is one under Section* 190 *of the Criminal Procedure Code and has the effect of an acquittal and the present proceedings therefore are barred by Section* 331 *of the Criminal Procedure Code.*

Per NAGALINGAM, S.P.J.—" The Magistrate was prepared to take all the evidence that the prosecution and defence were prepared to place before him. The prosecution had no evidence to place before him, so that as there was no evidence placed before the Magistrate he had no option but to find the accused not guilty and enter a verdict accordingly. In my opinion, an order under Section 191 can only be justified for instance, before the prosecutor has led all the evidence that is available to him and which he is ready and willing to place before the Court, the Court for some reason stops the proceedings and enters an order for discharge of the accused person.

ADRIAN DIAS *vs.* WEERASINGHAM XLIX. 77

AUTREFOIS CONVICT

Conviction under § 2 of the Lost Property Regulation—Not a bar to subsequent charge under § 394 of the Penal Code.

JOHN MOOTHATHAMBY *vs.* PETER XXI. 128

BAIL

Application for bail—Grounds on which bail should be allowed in case of murder.

Held: *That where the charge is one of murder and the accused has been properly committed for trial, strong grounds or*

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special grounds must be adduced for the granting of bail wherever the Crown opposes that application.

It is not necessary for the Crown to show that the accused is likely to abscond but the onus is on the applicant to show strong or special reason why the accused is not likely to abscond.

REX *vs.* VELUPILLAI ... I. 26

Application for bail—Accused charged with abetting murder—Circumstances in which bail may be allowed.

Held: *That the mere fact that the punishment for the offence with which the accused is charged is death should not prevent the Supreme Court from exercising its powers of allowing bail, if in the circumstances of the case before it, it is of opinion that bail should be allowed.*

P. C. DANDAGAMUWA ... II. 246

Bail Bond—Surety given time to produce defaulting accused—Production of accused on extended date.

Held: *That the bond cannot be declared forfeit after surety is given time and he produces the accused within the extended period.*

INSPECTOR OF POLICE *vs.* PUNCHIBANDA. II. 136

Order for forfeiture of bail bond without giving party an opportunity of showing cause against the forfeiture—Regularity.

THE KING *vs.* NAKEEM ... II. 255

The Supreme Court has no power to cause an accused-person who has been released on bail to be arrested while he is awaiting trial after committal.

DE ZOYSA *vs.* NANNIYAVAN AIYAVAN XXI. 66

An application for bail will be granted by the Court of Criminal Appeal only in cases of exceptional circumstances.

REX *vs.* KEERALA ... ... XXII. 82

Prisoner indicted with murder—Failure to be brought up for trial during 1st Criminal Sessions owing to postponements on application by defence counsel—Is it sufficient reason for allowing bail under Section 31 of the Courts Ordinance.

A prisoner, who was indicted with another for murder, could not be brought to trial at the 1st Criminal Sessions after the date of his commitment owing to postponements allowed on three occasions on the application of one or other of the prisoners' counsel.

On an application for bail made under Section 31 of the Courts Ordinance.

Held: *That the prisoner was not entitled to bail.*

NALLIAH *vs.* THE ATTORNEY-GENERAL XXIX. 16

Accused convicted and sentenced to imprisonment—Special leave to appeal against conviction and sentence granted by Privy Council—Power of High Court in India to grant bail—Indian Criminal Procedure Code, Sections 426, 496, 497, 498 and 561A.

Held: (1) *That the Indian Criminal Procedure Code confers no powers on a High Court to grant bail in the case of the convicted person and the fact that he has obtained leave from His Majesty in Council to appeal from his conviction or sentence makes no difference in this regard.*

(2) *That Chapter* 39 *of that Code together with Section* 426 *is, and was intended to contain a complete and exhaustive statement of the powers of the High Court in India to grant bail, and excludes the existence of any additional inherent power in a High Court relating to the subject of bail.*

(3) *That if the Local Court has no power to grant bail, no suggestion or direction of the Privy Council can confer that power.*

LALA JAIRAM DAS AND OTHERS *vs.* EMPEROR ... ... XXXI. 1

Bail—For person detained on charge of murder.

REX *vs.* JINASEKERA ... ... XXXII. 16

Offender arrested in Ceylon on warrant issued by Indian Court—Warrant defective—Proceedings under Fugitive Offenders Act abandoned—Order for release of offender on bail—Validity of order.

KANDASAMY *vs.* ROSAIRO ... XXXIII. 43

Bail—Questions for consideration on an application for.

Held: *That the fact that an offence is of frequent occurrence in a particular area and*

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that the accused persons may repeat such offence is not a ground for refusing bail.

IN *Re* APPLICATION IN M.C., NEGOMBO NO. 49097 (501) ... ... XXXIII. 88

Bail—Jurisdiction of Supreme Court to entertain application for.

REX *vs.* KARTHELIS AND OTHERS XXXVI. 82

Fixing of bail—Judicial discretion to be exercised—Warrant committing accused to custody of Fiscal pending trial—Period of validity—Criminal Procedure Code, Sections 289 and 396.

Held: (1) *That the maximum term for which an accused person can be remanded by a Magistrate is seven days at a time, except in certain Courts proclaimed by the Minister of Justice, where the maximum term is fourteen days.*

(2) *That at the end of that term, the accused person must be produced in Court so that the Magistrate may determine what would be the appropriate order to make should the trial be postponed.*

(3) *That in fixing bail, which must not be excessive and which must be fixed with due regard to the circumstances of the accused, a judicial discretion must be exercised.*

ATHURUPANE *vs.* ANDERSON ... XL. 92

Bailable offence—Summons reported served on accused—Failure to attend Court—Issue of warrant—Should it be issued without endorsement as to bail.

SAMARASINGHE *vs.* W. A. WILLIAM XLVI. 23

Bail-bond by persons arrested by Excise officers—Forfeiture of bond—Have Excise officers power to release persons arrested on their own bail—Can a Magistrate forfeit such bond?—Excise Ordinance, Sections 33 and 37—Criminal Procedure Code, Sections 2, 7 and 34.

Held: *That Excise Officers who arrest persons without a warrant have no power to release them on bail and a Magistrate, therefore, cannot forfeit a bond so taken, when the arrested persons fail to appear in Court.*

ANDIYA VIDANE *vs.* I. JANSZE, EXCISE INSPECTOR, CHILAW ... L. 95

BAILMENT

Bailment—Contract of—Loss of goods entrusted to bailee—Action for compensation for loss—Measure of damages—Can damages for pain of mind be awarded—Sentimental value of goods—When should it be taken into consideration.

Held: (i) *That in an action based on contract against the bailee for compensation for the loss of goods entrusted by the bailors, the assessment of such claim, as in other actions for breach of contract, should be based on the principle of* restitutio in integrum, *i.e., the plaintiff must be placed as far as money can do it in as good a situation as if the contract had been performed.*

(ii) *That in such an action the plaintiff is not entitled to any damages for pain of mind unless it has been established by evidence that such pain of mind resulted in patrimonial loss capable of estimation in terms of money.*

(iii) *That sentimental importance attaching to goods has no relevance where the goods have been entrusted to and lost by a third party under a commercial transaction.*

Per GRATIAEN, J.—" If it was intended to claim damages from the defendant on the basis of a tort, the allegation of fraud or deceit should have been specifically and unequivocally made so that he could have had the opportunity of meeting it."

MOHAMED SALIH *vs.* FERNANDO *et al* XLIV. 17

BANKING

Right of bank to sell property pledged without reference to Court.

HONGKONG & SHANGHAI BANKING CORPORATION *et al vs.* KRISHNAPILLAI I. 149

Money lent through bank on bank guarantee—Money placed to the credit of the borrower when deposited by lender—Liability of Bank.

Held: *That where a Bank acted as intermediary between a lender and a borrower and discharged its part of the contract it was not liable in an action for money had and received.*

ADAIKAPPA CHETTIAR *vs.* THOS. COOK AND SON LTD. ... ... II. 88

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Cheque—Certification for payment—Banking practice—Bank Manager's authority to certify cheque for payment—Does the authority extend to post-dated cheques.

Held: (1) *That a Bank Manager has no authority implied by law to certify for payment a post-dated cheque.*

(2) *That certification of a cheque for payment is not an acceptance within the meaning of the English or Indian Act or the common law.*

Per LORD WRIGHT: "Both Chalmers, and Paget (The Law of Banking, 4th ed. p. 164), are of opinion that marking or certification is neither in form nor in effect an acceptance of which the holder or payee can avail himself. Marking or certification is clearly not in form an acceptance, but if the form be disregarded, it is clearly in substance essentially different in its nature and effects. Marking or certification has been known in England in a very limited practice apparently referred to by the Court in 1810 in *Robson* vs. *Bennett* (1810—2 Taunt. 388). That is a practice between bankers for the purpose of clearing. It was judicially recognized by Sir Alexander Cockburn, C.J., in *Goodwin* vs. *Robarts* (L.R. 10 Ex., at p.351) in these words: 'A custom has grown up among Bankers themselves of marking cheques as good for the purposes of clearance by which they become bound to one another.' This is clearly different from an acceptance, the effect of which is to create a negotiable liability, fully defined in its complicated nature and characteristics by the Act. That practice is in Calcutta the subject now of Rule 12 of the new regulations and rules of the Calcutta Clearing Banks' Association, which are exhibited in the documents of this case. Rule 12 states: 'It shall be permissible for any member or sub-member in the intervals of clearing hours, to apply for the "acceptance" of a document by the member or sub-member on which it is drawn, but the latter shall have the option of issuing a debit note or cheque in lieu of "acceptance" of the document.' It is to be noted that though it uses the term 'acceptance' it puts it in inverted commas so as to distinguish it from a true acceptance under the Act. The practice seems to be simply that after clearing hours a cheque presented for clearing may be marked, and will then be paid on the next day when clearing business is resumed. It is true that in such a case the marking Bank is by the judicially established custom bound to pay it to the other Bank.

This certification or marking cannot, however, be identified with an acceptance.

BANK OF BARODA, LTD. *vs.* PUNJAB NATIONAL BANK, LTD. AND OTHERS XXVIII. 33

Payment on Customer's cheques alleged to be forged—Amount debited to Customer's Account—Action by customer to recover moneys so paid—Genuineness of signatures set up in defence—Negligence of customer—Burden of Proof.

Held: (1) *That where a banker sets up in defence the genuineness of a signature alleged by the customer to be forged, the onus of proving his case beyond all reasonable doubt lies on the banker.*

(2) *That however negligent a banker's customer may have been, such negligence would not avail a banker who honours a forged cheque, unless the customer is stopped from pleading the forgery.*

BANK OF CEYLON *vs.* KOLONNAWA URBAN COUNCIL ... ... XLII. 10

Bank undertaking to negotiate drafts drawn on plaintiff by foreign merchant on surrender of shipping documents in report of goods of specified weight and quantity—Payment by Banks' agent to foreign merchant of full sum on bill of lading showing less weight—Payment by plaintiff to Bank honouring draft—Action for damages to recover value of difference in weight.

ESSACK *vs.* NATIONAL BANK ... XLIII. 30

BAR COUNCIL

Advocate—Contravention of Rules made by Bar Council—Acceptance of fee without being previously instructed by a Proctor—Professional misconduct.

IN *Re* AN ADVOCATE ... ... XLVI. 56

BASTARD

Death of bastard intestate—Who may inherit such person's property in case such person leaves no surviving mother.

APPUHAMY *vs.* PERERA AND OTHERS XII. 37

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BENEVOLENT ASSOCIATION

Suicide of member of Benevolent Association—Is nominee of deceased member entitled to contribution payable on death of member—Rules of Association—Meaning of the words " on the death of a member."

Held: *That the contribution contemplated in the Rule was not payable in the event of the suicide of a member.*

PAGAVATHIAMMA *vs.* THE CEYLON LAWYERS' BENEVOLENT ASSOCIATION XXIV. 71

BETTING ON HORSE-RACING ORDINANCE

What is a Taxable Bet? Evidence of Decoy—Accused cannot be convicted unless corroborated.

The facts which are set-out in the judgment, shortly stated are as follows:—

On the day in question—a race day—the Police acting on certain information arranged a trap for the accused, Lye. They engaged a decoy L. S. Fernando, by name and handed to him a marked five rupee note and a list of three horses in duplicate. Two C.I.D. Officers and the decoy went to a restaurant at which the accused was. The Police Officers sent in the decoy who went and handed the marked note and the lists to the accused. The accused wrote the figures " 203 " on the two lists retained one and handed the other to the decoy who promptly returned to the Police Officers waiting outside. As soon as the decoy reported his action to them the Police Officers rushed in and searched the person of the accused, on whom they found the marked five rupee note, the other list with the number " 203 " a newspaper cutting containing an article estimating chances of certain horses in the day's races, and a piece of paper with sums of money written on it.

The accused gave evidence in his defence and explained that he was a bookmaker before the Ordinance came into force and that on the day in question Fernando, the decoy came in and wanted him to take a bet for him and handed him the slips and the money referred to above. He told him that he was not accepting any bets now so the decoy asked him to take the money and put it on the totalisator for him that day. He undertook to do this.

The facts as proved by the prosecution were undisputed save for the conversation that took place between the accused and the decoy.

Held: *That as the decoy was an accomplice in the contravention of Section* 3 (3) *it was unsafe to convict on his uncorroborated testimony.*

Per MACDONELL, C. J.—" To be a bet the bet must be " made " and a bet could not be made, I apprehend, merely by handing money to a person for him to put it on the totalisator."

WIJESURIYA *vs.* BABA SHERRIDAN LYE I. 44

Negotiation of a non-taxable bet by a " bucket-shop " keeper—Evidence of decoys —Absence of corroboration of decoys' evidence—one decoy cannot corroborate another decoy.

Held: *That in the absence of some independent corroborative evidence a conviction cannot be based on that of a decoy who stands on the same footing as an accomplice. The corroborative evidence must be in some material particular tending to show that the accused committed the offence and it must be some evidence other than that of an accomplice. One accomplice's evidence corroborating that of an another accomplice does not furnish the corroborative evidence necessary for basing a conviction.*

PEIRIS *vs.* SENEVIRATNE ... I. 118

Can master and servant be guilty of conspiracy to accept illegal bets.

REX *vs.* ANDREE AND TWO OTHERS XXI. 51

Section 3 (3)—Ingredients of offence under that Section—Evidence Ordinance Section 4 (1), 47, 81 and 114—Criminal Procedure Code, Section 66 (1).

Held: (i) *That for the purposes of Section* 3 (3) *of the Betting on Horse-Racing Ordinance it is sufficient to show that a bet was received on a scheduled horse-race.*

(ii) *That the offence is complete the moment the bet is received on a race proposed to be run.*

(iii) *That on the production of a registered newspaper containing a list of races due to run the Court is entitled to presume that the races in the list were proposed to be run at a race-meeting.*

(iv) *That a person summoned to produce a document under Section* 66 (1)

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of the Criminal Procedure Code may authorise any person by letter to produce the document he is summoned to produce.

IYER (SUB-INSPECTOR OF POLICE) *vs.* KARUNARATNE ... ... XXI. 123

Receive or negotiate a bet—What is necessary to prove such offence—Is bet on a race run in Secunderabad, India, a taxable bet.

A person accepted money and a chit containing the forecast of winners of a race to be run at Secunderabad, India, but he had not completed the usual steps, such as to give the commission and issue a duplicate of the chit.

Held: (i) *That such action amounted to the "receiving or negotiating" a bet as contemplated by Section* 3 (3) (*b*) *of the Ordinance.*

(ii) *That the onus of proving that the bet is a taxable bet is on the accused.*

LANTIS *vs.* MUSAFER, S. I., POLICE XXXVII. 4

Sections 2, 15 and 17 as amended by Ordinance No. 55 of 1943—Possession of instrument of unlawful betting—When is a person presumed to be guilty of unlawful betting.

Held: (i) *That the possession of any instrument of unlawful betting is an offence under Section* 17 (*b*) *and not under Section* 3 (3) *of the Betting on Horse-racing Ordinance.*

(ii) *That to come within the ambit of Section* 17 *the accused must be found in possession of an instrument of unlawful betting on the occasion of his being searched under the Ordinance.*

(iii) *That once it is established that Section* 17 *applies, an accused is presumed to be guilty of the offence of unlawful betting until he proves the contrary.*

GUNAWARDENE *vs.* RICHARD (SUB-INSPECTOR OF POLICE, KANDY) XXXVIII. 50

Betting on Horse-Racing Ordinance as amended by Ordinance No. 55 of 1943, Section 17—Being found in premises kept or used for the purpose of unlawful betting—Acceptance of betting slips—Meaning of the word "used."

The accused and others were found in a room near a table at which one person was seated accepting betting slips. It was contended that the room could not be regarded as premises coming within the ambit of Section 17 as there was no evidence that betting slips were accepted on previous occasions.

Held: *That there was no reason for limiting the meaning of the word 'used' by construing it to mean "used repeatedly" and that the room in which the accused was found constituted "premises" coming within the ambit of Section* 17 *of the Betting on Horse-Racing Ordinance.*

LESLIE ISAACS *vs.* THE CHIEF INSPECTOR OF POLICE ... ... XXXVIII. 71

Betting on Horse-Racing Ordinance—Offence under—Prosecution conducted by Police Officer who was a material witness but was not the complainant—Denial of Justice—Police Officer acting as detective and participating in offence. Is he an accomplice?

NANDASENA *vs.* WICKREMARATNE XXXIX. 66

Section 15 (2) as amended by Section 8 of Ordinance No. 55 of 1943—Should a Police Officer making a search of premises under this Section be in charge of a station.

Held: *That a Police Officer making a search of any premises under Section* 15 (2) *of the Betting on Horse-Racing Ordinance Cap.* 36 *as amended by Section* 8 *of Ordinance* 55 *of* 1943 *need not be an officer-in-charge of a Police Station.*

THE ATTORNEY-GENERAL *vs.* TUAN KITCHIL JOHAR *et al* ... XL. 38

Betting—Offence of receiving illegal bets—Accused searched and arrested without warrant—Legality of—Evidence obtained in the course of such search and arrest—Admissibility of—Betting on Horse-Racing Ordinance (Chapter 36) and No. 55 of 1943—Gaming Ordinance, Section 4 (Chapter 38)—Police Ordinance, Section 69, Chapter 43.

Where on evidence obtained through a decoy the accused was apprehended for receiving illegal bets and a Police Officer thereafter searched the accused without a warrant and arrested him and the evidence thereby obtained was led to convict the accused.

Held: (i) *That there was sufficient evidence, apart from the evidence of the Police Officer, to warrant the conviction of the accused.*

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(ii) *That the Police Officer had no power to arrest and search the accused without a warrant as neither Section 4 of the Gaming Ordinance nor Section 69 of the Police Ordinance apply to an offence under the Betting on Horse-Racing Ordinance.*

(iii) *That the evidence obtained in the course of such unlawful search and arrest is legally admissible.*

Per BASNAYAKE, J.—"Today as in the past it is necessary to safeguard the sanctity of the citizen's home against unauthorised entry. The fact that laws designed for the welfare of society have made considerable inroads on the liberty of the subject should not lead public officers to think that the fundamental rights of the citizen no longer exist. Let it be clearly understood that the attitude of the Courts towards admission of evidence illegally obtained carries with it no sanction of illegal arrests and searches. The offender's act nevertheless remains as unpardonable as ever—a trespass— his liability for which is in no way diminished by the reception of evidence.

PONNUDURAI (S. P., POLICE, PANADURA) *vs.* JALALDEEN ... ... XLV. 28

Betting—Charge of—Section 10, Betting and Horse-Racing Ordinance—What must be proved under Section 3—Decoy going back on evidence—Availability of other evidence—Can conviction be sustained.

Where the accused was charged under Section 10 of the Betting and Horse Racing Ordinance for receiving or negotiating a bet on a horse-race and there was evidence to establish that betting on horse-racing was going on at the premises and that the accused received the betting slips and negotiated the illegal bet.

Held: (i) *That the accused was rightly convicted.*

(ii) *That it is sufficient to prove that a bet was received on a horse-race proposed to be run and that it is not necessary to prove that the horses on which the bet is taken actually ran.*

(iii) *That where a decoy goes back on his evidence the Court can convict an accused person provided there is other evidence to establish the charge beyond reasonable doubt.*

(iv) *That where the offence is committed in a place other than the place authorized under the search warrant, the presumption of guilt under the Ordinance is not available and the prosecution must prove the offence in the ordinary way.*

Per CHOKSY, A. J.—"That a Judge of the Lower Court has not set out all the reasons that may be urged for rejecting a defence does not necessarily mean that he has not considered the defence. So long as the Appeal Court is satisfied that the defence has been examined and that its rejection has not been on grounds that cannot be justified, it cannot be said that the elementary principles of natural justice have not been observed."

KONSTZ *vs.* SUB-INSPECTOR THARMARAJAH ... ... XLVII. 58

BIAS

In Judge—*See under* **JUDGE.**

In Jury—*See under* **JURY.**

Irrelevant statements made to Judge by Police Officer—Likelihood of bias.

Where irrelevant statements, which were likely to create a bias in the mind of the Judge, were made by a Police Officer.

Held: *That the accused could not be said to have had a fair trial.*

SUDERIS *vs.* KOSGODA POLICE ... XL. 70

Prejudiced person sitting on tribunal.

O'REILLY AND OTHERS *vs.* GITTENS XL. 100

BILLS OF EXCHANGE

See also under **MONEY LENDING ORDINANCE, PROMISSORY NOTE.**

Promissory note made at Negombo—Place of payment not specified in note—Where can action on the note be filed—Executrix de son tort—Test of liability for debts of deceased.

Held: *That, as there were no circumstances from which it can be gathered that the place where payment is to be made was Negombo, the notes were not payable at a particular place and presentment for payment is not necessary to render the maker liable.*

STORER *vs.* SINTHAMANY CHETTIAR X. 176

Promissory note in Sinhalese—Note payable "to anyone presenting on his behalf"—Are the words sufficient to indicate the payee with sufficient certainty.

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Held: *That the words were sufficient to indicate the payee of the note with reasonable certainty.*

SILVA *vs.* JAYAWEERA X. 179

Promissory note—What is presentment for payment under the Bills of Exchange Ordinance—Place of presentment not indicated in note—Is there an obligation to present for payment—Stamp Ordinance Section 4 (*b*).

Held: (i) *That the meaning of presentment for payment contemplated by Section* 4 (b) *of the Stamp Ordinance must be interpreted, so far as promissory notes are concerned, by the terms of Section* 88 *of the Bills of Exchange Ordinance.*

(ii) *That there would be no presentment for payment within the meaning of Section* 4 (b) *unless presentment was made according to law.*

(iii) *That, in a case where the maker of a note neither resided nor carried on business in Colombo, the words "promises to pay the payee or order at Colombo, the sum of Rs.* 18,253/73 *" is sufficient to indicate the place of payment in the absence of any particular course of business from which it could be inferred that presentment for payment was to be made at some particular place in Colombo.*

RAMASAMY CHETTIAR *vs.* RAMANATHAN CHETTIAR AND ANOTHER ... XI. 32

Promissory note made payable at a particular place.

This action was brought on a promissory note in the following terms:

On the seventeenth day of December, 1938, I the undersigned D. H. Gunawardena of Talawakelle, promise to pay to D. G. Juwanis Appuhamy of Talawakelle or order, at.....Talawakelle the sum of Rupees Five Hundred Currency for value received.

(Sgd.) D. H. GUNAWARDENA

It appeared from the evidence that the maker and the payee had each a place of business in Talawakelle.

Held: (i) *That the presentment of the note at the address of the maker in Talawakelle is sufficient compliance with the requirement of Section* 88 *of the Bills of Exchange Ordinance that the note should be presented for payment at the place at which it is made payable.*

(ii) *That where a note has to be presented for payment at a particular place, an allegation to the effect that presentment has been made at that place is a necessary ingredient of the plaint and the plaintiff's cause of action is not complete without such an allegation.*

(iii) *That the allegation in a plaint that the promissory note was noted for non-payment carries with it the implied allegation that the note was duly presented for payment.*

DE SILVA AND ANOTHER *vs.* GUNAWARDENA XXI. 18

Cheque—Certification for payment—Banking practice—Bank Manager's authority to certify cheque for payment—Does the authority extend to post-dated cheques.

BANK OF BARODA LTD. *vs.* PUNJAB NATIONAL BANK LTD. AND OTHERS. XXVIII. 33

Cheque—Joint and several liability—Drawer of cheque and successive endorsees sued by last endorsee—Judgment entered against some defendants—Is the plaintiff precluded from recovering judgment against others.

Held: *That where the drawer and the endorsees of a cheque are sued together for the recovery of the value thereof, the fact that judgment was entered against some of them earlier does not preclude the plaintiff from recovering judgment against the others as their liability is a joint and several one.*

KUHAFA *et al vs.* VAIRAVAN CHETTIAR XLI. 16

Forgery of signature on cheque—Bank's liability.

BANK OF CEYLON *vs.* KOLONNAWA URBAN COUNCIL ... ... XLII. 10

Cheque—Legal effect of payment of rent by.

FERNANDO *vs.* SAMARAWEERA ... XLIV. 19

A Bank Manager has no authority implied by law to certify for payment a post-dated cheque. A certification of a cheque for payment is not an acceptance.

BANK OF BARODA LTD. *vs.* PUNJAB NATIONAL BANK LTD. AND OTHERS XXVIII. 33

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Taking of higher security—Does it operate as a discharge of an earlier inferior instrument.

MISSO *vs.* MOHAMEDALLY AND ANOTHER L. 74

BILL OF LADING

Bill of Lading—is conclusive evidence only in favour of a consignee or endorsee for valuable consideration of the shipment of goods against the maker or the person signing the Bill of Lading.

ESSACK *vs.* NATIONAL BANK ... XLIII. 30

BIRTHS AND DEATHS REGISTRATION ORDINANCE

Nature and scope of proceedings under Section 22.

Held: (i) *That a Court has power to order the unsuccessful opposing party to pay costs in proceedings under Section 22 of the Births and Deaths Registration Ordinance No. 1 of 1895.*

(ii) *That proceedings in appeal from a decision in proceedings under Section 22 of Ordinance No. 1 of 1895 are regulated by the provisions of the Criminal Procedure Code and the petition of appeal should be stamped with a stamp of Rs. 5/-.*

(iii) *That an appeal from a decision under Section 22 of Ordinance No. 1 of 1895 can be heard by one Judge of the Supreme Court.*

SAMYNATHAN *vs.* DORAISAMY AND ANOTHER ... ... V. 23

A Bill of Costs in a proceeding under 22 should be taxed under the lowest class.

SAMYNATHAN *vs.* DORAISAMY AND ANOTHER ... ... VI. 45

Change of name—Is a person who has been known by a name different from the name in the Register of Births entitled to have the entry relating to the name "rectified" under Section 20 of the Births and Deaths Registration Ordinance.

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

IN *Re* LUCY DE SILVA ... ... XVII. 109

Section 20—Application to insert name in Register of Births.

Held: *That a person may apply under Section 20 of the Births and Deaths Registration Ordinance to have his Birth Register rectified by the entry of his true name in the appropriate cage even in a case where the birth has been registered without a name.*

PERERA *vs.* PERERA AND OTHERS XXVII. 75

Section 42—Admissibility of death certificate not signed by proper party.

PONNAMMAH *vs.* RAJAKULASINGHAM XXXVII. 67

BOND

Bond to secure existing debt and future advances—Existing debt specified in bond smaller than sum actually due—Evasion of stamp duty—Can a claim on the bond include the larger amount of the existing debt not specified in the bond.

Held: (i) *That the appellant, having paid duty on the bond on the footing that it was for the amount of existing debt mentioned therein, cannot now be heard to say that the real amount was larger, and to thereby admit that the revenue was defrauded of the duty on the excess.*

(ii) *That the larger amount of existing debt not stated in the bond is not covered by it.*

(iii) *That a stated account in writing, though signed and certified by the directors as provided in the bond, cannot bring within the bond an indebtedness not covered by the bond.*

CARSON & CO., LTD. *vs.* DAISY HULME-KING ... ... XI. 123

Bond not in form required by Ordinance 7 of 1840. Invalid.

KADIJA UMMA *vs.* MOHAMED SULAIMAN AND OTHERS ... ... XIV. 1

A bond hypothecating immovable property as security for costs of appeal to the Privy Council executed before the Registrar of the Supreme Court is not valid.

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KADIJA UMMA *vs.* MOHAMED SULAIMAN AND OTHERS ... ... XIV. 1

A bond should not be forfeited without giving the person affected by the forfeiture an opportunity of showing cause.

PACKEER *vs.* PEIRIS ... ... XXVIII. 27

Conviction for theft—Validity of order to enter into bond to be of good behaviour.

GINIGE *vs.* DE SARAM ... XXXVIII. 48

Order to enter into bond—Proceedings conducted with extraordinary speed—regularity.

REV. SANGARAKKITA THERO *vs.* INSPECTOR OF POLICE, PELIYAGODA ... XXXIX. 61

BREACH OF PROMISE OF MARRIAGE

See under **MARRIAGE.**

BRIBE

A person who offers a bribe to a Public Officer is an accomplice.

REX *vs.* NUGAWELA ... ... XVII. 71

BRIBERY COMMISSION

Is it a judicial Tribunal.

PERERA *vs.* PEIRIS AND ANOTHER XXXI. 97

BRITISH COURTS PROBATE (RE-SEALING) ORDINANCE

Estate in Ceylon of British domiciled person—Application for sole testamentary jurisdiction by executor resident in Ceylon—Power of Court to entertain application.

IN *Re* BERESFORD BELL ... XXXVI. 7

Will admitted to probate in England—Reasons are required for not following the special procedure under above Ordinance.

IN *Re* BERESFORD BELL ... XXXVII. 16

Testamentary jurisdiction over Ceylon estate of person dying outside Ceylon—Application for—Correct procedure—Courts Ordinance, Section 68—British Courts Probates (Re-sealing) Ordinance—Civil Procedure Code, Section 547.

An application was made to the Supreme Court under Section 68 of the Courts Ordinance to appoint a District Court to have sole testamentary jurisdiction over the Ceylon estate of a person who died outside the Island. The applicant admitted that the alternative procedure provided by the British Courts Probates (Re-sealing) Ordinance was also open to him.

Held: (i) *That such an application will not be entertained by the Court in view of the special procedure provided by the British Courts Probates (Re-sealing) Ordinance.*

(ii) *That the words "it shall be lawful" in Section 68 of the Courts Ordinance are of a "permissive or enabling" nature, and do not make it obligatory on the Court to grant the application.*

(iii) *That the party contending that Section 68 is obligatory must prove it by special circumstances, and this the applicant has failed to do.*

IN *Re* WILLIAM SWIRE ... XXXVII. 105

Power of Supreme Court to make order conferring sole testamentary jurisdiction on District Court in cases falling within the ambit of the British Courts Probates (Re-Sealing) Ordinance.

IN *Re* CHARLES WILLIAM NOBLE XXXVIII. 44

BRITISH NATIONALITY ACT 1948

Qualifications for being a British subject.

SUDALY ANDY ASARI *et al vs.* VANDEN DRIESEN ... ... XLVIII. 17

BROKER

Action for breach of contract by broker who is not an auctioneer—Can he rely on entry in his books or on a bought or sold note as a note or memorandum in writing of the contract.

MULLER AND ANOTHER *vs.* FERNANDO I. 35

Broker engaged to raise loan on mortgage of premises—Loan arranged—Failure of transaction owing to defect in title—Is broker entitled to commission.

PEIRIS *vs.* JAYASINGHE ... IV. 75

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Broker employed to buy and sell rubber—Speculative contract—Broker not a party to the wagering transaction.

Held: *That the contract with the broker was enforceable.*

BARTLEET & CO. *vs.* EBRAHIM LEBBE MARIKAR ... ... XII. 133

Where by reason of a custom the brokers are liable to be sued by the sellers, they are not relieved of their liability because it is inconsistent with their position as mere agents under the general law.

MARIKAR *vs.* DE MEL LTD. ... XXIV. 103

Broker authorized to negotiate sale of property—When entitled to commission.

BOTEJU *vs.* PERERA ... ... XXV. 47

Broker and client—Broker authorized to buy goods and sell them in certain contingencies.

Held: (i) *That a broker engaged to buy goods for his client with authority to sell them in certain contingencies can exercise his power of sale if he himself has an interest in the transaction and his power of sale is irrevocable.*

(ii) *That when the seller fails to deliver goods to his buyer he is liable to make good the price at the date of the trial.*

KEELL AND WALDOCK *vs.* JAYASINGHE XXVII. 97

Broker—Authority to sell house at a fixed price—Remuneration specified—Refusal by vendor to sell although a willing buyer has been found—Is vendor liable to pay broker.

The defendant gave the plaintiff the following authority:

"I do hereby authorize you to sell my property bearing assessment No. 44 at Cotta Road, Borella, for the sum of Rupees Twenty Thousand Five Hundred (Rs. 20,500/-).

I agree to pay you by way of remuneration Rupees Five Hundred (Rs. 500/-). This holds good for 2 weeks."

The plaintiff found a buyer who was willing to pay the stipulated price, but the defendant when called upon refused to execute the transfer.

Held: *That the plaintiff broker was not entitled to his remuneration until the sale had been completed.*

WILLIAM *vs.* WICKREMASINGHE XXVIII. 56

Broker—Purchase of Rubber Coupons from undisclosed principal.
Usage of market.

EBRAHIM LEBBE MARIKAR *vs.* AUSTIN DE MEL LTD. ... ... XXXI. 94

Broker—Duties of

PEIRIS *vs.* AUSTIN DE MEL LTD. XXXVII. 26

BROTHEL

Keeping or managing a brothel.

Held: *That proof of one act of fornication is insufficient to establish a charge of keeping or managing a brothel.*

LA HARPE (INSPECTOR OF POLICE) *vs.* HINNIHAMY ... ... III. 105

What constitutes a brothel.

Held: *That a brothel is a house run by a person usually called a brothel-keeper to which men resorted for the purpose of having sexual intercourse with women who were to be found in the house or with women who resort to or are introduced into the house.*

SUB-INSPECTOR OF POLICE *vs.* CICILIA IV. 86

What is a brothel?

SCHOKMAN *vs.* BABY NONA ... XV. 107

Charge of assisting in the management of a brothel—What constitutes "assisting"—Is evidence of previous acts of accused tending to show his interest in the brothel admissible—Evidence Ordinance, Section 14.

Held: (i) *That the word "assisting," in Section* 2 (a) *of the Brothels Ordinance connotes that the person assisting does so willingly, voluntarily or with the intention of aiding the brothel-keeper.*

(ii) *That in a charge under Section* 2 (a) *of the Brothels Ordinance, evidence that the accused on a previous occasion accosted a person and took him to the brothel in question and that he was seen on the pavement in front of the brothel on an earlier date is admissible under Section* 14 *of the Evidence Ordinance to show intention or knowledge on the part of the accused.*

(iii) *That such evidence would also be admissible to rebut a possible defence as*

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the prosecution cannot lead evidence in rebuttal in a summary trial before a Magistrate.

SOLOMON APPU *vs.* R. C. PERERA, INSPECTOR OF POLICE... ... XXXIII. 58

Charge of having managed a brothel—Evidence required to prove it—Single act of prostitution supported by other evidence.

Held: *That proof of a single act of prostitution in a house, supported by other evidence such as accosting, introduction to the person in charge, the finding of marked notes in his possession, and taken together with observations by the Police of men visiting on previous occasions is sufficient to constitute the place a brothel.*

SHERIFF *vs.* INSPECTOR OF POLICE, MARADANA ... ... XXXVI. 24

Keeping or managing a brothel—Meaning of.

Held: *That a person who is not the controlling head of a brothel with a proprietary interest and control over it and who does not direct, govern or administer the brothel cannot be said to keep or manage the brothel.*

MARTIN AND ANOTHER *vs.* INSPECTOR OF POLICE, VEYANGODA ... XLI. 80

BUDDHIST ECCLESIASTICAL LAW

Succession to incumbency.

Sisyanu Sisya Paramparawa and Siwuru and Gnati Paramparawa.

Held: *That where the plaintiff asserted that the succession to a temple was according to Gnati Paramparawa and the defendant disputed the assertion the onus of proof was on the plaintiff.*

INDRAJOTI UNNANSE *vs.* SARANANKARA UNNANSE .. .. I. 290

Succession to the incumbency of a temple —In what circumstances can succession to an incumbency be determined by a Rule other than that of Sisyanu Sisya Paramparawa—Limitation of action—Within what time does a claim for an incumbency become statute-barred.

Held: (i) *That where a claim to the incumbency of a Vihare dedicated to the Sangha is made on the footing of the existence of a Rule of succession other than the Rule known as* Sisyanu Sisya Paramparawa *it must be proved by evidence that such Rule is contained in the instrument of dedication.*

(ii) *That a claim to an incumbency unless made within three years would be barred by the provisions of the Prescription Ordinance No.* 22 *of* 1871.

SUMANATISSA *vs.* GOONERATNE .. VIII. 67

Right to an incumbency—Misconduct of incumbent—In what circumstances does he forfeit his right to the incumbency—Prescription—Period within which the right to enforce a claim to an incumbency becomes prescribed.

Held: (i) *That a* bhikkhu *does not lose his right to an incumbency until he is expelled from the priesthood for an offence by a tribunal having jurisdiction to make an order of expulsion.*

(ii) *That the mere fact that there is evidence, in certain proceedings between other parties, that a* bhikkhu *had sexual intercourse with a woman is insufficient to establish that he had ceased to be a priest, especially in a case where the* bhikkhu, *against whom the allegation is made, has not given evidence.*

(iii) *That an action to be declared entitled to an incumbency becomes statute-barred in three years from the date when the cause of action first arose.*

PEMARATANA *vs.* INDRASARA ... XI. 116

Succession to the incumbency of a Vihare —Nomination of successor to incumbency —Where the right of nomination exists, how may such nomination be made—Is a notarially executed deed essential—Does Ordinance No. 19 of 1931, the Buddhist Temporalities Ordinance, effect a change in the law relating to the manner in which an incumbent may nominate his successor.

Held: (i) *That, where the right of nomination of the successor to an incumbency exists, a notarially executed instrument is not necessary to create a valid nomination.*

(ii) *That the law relating to the manner in which an incumbent may validly nominate his successor is not affected by the Buddhist Temporalities Ordinance,* 1931.

SADDHANANDA TISSA THERUNNANSE *vs.* GUNANANDA THERUNNANSE AND OTHERS ... ... XI. 142

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The claim to the incumbency of a Vihare is not a question of "great general or public importance" within the meaning of the Rules in Schedule I to the Privy Council Appeals Ordinance.

PEMARATNA THERO *vs.* INDASARA THERO XIII. 9

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

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

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

DHARMARAKKITA *vs.* WIJITHA ... XVI. 127

Sisyanu Sisya Paramparawa—Right to incumbency—Can it be acquired by prescription—Order of succession to an incumbency.

Held: (i) *That a* bhikkhu *cannot obtain a title to an incumbency by prescription.*

(ii) *That where the senior pupil of an incumbent predeceases him the pupil next in order is entitled to succeed to the incumbency on the death of the incumbent in preference to the pupil of the senior pupil.*

(iii) *The pupil of the deceased senior pupil though not entitled to succeed to the incumbency has the right to remain in the temple and be maintained out of its income.*

VIPULANANDA THERUNNANSE *vs.* SEDAWATTE PANNASARA... ... XX. 119

How is seniority of a pupil determined—Does a temporary disrobing owing to serious illness forfeit a pupil's right to succeed to an incumbency.

Held: (i) *That a pupil who is first to be robed is the senior pupil regardless of the order in which the* Upasampada *ordination is received.*

(ii) *That a pupil does not lose his seniority by disrobing temporarily in order to obtain medical attention and nursing during a serious illness.*

SOMARATNE ISTHAVIRA *vs.* JINARATNE ISTHAVIRA ... ... XXI. 68

Where a Buddhist priest, the incumbent of a temple, died leaving an instrument in writing appointing a pupil priest as his executor and successor to the incumbency.

Held: *That the instrument was a Last Will which affected property in Ceylon.*

DHAMMANANDA *vs.* PEMANANDA THERO XXIX. 89

Incumbency—Property dedicated to Sangha by original donors—Can the heirs of original donors claim rights to such property after forty years—Rights of succession to incumbency on the failure of pupils of last incumbency—*Sisyanu Sisya Paramparawa.*

Failure to raise issue at trial—Right to raise in appeal—Estoppel.

Held: (i) *That where in the Court below a party fails to raise issues on matters which he could have put in issue, he ought not to be allowed to rely on such matters in the Appeal Court. Such default creates an estoppel by election against such party.*

(ii) *That if at the original dedication no provision was made for regulating the mode of succession to the incumbency, then the general Rule of* Sisyanu Sisya Paramparawa *applies and the persons who dedicated the temple and the grantors cease to have any rights over the incumbency.*

(iii) *That where a property dedicated to the Sangha had been possessed by the grantee and his pupils* ut dominus *for over ten years, they can claim a right by prescription against the "dayakayas" who made the dedication and their heirs.*

PEMA AND OTHERS *vs.* JINALANKARA TISSA THERO ... ... XXXI. 43

Right of Buddhist Priest to maintenance from tutor's temple.

Held: *That a Buddhist Priest is entitled to receive a reasonable sum for his maintenance out of the income received by the temple of his Tutor Priest.*

Per KEUNEMAN, J.: "One of these judgments said that it was necessary before you claimed past maintenance to show expenditure from your own pocket or the incurring

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of liability to pay others. Now, undoubtedly this applies to past maintenance in the sense I have indicated, but in the present case what is claimed is not past maintenance but what Schneider, J., called future maintenance, namely, maintenance after the date of the plaint. It may or may not be a matter of importance that Schneider, J., himself dealt with this question of future maintenance but did not apply the arguments which he had adduced in the case of past maintenance. On the other hand, the question may well be considered as to whether future maintenance in the sense of maintenance after the date of the plaint is to be placed upon the same footing as past maintenance, namely, maintenance before the date of the plaint."

ATAPATTU AND OTHERS *vs.* PREMANANDA XXXI. 55

Incumbency of temple—Deed executed by incumbent gifting temple property to a particular pupil and expressly giving him the right to give the said lands on a similar instrument to anyone of his pupils to succeed him as Chief Incumbent—Construction of deed.

JINARATANA THERO *vs.* SOMARATANA THERO AND ANOTHER ... XXXII. 11

Controlling Viharadhipathi—Sisyanu Sisya Paramparawa—Bhikku who is not the rightful incumbent but in charge of Vihare—Can he maintain action for declaration of title to land appurtenant to such Vihare —Buddhist Temporalities Ordinance, Sections 3 and 4.

The plaintiff, claiming to be the Viharadhipathi of the Mailapitiya Vihare instituted this action in 1941 for a declaration of title to a paddy field alleging it to be an appurtenant of the Vihare. The defendant *inter alia* denied the plaintiff's right to maintain the action on the ground that he was not the rightful incumbent of the temple in question.

Admittedly Ratnajothi was the last lawful incumbent. It was also in evidence, (*a*) that about the year 1940, Ratnajothi brought the plaintiff to the temple in question, and after placing him in charge of the Vihare with the consent of the Dayakas, disrobed himself: (*b*) that thereafter the plaintiff collected the rents and produce of other lands appurtenant to the Vihare.

The plaintiff was not in Ratnajothi's line of pupillary succession nor was there evidence of any other right in the plaintiff to succeed to the incumbency.

Held: *That the plaintiff could not maintain the action as he could not lawfully claim to be the head of the Vihare.*

PUNCHIRALA *vs.* DHAMMANANDA THERO XXXIII. 53

" Thewawa priest " or assistant to Viharadhipathi of Dambulle Vihare—Appointment of such Thewawa priest by Viharadhipathi—Keys of Vihare and its effects entrusted to him —Refusal to re-deliver to Viharadhipathi—Can such Thewawa priest claim right to officiate under Sisyanu Sisya Paramparawa or by prescription—Should such dispute be referred to Sangha—Is it purely a religious matter—Jurisdiction of Civil Courts.

Plaintiff, as Viharadhipathi of Dambulle Vihare, which consists of five shrine rooms, appointed defendant on 15th August, 1928, as Thewawa priest or " Thewakarane Unnanse " (an assistant to the plaintiff), to one of the shrine rooms, *viz.*, Deva Raja Vihare. The evidence shows that every successor to this office must be a sacerdotal descendant of one or the other of two original bhikkus and the defendant was one such descendant.

When the defendant was appointed in 1928 he accepted the keys of the said Deva Raja Vihare and the effects belonging to it, *i.e.*, certain articles necessary for the performance of the ceremonies at the shrine. The defendant was re-appointed on 3rd July, 1938, for a short time according to plaintiff.

In March, 1943, plaintiff requested the defendant to hand over the keys and the articles of the said Vihare entrusted to him but was refused and this action was instituted.

The defendant contended (*a*) that the right to officiate at the shrine rooms is regulated by the Sisyanu Sisya Paramparawa rule of succession and that such right had devolved on him: (*b*) that he had acquired the right to hold the office by prescription: (*c*) that as a pupillary descendant of one of the original priests he was entitled to be appointed to one of the five shrine rooms.

The District Judge held against the defendant who appealed.

Held: (1) *That the plaintiff was entitled to the right and privilege of appointing*

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bhikkus to officiate at the five shrine rooms which comprise Dambulla Vihare.

(2) *That as regards the articles belonging to the Vihare in question, the defendant was in the position of a bailee and he is bound to re-deliver them to the plaintiff.*

(3) *That the fact that the articles vested in the trustee of the Vihare is no justification for the defendant's refusal to re-deliver them to the plaintiff.*

(4) *That as rights of a temporal nature are involved in the action Courts of law could not refuse to adjudicate on such rights.*

SRI DHAMMASIDDI THERO *vs.* DHAMMADASSI THERO ... ... XXXIII. 60

Temporary occupation of room in temple by pupil priest with permission of Viharadhipathi—Refusal to leave—Persistant assertion of right to remain—Does such conduct render pupil liable to be ejected from temple.

Where a Buddhist priest entered into temporary occupation of a room in the temple with the permission of his tutor, the Viharadhipathi, but later persisted in his occupation of the room and refused to leave it though requested.

Held: *That such Buddhist priest has by his conduct rendered himself liable to be ejected from the temple premises.*

DHAMMARATANA *vs.* ISTAVIRA ... XXXIV. 40

Mandamus—Application for writ of—Death of Viharadhipathi—Rival claimants to post of Viharadhipathi—Each claimant notified Public Trustee of his own nomination as Trustee—Duty of Public Trustee—Buddhist Temporalities Ordinance, Sections 10 (1) and 11 (2)—Does Mandamus lie?

On the death of X, the Viharadhipathi and Trustee of a Buddhist Temple, Y, his senior pupil, and Z, a junior pupil informed the Public Trustee of their respective claims to be the new Viharadhipathi. Z based his claim on a deed executed by X, nominating him the successor. Both Y and Z informed the Public Trustee, each nominating himself the Trustee of the Temple. Owing to the dispute, the Public Trustee appointed a third party as temporary Trustee.

In an application by Z for a Writ of Mandamus on the Public Trustee for failure to appoint one of them the Trustee on being "duly" informed of the nomination.

Held: (1) *That there was no failure on the part of the Public Trustee to discharge his statutory duty, as there could be no "due" nomination until the determination of the right of succession to the post of Viharadhipathi.*

BUDDHARAKKITA THERO *vs.* THE PUBLIC TRUSTEE ... ... XXXVI. 68

Right to incumbency—Forms of pupillage recognised by law—Pupillage by adoption—Is such pupillage known to our law—Abandonment of rights to an incumbency by monk—Does such abandonment deprive his pupils of right to succeed him—Does abandonment require notarial deed or other formality—Question of fact in each case.

Held: (1) *That it is well settled law that under the ecclesiastical law observed by the Buddhists in Ceylon there are only two forms of pupillage which will confer rights of pupillary succession namely, pupillage by robing and pupillage by ordination.*

(2) *That our law does not recognise 'pupillage by adoption' as conferring rights of succession.*

(3) *That the abandonment of an incumbency by a monk, who continues to remain in robes thereafter, deprives his pupils of their right to succeed to such incumbency.*

(4) *That such abandonment does not require any notarial deed or other prescribed formality, but is a question of fact, and the intention to abandon may be inferred from circumstances.*

PUNNANANDA *vs.* WELIWITIYA SORATHA XLII. 83

Temple—Plaintiff incumbent thereof—Requisition by the Military—Demolition of Temple—De-requisition—Partial restoration of temple by plaintiff—Claim by plaintiff to have himself declared incumbent—Objection on the ground temple non-existent—Meaning of temple—Section 2, Buddhist Temporalities Ordinance.

The plaintiff, who was the lawful incumbent of a long established temple, which had been demolished by the Military authorities on requisition so as to render it unfit for use as a place of worship, sought to have himself declared the lawful incumbent. After the premises were handed back by the Military, the incumbent and other priests

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began the work of restoring the temple by first erecting a temporary *avasa* and an image.

The defendant opposed the plaintiff's claim on the ground that the temple had so completely lost its identity and character as to be a "temple" within the meaning of Section 2, Buddhist Temporalities Ordinance.

Held: *That in the circumstances there was no loss either of the identity of the temple or the status of the incumbent who clearly intended to restore the* status quo *as soon as it was practicable to do so.*

Per GRATIAEN, J.—"If it be the duty of an incumbent to keep the Vihare and the other appurtenances of his temple in good order and repair and presumably to take the necessary steps to procure the restoration of any buildings that have been destroyed by some outside agency, I cannot see why even the complete demolition of a "temple" must necessarily operate to divest the incumbent of his office.

GUNARATNE THERO *vs.* NAYAKE THERO XLVII. 95

Dispute as to incumbency—Referred to Ecclesiastical Court by agreement of parties—Parties submitting to jurisdiction without protest—No misconduct or irregularity of procedure or violation of principles of natural justice—Can parties repudiate obligation to obey decision of such Court.

Parties unsuccessful before Ecclesiastical Court requesting other to refrain temporarily from enforcing rights—Repudiation of decision after period of indulgence—Action for declaration of right to incumbency three years after original dispute—Such action barred by prescription.

Held: (1) *That where parties to a dispute regarding the incumbency of a temple unequivocally submitted themselves to the jurisdiction of an Ecclesiastical Court as the proper tribunal for adjudicating upon their rival claims and took part in the proceedings without protest of any kind and placed their cases fully before the tribunal whose members were specially qualified to appreciate the merits and de-merits of the rival claims and where the decision given by such tribunal was not vitiated by misconduct or substantial irregularity of procedure or by a violation of the principles of natural justice, they are bound by the decision of such tribunal.*

(2) *That where a dispute as to the title to an incumbency had been left in a state of abeyance pending an investigation by an Ecclesiastical Court whose decision the rival claimants had expressly or implicitly agreed to regard as binding on them and where after the communication of its decision to the parties, the unsuccessful party requested the other to refrain temporarily from enforcing his rights which was complied with, and where after the period of indulgence, the unsuccessful party repudiated his obligation to obey the decision of the Ecclesiastical tribunal and re-asserted his claim, a fresh cause of action arose to the other party to claim the protection of a declaratory decree against further interference with his enjoyment of the rights already vindicated in the Ecclesiastical Court.*

Such an action is not barred by limitation though instituted after three years from the date of the original dispute.

Doubted: The correctness of the decisions to the effect that a claim to an incumbency of a temple is barred in three years.

KIRIKITTA SARANANKARA *vs.* MEDEGAMA DHAMMANANDA AND OTHERS L. 43

BUDDHIST TEMPORALITIES ORDINANCE

Commutation of Services—Who may sue for commuted dues.

The incumbent of a Vihare cannot maintain an action against a tenant of the temple for commuted services.

SUMANAGALA *vs.* PANNIKKIYA *et al* II. 28

Trusts Ordinance No. 9 of 1917 inapplicable to temples and Devales for which special provision was made by Ordinance No. 19 of 1931.

RATWATTE *vs.* PUBLIC TRUSTEE AND ANOTHER ... ... II. 134

Sections 16 and 35—Writ under §35 issued per incuriam—Can it be recalled—Civil Procedure Code § 839.

Held: (1) *That the President of a District Committee has no power under* § 16 *of Ordinance No.* 8 *of* 1905 *to suspend a Basnayake Nilame.*

(2) *That a District Court has power to re-call process issued* per incuriam

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and to vacate an order which has been obtained from it on insufficient and inaccurate information.

WIJESINGHE *et al vs.* ULUWITA ... II. 153

Possession of lands by Viharadhipathi qua Viharadhipathi for the use and benefit of Vihare—To whose benefit does such possession enure.

Held: (1) *That a Viharadhipathi who possesses lands of a Vihare for the use and benefit of the Vihare prescribes for the Vihare and not for himself, even where the lands have come to the Vihare not on some original gift to pious uses or on an admitted dedication but at a known time and on documents that make no mention of a dedication.*

(2) *That the possession by a successor of a Viharadipathi who has not completed ten years' possession is a continuation of the same possession and enures to the benefit of the Vihare.*

RANASINGHE *et al vs.* DHAMMANANDA *et al* ... ... III. 91

Dewala—Appointment of Trustee by Public Trustee.

Held: (1) *That the Public Trustee can legally appoint a Trustee to a Dewala to which it is not customary to appoint a Basnayake Nilame.*

(2) *That the expression "Dewala" as used in the Ordinance is wide enough to include a Dewala standing by itself, and a Dewala attached to a Vihare.*

PUNCHIAPPUHAMY AND ANOTHER *vs.* APPUHAMY AND OTHERS ... V. 1

Sections 18 and 20—Action by controlling Viharadhipathi in regard to the property of a temple to which there is no Trustee.

Held: *That a bhikkhu who has been resident in a temple for forty years and who was during that time in charge of its affairs comes within the expression controlling* Viharadhipathi.

SUMANA THERUNNANSE *vs.* SOMARATANA THERUNNANSE ... ... V. 37

Acquired property of deceased bhikkhu—Section 23—Meaning of "belonged."

Held: (1) *That where a bhikkhu had left the temple in which he was ordained and took up his abode in another temple and had not taken any interest in the former temple thereafter till he died he cannot be said to have "belonged" to the temple in which he was robed.*

(2) *That the word "belonged" in Section 23 of the Ordinance must be construed in relation to a state of affairs in existence at the date of death.*

DEWARAKITTA UNNANSE *vs.* SUMANGALA UNNANSE ... ... V. 43

Expulsion of Bhikku from Sangha—Is Registrar-General bound to enter up in his register kept under the Ordinance the fact of such expulsion when it is communicated to him.

IN *Re* MAHANAYAKE THERO OF MALWATTA, KANDY ... ... VIII. 50

Quo Warranto—Buddhist Temporalities Ordinance No. 19 of 1931, Sections 7, 9 and 33 (*b*)—Election of Diyawadana Nilame—Person holding more than one office—Has he a vote in respect of each office.

Held: (1) *That a person entitled to vote at the election of the Diyawadane Nilame can exercise only one vote although he may hold more than one office each of which qualifies him to vote at such election.*

(2) *That the Attamasthane Committee has only one joint vote and that each member is not entitled to vote separately.*

(3) *That the Court which has power under Section 33 (b) of the Buddhist Temporalities Ordinance to grant an extension of time in the case of an election is not necessarily the Court within whose jurisdiction the temple or* Devale *in respect of which the election is to be held is situate.*

(4) *That the provisions of Section 7 (2) of the Buddhist Temporalities Ordinance are directory and that a meeting held after the prescribed time is not invalid.*

APPLICATION BY C. B. NUGAWELA ON RATWATTE *vs.* THE PUBLIC TRUSTEE IX. 66

Acquisition of property by incumbent of Buddhist Temple—Buddhist Temporalities Ordinance No. 8 of 1905—Appeal—Can a new question which should have been put in issue at the trial be raised in appeal.

Held: (1) *That property dedicated to a* Vihare *is the property of the incumbent for the*

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time being, for the purposes of his office, including his own support and the maintenance of the temple and its services and that, on his death, it passes to the succeeding incumbent.

(2) *That an appellant cannot, in an appeal before the Privy Council, raise questions which should have been put in issue at the trial.*

DHAMMANANDA *vs.* DON DAVITH RANASINGHE AND OTHERS ... X. 78

Buddhist Temporalities Ordinance No. 19 of 1931—Sections 4 (1), 4 (2), 18 and 20—'Sanghika' property belonging to temple—Can the incumbent of a Buddhist temple, who is not the trustee, maintain an action for declaration of title in respect of property belonging to the temple in the absence of proof that the temple has been exempted from the operation of Section 4 (1) of Ordinance No. 9 of 1931.

Held: (1) *That the incumbent of a Buddhist temple, who is not a trustee, cannot maintain an action for declaration of title in respect thereof in the absence of proof that the temple in question has been exempted from the operation of Section* 4 (1) *of the Buddhist Temporalities Ordinance No.* 19 *of* 1931.

(2) *That the Buddhist Temporalities Ordinance does not provide for a* de facto *trustee to sue, in any case, in respect of property belonging to a temple.*

RATANAPALA THERUNNANSE *vs.* DIAS XI. 69

Personal liability of trustee for costs under Section 30 of the Buddhist Temporalities Ordinance No. 8 of 1905.

SADDANANDA THERUNNANSE *vs.* SUMANATISSA THERUNNANSE ... XIII. 77

Policy of life assurance of a Bhikkhu—Does death of Bhikkhu without assigning policy vest the property in the Sangha.

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

DHAMMADARA THERO *vs.* SEDARANHAMY AND OTHERS ... ... XV. 20

Buddhist Temporalities Ordinance (Chapter 222) Section 42.

Held: *The register that has to be looked at for the purposes of Section* 42 *of the Buddhist Temporalities Ordinance (Chapter* 222*) is the register kept by the Registrar-General under Section* 41.

JAYASURIYA *vs.* URAPOLA RATNAJOTI XV. 141

Writ of Quo Warranto to question the right of a Basnayake Nilame to hold office—Objection to election on the ground of admission of ballot paper put aside at first count.

Held: (1) *That the ballot paper was rightly admitted.*

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

WICKREMASINGHE *vs.* ABEYGUNAWARDENE XVI. 1

Scope of the Ordinance—Do the provisions of the Ordinance apply to a Devale exempted from the operation of Section 4 (1).

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

PETER SINGHO AND OTHERS *vs.* APPUHAMY XVII. 134

§ 41 (5). Duty of Registrar-General under the §.

SUMANGALA MAHA NAYAKE THERO AND OTHERS *vs.* THE REGISTRAR-GENERAL XIX. 81

Section 111 of the Trusts Ordinance applies to religious trusts regulated by the Buddhist Temporalities Ordinance.

SOBITHA THERO *vs.* WIMALABUDDI THERO AND ANOTHER ... ... XX. 85

A disposition by last will by a *bhikkhu* in respect of his *pudgalika* property does not amount to an alienation during his lifetime within the meaning of Section 23 of the Ordinance.

SUMANA THERO *vs.* RAMBUKWELLA XXV. 86

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Proclamation under Section 3—Court bound to take judicial notice.

GUNANANDA THERO *vs.* ATUKORALE AND OTHERS ... ... XXIX. 77

§§3 and 4—Bhikkhu not rightful incumbent but in charge of Vihare—Can he maintain action for declaration of title to land appurtenant to such Vihare.

PUNCHIRALA *vs.* DHAMMANANDA THERO XXXIII. 53

Death of Viharadhipathi—Rival claimants to post of Viharadhipathi—Each claimant notified Public Trustee of his own nomination as Trustee—Duty of Public Trustee—Does Mandamus lie?

BUDDHARAKKITA THERO *vs.* THE PUBLIC TRUSTEE ... ... XXXVI. 68

Disturbance of possession of field—Action for declaration of title and ejectment by Buddhist monk who is not the controlling Viharadhipathi—Disclaimer of title by Viharadhipathi—Possession of Buddhist monk *ut dominus*—Sanghika property—Possessory remedy.

The plaintiff, a Buddhist monk, was in possession of a field as part of the temporalities that have come to him as successor to a monk to whom it had been originally given by "*dayakas*" for his "*siupasa*" or personal needs. The original monk gifted the same to his pupil by deed and plaintiff claimed through him. The defendants, who were his cultivators, refused to give back possession, and plaintiff sued them for declaration of title, ejectment and damages.

This field is situated at Kondadeniya and is included in the plan showing the properties belonging to the Kondadeniya Vihare, whose Viharadhipathi disclaimed title to it.

The learned District Judge held that the property devolved on the plaintiff as *pudgalika* property and gave judgment for him. The defendants appealed, and it was contended for them that the plaintiff's action must be dismissed as he had no title to the property, the title being in the Viharadhipathi of the Kondadeniya Vihare.

Counsel for the plaintiff supported the judgment on the ground that the field was "*sanghika*" property and requested the Court to treat the matter as a possessory action allowing him to retain that part of the decree relating to the ejectment of the defendants.

Held: *That as it is clear from the evidence that the plaintiff had been holding the field in just the same way as if he were the owner, he was entitled to keep that part of the decree ordering the ejection of the defendants, damages and costs.*

MENIKA AND ANOTHER *vs.* DHAMMANANDA XXXIX. 12

Section 32—Application under—Dismissed by District Court—In appeal order set aside and case sent back "to be proceeded with." Is Supreme Court judgment a final judgment.

BUDDHARAKKITA THERA *vs.* ALGAMA AND SANGARAKKITA THERO ... XLIII. 93

Plaintiff, Chief Bhikku residing on land dedicated to Sangha—Permanent buildings erected thereon—Defendant in possession of money collected for preaching hall and Vihare—Plaintiff's right to recover money—Meaning of "controlling Viharadhipathi," "temple."

The plaintiff, a Bhikku, as the first incumbent resided on a land dedicated to the *Sangha*, where subsequently permanent living quarters were erected. Thereafter money collected from lay Buddhists for a preaching hall and Vihare was entrusted to the defendant as Treasurer of a Society whose object was to put up buildings for Buddhist worship.

Held: (1) *That the plaintiff's place of residence was a "temple" within the meaning of Section 20 of the Buddhist Temporalities Ordinance, and that no particular type of buildings were necessary to constitute a temple.*

(2) *That the plaintiff was the principal Bhikku of the temple, and there being no trustee, was the controlling Viharadhipathi within the meaning of Section 20 of the Ordinance, and could therefore recover the money from the defendant.*

ROMANIS FERNANDO *vs.* WIMALASIRI THERO ... ... XLV. 47

BUILDING CONTRACT

See under **CONTRACT**

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BURDEN OF PROOF

Plea of insanity as a defence.

REX *vs.* DON NIKULAS... ... XXIII. 90

Burden of proof in proving Last Will.

BRAMPY NONA AND ANOTHER *vs.* VITHANAGE ... ... XXIII. 110

In a prosecution under Regulation 6 of the Control of Prices Regulations, 1942, the burden of proving that the accused failed to furnish the return referred to therein is on the prosecution.

PONNUDURAI *vs.* MAILVAGANAM XXVI. 11

BUSINESS NAMES REGISTRATION ORDINANCE

Can the Attorney of an absent principal make the return required for the purpose of registration.

Held: (1) *That it is sufficient for the purposes of Section* 4 (1) (*e*) *of the Ordinance if the nature of the other business occupation of the applicant is given. It is not necessary to give the name under which it is carried on.*

(2) *That the Attorney of an absent principal is empowered by Section* 19 *of the Ordinance to furnish the particulars required under the Ordinance.*

ARUNACHALAM CHETTIYAR *vs.* RAMANATHAN CHETTIAR AND ANOTHER IV. 115

Scope of the expression "default" in Section 9.

Held: (1) *That the failure of the plaintiff to set out their names in the plaint as fully as they were set-out in the register of business names was no ground for treating the action as if the plaintiffs had committed a "default" within the meaning of Section* 9 *of the Registration of Business Names Ordinance No.* 6 *of* 1918.

(2) *That it is difficult to say that an erroneous statement in regard to the usual residence of a partner can be regarded as a "default in furnishing a statement of particulars" under Section* 9 *of the Ordinance.*

(3) *That where the Court is asked to give effect to the terms of Section* 9 *of the Ordinance on the ground that there is an error in the register in regard to the plaintiff's place of residence, the mere statement of witness made in cross-examination tending to show that the description in the register is wrong, is not sufficient. It must appear that the witness was not misinformed and that he realised the implication of the matter.*

MURUGAPPA CHETTIAR AND ANOTHER *vs.* RAMANATHAN CHETTIAR ... IX. 6

Business Names Registration Ordinance No. 6 of 1918—Objection based on failure to comply with provisions of—Can objection be raised after judgment.

VALIAPPA CHETTIAR *vs.* SUPPIAH PILLAI X. 149

Business Name—Should a party to an action be allowed to lead evidence of non-compliance with the provisions of the Business Names Registration Ordinance at the end of the case.

PALANIAPPA CHETTY *vs.* RAMANATHAN CHETTY ... ... X. 151

Omission to give the name of one of the partners in the statement of particulars required by Section 4 (1)—Does such omission amount to a default within the meaning of Section 9 (1).

Held: *That the omission to give the names of each partner of a Firm in the statement of particulars required by Section* 4 (1) *of the Business Names Ordinance is such a substantial failure to comply with the requirements of the Ordinance as to amount to a default within the meaning of Section* 9 (1).

CARUPPEN CHETTIAR (BY HIS ATTORNEY, SUBRAMANIAM PILLAI) *vs.* WICKREMESEKERA AND OTHERS. ... XXI. 103

Sections 4 (2) and 5—Meaning and effect of.

Held: (i) *That where a Firm as a Firm or an individual as an individual is carrying on the same business under two or more business names, Section* 4 (2) *of the Ordinance requires that all the business names must be stated.*

(ii) *That the affidavit required by Section* 5 *of the Ordinance need not be signed by all the partners of a Firm.*

NATCHIAPPA CHETTIAR AND OTHERS *vs.* RAMANATHAN CHETTIAR AND ANOTHER XXI. 131

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Business Names Registration Ordinance Section 9 (1) (c)—Meaning of expression "any other party"—Civil Law Ordinance, Section 5—Is compound interest legal—Money Lending Ordinance, Section 10.

Held: (i) *That the words "any other party" in Section 9 (1) (c) of the Business Names Registration Ordinance include both the other party to the contract and any third party on whom the rights of the other contracting party may have devolved and is not limited to a third party only.*

(ii) *That a Promissory Note given on an account stated is enforceable.*

(iii) *That Section 5 of the Civil Law Ordinance is a general provision that applies to all contracts and engagements including Bills of Exchange and Promissory Notes.*

(iv) *That the charging of compound interest is not illegal in our law if the parties have agreed to compound interest.*

(v) *That the agreement to pay compound interest need not necessarily be by written or spoken words but may result from a clear and unambiguous course of dealings between the parties.*

MARIKAR *vs.* SUPRAMANIAM CHETTIAR XXVI. 17

Certificates of registration of a business name issued under the Business Names Registration Ordinance may be produced in evidence in order to rebut a claim made on the basis of the existence of a partnership which is not evidenced by a writing.

MOHAMED HASSEN *vs.* MOHAMED YOOSOOF XXVII. 29

BUTCHERS ORDINANCE

It is not open to the proper authority under the Butchers Ordinance to impose a condition that a licence under Section 4 will not be issued to a person, who does not purchase at an auction held by the proper authority the right to obtain the licence.

MOHAMED NOORDEEN *vs.* THE CHAIRMAN, VILLAGE COMMITTEE, GODAPITIYA XXV. 62

Refusal of butcher's licence by local authority—Remedy.

DON CAROLIS *vs.* CHAIRMAN, URBAN COUNCIL, GAMPAHA ... XLI. 15

BY-LAW

See also under **ULTRA VIRES, DANGEROUS AND OFFENSIVE TRADE.**

Adulteration of milk—Interpretation of by-law—Meaning of the word "kept" in the context "sold or offered for sale or kept."

Held: (1) *That the accused was not guilty of an infraction of the by-law.*

(2) *That the word "kept" in the by-law means kept for sale.*

WANIGASEKERA (SANITARY BOARD INSPECTOR) *vs.* MUSTAPHA ... XII. 157

By-law made under Section 168 (8) of the Local Government Ordinance—Prohibition against preaching in streets without a permit.—Validity of by-law—Charge for contravening by-law should specify the Gazette in which by-law was published.

PERKINS *vs.* SRI RAJAH ... XVII. 56

By-law made under Section 56 (5) of Ordinance No. 13 of 1898—Repeal of the Ordinance—Saving of by-laws "not in conflict with" the provisions of the repealing Ordinance—Section 248 of Ordinance No. 61 of 1939.

Held: (i) *That a by-law which conflicts with Ordinance No. 61 of 1939 is not saved by Section 248 of that Ordinance*

(ii) *That the following by-law,*

"no person shall within the limits of the Local Board without a licence granted by the Board, publicly sell or expose for sale betel leaves, tobacco, arecanut or any articles of food or drink on any public ground or on any roadside, or at or near any roadway or pathway, unless the same shall be sold or exposed for sale in any private house, boutique or garden,"

is in conflict with the provisions of Ordinance No. 61 of 1939, in particular, Section 165.

BUULTJENS (REVENUE INSPECTOR, U.C., MATARA) *vs.* HENDRICK APPU. XX. 107

By-law—Municipal Councils Ordinance, Section 110 (6) (c)—Can Municipal Council make by-laws for the regulation of motor traffic.

Interpretation:—Does the term "vehicle" in Regulation 6 of Chapter VI of Municipal Council by-laws published in Gazette 8239 of 14th August, 1936, include a motor car.

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Held: (i) *The power given to Municipal Councils under Section* 110 (6) (*c*) *of the Municipal Councils Ordinance* (*Chapter* 193) *to make by-laws for the Regulation of "traffic in streets" does not include the power to make by-laws for regulating motor traffic.*

(ii) *The term "vehicle" in Regulation* 6 *of Chapter VI of the Municipal Councils by-laws published in Gazette* 8239 *of the* 14*th August*, 1936, *does not include a motor car.*

COOPER (SUB-INSPECTOR OF POLICE) *vs.* SIRISENA ... ... XXII. 38

By-laws—§ 11 of the Revised Edition Ordinance continues all by-laws in force on the date when the Revised Edition is brought into force.

WEERASINGHE *vs.* SAMY CHETTIAR XXII. 51

By-law relating to adulteration of milk—Milk in possession of authorised servant of registered diaryman—Liability of master.

JAYASENA *vs.* DABRERA ... XXXIX. 111

Interpretation of by-law—Must be reasonable.

JANSEN *vs.* SANITARY INSPECTOR, DEHIWALA-MT. LAVINIA U.C. ... L. 97

CARRIAGE OF GOODS

Carriage of Goods—By ship—Liability of carrier for loss in Port of Colombo.

BAGSOOBHOY *vs.* THE CEYLON WHARFAGE CO., LTD. .. .. .. XXXVII. 8

Railway—Liability for damage to goods—Limitation of liability by statute—Further limitation by contract—Meaning of "misconduct" by a servant of the Railway—Assessment of damages—Railway Ordinance, Section 15.

While goods conveyed by train from South India were being unloaded from a waggon at Jaffna, they received damage as a result of another waggon striking the stationary waggon during shunting operations carried out by a guard who had been clearly warned that an impact of the waggons involved the risk of damage to the goods.

Section 15 of the Railway Ordinance limits the liability of the Railway to loss or damage occasioned by the negligence or misconduct of the agents or servants of the Railway. The liability in this case was further limited by contract to loss from misconduct on the part of a servant of the Railway.

Held: (i) *That a carrier of goods, if not prohibited to do so by statute, may contract himself out of liability for the negligence of his servants, provided that the exemption is stipulated in express, clear and unambiguous terms.*

(ii) *That the guard was guilty of misconduct in doing a thing which he had been warned may seriously endanger the goods.*

(iii) *For the purposes of compensation, "value of the goods at the time and place of despatch" means the value at the time and place the goods were first handed over to the Ceylon Government Railway.*

SANGARALINGAM *vs.* THE ATTORNEY-GENERAL .. .. XLI. 100

CERTIORARI

Writ of Certiorari on the Board of Appeal constituted under the Tea Control Ordinance No. 11 of 1933—Section 20 (1)—Meaning of the word "may" in the Section—Has it the force of "must"—Discretion vested in the Tea Controller—Can the Board of Appeal exercise, on an appeal, a discretion which the Tea Controller may have exercised.

Held: (i) *That the right given to the Tea Controller by Section* 20 *of the Tea Control Ordinance to make deductions from the standard crop is a discretionary right.*

(ii) *That the word "may" in Section* 20 *of the Tea Control Ordinance has not the force of "shall."*

(iii) *That the Board of Appeal can, on an appeal, exercise the discretion vested by Section* 20 *in the Tea Controller.*

APPLICATION BY THE TEA EXPORT CONTROLLER FOR A WRIT OF CERTIORARI X. 39

Functions of the Tea Controller under Section 15 of the Tea Control Ordinance—Are they ministerial or judicial—Powers of the Board of Appeal—Estoppel—Res judicata—To what extent does a decision on an application for a Mandamus operate as res judicata so as to bar an application for a Writ of Certiorari in regard to the same subject-matter.

Held: (i) *That the words "other person or tribunal" in Section* 42 *of the Courts*

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Ordinance must be understood to mean person or tribunal under a duty to act judicially.

(ii) *That the Tea Controller in the discharge of his functions under Section 15 of the Tea Control Ordinance is not under a duty to act judicially, and is, therefore, not amenable to the Writ of Certiorari.*

(iii) *That the Board of Appeal has in hearing an appeal under Section 15 of the Tea Control Ordinance, power to decide whether the Tea Controller has exceeded his powers under that Section.*

(iv) *That, where an application for a mandamus had been refused on certain grounds in regard to a certain subject-matter, it is not competent for a petitioner to canvass such decision by applying for a Writ of Certiorari in regard to the same matter against the same respondent.*

DANKOLUWA ESTATES CO., LTD. *vs.* THE TEA CONTROLLER .. .. XIX. 41

Election Judge appointed under the Ceylon State Council (Elections) Order in Council 1931—Does a Writ lie to quash an order made by an Election Judge—Order in Council, Article 75.

Held: (i) *That the Election Court is a branch of the Supreme Court exercising original jurisdiction.*

(ii) *That the Supreme Court has no jurisdiction to issue a Writ of Certiorari against the Election Court.*

(iii) *That the writs mentioned in Section 42 of the Courts Ordinance can be issued only to inferior Courts.*

(iv) *That a branch of the Supreme Court in Ceylon is in exactly the same position as regards the issue of a Writ of Certiorari as a branch of the High Court of Justice in England.*

A. E. GOONESINGHE—APPLICANT XXIII. 41

An application for a Writ of *certiorari* is a civil action for the purposes of Section 3 of the Appeals (Privy Council) Ordinance.

A. E. GOONESINGHE—APPLICANT XXIV. 81

Certiorari—When does it lie?

WEERASEKERA AND ANOTHER *vs.* THE G.A., UVA PROVINCE .. XXIX. 4

Election Judge appointed under the Ceylon State Council (Elections) Order-in-Council 1931—Can a Writ of Certiorari issue to such Election Judge.

Held: *That a Writ of Certiorari cannot be granted to bring up any order made by an Election Judge appointed under the Ceylon State Council (Elections) Order-in-Council,* 1931.

Per LORD GODDARD: "It is well settled, and counsel did not seek to argue to the contrary, that a Court having jurisdiction to issue a Writ of Certiorari will not and cannot issue it to bring up an order made by a Judge of that Court. Nor will a superior court issue the Writ directed to another superior Court—*Reg. vs. Justices of the Central Criminal Court* (11 Q.B.D. 479)—And if the Election Judge is to be regarded as a special or independent tribunal his court would, in their Lordships' opinion, be a superior Court. Considering that the Court is held before a Judge of the Supreme Court from whose decision there is no appeal, it could not be otherwise. But their Lordships are of opinion that the true view is that cognisance of these petitions is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court and consequently certiorari cannot be granted to bring up any order made in the exercise of that jurisdiction. As the appellant's motion was rightly rejected it is unnecessary to consider the other matters raised in the appeal and their Lordships will humbly advise His Majesty that it should be dismissed with costs."

GOONESINGHE *vs.* KRETSER .. XXIX. 49

Certiorari—Does not run to give relief from wrong decisions—

DE ZOYSA *vs.* G.A., KANDY AND ANOTHER XXX. 66

Application for writ for quashing proceeding before Rent Assessment Board—Usurpage of jurisdiction by Board.

DE PINTO *vs.* RENT ASSESSMENT BOARD DEHIWALA-MT. LAVINIA ... XXXI. 12

Certiorari—For declaring Election void—Successful candidate not made a party—Application at hearing to add—should it be allowed.

GOONETILEKE *vs.* GOVT. AGENT, GALLE XXXIII. 16

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Certiorari—To quash award of tribunal under Essential Services (Avoidance of Strikes and Lockouts) Order, 1942.

BROWN & CO., LTD. *vs.* ROBERTS XXXIII. 48

Certiorari—Essential Services (Avoidance of Strikes and Lockouts) Order, 1942—Jurisdiction of Tribunal.

The Commissioner of Labour, acting under Paragraph 6 of the Essential Services (Avoidance of Strikes and Lockouts) Order, 1942, referred a petition to the District Judge stating that he was satisfied that the petition related to a trade dispute. A preliminary objection was taken before the District Judge that the petition did not disclose a trade dispute. The District Judge held that the Commissioner's decision *ipso facto* conferred jurisdiction on the Tribunal to inquire into the matter, and made an award.

Held: *Quashing the proceedings and award, that the District Judge has to be satisfied in his own mind that the petition discloses a trade dispute as defined in the order.*

LIPTONS LTD. *vs.* GUNASEKERA XXXIV. 22

Certiorari—Writ of, against Textile Controller—Cancellation of textile licences acting under Regulations 62 of the Defence (Control of Textiles) Regulations, 1945—Jurisdiction of Supreme Court to issue such Writ—Courts Ordinance, Section 42—Interpretation of words "or other person or tribunal" and "according to law"—Applicability of *ejusdem generis* Rule and English Law.

Held: (i) *That the Controller of Textiles, in making an order under Regulation 62 of the Defence (Control of Textiles) Regulations 1945, acts judicially, and is a "person or tribunal" within the meaning of Section 42 of the Courts Ordinance.*

(ii) *That the Supreme Court has jurisdiction to issue a mandate in the nature of a Writ of* certiorari *on the Textile Controller to question the correctness of such Order.*

(iii) *That the "ejusdem generis" Rule cannot be applied in the interpretation of the words "or other person or tribunal" in Section 42 of the Courts Ordinance.*

(iv) *That the words "according to law" in Section 42 of the Courts Ordinance should be interpreted to mean according to English Law.*

MOHAMED THASSIM *vs.* THE CONTROLLER OF TEXTILES ... ... XXXIV. 42

Order made by Textile Controller under Regulation 62 of the Defence (Control of Textiles) Regulations, 1945—Bias on the part of the Controller—Is it a ground for quashing such Order.

Held: (i) *That inasmuch as a proceeding under Regulation 62 of the Defence (Control of Textiles) Regulations, 1945 is a judicial inquiry, the Controller should possess an open mind and should be free from bias.*

(ii) *That where it is shown that the Controller's mind was tainted with bias, he has acted without jurisdiction and an application for a* certiorari *to quash an order made in such proceedings should be allowed.*

A. R. L. MOHAMED THASSIM *vs.* CONTROLLER OF TEXTILES ... XXXIV. 82

Dismissal of Employee—Does certiorari lie?

SURIYAWANSA *vs.* LOCAL GOVERNMENT SERVICE COMMISSION ... XXXV. 36

Certiorari—Order under Defence (Control of Textiles) Regulation 62—Cancelling licence of textile dealer—Notice of accusation and opportunity for explanation granted to dealer—When should Court review such Order.

MOHAMED HUSSAIN & CO. *vs.* JAYARATNE XXXV. 94

Co-operative Societies Ordinance (Chap. 107), Section 52 (2), Rule 29, and Section 45—Manager of Co-operative Store—Claim for value of goods entrusted after resignation of—Arbitration proceedings by officer appointed by Registrar of Co-operative Societies—Jurisdiction to arbitrate.

The petitioner was employed as manager of a registered Co-operative Store. After he resigned his post as manager, the 1st respondent, claiming to be an officer appointed by the Registrar of Co-operative Societies to arbitrate on an alleged dispute between the Co-operative Society and the petitioner, issued summons to the petitioner under Rule 29 of the Rules framed under Section 37 of the Co-operative Societies' Ordinance No. 34 of 1921, kept alive for certain purposes by Section 52 (2) of the later Ordinance No. 16 of 1936.

On receipt of the summons the petitioner replied challenging the 1st respondent's right to assume jurisdiction under Rule 29 as he

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was not a member of the Society. Arbitration proceedings, however, were proceeded with *ex parte* and the Society was awarded its full claim and costs of inquiry.

Petitioner applied to the Supreme Court for a Writ of *Certiorari* to quash the arbitration proceedings and the award.

Held: (i) *That the arbitration proceedings under Rule* 29 *were illegal as the Rule does not authorise a dispute between a Co-operative Society and one of its* ex-*officers to be referred to arbitration.*

(ii) *That even if the petitioner had been a member of the Society, Rule* 29 *would have been inapplicable because the dispute between him and the Society did not arise from a transaction resulting from his membership.*

(iii) *That the award cannot be supported even under Section* 45 (1) (c) *and* 45 (2) *of Chap.* 107 *inasmuch as the word* officer *in Section* 45 (1) (c) *cannot be construed so as to include an* ex-*officer of a Co-operative Society.*

ILLANGAKOON *vs.* BOGOLLAGAMA *et al* XXXVIII. 33

Court has discretion to make order of certiorari although alternative remedy is available.

SIRISENA *vs.* REGISTRAR OF CO-OPERATIVE SOCIETIES ... ... XLI. 1

Certiorari refused where officer did not act in excess of jurisdiction.

W.H. BUS CO., LTD. *vs.* THE COMMISSIONER OF MOTOR TRANSPORT XLI. 45

Power of Supreme Court to issue Writ on person like Textile Controller.

NAKKUDA ALI *vs.* JAYARATNE ... XLIII. 33

Ceylon (Parliamentary Elections) Order-in-Council, 1946—Application to have claimant's name entered in the register of voters—Decision by Registering Officer that claimant not a citizen of Ceylon, therefore not entitled to be registered—Appeal to Revising Officer under Section 13 of Order-in-Council—Reversal of decision by Revising Officer on ground that Ceylon Parliamentary Elections (Amendment) Act, No. 48 of 1949 and Citizenship Act No. 18 of 1948 invalid as offending against Section 29 of Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947.

Can Revising Officer's decision be reviewed by *certiorari*—Section 13 (3) of the Order—Final and conclusive—Effect of—When *certiorari* lies—Affidavits to supplement evidence on record—When admissible—Relevancy of such affidavits—Interpretation of statutes—When permissible to travel outside to ascertain scope and purpose—Validity of Citizenship Act and Ceylon Parliamentary Elections (Amendment) Act.

The second respondent made a claim to the Assistant Registering Officer of his district, to have his name inserted in the Register of Electors prepared under Section 11 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, and supported it by an affidavit, which stated that he possessed the requisite residential qualification, that he was domiciled in Ceylon, and that he was qualified to be an elector under the Order.

The Registering Officer, after inquiry, disallowed the claim on the ground that the second respondent was not a citizen of Ceylon within the meaning of the Citizenship Act No. 18 of 1948.

On appeal under Section 13 of the said Order-in-Council, the first respondent as Revising Officer, after considering the evidence placed before him and the arguments adduced, held that the Ceylon Parliamentary Elections (Amendment) Act No. 48 of 1949, which prescribed citizenship of Ceylon as a necessary qualification of an elector, and the Citizenship Act No. 18 of 1948 were invalid as offending against Section 29 (2) of the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, and that the operative law was that contained in the Ceylon (Parliamentary Elections) Order-in-Council 1946, as it stood before the Amending Act.

He, accordingly, held that the second respondent was a duly qualified elector, and directed his name to be included in the Register of Electors. By Section 13 (3) of the said Order, the decision of the first respondent is final and conclusive.

The Crown, therefore, made two applications for writs of *certiorari*, one in the name of the Assistant Registering Officer, and, the other in the name of the Commissioner of Parliamentary Elections (as there was a doubt as to the proper party who should make the application), to have the

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decision of the first respondent reviewed by the Supreme Court.

At the hearing of the applications, the learned Counsel for the second respondent conceded that the said decision was subject to review by the Supreme Court by means of a Writ of *certiorari*, and moved the Supreme Court to produce in support of the order, three affidavits from three (other) persons containing statistics relating to Indian Tamils.

Held: (i) *That the first respondent acted outside his jurisdiction, when he proceeded to decide as a preliminary issue the question as to what is the law which lays down the qualification of voters, when the jurisdiction invested in him was to decide the question whether the second respondent was qualified to be a voter under the law.*

(ii) *That the affidavits sought to be produced by the second respondent, are irrelevant to the question that arose in the application for* certiorari, *namely, whether the first respondent's decision, as to what is the law that lays down the qualification of voters in general, is erroneous.*

(iii) *That if the affidavits are relevant to supplement the affidavit already on record, such evidence could and should have been placed before the first respondent, at the hearing of the appeal.*

(iv) *That the affidavits will not be admitted at this stage, as an adjudication on them would amount to re-trying the case.*

(v) *That Sections* 4 *and* 5 *of the Citizenship Act No.* 18 *of* 1948 *and Section* 3 (1) (a) *of the Ceylon (Parliamentary Elections) (Amendment) Act No.* 48 *of* 1949, *are not rendered void under Section* 29 (2) *of the Ceylon (Constitution) Order-in-Council, as the disabilities and restrictions imposed by the two former Acts, do not, from the language used, attach to persons of any one community, but applies to all communities.*

(vi) *That the fact that a large section of Indians now residing in Ceylon are disqualified by the impugned Acts, is irrelevant, for the reason that it is not the necessary legal effect which flows from the language of the Act.*

(vii) *That where the words in an enactment are clear and unambiguous, it is not legitimate to travel outside the enactment, to ascertain its scope and purpose.*

MUDANAYAKE *vs.* SIVAGNANASUNDARAM *et al* VIRASINGHE *vs.* SIVAGNANASUNDARAM *et al* ... ... XLV. 49

Certiorari—Writ of—Public servant dismissed from office by order of Public Service Commission—Does it lie to quash such Order?

Held: *That a mandate in the nature of a* Certiorari *does not lie against the Public Service Commission to quash an order dismissing a member of the General Clerical Service from office.*

WIJESUNDERA *vs.* THE PUBLIC SERVICE COMMISSION ... XLIX 44

CEYLON (CITIZENSHIP) ACT No. 18 OF 1948.

See also under **CITIZENSHIP**

Sections 4 and 5—Do they contravene Section 29 (2) of the Ceylon (Constitution and Independence) Orders-in-Council 1946 and 1947.

KODAKAN PILLAI *vs.* MUDANAYAKE AND OTHERS ... ... XLIX 33

CEYLON (CONSTITUTION) ORDER-IN-COUNCIL, 1946

§ 49—Parliamentary Secretary—Does he hold public office?

PODISINGHO *vs.* GOONESINGHE XXXVII 12

Parliamentary Secretary appointed under—is a public officer within Section 10 (1) (d) of the Local Authorities Elections Ordinance.

GIVENDRASINGHE *vs.* DE MEL XXXVIII 1

Section 13 (3) (c)—Shareholder of company having contract with the Crown—Disqualification.

KULASINGHAM *vs.* THAMBIAYAH XXXVIII 6

§ 13(3)(c)—Shareholder of Company having contract with the Crown—Disqualification.

THAMBIAYAH *vs.* KULASINGHAM XXXVIII 53

§ 29 (4)—Validity of Parliamentary Elections Amendment Act No. 19 of 1948.

THAMBIAYAH *vs.* KULASINGHAM XXXVIII. 53

§ 29 (4)—Meaning of the words "this Order."

THAMBIAYAH *vs.* KULASINGHAM XXXVIII 53

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Section 57—Status of public servants—Office held at the pleasure of the Crown.

VALLIPURAM *vs.* POSTMASTER-GENERAL XXXIX. 1

Section 14 (1)—Penalty for sitting or voting in House of Representatives when disqualified to be elected—When right to penalty vests in informer.

Held: *That the right to the penalties imposed by Section* 14 (1) *of the Ceylon (Constitution) Order-in-Council becomes vested in the informer the moment he instituted the action and not when he applied for leave to proceed further under Section* 14 (2)

GIVENDRASINGHE *vs.* DE MEL ... XLII. 9

Sections 29 and 37—Interpretation of.

MUDANAYAKE *vs.* SIVAGNANASUNDRAM XLV. 49

§ 29—Power of Parliament to pass legislation.

MUDANAYAKE *vs.* SIVAGNANASUNDRAM XLV. 49

Section 14 (2)—Action under, by common informer to recover penalty for sitting and voting in House of Representatives having reasonable grounds for knowing disqualification—Plaintiff's application to proceed with action—District Judge's discretion to allow or withhold—Proviso to Sub-Section (2)—When may Supreme Court interfere with such discretion.

The District Judge, purporting to exercise discretion under the proviso to Sub-Section (2) of Section 14 of the Ceylon (Constitution) Order-in-Council, 1946 refused to give leave to the plaintiff, a common informer, to proceed with his action filed under Section 14 (2) of the said Order-in-Council for recovering Rs. 83,000 by way of a penalty from the defendant for sitting and voting in the House of Representatives, having reasonable grounds for knowing that he was disqualified from doing so.

This refusal was based on the ground that a similar action on the same facts, covering a different period of time brought by another plaintiff in the same Court had been dismissed earlier for want of appearance.

Held: *That the public interest requires that actions of this nature should have the opportunity of being decided on their merits, and as the earlier action was dismissed without a consideration of the merits, the learned District Judge should have granted leave to the plaintiff to proceed with the action.*

EGRIS *vs.* HAMID USEEN MARIKAR SEGI ISMAIL ... ... XLVII 108

Section 29 (2) (b)—Validity of the Immigrants and Emigrants Act of 1948, the Citizenship Act of 1948 and the Indian and Pakistani Residents (Citizenship) Act of 1949.

SUDALI ANDY ASARY *et al vs.* VANDEN DRIESEN ... ... XLVIII. 17

Section 29 (2)—Validity of Citizenship Act No. 18 of 1948, Sections 4 and 5 and Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949, Section 4 (1) (a).

KODAKAN PILLAI *vs.* MUDANAYAKE AND OTHERS ... ... XLIX. 33

CEYLON DIVORCE JURISDICTION ORDER-IN-COUNCIL, 1936

See under **DIVORCE**

CEYLON (LEGISLATIVE COUNCIL) ORDER-IN-COUNCIL, 1923

Action under Article 16 by common informer—Member of Legislative Council acting as Editor of a Dictionary—Compilation made with help of Government subsidy—Amendment of Principal Order-in-Council in 1928 indemnifying such member against penal consequences—Is such an Order-in-Council *intra vires* of the powers of the King?

Held: *That the indemnifying Order-in-Council of* 1928 *was valid inasmuch as His Majesty had power to do so under the rights reserved to Himself by Article* 67 *of the Order-in-Council of* 1923.

ABEYESEKERA *vs.* JAYATILAKE ... I 122

CEYLON (PARLIAMENTARY ELECTIONS) AMENDMENT ACT No. 48 OF 1949

Validity of—Does it offend against Section 29 of the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947.

MUDANAYAKE *vs.* SIVAGNANASUNDRAM XLV. 49

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Section 4 (1) (a)—Does it contravene Section 29 (2) of the Ceylon (Constitution and Independence) Orders-in-Council.

KODAKAN PILLAI *vs.* MUDANAYAKE AND OTHERS ... ... XLIX. 33

CEYLON (PARLIAMENTARY ELECTIONS) ORDER-IN-COUNCIL, 1946

Parliamentary Election—Petition to declare election void—Number of Charges—Adequacy of Security—Preliminary objections—Parliamentary Elections Order-in-Council, 1946, Sections 56, 58 (1) (c) and (d)—Parliamentary Election Petition Rules 12 (2) and (3)—Meaning of the word "charges."

A petition praying for a declaration that an election be void, contained the following charges:—

(1) That before and during the election the respondent and his agents and other persons with his knowledge or consent did print, publish and distribute or cause to be printed, published and distributed handbills which did not bear upon the face thereof the name and address of the printers and publishers, etc.

(2) That before and during the election, the respondent and his agents and other persons with his knowledge or consent did make and publish false statements of facts in relation to the personal character and conduct of the other candidate.....for the purpose of effecting the return of that candidate, etc.

(3) That before and during the election the respondent and his agents and other persons with his knowledge or consent, did inflict, or thereafter threaten to inflict injury, damage, harm or loss upon a large number of electors in order to induce or compel them to refrain from voting, etc.

The petitioner gave security in a sum of Rs. 5,000 as required by Rule 12 (2) of the Third Schedule of the said Order-in-Council.

The respondent, by way of a preliminary objection, contended that the ground No. (1) contained a multiplicity of charges, in that printing, publishing, distribution, etc. constituted separate charges. Similarly he contended that the grounds (2) and (3) contained several separate charges, and that, therefore, the security given was insufficient. For this reason he moved for the dismissal of the petition as provided in Rule 12 (3) of the Parliamentary Election Petition Rules.

Held: (1) *That printing, publishing, distributing, etc., as stated in ground No.* (1), *constituted only one charge.*

(2) *That similarly, grounds Nos.* (2) *and* (3) *each constituted one charge.*

(3) *That the security given was adequate.*

ANTHONY PERERA *vs.* JAYAWARDENA XXXV. 105

Sections 49 (5) and 87—Application for inspection of documents—List of tendered ballot papers—Declarations made by voters on tendered ballot papers—Tendered ballot papers—Disclosure involving secrecy of ballot—Rejected ballot papers—Finality of decision of Returing officer—Inspection of counted ballot papers involving a recount—Should inspection be allowed.

Held: (1) *That a petitioner, who claimed a seat in Parliament on the ground that he had a majority of lawful votes at an election, was entitled to inspect the list of tendered ballot papers and the marked Register in view of the allegation that voters, who would have cast their votes in favour of the petitioner, had been personated.*

(2) *That an inspection of the tendered ballot papers containing the names of the voters and their numbers in the Register should not be allowed, for it would lead to a violation of the secrecy of the ballot.*

(3) *That the Returning Officer's decision on rejected ballot papers was final under Sections* 49 (5) *and* 87 *of the Order-in-Council and their inspection would serve no useful purpose.*

(4) *That when an inspection of any ballot paper involves the counting of ballot papers, such inspection would not be allowed at an earlier stage, as a recount would be made only at the trial of the petition.*

JAYAWEERA KURUPPU *vs.* HETTIARATCHI XXXVI. 3

Parliamentary Election—Petition—Amendment—Notice given to respondent's agent—Failure to attend and raise objections—Effect of order.

In making an application for the amendment of an Election Petition, the petitioner

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gave notice to the respondent's agent, who noted it, but did not attend the hearing. Subsequently, he applied to have the order set aside, on the ground it was made *ex parte*.

Held: *That in the circumstances, the order of amendment must be regarded as having been made* inter-partes *and cannot be reviewed.*

CORANELIS DE SILVA *vs.* WILLIAM DE SILVA ... ... XXXVI. 21

Section 54—Offence of personation—Triable summarily by Magistrate.

ATTORNEY-GENERAL *vs.* DHARMASENA XXXVI. 26

Election Petition—Ceylon (Parliamentary Elections) Order-in-Council, 1946, Sections 55, 58, (1) (d), 77 (a) and (c)—False statements of facts in relation to the personal character and conduct of petitioner, a candidate for election—Circumstances resulting from floods preventing majority of voters from electing the candidate they preferred—Charges of 'treating' 'undue influence' and 'bribery'—Proof necessary—Succouring refugees who are voters to alleviate distress—Does it amount to "treating."

Evidence Ordinance, Section 35—Official report of election speech—Absence of rough note and rough draft made—Admissibility—Presumption under Section 114 (*f*)—Failure to call material witnesses though available—When such presumption may not be made.

Two petitions Nos. 4 and 5 (dealt with as one in accordance with Rule 6 of the Parliamentary Election Rules 1946) were presented against the return of the Hon'ble Mr. G. E. de Silva as member of the Kandy Electoral District at an election held on 23rd August, 1947.

The petition No. 4 contained *inter alia* the following charges:—

(1) That the respondent by himself, his agents and other persons on his behalf made and published for the purpose of affecting the return of the petitioner false statements of fact in relation to the personal character and conduct of the petitioner to the effect that the petitioner had as a clerk in the Government Service accepted or obtained illegal gratifications, and consequently had been dismissed from Service.

(2) That by reason of circumstances attending on or following the floods in the District, including the disorganisation of the life of a large section of the voters, the segregation of the refugees who were voters, disturbance of communication and transport and the scarcity of petrol, the majority of voters were or may have been prevented from electing the candidate, whom they preferred at the election.

Petition No. 5 contained three further charges of (*a*) treating (*b*) undue influence, and (*c*) bribery.

In support of the first charge in petition No. 4, evidence was led to prove—

(*a*) That the respondent himself in a speech at a meeting held on 27-7-47 stated that the petitioner had accepted bribes while serving as a clerk in the Kachcheri;

(*b*) That a statement to the same effect was published by the agents of the respondent with his knowledge in a pamphlet produced as P 2;

(*c*) A similar statement published in a pamphlet produced as P 7.

The main evidence to establish (*a*) above was the written report P 1 submitted on the same day by a police officer, who, on orders from his superior, attended the meeting in question. It was contended on behalf of the respondent, that the report ought not to have been admitted in evidence as the police officer concerned did not in specific words repeat from the box the passage in it which was relied on, or say, that he, in fact, heard those words spoken by the respondent, although he said it was a true report of what happened when he was there.

Held: (1) *That the report P1 was admissible under Section* 35 *of the Evidence Ordinance.*

(2) *That the report was not any the less admissible from the fact that the original rough note made during the actual course of respondent's speech and a rough draft of the report made immediately afterwards have since been lost or destroyed.*

The latter part of charge (1) above in petition No. 4, *viz.*: "Consequently been dismissed from Government Service" was not proved and it did not form part of the report P 1.

Held further: *That the sting of the false accusation against the petitioner was that he had taken bribes and that alone was sufficient to constitute an offence under Section* 58 (1) (*d*) *of the Ceylon (Parliamentary*

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Elections) Order-in-Council, 1946. *The unproved remainder was mere surplusage.*

The Court held that (*b*) and (*c*) under charge (1) in Petition No. 4 above referred to were also proved beyond reasonable doubt and that the respondent had committed corrupt practices as defined in Section 58 (1) (*d*) of the Order-in-Council.

Held further: (1) *That where a party omits to place before Court what would have been the best evidence to support its case, the Court would not presume under Section* 114 (*f*) *of the Evidence Ordinance that such evidence would have been unfavourable to the party withholding it, if the Court is satisfied that the reason why such witnesses were not called was because such witnesses had indicated that they would decline to give evidence in its favour—evidence whereby they might inculpate themselves in the commission of an offence.*

In support of charge (2) *above in Petition No.* 4 *it was contended on petitioner's behalf:*

(*a*) *That by reason of the circumstances attending the floods, the refugees were not in the mood for voting;*

(*b*) *That the refugees would naturally place to the personal credit of the respondent his official activities as Minister of Health in seeing to their welfare and those of his son as Mayor;*

(*c*) *That the petitioner and his agents were obstructed from having access to the refugee camps.*

Held further: (1) *That this charge was not proved as the evidence led failed to show how many refugees affected by the floods were voters, how many such voters abstained from polling, or that if any did so, that it was by reason of circumstances arising by floods, or that the polling percentage was lower in those districts in the electorate which were the worst affected by the floods.*

(2) *That relief granted to the refugees to alleviate their distress could not be said to have been given with the corrupt object of influencing them to vote for the respondent. Hence such succour to refugees did not amount to treating within the meaning of Section* 55 *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946.

The charges of treating and undue influence in Petition No. 5 were held to have been not proved. The charge of bribery as against an agent of the respondent was held to be proved.

Held further: *That a charge of undue influence must be proved beyond reasonable doubt; a strong suspicion is not sufficient.*

The election of the respondent was declared void subject to the incapacities set out in Section 58 (2) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946.

ILLANGARATNE AND ANOTHER *vs.* G. E. DE SILVA ... ... XXXVI 97

Election petition—Printing, publishing and distributing pamphlets—Should names and addresses of both printers and publishers be given—Corrupt practice—Need for proof that corrupt act was done with corrupt mind—Agency—Burden of proof—Circumstances indicating agent's object to betray candidate—Effect—Ceylon (Parliamentary Elections) Order-in-Council, 1946, Section 58 (1) (c).

Held: (1) *That where agency is admitted by a respondent to an election petition as being for a limited purpose only, it is for the petitioner to prove that it is of a wider nature in order to bring the act complained of home to the respondent.*

(2) *That where an agent of a candidate for election commits a corrupt act in circumstances giving rise to a suspicion that it was done with the object of betraying such candidate, it would be quite unsafe and improper to allow a petition against such candidate to succeed on that ground.*

(3) *That the mere insertion of such words as "Swastika Press, Colombo," at the foot of an election pamphlet is not a sufficient compliance with the requirement of Section* 58 (1) (*c*) *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946, *that the names of both printer and publisher should be given.*

(4) *That a non-compliance with Section* 58 (1) (*c*) *cannot be held to be a corrupt practice (carrying severe penal consequences) in the absence of proof that it was done with a corrupt mind, since the words of the statute did not unequivocally provide that a corrupt mind was not an essential ingredient of the offence.*

PERERA *vs.* JAYAWARDENE XXXVII 17

Section 58 (1) (a)—Offence of personation—Can such offence be tried by Magistrate who is also District Judge under Section 152 (3) of the Criminal Procedure Code.

Held: *That the offence of personation created by Section* 58 (1) (*a*) *of the Ceylon*

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(Parliamentary Elections) Order-in-Council, 1946, cannot be tried by a Magistrate under 152 (3) of the Criminal Procedure Code.

THE ATTORNEY-GENERAL *vs.* SINNATAMBY ... ... XXXVII. 48

Election Petition—Ceylon (Parliamentary Elections) Order-in-Council, 1946, Section 77 (e)—Election sought to be set aside on grounds that respondent was at the time of election disqualified for election as member—Respondent, shareholder of Company having contracts with the Government of Ceylon for services of the Crown in the Island—Is it a disqualification within the meaning of Section 13 (3) (c) of the Ceylon (Constitution) Order-in-Council, 1946.

The petitioner prayed for a declaration that the election of the respondent was void under paras, (*c*) and (*e*) of Section 77 of the Ceylon (Parliamentary Elections) Order-in-Council, 1946. The charge under para, (*c*), (bribery), was struck off as the petitioner failed to furnish particulars within the time allowed by an order of Court. The trial of the charge under Section 77 (*c*) (that respondent was at the time of election disqualified for election as member) was proceeded with and the following facts were established in support:—

(*a*) That the respondent, who was returned at a Parliamentary Election held on the 23rd August, 1947, as member for Kayts, was a shareholder and the Managing Director of the Cargo Boat Despatch Company, Limited, which had entered into contracts with the Government of Ceylon, acting through its duly constituted agents—contracts which came within the description referred to in Section 13 (3) (*c*) of the Ceylon (Constitution) Order-in-Council, 1946.

(*b*) That the contracts were:—

(i) For the performance of the service of taking delivery from the Landing Company of Government cargo landed from vessels arriving in the Port of Colombo between the 1st of May, 1947 and the 30th September, 1947, and delivering such cargo at the places indicated by the authorities.

(ii) For the performance from 7th August, 1947, (until terminated by 3 months' notice) of the services of the carriage and haulage from ships' side in the Port of Colombo to shore, warehousing and loading into transports of food or other cargo and all such services incidental thereto.

(*c*) That on the 1st contract the Company was paid Rs. 17,990.02 for the months of May, June, July, August and September, 1947; on the 2nd contract, between 5th August, 1947, and 31st July, 1948, a sum of Rs. 636,009.92 approximately was paid to the Company.

(*d*) That for the year April, 1947 to March, 1948, the respondent received a dividend of Rs. 10,999.20 after deduction of Income Tax.

Held: *That the respondent, as a shareholder of the said Company, indirectly enjoyed a benefit under the said contracts within the meaning of Section 13 (3) (c) of the Ceylon (Constitution) Order-in-Council, 1946, and, therefore, he was at the time of his election a person disqualified for election as a member of Parliament.*

KULASINGAM *vs.* THAMBIAYAH XXXVIII. 6

Petition to declare election void—Particulars furnished of alleged corrupt practice relate to wrong period—Application to amend petition by adding fresh charge.

Held: (1) *That where the particulars furnished in respect of the alleged commission of a corrupt practice on a specified date relate to a period before such date, they should be struck out.*

(2) *That an application to amend an election petition by adding a fresh charge long after it was filed should not be allowed.*

BELIGAMMANA *vs.* RATWATTE XXXVIII 29

Election Petition—Company having contracts with the Government of Ceylon of the description referred to in Section 13 (3) (c) of the Ceylon (Constitution) Order-in-Council, 1946—Is a shareholder of the Company disqualified under Section 13 (3) (c)—Validity of the Parliamentary Elections (Amendment) Act, No. 19 of 1948—The Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, Sections 13 (3) (c) and (h) and 29 (4)—The Ceylon (Parliamentary Elections) Order-in-Council, 1946, Sections 81, 82, 82A,

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82B, 82C and 82D—The Parliamentary Elections (Amendment) Act, No. 19 of 1948.

On an election petition the Election Judge held that the appellant, who was a shareholder of a Company which had entered into contracts with the Government of the description referred to in Section 13 (3) (*c*) of the Ceylon (Constitution) Order-in-Council, 1946, indirectly enjoyed a benefit under the said contracts and was therefore disqualified for election as a Member of the House of Representatives. The Election Judge, accordingly, declared the election to be void.

On appeal, the following points were raised by way of preliminary objection:—

(*a*) That the Ceylon (Parliamentary Elections) Order-in-Council, 1946, and the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, form one Act or Enactment and that the Parliamentary Elections (Amendment) Act, No. 19 of 1948, which amended the first-mentioned Order-in-Council was invalid as it was not passed in accordance with the proviso to Section 29 (4) of the second-mentioned Orders-in-Council.

(*b*) That Section 3 and 4 of the Parliamentary Elections (Amendment) Act No. 19 of 1948 involve an amendment or repeal of Section 13 (3) (*h*) of the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947, and are invalid as they had not been passed in accordance with the proviso to Section 29 (4) of those Orders-in-Council.

On the main appeal it was argued that a shareholder of such a Company was not disqualified under Section 13 (3) (*c*) of the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947.

Held: *On the preliminary objections:*

(1) *That the words "this Order" in Section* 29 (4) *of the Ceylon (Constitution and Independence) Orders-in-Council,* 1946 *and* 1947 *refer to the Ceylon (Constitution) Order- in-Council,* 1946, *as amended by the amending Orders-in-Council and the Ceylon (Independence) Order-in-Council,* 1947, *and not to the Ceylon (Parliamentary Elections) Order-in-Council,* 1946.

(2) *That the provisions of the Parliamentary Elections (Amendment) Act, No.* 19 *of* 1948, *relating to a report by the Supreme Court, so far as it embodies a finding that a corrupt or illegal practice has been committed, are* ultra vires *but are severable from the remaining provisions of the Act which are* intra vires.

Held: *On the main appeal:*

(1) *That in Section* 13 (3) (*c*) *of the Ceylon (Constitution and Independence) Orders-in-Council,* 1946 *and* 1947, *the word "holds" should be read only with "right" and the word "enjoys" with "benefit."*

(2) *That a person indirectly enjoying a benefit under a contract must be enjoying it by virtue of a tie of law connecting him with the person directly holding a right under the contract or directly enjoying a benefit under the contract.*

(3) *That a shareholder in a Company with limited liablity duly incorporated under the Joint Stock Companies Ordinance,* 1861 *is not a person falling within the scope of Section* 13 (3) (*c*), *and is, therefore, not liable to disqualification.*

THAMBIAYAH *vs.* KULASINGHAM XXXVIII 53

Sections 62 and 70—Return respecting election expenses—Evidence of illegal practice.

Held: (1) *That a charge under Section* 62 (2) *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946, *cannot be laid against an unknown person.*

(2) *That a return respecting election expenses need contain no information which is not required by Section* 70.

ALUWIHARE *vs.* NANAYAKKARA XXXVIII. 65

Election petition—Application to amend statement of particulars—Delay—Prejudice to respondent—Refusal of application.

Held: *That an application by the petitioner to amend the statement of particulars with regard to one important fact will not be allowed, where there was long delay on the part of the petitioner in moving the Court*

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and where the amendment, if allowed, will prejudice the respondent's case.

ALUWIHARE *vs.* NANAYAKKARA XXXVIII. 66

Election petition—Charges of bribery, treating, publication of false statements regarding character or conduct of candidate, and distributing handbills and placards not bearing the names and addresses of Printer and Publisher—Ceylon (Parliamentary Elections) Order-in-Council, 1946, Sections 55, 57, 58, (1) (c) and 58 (1) (d)—Burden of Proof—What constitutes treating—Caution necessary in receiving evidence of witnesses who say they were corruptly treated—What is necessary to be proved to constitute offences under Sections 58 (1) (c) and 58 (1) (d)—meaning of words " names and addresses " —Is *mens rea* necessary to constitute offence under Section 58 (1) (c).

In his petition to have the election of the respondent to represent the electoral district of Matale declared void the petitioner set out several charges of which evidence was led at the trial only on the following:—

(*a*) Bribery—in that the respondent, subsequent to the announcement of his candidature for the Matale Electoral District, contributed a sum of Rs. 333.70 to the fares and expenses of the travel to see 'the Buddhist relics in Colombo,' being a part of a sum paid by the respondent on account of the Railway fares in respect of the said journey—a net contribution of cents 40 to the expenses of each person.

(*b*) Treating—which, according to particulars supplied related to treating with refreshments, arrack, aerated waters and bread on 18-9-47 by the respondent and another at the house of Juanis Baas *alias* Juwanis Appu at Selagama.

(*c*) Publication of false statements regarding the character or conduct of the petitioner in a pamphlet in Sinhalese by an anonymous writer.

(*d*) Distribution of handbills, placards or posters referring to the elections and not bearing upon its face the names and addresses of its Printer or Publisher, offences under Sections 57, 55, 58 (1) (*c*) and 58 (1) (*d*) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946.

The learned trial Judge, holding that the charges were not proved, dismissed the petition.

Held: (1) *That in the trial of an election petition the standard of proof required is the same as in a criminal case,* viz., *proof beyond reasonable doubt, and any reasonable doubt should be resolved in favour of the respondent.*

(2) *That in a charge of treating under Section* 55 *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946, *it is not sufficient to show that eating and drinking took place under the eyes of the candidate, but it must be shown that the eating and drinking was supplied at the expense or upon the credit of the candidate, either by his authority or by the authority of one or more of his agents in order to influence voters.*

(3) *That the evidence of witnesses who say they were corruptly treated should be received with the caution with which the evidence of those who confess they were participating in an offence is generally regarded.*

(4) *That before a person can be found guilty of any offence under Section* 58 (1) (*d*) *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946 *there must be evidence that the statements of fact published are false in relation to the personal character or conduct of a candidate.*

(5) *That Section* 58 (1) (*c*) *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946 *should be construed consistently and in conformity with the Printing Presses Ordinance.*

(6) *That for the purposes of Section* 58 (1) (*c*) *the name of the Printer should be the Printer's true name in full and similarly the name of the Publisher should be his true name in full.*

(7) *That the address does not mean the place where the Printer resides, but premises where the press is, the name or number of the street and the name of the place where the street is situated. Similarly the Publisher should give a true and precise description of the place from where he conducts his business of Publisher.*

(8) *That when the Printer and Publisher are one and the same person it should be so stated and the name and address*

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given if both printing and publication are carried on at the same address. Otherwise the address at which publication is made should be separately stated.

(9) *That* mens rea *is not necessary to constitute an offence under Section* 58 (1) (*c*).

(10) *That the handing of a handbill or pamphlet to a person on a solitary occasion does not amount to distributing the pamphlet within the meaning of Section* 58 (1) (*d*).

ALUWIHARE *vs.* NANAYAKKARA XXXVIII. 101

Election Petition—Costs awarded—Bill taxed by Deputy Registrar and not by Registrar as required by Rule 33 of Parliamentary Election Petition Rules, 1946—Is such taxation valid—Interpretation Ordinance, Section 11 (c)—Its applicability.

Rule 33 of the Parliamentary Election Petition Rules, 1946, provides that the costs awarded to a successful party in an election petition shall be taxed by the Registrar.

Held: (1) *That a Deputy Registrar has no power to tax the bill for costs awarded to a successful party at an inquiry into an election petition.*

(2) *That Section* 11 (*c*) *of the Interpretation Ordinance enables a deputy or subordinate to perform the duties of his chief or superior when he is acting in place of his chief or superior and lawfully executing the duties that appertain to the office of his chief or superior.*

BELIGAMMANA *vs.* RATWATTE XLIII. 47

Section 13 (3)—Can Revising Officer's decision be reviewed by *certiorari.*

MUDANAYAKE *vs.* SIVAGNANASUNDARAM XLV. 49

Election petition—Allegation that ballot papers delivered to voters not stamped or perforated with official mark resulted in votes given for petitioner not counted as votes—Is Returning Officer a necessary party to such petition.

Application for inspection of documents—When should it be granted—Ceylon (Parliamentary Elections) Order-in-Council, 1946, Sections 42 (2), 45, 47 (1), 48 (10), 49 (1).

Where in an Election Petition the only allegation against the Returning Officer is that " many ballot papers delivered to the voters were not stamped or perforated with the official mark as required by Section 42 (2) of the said Order-in-Council" with the result that a large number of votes given in favour of the petitioner were not counted as votes for him.

Held: *That the Returning Officer is not a necessary party to such petition.*

Held also: (1) *That the Court should allow a petitioner to inspect and take copies of* (a) *the tendered votes lists;* (b) *the declarations made by persons who voted on tendered ballot papers; and* (c) *the marked register, where the Court is satisfied that these documents are necessary to enable the petitioner to maintain any particular charge or charges in the petition.*

(2) *That only the inspection of " rejected ballot papers which were not stamped or perforated with the official mark will be allowed." The petitioner will have no right to take copies thereof.*

MUNASINGHE *vs.* S. C. S. COREA *et al* XLVIII. 99

Election petition—Application for leave to amend by inclusion of additional ground of " corrupt practice "—Meaning of the expression " corrupt practice "—Does it include the making of a false return as to election expenses?—Should such " corrupt practice " be followed by payment of money or something akin thereto?—Is the making of a false return a ground questioning the validity of an election?—Ceylon (Parliamentary Elections) Order-in-Council, 1946, Sections 58 (1) (f), 83 (2), 77 (c), 83 (1) (a), 76.

On an application for leave to amend an election petition by the inclusion of the additional ground of " corrupt practice."

Held: (1) *That an election petition filed on* 23-6-52 *upon the result being published in the Gazette on* 2-6-52, *was presented in due time.*

(2) *That it was the duty of the Court to satisfy itself that an election petition had been presented in due time irrespective of any objection being raised by counsel at the hearing thereinto.*

(3) *That the making of a false return as to election expenses was a " corrupt practice " within the meaning of Section* 58 (1) (f) *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946, *and is, accordingly, a ground for seeking to have an election*

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declared void under Section 77 (c) *of the said Order-in-Council.*

(4) *That a "corrupt practice" need not be followed by a payment of money or something akin thereto.*

CHELVANAYAKAM *vs.* NATESAN XLVIII. 105

Election petition—Notice of presentation of—Service—How should it be effected—Publication of such notice in Government Gazette after appointment of respondent's agent and lodging at the Registry addresses for service—Is such publication an alternative procedure for service—Ceylon (Parliamentary Elections) Order-in-Council, 1946, Schedule Three, Rules 9, 10, 11, 15 and 35.

The petitioner, in his petition dated 21st June, 1952, prayed *inter alia* that the election of the respondent as a member of Parliament for the Chavakachcheri electorate be declared void.

The last day for service of notice of presentation of the petition on the respondent was the 1st of July, 1952.

It was proved that the respondent, in compliance with Rule 10 of the Third Schedule to the Ceylon (Parliamentary Elections) Order-in-Council, 1946, had on 25th June, 1952, lodged at the Supreme Court Registry a writing appointing one A, a Proctor, as his agent and giving their respective addresses. On the same date A lodged a notice in terms of Rule 35.

The petitioner's Proctor caused the publication of a notice of presentation of the petition in the Government Gazette of 27th June, 1952, and further made unsuccessful attempts to serve notice by posting three registered letters dated 28th June, 1952, to various addresses of the respondent.

Thereafter on the 2nd August, 1952, the respondent's agent moved that no further proceedings be had on the petition and that it be rejected on the ground that the petitioner had failed to give notice of presentation of the petition as required by Rule 15 of the said 3rd Schedule.

Held: (1) *That the notice given in the Government Gazette on the 27th June,* 1952, *was of no avail to the petitioner as the respondent had appointed his agent and given his address to the Registry earlier, to wit, on 25th June,* 1952. *Notice by publication in the Gazette is not alternative to the two methods referred to earlier in Rule* 15.

(2) *That when the respondent has made an appointment under Rule* 10 *the petitioner would have the option of serving the notice by posting the same in a registered letter to the address given under Rule* 10, *and it is immaterial then, whether or not the person, to whose address the petitioner was authorised to send the letter by post, received it or not.*

(3) *That the words "at any time" in Rule* 10 *cannot be given a limited construction to mean that a member may nominate an agent under this Rule only up to the date immediately before the presentation of the petition.*

(4) *That the date of placing of a notice with the Government Printer for publication in the Gazette is not the material date. The material date is the date on which the notice appeared in the Gazette.*

KANDIAH RAMALINGAM *vs.* VELUPILLAI KUMARASWAMY ... ... XLIX. 1

Election petition—Notice of presentation of—Mode of service—Ceylon (Parliamentary Elections) Order-in-Council, 1946—Schedule 3, Rules 15, 10—Is failure to give notice under Rule 15 a fatal defect?—Section 86 (2) Ceylon (Parliamentary Elections) Order-in-Council, 1946—English Petition Rules 14, 15, 60—Comparison of.

Held: (1) *That where an election petition is filed to set aside an election, notice of the presentation of the petition must be served by the petitioner on the respondent in the manner prescribed by Rule* 15 *in Schedule* 3 *of the Ceylon (Parliamentary Elections) Order-in-Council,* 1946.

(2) *That failure to comply with Rule* 15 *is a fatal defect to the hearing of the petition.*

(3) *That mere knowledge or possibility of knowledge by the respondent of the presentation of the petition does not amount to notice and does not dispense with the requirement as to the service of notice.*

(4) *That the modes of service under Rule* 15 *is not exhaustive in that it does not preclude from effecting service on the respondent personally by delivering the notice and copy to him by his own hand or that of an agent.*

(5) *That the material date for publication in the Government Gazette under Rule* 15 *is the date on which the notice appeared in the Gazette and not the date on*

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which the notice was handed to the Government Printer.

(6) *That Rule* 10 *in Schedule* 3 *of the Order-in-Council,* 1946 *was not meant to apply, to, and does not, in fact, apply to the service of notice of presentation of the petition, and that leaving a copy of the notice and of the petition with the Registrar does not amount to a notice under Rule* 15.

P. A. COORAY *vs.* H. J. G. FERNANDO ... ... XLIX. 29

Constitutional Law—Indian Tamil and British subject residing in Ceylon—Right to vote—Citizenship Act No. 18 of 1948, Sections 4 and 5—Ceylon (Parliamentary Elections) Amendment Act No. 48 of 1949, Section 4 (1) (a)—Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Do they contravene Section 29 (2) of the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947?—Tamil Community in Ceylon—Legislative discrimination against—Legislative power of Parliament—Scope of—*Maxim omnia praesumuntur rite esse acta***—Community—Characteristics of.**

The appellant, an Indian Tamil born in India sought to have his name registered as an elector in the Register of Electors prepared under the Ceylon (Parliamentary Elections) Order-in-Council, 1946. He supported it by an affidavit stating that he possessed the requisite residential qualification and that he was a British subject. He claimed that the alternatives in the qualification to be an elector effected by Act 48 of 1949 was not valid as it was *ultra vires* the Legislature.

The Registering Officer, after inquiry, disallowed the claim on the ground that he was not a citizen of Ceylon under Citizenship Act No. 18 of 1948. On appeal the Revising Officer held that the Acts in question were *ultra vires* as they were part of a legislative plan to reduce the electoral power of the Indian community.

The Supreme Court under a writ of *Certiorari* quashed the Revising Officer's order holding firstly, that the affidavits relating to the history of Indian immigration into Ceylon and the position of Indian residents under the Citizenship and Franchise Acts tendered at the hearing before the Supreme Court ought not to be admitted and was irrelevant; secondly, that a Court should not search among state papers and other political documents for the substance or the true nature and character of an impugned statute without permitting the language of the statute to speak for itself where such language is clear and unambiguous; and thirdly, the statutes in question do not upon their faces make the Indian Tamil Community liable to any disability to which other communities are not liable.

At their Lordships' Board, it was contended for the appellant that although the Citizenship Act and Franchise Acts do not upon their faces discriminate against the Indian Tamil Community they indirectly have that effect, since on the evidence and as was conceded by the Attorney-General a large number of Indian Tamils cannot become citizens of Ceylon, and that the Acts disclose the intention of the legislature to do indirectly what admittedly it cannot do directly, namely, to make persons of the Indian Tamil Community liable to a disability to which persons of other communities are not made liable.

Held: (1) *That the Citizenship and Franchise Acts are* intra vires *of the Ceylon legislature as, when these Acts are looked at as a whole, it is evident that the legislature does not prevent Indian Tamils from attaining citizenship, and therefore, the Acts do not contravene Section* 29 (2) (*b*) *of the Constitution Order-in-Council.*

(2) *That judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed.*

Per LORD OAKSEY—(*a*) "The principle that a legislature cannot do indirectly what it cannot do directly has always been recognized by their Lordships' Board and a *legislature must, of course, be assumed to intend the necessary effect of its statutes.* But the maxim *omnia praesumuntur rite esse acta* is at least as applicable to the Act of a legislature as to any other acts and the Court will not be astute to attribute to any legislature motives or purposes or objects which are beyond its power. It must be shown affirmatively by the party challenging a Statute which is upon its face *intra vires* that it was enacted as part of a plan to effect indirectly someting which the legislature had no power to achieve directy.

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(*b*) "A community is not bound together as a community by its illiteracy, its poverty or its migratory character but by its race or its religion."

GOVINDAN SELLAPPAH NAYAR KODAKAN PILLAI *vs.* PUNCHI BANDA MUDANAYAKE AND OTHERS ... ... XLIX. 33

Election Petition—Notice of presentation of petition published by petitioner in Gazette —Notice not served on respondent's agent as required by Rule 15 of the Parliamentary Election Rules 1946—Petition dismissed for breach of the Rule—Appeal under Section 82A (1) of the Parliamentary Elections (Amendment) Act No. 19 of 1948—Does appeal lie?— "Determination" of Election Judge under Section 81 of the Act—Meaning of.

The petitioner, having filed an election petition against the respondent, gave notice of the presentation of the petition in the *Government Gazette*, and did not serve it on the respondent's agent as required by Rule 15 of the Parliamentary Election Rules. The Election Judge dismissed the petition for this reason, and did not issue a certificate to the Governor in terms of Section 81 of the Ceylon (Parliamentary Elections) Order-in-Council.

The petitioner appealed under Section 82A (1) of the Act. To the preliminary objection of the respondent that no appeal lay from the order of the Election Judge, the petitioner contended that he had a right of appeal to the Supreme Court under Section 82A (1) of the Act on any question of law and that an Election Judge should regard Section 81 as requiring him to issue a certificate in all cases, even where the petition is rejected on the ground of non-compliance with one of the conditions precedent to its determination, as the rejection of a petition on such grounds necessarily implies a determination that the respondent member has been duly returned or elected.

Held: (1) *That no appeal lay under Section* 82A (1) *of the Act as there had been no "determination" by the Election Judge within the meaning of Section* 81 *of the Order-in-Council.*

(2) *That where the Supreme Court reverses a determination on appeal under Section* 82A (1), *it has no power to remit a matter to the Election Judge for further consideration or for disposal of the remaining issues, and its decision is final and conclusive.*

KANDIAH RAMALINGAM *vs.* VELUPILLAI KUMARASAMY ... ... L. 17

Election petition—Grounds alleged by petitioner to set aside election—(a) Non-compliance with Section 77 (b) of Ceylon (Parliamentary Elections) Order-in-Council, 1946, (b) Return of respondent undue—Some ballot papers issued without official mark or perforation and missing—Negligible number in comparison with ballot papers issued— Does this amount to non-compliance with Section 77 (b)—Votes impersonated—Mode of counting such votes—Sections 85 (1) (c), (3)—Section 45, 51 (1) of the Order—Scope of.

The petitioner sought to set aside the election of the respondent on two ground:— (1) firstly, that there has been a non-compliance with the provisions relating to elections in the Order-in-Council within the meaning of Section 77 (*b*) of the Order; (2) secondly, that the return of the respondent was undue and incorrect and did not conform to the provisions of Section 85 of the Order.

In respect of the first ground, it is agreed that out of 26,000 thirty-two ballot papers had been issued without official mark or perforation, and eight ballot papers were missing, there being no evidence as to how they were lost. The failure to perforate the ballot papers was not due to carelessness or negligence of the officers but to human fallibility. The thirty-two ballot papers were not taken into account in counting the votes in favour of any of the candidates and they were rejected by the Returning Officers in terms of Section 49. It was contended for the appellant that the omission to perforate the ballot papers and loss of ballot amounted to a non-compliance with the provisions of the Order-in-Council.

In regard to the second ground, the Election Judge reduced the majority of the respondent from 54 to 8 on the basis that every vote impersonated and every tendered vote which was regarded as valid were assumed to have been cast against the respondent.

There were eleven cases of impersonation, in each of which there were at least two voters bearing identical names and registered as voters at the same polling booth, and there was nothing to identify an

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entry in the register as relating to a particular voter, and it was not possible for the true voters to say which entry in the register related to any one of them.

The petitioner contended that the trial Judge should add to the poll the eleven votes for the reason that it was sufficient in terms of Section 45 of the Order if a voter whose name appears on the register proves that he is a voter without being called upon to establish his identity with a particular entry in the register, and that the addition of a tendered vote to the poll is not dependent upon striking out any or an alleged corresponding impersonated vote.

The learned Election Judge took the view that under Section 85 of the Order before he could add a tendered vote he must be in a position to strike out the corresponding impersonated vote.

Held: (1) *That in order to set aside an election under Section 77 (b) of the Order the petitioner must establish not merely non-compliance with the provisions of the Order-in-Council but that the non-compliance was of such degree and magnitude that it could reasonably be said that as a result of such non-compliance the electors had not been given a fair opportunity of electing the candidate of its choice and that there was no evidence in this case to justify such an inference.*

(2) *That the Election Judge was correct in his interpretation of Section 85 of the Order.*

J. C. W. MUNASINGHE *vs.* S. C. S. COREA
L. 37

Election Petition—To declare void appellant's election on ground of corrupt practice —Publication of documents without appellant's name or address and publisher—Section 58 (1) (c) Ceylon (Parliamentary Elections) Order-in-Council, 1946—Making a declaration as to expenses falsely—Section 58 (1) (f)—Corrupt intention, essential element of offence—Section 83 (1) (a) of the Order-in-Council—Scope of—Ceylon (Parliamentary Elections) (Amendment) Act No. 26 of 1953—Retrospective effect of—Appellate Jurisdiction under Section 82B—English Parliamentary Elections Act 1868 compared.

After a contested election on 24th May, 1952, the appellant was declared the successful candidate. On 16th June, 1952, *i.e.*, within 21 days of the *Gazette* notification of the result the respondent filed a petition challenging the election on various grounds. On 27th June, 1952, *i.e.*, 11 days after the petition the appellant, forwarded a declaration of his election expenses, which was published in the *Gazette* on 11th July, 1952. The respondents applied on 24th July, 1952, for leave to amend the petition under Section 83 (2) of the Ceylon (Parliamentary Elections) Order-in-Council, 1946, by including, as an additional ground, the allegation that the appellant had also committed a corrupt practice punishable under Section 58 (1) (*f*) of the Order-in-Council.

The Election Judge after trial declared void the appellants' election on the grounds (1) that he had " published " documents for his election campaign without his name or address and that of the publisher and had thereby committed a corrupt practice within the meaning of Section 58 (1) (*c*) of the Order-in-Council (2) that he had committed a corrupt practice within the meaning of Section 58 (1) (*f*) of the Order-in-Council by knowingly making a declaration as to his election expenses falsely.

In respect of the first ground, it was urged on behalf of the appellant that to establish a " corrupt practice " within Section 58 (1) (*c*) there must be proof of a corrupt intention accompanying the commission of the acts complained of, and that the Election Judge was wrong in holding that a corrupt intention need not be established as an element of the offence.

In regard to the second ground, it was urged that (*a*) there was no evidence to support the finding that the appellant had committed the corrupt practice in question (*b*) that the Election Judge had no jurisdiction to unseat the appellant for the alleged breach of Section 58 (1) (*f*) for the reason that Section 83 (1) proviso (*a*) applies only to corrupt practices previously committed but implemented subsequently by a payment of money or by the doing of some similar act, and that the proviso has no application to corrupt practices committed exclusively after the closing of the poll, as in this case.

Held: (1) (GRATIAEN, J. *dissenting*).

(a) *That the appellant did knowingly make a false declaration of election expenses.*

(b) *That the making of such declaration is a corrupt practice.*

(c) *That such corrupt practice is a ground for avoiding the election and is*

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covered by Section 83 (1) (a) *of the Order-in-Council.*

(d) *That the phrase in "pursuance or in furtherance of the corrupt practice in proviso of Section* 83 (1) *merely refers to the carrying out the act which constitutes the corrupt practice and not that there should be a link or connection between the corrupt practice as an isolated act and the payment of money or other act.*

(2) NAGALINGAM, A.C.J., *dissenting that there must be proof of corrupt intention to establish the offence within Section* 58 (1) (c) *and as there is no finding on evidence to justify the finding that the act was committed corruptly, the Election Judge's determination in respect of the allegation must be set aside.*

(3) *That the amending Act Ceylon (Parliamentary Elections) (Amendment) Act No.* 26 *of* 1953, *had no relevancy to the determination of the issues in the petition and could not alter the meaning of the words in Section* 58 (1) (c) *of the Order-in-Council as the amendments did not represent the law which the Election Judge was under a duty to apply.*

(4) *That Section* 58 (1) (c) *requires the identity of both the "printer" and the "publisher" to be disclosed in the printed documents of the description specified.*

(5) *That the word "candidate" in Section* 77 (c) *includes a member who is elected.*

E. L. SENANAYAKE *vs.* H. M. NAVARATNE AND ANOTHER ... ... L. 49

CEYLON (STATE COUNCIL) ORDER-IN-COUNCIL, 1931

Article 9 (d) Lease of house to head of Government Department as agent of the Crown.

Held: *That a lease of a house to the head of a Government Department acting as the agent of the Crown, for the use of such department is a contract falling within the ambit of Article* 9 (d) *of the Ceylon (State Council) Order-in-Council,* 1931.

SOMASUNDERAM *vs.* KOTALAWELA VI. 101

Article 9 (d)—Person having contracts with Government seeking election to the State Council—Formation of incorporated company to take over contracts of such person before nomination day—New company a sham—Does such person come within the disqualification in Article 9 (d).

Held: *That a Government contractor cannot escape the disqualification created by Article* 9 (d) *by merely transferring his contracts to an incorporated company, which is specially designed for the purpose of providing a cover under which he may remain as the virtual contractor though not in name.*

DAHANAYAKE *vs.* PIERIS ... XXVIII. 58

Articles 8, 9, 10, 11 and 15—Action by common informer—For recovery of penalty from State Councillor for having sat and voted while disqualified—Evidence necessary to prove that defendant sat and voted as aforesaid.

DE ZOYSA *vs.* WIJESINGHE ... XXXI. 5

Article 86 (2)—Effect of—Read with Royal Instructions—Public officers holding office during the pleasure of the Crown.

VALLIPURAM *vs.* POSTMASTER-GENERAL ... ... XXXIX. 1

CEYLON (STATE COUNCIL ELECTIONS) ORDER-IN-COUNCIL, 1931

Sixth Schedule—Rule 12 (2) Scope of the word "charges" therein.

Held: *That by the word "charges" in Rule* 12 (2) *is meant the various forms of misconduct coming under the description of corrupt and illegal practices.*

Any number of acts of the same kind of offence sought to be provided against a respondent amount to one "charge" within the meaning of this Rule.

SENADIRAGE DON DAVID TILLEKEWARDENA *vs.* F. A. OBEYSEKERA ... I. 12

Article 83—Sixth Schedule Rules 4 (4) 5, 6 and 12—Request for particulars of offences—Meaning of the expression "particulars"—Time within which particulars should be furnished.

Held: *That when an allegation in a petition is wide enough to include a variety of charges it has always been the practice to order at once particulars of the nature of the charges comprised under it. There is no inflexible Rule as to the period within which the particulars should be furnished.*

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Particulars of the nature of an act does not mean particulars as to who committed it.

The provision in our Rules requiring additional security where the charges are more than three in number is no authority for requiring that the petition should contain reference to each case of bribery or treating.

Where several acts of bribery or several acts of treating are alleged against a respondent, he is for the purposes of the election petition charged with only two offences, *viz.*, bribery and treating.

SENADIRAGE DON DAVID TILLEKEWARDENA *vs.* F. A. OBEYESEKERA I. 15

Article 83. Rules in the Sixth Schedule—Rules 12, 16, 18, 19 and 21. Specific charges and general charges—Recognizance required—How and by whom signed—Can the defect in a recognizance which is not in compliance with Rule 12, be cured?

Held: (1) *That charges of general bribery, general treating and general intimidation are distinct charges from those of bribery, treating and undue influence in regard to ascertained and named persons dealt with in Articles* 51, 52 *and* 53 *respectively.*

(2) *That the form given in Rule* 16 *clearly shows that the recognizance is by the sureties only. In view of this form Rule* 12 (2) *must be regarded as requiring the petitioner to enter into a recognizance with two sureties.*

(3) *That Rules* 19 *to* 21 *do not apply to a case where the petitioner has not furnished security to the right amount.*

A. W. STEPHEN DE SILVA (PETITIONER) *vs.* J. B. KARALIADDE (RESPONDENT) I. 19

Rules in Sixth Schedule—Interpretation of Rule 12 (2).

Held: (1) *The failure to state in Rule* 12 (2) *the method in which the original security of five thousand rupees should be given is a* casus omissus *and by virtue of Article* 83 (4) *the English Law on the subject would be applicable.*

(2) *That the security of five thousand rupees required by Rule* 12 (2) *may be given either by a recognizance with sureties not exceeding four in number or by deposit of money in the manner prescribed in Rules* 13 *and* 44 *or partly in one way, and partly in the other, A recognizance so given should be signed by the principal as well.*

HIDDADURA BARTHOLEMEW MENDIS OF RAGAMA *vs.* JAYASURIYA ARACHIE DON PANTALION *alias* D. P. JAYASURIYA OF BILEULLA, KANDANA ... I. 48

Recognizance required by Rule 12 of the Sixth Schedule—Stamping of recognizance—Amount of stamp duty—Nature of Election proceedings—" The Stamp Ordinance 1909 " —Appropriate item of Schedule B under which the recognizance given in an Election inquiry should be stamped.

Held: *That an Election proceeding is not a civil proceeding but has rather the character of a criminal or quasi-criminal proceeding.*

A recognizance given in an Election proceeding has to be stamped as there is no exemption in the Stamp Ordinance for bonds given in favour of the Crown. The appropriate item of Schedule B under which such a recognizance should be stamped is item 15 (1) of Part 1.

PERIES (PETITIONER) *vs.* SARAVANAMUTTU (RESPONDENT) ... ... I. 81

Recognizance given by petitioner in Election petition—Is liable to stamp duty.

WIJESEKERA *vs.* COMMISSIONER OF STAMPS I. 258

Charges of corrupt practice and illegal practice—Bribery, treating and making of payments for the conveyance of voters—Agents of candidate proved to be guilty of illegal practice—Article 64 of the Ceylon (State Council Elections) Order-in-Council, 1931—Agent acting outside scope of principal's instructions—Extent of liability of principal.

Held: *That where an agent employed to borrow cars from friends went outside the scope of his instructions and hired cars and spent money on petrol, the principal (candidate) cannot be held responsible for the agent's illegal practice in as much as the agent's acts were outside the authority given him, and outside the agency entrusted him.*

TILLEKEWARDENE *vs.* OBEYSEKERA I. 92

Articles 78 and 83—Is appeal a matter of practice and procedure—Effect of the word " final " in Article 78—An appeal from one

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tribunal to another does not lie unless expressly provided for—Courts Ordinance § 40.

Held: (1) *That the right to carry a matter in appeal from the determination of one Court to another and the creation of a tribunal of appeal are not matters of procedure and practice.*

(2) *That there is no right of appeal unless it be expressly given.*

(3) *That a determination which is declared to be final means a determination from which there is no appeal.*

Per GARVIN, S.P.J.—" Now the terms " procedure " and " practice " ordinarily have reference to the Rules and practices which regulate the manner in which a matter should be brought before a tribunal and the mode of proceeding within that tribunal until finality is reached—for example the procedure and practice of the District Court, or the procedure and practice of the Court of Appeal.

This is in accordance with the view that the creation of a right of appeal and of an appellate jurisdiction are matters for the legislature and are not mere matters of procedure and practice for the regulation of which Rules may be made under the provisions of Article 83 (2)."

TILLEKEWARDENE *vs.* OBEYESEKERA I. 112

No appeal lies to Privy Council from judgment or order of an Election Judge.

WIJESEKERA *vs.* COREA ... I. 159

Rules 5 and 7 of the Rules in Schedule—Failure to file list of particulars within the due date—When may petition be dismissed.

Held: *That there is neither a Rule of Court nor a Rule of law entitling the respondent to ask that the petition should be dismissed merely because particulars had not been filed within the due date.*

BARTHOLOMEW MENDIS *vs.* JAYASURIYA I. 234

Article 74 (d) of The Ceylon (State Council Elections) Order-in-Council, 1931.

Held: *That for the purposes of Article* 74 (d) *it is not necessary to show that the disqualified person was directly engaged by the candidate in person. It is sufficient if it is proved that the candidate knew that the disqualified person was canvassing for such candidate. 'Canvass' means a solicitation for votes or for support, which solicitation may be made in various ways, such as by personal request to individuals by speeches or by the distribution of leaflets exhorting people to vote for a particular candidate.*

ABDUL LATIFF *vs.* NAYSUM SARAVANAMUTTU ... ... II. 60

Effect of failure to comply with Rule 18 of the Election Petition Rules 1931.

Held: *That failure to give notice of the presentation of the petition and of the nature of the security in the manner required by Rule* 18 *of the Election Petition Rules* 1931 *is a fatal defect for which the petition is liable to be dismissed.*

ARON *vs.* SENANAYAKE ... V. 51

Unstamped recognizance—Is petitioner entitled to proceed with the petition.

Held: *That the failure to stamp the recognizance furnished by the petitioner was a fatal irregularity which rendered the petition liable to dismissal.*

WIJESEKERA *vs.* COREA ... V. 56

Failure to serve copy of petition on respondent—Rule 18 of the Election (State Council) Petition Rules.

Where the petitioner's Proctor served a copy of the petition in another case on the respondent.

Held: (1) *That Rule* 18 *of the Election (State Council) Petition Rules had not been complied with and that the petition was liable to be dismissed.*

Held further, That an election petition cannot be withdrawn except in the manner prescribed in the Rules.

SAMARAKONE *vs.* GUNAWARDENA V. 106

Ceylon (State Council) Order-in-Council, Articles 9 (c) and (d)—Meaning and scope of the words " holds or enjoys any contract made or entered into with any person for or on account of the public service "—Are clauses (c) and (d) of Art. 9 mutually exclusive—In what circumstances might the unsuccessful candidate be given the seat.

Held: (1) *That the terms of the respondent's employment as Visiting Lecturer at the Ceylon University College were such as*

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brought him within the ambit of Article 9 (d) *of the Ceylon (State Council) Order-in-Council*, 1931.

(2) *That the terms of the respondent's employment as Examiner to the Education Department of the Government of Ceylon did not constitute a contract or agreement within the meaning of Article* 9 (d) *of the (State Council) Order-in-Council*, 1931.

(3) *That clauses* (c) *and* (d) *of Article* 9 *of the (State Council) Order-in-Council*, 1931 *were not mutually exclusive and that an office, not caught up by clause* (c), *if it falls within clause* (d), *would disqualify the holder from election.*

(4) *That the unsuccessful candidate cannot be given the seat, unless he proves to the satisfaction of the Election Judge that the disqualification of the respondent or the facts causing it were notorious.*

(5) *That for a fact to be "notorious" it must be a matter of common knowledge.*

COORAY *vs.* DE ZOYSA ... V. 111

Rules 18 and 19 of the Election (State Council) Petition Rules 1931—Effect of non-compliance with requirements of the Rules.

Held: (1) *That notice of presentation of an election petition published in the following form in the Gazette within ten days of the presentation of the petition did not constitute sufficient notice of the proposed security as required by Rule* 18 *of the Election (State Council) Petition Rules*, 1931.

"Notice is hereby given under Section 18 of the Rules made under Article 83 of the Ceylon (State Council Elections) Order-in-Council, 1934 and 1935 and that an election petition has been presented by Hewa Lunuwillage Piyadasa of Meddawatta in Matara against the election of Raja Hewavitarane as member of the State Council for the Electoral District of Matara at the election held on March 5, 1936. A copy of the said petition together with connected papers may be obtained by the said Raja Hewavitarane, the respondent to the said petition on application to the Office of the Registrar of the Supreme Court."

H. L. PIYADASA,
Colombo 31st March, 1936. Petitioner.

(2) *That a letter to the Registrar of the Supreme Court in the following form by the respondent to an election petition does not amount to an appointment of the person named therein as agent of the respondent.*

The Registrar,
The Supreme Court,
Colombo.

Sir,

I have the honour to request you to hand over to my Agent, Mr. Fred G. de Silva, Proctor, S.C., a copy of the charges framed against me in the election petition filed by one Piyadasa of Matara.

I beg to remain,
Your obedient servant,
RAJA HEWAVITARNE.

(3) *That the service of a notice, required to be served on the respondent to an election petition, on his agent's clerk is not sufficient service of such notice.*

(4) *That the fact that the respondent to an election petition has entered an appearance cannot cure any defect in the service of the prescribed notice.*

(5) *That an election petition is liable to be dismissed where notice of the proposed security is not given as required by Rule* 18 *of the Election (State Council) Petition Rules* 1931.

The decision in 5 C.L.W. 51 (In the matter of the election petition filed in respect of the Dedigama Electoral District) followed.

IN THE MATTER OF THE ELECTION PETITION AGAINST THE RETURN OF MR. R. HEWAVITARNE ... ... VI. 139

Election Petition—Charges of bribery, treating and undue influence—Recognisance—What should be its form—Rules 12 (2) and 16 of the Election Petition Rules—Petition and letter of appointment of agent—Should they be stamped?—Is notice given by an agent appointed by a writing not duly stamped a valid notice?

Held: (1) *That when a charge of bribery is made against a candidate instances or cases of bribery by an agent can be proved.*

(2) *That the law does not require an election petition to be stamped.*

(3) *That the appointment of an agent by the petitioner to an election petition for the purpose of receiving notices must be by a formal writing.*

(4) *That the formal writing appointing an agent must be stamped under*

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item 35 *of Part* 1 *of Schedule B to the Stamp Ordinance* 1909.

(5) *That it is sufficient compliance with Rule* 18, *if the notice of the nature of the proposed security states whether security has been given by deposit or by a recognisance with sureties.*

VINAYAGAMOORTHY *vs.* PONNAMBALAM VII. 21

Articles 60 (8) and 72—Non-compliance with the provisions as to return and declaration respecting election expenses—Delay due to ill-health—Authorized excuse—Circumstances in which the Supreme Court will extend its indulgence to a candidate who has failed to comply with the terms of the Order-in-Council.

Held: *That, where the candidate himself was his own election agent, ill-health of the candidate was a sufficient excuse for the delay in supplying the omissions in his return.*

APPLICATION BY NEIL HEVAWITHARANE IX. 56

Election (State Council) Petition Rules 1931—Rules 9, 12, 18 and 19—Should writing left at office of Registrar under Rule 9 be stamped at the time it is handed to the Registrar—Effect of unstamped authority—Sureties—Extent to which each should be bound.

Held: (1) *That the failure to stamp the writing left with the Registrar under Rule* 9 *of the Election (State Council) Petition Rules* 1931, *at the time it is handed to the Registrar, does not invalidate it and prevent its reception after it is duly stamped.*

(2) *That each of the two sureties must be worth the required amount of security.*

(3) *Objections must be filed in time and the Court will hear only such objections as have been filed.*

SARAVANAMUTTU *vs.* JOSEPH DE SILVA ... ... XX. 131

Article 51—Offence falling within this Article and §169 F of Penal Code—Offender can be prosecuted under the Penal Code.

THIEDEMAN *vs.* GEORGE ... XXII. 9

Articles 45 (10), 75 (3) and 83 (4)—Application by the respondent to an election petition to inspect the marked registers and the tendered voters lists—Can Election Judge deal with an application under Article 45 (10).

Held: (1) *That an application under Article* 45 (10) *of the Ceylon State Council (Elections) Order-in-Council,* 1931, *can be made only for the purpose of instituting or maintaining an election petition and that the respondent to an election petition is not entitled in the course of hearing of the petition to inspect either the registers used by the Presiding Officers and marked in terms of Article* 38 (2) *or the tendered voters lists.*

(2) *That Article* 83 (4) *applies to any matter of procedure or practice arising on an election petition and not to applications under Article* 45 (10) *which applies to a stage prior to the filing of a petition.*

(3) *That a judge of the Supreme Court is not disqualified from dealing with an application under Article* 45 (10) *merely because he has been nominated to hear the election petition.*

(4) *That the English Law with regard to the marked register cannot be applied in Ceylon.*

SARAVANAMUTTU *vs.* JOSEPH DE SILVA ... ... XXII. 13

Article 79 (2)—Can a person called upon to show cause why he should not be reported lead evidence to disprove the Election Judge's finding in the election petition inquiry.

Held: (1) *That a person called upon to shew cause under Article* 79 (2) *must confine himself to shewing cause against being reported and cannot be permitted to canvass the findings of the Election Judge in the election petition inquiry.*

(2) *That the Counsel for the petitioner may appear at an inquiry under Article* 79 (2).

DR. R. SARAVANAMUTTU *vs.* M. JOSEPH DE SILVA ... ... XXII. 126

Article75—Election Judge appointed under the Order-in-Council—Does writ of Certiorari lie to quash an order made by an Election Judge.

A. E. GOONESINGHE, APPLICANT XXIII. 41

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Petition to declare election void—Charges of undue influence, treating, impersonation, and general intimidation, impersonation, general treating—Articles 74 (a) and (c)—Deposit of security in Rs. 5,000/- —Non-compliance with Rule 12 (2) —Effect—Applicability of Rules 19—21 of the Election (State Council) Petition Rules 1931.

The petitioner in his petition prayed that an election to the Ceylon State Council be declared null and void. It contained charges of:

(*a*) undue influence.
(*b*) treating.
(*c*) impersonation.
(*d*) general intimidation, impersonation on a large scale and general treating.

A sum of Rs. 5,000/- was deposited as security for costs of the respondent.

Held: (1) *That the amount of security deposited was not in compliance with Rule* 12 (2) *of the Ceylon State Council (Elections) Order-in-Council*, 1931, *and that the petition was liable to be dismissed.*

(2) *That Rules* 19—21 *of the Election (State Council) Petition Rules* 1931 *have no application in cases where the petitioner has not furnished security to the right amount.*

JEELIN SILVA *vs.* P. DE S. KULARATNE XXIV. 1

Articles 70, 74, 78 and 79—General intimidation—Evidence sufficient to establish —For purposes of Article 79 (1) (a) need agent be a duly appointed or authorized agent —Nature of acts sufficient to make a person an agent for purposes of Articles 74 (c) and 79 (a)—Stage at which a person who is to be reported under Article 79 (2) may be given an opportunity of giving and calling evidence to show why he should not be reported.

Held: (1) *That a person who is actively engaged in canvassing votes for a candidate and in generally promoting his interests is an agent for the purposes of Articles* 74 (*c*) *and* 79 (1) (*a*) *of the State Council (Elections) Order-in-Council, where the candidate is aware of the activities and adopts them as his own even though no express authority has been given by the candidate.*

(2) *That where general intimidation is established in an election it ought to be declared void, unless it can be shown that the gross amount of intimidation could not possibly have affected the result of the election.*

(3) *That an agent for the purposes of Article* 79 (1) (*a*) *need not be an election agent or a person expressly authorized by the candidate to be his agent. Any agent whose actions are sufficient to avoid an election under Article* 74 (*c*) *is an agent for the purpose of Article* 79 (1) (*a*).

(4) *That the candidate failed to establish the matters prescribed in Article* 70.

RUTNAM *vs.* DINGIRI BANDA ... XXVII. 17

Rules 12 and 13 of the Rules in the sixth schedule—Articles 37 and 74 (b).

Held: (1) *That by the word "charges" in Rule* 12 (2) *is meant the various forms of misconduct coming under the description of corrupt and illegal practices; for example whatever may be the number of acts of bribery sought to be proved against a respondent the charge to be laid against him is one of bribery.*

(2) *That the number of respondents does not affect the question of security.*

(3) *That on payment of the security money to the Financial Secretary it becomes automatically vested in the Chief Justice by operation of law.*

(4) *That where relief under Article* 74 (*b*) *is asked it is not necessary for the petitioner to set out in his petition alleging non-compliance with Article* 37 *that such non-compliance affected the result of the election.*

MOHAMED MIHULAR *vs.* NALLIAH AND ANOTHER ... ... XXVII. 63

Election Judge appointed under Ceylon (State Council Elections) Order-in-Council 1931—Can writ of certiorari issue to such judge.

GOONESINGHE *vs.* DE KRETSER ... XXIX. 49

State Council Election—Action by common informer—Action for recovery of penalty from State Councillor for having sat and voted in the Council knowing or having reasonable grounds for knowing that he was disqualified—Evidence necessary to prove that the defendant sat or voted as aforesaid—Application of Prescription Ordinance to actions under Article 11 of the Ceylon State Council (Elections) Order-in-Council—Prescription Ordinance Section 10—Evidence Ordinance Sections 74, 76, 77, 78 and 80—Ceylon (State Council) Order-in-Council, 1931, Articles 8, 9, 10, 11 and 15.

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This was an action by a common informer under Article 11 of the Ceylon (State Council) Order-in-Council, 1931, for the recovery of a penalty of Rs. 12,500 from the defendant for sitting and voting in the State Council knowing or having reasonable grounds for knowing that he was disqualified.

The defendant was elected as the member of the State Council for Colombo South at the election held on February 22, 1936. On an election petition his election was declared on July 16, 1936, to be null and void on the ground that, at the time of his election he was disqualified as he was a paid Visiting Lecturer at the Ceylon University College. He continued to deliver these lectures up to February 29, 1936.

On July 17, 1936, plaintiff's Proctors filed (*a*) a stamped paper in the form of a plaint stating that the defendant became liable to pay a penalty of Rs. 12,500 but restricting the claim to Rs. 1 000 and (*b*) a motion asking for leave to prosecute the action in terms of Article 11 (2) of the Order-in-Council.

On July 20, 1936, the District Judge ordered the application for leave to be supported and on the same date the Proctors filed another motion for raising the claim from Rs. 1,000 to Rs. 12,500. On July 29, 1936, the District Judge, allowed both applications. The original "plaint" did not bear the stamps required for a plaint in a claim of Rs. 12,500. This deficiency of stamp duty was made good only on June 3, 1943, and an amended plaint was filed on June 16, 1943. The Court then issued summons on the defendant on June 28, 1943.

The only evidence placed by the plaintiff at the trial was:

(*a*) A copy of the evidence given by the defendant at the Election Petition Inquiry in 1936.

(*b*) A copy of the judgment in that Inquiry, and

(*c*) A copy of the "Hansard" from March 17, 1936 to August 25, 1936.

The defendant called no evidence. The District Judge entered judgment for the plaintiff for Rs. 9,500 as he found that the defendant had sat or voted in the Council only on nineteen days. The defendant appealed.

The main questions argued in appeal were:

1. Has the plaintiff proved that the defendant sat or voted on the nineteen days or any of them in respect of which he has been awarded a penalty of Rs. 500 per day?

2. Was the defendant disqualified within the meaning of Article 11 or was the seat vacant on anyone of these days?

3. If the defendant sat or voted on those days did he do so knowing or having reasonable grounds to know that he was disqualified or the seat was vacant?

4. Is plaintiff's claim prescribed?

Held: (1) *That the mere production of a copy of "Hansard" from March* 17, 1936, *to August* 25, 1936, *was insufficient to prove that the defendant had sat or voted in the Council during the relevant period, and as no other evidence was led on the point, that the plaintiff had failed to prove that the defendant had sat or voted in the Council during that period.*

(2) *That the disqualification referred to in Article* 9 *of the Order-in-Council refers only to persons who sit or vote—*

(*a*) *without taking the oath as required by Article* 10, *or*

(*b*) *while holding or enjoying a contract, or*

(*c*) *while disqualified in any other way under the Order.*

(3) *That even if the defendant sat or voted in the Council on any one of the nineteen days referred to, he would not be a person who sat or voted while "disqualified by this Order for so sitting or voting" as he ceased to be a Visiting Lecturer at the University College some days before the formal opening of the State Council.*

(4) *That the defendant did not sit or vote in the Council after his seat became vacant; and*

(5) *That the plaint was filed only when the amended plaint was filed on June* 16, 1943, *that the cause of action accrued in* 1936, *that Section* 10 *of the Prescription Ordinance applied to penal actions filed under Article* 11 *of the Order-in-Council, and that therefore the action was prescribed.*

Per WIJEYEWARDENE, J.: "I come now to the third question argued before us. The defendant knew that he was a Visiting Lecturer at the University College up to February 29, 1936. If that fact disqualified him for sitting or voting as a member or rendered his seat vacant within the meaning of Article 11 could it not be said that he had the knowledge contemplated by that Article, though, in fact, the defendant might have held the view that his holding the post of Lecturer did not disqualify him from being

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elected as member? My brother and I hold somewhat conflicting views on this question, and I do not, therefore, propose to deal with this matter, as the appeal could be decided on the points on which we agree."

DE ZOYSA *vs.* WIJESINGHE ... XXXI. 5

CHARITABLE TRUSTS

See under **TRUSTS**

CHEETU

The Cheetu Ordinance No. 61 of 1935—Sections 5 (2) and 46—Does the Ordinance apply to Cheetus in existence at the time of the commencement of the Ordinance.

Held: *That the general terms in which sub-section* 4 *of Section* 46 *is expressed has the effect of making, by implication, the Ordinance applicable to existing Cheetus, and that the plaintiff is precluded by sub-section* 2 *of Section* 5 *from enforcing his claim by action by reason of the fact that the contributions of each subscriber are to be paid during a specified period exceeding thirty months, contrary to Section* 3 *(c).*

PARAMSOTHY *vs.* SUPPRAMANIAM AND OTHERS ... ... XI. 99

Cheetu started before the Cheetu Ordinance came into operation—Effect of failure to obtain exemption under Section 46 (4).

Held: *That Section* 5 (2) *of the Cheetus Ordinance (Chapter* 128) *is a bar to the recovery of money due under a Cheetu started before the Ordinance, but not exempted under Section* 46 (2).

MUTUAL LOAN AGENCY LTD. *vs.* DHARMASENA ... ... XIV. 115

CHEQUE

See under **BILLS OF EXCHANGE**

CHILD

Evidence of—*See under* **EVIDENCE**

CHILDREN AND YOUNG PERSONS ORDINANCE

Section 21—Principles determining sentence to be passed on youthful offender.

REX *vs.* JAYASENA *alias* JAYASINGHE ... ... XLIII. 71

CIRCUMSTANTIAL EVIDENCE

See under **EVIDENCE**

CITIZENSHIP

See also under **CEYLON CITIZENSHIP ACT**

Citizenship Act No. 18 of 1948

Validity of—Does it offend against Section 29 of the Ceylon (Constitution and Independence) Orders-in-Council, 1946 and 1947.

MUDANAYAKE *vs.* SIVAGNANASUNDRAM ... ... XLV. 49

"Citizen of Ceylon"—Its meaning—"British subject in Ceylon"—Do they enjoy same status.

SUDALI ANDY ASARY *vs.* VANDEN DRIESEN ... ... XLVIII. 17

Citizenship Act, 1948—Not ultra vires **§ 29 of Ceylon (Constitution) Order-in-Council.**

SUDALI ANDY ASARY *vs.* VANDEN DRIESEN ... ... XLVIII. 17

Citizenship Act—Section 2—Does Part III of the Immigrants and Emigrants Act No. 20 of 1949 apply to a person resident in Ceylon before 1st November, 1949.

SREENIVASAM *vs.* SITTAMPALAM XLVIII. 87

CIVIL APPELLATE RULES 1938

Do not apply to appeals in Insolvency proceedings.

DIAS *vs.* PALANIAPPA CHETTIAR II. 138

Do not apply to appeals under the Joint Stock Companies Ordinance No. 4 of 1861.

NADARAJAH *vs.* H. DON CAROLIS AND SONS LTD. ... ... V. 83

Failure to comply with Rule 2 (1)—When may an appeal be deemed to have abated by operation of Rule 4.

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Held: (1) *That an application for typewritten copies under Rule* 2 (1) *of the Civil Appellate Rules addressed to the Secretary of the District Court must be deemed to be an application to the District Judge.*

(2) *That the failure of an appellant in his application for typewritten copies to state:—*

(*a*) *Whether copies of the whole or portions only of the record were necessary for the decision of the appeal and if portions only what portions.*

(*b*) *The value of the subject-matter, and nature of the action or proceeding in which the appeal was preferred*

does not abate the appeal under Rule 4.

PALANIAPPA CHETTIAR *et al vs.* MERCANTILE BANK ... ... XXIII. 52

Supreme Court will in the exercise of its powers of revision examine the order of a District Judge declaring that an appeal has abated by operation of Rule 4.

PALANIAPPA CHETTIAR *et al vs.* MERCANTILE BANK *et al.* ... XXIII. 93

Distinction between 'Final' and "Interlocutory" appeal.

JAN SINGHO *vs.* ABEYWARDENE AND ANOTHER ... ... XLII. 92

Failure to conform to Rules—abatement of appeal.

ABRAHAM *vs.* FERDINANDO ... XLIII. 109

CIVIL LAW ORDINANCE

Interest on principal sum borrowed not to exceed principal.

LUCIA PERERA *vs.* ALBERT FERNANDO I. 107

English law of banking—to what extent applicable in Ceylon.

HONGKONG AND SHANGHAI BANKING CORPORATION *et al vs.* KRISHNAPILLAI ... ... I. 149

Section 5 of the Civil Law Ordinance is a general provision that applies to all contracts and engagements including Bills of Exchange and Promissory Notes.

MARIKAR *vs.* SUPPRAMANIAM CHETTIAR ... ... XXVI. 17

Boats and barges that ply between ship and shore do not come within the term "ship" as used in the Civil Law Ordinance.

BAGSOOBHOY *vs.* THE CEYLON WHARFAGE CO., LTD. ... ... XXXVII. 8

CIVIL PROCEDURE

More than one action in respect of the same land on the same cause of action—Is it permissible in law.

Held: (1) *That there can be no objection to this action existing side by side with two Courts of Requests cases.*

(2) *That under our law the fact that one action is pending in respect of a cause of action is no bar to the institution of another action in respect of that same cause of action.*

(3) *So far as the general law of* res judicata *and kindred topics go, a party has the technical right to litigate before different tribunals at one and the same time subject to the control of the Court to prevent the right being abused.*

S. MUDIYANSE AND ANOTHER *vs.* K. G. APPUHAMY ... ... VIII. 87

Order by Court entering judgment for plaintiff in a case where defendant's pleader applies for a postponement and is refused—Is such order an inter partes **order or an** ex-parte **order.**

Held: (1) *That the plaintiff should have been called upon to prove his case before judgment was entered in his favour.*

(2) *That the order made by the Judge was an* inter partes *order and an appeal was the proper remedy.*

THE PUBLIC TRUSTEE *vs.* KARUNARATNE ... ... IX. 72

Appeal—Failure to make a necessary party respondent to an appeal—Civil Procedure Code, Section 770.

Held: (1) *That the added plaintiffs were necessary parties to the appeal.*

(2) *That the failure to make the added plaintiffs respondents to the appeal was a fatal defect.*

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(3) *That the appeal is not one in which relief under Section 770 of the Civil Procedure Code can be granted.*

SEELANANDA THERO *vs.* RAJAPAKSE XI. 36

Issues—Trial on issues framed—After close of case, inspection of premises concerned in the litigation—Suggestion by Judge that issues should be recast with liberty to both parties to lead further evidence if necessary—Issues recast—Is it regular to do so.

Held: (1) *That, after the close of a civil action, the Judge has no right to give either the plaintiff or the defendant a fresh chance of raising further issues and leading evidence thereon.*

(2) *That once issues are framed and a trial is held and concluded on those issues, the Court should decide the case on the issues already framed.*

JOHN *vs.* WACE DE NIESE ... XI. 49

Appeal notwithstanding lapse of time—Civil Procedure Code, Section 765—Failure to stamp Petition of Appeal correctly—Can leave to appeal, notwithstanding lapse of time, be granted in such a case.

Held: *That the applicant was not entitled to leave to appeal, notwithstanding lapse of time, in the circumstances.*

SINNAPPU *vs.* THEIVANAI AND ANOTHER ... ... XI. 40

Joinder of parties and causes of action—Withdrawal of allegations against one defendant in respect of one of the causes of action—Misjoinder—Withdrawal of such cause of action—Right to proceed with other cause of action.

Held: (1) *That it was not open to the Court to allow the plaintiff to continue the action after he had withdrawn the first cause of action.*

(2) *That, after the plaintiff moved to withdraw the first cause of action, the Court should have dismissed his action.*

ETTAMAN *vs.* NARAYANAN AND ANOTHER ... ... XII. 152

Trial—Procedure at—Onus of proof on defendant—Close of defendant's case—Facts elicited in cross-examination from plaintiff—Should a judge allow fresh issues on facts so elicited after close of plaintiff's case.

Held: *That the Commissioner should not have allowed the defendant to raise an issue of mixed law and fact at the close of the case.*

PERIYA CARPEN *vs.* JAYASUNDERA XIII 43

When may a Judge call evidence not produced by either party—Courts Ordinance (Chapter 6) Section 36.

Held: *That a Civil Court has a discretion at any period in a case to allow further evidence to be called for its own satisfaction.*

REWATA THERO *vs.* HORATALA ... XIV. 155

Trial of action—Application for postponement by counsel—Withdrawal of counsel after refusal of postponement—Is the appearance of counsel to be regarded as limited to the application for postponement only—Are proceedings in action thereafter ex parte **or** inter partes.

Held: (1) *That the appearance of counsel was sufficient appearance for the parties and that the trial should despite his withdrawal be regarded as a trial* inter partes.

(2) *That the refusal to grant a postponement is not a ground on which a party or his Proctor or counsel may withdraw from a trial.*

(3) *That there is no such thing as a limited appearance of counsel.*

DE MEL AND OTHERS *vs.* SUGUNASEKERA AND OTHERS ... ... XIV. 164

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

Held: (1) *That the order made by the District Judge requiring the 3rd defendant to file an answer was the correct order to make.*

(2) *That if a Judge, having jurisdiction over the subject-matter and a party to the action, exercises such jurisdiction in an irregular manner at the invitation of such party, the legality of the proceedings*

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so initiated by him cannot be challenged by him later.

KARUPPEN CHETTIAR *vs.* AMERASEKERA AND OTHERS ... ... XV. 70

Partition action—Failure to serve summons on one of four defendants within time given by Judge—Can action be dismissed for such failure.

Held: *That a Judge has no power to dismiss a partition action on the ground that the plaintiff failed to take steps to have summons served on a defendant (one of four defendants) who was absent from the Island.*

RAJAPAKSE *vs.* RAJAPAKSE ... XVIII. 39

Decisory oath to decide action—Plaintiff to take out commission and pay Commissioner's fees—Action to be dismissed if plaintiff fails to take out commission—plaintiff's failure to take out commission—Agreement valid and enforceable.

Held: *That the Court was entitled to dismiss the action.*

SUPPIAH *vs.* BRAMPY AND ANOTHER ... ... XXI. 49

Applicability of the provisions of the Civil Procedure Code relating to Fiscal's sales to sales under Section 51 of the Insolvency Ordinance.

KARUNARATNE AND OTHERS *vs.* MOHIDEEN AND ANOTHER ... ... XXII. 33

Arbitration proceedings—Oral application by arbitrator for extension of time—Judge's duty.

Held: *That when an application by an arbitrator for an extension of the returnable date is made orally the Judge should at least minute that such an application was made.*

PERIYATHAMBY *vs.* RASIA ... XXII. 68

An order for payment of costs on or before the next date of trial is satisfied if the costs are paid during the course of the next trial date.

BARLIS *vs.* WEERASINGHE ... XXVI. 60

A question which was not expressly raised in the Trial Court may be taken in appeal when it can be brought under one of the issues framed.

THAMBU *vs.* ARULAMPIKAI AND ANOTHER ... ... XXVIII. 40

Divorce action—Submission of no case at close of petitioner's evidence—Judge's ruling against such submission—Can respondent call evidence thereafter.

YUILL *vs.* YUILL ... ... XXIX. 97

Transfer of defendant's interest pending action—Application by such transferee to be added as defendant—Objection by plaintiff and defendants—Does Section 404 of the Civil Procedure Code permit such intervention.

Held: (1) *A party claiming to be added as a defendant on the ground that such party has acquired interest in the subject-matter of the action is not precluded by Section* 404 *of the Civil Procedure Code from being added.*

(2) *That this Section vests in the Court a discretion as to the persons to be admitted as parties plaintiff or defendant.*

SILVA *vs.* JAYASEKERA AND ANOTHER ... ... XXX. 111

Trial—Application for postponement on ground of absence of a material witness—Refusal by Judge —Failure to lead available evidence—Duty of party affected by such refusal—Right of appeal.

Held: (1) *That when an application for a postponement of trial. on the ground that a material witness is absent. is refused. the party affected should nevertheless proceed to call what evidence is available to him as such evidence may disclose a stronger reason to Court to grant the postponement.*

(2) *That when an application for postponement is made and refused. the remedy is by way of appeal.*

RAMUPILLAI *vs.* ZAVIER AND ANOTHER ... ...XXXII. 42

Order to re-issue summons on a defendant several times—Failure on the part of plaintiff to take any steps—Order refusing further process—Is it justifiable.

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The learned District Judge made order on about nine occasions that summons on the 2nd defendant should be re-issued on fresh stamps. The plaintiff had taken no steps and on the last occasion the Judge made order refusing further process. The plaintiff appealed.

Held: *That the Court was justified in making the order.*

CHINNIAH *vs.* SINGHO APPU XXXII. 105

Ex parte **decree—Application to set aside—Jurisdiction of Court that passed such decree to entertain such application—When may a party apply to Supreme Court.**

Held: (1) *That where an* ex parte *order had been made behind the back of a party by any Court, such Court has jurisdiction to entertain and determine an application by the party affected to vacate such order.*

(2) *That an application for relief to the court that passed such* ex parte *decree should be made before the Supreme Court is moved to interfere.*

LOKUMENIKE *vs.* SILINDUHAMY XXXIV. 102

Joinder of parties and causes of action—Joint debt paid by third party—Rights of third party against co-debtors—Negotiorum gestor.

The 1st, 2nd, 3rd and 4th defendants and X and Y were owners of a property which they had mortgaged for Rs. 600. X and Y transferred their 1/3 share in the land to the plaintiff, who paid off the mortgage debt of Rs. 600, in circumstances constituting him a *negotiorum gestor*. The 4th defendant paid the plaintiff Rs. 100. The plaintiff then brought an action against the 1st, 2nd, 3rd and 4th defendants jointly for the balance of Rs. 300.

Held: (1) *That the plaintiff is entitled to contribution from the 1st, 2nd and 3rd defendants.*

(2) *That his claim is against each severally for a* pro rata *share.*

(3) *That the plaint is bad in law owing to misjoinder of parties and causes of action.*

DINGIRI APPU *vs.* PUNCHI APPUHAMY AND THREE OTHERS ... XXXV. 41

Seizure of money decree in favour of judgment-debtor—Application for substitution—Rights of substituted plaintiff—Is he entitled to draw all monies deposited to the credit of the case—Civil Procedure Code, Sections 234 and 339.

Where a judgment-creditor seized a money decree in favour of his judgment-debtor in another action and got himself substituted plaintiff in that action in terms of Section 339 of the Civil Procedure Code and moved to draw a sum in excess of the amount of the decree in his favour, which had been deposited in Court.

Held: *That the substituted plaintiff being the only party entitled to execute the decree in those proceedings had the right to draw the full amount payable under that decree in that action, irrespective of whatever claims his judgment-debtor may have had against him in another action for the recovery of the excess.*

MURUGESU *vs.* SADDANNATHAR XLVI. 2

Order made per incuriam**—Power of Judge to vacate.**

Where a Court through inadvertence entered judgment for the appellant, when it should have, following its usual practice, fixed a date for inquiry into the contested matter, and, on application by the respondent vacated the order.

Held: *That the order entering judgment was made* per incuriam *and that it could be vacated by the Court.*

ANTHONIMUTTU *vs.* SOOSAIPILLAI XLVIII. 16

CIVIL PROCEDURE CODE

§ 5

Meaning of term "public officer"

MUTTIAH CHETTIAR *vs.* ABEYSINGHE II. 448

Death caused by rash or negligent act—Can all dependants of the deceased join in an action for damages.

FERNANDO *vs.* MRS. SUNDARY PILLAI AND OTHERS ... XXVII. 14

Rei vindicatio**—cause of action, falsely asserting title and disturbing possession—Admission by plaintiff at trial that he is in exclusive possession of property in dispute—Dismissal of action on ground that plaintiff**

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has no cause of action—Plaintiff's right to maintain action.

GASPAR SELVAM *vs.* NAGENDIVAR KUDIPILLAI *et al* ... ... L. 24

§ 9

Does § 327 confer on the Courts a jurisdiction in excess of that conferred by Section 9.

PARIYAGAM PILLAI *vs.* CADER MEERA *et al* ... ... I. 174

"A party defendant" means "any party defendant" and a partition action may be brought in any District Court within the jurisdiction of which any party defendant resides.

HUSSEN *vs.* PEIRIS *et al* ... II. 53

Maintenance—Jurisdiction—Maintenance Ordinance, Section 2.

A Magistrate dismissed an application for maintenance on the ground that the applicant resided outside the jurisdiction of his Court. The defendant also happened to live outside his jurisdiction.

Held: (*Following* Jane Nona *vs.* Van Twest, 30 *N. L. R.* 449), *that the action cannot be maintained, not because the applicant resides outside the jurisdiction of the Court, but because the defendant is outside the jurisdiction of the Court.*

Per BASNAYAKE, J.—"My own view is that a Magistrate has jurisdiction to entertain an application under Section 2 regardless of the residence of parties or the place where the cause of action arises."

SARASWATHIE *vs.* KANDIAH XXXVI. 111

Does § 9 apply only to persons domiciled in Ceylon.

MILLER *vs.* MURRAY ... XLVII. 51

§ 10

Partition action—Sale ordered—Case allowed to be withdrawn on plaintiff's motion before sale—Power of Court to allow withdrawal of action.

MARY NONA *et al vs.* JAYAWARDENE ... ... XLIV. 31

§ 11

Joinder of parties—Death caused by a rash or negligent act—Can all the defendants of the deceased join in an action for damages.

Held: *That all the dependants of a deceased person are entitled to sue jointly the person or persons who wrongfully caused his death.*

FERNANDO *vs.* MRS. SUNTHARY PILLAI AND OTHERS ... ... XXVII. 14

§ 14

Joinder of parties and causes of action—Can appeal Court send back a case for amendment of pleadings.

Held: (1) *That Sections* 14 *and* 36 *of the Civil Procedure Code must be read together.*

(2) *That the joint, several, or alternative liability of defendants mentioned in Section* 14 *means a joint, several, or alternative liability in respect of one or several causes of action, which cause or causes of action are united in the same suit against the same defendants jointly.*

(3) *That the Supreme Court can, in an appropriate case, send back a case for amendment of pleadings.*

GRACE FERNANDO AND OTHERS *vs.* FERNANDO ... ... IX. 99

Action for declaration of title—Defendants independently in possession of separate defined blocks—Allegation of concerted action by defendants in plaint—Failure to prove allegation.—Misjoinder of defendants.

WISMALOMA *et al vs.* ALAPATHA XLV. 67

§ 16

An action on behalf of a Society by a member or members is not properly constituted unless permission to sue is expressly granted under § 16 even though the Court has ordered notice under the latter half of the §. The obtaining of permission is not a technical matter.

SILVA *vs.* SILVA ... ... II. 507

Action against an unincorporated Association—Action first brought on the footing that the Association was a corporate body—Action under Section 16 of the Civil Procedure Code taken later at the instance of Court—Claim within time at date of filing of plaint—Claim prescribed at the time action under

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section 16 of the Civil Procedure Code was taken—Is the action maintainable.

Held: (1) *That the action was maintainable.*

(2) *That an action can be said to be properly instituted against one member of an unincorporated body in a representative capacity if the plaint is so drawn and filed and that it only remains to get the permission of the Court to sue him, that is to say, to proceed with the action against him.*

BANIEL SILVA *vs.* LOW COUNTRY PRODUCTS ASSOCIATION ... IX. 13

Application for permission to sue on behalf of certain specified members of an Association—Factors that a Court should take into account in deciding an application under section 16—Terms of the notice that should be given to the parties—Can the Court hear objections to the application for permission to sue once permission has been granted.

Held: (1) *That once permission to sue or defend has been granted under section* 16 *of the Civil Procedure Code, the Court is not entitled to hear and decide objections against the application for permission to sue.*

(2) *That the notice required to be given by section* 16 *of the Civil Procedure Code is notice of the institution of the action, and not notice of the application for permission to sue or defend.*

Per HOWARD, C.J.: "The appellants put forward their claim as representing a certain number of the original members of the Association. In putting forward this claim they maintained that at the time of filing the action they and they alone were entitled to represent the Association. This is a question which dealt with the merits of the action and could not be decided on an application for a writ of summons. If the plaintiffs are unsuccessful in regard to this question, their action fails. The only questions that should have been considered by the Judge at this stage was whether the plaintiffs represented a class of persons with the same interest in suit and whether there was a *prima facie* case."

SOYSA *vs.* RATWATTE ... XXVIII. 100

§ 17

Misjoinder of parties—Muslim gift—Gift inter vivos **reserving life interest and creating a** fidei commissum**—Action instituted by administrator before obtaining letters of administration—Letters of administration obtained subsequently but before decree—Is decree in favour of administrator good—Courts Ordinance (Chapter 6) section 36.**

Held: (1) *That section* 17 *of the Civil Procedure Code* (*Chapter* 86) *does not compel a Court to dismiss an action for misjoinder of parties and of causes of action.*

(2) *That the decree obtained in an action brought by a person who had not obtained letters of administration at the time of its institution is nevertheless good if he had obtained letters before the date of decree.*

(3) *That a Muslim deed of gift reserving a life interest in favour of the donor is not governed by Muslim Law and is valid according to Roman-Dutch Law, and effect must be given to a* fidei commissum *created by it.*

KUDHOOS *vs.* JOONOOS ... XV. 133

Misjoinder of defendants—Discretion of Court in permitting amendment of plaint.

WISMALOMA *et al vs.* ALAPATHA XLV. 67

Misjoinder of parties and causes of action—what may a Court do in such a case.

SIVAKAMINATHAN *vs.* ANTHONY AND ANOTHER ... ... III. 51

§ 18

Action for declaration of right of way over several servient tenements—All servient tenants not made parties—Power of Court to order necessary parties to be joined.

DE SILVA *vs.* NONNOHAMY *et al* II. 1.

Where a right of cartway of necessity is claimed over contiguous lands belonging to different persons it is open to the plaintiff to join the owners of all the lands over which he claims the cartway in the same action.

ABEYTUNGE *vs.* SIYADORIS AND OTHERS ... ... XXV. 68

In partition proceedings parties should be allowed to intervene until final decree upon terms.

WIJESEKERA AND THREE OTHERS *vs.* WIJESURIYA ... ... XXV. 96

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Application under § 15 of Muslim Intestate Succession and Wakfs Ordinance—Failure to make all trustees respondents—Has Court power to add remaining parties.

SINNALEBBE AND ANOTHER *vs.* MUSTAPHA AND OTHERS ... ... XLI. 85

Action for rent and ejectment—Landlord may obtain decree binding on tenant as well as sub-tenant by joining the latter under section 18.

MOHAMED IBRAHIM SAIBO *vs.* MANSOOR *et al* ... ... XLVIII. 35

§ 22

Objection that the action was not properly constituted taken for the first time in appeal—Can such objection be taken at that stage—Action under section 102 of the Trusts Ordinance, 1917—Trustee of Hindu Temple.

Held: *That the appellant was precluded by section 22 of the Civil Procedure Code from taking such an objection in appeal.*

THIAGAR AND OTHERS *vs.* SARAWANAMUTTU AND ANOTHER ... IX. 118

Issue of misjoinder of defendants raised at commencement of trial—Judge, at conclusion of trial ruling against defendants on issue of misjoinder—Should plaintiff be allowed to amend pleadings and restrict his claim to one set of defendants.

WISMALOMA *et al vs.* ALAPATHA XLV. 67

§ 24

Appearance of party—Proctor on record present in Court but without instructions.

ANDIAPPA CHETTY *vs.* SANMUGAM CHETTY ... ... I. 178

Certification of payment under § 349—Proctor's right to certify on behalf of decree holder—Proviso to § 24 does not apply.

SOPIN NONA PATHMASILLIE *vs.* R. DON JORLIS RAJAPAKSE XLVII. 64

§ 25

Section 25 (b) which requires a Power of Attorney authorising proceedings to be filed in Court, has no application to proceedings under the Small Tenements Ordinance.

SINAN CHETTIAR *vs.* SORIMUTTU XIII. 40

Action instituted in name of landlord by his attorney holding a general Power of Attorney—Action properly constituted.

LANKA ESTATES AGENCY LTD. *vs.* W. M. P. COREA ... ... XLV. 33

§§ 31 and 32

Warrant of Attorney to confess judgment—Failure to comply with § 31—Warrant of no force in law.

VALIAPPA CHETTIAR *vs.* SUPPIAH PILLAI AND ANOTHER XIV.51

Warrant or Power of Attorney to confess judgment—Form No. 12 of First Schedule—Within what limits may the form be altered.

A warrant of attorney to confess judgment had been executed by the defendants under section 31 of the Civil Procedure Code in Form 12 of the First Schedule. The Form was altered to include the assigns of the mortgagee before the addition of the word "assigns" after the words "his heirs executors or administrators." Objection was taken to the warrant of attorney on the ground that the alteration was unauthorized by law and it was therefore invalid.

Held: *That the alteration was illegal and the warrant of attorney to confess judgment was therefore invalid.*

PALANIAPPA CHETTIAR *vs.* HASSEN LEBBE AND ANOTHER ... ... XIV. 67

§ 34

Promissory note accepted as conditional payment—Action on promissory note—Failure of action because of material alteration in note—Action on loan—Is the decision in the proceeding on the promissory note res judicata.

Held: *That the action was maintainable.*

DORISAMY NADAR AND OTHERS *vs.* ARUMUGAM NADAR AND ANOTHER III. 128

Principal and Surety—Renounciation of benefits of suretyship by surety to a mortgage bond—Need surety be made a party to the mortgage action.

Held: (1) *That where a person bound himself as surety, renouncing the benefits of suretyship, to pay a mortgage debt the mortgagee was not bound to make the surety a party to the mortgage action and that the*

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surety could be sued after the mortgage property had been excussed.

(2) *That section* 34 *of the Civil Procedure Code was no bar to a separate action against the surety.*

PANDITHAN CHETTIAR *vs.* SINGHAPPUHAMY ... ... IV. 84

Can interest and principal be claimed in separate actions.

SAIBO AND ANOTHER *vs.* ABUTHAHIR AND OTHERS ... ... IV. 110

Joint tort-feasors--Separate actions against some of them—Is a decree in one of the actions a bar to further proceedings in the other action.

MIGUEL APPUHAMY *vs.* APPUHAMY XI. 135

A mortgagee who fails to add to his claim on the mortgage bond when suing on it any rates and taxes paid by him under compulsion in respect of the mortgaged premises is prevented by section 34 of the Civil Procedure Code from suing for such rates and taxes subsequently.

MOTHA *vs.* FERNANDO ... XXII. 108

(1) A defendant who fails to abide by the previous decision of a Court cannot plead section 34 of the Civil Procedure Code when an action is brought to enforce that decision.

(2) The onus of showing that an action is barred by section 34 of the Civil Procedure Code is on the defendant.

ELARIS *vs.* ODIRIS HAMY ... XXIX. 21

§ 34 does not apply to proceedings instituted under enactments such as the Small Tenement Ordinance which provide for special remedies.

BANDARANAYAKE *vs.* PERERA XXXVI. 73

§ 35

Misjoinder—Causes of action—Declaration of title to land and damages, and for value of articles wrongfully removed—Amendment of plaint in Appeal Court.

Held: (1) *That the joinder of the two causes of action is obnoxious to section* 35 *of the Civil Procedure Code.*

(2) *That there is no provision in the Civil Procedure Code for striking off a cause of action improperly joined.*

(3) *That an application for amendment of the plaint may be made even in the Appeal Court.*

MUTHUMENIKA *vs.* SUDU MENIKA AND OTHERS ... ... XXVI. 91

§ 36

Sections 14 and 36 must be read together.

GRACE FERNANDO AND OTHERS *vs* FERNANDO ... ... IX. 99

§ 41

Requirements of plaint in action claiming a right of way.

ABDULLA AND ANOTHER *vs.* JUNAID AND OTHERS ... ... XLIV. 84

§ 46

Mandamus—**Application for writ on District Judge—Rejection of plaint for being prolix and failing to disclose cause of action—Amended plaint also rejected as defective—Judicial discretion exercised—Does** Mandamus **lie—Petitioner's remedy—Civil Procedure Code, section 46 (2) (a) (b) and (d).**

A District Judge rejected a plaint, after consideration, on the ground that it was prolix and did not disclose a cause of action. Later, he rejected an amended plaint for being defective and failure to comply with section 46 (2) (*a*) (*b*) and (*d*) of the Civil Procedure Code. On an application for a writ of Mandamus.

Held: *That a writ of Mandamus did not lie where a Judge has exercised the jurisdiction vested in his Court.*

ORR *vs.* SANSONI ... ... XXXVI. 22

§ 53

Action under—Drawer of cheque and successive endorsees sued by last endorsee—joint and several liability.

KUHAFA *et al vs.* VAIRAVAN CHETTIAR XLI. 16

§ 55

Meaning of the words "language of the defendant."

Held: *That the words "language of the defendant" in section* 55 *of the Civil Procedure*

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Code do not necessarily mean the language of the race to which he belongs, but the language the defendant understands.

MILLER AND CO., LTD. AND ANOTHER *vs.* RATNASEKERE ... XXVI. 7

§ 66

Service of summons on wife as agent of husband who was in Malaya—Agency not determined by enemy occupation of Malaya.

MURUGESU AND ANOTHER *vs.* CHELLIAH AND ANOTHER ... ... XLI. 108

§ 68

Summons—Service of, when defendant in jail—Plaintiff's duty—Failure to affix substituted service to last known place of abode as directed—Meaning of the term "abode"—Restitutio-in-integrum.

Held: (1) *That, where the plaintiff knows that the defendant is in prison, he must ascertain the prison in which the defendant is confined and serve summons in the manner indicated by section 68 of the Civil Procedure Code.*

(2) *That, where substituted service was not affixed to the last known place of abode as directed by Court, such service was bad and a judgment entered on such service should be set aside.*

MEERALEVVAI *vs.* SEENITHAMBY XXXIV. 9

§ 69

Service of summons out of the Island duly effected—Action for breach of promise of marriage—Defendant residing outside Ceylon —Has the Court jurisdiction to hear the case.

MILLER *vs.* MURRAY ... XLVII. 51

§ 74

Date fixed for answer—Extension of time—Application for further extension of time—Plaintiff's objection to application upheld, and date fixed for trial, without the defendant being given an opportunity of satisfying the Court as to the cause for the request for such extension.

Where the plaintiff's objection to an application by a defendant for further extension of the time fixed by Court for filing answer was upheld without the defendant being given an opportunity of adducing reasons in support of the application.

Held: *That the refusal of the application by the Court merely on the plaintiff's objection thereto, and without the defendant being afforded an opportunity of adducing reasons in support thereof, was unjustifiable.*

THOMAS *vs.* UKKU BANDA AND OTHERS ... ... XLVI. 9

§ 75

Pleadings—Failure to deny in answer averments in plaint—Does it amount to an admission.

Held: (1) *That section 75 (d) of the Civil Procedure Code requiring that the answer should contain a statement admitting or denying the several averments in the plaint is an imperative provision.*

(2) *That the failure to deny such an averment by a defendant must be deemed to be an admission by him of that averment.*

SAMARASEKERE *vs.* FERNANDO AND TWO OTHERS ... ... XXXVI. 94

§ 79

Refusal of application to file a replication—Circumstances in which a replication may be filed.

MOHAMADU *vs.* MOHAMADO *et al* II. 168

§ 82

Power of Court to grant or refuse adjournment of trial.

Where a motion, signed by the Proctors of both parties to an action was tendered to Court by the Proctor for the defendant asking for a postponement, the Proctor for the plaintiff and the plaintiff himself being absent on the ground that the case was likely to be settled.

Held: *That the Court was under no obligation to grant a postponement.*

MATCHER *vs.* DE ABREW ... V. 102

§ 84

Power of Court to grant or refuse adjournment of trial.

MATCHER *vs.* DE ABREW ... V. 102

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

MOHIDEEN AND OTHERS *vs.* MARIKAR ... ... XVI. 93

Application of § 84 to actions under the Partition Ordinance

DE SARAM *vs.* DE SILVA AND ANOTHER ... ... XVI. 102

Application to have decree nisi **set aside—Date of commencement of period of fourteen days prescribed by section 84—Power of Court to extend such period.**

Held: (1) *That the period of fourteen days prescribed by section* 84 *of the Civil Procedure Code commences on the date on which the decree* nisi *is passed.*

(2) *That a decree* nisi *under that section cannot be said to be passed until the form has been drawn up, approved and signed by the Court.*

(3) *That the court has no power to extend the period prescribed by that Section.*

Per KEUNEMAN, J., (*a*) "It has been suggested that where the Court signs a document containing the essential details contained in Form 21, it may be taken that it has passed the decree *nisi* although the document has not been formally drawn up in the office, and that an entry of such a kind made among the journal entries would be sufficient. I agree with the argument, but at the same time it is a question to be determined in each case as to whether the Court was, in fact, passing the decree *nisi* or merely giving an instruction to the office to prepare a decree *nisi* to be passed thereafter.

(*b*) "I would urge upon the legislature the need of a speedy amendment of section 84 so that the unreasonable hardships imposed upon the plaintiff may be removed."

DE MEL *vs.* KODAGODA XXIX. 105

Application of § 84 to inquiries under Workmen's Compensation Ordinance.

WEERASOORIYA *vs.* THE CONTROLLER OF ESTABLISHMENTS ... ... XLII. 51

§ 87

An application under § 87 to set aside a decree absolute must be made within a reasonable time after the decree, and must show that there were reasonable grounds for the default upon which the decree was passed.

MEEDENIYA *vs.* VANDER POORTEN IX. 10

§ 91

Admissions by counsel and proctors—Must be clear as to terms and made with consent of parties.

Held: *That an admission by counsel to be binding must be clear and distinct and made with the express authority of the party whom the counsel represents.*

PUNCHIBANDA *vs.* PUNCHIBANDA AND OTHERS ... ... XXI. 16

Compromise arrived at in course of action without complying with requirements of § 91 —Effect of.

BABYHAMINE *et al vs.* JAMIS *et al* XLVI. 5

§ 93

Amendment of pleadings—Order under section 93—Prepayment of costs made a condition precedent to the applicant proceeding further—Is such order valid?

Held: *That the power given to the Court under section* 93 *of the Civil Procedure Code to make an order as to costs does not extend to making an order, that the costs should be paid before the party, on whose behalf the amendment has been made, should be entitled to proceed with his action.*

PETER *vs.* THE COLOMBO TURF CLUB VI. 11

Amendment of pleadings—Duty of judge—Belatedness of proposed amendment—When may amendment of pleadings be allowed.

Held: (1) *That an amendment* bona fide *desired in order to elucidate the cases the parties wish to put forward should be allowed, even though the parties had been negligent or careless in stating their cases.*

(2) *That the matter of the belatedness of a proposed amendment is a matter that affects the question of terms in regard to costs and postponement.*

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PUNCHIMAHATMAYA MENIKE AND OTHERS *vs.* RATNAYAKE AND OTHERS... XVIII. 18

Amendment of plaint—When should it be allowed.

DE MEL *vs.* THENUWARA ... XXXIX. 84

§ 94

When interrogatories may properly be asked.

JUSTINAHAMY *vs.* OBIS APPUHAMY XXII. 88

§§ 98 and 100

Interrogatories—When may party be compelled to answer.

Held: (1) *That a party will not be compelled to answer an interrogatory merely because the answers might provide the plaintiff with evidence which would be relevant in the broad sense in which relevancy is defined in the Evidence Ordinance.*

(2) *That in judging an interrogatory a stricter test of relevancy is required. It must be relevant to a fact in issue or as leading up to a matter in issue in the action.*

WIJESEKERE *vs.* THE EASTERN BANK LIMITED ... ... XXII. 28

§ 99

Under § 99 the District Judge has power to extend the time for answering interrogatories.

RAGSOOBHOY *vs.* NAMASIVAYAM CHETTY XXIX. 32

§ 100

Interrogatories—When interrogatories may properly be asked.

Held: *That in a running-down case in which the assessment of damages formed no part of the defendant's case the defendant was not entitled to compel the plaintiff to answer an interrogatory as to the assessment of his damages.*

JUSTINAHAMY *vs.* OBIS APPUHAMY XXII. 88

Where a defendant fails to answer interrogatories delivered to him, an order striking off his defence should not be made unless a clear and specific order had been made earlier under § 100.

RAGSOOBHOY *vs.* NAMASIVAYAM CHETTY XXIX. 32

§ 103

Order for production of documents—When and in respect of what documents should such order be made.

SUNDARAM AND ANOTHER *vs.* GONSALVES XXXVII. 57

§ 104

Books of account merely referred to in the answer are not documents referred to in pleadings within the meaning of section 104 of Civil Procedure Code.

SUPPRAMANIAM CHETTIAR *vs.* BANDIRALA AND ANOTHER ... ... II. 51

§ 109

Before a plaintiff's action can be dismissed under Section 109 of the Civil Procedure Code it must appear clearly upon the record that all such steps and all such orders as must precede the making of an order under section 109 have been properly and regularly taken and made.

LETCHIMAN *vs.* DE SILVA ... II. 29

The Court has a discretion to grant indulgence to a party on an application for an order under § 109.

RAGSOOBHOY *vs.* NAMASIVAYAM CHETTY XXIX. 32

§ 134

When may a Judge call evidence not produced by either party.

REWATA THERO *vs.* HORATALA... XIV. 155

§ 146

Amendment of pleadings—Duty of Judge—

PUNCHIMAHATMAYA MENIKA AND OTHERS *vs.* RATNAYAKE AND OTHERS ... XVIII. 18

§ 147

When may trial be confined to the disposal of preliminary issues of law which are considered to go to the root of the litigation.

SOOTHIRETNAM *vs.* ANNAMMAH... L. 35

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§ 154

Explanation to clause (3) of this §—meaning of the words "forbidden by law."

SIYADORIS *vs.* DAINIS AND OTHERS XX. 33

§ 169

Mode of recording evidence of witnesses.

Held: *That a record of a summary of the statements made by a witness does not constitute compliance with the provisions of* § 169 *of the Civil Procedure Code.*

RAJAKARUNA *vs.* ROMANIS *et al* ... I. 195

The taking down of evidence by a shorthand writer under the direction of the Judge does not constitute sufficient compliance with § 169—Such record of evidence cannot be used against the witness in a prosecution for intentionally giving false evidence in a judicial proceeding.

REX *vs.* WIJESEKERA ... ... XVII. 81

§ 175

Witness—Failure to include name in list filed before commencement of inquiry—Is party in default entitled to call such witness—In what circumstances will such a witness be allowed to be called—Proviso.

The District Judge upheld an objection raised to the calling of a witness whose name did not appear in any of the lists filed before the commencement of an inquiry relating to a claim made to a share of an estate administered by the Court. In appeal it was contended that the learned District Judge should have acted under the *proviso* to section 175 of the Civil Procedure Code and allowed such witness to be called inasmuch as there were special circumstances *viz.*, (*a*) that the case was not a mere matter of *inter partes;* (*b*) that the matter sought to be proved by such witness was not a new case; (*c*) that an explanation had been given as to the delay in including his name.

Held: *That a case had been made out to enable the District Judge to exercise the powers vested in him under the proviso to section* 175 *of the Civil Procedure Code.*

HENDRICK APPUHAMY *vs.* PEDRICK APPUHAMY ... ... XXVII. 87

§ 179

Evidence on commission—In what circumstances may a commission issue for examination of witnesses.

Held: (1) *That an application for examination of witnesses on commission should only be granted when it is necessary for the purposes of justice.*

(2) *That in a case where the plaintiff has chosen the tribunal it is only in exceptional circumstances that a commission should be granted.*

ACHI AND TWO OTHERS *vs.* PALANIAPPA CHETTIAR ... ... XXI. 34

§ 184

Appearance of party—Proctor on record present in Court but without instructions——When a trial is deemed to be inter partes**—Averments in plaint—Traverse in answer. Judgment** ex parte **without proof of plaintiff's case.**

Held: (1) *That the presence in Court at the time a case is called of the Proctor on record is appearance of the party for whom the Proctor holds a proxy unless the Proctor informs the Court in clear and unambiguous language that he does not appear for such party.*

(2) *A mere statement by a Proctor that he has no instructions from his client is not sufficient to deprive him of his representative capacity.*

(3) *Where there is no such intimation any order made in the presence of the Proctors of the respective parties is deemed to be an* inter partes *order.*

(4) *Where the plaint is traversed and a specific defence is raised in the answer the plaintiff should be called upon to prove his case before judgment is entered for him in default of appearance of the defendant.*

ANDIAPPA CHETTY *vs.* SANMUGAM CHETTY I. 178

§ 188

Decree—Should terms of settlement be embodied in decree.

DASSENAYAKE *vs.* DASSANAYAKE XXXI. 29

§ 189

Amendment of decree after appealable time without notice to parties—Non-compliance with terms of § 189 (2).

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Held: *That compliance with the terms of section* 189 (2) *of the Civil Procedure Code is imperative especially where it is sought to amend the decree after the appealable time.*

SINNADDY *et al vs.* RASAN *et al* ... II. 189

Action for declaration of title—Omission to ask for ejectment—Original decree cannot be amended to include order of ejectment.

WANIGASEKERA AND OTHERS *vs.* KIRIHAMY AND ANOTHER ... ... VII. 134

Power of District Judge to amend decree in a partition action.

APPUHAMY AND ANOTHER *vs.* ALPERIS AND ANOTHER ... ... IX. 33

Amendment of caption of plaint by adding real name of defendant after decree—Has Court power to allow amendment.

PARSONS *vs.* ABDUL CADER ... XX. 123

Error made by Counsel in stating terms of settlement—Decree—Has Court power to review such consent decree.

Held: *That under section* 189 (1) *of the Civil Procedure Code, the Court has power to amend a consent order where it is satisfied that an error arising by a slip on the part of Counsel had occured in stating the terms of settlement.*

WICKRAMANAYAKE *vs.* HINNIHAMY AND ANOTHER ... ... XXXVI. 89

Section 189 (1) Scope of—Amendment of decree—Powers of Court.

The appellants petitioned the District Court under section 189 of the Civil Procedure Code for an amendment of its decree on the ground that it was not in conformity with its judgment in as much as the decree failed to refer to certain rights to which they claimed they were declared entitled to in the judgment.

The amendment was allowed (not by the Trial Judge) holding that when the judgment is read as a whole the appellants claim appeared to be correct.

Held: (1) *That section* 189 *of the Civil Procedure Code provides an exception to the General Rule that once an Order is passed and entered or otherwise perfected in accordance with the practice of the Court, the Court which passed the Order is* functus officio *and cannot set aside or alter the Order however wrong it may appear to be.*

(2) *The Court had no power to amend the decree as it involved the construction of the judgment and the variation did not appear on a perusal of the judgment and decree.*

PIYARATNA UNNANSE *et al vs.* WAHAREKE SONNUTTARA UNNANSE *et al* XLII. 89

§ 192

Section 3 of Ordinance No. 5 of 1852—

Interest on principal sum borrowed not to exceed principal—Extent to which § 192 of the Civil Procedure Code affects § 3 of Ordinance No. 5 of 1852.

Held: *That* § 192 *of the Civil Procedure Code does not in any way repeal the provision in* § 3 *of Ordinance No.* 5 *of* 1852. *section* 192 *of the Code is simply a procedural enactment giving the Court a discretion as to the adjudging of interest.*

LUCIA PERERA *vs.* ALBERT FERNANDO I. 107

When is interest payable in the absence of a special agreement.

ANNAMALAY CHETTY *vs.* THORNHILL III. 56

§ 194

Instalment decree—Must be entered in the first instance and cannot be entered as a variation of a decree already entered.

THE BANK OF CHETTINAD *vs.* PULMADAN CHETTY ... ... I. 255

Mortgage—Decree of payment by instalment of money due on.

Held: *That the provisions of* § 194 *of the Civil Procedure Code which enable a decree to be made for payment by instalments do not apply to a decree for money due on a mortgage on immovable property.*

PILLAI *vs.* THAMBY ... ... I. 379

§ 201

§ 201 does not permit variation of a decree once entered.

THE BANK OF CHETTINAD LTD. *vs.* PULMADAN CHETTY ... ... I. 255

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§ 207

Promissory note accepted as conditional payment—Action on promissory note—Failure of section because of material alteration in note—Action on loan—Is the decision in the proceeding on the promissory note res judicata.

Held: *That the action was maintainable.*

DORAISAMY NADAR AND OTHERS *vs.* ARUMUGAM NADAR AND ANOTHER III. 128

When an appeal has been taken from a decision of a Court and the Appeal Court disposes of the appeal on issues other than those on which the original Court made its decision, the decision of the original Court cannot be regarded as res judicata.

DE LIVERA AND OTHERS *vs.* AMARASEKERA AND OTHERS ... ... XIII. 157

Decree passed by Court which has no jurisdiction is a nullity and cannot operate as res judicata.

BANDARANAYAKE *vs.* PERERA XXXVII. 37

§ 209

When may Appeal Court interfere with an order for costs made by the original Court.

Held: *That, where it is clear that a Court has exercised no discretion at all in making an order as to costs and has arbitrarily given costs against the successful party, it will be contrary to principles of justice if the Supreme Court did not interfere with such an order.*

YAPA APPUHAMY *vs.* DON DAVITH X. 25

Costs—Discretion vested in Court—How it should be exercised—Where no award for costs or defers consideration of costs, need to give reasons in writing—Right of appeal—Order for production of documents—When and in respect of what documents should such order be made.

Held: (1) *That the discretion vested in the Courts by sections* 209 *and* 211 *of the Civil Procedure Code in the matter of costs must be exercised judicially, and where the Court does not award costs to the successful party, or postpones the consideration of the matter to a future date, it is required by section* 211 *to state its reasons in writing.*

(2) *That the Supreme Court has the power to entertain an appeal against an order as to costs.*

(3) *That the Court's power under section* 103 *of the Civil Procedure Code to order production of documents is confined to such of them as are known by discovery or otherwise to be in the possession or power of any party.*

(4) *That a Court will not order the production of a document even when it is admitted to be in a party's possession or power, unless it thinks it right to do so.*

(5) *That "possession" in section* 103 *of the Civil Procedure Code means sole legal possession or a power or right to deal with them.*

SUNDARAM AND ANOTHER *vs.* GONSALVES XXXVII. 57

§ 211

The discretion under this § must be exercised judicially and appeal lies to Supreme Court against an order for costs.

SUNDARAM AND ANOTHER *vs.* GONSALVES XXXVII. 57

§ 214

Application of § 214 to taxation of costs in a Court of Requests.

HARAMANIS APPUHAMY *vs.* WICKREMASINGHE AND ANOTHER ... XVI. 18

§ 218

"Public Officer" Meaning of term in sections 5 and 218 (h) of the Civil Procedure Code—Is a Municipal Officer a "Public Officer" and can his salary be seized.

Held: (1) *That an officer employed by a Municipal Council is not a "Public Officer" within the meaning of the expression in sections* 5 *and* 218 (*h*) *of the Civil Procedure Code.*

(2) *That the salary of an employee of a Municipal Council is not exempt from seizure.*

MUTTIAH CHETTIAR *vs.* ABEYSINGHE II. 448

Prohibitory notice on employer seizing labourer's wages—Where a seizure of a labourer's wages is made by a prohibitory notice, it is the judgment-debtor and not his employer or anyone else who should claim exemption under § 218.

JOSEPH NADAR *vs.* ASIRWATHAM ... IX. 107

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Section 218 (g)—Seizure of lump-sum retiring allowance payable to a pensioner—Is such retiring allowance liable to be seized—Stipend—Meaning of.

Held: (1) *That a lump-sum retiring allowance, granted by the Governor under section* 15 *of the Minutes on Pensions, does not fall within section* 218 *(g) of the Civil Procedure Code.*

(2) *That a lump-sum payment does not come within the scope of the expression "stipend" in section* 218 *(g) of the Civil Procedure Code.*

SEYADU IBRAHIM SAIBU *vs.* SYDNEY PHILIPS AND OTHERS ... ... IX. 123

Section 218 (j)—Are the wages of a conductor of a tramway car exempt from seizure?

Held: *That the conductor of a tramway car is not a "labourer" within the meaning of section* 218 *(j) of the Civil Procedure Code and his wages therefore, are not exempt from seizure under that section.*

WICKRAMATUNGA *vs.* PERERA ... XIV. 57

Section 218 paragraph (j) of proviso—Is Assistant Bar-keeper of a Club a domestic servant?

Held: *That the mere fact that a person is the servant of a Club does not take him out of the category of "domestic servant" within the meaning of that expression in Para (j) of the proviso to section* 218 *of the Civil Procedure Code if there is evidence to show that he belongs to the class known as domestic servants.*

SAMUEL APPUHAMY *vs.* DIONIS XX. 97

Section 218 (j)—Who is a labourer—Can payment calculated on each item of work be regarded as "wages" within the meaning of the section.

NAGASAMY *vs.* HAMEED ... XXIII. 116

§ 218 (h)—A Kathi appointed under the Muslim Marriage and Divorce Registration Ordinance is a Public Officer or servant for the purposes of § 218 (h).

WALKER & GREIG LTD. *vs.* MOHAMED XXV. 50

"Labourer"—Is Head-Kangany a "labourer"?—Meaning ascertained by reference to "The Service Contracts Ordinance" (Chapter 59) and The Estate Labour (Indian) Ordinance (Chapter 112)—Rule of interpretation.

A Head-Kangany, whose work was only to supervise a number of estate labourers, and who received for the services a salary, "dearness allowance" and "pence money," successfully claimed exemption in the District Court from seizure of his wages under section 218 (*j*) of the Civil Procedure Code on the ground that he was a labourer within the meaning of that section. On appeal it was held:—

(1) That a "Kangany" whose work was purely supervisory and involved no physical or manual labour of any kind would be a "labourer" within the meaning of section 218 (*j*) of the Civil Procedure Code.

(2) That (Gratiaen, J., dissenting) in ascertaining the meaning of the term "labourer" as used in the section 218 (*j*), the class of persons especially legislated for by Ordinance No. 11 of 1865 (The Service Contracts Ordinance, Chapter 59) should be taken into consideration, and under this Ordinance a Kangany whose duty is merely to supervise is a "labourer."

YAKOOB BAI *vs.* SAMIMUTTU ... XLII. 99

Seizure of right title and interest in action for declaration of share in theatre hall and equipment—Is it movable property?—Seizure of movable property under provisions for immovable property—Is the seizure valid?

Held: (1) *That the right title and interest of a plaintiff in an action for a declaration that he is entitled to a share of a theatre hall with its plant and machinery, and further praying for an accounting of the share of his profits, is movable property and is liable to be seized and sold in execution of a writ.*

(2) *That the fact that movable property was seized under the provisions relating to immovable property does not invalidate the seizure.*

SUPPIAH *vs.* SIVARAJAH: SUPPIAH *vs.* PERIATHAMBY ... ... XLVIII. 18

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§ 219

Warrant under § 219 (2)—Arrest on failure to obey the warrant—Arrest effected after sunset—Liability of Process Server in so arresting—Penal Code § § 71 and 72—Is a warrant issued under § 219 (2) a warrant issued in a criminal matter?

Held: *That, although under a warrant* § 219 (2) *of the Civil Procedure Code a person was liable to arrest or even to be committed for contempt under* § 137 *for failure to obey it, such a warrant comes under process issued in a civil case and cannot be executed between sunset and sunrise.*

The protection afforded to a Process Server by § § 71 and 72 of the Penal Code does not extend to a case where he is mistaken in what the process of law allows him to do. A Process Server who executes a warrant executable only between sunrise and sunset is criminally liable if he arrests any person in pursuance of such warrant outside such time.

BADOORDEEN *vs.* DINGIRI BANDA *et al* I. 74

Can immunity from attachment be claimed by disclosing property to the Fiscal?

Held: (1) *That an execution debtor does not procure immunity from a section* 219 *examination by disclosing property to the Fiscal.*

(2) *That the purpose of section* 219 *of the Civil Procedure Code is that the execution creditor should have the opportunity of examining the execution debtor and testing the truth of his disclosure of property.*

ESAKHAN *vs.* WANDURAGALA ... II. 208

Warrant issued under—Person arrested under warrant—Escaping from custody of Fiscal's Process Server—Failure to observe formalities regarding warrant of arrest—Effect of—

Held: (1) *That the arrest was not lawful as the warrant did not comply with the formalities prescribed by law.*

(2) *That, escape from the custody of a Process Server executing a warrant which had not been issued in accordance with the formalities required by law, was not an offence under section* 2 *of Ordinance No.* 11 *of* 1887.

GUNAWARDENE *vs.* GUNATILLEKE XII. 122

Failure to have debtor examined under § 219—Does it always amount to showing lack of diligence?

MUTTUKARUPPEN CHETTIAR *vs.* PATHIRANA ... ... XVI. 55

Examination under section 219—False statement—Summary punishment for contempt of Court.

Held: *That a false statement made at an examination under section* 219 *does not by itself justify a Judge in summarily punishing the witness for a contempt of Court.*

IN *Re* JUDGMENT DEBTOR ... XXXVIII. 70

§ § 223, 224 and 225

Application for recall of writ—Writ issued before decree was entered—Civil Procedure Code, sections 223, 224 and 225—Stamp Ordinance, Schedule B part II—Item V under Sub-head Miscellaneous.

Held: (1) *That it is irregular to allow an application to execute a decree before a formal decree has actually been entered.*

(2) *That an application for execution of a decree is a proceeding taken on or by virtue of any decree within the meaning of item V of Schedule B part II—Sub-head Miscellaneous of the Stamp Ordinance* 1909.

(3) *That an application for execution of a decree should not be allowed until the party applying has taken a copy of the decree.*

SILVA *vs.* WIJESEKARA ... III. 11

Civil Procedure—Writ of execution—Are proceedings in execution held by the Fiscal of no effect, if on or before the returnable day of the Writ to Court the period appointed for execution in the Writ is not extended?

Held: (1) *That the failure to extend the period of execution of a Writ on or before the returnable date does not render the seizure effected before that day invalid or ineffective.*

(2) *That even after the return is made the proceedings had by the Fiscal up to that date will continue to be recognized as valid unless expressly nullified.*

SIYANERIS *vs.* PEIRIS AND ANOTHER VII. 47

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Application for execution in the form prescribed by § 224—Application does not make judgment-creditor bound by all the other provisions of Chap. XXII of the Code.

PERERA *vs.* JONES AND ANOTHER XVI. 119

Section 224—Inappropriate to proceedings for enforcement of an extra-judicial decree or award which a Court is empowered, upon proof of its validity to recognize and enforce as if it were a judicial decree.

BARNES DE SILVA *vs.* GALKISSA WATTARAPPOLA CO-OP. STORES SOCIETY XLVIII. 102

§ 226

Failure of Fiscal to make demand of payment from judgment-debtor before execution of writ—Right of judgment-creditor to bid at sale in execution.

Held: (1) *That the requirements of section* 226 *of the Civil Procedure Code are imperative and that failure of the Fiscal to make demand of payment as required therein renders a sale null and void.*

(2) *That relief against such failure of the Fiscal can be claimed under section* 344 *of the Civil Procedure Code.*

(3) *That a judgment-creditor cannot purchase property at a sale in execution except with the permission of Court obtained under section* 272 *of the Civil Procedure Code.*

HADJIAR AND ANOTHER *vs.* KUDDOOS AND ANOTHER ... ... IV. 105

Effect of failure on the part of Fiscal to require the debtor to pay the amount of the Writ in accordance with section 226.

Held: *That the fact that no demand was made by the Fiscal under section* 226 *of the Civil Procedure Code does not deprive the Court of jurisdiction and render the seizure and sale thereafter a nullity, and that it is not open to any person to seek to attack the seizure and sale on that ground in a separate action.*

WIJEWARDENE *vs.* PODISINGHO *et al* XIII. 97

§ 227

Seizure of growing crop of tobacco—Validity of seizure.

THAMBIPILLAI *vs.* KANDIAH AND OTHERS XXIX. 75

§ 229

Prohibitory notice—Who should raise objection that money cannot be seized.

GANY SAIBO *vs.* PEIRIS ... I. 189

Estate Duties Ordinance No. 8 of 1919—Issue of citation and execution under section 32—Auction sale of goods of firm of which citee was partner—Money held by auctioneer for distribution among firm's creditors—Seizure of money in hands of auctioneer for balance estate duty due from citee.

Held: *That where a person holds a sum of money belonging to a judgment-debtor with express instructions to distribute the sum among certain specified creditors it is not a debt due to the judgment-debtor within the meaning of section* 229 *of the Civil Procedure Code.*

COMMISSIONER OF STAMPS *vs.* HILLS III. 1

§ 230

Prohibitory Notice—Sections 229 and 230—Who should raise the objection that the money cannot be seized?

Held: (1) *That the only cause which a debtor prohibited under clause* (*a*) *of section* 229 *of the Civil Procedure Code is allowed to show against remitting money to Court is that he is not indebted.*

That is not for a debtor prohibited under clause (*a*) of section 229 of the Civil Procedure Code to raise the objection that the money seized in his hands is not money that can be seized for a debt.

GANY SAIBO *vs.* PEIRIS ... ... I. 189

Debtor's failure to appear upon summons—Order for execution to issue—Power of Court to vacate order.

Held: *A Court has power to vacate an order made by it under section* 230 *of the Civil Procedure Code for execution to issue against a debtor who has failed to appear upon summons.*

JOHN *vs* PILLAI ... ... II. 25

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Garnishee order—Can Commissioner of Requests inquire into debts due by persons noticed where the amount is beyond his jurisdiction.

Held: That a Court has no power to hold an inquiry in Garnishee proceedings where there is a *bona fide* dispute as to the existence of a debt.

JAYAWEERA *vs.* ABDUL CADER II. 358

§ 234

Decree for money—Civil Procedure Code § 234—Seizure of decree pending full execution of writ thereunder—Warrant of arrest issued under decree seized—Application for recall of warrant—Can a judgment-creditor whose decree has been seized obtain process under the decree so seized?

On May 19th, 1926, Sivasampoe the plaintiff in this case obtained a decree against Chelvarayen the defendant for a sum of Rs. 4900/- The plaintiff finally issued writ on August 29, 1929, and realised a sum of Rs. 510/-. On the 18th of January 1929, the decree in favour of the plaintiff had been seized by an order issued in a case from the District Court of Colombo. This same decree was again seized on the 20th November, 1929, and November, 28th, 1929, by further orders issuing from the Court of Requests, Jaffna and the District Court of Colombo respectively. The plaintiff had on 18th November, 1929 applied for and obtained an order allowing a warrant for the arrest of the defendant. In spite of the seizures of the decree in his favour the plaintiff on August 6th 1930 took out the warrant and caused the arrest of the defendant. The defendant thereupon applied for his release on the ground that as the plaintiff's decree had been seized he was not entitled to take any process thereunder against him and also that he had saleable property which had not been seized. The District Judge rejected the contention that the plaintiff had no power to proceed under the decree in his favour after its seizure and refused to withdraw the warrant. The plaintiff appealed from this finding.

Held: *That once a decree has been seized, process in execution of that decree is only available to the person seizing it, and the original judgment-creditor under the decree seized cannot take out execution under it nor avail himself of it.*

SIVASAMPOE *vs.* CHELVARAYAN. I. 108

Seizure of money decree in favour of judgment-debtor—Application for substitution—Rights of substituted plaintiff—Is he entitled to draw all monies deposited to credit of the case.

MURUGESU *vs.* SADDANATHAR XLVI. 2

§ 237

There is no absolute prohibition in § 237 against alienation on the part of a judgment-debtor.

WIJEGOONESINGHE *vs.* GUNASEKERA XII. 49

Sale—Execution of writ—Mis-description of judgment-debtor in prohibitory notice under section 237 of the Civil Procedure Code—Judgment-debtor correctly described in writ, notices of sale, conditions of sale and Fiscal's conveyance in favour of bona fide **purchaser—Is sale void—Does purchaser get good title under the Fiscal's conveyance.**

The plaintiff-company, the Indo-Lanka Provident Insurance Company, Ltd., originally known as the Continental Provident Insurance Society Ltd., sued the defendant for declaration of title to property which the latter had purchased in 1940 at a sale in execution of a decree in the following circumstances:—

A decree was entered in 1936 against "the Continental Provident Insurance Society Ltd., by its Managing Director, S. K. Subramanium of Vathiry, Jaffna," The writ issued in pursuance of this decree contained full and correct particulars of the decree including the names of parties. When Fiscal proceeded to seize the property in question belonging to the judgment-debtor by giving the prohibitory notice required under section 237 of the Civil Procedure Code he gave the name of the judgment-debtor as "S. K. Subramanium of Vathiry" omitting the words "the Continental Provident Insurance Society, Ltd." All other particulars were stated correctly. The notices of sale under sections 255 and 256 of the Civil Procedure Code, and the conditions of sale gave correctly all the necessary particulars including the name of the judgment-debtor. At the sale held in 1940 the present defendant became

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purchaser, who, on obtaining Fiscal's Conveyance in 1941, entered into possession and effected improvements on the land.

The District Court held that the defendant did not get any title to the land under the Fiscal's Conveyance owing to the error in the prohibitory notice regarding the name of the judgment-debtor.

On appeal to the Supreme Court—

Held: (1) *That the plaintiff-company, who was the judgment-debtor under the decree entered in* 1936, *could not impugn the legality of the Fiscal's sale to the defendant, a* bona fide *purchaser, merely on the ground of the mis-description of the judgment-debtor's name in the prohibitory notice.*

(2) *That, in the circumstances, the mis-description of the judgment-debtor's name did not amount to an illegality.*

RAJENDRAM *vs.* THE INDO-LANKA PROVIDENT INSURANCE CO., LTD. XXXVI. 74

§ 238

Effect of registration of a seizure

NAGALINGAM *vs.* PULLE *et al* II. 333

Section 238 does not affect alienations made after seizure but before registration of the seizure.

WIJEGOONESINGHE *vs.* GUNASEKERE XII. 49

§ 241

The words "in a summary manner in § 241 do not authorise the use of the sections relating to summary procedure in the investigation of claims to property seized."

DHARMATILAKE *vs.* BRAMPY SINGHO AND ANOTHER ... ... XIII. 145

§ 243

Does this section place an imperative duty on the claimant to adduce evidence in support of his claim whether the judgment-creditor is present or not.

DHARMATILAKE *vs.* BRAMPY SINGHO AND ANOTHER ... ... XIII. 145

§ 247

Action under § 247 cannot be brought by a mortgagee.

ABRAHAM SINGHO *vs.* HARMANIS APPU AND ANOTHER ... ... I. 242

There is no presumption that the averments in the attestation clause of a deed are correct and true until the contrary is proved. The burden of proving that a deed was executed in fraud of creditors is on the person alleging it.

PALANIAPPA CHETTY *vs.* FERNANDO AND ANOTHER ... ... II. 512

When does a claim under § 247 act as a bar to an action for a declaration of title to the same land.

JULIUS PERERA *vs.* FEDRICK PERERA AND ANOTHER ... ... VIII. 119

Action, under section 247, by unsuccessful claimant—Is judgment-debtor a necessary party.

Held: *That the judgment-debtor is not a necessary party to an action brought by an unsuccessful claimant for the purpose only of section* 247 *of the Civil Procedure Code.*

PANDITHA *vs.* DAWOODBHOY XII. 41

Action under section 247—Plaintiff's interests in the subject-matter of action transferred before seizure subject to an agreement to a reconveyance—Can plaintiff maintain the action.

Held: (1) *That the plaintiff (D) cannot maintain this action, inasmuch as he had divested himself of his interests under P*1 *before the date of seizure.*

(2) *That, in view of the admission by the plaintiff, it became unnecessary for the learned District Judge to consider whether deed P*1 *was executed in fraud of creditors.*

SILVA *vs.* CAROLIS APPUHAMY AND ANOTHER ... ... XIII. 13

Action under section 247 by judgment-creditor—Judgment for plaintiff—Appeal by claimant (1st defendant)—Judgment-debtor (2nd defendant) not made a party—Is such omission fatal to appeal.

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Held: *That the appeal should be rejected inasmuch as the 2nd defendant was not made a party to the appeal.*

KAPPALARPITCHAI *vs.* ANTHONY XIII. 26

Damages for wrongful seizure under decree of Court—What must plaintiff do to succeed in an action?

Held: *That in order to succeed in an action for damages for wrongful seizure under a writ of execution, the plaintiff must aver specially in his pleadings and prove that the person seizing the property has* mala fide *set the law in motion.*

KANDASAMYPILLAI *vs.* SELVADURAI XVIII. 65

Defendant seeking to join in action vendors who sold the land claimed in order to obtain a rectification of his deed from which the land in dispute had been omitted in error.

Held: *That the defendant in an action under section* 247 *of the Civil Procedure Code is not entitled to bring in as parties-defendant to the action the vendors of the land in dispute with a view to obtain the rectification of the deed on which he relies by the addition of the land in dispute as it had been accidentally omitted therefrom.*

OLAGAPPA CHETTIAR *vs.* REITH XXI. 138

Section 247—Action under, by unsuccessful claimant—Burden of proof.

Held: *That in action under section* 247 *of the Civil Procedure Code by an unsuccessful claimant the burden rests on him to prove that at the date of seizure he had the right which he claims.*

BALAMANIKA *vs.* ABEYSENA ... XXXI. 50

Is a decree in action under § 247 an instrument affecting land for the purposes of the Registration of Documents Ordinance.

EBERT SILVA *vs.* WIJESEKERA XXXII. 1

Issue whether judgment-debtor or claimant entitled to land—Judgment dismissing action—Does such judgment operate as res judicata **between judgment-debtor and claimant in a subsequent action.**

HINNIAPPU *vs.* GUNARATNE XXXII. 102

Section 247—Evidence necessary to discharge burden of proof.

In an action under section 247 of the Civil Procedure Code, the evidence given by the judgment-creditor had raised a suspicion that the property seized belonged to the judgment-debtor.

Held: *That such evidence was not sufficient and that the judgment-creditor had not discharged the burden of proof resting on him.*

ABEYWARDENA *vs.* DE ZOYSA ABEYSIRIWARDENE ... ... XXXV. 40

§ 254

Seizure of decree in execution—Certification of payment to plaintiff thereafter in the action the decree of which was seized—Can this be done without notice to seizing judgment-creditor.

GOPALAKRISHNAPILLAI *vs.* SUPPIAH NADAR ... ... II. 165

§ 260

Fiscal's sale in execution of a hypothecary decree—Judgment-creditor permitted to bid at sale and allowed credit to the amount of his decree—Need he deposit one-fourth purchase price at time of sale.

Held: *That a judgment-creditor who has been allowed to bid at a sale in execution of a hypothecary decree and given credit to the amount of his decree is not bound to make a deposit of twenty-five percent on the purchase amount as required by section* 260 *of the Civil Procedure Code in the event of his becoming the purchaser of the property hypothecated.*

SILVA *vs.* CARUPPAN CHETTIYAR II. 149

§ 272

Right of holder of decree to bid at sale.

SILVA *vs.* CARUPPAN CHETTIYAR II. 149

A judgment-creditor cannot purchase property at a sale in execution except with the permission of Court obtained under § 272.

HADJIAR AND ANOTHER *vs.* KUDDOOS AND ANOTHER ... ... IV. 105

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A judgment-creditor who without obtaining previous sanction of Court arranges that a nominee should purchase the property seized in execution of a hypothecary decree is not entitled to seek the assistance of the Court to obtain a declaration that such nominee holds the property for him as constructive trustee.

WARNASURIYA *vs.* WICKREMASINGHE ... ... XXIII. 87

§ 276

Conditional transfer of land—Right to a re-transfer—Is such right movable or immovable?

ALAHAKOON AND ANOTHER *vs.* DIAS ... ... XI. 155

Sale in execution—Setting aside of—Irregularity in publishing sale—When may a Court presume that inadequacy of price is due to such irregularity—Sale notice referring wrongly to what was to be sold—

Held: *That there was an irregularity in the publishing of the sale within the meaning of section* 276 *of the Civil Procedure Code.*

KUNJIKUTTY *vs.* MATHURUVALLIACHY XIII. 5

§ 281

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

Held: (1) *That the purchaser was entitled to maintain the action without an order under section* 281 *of the Civil Procedure Code.*

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

DIAS *vs.* SILVA ... ... XVI. 75

§ 282

Application to set aside, after confirmation by court, on ground of fraud.

SIDAMBARAM CHETTIAR *vs.* ANNAMALAY CHETTIAR *et al* ... ... I. 138

A purchase by decree holder in the name of a nominee is an irregularity within the contemplation of § 282.

SIDAMBARAM CHETTIAR *vs.* ANNAMALAY CHETTIAR *et al* ... ... I 138

A person who merely has a decree against the judgment-debtor at the time of the sale is not a person who has an interest in the property.

LETCHIMANAN CHETTY *vs.* SAMICHCHI II. 31

Conditional transfer of land—Right to a re-transfer—Is such right movable or immovable property.

ALAHAKOON AND ANOTHER *vs.* DIAS XI. 155

Sale in execution—What is material irregularity in publishing or conducting it.

Held: (1) *That an irregularity in publishing or conducting a sale in execution cannot be regarded as a material irregularity unless—*

(*a*) *There is direct evidence that the irregularity has resulted in injury to the party seeking to set aside the sale, or*

(*b*) *The party complaining has suffered injury which may be reasonably and logically inferred to be the natural consequence of the irregularity.*

(2) *That a sale by an auctioneer, not authorized to conduct sales at the place where the auction was held, is not a material irregularity.*

(3) *That the mere failure on the part of the Court to notify the party complaining against the sale before approving any modification in the deposit and valuation is not a material irregularity.*

(4) *That mere failure on the part of the Court to approve the name of the auctioneer is not a material irregularity.*

(5) *That the conduct of a sale by an auctioneer without formal notice to the party complaining is not a material irregularity.*

PERIS *vs.* SENEVIRATNE ... XXVII. 59

§ 284

Crown lease—prohibition against alienation without consent of Crown—condition that land shall revert to Crown if lessee's interests are sold in execution—Sale of lessee's interests in execution.

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Held: *That the lessee had no saleable interest in the lease and that the purchaser was entitled to have the sale set aside.*

JANIS DE SILVA *vs.* KANAKARATNE XV. 8

§ 286

Mortgage Ordinance No. 2 of 1927, section 12—Should a plan be attached to a conveyance of land sold under a Mortgage decree by the Fiscal in a case where the Court has made no order that it should be done.

Section 286 does not apply to a conveyance under a mortgage decree.

SELLAPPA CHETTY *vs.* SENANAYAKE *et al* ... ... II. 171

A surveyor employed by the Fiscal to prepare a plan for the purpose of executing a Fiscal's conveyance as required by Section 286 is a public servant for the purpose of section 183 of the Penal Code.

VEERASINGHAM *vs.* MEENACHY XXII. 37

§ 289

Directions for sale of land in execution included in decree—Does it make § 289 applicable to such directions.

ZAHAN *vs.* STEPHAN FERNANDO I. 170

Although, under § 289, upon the execution of a Fiscal's conveyance, the grantee is deemed to have been vested with the legal estate from the time of the sale, it is not incumbent on a person filing a mortgage action in respect of the land to join the purchaser unless the Fiscal's conveyance has been registered at the date of the mortgage action.

WIJEWARDENA *vs.* PERERA ... XI. 57

§ 291

Prescription to land.

Held: *That the possession which is permitted to a judgment-debtor under section* 291 *of the Civil Procedure Code is not sufficient to establish a prescriptive title to land.*

FELICIA DE SOYSA *vs.* FERNANDO AND ANOTHER ... ... XXI. 143

§ 298

Immunity of minors from arrest under Roman Dutch Law.

N. H. L. GIRIGORIS *vs.* R. P. DE ZILVA ... ... VII. 83

The exemption created by § 298 applies only to cases arising under the Code.

VELUPILLAI *vs.* PARAMASIVAMPILLAI ... ... XIII. 119

§ 298, 299, 300 & 301

Effect of failure to hold the inquiry required by section 298 before the issue of warrant or notice—When objection not taken in the Court below may be entertained in appeal.

Held: (1) *That before the issue of a warrant under section* 298 *or a notice under section* 299 *of the Civil Procedure Code, the Court must hold such inquiry as the Court may deem necessary.*

(2) *That a mere perusal of the petition and affidavit does not satisfy the requirements of section* 298 *that an inquiry should be held before the issue of the warrant or notice.*

(3) *That the petition and affidavit are necessary ingredients of an application under section* 298 *and the application cannot be entertained in their absence.*

(4) *That a person who has obtained a decree of a sum of Rs.* 50/*-per mensem is not entitled to the aid of section* 298 *even though the monthly payment is in arrear and the arrears exceed Rs.* 200/-

GNANAMPIKAIAMMAI *vs.* CANDIAH XX. 115

§ 306

Application by debtor for discharge from arrest before issue of warrant.

Held: *That a judgment-debtor is not entitled to apply for a discharge before he is actually arrested or imprisoned or a warrant for his arrest is issued.*

JAYAWARDENE *vs.* PERERA ... IV. 92

Can the Court inquire into the validity of a gift made by the judgment-debtor before the action—Gift by Muslim—Can its validity be canvassed in proceedings under section 306.

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Held: (1) *That in proceedings under Section* 306 *of the Civil Procedure Code, and the subsequent Sections, there is hardly any scope for an inquiry with regard to the validity or otherwise of a transfer effected by a judgment-debtor.*

(2) *That, if the Court is satisfied that the judgment-debtor has not transferred any of his property since the institution of the action, it is entitled to discharge the debtor.*

SINNIAH CHETTIAR AND OTHERS *vs.* ISMAIL ... ... IX. 64

Discharge of judgment-debtor from custody.

Held: *That in dealing with a petition under Section* 306 *of the Civil Procedure Code, the Court should satisfy itself that the conditions laid down in Section* 311 *have been fulfilled.*

ISMAIL AND ANOTHER *vs.* PERERA XVIII. 16

§ 324

Is a sub-tenant a person bound by the decree against tenant.

KUDOOS BHAI *vs.* VISVALINGAM XXXIX. 20

Section 324 has no application if the property purchased in execution proceedings is in the occupation of a tenant who does not answer to one of the descriptions specified in Section 287 (1).

JUSTIN FERNANDO *et al vs.* ABDUL RAHAMAN AND ANOTHER ... ... XLV. 1

Section 324—Meaning of "tenant" in proviso.

MOHAMED IBRAHIM SAIBO *vs.* MANSOOR *et al* ... ... XLVIII. 35

§ 325

Jurisdiction of the Court which passed the decree under execution to exercise the punitive powers given by the above Sections.

Held: *That the Court which passed the decree under execution can exercise the punitive powers created by Sections* 325 *and* 326 *of the Civil Procedure Code whether the land in respect of which the obstruction or resistance took place is within its jurisdiction or not.*

SOBITHA THERUNANSE *vs.* SARANAPALA THERUNANSE ... ... II. 208

Dispossession by judgment-debtor of purchaser at Fiscal's sale after he had been placed in complete and effectual possession by Fiscal—Does Section 325 apply.

Held: *That Section* 325 *of the Civil Procedure Code does not apply to a case where the purchaser is dispossessed by the judgment-debtor after the Fiscal has given effectual and complete possession to the purchaser.*

PERERA *vs.* ABOOTHAHIR ... III. 24

Position of sub-tenant who obstructs delivery of property to landlord in execution of a decree against tenant.

KUDOOS BHAI *vs.* VISVALINGAM XXXIX. 20

Execution of proprietary decree—Resistance to Fiscal—Persons resisting instigated by defendants—Sentence of imprisonment not passed—Order to deliver possession made under Section 330—Correctness of such order.

Held: *That, where at an inquiry into a complaint under Section* 325 *of the Civil Procedure Code the evidence shows that a person resisting the Fiscal was instigated by the judgment-debtors, order directing the judgment-creditor to be put into possession of the property should be made under Section* 326 *and not under* § 330. *Section* 326 *does not make it obligatory for a Court to pass a sentence of imprisonment before making an order of possession.*

LUCINA FERNANDO *et al vs.* ASMABAI ADAMALY ... ... XLI. 10

Effect of constructive delivery of possession of premises.

MOHAMED IBRAHIM SAIBO *vs.* MANSOOR *et al* ... ... XLVIII. 35

§ 325-326

Mortgage decree—Sale of property mortgaged—Writ for delivery of possession—Resistance by wife of judgment-debtor claiming title on deed executed pending mortgage action—Remedy of purchaser.

ZEINADEEN *vs.* SAMSUDEEN AND ANOTHER XIV. 133

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Application under, by landlord for resisting Fiscal by tenant's agent claiming to be sub-tenant—Compromise by parties—Agreement to give possession on specified date—Failure to give possession—Re-issue of writ—Obstruction by tenant's servant claiming rights on deed of purchase—Bona fides **of transaction.**

A landlord took out writ against his tenant (1st respondent) for ejecting him. The 2nd respondent claiming to be a sub-tenant of 1st respondent obstructed the Fiscal and a consequent application under Section 325 of the Civil Procedure Code was compromised, the respondents agreeing to deliver possession on a specified date and not to sub-let to a third party in the meantime. On failure to deliver possession as agreed, writ was re-issued when the 3rd respondent claiming a share of the premises on a deed of purchase, resisted delivery of possession. A second application, under the said Section 325 made on that ground was dismissed by the learned Commissioner after inquiry, as he thought that the claim under the deed was a *bona fide* one. The landlord appealed.

There was acceptable evidence to the effect (*a*) that the sub-letting to the 2nd respondent was a nominal one and the 1st respondent continued to carry on the business at the premises even when the 2nd respondent obstructed the Fiscal; (*b*) that the 3rd respondent was managing the said business even when the 2nd respondent was regarded as sub-tenant; (*c*) that the 3rd respondent was a servant of the 1st respondent, who even at the date of inquiry was visiting the shop almost daily; (*d*) that on the said deed 3rd respondent acquired title *inter alia* to a 1/24th share of the premises for Rs. 7,000 and that the vendee had agreed to dispense with search; (*e*) the 3rd respondent did not take the slightest interest in regard to the transaction, but it was the 1st respondent who was present and gave instructions and who paid the money.

Held: *That in the circumstances, the deed produced by the 3rd respondent was obtained in his favour by the 1st respondent with a view to resist the attempts to obtain delivery of possession by the landlord.*

JOHN SINGHO *vs.* BEETAN SINGHO AND OTHERS ... ... XXXIV. 25

§ 326

Jurisdiction of Court which passed decree under execution to exercise the punitive powers given by above Section.

SOBITHA THERUNANSE *vs.* SARANAPALA THERUNANSE ... ... II. 208

Courts Ordinance Section 39—Is an order under Section 326 committing a person to prison made by a Court of Requests an appealable Order—Can a person other than those mentioned in the Section be committed for obstruction.

Held: (1) *That an order made under Section 326 of the Civil Procedure Code by a Court of Requests is an appealable Order.*

(2) *That a person other than those mentioned in Section 326 of the Civil Procedure Code; i.e., the judgment-debtor or person acting at his instigation, cannot be dealt with under the Section for obstruction.*

MARIKAR *vs.* DHARMAPALA UNNANSE. ... ... II. 422

Execution of proprietary decree—Resistance to Fiscal—Persons resisting instigated by defendants—Sentence of imprisonment not passed—Order to deliver possession made under § 330—Correctness of such order.

LUCINA FERNANDO *et al vs.* ASMABAI ADAMALY ... ... XLI. 10

§ 327

Does it confer on the Courts a jurisdiction in excess of that conferred by § 9 of the Code?

Held: *That Section 327 of the Civil Procedure does not confer on the Courts a jurisdiction, monetary or otherwise, beyond that conferred by § 9. A Court has no power under § 327 to deal with a matter irrespective of the pecuniary or other limitations of its ordinary jurisdiction.*

PARIYAGAM PILLAI *vs.* CADER MEERA *et al* ... ... I. 174

Bona fide **claimant to property seized—Undertaking to quit premises given to Court.**

A *bona fide* claimant in possession of premises in respect of which a mortgage decree had been entered gave an undertaking to Court to quit the premises by a stated

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time. He failed to keep his undertaking. When the Fiscal attempted to place the mortgage decree holder in possession at the expiraion of the stated period he resisted him.

Held: *That sections* 327 *and* 330 *of the Civil Procedure Code were applicable in such a case.*

ASSANDEEN *vs.* CHETTIYAR ... IV. 80

Execution of decree—Resistance to Fiscal—Petition to Court—What a Court has to investigate—Decree-holder's rights.

Action under section 102 of the Trusts Ordinance—Vesting order authorising trustees to take charge and possess temple and its temporalities and to eject parties therefrom—Is it an executable decree or merely declaratory—Reliefs claimed in action under section 102—Can they be decreed from time to time.

Held: (1) *That under section* 327 *of the Civil Procedure Code, the claim to be investigated is the claim of the person offering resistance to the decree and not the decree-holder's own right.*

(2) *That it is not necessary that the decree-holder should show that he has a cause of action. The fact that he is a holder of a decree for possession of immovable property is sufficient.*

(3) *That a decree directing delivery of trust property to trustees is executable and not declaratory.*

(4) *That in an action instituted under section* 102 *of The Trusts Ordinance, reliefs claimed therein need not be embodied in one decree, but that decree may be issued from time to time.*

CHINNATHAMBY AND OTHERS *vs.* SOMASUNDARA AIYAR AND OTHERS XXXV. 91

Defences open to a sub-tenant at inquiry under—

MOHAMED IBRAHIM SAIBO *vs.* MANSOOR *et al* ... ... XLVIII. 35

§ 330

Bona fide **claimant to property seized—Undertaking to quit premises given to Court.**

ASSANDEEN *vs.* CHETTIYAR ... IV. 80

Order under §330—When is it appealable?

ARLIS APPUHAMY AND OTHERS *vs.* ANDRAYAS APPUHAMY AND OTHERS ... ... XXXV. 20

Execution of proprietary decree—Resistance to Fiscal—Persons resisting instigated by defendants—Sentence of imprisonment not passed—Order to deliver possession made under §330—Correctness of such order.

LUCINA FERNANDO *et al vs.* ASMABAI ADAMALY ... ... XLI. 10

§ 337

Section 13 (1) Court of Requests Amendment Ordinance No. 12 of 1895—Appeal from Court of Requests—Can question of law be argued in an appeal on facts—Prohibitory notice on employer seizing labourer's wages—Can employer take objection to the seizure.

Held: (1) *That an appeal on law which has not been preferred within the prescribed time cannot be introduced into a petition of appeal on facts so as to defeat the provisions of the law regarding limitation of time for preferring an appeal.*

(2) *That where a seizure of a labourer's wages is made by a prohibitory notice it is the judgment-debtor and not his employer or anyone else who should claim exemption under section* 218 *of the Civil Procedure Code.*

JOSEPH NADAR *vs.* ASIRWATHAM IX. 107

Use of due diligence to procure complete satisfaction of decree—When may subsequent application to execute the same decree be refused.

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

MUTTUKARUPPEN CHETTIAR *vs.* PATHIRANA ... ... XVI 55

Money decree—Examination of debtor under section 219—Writ issued but unexecuted for want of debtor's address—Subsequent application to re-issue writ—Due diligence.

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The plaintiff, a decree-holder against the defendant, discovered after examination of the defendant under section 219 of the Civil Procedure Code, that his assets were so small that no useful purpose would be served by selling them in execution. He, however, obtained a writ, which was returned unexecuted owing to plaintiff's failure to furnish the defendant's address. Two years thereafter, the plaintiff applied to the Court for a re-issue of the writ, which was refused on the ground that on the last preceding application the plaintiff had not exercised due diligence to procure complete satisfaction of the decree.

Held: *That in the circumstances the plaintiff could not be said not to have used due diligence and the application to re-issue should have been allowed.*

PERERA AND OTHERS *vs.* PERERA XLIV. 11

Application after ten years for re-issue of writ returned unexecuted—Subsequent application—Court's power to grant.

Plaintiff obtained a money decree against the appellant on 16th December, 1937. The 1st application for writ was made on 8th July, 1948, and was allowed returnable on the 10th of February, 1949, and various sums of money representing the salary of the appellant for the months of March to December, 1948, were seized thereon and deposited in Court.

On 13th January, 1949, plaintiff's Proctor moved that the writ issued be recalled, extended and re-issued, but the Court made order that the application should be made after the return of the writ.

On 23rd of March, 1949, plaintiff made application for further execution setting out the steps taken on 13-1-49 and praying that writ returned be re-issued. The Court allowed it holding that the application was virtually due for extension of time. The appellant contended that the writ was barred by section 337 of the Civil Procedure Code.

Held: *That in the circumstances the writ was barred by section* 337 *of the Civil Procedure Code.*

KANAGASABAI *vs.* BALASUBRAMANIAM XLIII. 15

§ 339

Assignment of decree not yet in existence—Until decree comes into existence procedure in § 339 cannot be availed of.

SILVA *vs.* SUPRAMANIAM CHETTIAR III. 99

Seizure of money decree in favour of judgment-debtor—Application for substitution—Rights of substituted plaintiff—Is he entitled to draw all monies deposited to credit of the case?

MURUGESU *vs.* SADDANATHAR ... XLVI. 2

§ 341

Execution of writ after death of judgment-debtor.

Held: (1) *That section* 341 *of the Civil Procedure Code governs the execution of decrees after the death of the judgment-debtor and section* 347 *of that Code does not apply to such execution.*

(2) *That the Code does not provide for the remission of a taxed bill of costs by the Judge for re-taxation to the Taxing Officer.*

SIRIWARDENE *vs.* KITULGALLA *et al* XXI. 106

§ 343

§ 343 does not permit the variation of a decree once entered.

THE BANK OF CHETTINAD LTD. *vs.* PULMADAN CHETTY ... ... I. 255

Mortgage decree—Can Court stay execution of decree—

ARUNACHALAM CHETTIAR *vs.* A. D. PAULIS APPUHAMY ... ... VI. 151

§ 344

Applicability of § 344 to sales by Fiscal—Application to set aside sale on ground of fraud.

SIDAMBARAM CHETTIAR *vs.* ANNAMALAY CHETTIAR *et al* ... ... I. 138

§ 344 does not confer special power on Court to set aside its own decree.

THE BANK OF CHETTINAD LTD. *vs.* PULMADAN CHETTY ... I. 255

Application to set aside sale on ground of fraud—Fraud must be specifically pleaded.

RAMANATHAN CHETTIAR *et al vs.* KURERA *et al* ... ... I. 396

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Relief against the failure of the Fiscal to make demand of payment under § 226 can be claimed under § 344.

HADJIAR AND ANOTHER *vs.* KUDDOOS AND ANOTHER ... ... IV. 105

Independently of whether the terms of a bargain between a judgment-creditor and a judgment-debtor amount to an adjustment within the meaning of Section 349 the terms of the bargain should be considered by the executing Court under Section 344 as to whether the plaintiff's right to execution was controlled, and if so, to what extent and in what manner, by such bargain.

SILVA *vs.* WICKREMASINGHE ...XXIV. 131

§ 347

Does § 347 apply in a case in which a hypothecary decree has been entered and direction given that an auctioneer should carry out a sale in execution of a decree under the Mortgage Ordinance.

PERERA *vs.* JONES AND ANOTHER XVI. 119

§ 347—Does not apply to the execution of a decree after the death of the judgment-debtor.

SIRIWARDENE *vs.* KITULGALLA *et al* XXI 106

In a case involving a hypothecary decree directing that the mortgaged property be sold by a named auctioneer, no order for sale with notice to the judgment-debtor under § 347 is necessary.

DE FONSEKA *et al vs.* THE CHARTERED BANK ... ... XXVI. 73

Execution of decree—Application for execution made after lapse of more than one year from date of decree—Failure to give judgment-debtor notice of the application—Sale in execution—Validity of sale—Form of application.

Where, after the lapse of more than one year from the date of a decree, an application for its execution was made in Form 42 in Schedule II to the Civil Procedure Code and the judgment-debtor's property was sold in execution without giving him notice of the application as required by Section 347 of the Civil Procedure Code.

Held: (1) *That the form of the application was defective.*

(2) *That the sale in execution was void.*

FERNANDO *vs.* FERNANDO AND OTHERS ... ... XXIX. 58

Failure to serve notice under—Is sale in execution of decree null and void?

Held: (1) *That the provision as to service of notice under Section* 347 *of the Civil Procedure Code is merely directory.*

(2) *That the Court ought not to interfere with the rights of a purchaser at an execution sale merely on the ground that such notice was not served. The party contesting the rights of such purchaser must prove that the judgment-debtor was prejudiced by the omission.*

SILVA *vs.* KAVANIHAMY ... XXXIX. 33

§ 348

Case settled in terms of consent motion—Judgment for plaintiff—Undertaking, in consent motion, by surety to pay the amount of decree due if defendant failed to satisfy decree—Failure of defendant to satisfy decree—Application, under Section 348, for writ against surety—Can plaintiff proceed against such surety in the same action—Is a surety bond necessary for proceedings under this Section.

Held: (1) *That the judgment-creditor (the plaintiff) was entitled, under Section* 348 *of the Civil Procedure Code, to proceed against the appellant in this action.*

(2) *That there is no need for any bond, inasmuch as there is an express guarantee in the consent motion to satisfy the decree.*

CHARLES *vs.* JAYASEKERA ... XII. 118

Security given in Criminal Court for due performance of decree in proposed civil action—Can successful party in civil action realise security in execution proceedings under Section 348.

Held: *That execution proceedings under Section* 348 *of the Civil Procedure Code should be limited to security taken before the Court under the provisions of the Code and does not apply to security given outside the Court.*

JOHN AND ANOTHER *vs.* SILVA ... XLII. 67

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§ 349

Mortgage decree—Terms of settlement filed after decree—Payment of money into Court—What is adjustment of a decree.

Held: (1) *That Section 349 of the Civil Procedure Code applies only to payments made out of Court.*

(2) *That, where money is paid into Court, there is no necessity to inform the Court of the payment by petition.*

(3) *That, where terms of settlement are merely filed without any indication whatever by the parties or by the Judge that they are an adjustment of the decree under Section 349 of the Civil Procedure Code, the Section cannot be regarded as applying to the terms so filed.*

(4) *That, a transaction by which the parties agree to vary the mode by which the reliefs granted by the decree are to be realised in execution in a suit, or the time when the decree becomes executable, is not an adjustment of the decree.*

(5) *That the parties cannot by agreement vary a decree, and that a variation of a decree by agreement of parties is not valid and effectual.*

CHETTINAD CORPORATION *vs.* RAMAN CHETTIAR ... ... X. 58

Can a decree once entered be altered.

Held: (1) *That Section 349 of the Civil Procedure Code (Chapter 86) does not contemplate the alteration of a decree to give effect to an agreement reached by the parties after decree is entered.*

(2) *That agreements reached after decree has been entered in an action cannot be made the subject-matter of a fresh decree in the same action.*

HUNTER AND ANOTHER *vs.* DE SILVA XIV. 123

Section 349 (2)—Meaning of the words "adjustment to the satisfaction of the decree-holder."

Held: *That the words "adjustment to the satisfaction of the decree-holder" mean a transaction to which the decree-holder is a consenting party the effect of which in law is to extinguish the decree in whole or in part.*

PONNAMPERUMA *vs.* WICKREMANAYAKE ... ... XXIII. 16

Application by plaintiff for writ of execution—Application by defendant to have agreement certified of record as adjustment under § 349—Finding by Court that agreement did not amount to an adjustment—Should Court consider under § 344 whether right to execution is controlled by such agreement.

SILVA *vs.* WICKREMASINGHE ... XXIV. 131

Adjustment of decree—Certification—What amounts to certifiable adjustment.

Mortgage Decree—Setting aside sales under—Failure to issue notice under Section 347—is such notice necessary—Where Court directed notice to issue does failure to issue such notice vitiate sales held thereon.

Once the Judge has signed a hypothecary decree giving directions, is it necessary that the communication of such directions to the auctioneer should also be signed by the Judge himself.

Held: (1) *That the alleged adjustment was not one certifiable under Section 349 of the Civil Procedure Code, inasmuch as there was no completed contract but a case of negotiations which failed to achieve the end which the parties had in view.*

(2) *That in a case involving a hypothecary decree, directing that the mortgaged property be sold by a named auctioneer, no order for sale with notice to the judgment-debtor under Section 347 of the Civil Procedure Code is necessary.*

(3) *That even if it is assumed that the order of the Judge was intended to direct notice on the judgment-debtor, the failure to issue it was only a non-compliance with a direction of Court and as such not an irregularity that had the effect of vitiating the sales.*

(4) *That once the hypothecary decree giving directions for the sale of mortgaged property by a named auctioneer is signed by the Judge, the communication of the order to sell to the auctioneer may be made through an Officer of the Court.*

DE FONSEKA *et al vs.* THE CHARTERED BANK ... ... XXVI. 73

Certificate of payment—Proctor's right to certify on behalf of decree-holder.

Held: *That certification of payment under Section 349 of the Civil Procedure Code does not involve an appearance in Court on the part*

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of the decree-holder, and the proviso to section 24 of the Civil Procedure Code does not apply. The written consent of the decree-holder is not necessary where a Proctor representing him moves the Court to certify payment.

SOPIN NONA PATHMASILLIE *vs.* R. DON JORLIS RAJAPAKSE ... ... XLVII. 64

§ 350

A competing creditor who has no claim to concurrence inasmuch as his writ was not in the hands of the Fiscal at the time of the realization of assets, is entitled to the sum in excess of the amount due on the writ in the hands of the Fiscal out of the sum deposited in Court.

SELLAPPA CHETTIAR *vs.* ARUMUGAM CHETTIAR... ... ... XXIV. 31

§ 352

Money deposited in Court—Concurrence—Can a judgment-creditor who has no writ in the hands of the Fiscal at the time of realization of assets claim concurrence—Amount in excess of the writ in hands of Fiscal—Who is entitled to?

Held: (1) *That a writ in the hands of the Fiscal at the instance of a particular judgment-creditor is a condition precedent to a claim by him for concurrence.*

(2) *A competing creditor who has no claim to concurrence inasmuch as his writ was not in the hands of the Fiscal at the time of the realization of assets, is entitled to the sum in excess of the amount due on the writ in the hands of the Fiscal out of the sum deposited in Court.*

SELLAPPA CHETTIAR *vs.* ARUMUGAM CHETTIAR... ... ... XXIV. 31

§ 365

Service of notice of security for costs of appeal on public holiday—Dies Non—Is service valid?

WANIGASEKERA *et al vs.* LOUISZ *et al* XXV. 33

§ 384

The omission to fulfil the requirements of Rule 3 of the Rules made under the Reciprocal Enforcement of Judgments Ordinance cannot be made good under §384.

ALAGAPPA CHETTIAR AND ANOTHER *vs.* PALANIAPPA CHETTIAR ... XVII. 9

§ 384 governs the leading of evidence in summary proceedings.

DASSANAYAKE *vs.* DASSANAYAKE XXXI. 80

Summary Procedure—Inquiry—Oral evidence permitted to petitioner—Can the Court prevent respondent giving oral evidence or cross-examining petitioner.

Held: *That where at an inquiry under summary procedure the Court allows the petitioner to give oral evidence, it could not properly refuse the respondent the same privilege or the cross-examination of the petitioner.*

NOOR MOHAMED *vs.* UMMA ... XXXII. 27

§ 396

Circumstances in which an order of abatement may be made under § 396.

SELLAMMA ACHIE *vs.* PALAVASAM XV. 63

Consequences of valid Order of Abatement.

SOOTHIRETNAM *vs.* ANNAMMAH L. 35

§ 398

A person summoned to defend an action as legal representative must defend the action or object that he is not the legal representative. He cannot take exception to the claim that he is the legal representative and also file answer as such.

THORNTON AND ANOTHER *vs.* VELAITHAN CHETTY ... ... XI. 148

§ 402

Order of Abatement—Can such an order be made on the ground that there are certain other cases pending relating to the same subject-matter.

Held: (1) *That a Court cannot, upon the decision in appeal of a certain connected case, make an Order of Abatement in a case which had been postponed indefinitely pending the decision in appeal unless the plaintiff fails to take any step he is required by law to take.*

(2) *That a Court in postponing a case must postpone it to a date to be fixed by the Court.*

(3) *That it is irregular to make an order to "lay by" a case pending the decision in appeal of connected cases.*

TILLEKARATNE AND ANOTHER *vs.* KEERTHIRATNE ... ... III. 64

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Action taken off trial roll as Attorney alleged to be dead—No further steps taken for nearly two years thereafter—Order of Abatement of action.

Held: *That the order was correct.*

WILSON *vs.* SINNIAH ... ... XI. 103

Abatement—Death of plaintiff within twelve months from date of last order—Can a Court enter Order of Abatement under such circumstances.

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

SELLAMMA ACHIE *vs.* PALAVASAM XV. 63

§ 403

Order of Abatement—Application to vacate such order—Order that abatement do stand, but leave granted to file fresh action—Validity of such order.

Held: *That when an action has abated a Court has no power to grant leave to file a fresh action.*

KAMELA AND ANOTHER *vs.* ANDRIS XIV. 35

Order of Abatement in partition action—When is order a bar to a second action.

JAYASEKERA AND ANOTHER *vs.* SAMARANAYAKE ... ... XXI. 121

Consequences of valid Order of Abatement.

SOOTHIRETNAM *vs.* ANNAMMAH. L. 35

§ 404

Meaning of the word "interest" in § 404.

Held: *That "interest" in section* 404 *of Civil Procedure Code means interest in the property the subject-matter of the suit.*

WILSON *et al vs.* VEALYATHAN CHETTIAR *et al* ... ... I. 313

An Administrator can continue an action commenced by his predecessor in office.

THORNTON AND ANOTHER *vs.* VELAITHAN CHETTY ... ... XI. 148

Action instituted by alien enemy—Addition of Custodian of Enemy Property as a party—Can the added-plaintiff proceed with the action.

This is an action instituted by an alien enemy. The Custodian of Enemy Property intervened and was added as a party-plaintiff under section 404 of the Civil Procedure Code. The defendant contended that the Custodian was not entitled to proceed with the action in the absence of the plaintiff. The District Judge held that the added-plaintiff was entitled to proceed with the action. The defendant appealed from that decision. The Supreme Court dismissed the appeal and upheld the District Judge's order.

BOGSTRA AND OTHERS *vs.* RANASINGHE (CUSTODIAN OF ENEMY PROPERTY) ... ... XXVIII. 79

Transfer of defendant's interest pending action—Application by such transferee to be added as defendant—Objection by plaintiff and defendants—Does § 404 permit such intervention ?

SILVA *vs.* JAYASEKERA AND ANOTHER ... ... XXX. 111

Action instituted by administrator—Trial—Application for postponement on ground of plaintiff's illness—Recall of letters to plaintiff in testamentary case—Appointment of new administrator—Date given for substitution—Failure to substitute—No steps taken for over twelve months—Order of Abatement—Validity of order.

P, the administrator of the estate of a deceased person, instituted an action against the defendants to recover money due to the estate. The defendants filed answer and the case was fixed for trial. On the trial date the Proctor for plaintiff asked for a postponement on the ground of plaintiff's illness and that it had become necessary to appoint a new administrator. This was granted and order was made removing the case from the trial roll and fixing a date for substituting the new administrator, who was not substituted as plaintiff, and no further steps were taken in the case for over twelve months. Thereupon, the Court entered Order of Abatement. Later the appellant having obtained letters of administration in his favour and substitution,

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moved to have the Order of Abatement set aside. This was refused on the ground that there had been unreasonable delay.

Held: (1) *That under Section* 404 *of the Civil Procedure Code, the Court had no power to compel a person to get himself substituted.*

(2) *That the right of the original administrator to proceed with the action continued, because his successor was not substituted.*

(3) *That there had been no failure on the part of the original administrator to take a necessary step to prosecute the action inasmuch as the next step was to fix the case for trial, which duty rested with the Court under Section* 80 *of the Civil Procedure Code.*

(4) *That in the circumstances, the Order of Abatement was invalid.*

PARTHASARTHY *vs.* FERNANDO AND TWO OTHERS ... ... XXXV. 102

§ 406

Action for rent and ejectment—Proceedings wrongly instituted under Small Tenements Ordinance—Action withdrawn and regular action filed in Court of Requests—Plea of res judicata **not available.**

BANDARANAYAKE *vs.* PERERA XXXVII. 37

Partition action—Sale ordered—Case allowed to be withdrawn on plaintiff's motion before sale—Power of Court to allow withdrawal of action.

MARY NONA *et al vs.* JAYAWARDENA ... ... XLIV. 31

§ 408

Agreements reached after decree has been entered in an action cannot be made the subject-matter of a fresh decree in the same action.

HUNTER AND ANOTHER *vs.* DE SILVA ... ... XIV. 123

Settlement of action—Terms of settlement accepted by Court but not embodied in formal decree—Terms of settlement are binding on the parties.

FERNANDO *vs.* COOMARASWAMY XVII. 1

Agreement to recovery land accepted by Court as term of settlement of action—Agreement not executed before a Notary and not embodied in formal decree—Agreement is binding on the parties.

FERNANDO *vs.* COOMARASWAMY XVII. 1

Meaning of "action" and "subject-matter of action."

FERNANDO *vs.* COOMARSWAMY XVII. 1

Admissions by Counsel and Proctors—Must be clear as to terms and made with consent of parties.

PUNCHIBANDA *vs.* PUNCHIBANDA AND OTHERS ... ... XXI. 16

Challenge by Muslim plaintiff to Buddhist defendant to take Oath at Mosque—Acceptance of challenge—Terms of settlement recorded by Court—Subsequent application by plaintiff to withdraw from agreement allowed by Court.

Held: *Plaintiff should not have been allowed to resile from the agreement as it was a lawful compromise within* § 408.

NAGOOR ADUMAI *vs.* WILLIAM XXX. 108

Power of Court to accept compromise with respect to a charitable trust.

KANDIAHPILLAI AND FOUR OTHERS *vs.* VAITHILINGAM AND EIGHT OTHERS ... ... XXXVI. 27

Compromise arrived at in the course of an action without complying with requirements of § 408—Effect of.

BABYHAMINE *et al vs.* JAMIS *et al* XLVI. 5

Agreement or compromise—Affecting immovable property—Must it be embodied in a formal Order of Court.

VALLIPURAM *vs.* KANADIPILLAI XLVI. 92

§ 416

Principles that should govern the exercise of the discretion conferred by the Section.

Held: (1) *That a plaintiff should not be compelled to give security under Section* 416 *of the Civil Procedure Code merely because he is a pauper.*

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(2) *That the Court in making an order under Section* 416 *of the Civil Procedure Code should consider:*

(*a*) *Whether the plaintiff has solicited a particular forum in order to harrass the defendant or to render the recovery of costs by him difficult.*

(*b*) *Whether the provisions of the Section have been oppressively invoked by the defendant.*

SENANAYAKE AND OTHERS *vs.* DE CROOS AND ANOTHER ... XV. 148

§ 417

Security for costs—Defendant residing out of jurisdiction.

Held: *That in exercising his discretion under Section* 417 *of the Civil Procedure Code, the Judge must give reasons for his order.*

GIRIHAGAMA *vs.* W. HATHURUSINGHE *et al* ... ... XXXIV. 63

§ 422

Commission to examine a witness in England—In what circumstances should a commission issue?

Held: (1) *That the question whether or not a commission shall issue is in the discretion of the Trial Judge, in the sense that he is not bound to issue it because it is asked for.*

(2) *That the exercise of this discretion by the Trial Judge is open to review by the Supreme Court.*

(3) *That merely because expenses will be involved in bringing a witness before the Court, particularly in a case where his evidence is of the utmost importance, a commission will not be granted.*

HAYLEY AND KENNY *vs.* N. K. D. S. WICKREMASINGHE ... VII. 50

Evidence on commission—Can a commission for examination of defendant be issued?

Held: (1) *That the words in Section* 422 *of the Civil Procedure Code are very wide and make it possible for the parties themselves to be examined on commission.*

(2) *That applications for commissions to examine the parties themselves ought not to be lightly entertained.*

(3) *That such an application should not be granted unless it were supported by affidavits clearly stating that the commission would, under the circumstances, be conducive to the administration of justice.*

CANNANGARA *vs.* AMERASEKERA XV. 145

§ 423

Evidence on commission—What the Court must be satisfied with before granting application for —If application premature can a second application be made—Factors that should be taken into consideration.

Held: (1) *That in an application for the issue of a commission under Section* 423 *of the Civil Procedure Code for the examination of a witness at any place not residing within the Island, the petitioner must satisfy the Court that the evidence of that witness is necessary.*

(2) *That where the Court is of opinion that at the stage at which the application is made it is premature to state whether such a witness is necessary or not, the petitioner may be permitted to make a subsequent application.*

Per BASNAYAKE, J.—"We wish to observe that in seeking the assistance of English decisions for determining the true scope of our enactment the language of the Code should not be overlooked, and it should be borne in mind that the English Rule is not in exactly the same terms as our enactment. Another factor that should be taken into account in considering the older cases is the vast improvement in the speed of travel in modern times."

NATIONAL BANK OF INDIA, LTD. *vs.* KALIAPPAPILLAI AND OTHERS XLIII. 73

§ 430

Action for accounting regarding management of estate—Accounts filed by defendant—Commission to examine and report on such accounts before filing objections—Right to issue summons on witnesses to appear before such Commissioner.

Of consent, at the instance of the plaintiff, a commission was issued to an Accountant to examine and report on the accounts tendered as well as the books of account and connected papers kept by the defendant to an action to render accounts regarding the working and management of an estate.

The plaintiff applied for summons on certain witnesses to appear before the Accountant to explain the accounts tendered

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by the defendant. The District Judge allowed the summons and the defendant appealed.

Held: (1) *That the summons should not have been allowed.*

(2) *That a commission under section* 430 *can only issue when an examination or adjustment of acounts is deemed necessary by Court* (*and not by the parties*) *to facilitate it in entering up the decree.*

SENEVIRATNE *vs.* KARIAWASAM XLII. 20

§ 441

Action in forma pauperis**—Proctor's certificate that the application has a good cause of action—How far binding—Conditional permission to file fresh action—Can it be brought without complying with condition.**

Held: (1) *That the Proctor's certificate under section* 447 *of the Civil Procedure Code is not absolutely binding on the Trial Judge.*

(2) *That the Judge entertaining an application to sue in* forma pauperis *is entitled to look into the surrounding circumstances and the relative merits of an action before granting the application, even though it is supported by the certificate of a Proctor under section* 447.

(3) *That the appellants were not entitled to sue, on the footing of the leave to bring a fresh action granted by the Judge, without first paying the costs to the defendant as laid down in the order granting leave to sue.*

(4) *That the appellants were not entitled to sue in* forma pauperis *as they did not fall within section* 441 *of the Civil Procedure Code.*

FERNANDO *vs.* FERNANDO AND ANOTHER ... ... XIII. 1

§ 447

A Proctor's certificate under § 447 is not absolutely binding on the Trial Judge.

FERNANDO *vs.* FERNANDO AND ANOTHER ... ... XIII. 1

§ 456

The Attorney General should be made a party to an appeal under § 31 of the Stamp Ordinance.

PUNCHIMAHATMAYA *vs.* THE COMMISSIONER OF STAMPS ... ... XVI 74

Action for recovery of money paid to a Public Officer in his official capacity must be against the Crown.

FONSEKA *vs.* LEIGH CLARE ... XVII. 100

Action for the recovery of money deposited in the Post Office Savings Bank should be brought against the Trustees of the Bank and not against the Attorney General.

ARNOLIS HAMY *vs.* THE ATTORNEY GENERAL ... ... XIX. 58

§ 461

Action against Urban Council—Is notice of action, addressed to the Chairman of the Council, bad.

DULFA UMMA AND OTHERS *vs.* U. D. C., MATALE ... ... XIII. 151

§ 471

How may summons be served on a Joint Stock Company in voluntary liquidation—The Joint Stock Companies Ordinance 1861, section 87.

Held: (1) *That, where summons is taken to the Registered Office of a Company and there handed to the cashier, the requirements of section* 471 (*a*) *of the Civil Procedure Code are satisfied.*

(2) *That the requirement of section* 471 (*b*) *of the Civil Procedure Code, regarding service of summons on the Secretary or other principal officer, arises only when service is effected outside the Registered Office.*

(3) *That section* 87 *of the Joint Stock Companies Ordinance* 1861 *applies to a case of winding up of the affairs of a Company by a Court, and not to a voluntary winding up.*

MENDIS *vs.* THE INDEPENDENT PUBLISHING CO., LTD. ... ... X. 145

§ 472

Does the property of an intestate vest in the administrator?

DE SILVA *vs.* RAMBUKPOTHA XIV. 75

Where the devisees are actually in possession of the property devised to them, section 472 of the Civil Procedure Code has no

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application and it is open to the plaintiff to sue the devisees themselves.

RAMALINGAMPILLAI *vs.* ADJUVAD AND ANOTHER ... ... XXIII. 131

§ 472—Applies to partition proceedings.

MACKEEN AND ANOTHER *vs.* PULLE AND TWO OTHERS ... ... XXXIII. 28

Action for ejectment of tenant by administrator qua **administrator of estate of deceased landlord. Is action maintainable.**

RODRIGO *vs.* PARANGU ... XLII. 66

Meaning of "vested in.....an administrator."

CHELLIAH *vs.* WIJENATHAN *et al* XLVI. 27

§ 474

Liability of executor or administrator personally to pay costs in action instituted by him on behalf of the estate of the testator or intestate.

Held: (1) *That an executor or an administrator who brings an action in right of his testator or intestate is personally liable, under section* 474 *of the Civil Procedure Code* (*Chapter* 86), *to pay costs to the defendant in case of judgment being entered for the defendant unless the Court shall otherwise order.*

(2) *That where an executor or administrator has become personally liable to pay costs in an action brought in right of his testator or intestate, the property of the estate of the deceased cannot be seized in execution of the decree for costs.*

USOOF JOONOOS *vs.* ABDUL KUDNOOS ... ... XIV. 141

§ 480

Where § 480 provides a remedy for a case, remedy by way of restitutio in integrum **does not lie.**

THIAGARAJAH *vs.* BALASOORIYA AND OTHERS ... ... XIV. 91

Decree entered against unrepresented minor—Proceedings to have decree set aside after attaining majority.

Held: (1) *That a minor, who was unrepresented in an action against him, may, even after attaining majority, proceed under section* 480 *of the Civil Procedure Code to have the decree entered against him, when a minor, set aside.*

(2) *That section* 480 *applies not only to "orders" but also to decrees.*

SOMASUNDARAM *vs.* UKKU AND OTHERS ... ... XXVI. 47

Section 480—applies to actions under the Partition Ordinance and the Code governs the service of summons on, and the appearance of minors under that Ordinance.

SETUN BIBEE *et al vs.* ABUSALLY MARIKAR ... ... XLIX. 79

§§ 486 & 487

Minor—Next friend—Ex parte **application for appointment of—Failure to file copy of plaint in support or to name defendants—Formal order allowing application—Subsequent acceptance of plaint by the Judge—Is such defect fatal—Attainment of majority by minor when case partly heard—Motion to proceed in minor's own name allowed—Civil Procedure Code, sections 486 and 487.**

Held: (1) *That an irregularity in procedure in the appointment of a next friend is not necessarily fatal to the proceedings.*

(2) *That where a minor-plaintiff, who attains majority during the tendency of the action, is allowed by Court to proceed with the action in his own name, any irregularity in the appointment of his next friend must be taken to have been cured.*

WANIGASEKERE *et al vs.* LOUISZ *et al* XXV. 33

§ 502

When does a Muslim in Ceylon attain majority?

ABDUL CADER *vs.* RAZIK *et al* XLIII. 60

§ 513

Proctor and client—Failure of Proctor to comply with provisions of Code—Client cannot plead his Proctor's omissions.

Held: *That a party must suffer for the fault of his Proctor in not complying with the provisions of the Civil Procedure Code and*

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of the orders made by the Court from time to time.

GUNASEKERA *vs.* KARUNARATNE XVIII. 30

§ 518

Instrument in writing by Buddhist priest appointing pupil priest to be the executor and the incumbent of a temple—No specific disposition of property—Is such instrument a Last Will—If so, is the executor entitled to probate.

Where a Buddhist priest, who was the incumbent of a temple, died leaving an instrument in writing whereby he appointed a pupil priest as his executor and as the successor to the incumbency but made no specific disposition of property.

Held: *That the instrument in question was a Last Will which affected property in Ceylon and that the executor was therefore entitled to probate.*

DHAMMANANDA *vs.* PEMANANDA THERO ... ... XXIX. 89

Testamentary jurisdiction—Application under Chap. XXXVIII of the Civil Procedure Code—Will already admitted to probate in England—Reasons required for not following special procedure under British Courts Probates (Re-sealing) Ordinance.

Where a petitioner, in an application under Chap. XXXVIII of the Civil Procedure Code for sole testamentary jurisdiction of the property of a deceased, whose Will has already been proved in England, gives sufficient reasons for not following the special procedure of the British Courts Probates (Re-sealing) Ordinance, such an application will be allowed.

IN *Re* BERESFORD BELL ... XXXVII. 16

§ 519

In determining the value of the estate of a deceased person for the purposes of Section 519 allowance must be made for debts or encumbrances incurred or created bona fide **for full consideration in money or money's worth solely for the deceased's own use and benefit.**

DE SILVA *vs.* PEIRIS ... XXVI 110

Application for letters of administration—competing claims—No preferential right of widow.

MARIAM BEEVI *et al vs.* RUQQIAH UMMA ... ... XLIV. 92

§ 520

Appointment of Secretary of Court as administrator—Proceedings against such administrator—Can they be continued against his successor in office—Is Secretary of the Court a corporation sole.

Held: (1) *That the appointment of the Secretary of the Court as administrator under Section* 520 *of the Civil Procedure Code is not an appointment of the individual holding the office of Secretary, but an appointment of the person for the time being holding the office of Secretary.*

(2) *That the office of the Secretary of the Court falls within the category of* quasi *corporation sole and proceedings commenced against a Secretary in office could be continued against his successor.*

SAMARASEKERA *vs.* SECRETARY, D. C., MATARA AND ANOTHER ... XXXIX 108

§ 523

Right of widow governed by Hindu Law to letters of administration in respect of her husband's estate—Should a person resident outside Ceylon be granted letters of administration.

VYREVAN CHETTIAR *vs.* SEGAPPIACHY ... ... XIX. 61

Application for letters of administration—competing claims—No preferential right of widow.

MARIAM BEEVI *et al vs.* RUQQIAH UMMA ... ... XLIV. 92

§ 530

Testamentary Action—Two independent applications for letters of administration by two rival claimants—Application to Supreme Court for transfer of case by one claimant without disclosing the other—Order made allowing transfer—Subsequent application by other to vacate order of transfer—Intentional omission to disclose heir of deceased and to place full facts before Court—Contempt of Court.

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Held: (1) *That an intentional omission on the part of an applicant for letters of administration to state who the heirs of the deceased are, as required by Section* 530 *of the Civil Procedure Code, amounts to a contempt of Court.*

(2) *That such an applicant is not absolved from complying with the requirements of Section* 530, *even though in his view the next of kin are not entitled to succeed to the estate of the deceased.*

(3) *That an order made transferring a testamentary case, from one Court to another will not be vacated merely on the ground that the applicant for the transfer intentionally omitted to disclose an heir of the deceased.*

RATWATTA *vs.* KATUGAHA ... XLII. 24

§ 532

Evidence Ordinance, Section 41—Letters of Administration issued without advertisement—Can they be questioned in an action by the administrator?

Held: (1) *That where a new administrator is appointed in place of an administrator whose letters are recalled, the advertisement required by Section* 532 *of the Civil Procedure Code should be published.*

(2) *That Section* 41 *of the Evidence Ordinance protects all orders made by a Court having jurisdiction although such orders be erroneous in law.*

(3) *That when a new party is added the action will, so far as the new party is concerned, be regarded as having been instituted when he was made a party.*

(4) *Section* 547 *of the Civil Procedure Code has not the effect of preventing the institution of a suit in respect of an estate for which no administration has been taken. It provides only that "no action shall be maintainable.....unless letters of administration duly stamped shall first have been issued to some person or persons."*

HANIFFA *vs.* CADER AND OTHERS XXI. 44

§ 540

An action for damages for breach of a covenant to warrant and defend title lies against the heirs of a vendor only if administration of the estate has been completed by the executor and property belonging to the estate of the deceased testator has passed into the hands of the heirs, and then only to the extent of the property that has so passed.

RAMALINGAM CHETTIAR *vs.* MOHAMED ADJOOWAD AND ANOTHER XV. 124

Duration of the status of an administrator in relation to property which he has taken over in the exercise of his powers of administration.

BAHAR *vs.* BURAH AND TWENTY FIVE OTHERS ... ... XLVII. 75

§ 542

Right of widow governed by Hindu Law to letters of administration in respect of her husband's estate.

VYRAVAN CHETTIAR *vs.* SEGAPPIACHY ... ... XIX. 61

Undesirability of issuing letters of administration to a person as Attorney of a non-resident applicant.

VYRAVAN CHETTIAR *vs.* SEGAPPIACHY ... ... XIX. 61

§ 547

§ 547—has not the effect of preventing the institution of a suit in respect of an estate for which no administration has been taken. It provides only that no action shall be maintainable unless letters of administration duly stamped shall first have been issued to some person.

HANIFFA *vs.* CADER AND OTHERS XXI. 44

Probate or letters of administration—Should it be stamped.

Held: *That due stamping of a grant of probate or of letters of administration required under Section* 547 *of the Civil Procedure Code has been rendered unnecessary since the passing of the Estate Duty Ordinances.*

HASSAN *vs.* MUTHUWAPPA ... XXXIII. 108

In view of penalty under this Section, is there an obligation on the Court to grant an application under Section 68 of the Courts Ordinance.

IN *Re* WILLIAM SWIRE ... XXXVII. 105

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§ 549

Letters of administration issued without advertisement—Can they be questioned in an action by the administrator?

HANIFFA *vs.* CADER AND OTHERS XXI. 44

§ 556

Application under—Lunatic sojourning in mental hospital—Can it be said to be his residence?

Held: *That for the purposes of an application under Section* 556 (1) *of the Civil Procedure Code the mental hospital or asylum where a lunatic is "chiefly to be found" at the relevant time may be regarded as his place of residence.*

ARUNACHALAM *vs.* VAITHYLINGAM XLVI. 62

§ 595

Scope of the Section

HUNTER, GOVT. AGENT *vs.* SRI CHANDRASEKERA ... ... XLIV 1

§ 596

Scope of a matrimonial action.

SENADIPATHY *vs.* SENADIPATHY XXIII. 1

§ 598

Excuse from compliance with provisions of §..... In what circumstances excuse granted?

JOSLINE NONA *vs.* SAMARANAYAKE XXXVII. 46

Wife's action for divorce—Husband's answer disclosing persons committing adultery with plaintiff—Only one adulterer made party to action—Failure to obtain excuse under § 598—Rejection of answer—Is it justified?

KARUNATILEKE *vs.* KARUNATILEKE XLIV. 29

§ 599

Excuse from compliance with provisions of §..... In what circumstances excuse granted?

JOSLINE NONA *vs.* SAMARANAYAKE ... ... XXXVII. 46

§ 602

Principles which a Court may use for guidance in exercising the discretion conferred by section 602 proviso—When will the Appeal Court not interfere with the exercise of discretion by the Trial Court?

Held: (1) *That where the plaintiff has been guilty of considerable delay in presenting his plaint and has taken no satisfactory steps to ascertain whether his wife was alive the Trial Judge was justified in exercising the discretion vested in him by the proviso to section* 602 *of the Civil Procedure Code.*

(2) *That the Appeal Court will not interfere in a case where the Judge of original jurisdiction has properly exercised his discretion.*

ABRAHAM *vs.* ALWIS ... ... XXI. 10

Condonation by wife of husband's adultery —What amounts to.

MENSALINE HAMINE *vs.* DIAS AND ANOTHER ... ... XXIX. 109

§ 602—application of—to action for a declaration of nullity of marriage.

NAVARATNAM *vs.* NAVARATNAM XXX. 90

§ 602—Does § apply to action for nullity of marriage?

FERNANDO *vs.* PEIRIS ... XXXVIII. 74

Meaning of the words "satisfied on the evidence."

JAYASINGHE *vs.* JAYASINGHE ... L. 84

§ 603

Is counter-claim for divorce a reconventional claim?

KARUNATILEKE *vs.* KARUNATILEKE XLIV. 29

§ 604

Can action be taken under this § after decree nisi?

NELSON *vs.* FOENANDER ... XVII. 28

Action for nullity of marriage—Husband having Ceylon domicile—Wife having Indian domicile before marriage—Decree absolute entered—Validity.

NAVARATNAM *vs.* NAVARATNAM XXX. 90

The words "any person" do not include a party to the action.

FERNANDO *vs.* FERNANDO ... XXXVI. 33

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§ 605

Can a decree absolute be made to relate back to the earliest date at which it could have been made?

On 19th March, 1934 plaintiff obtained a decree *nisi* dissolving his marriage with the defendant, the decree to be made absolute at the expiration of three months. The plaintiff paid alimony for three months after decree *nisi* and stopped payment thereafter. An application for decree absolute made on 16th August, 1934 had been refused pending the decree of the case in appeal. The defendant obtained writ for alimony falling due after the period of three months and the plaintiff resisted the writ on the ground that the defendant was living in adultery. The Court disallowed the application and entered decree absolute on December 7, 1934 with effect from June 29, 1934.

Held: (1) *That the defendant was entitled to alimony till the date on which the decree was made absolute and that alimony could not be refused on the ground that the defendant was living in adultery.*

(2) *That there is no authority in the Code for relating back a decree entered at a later date to the earliest date at which it could have been entered.*

ASERAPPA *vs.* ASERAPPA ... V. 7

Should Court, on expiration of three months from the date of decree *nisi* enter decree absolute even if there is no application for that purpose by any of the parties to the action.

SATHIYANATHAN *vs.* SATHIYANATHAN IX. 135

§ 606

Can action be taken under this § after decree *nisi*.

NELSON *vs.* FOENANDER ... XVII. 28

§ 607

Action by wife for nullity of marriage—Husband's incurable impotence—Onus of proof—Delay in coming to Court.

FERNANDO *vs.* PEIRIS ... XXXVIII. 74

§ 608

Can a decree for separation be based entirely upon the consent of parties?

JOSEPH *vs.* JOSEPH ... ... XVII. 86

§ 612

When co-defendant should be made liable in costs.

ALLES *vs.* ALLES AND SAMAHIM XXX. 25

§ 614

There is no authority in the Code for relating back a decree for alimony entered at a later date to the earliest date at which it could have been entered.

ASERAPPA *vs.* ASERAPPA ... V. 7

Deductions that may be made in assessing husband's average net income.

SCHOKMAN *vs.* SCHOKMAN XXIII. 130

§§ 614, 615 and 617

Divorce—Action for recovery of cash dowry—Can the amount of permanent alimony be fixed before decree absolute is entered—Matrimonial Rights and Inheritance Ordinance No. 15 of 1876, Sections 6, 10, 11 and 19—Married Women's Property Ordinance No. 18 of 1923.

Held: (1) *That it is open in law for the parties to a divorce action by consent to have the amount of permanent alimony determined before decree* nisi *is made absolute.*

(2) *That an order for permanent alimony can properly be made only after the decree* nisi *for divorce has been made absolute even though the amount of permanent alimony has been determined beforehand by consent of parties.*

(3) *That a wife under the Roman-Dutch Law is entitled to claim restitution of her dowry in a case where the marriage did not take place in community of property.*

(4) *That, under the Roman-Dutch Law, the wife's right to claim restitution of her dowry may be forfeited by misconduct on her part.*

(5) *That, in the case of persons married before the Married Women's Property Ordinance No.* 18 *of* 1923, *the wife's movable property vests in the husband by virtue of Section* 19 *of the Matrimonial Rights and Inheritance Ordinance No.* 15 *of* 1876, *and that dowry money which has vested in the husband before* 1924 *cannot be recovered.*

KARUNANAYAKE *vs.* KARUNANAYAKE IX. 109

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§ 615

Power of District Court to order permanent alimony in favour of guilty wife.

EBERT *vs.* EBERT ... ... XIII. 91

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

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

MAARTENSZ *vs.* MAARTENSZ ... XVI. 32

Divorce—permanent alimony to wife—Order made by consent of parties—Subsequent application to modify order—Has Court jurisdiction.

ROWLANDS *vs.* ROWLANDS ... XXXIV. 93

§ 622

Application with respect to maintenance of minor children after decree absolute for divorce—Leading of evidence in summary proceedings.

Held: (1) *That Section* 622 *of the Civil Procedure Code enables a party to petition the Court from time to time for all such orders and provisions as come within the purview of the Section.*

(2) *That the leading of evidence in summary proceedings is governed by Section* 384 *of the Civil Procedure Code.*

DASSANAYAKE *vs.* DASSANAYAKE XXXI. 80

§ 653

Material on which mandate of sequestration should be allowed.

RAJADURAI *vs.* THANAPALASINGAM *et al* ... ... II. 147

Can the Court by mandate under § 653 prevent the sale of property under a decree in order to protect the interests of the landlord?

KOTHALAWELA *vs.* PERERA AND OTHERS ... ... VIII. 61

§ 663

Disobedience of injunction—Power of Court of Requests to punish as for contempt.

PERERA *vs.* ABDUL HAMID ... I. 141

§ 669

Underground encroachment by defendant by tunnelling into plaintiffs' land—Claim for damages—Application for commission to inspect and survey defendant's land—Has Court jurisdiction to make such order.

Held: (1) *That where a* prima facie *case is made out that a person, who has the power to make use of his land to the injury of another, is actually doing so, the Court can, under Section* 669 *of the Civil Procedure Code, notwithstanding the denial of such injury, issue a commission for survey and inspection of such person's land, if the Court thinks it necessary that it should have such evidence before it at the trial.*

(2) *That when issuing such a commission the Court should impose such conditions as it deems necessary to prevent injury to the person against whom it is issued.*

THE CHETTINAD CORPORATION LTD. *vs.* E. P. A. FERNANDO AND OTHERS XXXIII. 69

§ 676

Reference to arbitration—Reference in general terms—No record of desire of parties to arbitrate or of Proctor's authority to apply for arbitration—Validity of Award.

In the course of an action the matters in difference were referred to arbitration. The reference was in general terms and did not state the particular matters in difference. The record did not show either that all the parties desired a reference to arbitration or that their Proctors had the necessary authority to apply for such a reference.

Held: (1) *That there had been no compliance with the Civil Procedure Code either in regard to the application for a reference to arbitration or in regard to the reference itself.*

(2) *That no finality attached to the award, as it had been made under a reference which was invalid.*

GIRIGORIS *et al vs.* PUNCHI SINGHO *et al* ... ... XL. 25

Reference to arbitration without complying with § 676—Reference bad in law.

DE SILVA *vs.* PERERA ... XLIV. 69

Reference to arbitration without complying with provisions of Section 676—Validity.

MADASAMY *vs.* AMINA ... XLV. 40

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§ 677

Reference to arbitration without complying with § 677—Reference bad in law.

DE SILVA *vs.* PERERA ... XLIV. 69

§ 678

Reference to arbitration without complying with § 678—Reference bad in law.

DE SILVA *vs.* PERERA ... XLIV. 69

§ 685

Arbitration award filed in presence of Proctors—Parties to the case not noticed—Not a sufficient compliance with § 685.

PICHE AND ANOTHER *vs.* MOHAMADU XIII. 59

§ 692

Finality given by § 692 to an award attaches only to award made in pursuance of a reference to arbitration in compliance with the Code.

GIRIGORIS *et al vs.* PUNCHI SINGHO *et al* ... ... XL. 25

§ 703

Action by executors to recover money lent by deceased on a promissory note—Defendant allowed to file answer and defend without giving security—Is summary procedure provided by Chapter 53 of the Civil Procedure Code available to executors.

The plaintiffs, as executors of X, filed an action to recover money due to the estate from the defendants on a promissory note. The District Judge, in granting the defendants leave to defend without giving security, held that the executors could not avail themselves of the summary procedure provided in Chapter 53 of the Civil Procedure Code on the grounds that: (1) they are executors and their names do not appear on the promissory note. (2) there is no averment in the affidavit that the amount sued for is due on the note. (3) the defence as set out in the affidavit appeared to be *bona fide*.

Held: (1) *That the absence of the names of the executors in the promissory note did not bar an action under the summary procedure provided by Chapter* 53 *of the Civil Procedure Code.*

(2) *That as the plaintiffs' affidavit sufficiently sets out the facts showing that the amount claimed is rightly and properly due, it is not necessary to aver specially that the sum sued for is due on the note.*

(3) *That, as the defendants' affidavit did not disclose sufficient particulars to enable the Court to satisfy himself that the defence on the merits was* bona fide, *they should be ordered to furnish security.*

DE SILVA AND ANOTHER *vs.* DE SILVA AND ANOTHER ... ... XXXVI. 52

§§ 703-711

In order to entitle a person to sue by way of summary procedure under chapter LIII it is not sufficient to set out in the affidavit merely that an amount is due on a promissory note but it must be stated that the sum claimed is "justly due".

WIJESINGHE *vs.* PERERA ... II. 506

§ 704

Dismissal of plaintiff's action before granting leave to defend in an action by way of summary procedure—Can judge go into merits of defence before leave is granted?

Held: (1) *That in deciding whether a defendant should be given leave to defend an action under* § 704 *of the Civil Procedure Code the Court need only consider whether the defence set out in the affidavit is* prima facie *sustainable or is one in regard to which he has reasonable doubt as to its good faith.*

(2) *That a Judge cannot dismiss a summary action on a liquid claim on the merits of the case before granting the defendant leave to defend.*

SADADEEN *vs.* MEERASA ... III. 138

Action by executors to recover money lent by deceased on promissory note—Defendant allowed to file answer and defend without giving security—Is summary procedure available to executors?

DE SILVA AND ANOTHER *vs.* DE SILVA AND ANOTHER ... ... XXXVI. 52

§ 705

What material should be set out in the affidavit of the plaintiff made under this provision.

Held: *That it is not necessary in an affidavit made under Section* 705 *of the Civil Procedure Code to state in the very words of the Section that the sum the plaintiff claims is*

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"justly" due. It is sufficient if material to show that the sum claimed is rightly and properly due is set out.

PANDITHAN *vs.* NADAR ... IV. 25

Action by executors to recover money lent by deceased on promissory note—Defendant allowed to file answer and defend without giving security—Is summary procedure available to executors.

DE SILVA AND ANOTHER *vs.* DE SILVA AND ANOTHER ... ... XXXVI. 52

§ 707

Action under summary procedure—Chapter LIII of the Civil Procedure Code—Leave allowed to file answer on giving security—Date on which security to be tendered not specified—Tender of security after 21 days—Is the tender too late.

Held: *That as no time was specified in the order of the 9th May, 1938, within which the security was to be tendered, the appellants were entitled to tender it within a reasonable time and that a period of 21 days was not an unreasonable one under the circumstances.*

DON SALMON APPUHAMY *vs.* ALLIS APPUHAMY AND FOUR OTHERS XIII. 118

§ 707—Scope of.

KHAN *vs.* SALLY AND ANOTHER XV. 100

§ 718

Scope of—When can an amendment of an inventory in a testamentary case be made.

Held: *That an amendment of an inventory in a testamentary case may be ordered either under Section 718 or under Section 736 of the Civil Procedure Code, and it would be in the discretion of the Court to direct amendment under Section 718 or to refer a party to the procedure of Section 736 according to the nature and scope of the particular application and the stage at which it is made.*

SUPPAMMAL *vs.* GOVINDAN CHETTY XXIV. 121

§ 721

Affidavit denying legality and validity of claim.

Held: *That where the executor or administrator files an affidavit denying the validity or legality of the claim, the Court is debarred from acting under Section 721 of the Civil Procedure Code and compelling payment of a disputed claim or trying the question in dispute.*

DE SILVA *vs.* JAYAKODY ... XX. 47

§ 736

§ 736—Scope of—When can an amendment of an inventory in a testamentary case be made.

SUPPAMMAL *vs.* GOVINDAN CHETTY XXIV. 121

§ 741

Agreement or compromise affecting immovable property—Must it be embodied in a formal order of Court.

VALLIPURAM *vs.* KANADIPILLAI XLVI. 92

§ 753

REVISIONARY POWERS OF SUPREME COURT.

See also under **REVISION.**

Powers of Supreme Court under § 753 are not unlimited—Powers of revision not exercised where third parties have acquired rights.

DE SARAM *vs.* DE SILVA AND ANOTHER ... ... XVI. 102

Powers of Supreme Court to revise a judgment from which an appeal lies.

Held: *That the Supreme Court will exercise its powers of revision even in a case in which an appeal lies, when the delay occasioned in bringing the matter up in appeal will render the relief granted useless to the parties, unless their cause is promptly heard.*

DE SILVA *vs.* DE SILVA ... XXVI. 3

§ 753 confers on the Supreme Court a revisionary jurisdiction only in cases in which an appeal lay, but for some reason was not taken.

SABAPATHIPILLAI *vs.* ARUMUGASAMY AND ANOTHER ... ... XXVII. 5

§ 753—does not prescribe the scope of or put a limitation on the powers of the Supreme Court to deal with an application in revision.

PERERA *vs.* AGIDA HAMY AND TWO OTHERS ... ... XXXIII. 86

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§ 754

'Forthwith'—When may a Court grant relief against a failure to comply with the requirements of Section 756.

Where a petition of appeal was filed a day before the last day for filing such petition, and notice of security for costs was tendered three days later.

Held: *That the appellant was entitled to relief under Section 756 of the Civil Procedure Code in the absence of anything to show that the respondent was materially prejudiced by the failure to furnish notice of security forthwith.*

RAMALINGAM *vs.* VELUPILLAI AND ANOTHER ... ... V. 105

§ 755

Petition of appeal by the appellant and signed before the Secretary of the Court—Can such petition be entertained?

Held: *That a petition of appeal tendered by the appellant and signed by him before the Secretary of the District Court cannot be entertained*

MEYAPPA CHETTY *vs.* A. CHELLIAH VII. 80

The words "some.....Proctor" in § 755 mean the Proctor whose proxy is on record when the appeal is filed.

SILVA *vs.* CUMARANATUNGA XII. 112

Petition of appeal not bearing the signature of Proctor or Advocate at the end of petition—Stamps cancelled by the signature of the Proctor—Objection that appellant had not complied with Section 755 upheld by District Court—Order abating appeal—Application in revision.

Held: *That the fact that the stamps on a petition of appeal were cancelled by the Proctor for the appellant is sufficient compliance with the requirements of Section 755 of the Civil Procedure Code.*

MEDHANANDA THERUNNANSE *vs.* DHAMMANANDA THERUNNANSE AND OTHERS XXIX. 42

Petition of appeal by appellant in person—Failure to conform to § 755—Abatement of appeal.

ABRAHAM *vs.* FERDINANDO XLIII. 109

§ 756

Security tendered after the prescribed time.

Held: *That where security for costs is not tendered within the time prescribed in Section 756 of the Civil Procedure Code, an appeal cannot be entertained.*

JAYARATNE AND ANOTHER *vs.* TISSEVERASINGHE AND ANOTHER ... V. 20

Meaning of 'forthwith'.

RAMALINGAM *vs.* VELUPILLAI AND ANOTHER ... ... V. 105

Failure to comply with terms of Section—Abatement of appeal—What procedure should be observed in obtaining relief, under the Section, from the Supreme Court.

Held: *That where an appeal has abated by operation of Section 756 of the Civil Procedure Code the procedure to be followed in obtaining relief from the Supreme Court under that Section is by way of a special application to the Supreme Court for relief and not by way of appeal against the order of abatement made by the District Judge.*

ZAHIRA UMMA *vs.* ENID V. A. ABEYSINGHE AND OTHERS ... ... VIII. 26

Order of abatement of appeal—Relief under Section 756—Special application—Appeal from order of abatement may be treated as special application.

Held: (1) *That the security was tendered in time and that it should have been accepted.*

(2) *That the Supreme Court can treat an appeal from an order that an appeal has abated as a special application under Section 756, and grant relief.*

DE SILVA AND ANOTHER *vs.* JAMES AND ANOTHER ... ... IX. 124

The provisions of § 756 cannot be extended to a case of non-compliance with an order of the Supreme Court under § 833A.

KANDASAMYTHURAI *vs.* CASSIM XI. 66

Appeal—Failure to give notice to certain respondents that security for their costs will be tendered—Nor deposit of such security made—When there are several respondents can security for one respondent be accepted as security for all.

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Held: (1) *That failure to comply with the provisions of Section 756 of the Civil Procedure Code cannot be excused.*

(2) *That, where there are several respondents to an appeal, security given for the costs of one of them cannot be accepted as security for all.*

KATONIS APPU *vs.* CHARLES AND ANOTHER ... ... XII. 162

Leave to appeal notwithstanding lapse of time.

Held: *That there was substantial non-compliance with the terms of Section 756 of the Civil Procedure Code by the applicant, and that he was not entitled to relief under the Section in the absence of sufficient reason for such non-compliance.*

SIYADORIS APPU *vs.* ABEYNAYAKE XIII. 22

Failure to serve notice of appeal and security for costs in appeal to party named as respondent to an appeal—Action withdrawn as against party concerned before service of summons—Is the failure to serve notice on such party fatal to the appeal.

Held: *That in the circumstances the appeal was in order.*

MUTUAL LOAN AGENCY LTD. *vs.* MRS. WEERASINGHE AND ANOTHER XIV. 79

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

Held: (1) *That even where parties against whom no relief is claimed are made respondents to an appeal notice of security should be given to them.*

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

SUPPRAMANIAM CHETTIAR *vs.* SENANAYAKE AND OTHERS ... ... XVI. 41

Notice of security for respondent's costs of appeal—Two respondents to appeal-Notice given at the same time but served on one of them within the period of twenty days, and on the other after the period of twenty days—Delay in service of notice due to absence of respondent outside jurisdiction of Court—Delay not due to any fault of appellants—Can relief under Section 756 (3) be granted in such a case.

Held: (1) *That notice of security , unless waived, must be given forthwith, that is to say, must be tendered or filed on the day on which the petition of appeal is received by the Court.*

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

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

(4) *That relief under Section 756 (3) of the Civil Procedure Code cannot be granted where an appellant fails to comply with (1) and (2) or with (1) or (2).*

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

DE SILVA *vs.* SEENATHUMMA AND OTHERS ... ... XVI. 105

An appeal cannot be entertained in a case where the notice of appeal is not given in compliance with Section 756 of the Civil Procedure Code.

SULAIMAN *vs.* WILEGODA ... XXVI. 15

Notice of security served on respondent's Proctor--Failure to serve on the respondent—Order of abatement—Application in Revision for relief under Section 756 (3) of the Civil Procedure Code—Is such application in order.

Held: (1) *That the service of notice of tendering security for costs of appeal on the respondent's Proctor is a sufficient compliance with the requirements of Section 756 of the Civil Procedure Code.*

(2) *That where an order of abatement of appeal is made for failure to serve such notice on the respondent personally the*

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remedy is by way of appeal, inasmuch as it is an error of law committed by the District Judge.

CARLINA *vs.* SILVA ... ... XXXI. 71

Notice of tender of security—Reissue of notice by Court for another date—Validity.

Held: (1) *That there is no authority in Section 756 of the Civil Procedure Code for the re-issue of a notice given by an appellant of tender of security for respondents' costs of appeal for a date other than that mentioned in the notice by the appellant.*

(2) *That the Court will not be justified in granting relief under Section 756 (3) in the absence of an explanation for the failure to serve the notice in time and of evidence that the appellant had done all in his power to comply with Section 756.*

RAHUMAN *vs.* MOHAMED ... XL. 41

Preliminary objection — Appeal — Notice tendering security for costs—Failure to mention name of respondent on whom notice served informing that security will be given for his costs of appeal—Names of other respondents mentioned—Does such notice comply with Section 756 of Civil Procedure Code—Form No. 126 given in schedule—Interpretation.

Failure to take objection in Lower Court—Powers of Supreme Court to entertain objection—Relief under Section 756 (3).

Where in a notice of tendering security for costs of appeal served on one of the respondents the appellant failed (*a*) to mention his name as the person in respect of whose costs the appellant proposed to give security; (*b*) to follow the form prescribed in Form 126 of the Civil Procedure Code.

Held: (1) *That the notice did not comply with Section 756 of the Civil Procedure Code, and the appeal should have been held to have abated.*

(2) *That no relief should be granted as the failure or omission complained of was completely and immediately within the appellant's power to avoid:*

(3) *That where a statute prescribes that notice should be given to a party to a suit and indicates the form in which that notice should be given, that notice should comply with the requirements of the statute and should be in the prescribed form not withstanding the absence of any reference to the form in the relevant Section.*

(4) *That as the Supreme Court has power to reject an appeal that is not properly before it the respondent is not precluded from taking objection to the hearing of an appeal although he had not asked the Trial Judge to hold that the appeal had abated.*

SIVAGURUNATHAN *vs.* DORESAMY *et al* XLIV. 38

Appeal—Notice of security not served within time prescribed—Order accepting security before service of such notice—Order to re-issue notice for date after prescribed date —Motion for order of abatement allowed—Application for relief—When it should not be granted.

Held: (1) *That the Court has no jurisdiction to fix the amount of security for costs of appeal and to order the bond to be perfected before notice of security on the respondent is served.*

(2) *That relief under Section 756 of the Civil Procedure Code will not be granted where the Court is not satisfied that the petitioner's Proctor did everything in his power to comply with the provisions of that Section.*

NAGENDRAN *vs.* ALGINA PEIRIS... XLIX. 26

§ 758

A respondent to an appeal can support the decree of the Trial Judge on a ground decided against him in the Trial Court without filing an objection in the form prescribed in Section 758 (e).

VICTOR MATHES *vs.* VICTOR APPUHAMY XXVII. 90

§ 761

Execution pending appeal—Discretion of Judge in fixing security—How it should be exercised.....

Held: *That the amount of security which a Judge may fix as a condition of a stay of execution pending appeal should be such as would reasonably safeguard the interests of the judgment-creditor in the event of the judgment appealed from being affirmed by the Supreme Court.*

SOBITHA UNNANSE AND ANOTHER *vs.* PIYARATANA UNNANSE AND OTHERS XLIX. 95

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Stay of execution pending appeal—In what circumstances may stay of execution be made?

Held: *That stay of execution pending appeal is ordinarily granted only when the proceedings would cause irreparable injury to the appellant, and when the damages suffered by the appellant by the execution pending appeal would be substantial.*

SOKKALAL RAM SAIT *vs.* KUMARAVEL NADAR AND FOUR OTHERS ... XIII. 52

§ 763

Application for execution of a mortgage decree—Judgment-debtor not made a respondent to the application—Sale of land hypothecated—Is sale valid?

Held: (1) *That Section 763 of the Civil Procedure Code is an imperative provision.*

(2) *That failure to comply with the terms of Section 763 of the Civil Procedure Code would vitiate a sale held in execution of a mortgage decree.*

KEEL AND OTHERS *vs.* ASIRWATHAM AND ANOTHER ... ... IV. 128

Execution of decree—Application for execution pending appeal by judgment-debtor—Judgment-debtor not made respondent to the application—Jurisdiction of Court—

Held: *That the omission of a judgment-creditor, who applies for the execution of a decree which is appealed against, to make the judgment-debtor a respondent to the application, results in a failure of jurisdiction and is not merely an irregular or an erroneous exercise of jurisdiction.*

DE SILVA *vs.* EDWARD... ... XXX. 81

§ 765

Failure to stamp petition of appeal correctly—Leave to appeal notwithstanding lapse of time not granted.

SINNAPPU *vs.* THEIVANAI AND ANOTHER XI. 40

§ 770

See also under Appeal and Civil Procedure.

Mistake in decree—Discretionary powers vested in Court by § 770 exercised.

RAMASAMY CHETTIAR *vs.* MOHAMADU LEBBE MARIKAR ... ... VII. 64

Relief under § 770 to add parties granted as a matter of indulgence.

FRANCINA FERNANDO *vs.* KAIYA FERNANDO AND OTHERS ... VII. 133

Appeal—Failure to make necessary party respondent to appeal—No relief granted under § 770.

SELANANDA THERO *vs.* RAJAPAKSE XI. 36

Failure to join necessary parties—Relief under Section 770.

SINNAN CHETTIAR AND OTHERS *vs.* MOHIDEEN ... ... XV. 47

§ 772

Can one respondent to an appeal file cross-objections to a decree in favour of another respondent—The Loan Board Ordinance 1865—Is interest payable on money paid over to the Treasurer by the Commissioners of the Loan Board under Section 18 (2) after such payment to the Treasurer—"Male descendant"—Meaning of expression.

Held: (1) *That one respondent to an appeal cannot file cross-objections to a decree in favour of another respondent.*

(2) *That the proviso to Section 772 of the Civil Procedure Code, requiring the respondent to give the appellant or his Proctor seven days' notice in writing of his objections, clearly limits the rights of the respondent under Section 772 to objections which affect the appellant only.*

(3) *That interest payable under Section 18 (2) of the Loan Board Ordinance 1865 to a claimant successfully establishing a claim to money deposited with the Loan Board is restricted to the interest that had accrued at the time the amount in deposit was paid over to the Treasurer by the Commissioners of the Loan Board.*

(4) *That the words "male descendants" in a testamentary disposition means descendants claiming through males only.*

FLORA AUGUSTUS PERERA *vs.* MARY JURY AND ATTORNEY-GENERAL ... X. 15

Objection may be taken by a respondent to anything appealable in the decree out of which the appeal arises.

WIJERATNE *vs.* PILLAI ... XXII. 20

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§ 800

Examination under § 219—False statement—Summary punishment for contempt of Court.

IN *Re* JUDGMENT-DEBTOR ... XXXVIII. 70

§ 805

Action for declaration of title to land and damages, and for value of articles wrongfully removed—Misjoinder of causes of action.

MUTUMENIKA *vs.* SUDU MENIKA AND OTHERS ... ... XXVI. 91

§ 806

Courts Ordinance, Sections 36 and 78—Action for damages in Court of Requests—Summons in English served on defendant who did not know English—Absence of defendant on returnable date—Judgment by default entered without ex-parte **hearing—Regularity of procedure—Judgment set aside later on the ground that summons served on defendants not in language they understood—Can plaintiff appeal from such order setting aside judgment.**

Held: (1) *Section* 806 *of the Civil Procedure Code does not require the summons served on a defendant, who does not understand English, to be in the vernacular.*

(2) *Where the relief claimed depends on the right to possession of land, the Court should not enter judgment without* ex-parte *hearing even though the defendant is absent.*

(3) *That an order setting aside a judgment entered by default is not an appealable order.*

ANA HABBEBU MOHAMADO *et al vs.* KAWANNA HAMMEDU LEBBE MARIKAR XXXV. 39

§ 817

Pleadings—Claim in reconvention—Order that replication should be filed before a date fixed by Court—Failure to file replication—On such failure can judgment be entered for defendant on his claim in reconvention.

Held: (1) *That the Commissioner of Requests was wrong in entering judgment for the defendant on the claim in reconvention.*

(2) *That the absence of a replication by the plaintiff cannot be construed as meaning an admission by the plaintiff of the allegation in the answer.*

(3) *That judgment on a counter claim should not be entered merely on the ground that the statements made therein remain uncontradicted.*

ALAGAMMAH *vs.* SUBRAMANIAM ... IX. 35

§ 823

Appearance of party—Proctor on record present in Court but without instructions—when is trial inter partes.

ANDIAPPA CHETTY *vs.* SANMUGAM CHETTY I. 178

Order setting aside a judgment by default—Does an appeal lie from such an order—Courts Ordinance, Sections 39 and 80.

Held: *That an appeal does not lie from an order of a Commissioner of Requests setting aside a judgment by default.*

BARON APPUHAMY *vs.* TIVANAHAMY XII. 19

Mere absence of the plaintiff on the day fixed for the hearing of the action does not entitle the Commissioner to dismiss the action.

MOTHA *vs.* FERNANDO ... XX. 109

Plaintiff absent—Proctor of plaintiff present but says he has no instructions—Defendants present—Dismissal of plaintiff's action—Order inter partes.

Held: *That an order made in the presence of the defendant and the plaintiff's Proctor is an* inter partes *order although the plaintiff was absent and his Proctor said he had no instructions.*

CHELLIAH PILLAI *vs.* MUTUVELU ... XXI. 82

Section 823 (3) is not applicable to a case where on the ground that he was not served with summons a defendant asks to vacate a judgment entered by default in the Court of Requests.

JAMIS *vs.* DOCHINONA... ... XXV. 70

§ 823—Meaning of "day"

SABAPATHIPILLAI *vs.* ARUMUGASAMY AND ANOTHER ... ... XXVII. 5

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Action dismissed owing to plaintiff's failure to appear—Plaintiff given permission to institute fresh action on paying costs of previous action—Must costs be prepaid.

JAMEELA UMMA *vs.* ABDUL AZEEZ XXXI. 74

Where the relief claimed depends on the right to possession of land, the Court should not enter judgment without ex parte **hearing, even though the defendant is absent.**

ANA HABBEBU MOHAMADO *et al vs.* KAWANNA HAMMEDU LEBBA MARIKKAR XXXV. 39

§ 833

Charges in bill of costs in respect of expert witness—Right of Commissioner of Requests to determine witness' expenses.

Held: (1) *That a Commissioner of Requests is bound to examine the charges claimed in a bill of costs in respect of witnesses and to express his decision thereon.*

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

HARAMANIS APPUHAMY *vs.* WICKREMASINGHE AND ANOTHER ... XVI. 18

§ 833 A

Appeal—Order of Supreme Court granting leave to appeal from a judgment of the Court of Requests on condition the appeal is "perfected" within a specified number of days from the receipt of the record—Meaning of "perfecting an appeal"—Order under Section 13 (2) of Ordinance No. 12 of 1895.

Held: (1) *That the appeal had not been perfected in time.*

(2) *That the word "perfected" in the order of the Supreme Court must be taken to imply that all steps have been taken by the appellant which are necessary preliminaries to the transmission by the Court of Requests of the petition of appeal to the Supreme Court.*

(3) *That, in the computation of a period of time, fixed by the Supreme Court, for perfecting an appeal in an order under Section* 13 (2) *of Ordinance No.* 12 *of* 1895, *Sundays and public holidays need not be excluded unless the order itself provides for their exclusion.*

(4) *That the provisions for granting relief in certain cases of mistake, omission or defect in Section* 756 *of the Civil Procedure Code applies only to cases of non-compliance with the provisions of that Section and cannot be extended to a case of non-compliance with an order of the Supreme Court under Section* 13 (2) *of Ordinance No.* 12 *of* 1895.

KANDASAMYTHURAI *vs.* CASSIM ... XI. 66

Questions concerning admissibility or inadmissibility of evidence are questions of law.

NANDIRIS SILVA *vs.* ARTHUR DE ZOYSA AND ANOTHER ... ... XV. 104

Section 833 (A) does not apply to an appeal under Section 124 (3) of the Municipal Councils Ordinance.

SOYSA *vs.* COLOMBO MUNICIPAL COUNCIL XVIII. 113

No leave to appeal on facts from a hypothecary decree entered in the Court of Requests in necessary.

CHELLAPPA AND OTHERS *vs.* SELLIAH XX. 20

§ 837

Application to release judgment-debtor from jail—Order refusing the application—Appeal—What provisions of the Civil Procedure Code govern such appeal.

Held: *That an appeal from an order refusing to release a judgment-debtor from jail is governed by the provisions of Section* 756 *of the Civil Procedure Code.*

CARGILLS LTD. (OF NUWARA ELIYA) *vs.* ABDUL RAHIMAN ... ... IX. 98

§ 839

Inherent powers of District Court—Power to vacate order obtained on insufficient or inaccurate information.

WIJESINGHE *et al vs.* ULUWITA *et al* II. 153

There is no inherent power in a District Court to vary its own order.

PAULAUSZ *vs.* PERERA ... II. 252

Application to vacate order of abatement—Leave granted to file fresh action while allowing order of abatement to stand—Validity of such order.

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Held: *Section* 839 *does not authorise the overriding of express provisions of the law.*

KAMELA AND ANOTHER *vs.* ANDRIS XIV. 35

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

RAMAN CHETTIAR *vs.* VYRAVAN CHETTIAR XVI. 65

Inherent power of a Court to lay by an action pending the decision of another action affecting the same subject-matter.

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

SELVADURAI *vs.* RAJAH AND ANOTHER XVI. 90

Amendment of caption of plaint by adding real name of defendant after decree—Has Court power to allow amendment.

Held: *That where the defendant had described himself and held himself out as another person, the Trial Court has power under Section* 839 *of the Civil Procedure Code to amend the caption by inserting the true name of the defendant even after decree in a case where the existing rights and obligations under the decree are unaffected by the amendment.*

PARSONS *vs.* ABDUL CADER ... XX. 123

Case laid by for three months—

OLAGAPPA CHETTIAR *vs.* REITH ... XXI. 138

Has the District Court power to order the Secretary of the Court to proceed to the house where the movable property of a deceased person may be found and to prepare an inventory pending the grant of probate or letters of administration to the person entitled to them—Penal Code, Section 183.

Held: *That a District Court has no power under Section* 839 *of the Civil Procedure Code to order the Secretary of the Court to proceed to the house where the movable property of a deceased person may be found and to prepare an inventory thereof pending the grant of probate or letters of administration to the person entitled thereto.*

GNANAPRAKASAM *vs.* SUBRAMANIAM XXIV. 117

Action for divorce—Order for payment of alimony pendente lite**—Non-compliance with order—Powers of Court—**

Held: (1) *That where a plaintiff fails to comply with an order for the payment of alimony* pendente lite, *the Court has power, under Section* 839 *of the Civil Procedure Code, to stay further proceedings until alimony is paid.*

(2) *That such failure constitutes contempt of Court.*

ASLIN NONA *vs.* PERERA AND ANOTHER XXIX. 79

Failure to serve summons on defendant who was in jail—Restitutio-in-integrum.

MEERALEVVAI *vs.* SEENITHAMBY XXXIV. 9

Second Schedule

Scale of costs and charges to be paid to Proctor in the District Courts—Making and serving copy of plaint—Meaning of the words " making a copy " as used in the Schedule.

Held: (1) *That the words " making a copy " as used in the Schedule to the Civil Procedure Code mean making a copy by other than mechanical means.*

(2) *That a charge for serving printed copies of a plaint in a partition action does not fall within any of the items in the Schedule.*

N. K. DE S. WICKREMASINGHE *vs.* D. R. SENEVIRATNE ... ... VI. 113

Right of Commissioner to determine witness' expenses.

HARAMANIS APPUHAMY *vs.* WICKREMASINGHE AND ANOTHER ... XVI. 18

CLUB

Member of Club injured on premises by reason of building being defective—Liability of Committee of Management.

SHORE *vs.* MINISTRY OF WORKS AND OTHERS ... ... XLIII. 76

CO-ACCUSED

Statement made by one accused from dock —Does it affect co-accused.

REX *vs.* LIYANAGE SIMEION ... XL. 6

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CO-DEBTORS

See also under **DEBTOR AND CREDITOR**

Remedy of co-debtor who has satisfied entire debt.

HARRIET DIAS AND ANOTHER *vs.* SILVA I. 214

Part payment of a promissory note by one co-debtor operates as payment to take the debt out of the Prescription Ordinance as against the other co-debtor.

SOOSAIPILLAI *vs.* VAITHIYALINGAM AND ANOTHER ... ... IV. 139

Payment by one debtor of his share of liability—Liability of other.

DEONIS APPU *vs.* GUNAWARDENE XVI. 29

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

HARAMANIS PERERA *vs.* CAROLIS PERERA AND ANOTHER ... ... XVII. 108

Co-debtor—Cannot be made liable in solidum unless there is a special agreement to that effect or by operation of law.

SARAM *vs.* VANDER POORTEN ... XXIII. 84

Joint and several obligations—Liability of co-obligors—Is each liable in solidum for the whole debt—Position of surety who has paid the whole debt—Subrogation—Promissory notes—Are they governed by English or Roman-Dutch law?

The plaintiff-respondent discharged a promissory note whereon he and the two defendants were jointly and severally liable. Thereafter the respondent, who had signed the note merely as an accommodating party, sued the two defendants for the sum paid on their behalf. The second defendant-appellant maintained that the respondent could only recover from each defendant one half of the amount paid in discharge of the promissory note.

Held: (1) *That once a promissory note is discharged by payment the English law ceases to apply. Any debt due by reason of such payment is governed by the Roman-Dutch law.*

(2) *That each of several co-obligors is only liable for his share of the contract (except in the case of co-partners) and not for the whole contract in solidum, unless the contrary has been stipulated.*

(3) *That a surety who has discharged the whole debt may only enforce his own rights against the principal debtors unless he has procured a subrogation to the rights of the creditor.*

GUNASEKERE *vs.* GUNASEKERE ... XXIV. 35

Co-debtors—Joint debt paid by third party —Rights of third party against co-debtors— Negotiorum gestor.

DINGIRI APPU *vs.* PUNCHI APPUHAMY AND THREE OTHERS ... ... XXXV. 41

COLLATION

See under **MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE**

COLOMBO MUNICIPAL COUNCIL (CONSTITUTION) ORDINANCE No. 60 of 1935.

See under **MUNICIPAL COUNCILS**

COMMISSION

Commission to examine witness—Application for—Reasons for refusal—When should objection be taken?

ABNER & CO. *vs.* CEYLON OVERSEAS TEA TRADING CO. ... ... XXXI. 59

Commission to inspect and survey defendants' land—Underground encroachment by defendant by tunnelling into plaintiffs' land—Has Court power to appoint Commission.

CHETTINAD CORPORATION LTD. *vs.* E. P. A. FERNANDO AND OTHERS ... XXXIII. 69

Commission appointed by consent of parties to examine accounts—Right to issue summons on witnesses to appear before Commissioner.

SENEVIRATNE *vs.* KARIAWASAM ... XLII. 20

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Commission—Evidence on—What must Court be satisfied with before granting application for.

NATIONAL BANK OF INDIA LTD. *vs.* KALI APPAPILLAI AND OTHERS ... XLIII. 73

COMMISSIONS OF INQUIRY

COMMISSIONS OF INQUIRY ORDINANCE.

Powers of Commissioner to hear evidence in absence of parties implicated or concerned in the matter under inquiry.

WICKREMASINGHE *vs.* CROSSETTE THAMBYAH ... ... XXIX. 69

Publication of report of Commission—Privilege—Malice—Justification—Public interest.

M. G. PERERA *vs.* ANDREW VINCENT PEIRIS AND ANOTHER ... XXXIX. 42

COMMISSIONS OF INQUIRY ACT No. 17 of 1948.

Commissioner appointed under Act—Jurisdiction of Supreme Court to issue writ of Prohibition on.

THE MAYOR OF COLOMBO *vs.* THE COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER... ... ... XLI. 28

Circumstances in which writ of Prohibition on Commissioner will be refused.

THE MAYOR OF COLOMBO *vs.* THE COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER... ... ... XLI. 33

COMMON CARRIER

Common Carrier—Liability under Roman-Dutch Law.

BAGSOOBHOY *vs.* THE CEYLON WHARFAGE CO., LTD.... ... ... XXXVII. 8

COMMON INTENTION

Common Intention to murder—When motive is relevant.

REX *vs.* DINGO *et al* ... ... XXXIX. 52

COMPANIES

Company in voluntary liquidation—How may summons be served on—Joint Stock Companies Ordinance No. 4 of 1861, Section 87.

MENDIS *vs.* THE INDEPENDENT PUBLISHING CO., LTD.... ... ... X. 145

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

AMIJEE AND OTHERS *vs.* LEWIS AND OTHERS XVI. 114

Supreme Court has no power to revise an order pronounced by a Court under Section 133 (5) of the Companies Ordinance.

LAWRIE MUTTUKRISHNA *vs.* CEYLON EXPORTS LTD. ... ... XXIII. 95

Companies Ordinance—Section 130—Auditors appointed under—Duties of auditors—Balance Sheet—Whose duty to prepare—Incomplete balance sheet prepared by auditors—Are they entitled to remuneration— Quantum meruit.

Held: (1) *That the preparation of the balance sheet of a Company is a duty imposed on the directors of a Company under Section* 121 *of the Companies Ordinance and forms no part of the duty of the auditors.*

(2) *That where there is no such balance sheet the only duty cast on the auditors by Section* 132 (1) *is to report to the members on the accounts examined by them.*

(3) *That where the auditors of a Company who were requested by the directors to prepare a balance sheet failed to complete it owing to the default of the Company, such auditors are not entitled to any remuneration.*

(4) *That the auditors cannot base such claim for remuneration on* quantum meruit, *as the Company did not get the benefit of any work done.*

CHARLES AND ANOTHER *vs.* LIQUIDATOR, TURRET MOTORS ... ... XXV. 84

Share Certificate—Physical delivery of—To mortgagee—Cannot be said to constitute delivery of right mortgaged.

MITCHELL *vs.* FERNANDO ... XXX. 57

Companies Ordinance (No. 51 of 1938), Section 18 (1) (a)—Registered Insurance Company—New Company—Resemblance in name—Both Companies engaged in Insurance

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—Injunction to restrain use of name by older Company.

The plaintiffs, The Ceylon Insurance Co., Ltd., carrying on business in Motor, Fire, Fidelity and Life Insurance, were registered on the 3rd April, 1939. The defendants, who carry on business in Life Insurance, were registered on the 24th May, 1944, as the United Ceylon Insurance Company. The plaintiffs sought by injunction to restrain the use of the defendants' name, as the resemblance of the names was likely to induce deception.

Held: *That no case had been made out for an injunction as the use of the word "United" sufficiently distinguished the name of the defendants from that of the plaintiffs.*

THE CEYLON INSURANCE CO., LTD. *vs.* THE UNITED CEYLON INSURANCE CO., LTD. ... ... XXXV. 45

Companies Ordinance—No. 51 of 1938, Section 120—Failure of Director to keep proper books of accounts.

In this case the conviction of the accused, the Managing Director of a Company for failure to keep proper books of accounts as required by Section 120 of the Companies Ordinance was set aside on the ground that inadmissible evidence had been admitted and that the accused's guilt had not been proved by relevant evidence.

Per GRATIAEN, *J.*—"*The Section* (*i.e.*, S. 120 (3)) is satisfied so long as a set of 'books of original entry' is maintained in one or other of which books every transaction is faithfully recorded at the time when it occurs."

HEENBANDA *vs.* HERATH ... XLI. 5

Proceedings against Company—Summons served on Managing Director—Was summons served on lawful representative of Company.

EASTERN BUS CO., *vs.* INSPECTOR OF LABOUR, BATTICALOA ... XLV. 85

Companies Ordinance, No. 51 of 1938, Section 110 (1) and (2)—Charge under—Material ingredient.

In a charge made under Sub-Section (2) of Section 110 of the Companies Ordinance in that the accused failed to hold a meeting in his capacity as Managing Director, it is essential to set out that the offender is "knowingly a party to the default."

M. E. DE SILVA *vs.* CROOS ... XLVIII 15

Companies Ordinance, No. 51 of 1938—Winding up of Company on the ground of deadlock, under Section 162 (6)—Disagreements and conflicts between Directors and their respective supporters—Attempts to dislodge Directors—Mutual recriminations—Action filed and injunction obtained to restrain one party from holding meeting to remove Directors and appoint new ones—Counter action and injunction to restrain the other party from acting as Directors—Fears that one party would command majorities in future and oppress the minority shareholders—What should be proved in an application for winding up on ground of deadlock—Circumstances in which Courts would grant an application for winding up.

Disagreements arose between two Directors of a Public Company (the appellant and another) and their respective supporters, regarding the working and administration of the affairs of the Company. The Agents and Secretaries, who were a Private Company, in which the appellant had a controlling interest, failed to carry out certain instructions given by the Board of Directors, besides acting in an arbitrary manner. A resolution was accordingly passed making specific complaints against them and calling upon them to hand over the account books, etc., to another Director on the ground that their continuance was detrimental to the progress of the Company.

Thereafter the appellant addressed a requisition dated 10-10-49 and signed by himself and five other shareholders to the Board of Directors requesting that an extraordinary meeting be held on 22-10-49 to pass resolutions, the object of which was to reinstate the said Private Company as Agents and Secretaries and to remove certain Directors. The Board of Directors, taking the view that a special resolution was necessary for the purpose fixed the meeting for 30-11-49. The appellant contended that no special resolution was necessary and again requested the Board to summon a meeting on or before 30-11-49. The Board persisted in its opinion and fixed the meeting for 22-12-49. The appellant then convened

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an extraordinary meeting for 3-12-49 presumably under Section 112 (3) of the Ordinance.

Thereupon three of the Directors filed action in the District Court praying *inter alia* for an interim injunction restraining the appellant from holding or taking part in the meeting fixed for 3-12-49. The injunction was issued but not served on the appellant. The Chairman read out the enjoining order to the shareholders who were present at the meeting of 3-12-49. The appellant however, was absent. After the Chairman left, the shareholders proceeded to hold a meeting at which they purported to re-appoint the said Private Company as Agents and Secretaries, to pass a vote of no confidence on the Board of Directors, to dislodge the existing Directors except the Life Director and to substitute for them the appellant and his son.

The appellant and his son thereafter instituted another action making the opposing Directors defendants praying *inter alia* (*a*) for a declaration that the plaintiffs were duly elected Directors, (*b*) for an injunction restraining the defendants from acting as Directors. This injunction was also granted.

These differences and disputes coupled with a series of mutual accusations and fears that the appellant would command majorities in the future to oppress the minority shareholders, culminated in an application for a winding up on the ground of deadlock under Section 162 (6) of the Companies Ordinance by the respondents. The appellant having unsuccessfully opposed this in the District Court, appealed.

Held: (1) *That, however violent the disputes that have taken place, they are not incapable of solution through the machinery of the Courts.*

(2) *That the mere proof of embarrassment caused by the conflicts between the Directors and the possible delays inevitable in litigation in achieving their resolutions, without further establishing that the matters of disagreement, for lack of means of solution, would be of such a permanent character as either to bring the business to a standstill or to cause irreparable damage to the shareholders, is not sufficient to justify an order for winding up on the ground of deadlock.*

(3) *That in an application for winding up of a Company the Court should not, unless a very strong case is made, take upon itself to interfere with the domestic forum which has been established for the management of the Company, as all internal questions which arise in the course of the working of a Company are matters for discussion and settlement in such domestic forum.*

(4) *That though the language of Section* 162 (6) *is extremely wide on the face of it, a review of the decided cases shows that so far the Courts have acted under this Subsection only in the following cases:—*

(*a*) *Where an individual or group holding a majority of shares, which ensures for him or them a controlling interest have used the overwhelming power so possessed perversely;*

(*b*) *Where the substratum of the Company has, for one reason or another, disappeared;*

(*c*) *Where there is a deadlock it must be complete not only at any given moment but must appear reasonably that no remedy can be hoped for by recourse to the Courts.*

(5) *That the resolution passed at the meeting of* 3-12-49 *was of no effect in law as* (1) *a special resolution was necessary to displace a Board of Directors and no such resolution was passed.* (2) *Even if the Directors were in default in not summoning a meeting in response to the requisition, the conveners of the said meeting did not, before they summoned a meeting themselves, let the time required by law under Section* 112 (3) *to elapse.*

CEYLON TEXTILES, LTD. *et al vs.* SENATOR CHITTAMPALAM GARDINER *et al* XLVIII. 51

COMPENSATION

Person in possession of land under conditional permit—One condition that person in possession not entitled to compensation for improvements—No right to compensation arises.

JAMES APPU *vs.* KIRI BANDA ... II. 426

Bona fide **encroachment on land vested in the Municipal Council—What are the rights of the encroacher.**

Held: *That a person, who erects a building partly encroaching on land, vested in a Municipal Council, which it cannot sell without the sanction of the Governor, must remove*

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the encroaching portion of the building and is not entitled to recovery money compensation for the value of the building or a portion of it from the Municipal Council.

GUNATILLEKE *vs.* THE MUNICIPAL COUNCIL OF COLOMBO ... V. 76

Planting agreement—Death of grantor of agreement—Sale of land by Fiscal in execution of a writ against heirs of grantor—Existence of agreement made known to those present at sale—Are purchasers bound by the agreement.

Held: *That the purchaser was bound by the agreement and was bound to pay compensation for the improvements effected by the plaintiff.*

AGOSTINU APPUHAMY AND ANOTHER *vs.* CAROLINE HAMINE ... ... VII. 129

A person entitled to compensation for improvements is not entitled to a jus retentionis **unless he falls within the class of persons to whom the right is granted under our law**

WIJESEKERA *vs.* MEEGAMA ... XIII. 136

Rights of a person in the position of a tenant effecting improvements—Can an improving lessee or tenant claim compensation from any party seeking to recover possession or may he claim compensation only from the lessor or landlord.

DE SILVA AND OTHERS *vs.* PERUSINGHE XIV. 137

Right of improver of land settled under the Land Settlement Ordinance to claim compensation for improvements from the person on whom the land is settled.

HETUHAMY *vs.* BOTEJU ... XXI. 133

COMPENSATION FOR IMPROVEMENTS

(1) A transfer of a property together with all right title and interest and all things belonging thereunto conveys the right to claim compensation for the improvements effected by the transferor.

(2) When the real owners of a property consented to an acquiesced in the making of improvements, the right to claim compensation cannot be denied to a mala fide **improver or to his purchaser.**

(3) A claim for compensation for improvements alone can be asserted in a partition action.

JASOHAMY AND ANOTHER *vs.* PODIHAMY AND TWO OTHERS ... ... XXV. 100

Compensation for improvements by *bona fide* **improver—Is claim wiped out by order under § 4 of Waste Lands Ordinance No. 1 of 1897.**

WICKRAMASINGHE *vs.* DIAS ... XXX. 74

Compensation for improvements effected on land of which at the time the party claiming compensation was owner and not on land which he thought belonged to him.

PERIYACARUPPEN CHETTIAR *vs.* PROPRIETORS AGENTS LTD. ... XXXII. 19

Compensation for Improvements—*Bona fide* **possessor—Rights and liabilities of—Improvements made during action—Can value of such improvement be claimed—How long can an improver continue to take fruits of improvements—Amount of expenditure recoverable by improver.**

Held: (1) *That where a* bona fide *improver is sued by an owner, the former is not required to pay compensation for the fruits which he has gathered in good faith, whether they have been consumed or are still in existence, but is only bound to restore the principal thing together with such fruits as were extant at the moment when* litis contestatio *took place.*

(2) *That from the moment of* litis contestatio *he is bound to apply the utmost care in the cultivation of the fruits.*

(3) *That if the owner succeeds in proving his ownership, he can require the possessor to hand over all the fruits gathered by him during the action, or pay compensation, and can further claim damages for such fruits as he could have gathered by the exercise of due care.*

(4) *That a* bona fide *possessor is not entitled to claim any sum for improvements effected after the institution of an action against him by the owner.*

(5) *That the amount of expenditure which an improver is entitled to recover is restricted to its value at the time he restores the property.*

BILINDI AND OTHERS *vs.* ATTADASSI THERO XXXII. 50

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Compensation for improvements in respect of land reserved for a road.

WIJESINGHE *vs.* ATTORNEY-GENERAL ... ... XXXIII. 26

Compensation—Improvements by purchaser on property gifted subject to *fidei commissum*—**Purchaser unaware of** *fidei commissum*—**Is he a** *mala fide* **possessor—Can transferee from such improver claim compensation.**

Held: (1) *That a person, who makes improvements on property purchased from the heirs of a donee, without being aware that the gift to such donee was subject to a* fidei commissum, *is in the position of a* bona fide *improver.*

(2) *That a transferee from such improver is entitled to compensation for such improvements from the* fidei commissaries.

MARCELINE FERNANDO AND OTHERS *vs.* PEDRU FERNANDO AND OTHERS XXXIV. 68

Compensation for loss of goods entrusted to bailee.

MOHAMED SALIH *vs.* FERNANDO *et al* XLIV. 17

Landlord though not actual owner consenting to improvements by tenant—Owner conveying premises let to another—Attornment and payment of rent to purchaser—Claim for compensation for improvements by tenant against landlord at the time of improvements—Who is liable for the claim.

ALLES *vs.* KRISHNAN AND ANOTHER XLVII. 19

Lease of land—Sub-lease by lessee to respondent with lessor's consent under indenture with similar terms—Buildings erected by respondent—Claim by respondent for compensation for buildings—No provision in lease for compensation—Rights of lessee.

JAFFERJEE AND TWO OTHERS *vs.* CYRIL DE ZOYSA ... ... L. 1

COMPOUND INTEREST

See under INTEREST

COMPROMISE

Compromise—Challenge by Muslim plaintiff to Buddhist defendant to take oath at Mosque—Acceptance of challenge—Terms of settlement recorded by Court—Subsequent application by plaintiff to withdraw from agreement allowed by Court—Is such agreement obnoxious to Section 7 of the Oaths and Affirmations Ordinance (Chapter 14)—Civil Procedure Code, Section 408.

On the trial date *viz.*, 24-8-43, the plaintiff who was a Muslim, challenged the defendant, a Sinhalese Buddhist to take an oath at the Warakamure Mosque that he (the defendant) did not make a payment of Rs.10 on 31st July, 1938, or a payment of Rs. 5 on 17th January, 1943, on account of a promissory note sued upon. Defendant accepted the challenge and it was agreed by the parties that if the defendant took the oath, plaintiff's action should be dismissed with costs, and if the defendant failed to take the oath, judgment should be entered for plaintiff as prayed for with costs. Both parties signed the record.

Subsequently, plaintiff moved to withdraw from the agreement on the ground that he agreed to the terms on a misunderstanding and that the defendant is a Sinhalese Buddhist. The Court allowed this motion. The defendant appealed.

Held: (1) *That the plaintiff should not have been allowed to resile from the agreement as it was a lawful compromise within the meaning of Section* 408 *of the Civil Procedure Code.*

(2) *That the agreement did not fall within Section* 7 *of the Oaths and Affirmations Ordinance* (*Chapter* 14).

NAGOOR ADUMAI *vs.* WILLIAM ... XXX. 108

Compromise—arrived at in the course of an action without complying with requirements of §§ 91 and 408 of Civil Procedure Code—Effect of

BABYHAMINE *et al vs.* JAMIS *et al* XLVI. 5

CONCUBINE

Law relating to gifts to concubines

WANIGARATNE AND TWO OTHERS *vs.* SELLOHAMY AND TWO OTHERS XIX. 137

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CONDITIONAL TRANSFER OF LAND

See under **AGREEMENT**

CIVIL PROCEDURE CODE

CONFESSION

See also under **EVIDENCE ORDINANCE**

Confession made to an Unofficial Police Magistrate—Is it admissible in evidence.

POLICE SERGEANT HENDRICK *vs.* ARUMUGAM AND ANOTHER ... VIII. 81

Evidence—Confession by accused to Excise Inspector—Ordinance No. 18 of 1928—Section 3—Inadmissibility—Failure of Magistrate to rule out such confession—Possibility of Magistrate's mind being prejudiced against the accused.

Held: (1) *That the Magistrate should have ruled out the confession led in evidence as being inadmissible under Section* 3 *of Ordinance No.* 18 *of* 1928.

(2) *That there was a fair possibility of the Magistrate's mind being influenced against the accused by this inadmissible confession.*

RANHOTTY (EXCISE INSPECTOR) *vs.* POORANAM ... ... XII. 55

Confession made to police officer—Inadmissible as proof against person making it—Whether as substantive evidence or in order to show that he has contradicted himself.

THE KING *vs.* KIRIWASTU AND ANOTHER ... ... XIV. 25

Confession to Magistrate made after commencement of non-summary inquiry—Can it be admitted in evidence—Confession to Superintendent of Prisons—When may it be admitted in evidence.

Held: (1) *That a confession recorded by a Magistrate under Section* 134 *of the Criminal Procedure Code is not inadmissible in evidence merely because it is recorded after the arrest of the accused and after investigation by the police.*

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

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

REX *vs.* KARALY MUTTIAH AND OTHERS ... ... XVI. 37

Confession made to Assistant Government Agent while in police custody—Admissibility

POULIER *vs.* ABEYGUNAWARDENA XVII. 33

Confession recorded under § 134 of the Criminal Procedure Code cannot be admitted in evidence if it is irrelevant under § 24 of the Evidence Ordinance.

REX *vs.* FRANCISCU APPUHAMY XXI. 113

Statement in the nature of a confession made by a witness is admissible in a prosecution against him unless the statement is excluded by any particular provision of the Evidence Ordinance. A confession induced by a Police Officer on the suggestion that some advantage would accrue to the maker is inadmissible.

KING *vs.* PUNCHI BANDA ... XXIV. 95

Confession by accused partly incriminating him, partly exculpating him—Should court accept or reject such confession.

THE KING *vs.* SATHASIVAM ... XL. 89

CONFISCATION

Confiscation of motor car used for transporting toddy.

See under **EXCISE ORDINANCE.**

Confiscation—A power of confiscation cannot be implied where the legislature has not expressly conferred it.

VAN SANDEN *vs.* PERERA ... XXX. 70

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CONSENT

Judgment of consent in a partition action operates as res judicata.

MENIK ETANA *vs.* PUNCHI APPUHAMY AND ANOTHER ... ... XXI. 14

CONSENT MOTION

See under **DECREE**

CONSIDERATION

Compromise of a claim for wages constitutes valuable consideration for the execution of a promissory note.

AIYAMPILLAI *vs.* SORNAMMAH AND ANOTHER ... ... XXIII. 108

Consideration—Contract—Promises based on legal and illegal consideration—Principles governing doctrine of severability.

KANDIAH AND ANOTHER *vs.* THAMBIPILLAI ... ... XXVI. 49

Consideration in Roman Dutch Law.

EDWARD *vs.* DE SILVA ... XXXI. 49

Consideration—Transfer of property without consideration.

FERNANDO *vs.* THAMEL AND ANOTHER ... ... XXXII. 66

Action for cancellation of deed for failure of consideration

WIJESINGHE *vs.* SONNADARA XLV. 64

CONSTITUTION

See under **CEYLON (CONSTITUTION) ORDER IN COUNCIL**

CONSTITUTIONAL LAW

Power of His Majesty to legislate for the Island. Ceylon (Legislative Council) Order in Council, 1923

ABEYSEKERA *vs.* JAYATILAKE I. 122

CONSTRUCTION OF DOCUMENTS

See also under **DEED, INTERPRETATION**

Power of Attorney containing general words in later clauses and special powers in earlier clauses—How construed

ADAIKAPPA CHETTIAR *vs.* THOS. COOK AND SON LTD. ... ... II. 88

Deed—All the terms of a deed must be taken into consideration in construing it.

WEERASEKERA *vs.* PEIRIS ... II. 99

Construction of deed—Deed of gift—Mortgage of subject matter of gift by donees—Donees parties to the mortgage—Interests of donees mortgaged—Does ignorance of their rights on the part of the donees affect their act in so far as it is valid.

By a deed P 1 an allotment of land was gifted to Francina Soosa and her husband Arnolis Silva. Francina Soosa died leaving her husband and their children. By a Bond P2 Arnolis Silva and his three children mortgaged certain interests in the property gifted by P1. The Bond was put in suit and the land sold. The plaintiffs, the descendants of Arnolis Silva and Francina Soosa claimed that P1 created a valid *fidei—commissum* and that the deed P2 did not create an effective mortgage of their rights even over the half share dealt with in P1.

Held: *That P2 created a valid mortgage of the share of land dealt with in P1*

AGOSTINA SILVA AND THREE OTHERS *vs* JOHN CHRISIS SILVA XIII 31

Interpretation—of deed where vendor entitled to 3/16 of a land purported to convey 1/2.

FERNANDO *vs* SILVA AND OTHERS XXXI 73

CONTEMPT OF COURT

Injunction granted by Court of Requests under § 87 of the Courts Ordinance—Disobedience of injunction—The Court has power to punish persons disobeying an injunction issued by it—Section 663 of the Civil Procedure Code.

Held: *That the Court of Requests has power to punish as for contempt a person disobeying an injunction issued by it.*

PERERA *vs.* ABDUL HAMID I. 141

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Curator of minors failing to obey order of Court to deposit money—Can he be dealt with as for Contempt of Court?

Held: *That the curator of a minor cannot be punished for contempt of Court for failing to obey an order of Court to deposit money belonging to the estate of the minor as there is no special provision of the Civil Procedure Code making such disobedience punishable as for Contempt.*

SINNIAH KANGANY *vs.* THE ATTORNEY GENERAL ... ... I. 417

Publication of notice convening a meeting for discussing a pending case—Meeting held in pursuance of such notice.

The respondent, a Proctor of the Supreme Court practising at Avissawella, was by a rule *nisi* called upon to show cause why he should not be punished for contempt of the authority of the Supreme Court

(*a*) in that he did on or about the 9th July, 1936 at Avissawella, cause to be printed and published a notice to the following effect:—

A serious and frightful crime, which has been committed on a young respectable Sinhalese lady who is a stranger, by a rich landed proprietor of Kanantota called Wahab Mudalali, with his henchman, is now being inquired into at the Police Court at Avissawella.

As this is an unheard of and frightful crime which has never taken place in those parts before, a public meeting will be held on the 9th instant at 4 p.m. at the Avissawella Public Market, under the Chairmanship of Proctor Mohandas de Mel Laxapathy and all are requested to be present without fail.

Which said notice had reference to the non-summary proceedings there pending before the Police Court of Avissawella in case No. 12421 wherein one Seleka Marikkar Abdul Wahab alias Wahab Mudalali of Pelangoda Estate, Hanwella, with seven others was charged with having on or about the 19th June, 1936, committed the offence of being members of an unlawful assembly with intent to cause hurt, robbery, and rape on a woman named Mentho Nona, which said publication was calculated to prejudice the fair hearing of said case before the Supreme Court.

(*b*) in that he did on or about the 9th July, 1936, preside at a public meeting held near the Public Market at Avissawella in pursuance of the said notice, where he caused the said notice to be read out to the public assembly at the said meeting, which said act was calculated to prejudice the fair hearing of the said case before the Supreme Court.

The notice was published in Sinhalese and the proceedings at the meeting were conducted in the same language.

At the hearing the respondent showed no cause, but explained his position by an affidavit in which he pointed out that he was taken by surprise and that he did not know Sinhalese quite as well as he might, and that he would not have approved the notice if he had appreciated its force, and that he had no intention of prejudicing the fair trial of the case.

Held: *That the conduct of the respondent constituted a contempt of Court.*

THE ATTORNEY GENERAL *vs.* M. DE MEL LAXAPATHY ... ... VI. 148

Non-summary proceedings pending—Notice of meeting having reference to a pending non-summary case—Meeting held in pursuance of such notice—Discussion of the case in public calculated to prejudice the fair hearing of the case.

Held: *That the publication of a leaflet and the discussion of a case at a public meeting while it was still pending constituted a contempt of Court.*

S. M. ABDUL WAHAB *vs.* A. J. PERERA AND OTHERS ... ... VI 130

Newspaper article containing matter both scandalous and calculated to bring Judges of the Supreme Court into public odium and ridicule,

Held: *That the article constituted a Contempt of Court.*

IN THE MATTER OF A RULE FOR CONTEMPT OF COURT ON H. A. J. HULUGALLE, EDITOR, "CEYLON DAILY NEWS" VII. 137

Criminal proceedings pending against petitioner on a charge of murder—Reference to act of petitioner as "murder" in a leaflet published by the respondents convening a public meeting—Does the publication consti-

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tute a contempt of Court—Is the intention of the authors of the leaflet material.

Held: *That, in the circumstances, the respondents were guilty of having committed a contempt of the Supreme Court by interfering with the due administration of justice.*

JAYASINGHE *vs.* WIJESINGHE AND OTHERS ... ... XI. 159

Letter written to District Judge regarding proceedings before him by a person unconnected with proceedings—Request that a person against whom a warrant had been issued should be given a date to appear in Court.

Held: *That the respondent's letter amounts to an attempt to influence the Judge upon a matter publicly before him, and that the respondent's conduct in writing the letter amounted to a contempt of Court.*

IN *Re* RATNAYAKE ... ... XII. 3

Giving false evidence in the course of proceedings in a Civil Court.

Held: *That a person should not be convicted for contempt of Court by giving false evidence unless it is clear from the evidence that the false evidence was given with a contumacious intent.*

VANDERPOORTEN *vs.* RANASINGHE XII. 81

Newspaper editorials and reports calculated to prejudice a trial—Meaning of the expression "calculated to prejudice a trial"

Held: (1) *That the offence of contempt of Court is committed by a newspaper when it publishes something which is intended or calculated to prejudice a pending trial.*

(2) *That a person who publishes in a newspaper something about a pending trial "calculated to produce an atmosphere of prejudice in the midst of which proceedings must go on" interferes with a fair trial of the case although that person has no intention to cause prejudice.*

(3) *That a casual reference in a newspaper to a pending case as a case of "murder" will not of itself constitute a contempt of Court. But where in a succession of references to the case in different issues of the same paper it is insisted that the alleged act is "murder" by the use of such expressions as "assassination," "dastardly murder in circumstances of peculiar barbarity," "murder of a cruel and cowardly type," "here is an indisputable fact—murder, no less," then the publisher is guilty of contempt of Court even though he had no intention to cause prejudice.*

VEERASAMY *vs.* STEWART (EDITOR, TIMES OF CEYLON) AND ANOTHER XXI. 60

Failure to comply with an order for payment of alimony pendente lite constitutes a contempt.

ASLIN NONA *vs.* PERERA AND ANOTHER ... ... XXIX. 79

"Scandalizing a judge"—Statement contained in petition of appeal to the Court of Criminal Appeal

A petition of appeal to the Court of Criminal Appeal contained the following statement:

"His Lordship suggested to witnesses for the prosecution answers which enabled them to shape the evidence in a manner which made the case for the prosecution more convincing than on the evidence as it otherwise stood."

The petition was drafted by an advocate of the Supreme Court.

Held: *That the statement was calculated to bring the judge into contempt or to lower his authority and that the advocate was guilty of a contempt of Court.*

IN *Re* RAGUPATHY ... ... XXX. 71

Contempt of Court—Definition of—Insult to Counsel in Court—Is it contempt—Summary powers of punishment—When should they be used—Costs in Privy Council—When Crown should be ordered to pay.

The appellant, while appearing in person in support of certain objections and in reply to a remark by the opposing Counsel that the appellant was misleading the Court, said **"I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the Court."**

Held: *That the words used by the appellant respecting the Bar, and which must be taken to have been intended by him to refer*

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to the opposing Counsel in particular, did not amount to a contempt of Court.

PARASHURAM DETARAM SHAMDASANI *vs.* EMPEROR ... ... XXX. 97

Summary punishment for contempt—False statement at inquiry under Section 219 of the Civil Procedure Code.

IN *Re* JUDGMENT DEBTOR XXXVIII. 70

Intentional omission on part of applicant for letters of administration to state who the legal heirs of the deceased are amounts to a contempt of Court.

RATWATTE *vs.* KATUGAHA ... XLII. 24

Article published in newspaper, commenting on the facts of a pending case—Does the publication tend to interfere with the due course of justice?—Apology, and offer to publish unqualified withdrawal of offending passages—Considerations affecting sentence—Costs in criminal or quasi-criminal proceedings.

Where a *rule nisi* for contempt of Court was issued on the editor of a newspaper, in respect of a passage commenting on the facts of a pending case, and the editor apologised, and offered to publish an unqualified withdrawal of the offending passages.

Held: (1) (NAGALINGAM, J., dissentiente)*: That in considering the sentence to be imposed on him, the Court should take into account the question of not only preventing the mischief in that particular case, but also the prevention of mischief arising in other cases, and that, therefore, a punishment, however slight should be imposed on the offender.*

(2) *That under our law costs cannot be awarded in criminal or quasi-criminal proceedings except in the case provided by Section* 352 *of the Criminal Procedure Code.*

IN *Re* KRISHNAPILLAI VAIKUNTHAVASAM ... ... XLV. 102

CONTRACT

See also under **BAILMENT, INSURANCE, SALE OF GOODS**

Contract of sale of Land—Misrepresentation by vendor—Vendee acting on such misrepresentation without knowing it to be false—Action to set aside sale.

Held: *That vendee of a land who was misled by the vendor's misrepresentation was entitled to a rescission of the contract and a refund of the purchase price.*

MARTINUS *vs.* PERERA ... II. 287

Breach of contract—Action for by broker who is not an auctioneer—Can be rely on entry in his books or on a bought or sold note as a note or memorandum in writing of the contract.

MULLER AND ANOTHER *vs.* FERNANDO I. 35

Loan for purchase of cattle—Term of contract that till payment of loan cattle vouchers should be made out in favour of lender as additional security—Possession in borrower—Sale of cattle by lender in breach of contract—Action for damages—Need plaintiff prove title to the cattle.

Held: *That it is not essential to the success of an action such as this that the plaintiff should or need prove his title to the animals*

SUPPERNAYAKER *vs.* LETCHUMANANPILLAI AND OTHERS ... ... III. 97

Contract with manufacturer through Commission Agent—Can Commission Agent sue for breach of contract.

The defendant entered into the contract set out in the judgment with Messrs. M. Nakai and Co., Ltd., Kobe, through the plaintiff, a Commission Agent. On the failure of the defendant to take delivery of the goods, the plaintiff sold them and brought this action to recover the shortfall.

Held: *That the plaintiff was not entitled, under the contract, to bring an action for the shortfall.*

SARFALLY AND ANOTHER *vs.* YUSOOF V. 92

Contract by public officer contrary to general orders of Government—Enforceability.

LUCY THIRUNAYAKAR *vs.* LEONARD THIRUNAYAKAR ... ... VII. 127

Forward contract for the sale of rubber—Delivery of a specified quantity to be made monthly over a period of six months—Acceptance of three of the deliveries—Refusal to accept the subsequent deliveries—Breach of

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contract—Purchaser not a licensed rubber dealer—Is the contract for this reason void and unenforceable.—Section 3 of the Rubber Thefts Ordinance No. 21 of 1908.

Held: (1) *That the provisions of the Rubber Thefts Ordinance No.* 21 *of* 1908 *do not apply to forward contracts for the sale or purchase of rubber.*

(2) *That this contract was not void and that the plaintiff was entitled to damages.*

(3) *That a licence under the Rubber Thefts Ordinance is not necessary until delivery of rubber is taken by way of completion of a contract.*

(4) *That the object of the Rubber Thefts Ordinance, is clearly, to prevent the purchase of stolen rubber, and not to control all dealings in rubber.*

HULL BLYTH AND CO., LTD. *vs.* VALIAPPA CHETTIAR ... ... VIII. 101

Where a Muslim minor enters into a contract with the consent of his natural guardian, the contract is valid according to Muslim law.

Where a minor by falsely representing himself to be of full age deceives a person to contract with him, the minor is bound by his contract.

SHORTER AND CO. *vs.* MOHAMED IX. 46

Contract—Arrival contract—C. I. F. contract—Failure to tender Bill of Lading—Acceptance of delivery order in lieu of a Bill of Lading—Where it is clear that the delivery order is tendered on C. I. F. terms, does the delivery order take the place of the Bill of Lading.

Held: (1) *That, where in a C.I.F. contract the buyer accepts a delivery order in place of the Bill of Lading, the buyer must be taken to have agree to accept the delivery order in place of the Bill of Lading.*

(2) *That a misconception on the part of the buyer as to the nature of the contract cannot affect its character or its legal implications.*

DADA *vs.* THE BRITISH CEYLON CORPORATION ... ... IX. 78

Contract—Speculation in buying and selling rubber—Brokers employed to buy and sell—Is the contract with the brokers enforceable.

Held: *That, the plaintiffs' only interest in the transactions being their brokerage, they were no parties to the wagering transactions of the defendant, and were entitled to succeed.*

BARTLEET AND CO. *vs.* EBRAHIM LEBBE MARIKAR ... ... XII. 133

Contract of service—Notice to terminate—computation of time.

PERIANEN KANGANY *vs.* EBBELS XVI. 15

FORBES *vs.* RENGASAMY XVII. 45

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

Held: (1) *That where the plaintiff entered into a contract to buy and sell rubber forward, the mere fact that the plaintiff performed the contract by the payment of the difference between the contract price and the market price on the due date does not make the contract a wagering contract in the absence of proof that it was a term of the arrangement between the plaintiff and the defendant that no rubber was to be taken or delivered under the forward contracts but that the contracts were to result merely in the payment of the differences.*

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

EBRAHIM LEBBE MARIKAR *vs.* ARULAPPA PILLAI ... ... XVI. 25

Contract—Sale by tender of cargo of rice seized as prize—Sale by description—Tender notice—" Broken rice " delivered in place of " whole rice "—Effect of condition that " the purchaser shall not be entitled to any remission of the purchase price on any ground whatsoever."

Held: *That the legal implications of the stipulation that " the purchaser shall not be entitled to any remission of the purchase price*

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on any ground whatsoever" is that, although it leaves open to the purchaser the remedies of rescission and damages for breach of a condition of the contract, if he is able to frame actions to obtain such relief, it takes away from him completely and absolutely the remedy of remission of price.

IN *re* PART CARGO EX M.V. "MARO Y" ... ... XVIII. 133

Contract—Tender for the right to exploit a forest area—Acceptance of tender of highest tenderer—Failure of tenderer after acceptance of tender to carry out contract—Offer of contract to next highest tenderer—Is defaulting tenderer liable to make good the difference between the amounts of the two tenders.

The defendant offered by tender a certain amount for the grant of the right to exploit for timber a specified forest area. His tender which happened to be the highest was accepted. But the defendant failed to carry out the contract. The Government thereupon gave the contract to the next highest tenderer after attempting unsuccessfully to get him to increase his offer and sued the defendant for the difference between his tender amount and that of the tenderer to whom the contract was subsequently given.

Held: *That the Government was in the circumstances entitled to recover from the defendant the difference between the amount of his tender and the next highest tender.*

ATTORNEY-GENERAL *vs.* VITHILINGAM ... ... XXII. 26

Contract—When does a contract become a wagering contract—Bet—What is a.

Held: (1) *That the essence of a bet is that both parties agree that they will pay and receive respectively on the happening of an event in which they have no material interest, regardless of whether the transaction is cloaked behind the forms of genuine commercial transactions.*

(2) *That to establish the bet it is necessary to prove that the documents are but a cloak and that neither party intended them to have any effective legal operation.*

(3) *That where the documents show an ordinary commercial transaction and in conformity with them one of the parties incurs personal obligations on a genuine transaction with third parties, so that he himself is not a winner or loser by the alteration of price, but can only benefit by his commission, the inference of betting is irresistibly destroyed. In such cases the fact that no delivery is required or tendered is of practically no value.*

ISMAIL LEBBE MARIKAR EBRAHIM LEBBE MARIKAR *vs.* BARTLEET & COMPANY ... ... XXII. 136

Breach of contract of service—Wrongful dismissal of school teacher—Quantum of damages.

THURAISAMY *vs.* THAIALPAGAR XXV. 41

Contract—Promises based on legal and illegal consideration—Severability—Principles governing the doctrine of.

1st and 2nd plaintiffs and the defendant, (an uncle of the 2nd plaintiff) entered into a contract the material clauses of which were as follows:

(1) That the first plaintiff should marry the second plaintiff within six months of the execution of the agreement.

(2) That the defendant in consideration of the said marriage should give in dowry to the plaintiffs the premises specified therein and Rs. 300/- on the date of their marriage and Rs. 200/- to the first plaintiff on the execution of the said agreement.

(3) In the event of the defendant failing to give the second plaintiff in marriage to the first plaintiff, the defendant should pay to the first plaintiff the sum of Rs. 500/- as and by way of liquidated damages.

(4) In the event of the first plaintiff failing, refusing or neglecting to marry the second plaintiff the first plaintiff should pay to the defendant the sum of Rs. 500/- as and by way of liquidated damages.

The plaintiffs, having been duly married, sued the defendant claiming the transfer of the land specified in clause (2) together with the sum of Rs. 300/- referred to therein less Rs. 25/- already paid.

On a preliminary issue the learned District Judge held that clauses (3) and (4) are illegal and contrary to public policy and the various clauses of the agreement were interdependent and indivisible, and dismissed the action with costs.

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Held: *That the promise to transfer the land and to pay a sum of Rs.* 300/- *contained in clause* (2) *is a separate promise by the defendant based on valid consideration and is independent of the performance of the promises in clauses* (3) *and* (4).

KANDIAH AND ANOTHER *vs.* THAMBIPILLAI ... ... XXVI. 49

An implied promise to pay a sum can be inferred from a document containing an acknowledgment of the borrowing of a sum specified therein.

NADAR *vs.* FONSEKA ... ... XXVI. 88

Contract—Transfer of licences to import regulated textiles of Japanese origin—Agreement to refund value of licences unused " in the event of the permit system being abolished by the Government for reasons unforeseen or due to *force majeure* **"—Importation of Japanese textiles subsequently restricted by law, but not abolished—Effect on contract—Meaning of** *force majeure*—**The Defence (Trading with the Enemy) Regulations—The Defence (Control of Imports) Regulations.**

The defendant transferred to the plaintiff certain licences to import regulated textiles of Japanese origin and contracted that " in the event of the above permit system being abolished by the Government for reasons unforeseen, or due to *force majeure* if you are unable to use the above permits or any portion of same, we bind ourselves to refund (at the same rate paid to us) such value of the licences as may remain unused on the date of such abolition." On the entry of Japan into the War, the Defence (Trading with the Enemy) Regulations and the Defence (Control of Imports) Regulations affected the contract. These regulations authorized the importation of Japanese textiles without a licence from any part of the British Empire other than Canada or Newfoundland. The plaintiff claimed a refund under the contract on the ground that certain licences could not be used by him.

Held: *That as the licences were available for use in a very restricted sense, namely, for the importation of Japanese textiles from Canada or Newfoundland, the plaintiff had failed to prove that the permit system had been abolished and was therefore not entitled to a refund under the contract.*

Per KEUNEMAN, J.: " As regards the meaning of '*force majeure*' see the judgment of McCardie, J. in LEBEAUPIN *vs.* CRISPIN—'The phrase "*force majeure*" was not interchangeable with "*vis major*" or "Act of God." It goes beyond the latter phrase. Any direct legislative or administrative interference would of course come within the term; for example, an embargo.'"

ISMAIL *vs.* LYE ... ... XXIX. 66

Contract—Sale of goods—Express warranty—Implied condition that goods are fit for purpose intended—Sale of Goods Ordinance (Chapter 70) Section 15 (1)—Meaning of the word " description."

The defendant company, who were agents for an instrument known as the " Ediphone" sold to the plaintiff an instrument called a " Telediphone " for the purpose of recording and reproducing the charges of Judges of the Supreme Court to juries in the course of their criminal jurisdiction. The instrument was not fit for the purpose for which it was purchased.

The questions that arose in the case were:

(*a*) Whether the transaction was a contract of sale or merely an order on the defendant company to import a specified article;

(*b*) Whether there had been an express warrantly that the instrument was reasonably fit for the purpose intended;

(*c*) Whether there was an implied condition under Section 15 (1) of the Sale of Goods Ordinance.

The learned District Judge held:

(i.) That though the transaction began with an order by plaintiff to the defendant to import the instrument, there was a subsequent sale by the defendant to the plaintiff;

(ii.) That there was no express warranty by the defendant;

(iii.) That the transaction was not merely a sale of a specified article under its trade name and that the proviso to Section 15 (1) did not apply;

(iv.) That the defendant knew the purpose which the instrument was intended to serve, that the plaintiff

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relied on the defendant's skill and judgment in the matter, but that, for the purpose of Section 15 (1) the Telediphone was not an instrument of a description which it was in the course of the business of the defendant to supply.

He accordingly dismissed plaintiff's action. It was established that the Ediphone and the Telediphone were instruments of the same class or kind although the process for recording was different in the two cases.

Held: (1) (*In appeal*)—*That the Ediphone and the Telediphone were goods of the same description and that the Telediphone was an instrument of a description which it was in the course of the business of the defendant to supply.*

(2) *That for the purposes of Section* 15 (1) *of the sale of Goods Ordinance the words "of a description" may be treated as including the meaning "of a class or kind."*

JAYASENA *vs.* COLOMBO ELECTRIC TRAMWAYS AND LIGHTING CO., LTD. XXXI. 40

Contract—Purchase and sale of rubber coupons—Request to broker to purchase coupons—Purchase by broker from undisclosed principal—Usage of market—Broker liable to deliver coupons to buyer whether received from seller or not—Buyer liable to pay contract price to broker direct—Right of each party to look to broker for performance of contract—Buyer wrongfully refusing to accept delivery—Can broker sue to recover damages—Is broker in the position of surety for due performance of contract—Wagering contract.

Where according to the agreed usage of the market where business in the purchase and sale of rubber coupons is transacted—

(*a*) the broker's bought note or the sold note never discloses the name of the other party to the contract;

(*b*) the broker was liable to deliver to the buyer the coupons sold, whether or not he had received them from the seller, and the buyer was liable to pay the contract price direct to the broker if delivery is accepted;

(*c*) the buyer and seller have no dealings with each other direct in regard to the performance of the contract, and each party is entitled to look to the broker for performance of the contract;

Held: (1) *That in the event of the buyer accepting delivery and refusing payment, or if the buyer wrongfully refuses to accept delivery, the broker is the person to recover damages for breach of contract;*

(2) *That, if the buyer is entitled to delivery of the coupons purchased by the broker, the contract is not a wagering one.*

(3) *That the broker's position is not one involving suretyship as there is nothing in the contract to suggest that the buyer must first claim delivery of the coupons from the seller before having recourse to the broker.*

E. L. EBRAHIM LEBBE MARIKAR *vs.* AUSTIN DE MEL, LTD. ... ... XXXI. 94

Contract—Action for breach of contract—Quantum of damages—

DAVID *vs.* SENEVIRATNE AND TWO OTHERS XXXII. 9

Impossibility of performance owing to outbreak of war, and alteration of normal conditions by Defence Regulations—Exorbitant sum claimed as interest on loan.

Held: (1) *That where the parties had entered into a contract on the assumption that normal conditions would prevail, and such contract became impossible of performance owing to the outbreak of war, and consequent emergency legislation, it was open to the Court to do what seems to be equitable between the parties.*

(2) *That at no time can a creditor sustain a claim to recover more than double the principal which has been lent.*

ELIYATHAMBY *vs.* MIRCANDO AND OTHERS XXXII. 15

Contract of Insurance—Clause that all differences between the parties arising out of the contract shall be referred to arbitration—Mere denial of liability by one party—Institution of action—Is reference to arbitration a condition precedent to such action—Failure of defendant to specify grounds on which liability is repudiated—Can it be said that differences which could be referred to arbitration existed—Arbitration Ordinance, section 7.

Held: (1) *That where parties to a contract agreed that all differences arising out*

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of the contract shall be referred to the decision of an arbitrator, a reference to such arbitration is a condition precedent to the institution of an action by one of the parties.

(2) *That, where one of the parties failed, though requested by the other, to specify the grounds on which liability was denied, and an action was instituted against the party in default, the Court had jurisdiction to entertain the action, as it cannot be said that any differences, which could be referred to arbitration, existed between the parties before action was brought.*

(3) *That in view of Section 7 of the Arbitration Ordinance the party sued is entitled to have an order staying the action until the matters in difference between the parties have been referred to arbitration.*

WIJAYANARAYANA *vs.* THE GENERAL INSURANCE CO., LTD. ... XXXII. 57

Contract—Breach of—Lease of Crown Lands—Action against Crown for damages—Power of Land Commissioner to bind the Crown.

ATTORNEY GENERAL *vs.* WIJESURIYA XXXII. 89

Contract of service—Does mandamus lie to compel performance of obligations.

PERERA *vs.* COLOMBO MUNICIPAL COUNCIL AND ANOTHER ... ... XXXIV. 7

Building contract—Provision for payment of liquidated damages for delay in completion—Does this provision operate where the builder or contractor fails to complete the building.

A building contractor was sued for damages on the following provision in the agreement for failure to complete the building:—

" 22. If the contractor fails to complete the works by the date named in Clause 21 or within any extended time to which he may become entitled under these presents and if the Architects shall certify in writing on or before the date of issue of their certificate for the last payment to which the contractor may become entitled hereunder that the works could reasonably have been completed by the said date or within the said extended time, then the contractor shall pay or allow to the employers the sum of Rs. 500 per month as agreed and liquidated damages and not by way of penalty for every month beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, and such damages may be deducted from any moneys due or which may become due to the contractor."

Held: *That the agreement to pay liquidated damages under this clause can only operate where the builder or contractor in fact completes the building, and has no application where he does not complete the building.*

MOHAMED *vs.* WIJEWARDENA ... XXXIV. 17

Ferry rights—Agreement by a local body with the purchaser of the exclusive right of ferry—Use of land at both ends—Prevention of user by owner of soil at one end—Is purchaser entitled to quiet possession and the right to land at both ends—Damages for breach of agreement.

A Village Committee, whose jurisdiction extended to only one bank of a river, under an arrangement with the local authority on the other bank, gave the plaintiff the exclusive right of ferry, on an agreement. It imposed, *inter alia*, the duty of erecting sheds, notices, etc., on both banks. The owner of the soil on the other bank prevented the plaintiff from erecting the sheds, etc., and bringing the canoes up to the bank. The plaintiff complained to the defendant and requested it to cancel the agreement or to place the plaintiff in possession of the obstructed bank. The defendant failed to do so, and the plaintiff instituted this action for damages arising from the breach of the agreement.

Held: *That the defendant's failure to place the plaintiff in quiet possession of both banks of the river amounts to a breach of the agreement, for which the defendant is liable in damages.*

Per HOWARD, C.J.—" In my opinion the appellant did not by entering into the contract with the respondent guarantee, as in the case of landlord and tenant, the quiet enjoyment of the ferry. Nor was it necessary that the appellant should have the property in the soil on either side of the ferry. The respondent must, however, have the right to land on either side."

SOLOMON SILVA *vs.* THE VILLAGE COMMITTEE OF THE MAMPE-KESBEWA VILLAGE AREA ... ... XXXV. 73

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Specific performance—Property conveyed reserving right to a re-transfer—Assignment of rights to third party—Has assignee right to claim re-transfer—Purchase money deposited with Proctor and notification thereof—Does it amount to valid tender.

A conveyed property to the defendants or to their heirs, executors and administrators, reserving the right to a re-transfer. Subsequently, A assigned his rights to the plaintiffs, who deposited the purchase money with their proctors, and asked the defendants to re-transfer the property to them. The defendants refused.

Held: (1) *That the right to re-transfer, as reserved in the deed, was impersonal and assignable.*

(2) *That the deposit of the purchase money with the proctor and notification thereof to the defendants constituted a valid tender.*

MUHANDIRAM *vs.* ABDUL SALAM XXXVI. 8

Breach of contract—Common carrier failing to deliver goods—Loss of goods while in transit within the Port of Colombo—Carriage of goods by ship—Liability of carrier—Applicability of English Law and Roman-Dutch Law.

Held: (1) *That boats, barges or other vessels, that ply between ship and shore do not come within the meaning of the word "ship" as used in the Civil Law Ordinance and hence the law applicable to the carriage of goods by such vessels is the Roman-Dutch Law and not the English Law.*

(2) *That under the Roman-Dutch Law upon proof of receipt of goods by a carrier for trade and their loss or non-delivery to the consignee, the carrier is liable unless he can bring himself within the exceptions that exempt him from liability, such as loss by inherent vice, negligence of the consignee,* vis major, damnum fatale.

(3) *That the onus of proving such exemption from liability is on the carrier.*

(4) *That the exemptions are not a valid defence where they have been brought about by the carrier's negligence.*

BAGSOOBHOY *vs.* THE CEYLON WHARFAGE CO., LTD. ... ... XXXVII. 8

Contract—Brokerage—Sale and purchase of rubber coupons through intermediary of brokers—Real capacity in which brokers acted—Principal and agent—Duties of broker.

The plaintiff company, a firm of brokers, used to buy and sell rubber coupons on behalf of their clients in the following manner:—Instead of always negotiating a transaction between two principals, the plaintiff company, when requested by a client to buy or sell coupons, before finding the other contracting party, the Company itself bought or sold the coupons. Later, when the other party was found, the Company substituted it as the seller or buyer. In the words of the Managing-Director, the Company acted as a "coupon exchange bank." The plaintiff company claimed a sum of money as brokerage from the defendant for a series of such transactions.

Held: *That the plaintiff company had acted as principals, and not as brokers or agents and therefore, the Company is not entitled to the money claimed as brokerage.*

PEIRIS *vs.* AUSTIN DE MEL, LTD. XXXVII. 26

Contract—Capacity of Muslim aged 18 to enter into—

ASANAR *vs.* ABDUL HAMEED ... XXXVIII. 97

Executory contract—Application of Section 93 of Trusts Ordinance.

HAWADIYA *vs.* UNOOS ... XXXIX. 76

Sale of Goods—Goods delivered to buyer—Original date for payment extended by seller-Buyer repudiating liability—When can seller sue for price of goods.

Held: (1) *That in a contract for the sale of goods in which delivery has been made, payment of the price cannot be claimed until the date fixed for payment in the original contract or, where an extension of time has been granted, until the date fixed in the contract in so far as it has been varied to this limited extent.*

(2) *That where the original date for payment is extended by the seller, a repudiation by the buyer of his liability does not have the effect of restoring the date in the original contract as the operative date for payment.*

ATTANAYAKE *vs.* CHELLIAH ... XL .107

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Contract of sale of land by minors—When and to what extent can it be repudiated by them.

KANAPATHIPILLAI THANGARETNAM *vs.* ALIARLEVVE UMARULEVVE *et al* XLI. 51

Contract—Agreement by a contractor for transport of a certain specified minimum quantity of salt per day—Penalty for failure to transport such minimum—Implied obligation to make such minimum available to the contractor — Necessary implication — Damages.

The defendant-respondent entered into an agreement with the Assistant Government Agent, Hambantota, for the transport and storage of salt at the rate of not less than 2,375 bags per day. If he failed to employ the necessary labour and vehicles to transport this minimum quantity he was liable to penalty. On certain days during the contractual period the Assistant Government Agent failed to supply the minimum quantity which the contractor was obliged to transport and the contractor sued the Crown for damages suffered by him in employing labour and vehicles sufficient to transport the minimum quantity. It was contended for the Crown that the terms of the agreement did not impose an obligation on the Assistant Government Agent to supply the minimum quantity for the contractor to transport.

Held: *That by necessary implication the Crown was under an implied obligation to make available to the contractor the minimum quantity to be handled by him under the contract and that the Crown's default in supplying this minimum quantity on any day constituted a breach of contract which entitled plaintiff to claim damages to compensate him for the consequent loss sustained by him.*

ATTORNEY-GENERAL *vs.* JUNAID ... XLI. 56

Crown—Liability of—Breach of contract—Service goods lying in Customs premises for long period—Warehouse rent due—Sale of goods by auction by Principal Collector of Customs acting under Section 108 of Customs Ordinance—Purchase by plaintiff—Failure to deliver goods to plaintiff—Action for damages against Attorney-General—Customs Ordinance, Sections 108, 148, 150.

Among other service goods brought into the Island during the last World War, about 11,000 tons of steel plates of assorted sizes were dumped in the Customs premises in Colombo. These goods though free of Customs duty were liable for warehouse charges. After the cessation of hostilities, the Principal Collector of Customs, after notifying all service Heads his intention to dispose of the goods, advertised with the approval of the Chief Secretary by Gazette notice dated 21-2-1947 for sale of the goods by public auction and the plaintiff purchased the goods at the auction.

In the interval the Services Disposal Board, a local branch of the Ministry of Supply of the Imperial Government, had sold these goods to another firm, and the delivery of the goods was refused to the plaintiff, who sued the Attorney-General of Ceylon for damages for breach of contract.

The District Judge dismissed his action and on appeal the Crown contended:—

(1) That the goods could not be sold under Section 108 of the Customs Ordinance for the reason that they had been imported and left in the warehouse by the Crown and the Crown is not bound by Section 108.

(2) That even if the Principal Collector of Customs had authority under Section 108 to sell the goods, such sale could not bind the Crown because in acting under Section 108 the Principal Collector was acting under a statutory duty and not acting as agent or servant under the Crown.

(3) That no action lay against the Crown in this case as the Customs Ordinance itself (Sections 148, 150) provided the remedy available to the plaintiff—namely to proceed against the Principal Collector of Customs.

Held: (1) *That the Customs Department of Ceylon is a revenue collecting department of the Crown and when its official head, the Principal Collector of Customs acts under Section* 108 *of Customs Ordinance, he is not acting on his own behalf, but on behalf of the Crown.*

(2) *That whether the Principal Collector acted under statutory powers or on the express orders of the Government, so long as he acts* bona fide *and within the scope of his authority, he is an agent of the Crown and his acts bind the Crown.*

(3) *That where the case is one of a mere breach of contract, whether the public servant acted under statutory powers or not, the action must be brought against the*

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Attorney-General, and unless the Crown can show that the public servant acted without authority, actual or ostensible, or that there was no holding out by the Crown that the public servant was its agent, it would be liable.

(4) *That Sections* 148, 150 *of the Customs Ordinance do not lay down substantive law and do not create any rights of action against a Customs Officer. They merely indicate certain rules of procedure which must be observed if and when such an officer is sued.*

SILVA *vs.* THE ATTORNEY-GENERAL XLV. 17

Impossibility of Performance—Principles of Roman-Dutch Law apply only to Executory Contracts.

WIJESINGHE *vs.* SONNADARA ... XLV. 64

Failure of consideration—Action for cancellation of deed—

WIJESINGHE *vs.* SONNADARA ... XLV. 64

Contract—Member of Club managed by elected Committee—Club not proprietary—Injured on the premises by reason of defective building—Action based on implied warranty by Committee of reasonable safety of premises—No privity of contract between plaintiff and the Committee.

The plaintiff was a member of a club called " Corsham Community Centre," who were licencees of a hall used for club activities. Under the rules of the Club a committee of management was elected by the members, and was authorized under the rules merely to manage the affairs of the Club and to provide, at their discretion, to what use the centre should be put.

The plaintiff while attending an entertainment without payment at the hall, which was one of the privileges of the membership, was injured by bricks from a damaged roof. She sued the committee of management on the ground that the contract between herself and the committee contained an implied warranty that the premises were and would be as safe for the purposes for which she was admitted as member as reasonable care and skill could make them.

Held: *That the only contract the plaintiff made was when she paid her subscription to the Secretary of the Club as representing its members, and that was only a contract with the other members of the Club that she should be admitted to membership under its rules, and that the rules did not impose on the committee of management the liability which the plaintiff sought to put on them.*

SHORE *vs.* MINISTRY OF WORKS AND OTHERS ... ... XLIII. 76

Government official contracting with plaintiff's agent in Ceylon to indent goods from foreign country on commission—Order executed and goods accepted though not consigned to official as agreed—Action by plaintiff as undisclosed principal against Crown for balance due—Privity of contract.

JAFFERJEE *vs.* THE ATTORNEY-GENERAL XLVII. 17

Contract—Appellant employed by respondent on a fixed salary—Oral agreement for payment of commission—Finding of Trial Court—When may Appellate Court interfere? —Meaning of " share of profits," " commission," 'bonus'—Evidence Ordinance, Sections 34, 37.

The appellant who was employed by the respondent on a fixed salary alleged that he was promised a commission on the net profits of the business for each year; certain sums of money described as " commission " " bonus " had been credited to the appellant in the books of the respondent.

The trial Judge found for the appellant on his claim to a commission based largely on his estimate of the credibility of the appellant and the respondent respectively.

The Supreme Court set aside the order of the trial Judge on the ground of misdirection in that the finding was based on his disbelief of the respondent by reason of 'respondents' contradictions, and that those contradictions in their view amounted to nothing more than an incapacity to explain or remember certain facts.

Held: (1) *That the order of the Supreme Court should be set aside as their Lordship's find it impossible to agree with the reasons given by the Supreme Court, as in their Lordship's view the judgment of the trial Judge indicates that his acceptance of the appellant's story was based largely on his impression of the demeanour of the appellant.*

(2) *That objection cannot be taken at the Privy Council to evidence admitted at the trial and in the Court of Appeal.*

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The terms " share of profits " and " commission " are expressions relating to a legal right, while " bonus " refers generally to an ex-gratia payment.

MOHAMED AKBAR ABDUL SATHAR *vs.* W. L. BOGSTRA *et al* ... XLVII. 53

Plaint based on contract—Mere mention of negligence in the plaint does not convert it into one of tort.

MUNASINGHE *vs.* DE SILVA ... XLVII. 63

Contract—Tender for erection of buildings by plaintiff—Tender form stipulating execution of an agreement between parties—No formal agreement executed—Plaintiff prevented from erecting buildings agreed to—Action for damages—Contract to execute further contract—When binding.

The plaintiff tendered to erect buildings on two sites A and B for the defendant council. One of the clauses of the tender notice and of the tender form of the defendant stipulated an agreement to be entered into between the tenderer and the Chairman of the Council. A " formal " agreement for erection of buildings on site B was executed but before this was done the parties agreed that the buildings to be erected thereon were to be site A buildings and that the buildings to be erected on site A were to be site B buildings. No similar formal agreement for the erection of buildings on site A was entered into. After completion of the buildings on site B the plaintiff was prevented from erecting buildings on site A.

In an action for damages for breach of contract by the plaintiff,

Held: *That there was no binding contract in respect of the buildings on site A between the plaintiff and the defendant as the documents relating to the transaction indicate that a binding contract for the erection of buildings was to arise only on the execution of a formal agreement.*

URBAN COUNCIL OF MATALE *vs.* WEERASINGHE ... ... XLVIII. 39

Contract—Sale of goods—Price of goods controlled under statutory order—Contract price higher than controlled price—Enforceability—Recovery of part payment of price—Applicability of maxim of *pari delicto potior est conditio defendentis.*

The plaintiffs sued the defendants in damages for failure to deliver under separate contracts certain bags of " juwari " and of " bajiri " and for the recovery of certain sums of money paid as part payment of the price in respect of each contract. The delivery of the goods according to the plaintiffs was to be on or before the 30th November, 1946, under both contracts.

At the time the contract for " bajiri " was entered into there was a price control order, which the parties were aware of, fixing the maximum wholesale price of " bajiri." The contract price was higher than the statutory maximum. The price control order came to an end on 13th November, 1946. It was sought to be argued that the cessation of the price control order had the effect of removing the taint of illegality and of validating the sale of " bajiri " at the original contract price.

Held: (1) *That the contract relating to " bajiri " was illegal* ab initio *and could not be enforced.*

(2) *That the part payment of the price by the plaintiffs could not be recovered as the general rule in pari* delicto potior est conditio defendentis *must be applied in the circumstances of this case.*

JAFFERJEE AND OTHERS *vs.* SUBBIAH PILLAI AND OTHERS ... ... XLVIII. 83

Sale by auction of Crown property by Collector of Customs to plaintiff—Refusal to deliver property—Action for damages by plaintiff—Validity of contract—Power of officer of Crown to bind the Crown.

ATTORNEY-GENERAL OF CEYLON *vs.* A. D. SILVA ... ... XLIX. 7

Contract—Sale of goods—Breach by buyer—Sale in open market—Assessment of damages.

Held: (1) *That in an action for breach of contract for the sale of goods, the innocent party is entitled to be compensated for pecuniary loss naturally flowing from the other party's breach, subject to the qualification that he is under a duty to take all reasonable steps to mitigate the loss consequent on the breach.*

(2) *That the burden of proving that the innocent party has discarded a reasonable opportunity to mitigate the damage rests upon the defaulter.*

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(3) *That when it is the buyer who has defaulted, and there is an available market for the goods, the loss to be ascertained is* prima facie *the difference between the contract price and the market price prevailing at the time of the breach.*

ABDUL LATIF ABDUL HAMID *vs.* ODHAVJI ANANDJI & CO., LTD., OF MOMBASA XLIX. 37

CONTROL OF PRICES ORDINANCE No. 39 OF 1939.

Sale of maldive fish at a price above the maximum price—Meaning of sale for purpose of the offence—Sale of Goods Ordinance, No. 11 of 1896 (Chapter 70) Sections 2, 4 and 18.

Accused was charged with having sold a bag of maldive fish at Rs. 95/65, a price nearly Rs. 25/- above the controlled maximum price. The sum actually tendered was Rs. 94/- and the Police entered the boutique before the balance 1/65 could be tendered.

Held: *That it is not necessary for the purpose of a prosecution of this nature to prove a contract of sale within the meaning of Section* 4 *of the Sale of Goods Ordinance.*

MERRY (A.S.P.) *vs.* PAKIAMPILLAI XXIV. 78

A forfeiture under Section 5 of the Control of Prices Ordinance No. 39 of 1939 does not follow upon a conviction as a matter of course. The magistrate has to exercise a discretion and if he exercises his discretion in favour of forfeiture he must set out good reasons for the forfeiture so that the appellate tribunal may examine them.

PANDITHARATNE *vs.* KONSTZ ... XXV. 64

Ignorance of traders regarding the alteration of maximum prices should be taken into account in imposing a sentence on a person convicted of the offence of selling a controlled article at a price in excess of the maximum price.

CONDERLAG (SUB-INSPECTOR OF POLICE) *vs.* GOONERATNE ... ... XXV. 54

Control of Prices Regulations 1942—Breach of regulation 6—Onus of proof on whom.

Held: *That in a prosecution for breach of regulation* 6 *of the Control of Prices Regulations* 1942, *the onus of proving that the accused failed to furnish the return referred to therein is on the prosecution.*

PONNUDURAI *vs.* MAILVAGANAM XXVI. 11

Control of Prices (Supplementary) Regulations 1942—Regulation 6—Charge of failure to furnish return of stock of price-controlled article kept at store or other place—Do the words " every person " in regulation 6 mean only the importers or wholesale traders.

Held: *That the words " every person " in regulation* 6 *cannot be restricted to mean only importers or wholesale dealers.*

DABRERA *vs.* ATURUGIRIYA POLICE XXVI. 12

Control of Prices—Regulation 6—Refusal to sell beef—Defence that beef was reserved for regular customers—Is such defence valid—Control of Prices Ordinance Section 4 (3).

Held: (1) *That the defence should be accepted as a valid one.*

(2) *That in any event, the conviction of the manager could not stand in the absence of proof that the employer of the salesman was out of the Island.*

MOHAMED *vs.* NUWARA ELIYA POLICE XXVI. 13

Control of Prices—Meaning of the words " tallow, locally produced."

Held: *That the controlled article " tallow, locally produced " means the fat of animals.*

AIYER *vs.* YUSOOF ... ... XXVI. 43

Price Control Ordinance Section 5 (3)—Refusal to sell—Sufficient defence to show that a reasonable quantity was offered.

Held: *That where a person is charged under Section* 5 (3) *of the Price Control Ordinance, it is a sufficient defence for him to show that he offered to sell a reasonable quantity considering his stock and the number of customers he had to serve.*

DE SILVA (INSPECTOR OF POLICE) *vs.* JINADASA ... ... XXVII. 15

Control of Prices—Regulation 5 of the Defence (Control of Prices) (Supplementary Provisions) Regulations—Master and servant—Liability of master for acts of servant.

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Held: *That regulation 5 of the Defence (Control of Prices) (Supplementary Provisions) Regulations (Gazette 9019 of 8th October, 1942) makes the master liable for the act or default of a servant employed in the course of the business, unless the master proves that he had no knowledge of the act or default, and had taken proper precautions to prevent it.*

ROCHE AND ANOTHER *vs.* IYER (INSPECTOR OF POLICE) ... ... XXVII. 38

Defence (Control of Prices) Supplementary Provisions) Regulations.

The accused who claimed to be the printer of a paper called "The Trespasser" stocked in his house 476 reams of unglazed newsprint. The house was not a registered store nor had he furnished a return as required by regulation 6.

(1) *The accused's house was held to be a store within the meaning of that expression in regulation 6.*

(2) *A forfeiture under Section 5 of the Control of Prices Ordinance No. 39 of 1939 does not follow upon a conviction as a matter of course. The magistrate has to exercise a discretion and if he exercises his discretion in favour of forfeiture he must set out good reasons for the forfeiture so that the appellate tribunal may examine them.*

PANDITHARATNE (SUB-INSPECTOR OF POLICE) *vs.* KONSTZ ... XXV. 64

Defence Regulations—Control of Prices (Supplementary Provisions) Regulation 2 (7)—Breach of regulation 6 of the Control of Prices Regulations 1942—Can articles kept in an unregistered place be forfeited under Control of Prices (Supplementary Provisions) Regulation 2 (7).

Held: (1) *That articles in an unregistered place are not liable to forfeiture under Control of Prices (Supplementary Provisions) Regulation 2 (7) upon the conviction of the owner of such articles for a breach of Regulation 6 of the Control of Prices Regulations 1942.*

(2) *That an order of forfeiture under Control of Prices (Supplementary Provisions) Regulation 2 (7) should not be made without giving the person affected by such an order an opportunity of showing cause against it.*

AMBALAVANAR *vs.* WAIDYARATNE XXVIII. 23

Control of Prices—Order under Control of Prices Ordinance, No. 39 of 1939, fixing maximum price of one-pound and half-pound loaves of bread—Sale of quarter-pound loaves —Applicability of order.

Held: *That an order under the Control of Prices Ordinance fixing the maximum price of one-pound and half-pound loaves of bread has no application to the price at which quarter-pound loaves may be sold.*

Per HOWARD, C.J.: "With regard to the weighing of the bread on the scales of the respondent, criminal cases of this nature must be established beyond all reasonable doubt. With no evidence as to the accuracy of the scales it cannot be said that this standard of proof has been reached."

EKANAYAKE (S. I. P.) *vs.* WASSIRA XXIX. 76

Control of prices—Attempt to obtain price—controlled goods by means of forged document—Is it an offence.

KING *vs.* FERNANDO XXX. 79

Control of Prices Ordinance, No 39 of 1939—Order fixing maximun prices for thread and requiring every trader who sells thread to exhibit notice setting out prices so fixed—Failure to exhibit notice—No proof that thread actually sold—Validity of conviction.

An order fixing maximum prices for thread under the Control of Prices Ordinance required every trader who "sells" thread to exhibit a notice setting out the prices so fixed. The accused was convicted with having failed to exhibit the notice. There was no proof that he sold thread to any person on the premises.

Held: *That an actual sale of thread must be proved and that proof of mere exposure for sale is not sufficient to justify a conviction.*

DHARMASENA *vs.* ARIYARATNE. XXX. 34

Control of Prices—Orders under Control of Prices Ordinance, No. 39 of 1939, fixing maximum prices of Koduwa fish and Sunlight soap—Prices fixed per pound and per tablet respectively—Sale of quarter pound of Koduwa fish and twin tablet of Sunlight soap—Applicability of orders.

Two orders were made under the Control of Prices Ordinance, No. 39 of 1939, fixing

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the maximum prices of Koduwa fish per pound and of Sunlight soap per tablet.

Held: *That the orders applied to the sale of a quarter pound of Koduwa fish and a twin tablet of Sunlight soap.*

JAYAWARDENE *vs.* AHAMED XXX. 110

Price control—Sale of potatoes above controlled price—Does the price order apply to locally grown potatoes—Are the columns specifying the controlled commodity and the importers', wholesale and retail prices to be regarded as interdependent.

Held: (1) *That the price order published in Government Gazette No.* 9267 *dated 5th May,* 1944 *applied to locally grown potatoes.*

(2) *That each column in the said price order is independent and that while column* 2 *refers to imported things, the other columns refer to goods whether imported or locally grown.*

ELIAS POLICE SERGEANT *vs.* HEWASILIYANGE ... ... XXXIII. 45

Defence Regulations—Control of Prices—Bread—Price of a loaf or a part of a loaf of any weight—Is it controlled—Framing of charge—Criminal Procedure Code, Section 187.

Held: (1) *That where an accused person is produced before a Magistrate charged with offences punishable with more than three months' rigorous imprisonment or a fine of fifty rupees, it is irregular to charge him from the plaint without framing a charge as required by section* 187 (1) *of the Criminal Procedure Code.*

(2) *That the maximum prices at which a loaf or a part of a loaf of bread of any weight could be sold are controlled.*

THE FOOD AND PRICE CONTROL INSPECTOR (PUTTALAM) *vs.* PUNCHI BANDA ABEYARATNE ... ... XXXIII. 62

Defence (Control of Prices Supplementary Provisions) Regulations, 1942—Sections 1 (3) and 16 (1)—Prosecution by Price Control Inspector—Is proof necessary that he is an "authorised officer"—Public Servant within meaning of Section 148 (1) (b) of the Criminal Procedure Code.

In a prosecution by a Price Control Inspector for selling mutton above the regulated price, the charge was dismissed without calling on the defence, on the grounds that there was no proof that the Inspector was an "authorised officer" under Section 1 (3) of the Control of Prices Regulations, 1942.

It was also contended that the complainant was not a public servant according to Section 148 (1) (*b*) of the Criminal Procedure Code, although it was admitted that he was a Price Control Inspector.

Held: (1) *That proof that the complainant was an "authorised officer" according to Section* 1 (3) *of the Control of Prices Regulations was not a necessary ingredient to maintain a charge under the Regulations.*

(2) *That the Court is entitled to take judicial notice of the fact that a Price Control Inspector is a public servant within the meaning of Section* 148 (1) (*b*) *of the Criminal Procedure Code.*

RAZIK MARIKAR *vs.* MOHAMED ABDULLA ... ... XXXV. 86

Control of Prices Ordinance—Order fixing maximum retail price of condensed milk—Article controlled was tin of milk, not a specific weight of milk—Prosecution need not be instituted by authorised officer—Judicial notice of Price Control Inspectors.

By a Price Order made under the Control of Prices Ordinance, No. 39 of 1939, the maximum retail price of a tin of sweetened full cream condensed milk—Milkmaid Brand—net contents or size of tin, 14 oz.—was fixed at 62 cents. The accused sold a tin of this milk for 80 cents. The tin so sold had a label on it which reads as follows:—

"net weight 14 oz."

Held: (1) *That the accused had contravened the Price Order as the article controlled was a tin of this milk of the specified weight, and as the weight of the milk in the tin had not been the subject of price control, it was not incumbent on the prosecution to prove the weight of the milk in the tin sold.*

(2) *That following the case of* Abdulla *vs.* Marikar (48 *N. L. R.* 468), *it was not necessary for the prosecution to be entered by an authorised officer.*

(3) *That the Court should take judicial notice of the fact that Price Control Inspectors are public servants within the*

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meaning of Section 148 (1) (*b*) *of the Criminal Procedure Code.*

RODE, PRICE CONTROL INSPECTOR *vs.* SEEMEE SILVA ... XXXVII. 50

CONVEYANCE

A minor who has effected a conveyance which is ipso jure void need take no legal action to have it set aside unless he has lost possession of the property conveyed.

HATURUSINGHE *vs.* UKKU AMMA XXVIII. 107

Conveyance of land by person without title—Subsequents acquisition of title— *Exceptio rei venditae et traditae*—**Extent to which doctrine operates.**

CARLINA *Alias* HAMINE *vs.* NONHAMY ... ... XLI. 7

CO-OPERATIVE SOCIETIES.

Co-operative Societies Ordinance No. 34 of 1921—Scope of Section 36 (6).

Held: *That Section* 36 (6) *of Ordinance No.* 34 *of* 1921 *takes away the jurisdiction of the Courts in regard to claims against the Society by any member.*

AMIRTHAVASAGAM *vs.* THE TELLIPPALAI SOUTH AMERICAN MISSION AGENTS CO-OPERATIVE SOCIETY. ... V. 104

Co-operative Society—Action against, by dismissed manager of its stores, who was also a member, to recover deposit—Defence that plaintiff misappropriated moneys of society and dispute should have been referred to Registrar—Is plaintiff's claim barred by Section 45 (b) and (c) of Co-operative Societies' Ordinance, (chap. 107).

The plaintiff, who was a member of the defendant Co-operative Society was appointed the manager of its stores. His services were dispensed with after some time. This action was instituted by the plaintiff to recover a sum of Rs. 250 being a part of his security deposited with the defendant.

The defendant pleaded (i) that the plaintiff had misappropriated a sum of Rs. 1,370.12 and that the plaintiff's claim be set off against this sum.

(ii) that the plaintiff's claim was barred by the provisions of Section 45 (*b*) and (*c*) of the Co-operative Societies' Ordinance.

On a preliminary issue based on (ii) the Commissioner dismissed plaintiff's action with costs.

Held: (1) *That in the absence of evidence to show what the functions of the plaintiff as manager of the stores were, or what authority he had to bind the Society, the plaintiff cannot be considered to be an officer of the society within the meaning of Section* 45 (*c*) *of the Co-operative Societies Ordinance.* (*chap.* 107)

(2) *That the claim of the Society against the Manager of its Stores for misappropriating moneys of the society cannot be said to be a dispute between the society and one of its members within the meaning of Section* 45 (*b*) *of the same Ordinance.*

MEERA LEBBE *vs.* THE VANNARPONNAI WEST CO-OPERATIVE SOCIETY, LTD. XXXIV. 15

Co-operative Societies Ordinance (Cap. 107)—Section 45—Scope of Section.

Held: *That a dispute between a society registered under the Co-operative Societies Ordinance and one of its members in regard to a transaction not resulting from membership is outside the scope of Section* 45 *of the Ordinance.*

CADER MOHIDEEN *vs.* THE LANKA MATHA CO-OPERATIVE STORES ... XXXIV. 60

Co-operative Societies Ordinance (Cap. 107) Section 52 (2), Rule 29 and Section 45—Arbitration proceedings in dispute between Co-operative Society and one of its ex-officers—jurisdiction to arbitrate.

ILLANGAKOON *vs.* BOGOLLAGAMA *et al* ... ... XXXVIII. 33

Cap. 107, Sections 40 (1) (d), 41 (h)—Rule 29 framed under Co-operative Societies Ordinance, 1921 —Cancellation of registration of Co-operative Society—Liquidator's claim against ex-President of Society—Reference to arbitration—Enforcement of award—Validity of award—Can the Cour-

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question the validity of award in view of the provisions of paragraphs (j) and (k) of rule 29.

Held: (1) *That to uphold an award on the footing that the reference was made under Section* 41 (h) *of the Co-operative Societies Ordinance* (*Cap.* 107) *it would have to appear on the face of the award that the legal requirement necessary to its validity under that Section, namely, the obtaining of the written consent of the other party had been complied with.*

(2) *That an award which purports on the face of it to have been referred under rule* 29 *of the Rules framed under the Co-operative Societies Ordinance (kept alive by Section* 52 *of the present Ordinance, Cap.* 107) *and to have been referred by the Registrar's order cannot be deemed to have been made upon a reference by the liquidator under Section* 40 (1) (d) *of the new Ordinance* (*Cap.* 107).

(3) *The Registrar has no power to refer a dispute to arbitration under rule* 29 (a) *and* (b) *of the said Rules where the dispute is between an* ex-*officer and the liquidator of a Co-operative Society, whose registration has been cancelled.*

(4) *That the provisions of paragraphs* (j) *and* (k) *of Rule* 29 *of the Rules aforesaid only apply to an award which is in fact an award and not to one which, on the face of it, is not.*

(5) *It is the duty of the Court, where a party seeks to rely on an award, invalid for want of jurisdiction, to declare it null and void, or at the least to decline to act on it and to leave the party to bring an action on it.*

H. B. EKANAYAKE *vs.* THE PRINCE OF WALES CO-OPERATIVE SOCIETY LTD. XXXIX. 57

Claim against past officer of Society—Reference to arbitration—Legality of arbitrator's award—Certiorari**—Does it lie when other remedy is available.**

Held: (1) *That there is no power under the Co-operative Societies Ordinance to refer compulsorily to arbitration a dispute between a registered Co-operative Society and a person who has ceased to be an officer of the Society.*

(2) *That the Court has a discretion to make an order of* certiorari *although an alternative and equally convenient remedy is available to an aggrieved party.*

(**Note:** On the first point see now the Co-operative Societies (Amendment) Act, No. 21 of 1949—Edd. C. L. W.).

SIRISENA *vs.* REGISTRAR OF CO-OPERATIVE SOCIETIES ... ... XLI 1

Writ of prohibition—Application for—Dispute between Co-operative Union and officer—Arbitration—Only Arbitrators and Registrar of Co-operative Societies made parties—Co-operative Union not made a party—Is the application properly constituted —Co-operative Societies Ordinance, Section 45.

The petitioner was an employer of a duly registered Co-operative Society or 'Union' —A dispute between him and the 'Union' was referred to a Board of Arbitrators under Section 45 of the Co-operative Societies Ordinance (Cap. 107).

The petitioner applied for a writ of prohibition on the ground that the Board of arbitrators had no jurisdiction to proceed with the matter as the dispute was not such as could have formed the subject of proceedings under Section 45 of the Ordinance. The only respondents to the application were the members of the Board of Arbitration and the Registrar of Co-operative Societies. The 'Union' was not made a respondent, but was later noticed.

On a preliminary objection taken on behalf of the respondents.

Held: *That the application was not properly constituted as the party who would be affected by the grant of the application had not been made a party.*

V. R. MURUGESU *vs.* H. E. AMARASINGHE *et al* ... ... XLIV. 25

Co-operative Societies Ordinance Section 17—An order conferring intended functions on the Deputy or Assistant Registrar must be duly proved and a Court cannot take judicial notice of it.

ROMANIS SINGHO *vs.* ABEYSINGHE XLVIII. 97

Co-operative Societies Ordinance (Cap. 107)—Arbitration—Irregularity of proceedings—Procedure to be followed in application to enforce award—Powers of District Court—

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Liberty to have dispute re-referred—*Ultra vires*—Section 46 (2); Civil Procedure Code, Section 224.

A dispute between the appellant, who was the Treasurer of a Co-operative Stores, and the Society was referred by the Registrar of Co-operative Societies to an arbitrator who made his award directing the appellant to pay to the Society a sum of Rs. 2,210.56. The Society applied to the District Court *ex-parte* for the enforcement of the award "as a decree" and the application was granted. Later the appellant moved to have the writ recalled on the ground that the arbitration proceedings were irregular. It was conceded by the Society's counsel that the proceedings were irregular and he sought to withdraw the writ. The learned District Judge allowed the application but added that the Society was at liberty to have its dispute with the appellant referred to arbitration in accordance with the provisions of the Co-operative Societies Ordinance. The same dispute was again referred to another arbitrator and his award against the appellant was sought to be enforced in the District Court by an *ex-parte* application under Section 224 of the Civil Procedure Code. The appellant intervened again and sought to have the writ recalled on the ground that the arbitrator had acted without jurisdiction. The learned District Judge took the view that the appellant was precluded from objecting to the second arbitrator's jurisdiction because the Court had expressly granted liberty to the Society to take fresh proceedings under the correct section of the Ordinance and allowed the application.

Held: (1) *That the District Court had no power to vest the Society with liberty to refer the dispute again for arbitration.*

(2) *That an application to enforce an award of this nature must be made either by a regular action or at least by petition and affidavit (in proceedings by way of summary procedure) setting out facts which prove that the purported award is* prima facie *entitled to such recognition.*

(3) *That although the legislature has withdrawn from the Courts the jurisdiction to determine disputes touching the affairs of Co-operative Societies or scrutinize the correctness of decisions or awards made, the right and duty to examine the validity of decisions and awards is still vested in the Courts which are empowered to enforce them.*

BARNES DE SILVA *vs.* GALKISSA-WATTARAPOLA CO-OPERATIVE STORES SOCIETY ... XLVIII. 102

Co-operative Societies Ordinance Section 45—Award—Arbitration between Co-operative Society and ex-manager—Relationship between parties need not be stated on award.

There is no legal requirement that in an award made under Section 45 of the Co-operative Societies Ordinance (Cap. 107), the relationship in which the person against whom the award is made stood to the Co-operative Society should be stated. The mere omission to state this fact will not make the award bad *ex-facie*,when in all other respects, the proceeding before the award and the award itself are good.

VALACHENAI IBRAHIM CO-OPERATIVE STORES *vs.* ADAMBAWA VELLACUDDY ... ... L. 77

Amendment Act No. 21 of 1949, Section 50 A—Order by Registrar on appellant to pay sum of money, in default of payment, to be recovered as fine imposed by Magistrate—Can Magistrate impose term of imprisonment in default of payment—Criminal Procedure Code, Section 312.

Held: *That Section* 50A (2) *of the Co-operative Societies Ordinance No.* 16 *of* 1936 (*Cap.* 107) *as amended by Act No.* 21 *of* 1949, *merely provides the machinery for the recovery of the money under Section* 312 (2) *of the Criminal Procedure Code and does not empower a Magistrate to impose a term of imprisonment on a person against whom an order is made by the Registrar and who has made default in payment.*

MANMUNAI SOUTH AND ERUVIL CO-OPERATIVE AGRICULTURAL PRODUCTION AND SALES SOCIETY LTD. *vs.* SINNATAMBY THAMBIPILLAI ... ... L. 80

CO-OWNERS

Co-owner causing wanton destruction of fences or common property—Guilty of mischief.

HAPUWA *vs.* PEIYA AND ANOTHER I. 212

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Co-owner improving common estate—Is he entitled to compensation for improvements.

HARRIET DIAS AND ANOTHER *vs.* SILVA ... ... I. 214

Rights of improving co-owner at partition

ABDUL AZEEZ *vs.* MOHAMED ... II. 444

One co-owner cannot create servitude without other co-owners' consent.

THAMBU *vs.* ANNAMAH ... II. 496

Co-owners—Action for possession—Nature of possession necessary to enable a co-owner to obtain a possessory decree.

The plaintiff brought a possessory action against the other co-owners of a land. It was admitted that after the death of the donor—a Buddhist priest named Gunatissa —of a certain land in respect of which this action was brought, all his pupils, meaning, thereby the co-owners under the two deeds of donation, came to an understanding that the plaintiff should possess a field and a high land adjoining it in lieu of his shares in the other lands.

Held: (1) *That the plaintiff's possession was not* ut dominus.

(2) *That a possessory action cannot be brought by a person who has not had* possessio civilis.

SADIRISA AND ANOTHER *vs.* ATTADASSI THERO ... ... VI. 13

Building by co-owner on common land without the consent of the other co-owners—Is such co-owner entitled to compensation.

Held: (1) *That a co-owner cannot without the leave of the other co-owners build on common land.*

(2) *That any building erected on common land by a co-owner without the consent of the other co-owners may be ordered to be pulled down.*

WELIKALA *vs.* PERERA ... IV. 91

Co-owner of land—Right of co-owner to a house erected by him on common land—Can another co-owner enter into possession of it without the consent of the co-owner who built it—If he does what remedy.

Held: (1) *That where a co-owner builds a house on common land another co-owner has no right to enter into possession of the house without the consent of the co-owner who built it.*

(2) *That a co-owner, who is kept out of possession of a house built by him on common land by another co-owner, is entitled to claim damages for the period during which he is deprived of his possession of the building.*

GIRIHAGAMA *vs.* APPUHAMY ... XIV. 11

Co-owners—Prescription among—Division of inheritance among heirs—Different entities of land assigned to heir for his exclusive use in lieu of undivided shares—Does possessor by virtue of such division acquire a prescriptive title by user to such land.

RAMANATHAN *vs.* SALEEM AND OTHERS ... ... XVIII. 73

Prescription among co-owners. The co-owners of a property, who seek to establish prescriptive title by leading evidence that they dealt with the entirety for over thirty years cannot succeed without proving further that the co-owners who were not in possession had knowledge of such dealings.

FERNANDO *vs.* FERNANDO AND OTHERS ... ... XXVII. 71

Co-owners—Prescription among—Long, continued and undisturbed possession of paddy land by some co-owners to the exclusion of others—Execution of deeds by those in possession on the basis of exclusive ownership—Absence of evidence of acquiescence or knowledge on the part of co-owners not in possession—When may ouster be presumed.

Admittedly, the land in dispute, a paddy field, originally belonged to one Henchappu was had four sons and three daughters. The plaintiffs and the 5th defendant, who are successors in title of the four sons claimed the entire land on the ground that they and their predecessors in title, had by exclusive continued and uninterrupted possession from 1904 to 1942, acquired a prescriptive title as against the 1-4 defendants who claimed through one of the daughters of Henchappu. The plaintiffs further proved that a number of deeds had been executed during this period on the basis of this exclusive ownership. There

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was no evidence to shew that the three daughters or those claiming from them knew of the execution of the said deeds or that they acquiesced in the acquisition of such prescriptive title.

Held: (1) *That in the circumstances the Court was not entitled to presume ouster.*

(2) *The question as to whether from long, continued, undisturbed and uninterrupted possession ouster may be presumed depends on all the circumstances of the case.*

Per HOWARD C.J: "Moreover it would appear that the plaintiff Tillekeratne had bought the share of the co-owner, had worked a plumbago pit himself on another land in the neighbourhood, and had never claimed or taken a share in the plumbago which to his knowledge was being dug from the disputed land by the defendants and their lessees. It seems to me that the distinction drawn between the excavation and removal of minerals, an act definitely depreciating the value of the holding, and the taking of natural produce such as fruit of trees or the development of lands for the cultivation of paddy by expenditure incurred by the occupier is both logical and sound."

SIYADORIS AND OTHERS *vs.* SIMON AND ANOTHER ... ... XXX. 50

Co-owner not appearing before special officer under Waste Lands Ordinance in response to notice under § 1—Rights of co-owner are wiped out by the publication of the orders embodying the agreement with the claimants.

HARAMANIS APPUHAMY *vs.* MARTIN AND OTHERS ... ... XXXI. 17

Co-owner leasing undivided share can institute partition action pending such lease.

GUNAWARDENA *vs.* BABY NONA AND ANOTHER ... ... XXXI. 81

Co-owner can maintain against another co-owner a possessory action for plantation.

COORAY AND ANOTHER *vs.* SAMARANAYAKE ... ... XXXII. 43

Co-owner of Panguwa—Exclusive possession of lot in lieu of shares for over twenty years—Does such possession confer prescriptive title.

BANDARA *vs.* SINAPPU AND OTHERS ... ... XXXII. 54

Co-owner erecting building on co-owned property without consent of other co-owners—Action for an order for demolition—Can such action be maintained without joining other co-owners.

Held: *That all co-owners need not be joined in an action in which the plaintiff seeks for a mandatory order to demolish a building put up by a co-owner on co-owned property without the consent of other co-owners.*

PERERA *vs.* PODI SINGHO AND ANOTHER ... ... XXXII. 61

Co-owner—Rubber plantation by—Can he possess plantation irrespective of the share of the soil entitled to.

Held: *That a co-owner is entitled to possess the plantations made by him irrespective of the share of the soil he is entitled to till common ownership is put an end to by a partition decree.*

ARNELIS SINGHO *vs.* MARY NONA AND ANOTHER ... ... XXXIII. 64

Co-owner—Rights to improvements effected on common property.

Held: *That a co-owner who plants and improves a portion of the common land is entitled to take all the fruits of the improvements effected by him.*

PEERIS SINGHO AND ANOTHER *vs.* NOMIS ... ... XXXIII. 65

Co-owner erecting new house on common land—Possession for over ten years—Does mere possession mature into prescriptive title to building and soil covered thereby—Co-owners members of one family—Necessity to lead strong evidence of exclusive possession to establish prescription.

DIAS ABEYSINGHE *vs.* DIAS ABEYSINGHE AND TWO OTHERS ... ... XXXIV. 69

Co-owners—Tenancy of co-owned property—Property transferred to one co-owner

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pending partition action—Is new tenancy created.

NAZAAR AND TWO OTHERS *vs.* HASSIM ... ... XXXIV. 91

Improvements effected by one co-owner on undivided land—Jus retentionis—**When is it not available to an improving co-owner—Rights of a lessee from such co-owner.**

Held: *That where a co-owner of land effected improvements on undivided land with the consent of another co-owner, the former's lessee is entitled to the benefit of such improvements until common ownership is terminated by a partition decree.*

Per KEUNEMAN, J.—In *Arnolis Singho vs. Mary Nona* (47 N.L.R. 401) it was held that where a co-owner plants more than his proportionate share of the common property, he is entitled to possess the entire plantation as against the other co-owners until the common ownership is terminated by a partition action.

It is possible that on the authorities this view will have to be modified to this extent, that it will not apply where the improvement has been made against the wishes or without the acquiescence of the other co-owners.

W. DON JOHN APPUHAMY *vs.* L. MATHTHES ... ... XXXV. 23

Action for use and occupation—Is it maintainable against defendant who is a co-owner.

KATHIRGAMU AND ANOTHER *vs.* NADARAJAH AND ANOTHER ... XL. 34

Rights of co-ownership as between trustee and beneficiary.

LUCIA PERERA *vs.* MARTIN PERERA *et al* ... ... XLIV. 60

Sale by co-owners in land of whatever interest might ultimately be allotted to him under decree in pending partition action—May be construed as a conventio rei speratae.

WIJESINGHE *vs.* SONNADARA ... XLV. 64

Co-owners—Rights and obligations of—Building on common land against the wishes of other co-owners—Mandatory injunction to demolish the building—When may it be granted?—Roman-Dutch Law.

The plaintiffs and defendant were co-owners of a land. The defendant built a house on the common land before the trial date against the express wishes of the plaintiffs. The plaintiffs obtained a mandatory injunction to demolish the house.

Held: (1) *That the plaintiffs were not entitled to the mandatory injunction in the absence of proof that the erection of the building caused them any material damage or interfered with any of their proprietary rights or altered intrinsically the character of the common property.*

(2) *That every co-owner has the right to enjoy his share in the common land reasonably and to an extent which is proportionate to his share, provided that he does not infringe the rights of other co-owners.*

(3) *That the question whether in any particular case a co-owner has exceeded his rights or violated the rights of others must be determined by reference to all the relevant factors and cannot be solved as an abstract question of law.*

W. M. ELPI NONA *vs.* M. A. PUNCHI SINGHO *et al* ... ... XLIII. 90

Co-owners—principle that possession by co-heir enures to the benefit of his co-heirs does not apply to a stranger who has bought entirety of land from one of the co-owners and continues to be in exclusive possession thereof.

SELLAPPAH *vs.* SINNADURAI AND OTHERS ... ... XLVI. 17

CORPORAL PUNISHMENT

A magistrate acting under section 152 (3) of the Criminal Procedure Code cannot impose a sentence of whipping under section 7(1) of the Corporal Punishment Ordinance.

SIVASAMPU *vs.* RATNAYAKE AND TWO OTHERS ... ... XXIX. 59

CORPORATION

Is Secretary of District Court a corporation sole.

SAMARASEKERA *vs.* SECRETARY D.C. AND ANOTHER ... ... XXXIX. 108

CORROBORATION

See also under **DECOY**
EVIDENCE

Charge of incest—Is corroboration of the testimony of a partner in incest necessary for conviction.

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Held: (1) *That a partner in incest is an accomplice and it is dangerous to act upon the uncorroborated evidence of such person.*

(2) *That corroboration must be evidence from an independent source, and not a self-serving source.*

DOLE (INSPECTOR OF POLICE) *vs.* ROMANIS APPU ... ... XIII. 111

Corroboration of one accomplice by another —Is it admissible.

REX *vs.* NUGAWELA ... ... XVII. 71

Charge of rape—Extent to which evidence of prosecutrix should be corroborated.

REX *vs.* ANA SHERIFF ... XIX. 87

Charge of rape—Nature of corroborative evidence required.

REX *vs.* MARATHELIS ... ... XXIV. 21

Charge of rape—Can conviction to based on uncorroborated testimony of prosecutrix.

REX *vs.* THEMIS SINGHO ... XXVII. 76

Maintenance case—Statement by putative father under § 122 (3) of the Criminal Procedure Code—Is such statement admissible to corroborate applicants' testimony.

ZOYSA *vs.* WILBERT ... ... XXXV. 78

Corroboration not necessary of evidence of person who participates in crime without being a guilty associate.

PERIES AND ANOTHER *vs.* DOOLE S.I. POLICE ... ... XXXVI. 23

Corroboration of plaintiff's evidence—When necessary—in action for damages for seduction.

VEDIN SINGHO *vs.* MENCY NONA XLII. 31

Application by mother for maintenance of her illegitimate child—Question of corroboration does not arise if the mother's evidence does not convince the Judge.

TURIN *vs.* LIYANORA ... ... XLVI. 32

Corroboration of dying deposition—Is it necessary.

REX *vs.* B. FRANCIS FERNANDO XLVII. 101

COSTS

Proctor's lien for—*See under* **PROCTOR**

Survey by Crown—Recovery of costs—*See under* **DEFINITION OF BOUNDARIES ORDINANCE**

Costs—Prepayment of—Withdrawal of action with liberty to institute fresh action on prepayment of costs of former action.

Held: *That the second action could not be brought without complying with the condition even though the Bill of costs in the previous action had not been taxed.*

LILAWATHI *et al vs.* UKKUWA VIDANE II. 158

Order allowing costs of appeal—Costs incurred in the District Court in connection with the appeal are included.

Held: *That "costs of appeal" include the costs incurred in the District Court in respect of the steps taken in the preparation and the presentation of the petition of appeal.*

RATRANHAMY *vs.* GUNARATNE ... II. 169

Bill of Costs—Taxation—Under what class should a Bill of Costs in a proceeding under Section 22 of Ordinance No. 1 of 1895 be taxed.

Held: *That a Bill of Costs in a proceeding under Section 22 of Ordinance No. 1 of 1895 should be taxed under the lowest class.*

SAMYNATHAN *vs.* DORAISAMY AND ANOTHER ... ... VI. 45

When may appeal court interfere with an order for costs made by the original Court.

YAPA APPUHAMY *vs.* DON DAVITH X. 25

Costs in partition actions—Cursus curiae as to.

DE SILVA AND OTHERS *vs.* DE SILVA AND OTHERS ... ... XII. 124

Taxation of costs—Civil Procedure Code.

Held: (1) *That, where the Registrar had struck off more than one-sixth of the bill of costs, the costs of taxation should be disallowed.*

(2) *That there is no provision for the allowance of a further brief fee where the*

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argument of an appeal in the Supreme Court is continued over the day.

POUNDS AND ANOTHER *vs.* GANEGAMA ... ... XII. 145

Action for declaration of title to temple premises against two defendants personally—Averment in answer that they were incumbent and trustee—Failure to alter caption in the plaint to show representative capacity—Representative capacity established by evidence led—Order for costs against defendants—Objection by trustee that he is not personally liable—Ordinance No. 8 of 1905—Section 30.

Held: (1) *That, for the payment of costs in the circumstances, the 2nd defendant was personally liable.*

(2) *That the mere fact that the evidence disclosed that the 2nd defendant was a trustee and that he asserted claims to the premises as such was not sufficient to convert the action into one against the 2nd defendant as trustee.*

SADDANANDA THERUNNANSE *vs.* SUMANATISSA THERUNNANSE ... XIII. 77

Liability of executor or administrator personally to pay costs in action instituted by him on behalf of the estate of the testator or intestate.

USOOF JOONOOS *vs.* ABDUL KUDHOOS ... ... XIV. 141

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

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

PELPOLA *vs.* GOONESINGHE ... XV. 23

Costs—Undertaking to pay on a particular date—Breach of undertaking—Decree passed upon breach—Application for relief—When allowed.

KHAN *vs.* SALLY AND ANOTHER ... XV. 100

Taxation of Costs in Court of Requests—Right of Commissioner to determine witnesses' expenses.

HARAMANIS APPUHAMY *vs.* WICKREMASINGHE AND ANOTHER ... XVI. 18

Order allowing amendment of plaint on condition that if costs of the day were not paid before a certain date action to be dismissed—

Held: *Court has no jurisdiction to make the order.*

PERERA *vs.* ASSEN ... ... XVII. 8

Costs in divorce case—When will Court not allow co-respondents' costs.

BLOK *vs.* BLOK ... ... XVIII. 85

Costs will not be allowed to the successful respondent who fails to give the appellant prior notice of a preliminary objection to the appeal.

PUNCHIMENIKA AND OTHERS *vs.* SIMON AND OTHERS ... ... XVIII. 111

The Civil Procedure Code does not provide for the remission of a taxed bill of costs by the Judge for retaxation to the Taxing Officer.

SIRIWARDENE *vs.* KITULGALLA *et al* XXI. 106

Crown costs and compensation—Order for—Opportunity not given to complainant to show cause against the making of such order—Is order valid.

HENRY DE SILVA *vs.* EDMUND AND OTHERS ... ... XXIII. 60

Postponement—Trial of case—Consent order to pay costs on or before next date of trial—Can the costs be paid during the course of the day.

On an application for postponement of the hearing of a case on a date fixed for trial the Court made the following order: "In view of the medical certificate I allow a date. Defendant to pay Rs. 105/- as plaintiff's costs of the day. If costs are not paid on or before the next date of trial, of consent, judgment to be entered for plaintiff as prayed for with costs."

Held: *That the payment of costs during the course of the next trial date was a sufficient compliance with the terms of the order.*

BARLIS *vs.* WEERASINGHE ... XXVI. 60

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Costs—Order for in class in which action instituted—Sum awarded to plaintiff in a lower class—Absence of reason for such order—Powers of Supreme Court to examine such order.

Held: (1) *That an order for costs in the class in which an action is brought may be made although the sum awarded is in a lower class.*

(2) *That it is extremely desirable that a trial judge should state his reasons for such an order.*

(3) *That where a trial judge has failed to give reasons for making such an order it is open to the Appeal Court to examine the merits of such order.*

PERERA *vs.* TISSERA AND ANOTHER XXVII. 98

Costs—Taxation of in special proceedings not provided for in the schedule to the Civil Procedure Code—Discretion of taxing officer as to fixing of costs—When will Court interfere in review of taxation.

Held: (1) *That the Table of Costs prescribed in the Second Schedule to the Civil Procedure Code does not apply to proceedings under Section 42 of the Courts Ordinance.*

(2) *That in cases to which the Second Schedule of the Civil Procedure Code does not apply, costs which are in the opinion of the Taxing Officer reasonable should be allowed. These costs will not necessarily be the actual costs incurred by the parties.*

(3) *That the Court will not vary the taxation of the Registrar except on very strong grounds or unless it has proceeded on wrong considerations.*

WIJESEKERE *vs.* THE ASSISTANT GOVERNMENT AGENT, MATARA ... XXVII. 110

Costs—In Privy Council—When Crown should be ordered to pay.

P. D. SHAMDASANI *vs.* EMPEROR ... XXX. 97

Security for costs of appeal. Notice of tendering served on respondent's Proctor instead of on respondent.

CARLINA *vs.* SILVA ... ... XXXI. 71

Plaintiff, on dismissal of action, given power to institute fresh action upon paying costs of previous action. Must costs be pre-paid.

JAMEELA UMMA *vs.* ABDUL AZEEZ XXXI. 74

... ...

Costs—Discretion vested in Court—How it should be exercised—Right of appeal against order for costs—

SUNDARAM AND ANOTHER *vs.* GONSALVES ... ... XXXVII. 57

Order that defendants would be entitled to fees paid by them to Counsel—Further order that costs as stated would be taxed by this Court—Effect of order—Interpretation.

In making an order for costs the learned District Judge stated as follows:—"In my opinion it would be reasonable to order the Crown to pay the costs incurred by the defendants in retaining Counsel for these two trial dates."

"Defendants would be entitled to the fees paid by them to the Counsel engaged by them for these dates of trial."

The costs as stated by me earlier would be taxed by this Court and the Crown will be liable to pay that amount to the defendants."

Held: *That the defendants are entitled to the sum paid to Counsel for the two dates in question as the later part of the order directing that the costs "be taxed by this Court" merely required that the Taxing Officer should satisfy himself that the amount claimed in the bill of costs represented the sum actually expended in retaining Counsel for the trial.*

SENEVIRATNE *et al vs.* ASSISTANT GOVERNMENT AGENT, COLOMBO DISTRICT XLIV. 27

Right to withdraw deposit of security for costs after withdrawal of appeal to Privy Council.

VANDER POORTEN *vs.* VANDER POORTEN *et al* ... ... XLIV. 47

Application for writ of Mandamus— **Payment of costs—Principles which apply.**

WIJESEKERA & CO., LTD., *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS ... ... XLV. 81

Costs—In criminal and quasi—criminal proceedings.

IN *re* KRISNAPILLAI VAIKUNTHAVASAM ... ... XLV. 102

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Costs in election petition—Taxation of—

BELIGAMMANA *vs.* RATWATTE ... XLIII. 47

Costs—Failure to prepay in partition action—Dismissal of action—No adjudication on merits—Is decree binding on the parties—Resjudicata.

SEDARAHAMY *vs.* ALICE NONA ... L. 6

COUNSEL

See under **ADVOCATE**

COURT OF CRIMINAL APPEAL DECISIONS

Conviction for murder—Misdirection—Non-direction—Evidence Ordinance, Section 106—Hearsay evidence—Duty of Prosecution—Criminal Procedure Code Section 238—Inspection of scene of crime by Court—Undue pressure on jury.

The accused was tried before Mr. Justice Akbar and an English-speaking jury. The trial began on 14th May, 1934 and lasted 21 days. He was found guilty of the offence of murder by a verdict of 5 to 2 (one of the five in the majority recommending him to mercy) and sentenced to death. The sentence was commuted by the Governor to one of imprisonment for life.

Held: (1) *That there were no grounds on the evidence taken as a whole upon which any tribunal could, properly as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty, and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not in law or justice, permissible grounds on which to base a verdict.*

(2) *That Section* 157 *of the Evidence Ordinance does not permit of the admission in evidence of statements made by a witness without previous cross-examination of the person as to such statements.*

(3) *That hearsay evidence is not admissible as corroboration under Section* 157 *of the Evidence Ordinance.*

(4) *That Section* 106 *of the Evidence Ordinance does not impose a general onus on an accused person to explain everything that might be within his knowledge.*

STEPHEN SENEVIRATNE *vs.* THE KING VI. 51

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

Held: (1) *That the charge on the whole was a correct and sufficient direction on what constitutes insanity in the eye of the law.*

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

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

THE KING *vs.* ABRAHAM APPUHAMY ALIAS ASSON ... ... XV. 37

Court of Criminal Appeal—Principles which should guide the Court—Misdirection—Duty of Trial Judge to explain to the Jury the principle to be followed by them in dealing with circumstantial evidence.

REX *vs.* DE SILVA ... ... XVII. 61

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

REX *vs.* DE SILVA ... ... XVII. 61

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

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

REX *vs.* BELLANA VITANAGE EDDIN XVII. 128

Circumstances in which the Court will interfere on questions of fact—Misdirection—Attitude which the Court will adopt in regard to misdirection.

Held: (1) *That it is not the function of a Court of Criminal Appeal to re-try a case which has already been decided by a jury.*

(2) *That the Court of Criminal Appeal will not interfere on grounds of fact unless it is shown to its satisfaction that the*

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verdict is unreasonable or that it cannot be supported having regard to the evidence.

(3) *That where two acts of killing took place in the course of the same transaction it can be fairly presumed that the common intention which existed in the beginning continued throughout the transaction.*

(4) *That a direction by the Judge to the Jury that they should not pay attention to any suggestion put to the witnesses in cross-examination unless those suggestions were supported by proof is a proper direction.*

(5) *That the fact that the Magistrate had discharged the accused at the close of the preliminary proceedings is irrelevant and should not be put to the Jury.*

REX *vs.* SILVA AND APPUSINGHO XVIII. 1

Threat of accused in the course of a trial to kill a prosecution witness—May witness give evidence of such threat—Procedure to be followed in proving that a witness has in the Trial Court contradicted his deposition in the Magistrate's Court—Criminal Procedure Code — Sections 186 (2), 237 (2) and 296 (2)—Evidence Ordinance Sections 80, 145 and 155—Right of reply of prosecution counsel.

Held: (1) *That a witness's evidence of a threat (to kill him if he continued to give evidence) uttered by the accused in the course of the trial is relevant and admissible.*

(2) *That if an accused person desires to make use of a deposition of a witness taken in the course of the preliminary inquiry in the Magistrate's Court under Section* 145 *or* 155 *of the Evidence Ordinance, he must prove such deposition and thereby such deposition becomes evidence given by or on his behalf for the purposes of Section* 237 (2) *of the Criminal Procedure Code.*

(3) *That the production in evidence on behalf of the accused of the deposition of a witness gives the Counsel for the prosecution the right of reply.*

(4) *That Section* 80 *of the Evidence Ordinance does not go to the extent of permitting the use in evidence of the deposition of a witness in a judicial proceeding without formal proof of that deposition.*

(5) *That if the deposition of a witness is to be used as evidence it must be produced on the sworn testimony of a witness.*

REX *vs.* KADIRGAMAN *et al* ... XVIII. 41

Joinder of charges—Unlawful assembly and murder—Penal Code section 32—Criminal Procedure Code section 185 and section 6 (2) of the Court of Criminal Appeal Ordinance No. 23 of 1938.

The appellants five in number were convicted of:

(i) Being members of an unlawful assembly, the common object of which was to cause serious bodily injury to one Welisarage Rogus Fernando, did thereby commit an offence under Section 140 of the Penal Code.

(ii) Being members of the said unlawful assembly who in prosecution of the said common object did commit murder by causing the death of the said Welisarage Rogus Fernando an offence punishable under Sections 146 and 296 of the Penal Code.

A third count in the indictment, charging the accused that they " acting in furtherance of a common intention, did commit murder " was withdrawn by Crown Counsel after the Jury returned its verdict.

Held: (1) *That the evidence established neither the existence of an unlawful assembly nor a common intention on the part of the accused to commit murder.*

(2) *That the fact that a conviction under count* (3) *as framed is not warranted by the evidence does not preclude the Court of Criminal Appeal from finding the accused guilty of offences arising out of individual acts committed by them.*

REX *vs.* SILVA AND OTHERS ... XVIII. 51

Powers of Court under section 10 (1) (b) of the Court of Criminal Appeal Ordinance No. 23 of 1938—When will the Court take evidence in appeal.

Held: *That the Court of Criminal Appeal will take fresh evidence of witnesses not called at the trial, under section* 10 (1) (b) *of the Court of Criminal Appeal Ordinance No.* 23 *of* 1938, *when it is satisfied that the failure to produce such evidence was due to ignorance on the part of the prisoner or to the mistaken conduct of the case by the prisoner or his adviser.*

REX *vs.* RANHAMY ... ... XVIII. 61

Evidence taken under section 10 (1) (b) of the Court of Criminal Appeal Ordinance

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No. 23 of 1938—Principles by which the Court will be guided in deciding the case with the aid of fresh evidence.

Held: *That in a case where fresh evidence has been taken by the Court of Criminal Appeal the Court should first consider whether the Jury would have believed the fresh evidence or there was strong probability that they would have believed it and further whether it would have raised such a doubt in the minds of the Jury that they must have acquitted the accused.*

REX *vs.* RANHAMY ... ... XVIII. 63

Conviction for rape—Can first statement of prosecutix implicating accused elicited by her father under threat of bodily injury be admitted in evidence—In what circumstances may the Court of Criminal Appeal interfere with the verdict of the Jury.

The appellant was convicted of the offence of rape and sentenced to five years' rigorous imprisonment. The appellant's defence was that the act of sexual intercourse was with the consent of the prosecutrix. The evidence of the prosecutrix was uncorroborated. The prosecutrix made no complaint to anyone although she had opportunities of doing so. Her first complaint was made to her father, but that was made under threat of bodily injury.

Held: (1) *That the conviction cannot be sustained in the absence of corroboration.*

(2) *That first statement made by the prosecutrix to her father charging the appellant with having ravished her cannot be admitted in evidence.*

REX *vs.* WADUGE ARTHUR FERNANDO *alias* ARTHUR BAAS ... XIX. 21

Conviction for murder—Facts equally consistent with innocence as with guilt of the accused—Can verdict be supported.

Held: *That where the facts disclosed in evidence are equally consistent with the innocence as with the guilt of the accused, a conviction cannot be supported having regard to such evidence.*

REX *vs.* JAN SINGHO AND TWO OTHERS ... ... XIX. 39

Evidence of co-accused—Admissibility of—Against other accused—Precaution to be observed in directing the Jury on such evidence—Charge of rape—Extent to which evidence of prosecutrix should be corroborated.

REX *vs.* ANA SHERIFF ... XIX. 87

Evidence Ordinance sections 5 and 6 to 16—Charge of murder—In what circumstances may evidence of injuries inflicted on persons other than the one mentioned in the charge be admitted—Court of Criminal Appeal Ordinance section 6 (2).

The prisoner was indicted on a charge of murder of A. At the trial counsel for the prisoner before any evidence had been tendered objected to the admission of medical evidence as to the nature and extent of the injuries on persons other than the deceased on the ground that the Jury would be unduly influenced thereby. The learned Trial Judge admitted the evidence on the footing—

(*a*) that the other injuries were inflicted as part of the same transaction which resulted in the death of the deceased; and

(*b*) that evidence as to the nature of injuries inflicted on the other persons is relevant to prove the intention of the accused.

Held: (1) *That the precise nature and extent of the injuries were not so connected with a fact in issue as to form part of the same transaction, and therefore, relevant under Section 6 of the Evidence Ordinance.*

(2) *That, as no question arose as to whether the blow inflicted on the deceased was accidental or not, evidence as to the nature and extent of the injuries inflicted on others cannot be admitted to prove the accused's intention.*

REX *vs.* HEWA WALGAMAGE MENDIAS XIX. 98

Statement made by accused to Police Officer when excluded as containing an inference of guilt.

REX *vs.* LAMBERT GUNAWARDENE XIX. 124

Charge for murder—Penal Code section 294, exceptions 1 and 2 and section 296—Existence of evidence of provocation—Denial by accused that he was provoked—In the circumstances should evidence of provocation be put to the Jury.

Held: (1) *That in a charge for murder where there is evidence of provocation, the*

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entirety of the evidence bearing on the question of provocation should be put to the Jury even though the accused expressly says that he was not provoked.

(2) *That failure to give a proper direction regarding the evidence of provocation is a misdirection which affects a conviction for murder.*

REX *vs.* MOHIDEEN MEERA SAIBO XIX. 129

Evidence Ordinance Section 32 (1) —Statement by deceased person as to the cause of his injuries—Criminal Procedure Code Sections 121 and 122—Statement made by a deceased person to a Police Officer investigating a cognizable offence—When may such statement be admitted in evidence.

Held: *That a statement made by a deceased person as to the cause of his injuries to a Police Officer investigating a cognizable offence can be admitted in evidence under Section* 32 (1) *of the Evidence Ordinance, if it appears that the investigating officer recorded the deceased's statement not,* qua *officer investigating the cognizable offence under Sections* 121 *and* 122 *of the Criminal Procedure Code, but merely as a statement made to him by a person whom he found to be grievously injured.*

REX *vs.* JOHN PEIRIS ... ... XIX. 134

Criminal Procedure Code, Sections 186 (2), 232 and 234—Evidence Ordinance section 114 (f)—Is prosecutor bound to call all the witnesses on the indictment or to tender them for cross-examination—Should the Judge refer to the presumption under section 114 (f) in cases in which the prosecuting counsel does not call or tender for cross-examination the witnesses whose names are on the indictment and who are not called by the prosecuting counsel.

Held: (1) *That a prosecutor is not bound to call all the witnesses on the indictment or to tender them for cross-examination.*

(2) *That the prosecutor has a discretion in the matter of calling witnesses on the back of the indictment or tendering them for cross-examination.*

(3) *That a Judge might interfere to ask the prosecutor to call a witness, or to call a witness as a witness of the Court.*

(4) *That there is no non-direction by the Judge when he omits to refer to the presumption under section* 114 (f) *of the Evidence Ordinance in cases in which the Crown does not call or tender for cross-examination, on the request of the prisoner's pleader, a witness whom the prisoner's pleader had himself an opportunity of calling.*

REX *vs.* CHALO SINGHO ... XX. 21

Defence that had not been raised by the prisoner though arising on the evidence—Is it the duty of the Judge to put every defence arising on the evidence to the jury.

Held: *That it is the duty of the Trial Judge to put to the jury every defence that may reasonably be raised on behalf of the prisoner on the evidence given at the trial regardless of whether the prisoner has raised such defence or not.*

REX *vs.* LANTY ... ... XX. 71

Criminal Procedure Code section 122 (3)—Is Police headman a Police Officer for the purposes of that section—Misdirection—Inaccurate comment made by judge in summing-up to the effect that the first mention of the defence put forward by the accused was at his trial and therefore it was belated.

Held: (1) *That a police headman is not a Police Officer for the purposes of section* 122 (3) *of the Criminal Procedure Code.*

(2) *That to be a " Police Officer in the course of an investigation under this Chapter " for the purposes of Section* 122 (3) *of the Criminal Procedure Code, a person must by virtue of section* 121 (1) *of that Code be an " officer in charge of a Police Station " who keeps an " Information Book."*

(3) *That it is a misdirection for the Trial Judge to make an inaccurate comment in his summing-up to the effect that the first mention of the defence put forward by the accused was at his trial, and, therefore, it was belated.*

REX *vs.* JAMES SINGHO AND WIJEMANNE ... ... XXI. 1

Misdirection—Evidence Ordinance sections 114 (f) and 157—Abduction.

Held: (1) *That from the mere admission by the accused who was charged with abducting a woman that intercourse took place, it cannot be inferred that there was an intention to force illicit intercourse.*

(2) *That any inference to be invited from the statutory statement of the accused should regard that statement in its*

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entirety and not merely as an isolated passage.

(3) *That a direction that no inference can be drawn either way from the circumstances that the Crown did not call a witness whose name was on the back of the indictment is not a misdirection.*

(4) *That the natural presumption when a young man abducts a girl of marriageable age is that he abducted her with the intention of having sexual intercourse with her either forcibly or with her consent after seduction or after marrying her.*

(5) *That counsel must not convey to the Jury by suggestion or otherwise that there is in existence a document prejudicial to the defence, unless he is in a position to produce that document in due course of law.*

(6) *That statements elicited in reply to questions put to a witness are admissible under section 157 of the Evidence Ordinance, if the question merely anticipates a statement which the complainant was about to make. But such statements are inadmissible, if the circumstances indicate that but for the questioning, there probably would have been no voluntary complaint.*

REX *vs.* LIONEL BANDARA WEGODAPOLA ... ... XXI. 21

Appeal on question of fact—

Held: *That in an appeal involving questions of fact only, it is not the function of the Court of Criminal Appeal to retry a case which has already been decided by the Jury. The Court in such a case is only required to say whether the verdict of the jury is unreasonable or whether it cannot be supported by the evidence.*

REX *vs.* DON ANDRAYAS AND ATAPATTU ... ... XXI. 93

Misstatement by Judge—Misdirection—Onus of proof.

Held: (1) *That a mis-statement by the Judge on a vital point in the case is a misdirection which vitiates a conviction.*

(2) *That a direction in these terms "if you accept the evidence of the accused and his wife as the truth, then he must be acquitted" amounts to a misdirection as it seems to indicate that, if the jury do not accept the evidence of the accused and his wife, the accused must be convicted.*

(3) *That a direction that "the onus of proving his case is not as heavy on the accused as it is on the prosecution. If you think that the accused has established by a preponderance of probability that he is not guilty of any offence at all, then he is entitled to be acquitted" amounts to a misdirection as it seems to indicate that the onus of proving his innocence in some manner rests on the accused.*

REX *vs.* HEEN BANDA ... ... XXI. 97

Judge calling witness after the case for the prosecution and defence had been closed—Should prosecution witness be recalled and examined in middle of summing-up—Criminal Procedure Code section 429.

Held: (1) *That a Judge should not call and examine a witness after the close of the case for the prosecution and defence unless it is essential to a just decision of the case.*

(2) *That an Assize Judge should not recall and examine a prosecution witness in the middle of his summing-up to the Jury.*

REX *vs.* W. M. CHARLIS ... XXI. 99

Penal Code section 294 Fourthly, illustration (d)—Affidavit to be used in Criminal Court to be sworn before whom—Criminal Procedure Code section 428—Affidavit how proved—When may evidence of injuries to persons other than those in respect of whom a charge is made be put in evidence.

Held: (1) *That the prosecution was entitled to prove that the injuries on the deceased and others, in respect of whose injuries there was no specific charge, were caused by gunshot, in order to disprove the theory of the defence that the injuries were caused in a hand to hand conflict.*

(2) *That an affidavit made by an accused person cannot be admitted in evidence against him without proof by either an admission of his signature by the accused or by the evidence of the Justice of the Peace before whom the affidavit was sworn.*

(3) *That an affidavit sworn before a Justice of the Peace who has not been generally or specially authorised by the Supreme Court to administer oaths in the Supreme Court cannot be used in a Criminal Court in view of section 428 of the Criminal Procedure Code.*

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Obiter (4) *That in a case falling under section* 294 *Fourthly, of the Penal Code, the Judge should direct the Jury as to the nature of the circumstances which might come within the words "without any excuse" in that provision.*

REX *vs.* IYASAMY WIJEYERATNAM *alias* WIJEYAM ... ... XXII. 1

Notice of appeal on questions of law—When may appellant raise a question of law not stated in the notice—Evidence Ordinance section 11 (b)—Presence of gonorrhoea in accused when relevant in a case of attempted rape.

Held: (1) *That substantial particulars of misdirection or of other objections to the summing-up must always be set out in the notice of appeal, and leave to amend the notice of appeal by adding a further question of appeal will not be permitted except in a capital case.*

(2) *That the presence of gonorrhoea in the accused was relevant under section* 11 (b) *of the Evidence Ordinance in a case of attempted rape in which the prosecutrix was found to be suffering from the same disease seven days after the assault.*

REX *vs.* BURKE ... ... XXII. 7

Evidence Ordinance sections 17 (2) and 25—Misdirection—When should Judge direct the Jury on the question of the exercise by the accused of the right of private defence.

Held: (1) *That a statement made by an accused to a Police Officer is not inadmissible unless it is an admission stating or suggesting the inference that he committed the offence with which he is charged.*

(2) *That in a charge of attempted murder the Judge is under no obligation to direct the Jury on the question of the accused's right of private defence unless the accused pleads it and adduces evidence in support of the plea.*

REX *vs.* ALLIS SINGHO AND ANOTHER XXII. 63

Bail—When may an application for bail be granted.

Held: *An application for bail will be granted by the Court of Criminal Appeal only in cases of exceptional circumstances.*

REX *vs.* KEERALA ... ... XXII. 82

Section 134 Criminal Procedure Code—Commencement of inquiry or trial—Section 35 Criminal Procedure Code—Right of arrest of person "who is running away and whom he reasonably suspects of having committed a cognizable offence"—Section 24 Evidence Ordinance—Person in authority—Is the conductor of an estate taking into his charge an absconding labourer whom he suspects of having committed a cognizable offence a person in authority.

Held: (1) *That for the purposes of section* 134 *of the Criminal Procedure Code the commencement of the inquiry or trial is the time at which the charge is read over to the accused.*

(2) *That the conductor of an estate who arrests an absconding labourer of another estate on the suspicion that he has committed a cognizable offence is not a person in authority for the purposes of section* 24 *of the Evidence Ordinance.*

(3) *That the words "running away" in section* 35 *of the Criminal Procedure Code are used in that section in their literal meaning and not in the sense of absconding.*

REX *vs.* WEERASAMY AND VELAITHAN ... ... XXII. 103

Plea of grave provocation—State of intoxication—Nature of evidence necessary to justify Jury in taking account of—Evidence Ordinance sections 8, 11, 21 and 25—Confessional statement—Is it admissible under sections 8 (a) or 11 (b) of the Evidence Ordinance.

Where the only evidence with regard to the state of intoxication of the accused was (*a*) that he smelt of alcohol (*b*) that he was smelling of liquor but not strongly (*c*) that he smelt of toddy and was somewhat drunk.

Held: *That the evidence is insufficient to justify a finding that the accused's faculties were in fact impaired by intoxication.*

Held also: (1) *That a confession to a Police Officer by an accused person can, if it is relevant, be proved to assist him.*

(2) *That a statement made by the accused to a Police Officer to the effect that he had been assaulted by someone would become admissible under section* 157 *of the Evidence Ordinance to corroborate the evidence of an accused person who elects to give*

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evidence, but cannot be admitted under section 8 (1) *or, section* 11 *or section* 21 (c).

REX *vs.* I. K. G. PITCHORIS APPU XXIII. 32

Criminal Procedure Code section 122 (3)—Evidence Ordinance sections 25, 120 (6), 145 and 155—Position of accused person when giving evidence.

Held: *That a statement by an accused person, if made in the course of a Police investigation under Chapter XII of the Criminal Procedure Code, is admissible under section* 122 (3). *If not made under that chapter it is still admissible under sections* 145 *and* 155 *of the Evidence Ordinance.*

REX *vs.* M. NADARAJAH ... XXIII. 50

Calling of fresh evidence by the Judge after the close of prosecution and defence—Does it vitiate a conviction—Section 429 of the Criminal Procedure Code.

Held: (1) *That fresh evidence called by a Judge* ex proprio motu, *after the close of the cases for the prosecution and the defence, unless* ex improviso, *is irregular and will vitiate the trial unless it can be said that such evidence was not calculated to do injustice to the accused.*

(2) *That a Court should not call any evidence in the exercise of its power under section* 429 *of the Criminal Procedure Code in any case in which such evidence puts the defence at an unfair disadvantage.*

REX *vs.* S. AIYADURAI AND TWO OTHERS ... ... XXIII. 61

Magistrate's record—Statement that accused wished certain witnesses summoned to prove an alibi**—How may it be proved.**

Held: *That a statement in the Magistrate's record to the effect that the accused wished certain witnesses to be summoned to prove an* alibi *cannot, in a case in which it is not clear whether the Magistrate recorded the words of the accused or merely his own opinion as to the nature of the testimony the accused intented to call, be proved without calling the Magistrate who recorded the statement or someone who heard what the accused said.*

REX *vs.* M. M. DINGIRI BANDA ... XXIII. 79

Plea of insanity—Burden of proof—Failure of Trial Judge to bring home sufficiently to the minds of the Jury the distinction between the burden resting on Crown and that resting on accused.

Held: (1) *That the burden of proving insanity as a defence is no higher than that resting on the plaintiff or defendant in a civil case, or in other words, is discharged by an accused person who tenders a preponderance or balance of evidence in support of such a plea.*

(2) *That where there was a considerable volume of evidence to support the plea of insanity, the failure by a Trial Judge in his summing-up to bring home sufficiently to the minds of the Jury the distinction between the burden resting on the Crown and that resting on the accused to prove insanity, vitiates the conviction.*

REX *vs.* DON NIKULAS *alias* BUIYA ... ... XXIII. 90

Is the question, whether a particular witness is an accomplice, one which should be left for the Jury to decide—Criminal Procedure Code sections 244 and 245—Corroboration—Comment by Judge on failure of accused to offer an explanation of their conduct.

Held: (1) *That the question as to whether a witness is an accomplice was one of mixed law and fact which was quite properly left to the Jury under the provisions of section* 244 *and* 245 *of the Criminal Procedure Code.*

(2) *That the learned Judge quite properly commented on the failure of the accused to offer an explanation of their conduct by giving evidence.*

REX *vs.* PEIRIS APPUHAMY AND SOPI NONA ... ... XXIII. 101

Misdirection—Trial Judge commenting on the absence of accused from witness box—Jury asked to draw adverse inference—Omission to point out to Jury the nature of such inference or that the existence of a reasonable doubt enured to the benefit of the accused whether he gave evidence or not.

Held: *That in the circumstances the principle that the standard of proof required in Criminal cases remains constant, irrespective of the fact that the accused has not given evidence, may not have been fully appreciated by the Jury.*

REX *vs.* DURAISAMY ... XXIII. 112

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When would the Court entertain grounds not stated in the notice of appeal.

Held: *That the Court of Criminal Appeal will as a general rule refuse to entertain grounds not stated in the notice of appeal but would relax the rule where the appellant was without legal aid and has drawn his own notice of appeal.*

REX *vs.* MARTHINO AND TEN OTHERS ... ... XXIII. 124

Penal Code section 445—Scope of section.

Held: (1) *That the offence of house-breaking is founded upon house-trespass, an offence which is committed by entering into or remaining in premises of a certain description with a certain intent. House-trespass may be committed in a moment of time or may be a proceeding of some duration. The same time factors apply to the offence of house-breaking.*

(2) *That the offence of house-breaking continues as long as the house-trespass which follows the act of entering continues.*

(3) *That grievous hurt caused by a house-breaker coming out of the house he had broken into to a person on the front steps of the house is an offence under section* 445 *of the Penal Code.*

REX *vs.* SILVA KAVIRATNE ... XXIII. 128

Conviction for rape—Nature of Corroborative evidence required.

The accused was convicted of committing rape on a girl. Apart from the evidence of the girl there was independent evidence of a witness to the effect—

(I) that he saw the girl enter the house of the accused at about the time the offence was committed;

(II) that the accused was the sole occupant of the house at the time of the offence.

Further, there was evidence of the presence of blood on the sarong which the accused admittedly wore on that day. The accused falsely denied that the house was his and made a false statement that he was away from the village at the time of the alleged offence.

Held: *That the evidence corroborates the girl's story by tending to show that the accused was the person who assaulted her.*

Per SOERTSZ, J.: "As observed by Howard, C.J., Lord Reading said that the rule does not mean 'that there must be confirmation of all the circumstances of the crime. It is sufficient if there is corroboration as to *a material circumstance* of the crime and of the identity of the accused in relation thereto.'"

REX *vs.* MARATHELIS ... ... XXIV. 21

Burden of proving that prisoner comes within any of the general exceptions in the Penal Code—Evidence Ordinance section 105.

Held: *That the burden which rests on a prisoner of proving that he comes within any of the general exceptions in the Penal Code is not so heavy as that which lies on the prosecution of proving its case beyond all reasonable doubt.*

REX *vs.* HARAMANISA *alias* THIMISA ... ... XXIV. 25

Evidence of bad character of accused—When relevant—Evidence of good character—What amounts to—Evidence Ordinance (Chapter 11) section 54—Scope of re-examination.

The prosecution led evidence of several incidents tending to show that there was ill-feeling between the deceased and the accused such as might provide the latter with a motive for intentionally harming the deceased. The deceased's father in cross-examination said that apart from the feeling of jealously between the two he had "nothing to say against the accused." On being questioned further as to whether the accused was a well-behaved man the witness replied that he was a quarrelsome man who loses his temper in no time for trivial things.

Held: (1) *That the* 1*st statement did not amount to evidence of good character as contemplated by section* 54 *of the Evidence Ordinance, as it was elicited in answer to a question directed to show the absence of motive and was therefore limited to that aspect of the case.*

(2) *That the second statement was irrelevant and might well have had the effect of inclining the Jury to the belief that the appellant was of a violent disposition and therefore not unlikely to have intentionally shot at the deceased.*

(3) *That a re-examination by the prosecution was not proper merely because*

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it was directed to matters referred to in cross-examination, unless such reference required explanation from the point of view of the case for the prosecution.

REX *vs.* KOTALAWALA ... XXIV. 47

Criminal Procedure Code sections 134 and 233.

Held: (1) *That a statement made by an accused voluntarily after the commencement of the non-summary inquiry and recorded in the manner prescribed by section* 134 *of the Criminal Procedure Code cannot be put in evidence at the trial by the prosecution.*

(2) *That the statements contemplated by section* 233 *of the Criminal Procedure Code are the statements made under section* 160 *and* 165 *of that Code.*

(3) *That in regard to an accused's statements which do not come under section* 160 *or* 165 *of the Criminal Procedure Code it is open to the prosecution or to the accused to decide whether to make use of them or not, provided they are relevant and admissible.*

REX *vs.* PUNCHIMAHATMAYA ... XXIV. 108

Charge of murder—Plea of self-defence—Evidence Ordinance section 105—Court of Criminal Appeal—Directions of Judge—Questions put to the Judge by the foreman with a view to clear their understanding of certain points in the summing-up—Indication from the questions that the Jury did not follow the charge of the Judge—Retrial.

Held: (1) *That an accused person who puts forward the plea that he acted in self-defence must prove that he was exercising that right. Section* 105 *of the Evidence Ordinance imposes that burden on him.*

(2) *That the verdict should be quashed and a retrial ordered as the Jury do not appear to have understood the Judge's charge.*

REX *vs.* MUDIYANSELAGE MUDIYANSE ... ... XXIV. 111

Plea of autre fois acquit.—**Criminal Procedure Code sections 190, 191 and 330.**

Held: (1) *That the wording of section* 190 *of the Criminal Procedure Code means that a Magistrate is precluded from making an order of acquittal under that section till the end of the case for the prosecution.*

(2) *That a discharge under section* 191 *of the Criminal Procedure Code, even though the Judge calls it an acquittal, cannot support a plea of* autre fois acquit.

REX *vs.* WILLIAM *alias* RATU WILLIAM ... ... XXIV. 115

Evidence Ordinance sections 3 and 105—Nature of the burden on the accused of proving the statutory exceptions.

Held: (1) *That the case of* REX *vs.* CHANDRASEKERE *lays down that if the existence of circumstances which would bring "the case within one of the exceptions" is involved in doubt, the existence of those circumstances cannot be said to have been proved.*

(2) *That the case of* REX *vs.* CHANDRASEKERE *does not lay down that if two possible views may be taken of a set of proved circumstances the Jury is precluded from adopting either of those views.*

REX *vs.* JOHANIS *alias* JOHN AND PIYASENA ... ... XXIV. 137

Case stated under section 355 (1) of the Criminal Procedure Code—Evidence Ordinance sections 3 and 105—Onus of proof of any general or special exception in the Penal Code.

The following question of law was referred by Moseley, J. under section 355 (1) of the Criminal Procedure Code and by virtue of section 21 of the Court of Criminal Appeal Ordinance:

"Whether, having regard to section 105 of the Evidence Ordinance and to the definition of 'proved' in section 3 thereof in a case in which any general or special exception in the Penal Code is pleaded by an accused person and the evidence relied upon by such accused person fails to satisfy the Jury affirmatively of the existence of circumstances bringing the case within the exception pleaded, the accused is entitled to be acquitted if, upon the consideration of the evidence as a whole, reasonable doubt is created in the minds of the Jury as to whether he is entitled to the benefit of the exception pleaded."

Held: (DE KRETSER, J. *dissenting*) (1) *That the existence of circumstances bringing an accused within an exception is a fact in issue that must be proved by him.*

(2) *That the Jury is entitled to presume the absence of circumstances bringing*

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an accused within any of the general or special exceptions of the Penal Code until the accused establishes to their satisfaction that he is entitled to the benefit of any particular exception.

(3) *That the standard of proof of all exceptions including insanity is the same.*

REX *vs.* CHANDRASEKERA ... XXV. 1

Two accused charged with murder—Absence of evidence of common intention—Circumstantial evidence — Unreasonable verdict of Jury.

Where the only evidence led by the prosecution against two accused, who were indicted with murder, was that they had the opportunity of committing the offence either jointly or individually and that after the discovery of the body they absconded and were not apprehended until three years later and the Jury convicted them both.

Held: (1) *That the verdict was unreasonable.*

(2) *That in the absence of evidence of a common intention, the only footing upon which either could be convicted would be that there was evidence against that particular accused that he caused the death of the deceased.*

REX *vs.* DINGIRI APPUHAMY AND WILLIAM ... ... XXV. 77

Charge of rape—Conviction by Jury—Existence of real doubt as to guilt of accused—Indication from evidence led that Jury prepared to convict accused because of his character—Is accused entitled to acquittal.

Held: *That where a real doubt exists as to the guilt of the accused, coupled with a probability, on the evidence, that the Jury formed an opinion unfavourable to the accused's character, it is safer that the conviction should not be allowed to stand.*

REX *vs.* MUSTHAPA LEBBE ... XXVI. 41

Misjoinder of charges—Section 181 of the Criminal Procedure Code—When may alternative charges in respect of distinct offences be joined—Irregularity in framing charges—When vitiates a conviction.

When counsel should notify appearance at trial—Time at which an objection to the indictment may be taken.

Held: (1) *That the charges were properly joined under section* 181 *of the Criminal Procedure Code inasmuch as the prosecution was faced with a genuine doubt as to whether they could establish exclusively any one offence.* (*Hearne, J.* dissentiente).

(2) *That even where the indictment is tainted with an irregularity, the appeal is liable to be dismissed, if it has not occasioned a substantial miscarriage of justice.*

(3) *That appearance of counsel should be notified to Court as soon as the case is called and before the accused has been called upon to plead.*

(4) *That the proper time to raise an objection on the ground of misjoinder is before the accused has pleaded.*

REX *vs.* PONNASAMY AND FOUR OTHERS ... ... XXVI. 99

Statement by accused to Police—Confession made in course of statement—Is so much of statement as does not amount to a confession admissible.

Held: *That so much of an accused's statement to a Police Officer as does not amount to a confession is admissible in evidence.*

REX *vs.* VASU ... ... XXVII. 16

Rape—Can a conviction be based on the uncorroborated testimony of the prosecutrix—When may the Court of Criminal Appeal set aside a conviction based on uncorroborated testimony.

Held: (1) *That it is open to a Jury to convict a person accused of rape on the uncorroborated evidence of the prosecutrix only when the evidence of the prosecutrix is of such a character as to convince the Jury that she is speaking the truth.*

(2) *That the Court of Criminal Appeal will set aside a conviction when it thinks it safer on the whole that the conviction should not be allowed to stand.*

REX *vs.* THEMIS SINGHO ... XXVII. 76

Evidence Ordinance section 33—Scope of expression "incapable of giving evidence."

Held: (1) *That the evidence of a witness who is unable to attend the trial owing to illness such as pneumonia cannot be read in evidence under section* 33 *of the Evidence Ordinance.*

(2) *That the expression "incapable of giving evidence" does not mean "incapable" for the time being owing to illness.*

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(3) *That consent of counsel for the accused to the admission of evidence which is not admissible does not rectify the wrong admission of evidence.*

REX *vs.* AMARAKOON ... ... XXVIII. 4

Reduction of sentence.

In this case the Court had a doubt as to whether the Jury were of opinion that the accused had a murderous intention or merely the knowledge that what he did was likely to cause death. The accused was given the benefit of the doubt and sentence was therefore reduced.

REX *vs.* DUWALAGE ALDON ... XXVIII. 14

Evidence Ordinance section 144 (a)—Presumption arising from possession of stolen goods soon after they have been stolen.

Held: (1) *That possession by a person of property recently stolen from a house in the course of house-breaking gives rise to the presumption that the possessor was either concerned in the house-breaking or received the goods knowing them to be stolen.*

(2) *That the strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed since the commission of the offence.*

Per HOWARD, C.J.: " ' If the interval has been only an hour or two, not half a day, the presumption is so strong, that it almost amounts to proof; because the reasonable inference is, that the person must have stolen the property. In the ordinary affairs of life, it is not probable that the person could have got possession of the property in any other way. And Juries can only judge of matters with reference to their knowledge and experience of the ordinary affairs of life.

Thus, for instance (to put the present case), if the property were the produce of a burglary, then the possession of it, soon after the burglary, is some evidence that the person in whose possession it is found was a party to the burglary. For, at all events, he must have received it from one who was a party to it; and this is strong evidence that he was privy to it and some evidence that he was a party to it. Whether or not he was so, must be judged of from all the other circumstances of the case.

If the explanation is, for instance, that the party had found the property where it might have been found, and was going to deliver it up to a constable, and the circumstances were consistent with that account, some evidence ought to be given to contradict it, and show it to be untrue.

What the Jury have to consider in each case is, what is the fair inference to be drawn from all the circumstances before them, and whether they believe the account given by the prisoner is, under the circumstances, reasonable and probable, or otherwise.' "

REX *vs.* WILLIAM PERERA AND ETIN ... ... XXVIII. 43

Misdirection—Erroneous statement of fact by Trial Judge on the main evidence—Criminal Procedure Code Chapter XII and section 122 (3)—Evidence Ordinance sections 91, 155 and 157.

Held: (1) *A statement made to a Police Officer or inquirer by any person, which expression includes a person accused in the course of any investigation under Chapter XII of the Criminal Procedure Code, must be reduced into writing.*

(2) *By reason of section* 91 *of the Evidence Ordinance only the written record of a statement within the ambit of* (1) *is admissible in evidence. Hence oral evidence of such a statement is inadmissible.*

(3) *The written record of such a statement is admissible by virtue of section* 122 (3) *of Chapter* 16 *to contradict a witness after such witness has given evidence.*

(4) *The written record of the statement of a witness used, as formulated in* (3), *is not substantive evidence of the facts stated therein, but is available for impeaching the credit of such witness as laid down by section* 155 *of the Evidence Ordinance.*

(5) *If it had not been for the prohibition contained in section* 91 *of the Evidence Ordinance, oral evidence of a statement made under Chapter XII of the Criminal Procedure Code might be tendered not only to contradict a witness, but also under the provisions of section* 157 *to corroborate the testimony of such witness. Such oral testimony would again not be substantive evidence of the facts contained therein, but merely corroboratory.*

REX *vs.* HARAMANISA ... ... XXVIII. 68

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Rape—Burden of proof.

Held: *That in a charge of rape there is no burden on the accused to prove that the intercourse was with the consent of the prosecutrix. The prosecution must prove that the accused had intercourse with the prosecutrix without her consent.*

REX *vs.* BALAKIRA ... ... XXIX. 50

Misdirection—Comment in the charge to the Jury on the failure of the accused to give evidence—In what circumstances is Judge entitled to comment on failure of accused to give evidence.

Held: *That a statement to the effect that the failure of the accused to give evidence was an element the Jury might take into consideration does not by itself amount to misdirection.*

REX *vs.* JOHN SILVA ... ... XXIX. 51

Unlawful assembly and rioting—Penal Code sections 140, 141, 144, 146, 380, 283 and 419—Possession of property removed by members of the unlawful assembly—Is such possession, in the absence of other evidence, sufficient to establish that the possessors were members of the unlawful assembly.

Held: *That where property is robbed by the members of an unlawful assembly evidence of possession of such stolen property is not in itself sufficient to establish against the possessor the charge of being a member of the unlawful assembly.*

REX *vs.* LEWISHAMY AND TWO OTHERS ... ... XXIX. 53

Circumstantial evidence—Matters which a Court should consider in deciding whether the evidence excludes the possibility of a hypothesis consistent with the innocence of the accused.

Held: *That in a case based entirely on circumstantial evidence, the fact that the deceased was last seen alive in the Company of the accused would not, of itself, justify a conviction, where the exact time of death is not established; nor would the fact that the accused subsequently attempted to dispose of a weapon which might have caused the injuries on the deceased.*

(a) The fact that a not unreasonable explanation was given by the accused fairly promptly after his arrest;

(b) Absence of any motive for the accused to murder the deceased;

(c) The behaviour of the accused during the relevant period;

(d) The fact that there were other men in the background who may have had a motive for the murder and may have used the accused as an innocent tool;

(e) The fact that the accused was not continuously in the company of the deceased during the time when the murder may have taken place; and

(f) Absence of evidence proving that the accused absconded immediately after the murder.

Are all points which should be taken into account in deciding whether the evidence excludes the possibility of a hypothesis consistent with the innocence of the accused.

KING *vs.* APPUHAMY ... XXX. 10

Two accused charged with murder of one man—Fatal injury caused by first accused—No evidence that injury caused by second accused either accelerated or contributed to death of deceased—Common intention—Grave and sudden provocation—Misdirection.

Two accused were charged with the murder of the deceased. The only fatal injury was that inflicted by the first accused, while the injury inflicted by the second accused neither accelerated nor contributed to the death of the deceased. The Trial Judge directed the Jury that if they thought there was no common intention and that the second accused acted independently, under grave and sudden provocation, his offence would be one of culpable homicide not amounting to murder. The Jury found the first accused guilty of murder and the second accused guilty of culpable homicide not amounting to murder.

Held: *That this was a misdirection in the absence of any evidence that the injury caused by the second accused either accelerated or contributed to the death of the deceased, and that the proper verdict against the second accused would be one of attempting to commit culpable homicide not amounting to murder where hurt has been caused.*

KING *vs.* FERNANDO *et al* ... XXX. 22

Evidence of witness called by the Crown and then dealt with as adverse—Must it be excluded from the case—Meaning of the

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words "without premeditation" in Penal Code section 294, exception 4—Misdirection.

Held: (1) *That the fact that a witness is dealt with as adverse and cross-examined to credit, in no way warrants a direction to the Jury that they are bound in law to place no reliance on his evidence.*

(2) *That an explanation of the word "premeditation" in exception 4 to section 294 of the Penal Code as if it was synonymous with "intention" is a misdirection.*

REX *vs.* FERNANDO ... ... XXX. 39

Rejection by Jury of evidence of prosecution witnesses against some accused—Conviction of another on same evidence although learned Trial Judge made it clear to Jury that acquittal of all accused justified—Appeal on certificate of Trial Judge—Jury's verdict not supported by evidence—Misdirection—Trial Judge disapproving of Jury's verdict—Is it sufficient ground for setting aside verdict.

REX *vs.* DE ALWIS ... ... XXX. 103

Prosecution witness—Presumption of innocence—Onus of proof on prosecution—Absence of adequate direction on common intention and knowledge—Misdirection on what constitutes culpable homicide—Effect of.

Five persons were jointly charged with the murder of a man by shooting. The evidence showed that four empty cartridges found at the scene of the shooting had been fired from a gun found in the house of the second accused. The defence suggested that these cartridges might have been substituted by the Police. After trial, the first accused was acquitted and the remaining four were convicted of culpable homicide not amounting to murder.

Held: (1) *That there is no such presumption of innocence in favour of a prosecution witness, against whom a suggestion of improper conduct is made, as there is in favour of an accused person.*

(2) *That the obligation on the Crown is not to prove a* prima facie *case but to prove the guilt of the accused beyond all reasonable doubt irrespective of whether the accused have given evidence or not.*

(3) *That where the defence does not rely on one of the exceptions* (e.g. *self-defence or sudden fight*) *a reference in the course of the charge to the onus on the accused being less than the onus on the Crown is irrelevant and misleading.*

(4) (*By a majority of the Court*). *That as it was a reasonable inference from the evidence that only one person—the second accused—fired the gun, the absence of adequate direction to the Jury on common intention and knowledge, with reference to the facts of the case, and a palpable misdirection as to what constitutes culpable homicide not amounting to murder, rendered the verdict of the Jury untenable as against the third, fourth and fifth accused.*

Per Rose, J.: "It seems to us that there is great force in Mr. H. V. Perera's contention that where in a summing-up there are substantial misdirections as to the law (as distinct from mistakes as to the facts which may or may not be vital) it is not safe to adopt the line of reasoning that because in other parts of the summing-up the Judge has adequately, although only in general terms, directed the Jury, the misdirections should be disregarded."

REX *vs.* SUBRAMANIAM AND THREE OTHERS ... ... XXXI. 36

Common intention—Misdirection—Reference by Crown in opening case to evidence not subsequently proved—Curable irregularity.

Held: (1) *That when several accused are jointly charged with murder in that they acted with a common intention, the "common intention" that must be proved against each accused, in order to establish the charge of murder against him, is a murderous intention and not merely a criminal intention, and that a failure to make this clear to the Jury renders a verdict of guilty of murder insupportable.*

(2) *That when, in opening the case to the Jury, the Crown refers to evidence which is not subsequently led, the irregularity is cured by the Judge warning the Jury that they must disregard such reference entirely and decide the case only on the evidence led at the trial.*

REX *vs.* APPUHAMY ... ... XXXI. 60

Applicability of § 31 of Courts Ordinance to a case where re-trial is ordered by the Court of Criminal Appeal.

REX *vs.* JINASEKERA ... ... XXXII. 16

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Common intention and same or similar intention—Evidence of sudden and grave provocation—Failure on the part of Trial Judge to direct the Jury on such evidence—Verdict of murder reduced to culpable homicide not amounting to murder.

Held: (1) *That in a charge to the Jury on the point of common intention the Tric' Judge should instruct them sufficiently to enable them to discriminate between "common intention" and "same or similar intentions."*

(2) *That where there are significant facts which in the opinion of the Court indicate that the appellants in causing the death of the deceased were acting on grave and sudden provocation, the offence should be reduced to one of culpable homicide not amounting to murder.*

REX *vs.* S.RANASINGHE *alias* NILAME AND ANOTHER ... ... XXXII. 98

Verdict of culpable homicide—Self-defence—Right exceeded—Trial Judge's view that accused guilty of murder—Sentence of ten years' rigorous imprisonment—Is it excessive in the circumstances.

The appellant was found guilty by the Jury of culpable homicide not amounting to murder as he had exceeded the right of self-defence. The learned Trial Judge, after this verdict, stated that in his view the appellant was guilty of murder and passed a sentence of ten years' rigorous imprisonment.

Held: *That the Jury's verdict indicated that they accepted the appellant's story of self-defence and in the circumstances the sentence passed was excessive.*

REX *vs.* W. F. FERNANDO ... XXXII. 104

Rape—Defence that accused had no connection with the girl—Is consent relevant then—Misdirection in the charge to Jury.

Held: *That in a charge of rape it does not necessarily follow that because the accused's defence was that he had had no connection with the girl the question of consent was irrelevant.*

REX *vs.* G. ARIYARATNE ... XXXIII. 8

Conviction for attempted murder—Death of injured man before trial—Cause of death unconnected with injuries caused—Statements of injured man as to how he came by his injuries—When admissible as part of res gestae—**Failure on the part of Trial Judge to indicate to the Jury possible basis for a lesser offence—Common intention—Directions not sufficiently clear—Evidence Ordinance, sections 6 and 32—Court of Criminal Appeal Ordinance, section 5 (1), proviso.**

The three appellants were convicted of (*a*) attempted murder (*b*) causing simple hurt.

It was in evidence that the injured man was admitted to hospital on 3-7-44 suffering from a fracture of the parietal bone; that he was discharged from hospital on 14-9-44, after his fracture was healed; that on 24-9-44 he was again admitted to hospital suffering from bed sores; that he died on the morning of 23-10-44; that the post-mortem revealed that death was due to septic absorption due to bed sores.

It was contended for the appellant that a statement made by the injured man (deceased at the time of trial) to the Headman, to the effect that the appellants assaulted him, should not have been admitted and its admission had caused substantial miscarriage of justice.

A further objection was taken to the admission of a similar statement made by the injured man to his son, who, in the course of giving evidence in support of the 2nd count (of causing simple hurt to himself) stated that on hearing cries he ran to his father who was lying fallen and on questioning him as to who assaulted him, mentioned the names of the three accused as his assailants. The assault on the son took place within one fathom from his father.

Held: (1) *That the statement of the deceased to the Headman was inadmissible under section* 32 *of the Evidence Ordinance. Nor was it admissible under section* 6 *as it did not form part of the* res gestae.

(2) *That having regard to the evidence in the case the Court was satisfied that no substantial miscarriage of justice had resulted from the admission of such statement.*

(3) *That the statement of the deceased to his son was inadmissible under section* 32 *of the Evidence Ordinance, but was admissible under section* 6 *as forming part of the* res gestae.

(4) *That as the Trial Judge in his charge suggested that the accused or anyone of them may by reason of self-induced intoxication have been incapable of forming a murderous intention he should have pointed out, that* (*a*) *if the Jury thought that there*

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was no murderous intention but merely knowledge that their acts were likely to cause death, the offence was one only of attempted culpable homicide not amounting to murder (b) that if knowledge was not established the offence was one of voluntarily causing hurt.

(5) *That as it appeared from the charge that the directions on common intention did not make it clear to the Jury that to convict all the accused of the offence of attempted murder, each one of them at the time of the assault was actuated by a common intention not only to beat the injured man, but also to cause his death, or such bodily injuries as were sufficient to cause death, the conviction for attempted murder should not be allowed to stand.*

REX *vs.* HERAS HAMY AND TWO OTHERS ... ... XXXIII. 91

Indictment for murder—Plea of self-defence—Failure of Trial Judge to comment on matters vital to defence—Misdirection—Remarks prejudicial to accused.

The appellant was indicted with murder by shooting but was convicted of culpable homicide not amounting to murder—Jury indicating that he exceeded the right of private defence—None of the prosecution witnesses saw the shooting but the appellant admitted causing the two injuries on the deceased which according to expert evidence had been caused by gunshots fired from 70 and 10-15 feet respectively. The appellant further stated that he set out to go to Point Pedro with a gun when the deceased came with a sword calling on him to stop. Appellant hurried away to escape and at the same time loaded his gun. He warned the deceased and when deceased was about 46 feet fired the 1st shot. The deceased continued to come on and when appellant found he could not retreat any further owing to a deep ditch, he fired the 2nd shot (fatal) at a distance of 6 to 10 feet, as he feared he would be killed. The learned Trial Judge (*a*) failed to comment on the expert evidence which would have furnished the Jury with the range at which each of the shots was fired.

(*b*) inadvertently made an error in stating the distance at which the 2nd shot was fired leaving a possible impression that the shot was fired at a distance three times as great as the actual distance.

(*c*) failed to point out that the further retreat of the appellant was prevented by the deep ditch.

Held: (1) *That these amounted to misdirections on a matter vital to the defence and the conviction could not be allowed to stand.*

(2) *That, when an accused had been indicted separately with the murder of another person on the same day and acquitted after trial, a reference to such "murder," by the Trial Judge in his charge without pointing out to the jury that he had been acquitted, may cause considerable prejudice in the minds of the Jury against the accused.*

REX *vs.* K. MUTTU ... ... XXXIII. 99

Charge of attempt to murder—Verdict of voluntarily causing grievous hurt—Failure on the part of Trial Judge to direct that a verdict of causing grievous hurt on sudden and grave provocation possible—Alteration of conviction.

The appellant was charged with the offence of attempt to murder. The Jury's verdict was that he was guilty of voluntarily causing grievous hurt. Further the Jury indicated that in their opinion there was "latent provocation." The learned Trial Judge failed to direct that it would be possible for them to return a verdict of causing grievous hurt on grave and sudden provocation.

Held: *That in the circumstances, the conviction should be altered to one under section* 326 *of the Penal Code and that a sentence of two years' rigorous imprisonment would be sufficient.*

REX *vs.* M. G. P. FERNANDO ... XXXIII. 101

Appeal from sentence.

Held: *That, where a plea of culpable homicide not amounting to murder was accepted, and the evidence recorded by the Magistrate indicated that the accused exceeded his right of self-defence and that he fatally injured the paramour of his mistress when trying to break into his house, a sentence of four years' rigorous imprisonment would be adequate.*

REX *vs.* K. PUNCHIRALA ... XXXIII. 102

Indictment for murder—Several accused—Statement to Magistrate by one accused implicating others—Admissibility of such

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statement at trial—Assigned Counsel—Conflict of defences during trial—Assignment of separate Counsel—Prejudice to accused—Duties of assigned Counsel when defences appear to conflict.

Held: (1) *That a statement, made by a co-accused to the Magistrate in the course of his inquiry implicating the other accused; could be taken into consideration by the Jury, where such co-accused gave evidence re-affirming in effect the statement made to the Magistrate, provided that the Judge gave a proper direction to them on the question of corroboration.*

(2) *That where several accused, charged with murder, were defended by one assigned counsel and one of the accused, contrary to instructions given to his counsel, got into the witness-box and gave evidence implicating the other accused, whereupon the court assigned his defence to another counsel, such accused could not be said to have been unrepresented till the 2nd counsel took over.*

REX *vs.* H. PUNCHI BANDA AND TWO OTHERS ... ... XXXIII. 110

Joinder of three charges of murder in one indictment—Desirability of such joinder—Permissibility—Criminal Procedure Code, section 179 (1) and 180 (1)—Discretionary power of the Judge.

The accused-appellant was convicted on three charges of murder included in one indictment. Before the trial commenced counsel for the accused objected to the joinder, but the Trial Judge allowed it as the evidence in the case was so interwoven that it was difficult to separate the three charges. It was argued in appeal that the joinder was not permissible, and that, even if permissible, it should not have been allowed in the particular case as it caused prejudice to the accused.

Held: (1) *That the practice of including more than one charge in an indictment for murder is not a desirable one; but*

(2) *That on the facts of the present case, the joinder was legally permissible either under section* 179 (1) *or under section* 180 (1) *of the Criminal Procedure Code, and that the permission of such joinder was a matter within the discretion of the Trial Judge.*

REX *vs.* A. PEDRICK SINGHO ... XXXIV. 5

Evidence—First complaint of an offence—When admissible—Criminal Procedure Code, section 121—Evidence Ordinance, sections 32 and 157—Court of Criminal Appeal Ordinance, section 5, proviso to—

Held: (1) *That the 1st information given under section* 121 *of the Criminal Procedure Code is admissible under section* 157 *of the Evidence Ordinance provided* (a) *that the information is not based on hearsay, unless hearsay matter is relevant to explain conduct,* (b) *that the informant is called as a witness, except when tendered under section* 32 *of the Evidence Ordinance.*

(2) *That as no substantial miscarriage of justice to the accused had occurred, the appeal should be dismissed under the proviso to section* 5 *of the Court of Criminal Appeal Ordinance.*

REX *vs.* RAMU KARTHIGESU *alias* CHELLIAH ... ... XXXIV. 10

Appeal against sentence—Charges relating to matters arising out of the same transaction—Punishment—Penal Code, section 67.

The two appellants were convicted under six counts for offences committed in the course of the same transaction. The sentences imposed were ordered to run consecutively, but the total of the sentences did not exceed the total which could have been passed for the most serious of those offences.

On appeal against the sentences the Court expressed the view that it would be better in such cases to make sentences run concurrently and varied the sentences giving effect to the opinion of the presiding Judge that the accused merited a sentence of at least ten years.

REX *vs.* R. P. D. HOTHA AND ANOTHER ... ... XXXIV. 11

Indictment for murder—Plea of self-defence—Charge to the Jury—Absence of direction on intention referred to in Exception 2 to section 294 of the Penal Code.

Held: (1) *That the "intention" referred to in Exception* 2 *to section* 294 *of the Penal Code is a special kind of intention and its meaning should be adequately explained to the Jury.*

(2) *That where the Jury were not given the opportunity of considering its special meaning and when it appears that in*

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bringing a verdict of murder the Jury could well have had the impression from the charge that, if they found in fact, more harm was done than necessary for the purpose of defence, the proper verdict was that of murder, and not culpable homicide not amounting to murder, the latter verdict should be substituted for the former.

REX *vs.* G. L. KIRINELIS ... XXXIV. 13

Verdict of Murder—Presence of facts disclosing basis for plea of grave and sudden provocation—Failure of Trial Judge to direct Jury to consider such plea—Substitution of lesser offence.

The evidence disclosed elements of a plea based on the fact that the applicant had lost his power of self-control by reason of grave and sudden provocation. The learned Judge in his charge referred to this plea in dealing with the possible defences available to the applicant, but failed to ask the Jury to consider the facts and decide thereon. The Jury by a majority of 5 to 2 brought in a verdict of murder.

Held: *That in the circumstances, the conviction for murder should be set aside and a conviction for culpable homicide not amounting to murder should be substituted therefor.*

REX *vs.* PREMARATNE ... XXXIV. 32

Indictment for murder—Counsel assigned for defence—Absence of retained counsel at trial—Failure to give adequate explanation of such counsel's absence—Trial ordered to be proceeded with—Defence conducted by assigned counsel—Conviction—Validity—Miscarriage of Justice.

The accused was indicted with murder and counsel was assigned for his defence. When the case was taken up for trial counsel said to have been retained by the accused was absent presumably because the trial date had been advanced and no good cause was shown why retained counsel, if any, was absent. The trial proceeded, assigned counsel representing the accused, who was convicted of culpable homicide not amounting to murder.

Held: *That in the circumstances, it could not be said that the accused did not have a fair and proper trial.*

REX *vs.* PERERA ... ... XXXIV. 35

Private defence—Exceeding the right—Puzzling verdict by Jury.

The accused was indicted with attempt to murder and his defence was that he inflicted the injuries on the deceased in self-defence.

The Jury returned after considering their verdict (which was a 5 to 2 one) and on being questioned by the clerk of the Assize as to whether the accused was guilty or not of attempted culpable homicide not amounting to murder the Foreman answered "No." They were then asked whether the accused was guilty of a lesser offence, and the answer was "he has exceeded the right of private defence." The Court then said "Then do you find him guilty," and the Foreman replied "definitely not."

Thereupon the Court having explained that if the accused exercised the right of private defence and did not exceed the right, then he is not guilty, but if he exceeded the right of private defence he is guilty, asked the Jury to retire again. On their return after reconsideration they replied that they were unanimous that the accused was guilty on the ground that he "exceeded the right of private defence to a certain extent." The Court accepted this verdict and the accused was sentenced.

Held: *That the verdict was a puzzling one and that since the Jury found that occasion for self-defence arose, it could not be said having regard to the injuries inflicted, that the accused exceeded his right of private defence.*

REX *vs.* J. A. SIMON WIJERATNE... XXXIV. 75

Evidence—Statement alleged to have been made by person not called by Crown elicited in cross-examination from prosecution witness—Denial of statement by such person when called by defence—Effect of such denial.

Held: *That, where a statement alleged to have been made by a person, who was not called as a witness by the Crown, is elicited in cross-examination from a prosecution witness, and later such person, when called by the defence, denied having made such statement, the Jury ought to be told that there is no substantive evidence of such statement before them and that such testimony should not be considered by them.*

REX *vs.* A. H. M. CASSIM ... XXXIV. 77

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Verdict guilty of murder—Evidence disclosing elements of defence of grave and sudden provocation—Failure on the part of Trial Judge to give adequate direction thereon.

Held: *That where in the absence of an adequate direction by the learned Trial Judge to the jury on the defence that the act was committed when the accused had lost his power of self-control by reason of grave and sudden provocation, when the elements of such defence was disclosed in the evidence, the conviction for murder cannot stand and a verdict of culpable homicide not amounting to murder should be substituted.*

REX *vs.* W. PREMERATNE *alias* BANDA ... ... XXXIV. 81

Conviction for murder—Direction to Jury by Trial Judge not to consider verdict of culpable homicide—Misdirection.

The four appellants were convicted of murder. The defence was that the second accused inflicted some injuries on the deceased in the exercise of the right of private defence, and that later some other persons—not the other accused—came and joined in the attack on the deceased. The learned Trial Judge asked the Jury to consider whether any of the accused were guilty of murder or of voluntarily causing grievous hurt. Further he said that the verdict of culpable homicide not amounting to murder did not arise for consideration in this case.

Held: *That, in the circumstances, the learned Trial Judge's direction to the Jury that they should not consider the verdict of culpable homicide amounted to a misdirection.*

REX *vs.* JEEMONIS FERNANDO AND FOUR OTHERS ... ... XXXIV. 95

Conviction for attempted murder by stabbing—Excessive sentence—Age and character of accused.

The appellant, who was 25 years of age and with no record of previous offence of violence committed by him, was convicted of attempted murder by stabbing with a knife and was sentenced to 15 years' rigorous imprisonment.

In passing this sentence the learned Trial Judge took into account the fact that the stabbing was without premeditation, but appeared to have inferred—

(*a*) that the knife used by the appellant was a kris knife (when the evidence was not quite clear on the point).

(*b*) That the possession of the kris knife was indicative of his violent temper.

(*c*) That the use of the knife in the way he did showed that the slightest provocation was sufficient for the appellant to use the knife.

Held: *That in the circumstances, a sentence of* 15 *years' rigorous imprisonment was excessive and a sentence of five years' rigorous imprisonment should be substituted.*

REX *vs.* WARNAKULASURIYA ALPHONSO *alias* ISTHEGU ALPHONSO XXXV. 7

Conviction for murder—Evidence of grave and sudden provocation—Withdrawal of the issue from the Jury—Effect.

Held: *That, where there was evidence of grave and sudden provocation, but the learned Trial Judge withdrew that issue from the Jury, a conviction for murder cannot stand and a verdict for culpable homicide not amounting to murder should be substituted.*

REX. *vs.* K. G. MICHAEL XXXV. 15

Penal Code, sections 79 and 296—Evidence Ordinance, section 105—Accused indicted for murder—Defence of drunkenness—Effect of intoxication on the intention of accused—Burden of proof—Direction to Jury.

The accused was indicted upon a charge of murder. There was some evidence for the prosecution that he was smelling of liquor. The Trial Judge directed the Jury that the burden was on the accused to prove that he was so drunk as not to be able to form the necessary intention. It was contended, in appeal, that such an observation was a misdirection, and that it was the duty of the prosecution to prove that in spite of the intoxication, the accused had a murderous intention.

Held: (1) *That section* 79 *of the Penal Code provided an exception to the general rule that a man is presumed to intend the natural and inevitable consequences of his act.*

(2) *That the burden of proving that the accused came within the benefit of such exception and that he was in such a state of intoxication as to be incapable of forming a murderous intention was on the defence.*

(3) *That a direction to the Jury placing the burden of proof, in such circumstances, on the accused was a proper direction.*

REX *vs.* VELAIDEN ... ... XXXV. 49

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Evidence—Joint conviction of four persons for murder—Sufficient evidence against one, unsatisfactory evidence against the rest—Common intention—Absence of evidence of a pre-arranged plan—Penal Code section 34.

Four persons were jointly convicted of murder, the only evidence being that of a young boy, and the deceased's dying declaration. In the latter, the deceased made no mention of the participation in the assault, of the 2nd, 3rd and 4th accused. The boy stated that after the 1st accused dealt a blow, which medical evidence proved to be fatal, the others joined in the assault of the fallen man. He did not, however, mention this to the first person who appeared on the scene, and the statement itself was made to the Police after some delay. There was no evidence of a pre-arranged plan.

Held: *That, in the circumstances, a common intention to murder cannot be inferred in order to sustain the conviction against the 2nd, 3rd and 4th accused.*

REX. *vs.* SUMATHIPALA AND OTHERS XXXV. 75

Misdirection—Penal Code, section 294—Conviction for murder—Defence of grave and sudden provocation—Mere abuse unaccompanied by physical acts—Omission in directions to Jury—Validity of conviction.

In a charge of murder, the accused pleaded grave and sudden provocation, caused by mere abuse unaccompanied by physical acts. In the address to the jury, the Trial Judge appeared to have drawn attention mainly to the fact whether the act committed was proportionate to the provocation, without definite directions that mere abuse may, in the circumstances, amount to sufficient provocation.

Held: *That the failure to instruct the jury that mere abuse may amount to sufficient provocation was a misdirection.*

REX *vs.* PATHIRANAGE KIRIGORIS XXXV. 77

Penal Code, section 297—Verdict of culpable homicide not amounting to murder—Intention and knowledge—Jury's explanation of decision—Doubt—Sentence.

The Jury, in returning a verdict of culpable homicide not amounting to murder, stated that "they found the accused inflicted an injury which was likely to cause death without a murderous intention." The Trial Judge passed a sentence of twelve years rigorous imprisonment.

Held: *That where there was doubt whether the Jury appreciated the real distinction between intention that the act was likely to cause death and knowledge that the act was likely to cause death, the accused was entitled to the benefit of the doubt.*

The Court reduced the sentence to ten years' rigorous imprisonment to bring it within the second part of section 297 of the Penal Code.

REX *vs.* PUNCHIAPPUHAMY XXXV. 101

Penal Code, sections 140, 146 and 296—Charge of unlawful assembly with robbery as the common object—Second count of committing murder in prosecution of the common object—Omission of the second part of section 146 of the Penal Code in the indictment—Charge to jury based on second part of section 146—Can conviction be sustained.

Six accused were indicted on charges of being members of an unlawful assembly, the common object of which was to commit robbery and of having committed murder in prosecution of that common object on the first ground set out in section 146 of the Penal Code. The charge to the jury was based on the second ground set out under that section, namely, that if the members of the unlawful assembly knew that murder was likely to be committed in prosecution of the common object they would be guilty of murder. Five of the accused were convicted on the charges of unlawful assembly and murder.

Held: *That as an accused person is entitled to know with certainty and accuracy the ground on which it is sought to make him criminally liable for a murder committed by another the conviction could not stand in the absence of an indictment setting out the second ground under section 146 of the Penal Code.*

REX *vs.* PANNILAGE GABO SINGHO AND OTHERS ... ... XXXVII. 43

Application for leave to appeal made long after the prescribed period—In what cases the Court will grant an extension of time.

Held: *That the Court of Criminal Appeal will grant an extension of time for an application for leave to appeal only in very special circumstances.*

REX *vs.* SILVA AND ANOTHER XXXVII. 56

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Charge of murder—Defence of sudden fight—Evidence tendered in support—Opinion on question of fact expressed by Judge—Probability of misunderstanding by jury—Can verdict of guilty of murder be maintained.

In a trial for murder, in the face of strong evidence, the jury rejected the defence of sudden fight, raised by the prisoner. It appeared that an opinion on a question of fact, expressed with some emphasis by the Trial Judge, had been misunderstood by the jury as a direction on a question of law, and that they had concluded that even on the facts as stated by the defence, the accused was not entitled to the benefit of the plea of sudden fight.

Held: *That on a proper consideration of the evidence, the jury should have accepted the defence raised by the accused.*

REX *vs.* HEWAGE ROMEL XXXVII. 70

Who is an accomplice—Question for jury—Corroboration of evidence—Failure of Judge to warn Jury—Misdirection—Fresh trial.

The accused was charged with the murder of the deceased by shooting him with a gun. The only evidence, excepting the statements of the deceased, was that of the only eye-witness, one Ran Banda. It was suggested by the defence that Banda was an accomplice in that he inveigled the deceased to be shot by the accused. The presiding Judge did not consider him an accomplice and failed to direct the jury to consider whether or not Ran Banda was an accomplice.

Held: (1) *The question whether or not a witness was an accomplice is one for the jury to decide.*

(2) *The omission of the Trial Judge to direct the jury to consider this question, and to warn them not to act upon this witness' evidence without corroboration, if they considered him an accomplice, was a misdirection.*

THE KING *vs.* PIYASENA ... XXXVIII. 30

Conviction for murder—Accused found running away from the scene with blood stained knife—Observation by Trial Judge on the failure of accused to explain his conduct.

Where the Trial Judge in his charge to the jury referred more than once to the failure of the accused to explain his conduct in running away with a blood stained knife from the direction of the scene of the murder.

Held: *That the conduct of the accused in the circumstances needed explanation and that the comment of the Trial Judge on the failure of the accused to give evidence was both legitimate and necessary.*

REX *vs.* DARA KANKANAGE GILBERT ... ... XXXVIII. 96

Witness of tender years—Affirmation—Trial Judge satisfied regarding competency—Value of such evidence—Common intention to murder—When motive is relevant.

Held: (1) *That where a Trial Judge, on being satisfied that a boy of five years was a competent witness, affirmed him before he gave his evidence, no complaint against the reception of such evidence can be entertained.*

(2) *That where the Crown relies on an alleged motive to prove community of intention and make one person liable for the injuries inflicted by another, the question of motive deserves some consideration.*

(3) *That the fact, that two persons have motives for killing a third party, does not necessarily prove common intention.*

REX *vs.* DINGO *et al* ... XXXIX. 52

Conviction for murder—Evidence of witness in examination in chief and cross-examination supporting plea of provocation—Questions by Trial Judge reminding witness of evidence before the Magistrate having the effect of rebutting such plea—Caution by Judge not to consider the witness' evidence given in answer to him—Likely prejudice in spite of caution.

The accused who was charged with the murder of his wife admitted the stabbing but pleaded grave and sudden provocation. At the trial, the mother of the deceased, whose evidence in examination and cross-examination seemed to support this plea, was examined by the Judge who reminded her of her evidence before the Magistrate that the accused threatened to kill the deceased a week before the stabbing, whereupon she asserted that her evidence before the Magistrate was true, and that she even made an entry at the Police station (which was not produced at the trial) regarding the threat. The jury found the accused guilty of murder.

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Held: *That the evidence of the witness given in answer to questions from Court must have prejudiced the Jury in spite of the Judge's warning not to consider that evidence and that the proper verdict was one of culpable homicide not amounting to murder.*

REX *vs.* M. R. PERERA *alias* M. A. PERERA ... ... XL. 1

Charge of murder against two accused—Conviction of the first of murder and acquittal of second—Injuries on deceased caused by katty and knife—No definite proof that fatal injury was caused by first accused—Unreasonableness of verdict—Reduction of offence to one of attempted murder—Value to be attached to an accused's unsworn statement from the dock regarding other accused.

Where two accused were charged with the murder of a person on whose body were found several incised injuries, only one being fatal, and the first accused was convicted of the charge, while the second was acquitted by the Jury and there was no evidence to eliminate the fact that the second accused may have caused the fatal injury.

Held: (1) *That the offence committed by the first accused was one of attempted murder.*

(2) *That a statement made by an accused person from the dock cannot be taken into account in considering the case against his co-accused.*

REX *vs.* LIYANAGE SIMEION ... XL. 6

Charge to the Jury—Direction that 'as a matter of law' the Jury must not pay attention to evidence of accused's good character—Misdirection.

Held: *That it was a misdirection to tell the Jury "as a matter of law" that they "must not pay the slightest attention" to the evidence of the accused's good character.*

REX *vs.* GUNATILAKE ... XL. 31

Accused convicted of murder of his wife's paramour—Plea of provocation—Evidence that accused's wife lived with paramour for one month before offence—Production by prosecution of document referring to agreement by accused and wife to cancel marriage—No legal proof of document—Charge to Jury based on statements in document—Retrial.

Where the accused was charged with the murder of the man with whom the accused's wife was living at the time of the incident and one of the pleas of the accused was that the act was committed under grave and sudden provocation and the Judge directed the Jury on the basis of certain statements in a document not properly proved by the prosecution which statements had the effect of negativing the plea of provocation and there was no other evidence to support the direction negativing the plea of provocation.

Held: *That the conviction for murder could not stand as it was difficult to say that the Jury would have refused to entertain the plea even if the document was not read and the Trial Judge abstained from making the observations based on the document.*

REX *vs.* RETIGAHALANDEGEDERA RAN BANDA ... ... XL. 33

When may deposition of an absent witness be read in evidence—

In a trial before the Assizes an application was made by the Crown to read in evidence under the provisions of section 33 of the Evidence Ordinance the depositions of four witnesses, recorded during non-summary proceedings by the enquiring Magistrate. Evidence, uncontested by the defence, was led to show that the four witnesses were presently at Tokyo, Bangkok, Singapore and Calcutta respectively. Counsel for the defence opposed the application on the ground that there was no evidence before Court that efforts had been made to secure the personal attendance of the witnesses in question. The application was allowed, the presiding Judge holding that such evidence was unnecessary and that on the material available the Court was satisfied that the presence of the witnesses could not be obtained without an amount of delay and expense which, under the circumstances of the case, was unreasonable. In appeal it was argued on behalf of the defence that the depositions were improperly admitted.

Held: (1) *That the discretion of the Trial Judge was exercised on insufficient material inasmuch as there was no evidence of the actual delay and expense that would be involved in securing the attendance of the witnesses in question.*

(2) *That as the evidence of the witness presently in Calcutta was of a vital*

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nature, the delay and expense involved in securing his attendance was not unreasonable under the circumstances of the case, and that steps should have been taken by the Crown to secure his attendance at the Trial.

REX *vs.* FERNANDO ... ... XL. 55

Statements made by accused, partly incriminating him, partly exculpating him—Should the Court accept or reject such statements.

Held: *That if a confession made by the accused contains matter which incriminates him as well as matter favourable to him, the Court should accept the confession as a whole, though the Jury may attach different degrees of credit to the different parts.*

THE KING *vs.* SATHASIVAM ... XL. 89

Charge of murder—Penal Code sections 78 and 79—Plea of drunkenness and provocation—Relevancy of evidence of good character of accused—Misdirection.

In a case of murder in which the accused put his character in issue and pleaded that he was so drunk as to be incapable of forming a murderous intention and that he committed the offence under grave and sudden provocation.

Held: (1) *That the intoxication necessary to reduce the offence from murder to culpable homicide not amounting to murder on the ground of absence of a murderous intention need not merely be the degree of intoxication referred to in section 78 of the Penal Code.*

(2) *That where the Judge's direction appeared to give the impression to the Jury that any intoxication falling short of the degree of intoxication contemplated by section 78 of the Penal Code should not be considered in dealing with the question whether a man's susceptibility to provocation was affected by intoxication, it amounted to a misdirection on the Law.*

(3) *That evidence of good character of an accused was relevant to the consideration whether the act of the accused was unprovoked or not.*

THE KING *vs.* HAPITIGE DON MARSHAL APPUHAMY ... ... XLI. 49

Charge of attempted murder in which accused was undefended—Evidence of bad character given by accused—Failure of Trial Judge to warn the Jury not to take inadmissible evidence into account—Retrial.

Where in a case of attempted murder an undefended accused while giving evidence referred to the fact that he had served a term of imprisonment, and where the learned Trial Judge failed to give a specific warning to the Jury that they should not take that evidence into account in arriving at their verdict.

Held: *That in view of the conflicting evidence in the case and the stage at which the inadmissible evidence was introduced, it would have been perhaps better if the learned Judge referred to that evidence and gave a specific warning to the Jury not to take that evidence into account in arriving at their verdict.*

REX *vs.* RAIGAMA BADALGE DINESHAMY ... ... XLI. 72

Questions put to witness by the Trial Judge in the course of the examination in chief, cross-examination and re-examination—Powers of the Judge under section 165 of the Evidence Ordinance.

The accused was charged with the murder of a Police Constable by stabbing. The evidence led by the prosecution proved that the deceased, prior to the stabbing, had attempted to molest a woman named Somawathie living in the same compound as the accused, and that he had refused to go away when the accused asked him to do so. The evidence of the accused's mistress, called by the defence, was to the effect that, when admonished by the accused and asked to leave, the deceased said, "If you are unwilling to allow me to molest this woman, let me have your wife," and that then there was an exchange of blows. In her complaint to the Police, made shortly afterwards, Somawathie referred only to the attempted molestation and not to the subsequent stabbing. In the course of his charge to the Jury the Trial Judge strongly suggested that the accused, his mistress and Somawathie had together "concocted" a false story before Somawathie went to the Police. All through the trial the Judge took a large part in the questioning of the witnesses, both prosecution and defence, during their examination-in-chief, cross-examination and re-examination, in the exercise of his powers under section 165 of the Evidence Ordinance.

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Held: (1) *That the suggestion that a false story had been "concocted" by the accused, his mistress and Somawathie amounted to a misdirection on the facts unsupported by the evidence.*

(2) *That on the evidence the Court was satisfied that the accused had established his right to the plea of grave and sudden provocation.*

(3) *That the Trial Judge had not exercised properly the powers given to him under section* 165 *of the Evidence Ordinance.*

REX *vs.* NANDIAS SILVA ... XLI. 81

Rape—Girl alleged to be under 12 years of age—Proof of age solely by X'ray photograph—Admissibility—Failure of judge to put defence fairly to the Jury—Misdirection.

The appellant was charged with rape of a girl called Asilin, who was alleged to be under 12 years of age. The Crown sought to establish age through the Medical Officer on an X'ray photograph of the girl. Evidence was not led to show that the admitted X'ray photograph was that of Asilin and that the Medical Officer was present when the photograph was taken.

The appellant in his evidence stated that certain witnesses were angry with him because of a certain incident and that he had absconded through fear of bodily harm. The learned Judge in summing up not only failed to draw the Jury's attention to this part of the evidence but indicated to them that the appellant had not assigned any reason for the witness to give false evidence against him.

Held: (1) *That, in the circumstances, the X'ray photograph should not have been admitted in evidence.*

(2) *That the learned Judge's omission to direct the Jury fairly and adequately on the defence amounted to a misdirection.*

REX *vs.* MENDIS ... ... XLI. 103

Conviction for murder—Statement by deceased two or three days prior to death to her mother that appellant made improper suggestion to her—Admissibility of statement—Evidence Ordinance, section 32 (1).

The appellant was found guilty of the murder of a woman named Elizabeth. The mother of the deceased stated in evidence (*a*) that two or three days prior to her death the deceased complained that the appellant made an improper suggestion to her; (*b*) that she did not agree to it and that she did not want him to come to the house; (*c*) that she the witness soon after the complaint went to the appellant and asked him not to come to her house. It was contended in appeal that the statement alleged to have been made by the deceased to her mother was not admissible in evidence under section 32 (1) of the Evidence Ordinance.

Held: *That the statement was admissible in evidence as it indicated some of the circumstances of the transaction which resulted in her death.*

REX *vs.* H. D. M. APPUHAMY ... XLII. 4

Accused charged with unlawful assembly and other offences read with section 146 of Penal Code—Accused acquitted of unlawful assembly but convicted of the other offences read with section 32 of Penal Code—Is conviction proper—Scope of sections 146 and 32 of the Peral Code.

The appellants were charged with being members of unlawful assembly, the common object of which was (*a*) to commit house breaking and robbery (*b*) house breaking by night (*c*) to cause grievous hurt and (*d*) hurt—offences punishable under sections 140, 443, 380, 386, 382 all read with section 146 of the Ceylon Penal Code. The Jury acquitted them on all the charges but under direction from the presiding Judge they brought in a verdict that there was no unlawful assembly but that the offences of housebreaking, robbery, grievous hurt and hurt had been committed by the appellants acting in furtherance of a common intention within the meaning of section 32 of the Penal Code.

Held: *That in the absence of a charge with reference to section* 32 *of the Penal Code the appellants should not have been convicted. Section* 146 *creates a specific offence and deals with the punishment of that offence. Section* 32 *declares a principle of law and does not create a substantive offence.*

REX *vs.* HEEN BANDA AND DAVID SINGHO ... ... XLII. 26

Charges of conspiracy and abetment—Judge's reference in address to the Jury to the alleged date of conspiracy, which was unsupported by the evidence—Also to appel-

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lant's failure in civil case, where issues were similar to the findings of fact in this case—Verdict unreasonable=Prejudice caused to appellant.

The appellant was charged with the offences of (1) conspiracy, (2) abetting another to use as genuine a forged document, (3) abetting another to deceive the accountant of a Bank, and was convicted on the first two counts.

The appellant had on March, 4th 1946, deposited with the assistant shroff of the Bank a large sum of money on a paying-in slip on which he had entered certain details. He received on the same day the counterfoil of the slip P1 which had the seal of the Bank, the letters "MAR" stamped and "PATH" in ink within the circle of the seal alleged to be the initials of the receiving shroff and a signature alleged to be that of the cashier.

The assistant shroff and the cashier denied both the fact of payment and the writings on P1.

The appellant led evidence to show that P1 was not a forged document, that he had sought to purchase a large rubber estate on March 10th and had interviewed the accountant of the Bank on March 13th as his cheque was dishonoured, and had consulted his legal advisers on that day with P1.

The Judge in his charge to the Jury referred to March 13th or 14th as the date on which the appellant caused somebody to forge P1 although the indictment referred to the period of the offence as between the 8th and 15th March.

The Judge also referred to the failure of the appellant to recover the money deposited by him from the Bank in a civil action in the District Court and commented adversely upon the credibility of certain witnesses of the appellant in that case and also upon matters that were irrelevant and prejudicial to the appellant in his trial.

Held: (1) *That it is reasonable to conclude that the Jury found that the appellant had caused somebody to forge P1 on March 13th or 14th as directed by the presiding Judge, and not between the 8th and 15th March, as stated in the indictment and therefore the verdict was unreasonable and could not be supported on the evidence.*

(2) *That the references by the Judge to the civil action were irrelevant and prejudicial to the appellant and that it could not be said definitely as to what view the Jury might have taken had no reference been made to the civil case.*

REX *vs.* FERNANDO ... ... XLII. 56

Dying deposition of deceased—Failure on the part of Trial Judge to give directions regarding degree of reliance to be placed on it—Misdirection—Evidence Ordinance section 32 (1).

Criminal Procedure—Dying deposition—How it should be recorded.

Held: (1) *That where the prosecution relies upon a " dying deposition " to establish a charge of murder, it is imperative that the Trial Judge should adequately caution the Jury that, when considering the weight to be attached to such evidence, they should appreciate that the statements of the deponent had not been tested by cross-examination.*

(2) *That whenever in recording a dying deposition questions are put to the deponent for purposes of elucidation the form of the question as well as of the answer should be precisely recorded.*

Per GRATIAEN, J.—" The method of recording evidence ' in the form of a narrative ' though sanctioned in ordinary cases by section 298 (2) of the Code, seems to be inappropriate to the special case of a ' dying deposition.' "

REX *vs.* ASIRVADAN NADAR ... XLIII. 25

Conspiracy—Prior agreement to commit intended criminal act essential—Abetment of conspiracy—Agreement an essential prerequisite—Where offence consists of series of conspiracies insufficient for indictment to allege a conspiracy—Abetment by facilitation of criminal breach of trust—Joinder of charges—Sections 168 (2), 179, 184 Criminal Procedure Code—Sections 100, 113A Penal Code.

Two accused were charged with acting together with a common purpose for or in committing breach of trust of money, the first accused alone with criminal breach of trust of money, and the second accused with abetting the first accused, offences punishable under sections 113B, 392 and 102, of the Penal Code.

On appeal it was contended on behalf of both the accused that the charge of " conspiracy " was bad in law in that it did not

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allege an "agreement" between them to "act together" in the manner and for the purpose specified.

Held: (1) *That the indictment was bad in law in that it did not allege and was not intended to allege a prior "agreement" between the accused which is essential to the commission of any species of the offence of criminal conspiracy within the meaning of section* 113A *of the Penal Code.*

(2) *That where the indictment preferred a single conspiracy charge and there is evidence of a series of separate conspiracies, the Judge should specifically direct the Jury that there is only one single charge of conspiracy and that it was not competent for them to convict the accused unless they were satisfied upon the evidence that there was one single conspiracy which preceded and motivated the consequential acts which each accused was alleged to have committed.*

(3) *That in a charge of "abetment by conspiracy" under section* 100 *of the Penal Code, an agreement, which is an essential prerequisite of the offence, must be established.*

(4) *That in a charge of abetment by facilitation of criminal breach of trust, the liability of an alleged abettor under section* 184 *of the Criminal Procedure Code to be jointly tried with the principal offender is subject to his right under section* 179 *to claim that not more than three charges of the same kind may be laid against him in the course of a single trial. This right is, as far as the abettor is concerned, not affected by the provisions of section* 168 (2).

Per GRATIAEN, J.—"It seems to us that the words "with or without previous concert or deliberation" were advisedly introduced into the language of Section 113A of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the only form of "agreement" which needs to be proved is an agreement with a "common design."

REX *vs.* COORAY ... ... XLIII. 49

Conspiracy to commit murder—Passages in judge's charge to jury likely to have confused them on the matters to be taken into account in deciding whether one of the principal prosecution witnesses was an accomplice — Misdirection — Proviso to scetion 5 (1) of the Court of Criminal Appeal Ordinance.

The five appellants were convicted by a divided verdict of 5 to 2 on a charge of having conspired to murder two persons, in pursuance of which conspiracy both persons were in fact murdered. The circumstances in which Dias, one of the principal witnesses for the prosecution claimed to be able to testify to certain incidents alleged to have taken place during the crucial period were such as prominently to raise the question whether his evidence should be regarded as that of an accomplice. The jury were not invited by the Trial Judge to consider whether, apart from the evidence of Dias, the guilt of the accused was established by the evidence of the other witnesses called by the prosecution. Certain passages in the charge to the Jury were likely to have led them to think that they need not regard Dias as an accomplice, if in their view, he had been a guilty associate in the original plot but was not a guilty associate in the actual commission of the murders.

Held: (1) *That a guilty associate in a conspiracy to cause the death of someone cannot divest himself of the character of an accomplice merely because he refrained thereafter from participating in the murder which had been planned.*

(2) *That the passages in question amounted to a misdirection which vitiated the conviction unless it could be held that no substantial miscarriage of justice had actually occurred.*

(3) (*By the majority of the Court*) *that it was not a case to which the proviso to section* 5 (1) *of the Court of Criminal Appeal Ordinance should be applied.*

Per GRATIAEN, J.—"In our opinion the proviso to section 5 (1) of the Court of Criminal Appeal Ordinance cannot properly be applied in the case of a divided verdict unless the evidence is of such a character as to justify the reproach that the judgment of the dissenting Jurors was manifestly reverse."

REX *vs.* GUNAWARDENA, CHANDANAHAMY, APPUHAMY, WIJEDASA AND KOVIS SINGHO ... ... XLIII. 95

Charge of unlawful assembly with house-trespass and attempted murder as common objects—Acquittal of accused on charges of house-trespass and attempted murder—Conviction for unlawful assembly and riot-

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ing—Inconsistency—Failure of Judge to put evidence of accused to Jury.

Out of four accused charged with unlawful assembly, with house trespass and attempted murder as the common object one was completely acquitted, while the others were acquitted of house-trespass and attempted murder and convicted of unlawful assembly and rioting. The defence, supported by the accused's own evidence, was not put to the Jury.

Held: (1) *That the evidence on all the counts being the same, the alleged guilt of the accused on the counts of unlawful assembly and rioting was inconsistent with and was negatived by the verdict of acquittal on the connected offences.*

(2) *That the failure of the trial Judge to put to the jury the defence of the accused supported by his own evidence was itself a sufficient ground to quash the conviction.*

REX *vs.* ABEYRATNE ... XLIII. 104

Charge of murder by strangulation—Evidence showing commission of crime by A or B or C—What prosecution has to prove—Charge of murder not proven—Evidence of disposal of body—Can accused be convicted under section 198, Penal Code, though indictment contained no such charge—Criminal Procedure Code section 182.

In a charge of murder by strangulation the evidence disclosed that the person who strangled the deceased might be A,B or C.

Held: *That in order to secure the conviction of A the prosecution had to establish beyond reasonable doubt that the person who strangled the deceased was not B or C.*

Held also: *That a person who was charged with murder only but whose guilt was not proven, could be convicted under section* 198 *of the Penal Code, where there was evidence for the purpose, although the indictment contained no charge under that section.*

REX *vs.* KARUPPIAH SERVAI ... XLIV. 44

Conviction for murder—Two accused—Absence of evidence of pre-arranged plan—Verdict indicating that Jury held each accused responsible for acts of other—Can conviction stand?

The two appellants were convicted of murder. Despite the absence of evidence of any pre-arranged plan between them, the verdict of the Jury indicated that they held each appellant responsible for the acts of the other.

Held: *That the conviction for murder could not stand.*

The appellants were convicted of voluntarily causing grievous hurt.

PONNAMBALAM *et al vs.* THE KING XLIV. 48

Murder charge—Alternative verdict of lesser offence possible—Failure of judge to direct Jury on the lesser offence—Nondirection.

Where in a murder charge the judge failed to explain to the jury the ingredients of the lesser offence of culpable homicide not amounting to murder and did not direct that they could convict the accused of the lesser offence if they were not satisfied that the accused acted with an intention to cause death, but were satisfied that he caused the death of the deceased by doing an act with the knowledge that such an act was likely to cause death.

Held: *That it amounted to non-direction and that the conviction for the lesser offence should be substituted for that of murder.*

REX *vs.* NADAR ... ... XLIV. 64

Appellant convicted of robbery and attempted murder—Concurrent sentence of ten and twelve years of rigorous imprisonment—Appellant under 17 years—Judge unaware of—Youthful offender—Sentence altered to Borstal detention—Relevant material for determining appropriate punishment must be placed before Court by prosecuting authorities—Powers of Court of Criminal Appeal to review sentence—Youthful offenders (Training Schools) Ordinance No. 28 of 1939—Section 4—Meaning of "Criminal habits and tendencies."

The appellant was sentenced to ten and twelve years' rigorous imprisonment for the offences of robbery and attempted murder. The Trial Judge did not know and he was not informed that the appellant was only 15 years and 9 months at that time.

On appeal against sentence, the Commissioner of Prisons at the request of the Court of Appeal reported that the appellant was medically and otherwise suitable for

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Borstal detention and training, and that accommodation could be found at a Training School.

Held: (1) *That the sentence of imprisonment should be altered to one of Borstal detention.*

(2) *That under section 4 of the Youthful Offenders (Training Schools) Ordinance No. 28 of 1939 a Court, in passing sentence on a "youthful offender" convicted of an offence triable only by the Supreme Court, has power to make an order for Borstal detention instead of an order for imprisonment, if it appears to the Court that "by reason of his criminal habits and tendencies," it is expedient that the offender should be subject to detention under such instruction, training and discipline as would be available in a Training School established under the Ordinance.*

(3) *That the appellant was a youthful offender and had exhibited "criminal habits and tendencies" by his conduct in the present case taken by itself, and that a prolonged period of training and discipline in a Training School for youthful offenders was better calculated to give the appellant an opportunity of rehabilitating himself as a useful member of society.*

(4) *That in exercising its jurisdiction to review sentences the Court of Criminal Appeal should not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence. The sentence must be manifestly excessive in view of the circumstances of the case, or be wrong in principle before the Court will interfere.*

REX *vs.* A. G. MARTIN ... XLIV. 94

Accused charged with murder and abetment of—Willing to tender plea of guilt to lesser count—Jury asked by Judge whether or not they would accept the plea—No objection by prosecuting counsel—Jury's return of a verdict instead of answer to the specific question—Correct procedure where accused tenders a plea of guilt to the lesser offence.

The accused who were charged with murder and abetment of murder respectively were willing to tender a plea of guilt to the lesser offence of culpable homicide not amounting to murder and of its abetment. The jury were then invited by the Judge to consider whether or not they would accept this plea after the prosecuting counsel had expressed the view that he had no objection to this procedure. The jury instead of answering the specific question returned a verdict finding them respectively guilty of culpable homicide not amounting to murder and of abetment of that offence.

Held: (1) *That the jury should have answered the specific question put to them and that their verdict was both premature and improper.*

(2) *That the correct procedure to follow when an accused person who had previously pleaded not guilty seeks, after his trial has commenced before a jury empannelled for the purpose, to retract his earlier plea and to tender an unqualified admission that he is guilty of some lesser offence on which a verdict against him may properly be recorded without an amendment to the indictment is as follows:—*

(*a*) *If the Crown is not prepared to accept the plea of guilt in respect of the lesser offence, the case against the accused should proceed normally on the whole indictment;*

(*b*) *If, on the other hand, the Crown intimates its willingness to accept the plea, the presiding Judge must himself decide whether, upon the evidence so far recorded and upon the depositions recorded by the committing Magistrate it would be in the interests of Justice for the Court to accept the plea;*

(*c*) *If the presiding Judge, notwithstanding the Crown's willingness to accept the plea, decides that it should not be accepted by the Court, the case against the accused must proceed on the whole indictment;*

(*d*) *If, on the other hand, the Judge considers that the plea may properly be accepted by the Court, he should invite the jury, in whose charge the accused has been given after they were empannelled to try the case, to state whether they would accept the plea; and the Judge may inform the jury at this stage of the reasons why acceptance of the plea is recommended by him;*

(*e*) *If the jury state that they are willing to return a verdict on that basis, the*

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unqualified admission of guilt of the accused should, if this has not been already done, be recorded in the presence of the Judge and jury; this admission becomes additional evidence on which the jury may act, and they should then be directed to pronounce a verdict accordingly.

REX *vs.* K. SITTAMPALAM *et al* XLIV. 110

Accused charged with murder of three persons—Three separate counts—joinder of murder charges in the same indictment—Function of the Court of Criminal Appeal.

EBERT SILVA *vs.* THE KING ... XLV. 21

Privy Council—Appellant charged with murder of three persons—Three separate counts—No evidence of corpus delicti **of one of the deceased—Defence that missing personal committed the murder—Conviction on all counts—Function of the Court of Criminal Appeal—Court should decide whether sufficient evidence for jury to infer missing person dead and to convict appellant on each count—Not necessary for the Court to consider whether charges have been proved beyond reasonable doubt—Charge fairly put to jury—No misdirection—Joinder of murder charges in the same indictment.**

The appellant was charged in three separate counts with the murder of three persons Muttusamy (count 1), Baby Nona (count 2), Hemalatha (count 3). The Crown could not establish the *corpus delicti* Muttusamy, but led evidence to prove that the three persons had been murdered by the appellant. The defence of the appellant at the trial was that Muttusamy had committed the murder of Baby Nona and Hemalatha, and had disappeared. The jury found the appellant guilty on all three counts.

On appeal in the Court of Criminal Appeal it was argued by the defence (1) that on count 1 there was no evidence that Muttusamy was dead, and (2) that with regard to counts 2 and 3 as the Crown had put forward as the motive for killing Baby Nona and Hemalatha the fact they were privy to the killing of Muttusamy the conviction on these counts could not stand if Muttusamy was not proved to be dead.

The Court of Criminal Appeal held that the death of Muttusamy was not established beyond reasonable doubt, but that there was sufficient evidence to establish beyond reasonable doubt the charges on counts 2 and 3.

On appeal to the Privy Council the counsel for the appellant argued that the Court of Criminal Appeal had exceeded its function by substituting its own verdict for that of the jury, and that the Commissioner at the trial had failed to direct the jury that if they acquitted the appellant on count 1 for lack of evidence of Muttusamy's death, they should approach counts 2 and 3 on the assumption that Muttusamy was alive, and to point out that this was a matter vital to appellant's defence.

Held: (1) *That it was sufficient for the Court of Criminal Appeal merely to have considered whether there was any evidence for the jury to infer that Muttusamy was dead and not to have decided that the death of Muttusamy had not been established beyond all reasonable doubt.*

(2) *That there was clearly abundant evidence to justify a verdict of guilty on each of the counts* 2 *and* 3 *whether Muttusamy was or was not proved to be dead.*

(3) *That it was sufficient for the Court of Criminal Appeal to have considered whether there was any evidence upon which the jury could find their verdict and not to have enquired whether the evidence established the charges on counts* 2 *and* 3 *beyond reasonable doubt.*

(4) *That the charge as a whole was fairly and squarely put to the jury, and the jury had clearly put before them the issue whether the appellant or Muttusamy was the murderer of Baby Nona and Hemalatha, and there was no misdirection by the Commissioner.*

(5) *That the evidence in the present case justified the joinder of all three counts for murder in the same indictment.*

EBERT SILVA *vs.* THE KING ... XLV. 21

Charge of Murder—Death due to septic poisoning caused by injury—"Murder" only if probability of death very great "in the ordinary course of nature"—Section 294, Penal Code.

In criminal cases where the injured man's death is not immediately referable to the injury actually inflicted but is traced to some

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condition, such as septic poisoning, which arose as a supervening link in the chain of causation, the prosecution should, in presenting a charge of murder, be in a position to place evidence before the Court to establish that "in the ordinary course of nature," there was a very great antecedent probability (as opposed to a mere likelihood):—(*a*) of the supervening condition arising as a consequence of the injury inflicted, and also (*b*) of such supervening condition resulting in death.

The words " sufficient in the ordinary course of nature to cause death" in clause 3 of the definition of "murder" contained in section 294 of the Penal Code require that the probability of death ensuing from the injury inflicted was *not merely likely but "very great, though not necessarily inevitable."*

If the evidence establishes that there was probability in a lesser degree of death ensuing from the act committed, the finding should be that the accused intended to cause an injury likely to cause death and the conviction should be culpable homicide not amounting to murder.

REX *vs.* T. C. MENDIS AND A. N. ZOYSA ... ... XLVI. 78

Defence counsel's undue attack on credibility of prosecution witness—Comment by Trial Judge on counsel's conduct in his summing up—Does it cause prejudice.

Where in a trial for murder the Trial Judge expressed the view in his summing up to the jury, that the defence Counsel, in attacking the credibility of the main witness for the prosecution, had exceeded the bounds of decent advocacy and it was urged in appeal that the jury might have been unduly influenced by the strong views of the Judge on the improper conduct of the counsel.

Held: *That in the circumstances of this case, the Judge was merely giving strong expression to his own opinion of the witness' credibility and of the criticisms of the defence Counsel, and had made it clear to the jury that they were not bound by his opinion.*

Per GRATIAEN, J.—"If, in this connection, the lawyer for the defence is so unwise, in the course of his final speech to the Jury, as to make statements of fact unfavourable to a witness which are not borne out by the evidence in the case, we do not doubt that it is the duty of the presiding Judge in his summing-up to remove the effect of such improper statements. This process might well involve some criticism of the conduct of the lawyer concerned.

REX *vs.* (1) KIRIWANTHIE (2) MALHAMY ... ... XLVII. 31

Dying deposition—Must there be corroboration—Judge's duty to caution jury—Evidence Ordinance, section 32 (1)—Accused's failure to give evidence—Adverse comment of Judge—No misdirection in the circumstances of the case.

Where in a trial for murder by stabbing, the accused was convicted on the dying deposition of the deceased as to the circumstances of the transaction, which resulted in his death, and it was contended in appeal that there was misdirection by the Trial Judge on two grounds: firstly, that the learned Judge failed to caution the jury adequately upon the danger of acting on the uncorroborated deposition of the deceased and secondly, that the Trial Judge had observed that the accused had not given evidence, although in view of the nature of the prosecution case, the accused could have given the jury an account of a sudden fight or of grave and sudden provocation which caused him to lose his self control and stab the deceased and that consequently this comment might have led the jury to infer wrongly that the accused was the deceased's assailant.

Held: (1) *That there was on the established facts of the case ample corroboration of the deceased's deposition and that the jury were adequately cautioned as regards the inherent weakness of evidence of this kind.*

(2) *That the view adopted in* In re Guruswami Tevar *A. I. R.* 1940 *Madras at page* 200 *is preferable to the view expressed in* Emperor vs. Akbarali Karimbahai 1933 *A. I. R. Bombay* 479.

(3) *That the comment of the Trial Judge on the failure of the accused to give evidence did not amount to a misdirection as* (*a*) *the jury had been directed that the burden of proof on the accused would arise only if the jury were satisfied that the deceased's assailant was the accused and* (*b*) *that jury had been directed that the onus of proof was on the prosecution to establish the identity of the assailant and the fact that the appellant*

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did not give evidence did not help the prosecution to discharge the obligation.

REX *vs.* B. FRANCIS FERNANDO *alias* LEWIS FERNANDO ... ... XLVII. 101

Murder—Evidence led in rebuttal by the Crown after close of prosecution case—Such evidence available to the Crown before close of case—Evidence allowed in the interest of justice and to impeach credibility of accused—Was it proper—Judge's exercise of discretion under section 237 (1) Criminal Procedure Code—Principles governing it—Burden of proof where accident is pleaded—Section 73, Penal Code.

In a charge of murder by shooting with a gun the presiding Judge allowed the Crown to lead in rebuttal evidence of facts constituting a motive for the alleged murder after the prosecution had closed its case and the accused had given evidence. This was done for the purpose of impeaching the credibility of the accused and in the interest of justice. The evidence led in rebuttal was available to the Crown before it closed its case.

The presiding Judge also in referring to the appellant's evidence that the gun was discharged accidently told the jury that the burden was on the accused to satisfy them, that the accused's version was probably true.

Held: (1) *That there has been a miscarriage of justice resulting from a wrong exercise of discretion by the presiding Judge to allow the prosecution to call in evidence in rebuttal.*

(2) *That the prosecution should not have been permitted to adduce at that stage evidence which, if it was admissible at all, could have been adduced before the appellant entered upon his defence; for the prosecution was thereby enabled to withhold until after the close of the case for the defence an important part of its own case, consisting of the whole of the evidence of a motive and a part of the evidence of the preparation for the commission of the offence charged.*

(3) *That the onus was on the prosecution to prove beyond reasonable doubt that the firing of the gun was not accidental and the appellant would have been entitled to an acquittal even if it was not proved that the injury was the result of an accident but there was a reasonable doubt on that point.*

REX *vs.* V. THURAISAMY ... XLVII. 105

No evidence of sudden fight between accused and deceased—Charge by Judge to Jury that inference of sudden fight justified by accepting portions of evidence and rejecting others—Misdirection—Common intention to kill in a sudden fight—Meaning of — Inadequate direction by Judge—Principles to be followed by Judge in summing-up—Section 296, Penal Code.

The accused (five of them) were charged amongst other offences (of which they were acquitted) with the murder of one G. The Jury brought in a verdict of culpable homicide not amounting to murder on the ground that there was a sudden fight.

The evidence led by the prosecution and the defence did not suggest a sudden fight between the accused and the deceased but the Trial Judge in his charge to the Jury suggested that by rejecting chunks of the evidence for the prosecution and the defence and accepting certain items of the evidence the Jury would be justified in returning a verdict that the killing was caused in the course of a sudden fight between the accused and the deceased.

The Judge also in his direction to the Jury did not tell them how a common intention could have been formed in the circumstances of a sudden fight, and particularly in this case, that the mere presence of the accused was not sufficient; that there was a difference between "similar intention" and "common intention"; that some act must be proved or some act established from which common intention could be reasonably inferred.

Held: (1) *That the verdict was bad as it was based upon facts suspected not proved.*

(2) *That it was not possible for the Jury to arrive at their verdict merely by rejecting chunks of the evidence for the prosecution and the defence and accepting other items of the evidence without resorting to conjecture.*

(3) *That the direction of the Trial Judge to the Jury on the question of common intention was inadequate and that there was no circumstance or act established or spoken to by the witnesses in the case from which common intention could be reasonably inferred.*

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(4) *That the inference of common intention within the meaning of the term in the section should never be reached unless it is a necessary inference deducible from the circumstances of the case.*

In a summing-up a general statement of the law followed by a statement of the facts is undesirable. A Jury is not likely to absorb a long disquisition on the law and the significance to be attached to such disquisition is problematical. What is of importance is that with or without a preliminary general disquisition the Trial Judge should apply the relevant law to the relevant facts in as simple a manner as possible and in the course of the analysis of those facts.

REX *vs.* M. J. FERNANDO *et al* ... XLVIII. 67

Accused charge with attempt to promote feelings of ill-will and hostility between different classes by speech—Speech reproduced from a recording machine—Is document containing speech admissible?—Evidence Ordinance, sections 11, 159, 160—Misdirection by Trial Judge—Meaning of "classes" in section 120 Penal Code—"Capitalist" and "working" class.

The appellant was convicted under section 120 of the Penal Code with attempting to promote feelings of ill-will and hostility between different classes of the King's subjects by a speech. The speech was electrically recorded and reproduced by means of an instrument called the Webster wire recorder and taken down in writing (P4) by one W, which the Crown tendered as evidence of the speech. There was evidence for the Jury to hold that the wire recorder could accurately record a speech and reproduce it.

The indictment did not state what were the different classes of King's subjects contemplated in the charge, but the Crown in its address to the Jury stated that the classes were "capitalists" and "workers" respectively. The Judge in his charge to the Jury did not discuss the term "class" adequately and gave no definition of it and did not tell them that the term "classes" as used in the section must be given a restrictive interpretation and not its ordinary meaning.

It was contended in appeal (1) that (P4) was inadmissible, (2) that the Judge had failed to direct the Jury as to what was meant by (*a*) ill-will and hostility, (*b*) between different classes of King's subjects.

Held: (1) *That P4 was admissible under section 11 of the Evidence Ordinance.*

(2) *That even if the document itself was not admissible, there was before the Jury admissible oral evidence of what was heard by W, from which they could infer what was said by the appellant and was recorded on the machine.*

(3) *That the omission of the Judge to give adequate direction on the meaning of the term "classes" constituted a vital misdirection.*

(4) *That having regard to all the evidence it was not unreasonable for the Jury to hold upon a proper direction that the appellant intended to promote ill-will and hostility between different classes of the King's subjects.*

(5) *The term "classes" in section 120 of the Penal Code must have the characteristics of being reasonably well-defined, stable and numerous; and it is a question for the Jury in each case whether a given class has these characteristics.*

REGINA *vs.* ABU-BAKR ... XLVIII. 107

Murder—Common intention—Proof of complaint to Village Headman—Facts alleged in complaint not proved by prosecution—Hearsay.

Where in a charge of murder the prosecution relied for proof of common intention in part upon evidence of the terms of a complaint made to village headman but did not place before the Jury evidence to prove the facts alleged in the complaint and the trial Judge in summing up drew the jury's attention to the terms of the complaint, pointing out that the prosecution relied on it to establish common intention.

Held: *That the conviction must be set aside as the complaint amounted to inadmissible hearsay, and it was not possible to say that upon examination of all the evidence the Jury without doubt would have arrived at the same verdict if the inadmissible evidence had been excluded.*

THE QUEEN *vs.* YAPA GUNAWARDENA AND YAPA GUNAWARDENA ... XLIX. 62

Evidence of only prosecution witness not trustworthy—Direction to Jury that from failure of accused to give evidence, if they hold evidence of such prosecution witness true, they could act on his evidence—Misdirection.

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Where in a charge to the Jury, in effect they were told that they could legitimately draw the inference that though the evidence of the witness for the prosecution, which taken by itself may not be regarded as trustworthy, in view of the failure of the prisoners to give evidence on their own behalf and contradict that evidence, the evidence of such witness could be deemed to be true.

Held: *That this amounted to a misdirection as the absence of the accused from the witness-box does not make a case more onerous against him or that a prosecution case otherwise not established is proved thereby.*

REG *vs.* W. JAYASENA *alias* HARAMANIS *et al* ... ... L. 26

Penal Code—Murder—Trial Judge recalling witness to speak about certain suggestions made by accused in cross-examining the witness at Magisterial inquiry indicating blow that accused struck caused death of deceased—Denial by witness—Substantive evidence—Admissibility—Direction to jury that such suggestion amounted to an admission by accused and may be acted upon though prosecution witnesses cannot be relied upon—Misdirection.

In a charge for murder the prosecution relied upon the evidence of three alleged eye witnesses whose evidence was unsatisfactory and when the prosecution was about to close its case, the learned Trial Judge recalled one of these witnesses to speak to certain statements made by him at the Magisterial inquiry where the suggestion was made to that witness in cross-examination by the accused, that the accused had struck the blow which caused the death of the deceased. The witness denied that such a suggestion was made to him by the accused and the learned Trial Judge through the clerk of Assizes marked in evidence the portion of the statement in order to contradict the witness and told the Jury that such a suggestion amounted to an admission by the accused and the evidence so elicited may be acted upon though the prosecution witnesses were unsatisfactory.

Held: *That an improper use was made of the statement made by the witness at the Magisterial inquiry as it should not have been treated as substantive evidence and the Jury were misdirected when they were told that the evidence elicited by recalling the witness amounted to an admission by the accused and could be acted upon.*

REG *vs.* S. S. FERNANDO *alias* MARTIN L. 33

COURT OF CRIMINAL APPEAL ORDINANCE

§ 6 (2) Substitution of fresh verdict by Court of Criminal Appeal.

REX *vs.* HEWA WALGAMAGE MENDIAS XIX. 98

§ 8—Principles applicable to the grant of extension of time within which notice of an application for leave to appeal may be given—Leave to add a ground of appeal—Principles governing the grant of such leave.

Held: *That the principles governing the grant of an extension of time within which to appeal should be applied when considering an application for leave to add a ground of appeal.*

REX *vs.* HEMASIRI SILVA ... XXIII. 121

§ 5 (1)

Circumstantial evidence.

Where the case against the accused is not proved with that certainty which is necessary in order to justify a verdict of guilty, the Court will give the accused the benefit of the doubt which they have in their own mind in regard to his guilt and acquit the accused.

REX *vs.* JOHN AND SIX OTHERS ... XXV. 57

§ 5 (1)—Construction of proviso.

REX *vs.* HERAS HAMY AND TWO OTHERS ... ... XXXIII. 91

§ 5—Dismissal of appeal under the proviso —No substantial miscarriage of justice.

REX *vs.* RAMU KARTHIGESU *alias* CHELLIAH ... ... XXXIV. 10

Section 8 (1)—Court of Criminal Appeal Rules 1940, Forms IV and VI—Failure to state grounds in notice of appeal.

Where a ground of appeal not set out in the petition of appeal, or in the supplementary notice setting out a further ground, is raised by the Counsel for the accused at the hearing of the appeal.

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Held: *That the Court will not entertain a ground of appeal not stated in the notice of appeal.*

REX *vs.* BELLO SINGHO AND THREE OTHERS ... ... XXXV. 81

§ 5 (1)—Miscarriage of justice—What amounts to

DHARMASENA *vs.* THE KING ... XLIII. 1

§ 5.

The proviso to § 5 (1) cannot apply to a case where the inadmissible evidence was of such an extremely damaging character and virtually destroyed the defences relied on by an accused.

REX *vs.* SEYADU ... ... XLVI. 46

COURT OF REQUESTS

See also under **APPEAL, JURISDICTION**

Court of Requests—No leave to appeal on facts from a hypothecary decree entered in the Court of Requests is necessary.

CHELLAPPA AND OTHERS *vs.* SELLIAH XX. 20

Order dismissing plaintiff's action on trial date as plaintiff was absent though plaintiff's Proctor present—Is such order justified—Civil Procedure Code section 823.

On the trial date the learned Commissioner made the following order: "Plaintiff absent. Her Proctor is present. Defendant and his Proctor are present. Plaintiff's action dismissed with costs."

Held: *That the learned Commissioner was premature in dismissing the plaintiff's action inasmuch as*

(*a*) *there was no default of appearance for plaintiff.*

(*b*) *issues had not been framed and that it may not have become necessary for plaintiff to give evidence.*

MOTHA *vs.* FERNANDO ... XX. 109

Leave to appeal from judgment—Duty to supply typed copies of proceedings for use of Appeal Court.

Held: *That an application for leave to appeal from a judgment of the Commissioner of Requests must be accompanied by a typed copy of the proceedings for the use of the Supreme Court.*

SIVASAMPU *vs.* PONNAMPALAM ... XXIII. 94

Judgment by default—Later application by defendant to vacate judgment on the ground that no summons served—Refused as affidavit failed to show valid and sound defence—Applicability of § 823 (3) of Civil Procedure Code.

JAMIS *vs.* DOCHINONA... ... XXV. 70

Absence of plaintiff on trial date—Dismissal of action on no excuse forthcoming—Application in revision to Supreme Court to set aside order of dismissal—Revisionary powers of Supreme Court—Civil Procedure Code sections 753, 823 (1), (4), (5) and (6)—Meaning of the word "day" in section 823.

Held: (1) *That, where an action in the Court of Requests was dismissed for want of appearance, the Supreme Court, acting in revision, has no power to direct that the order of dismissal be set aside.*

(2) *That the time at which such an order of dismissal may be made, if no excuse for the plaintiff's absence is forthcoming, is at the time the case is called.*

(3) *That section 753 of the Civil Procedure Code confers on the Supreme Court a revisionary jurisdiction only in cases in which an appeal lay, but for some reason was not taken.*

SABAPATHIPILLAI *vs.* ARUMUGASAMY AND ANOTHER ... ... XXVII. 5

Jurisdiction in action for definition of boundaries—

CHANDRANAYAKE HAMINE *et al vs.* GUNASEKERA *et al* ... XXXIII. 4

Order refusing amendment of plaint—Powers of supreme Court in revision.

PERERA *vs.* AGIDA HAMY AND TWO OTHERS ... ... XXXIII. 86

Action for damages for wrongful possession of half share of land admittedly worth over Rs. 300—Preliminary issue on jurisdiction—Decision in plaintiff's favour—Award of damages—Appeal—Power of Supreme Court to order transfer to District Court—Should objection to jurisdiction and raising

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preliminary issue be regarded as an application to transfer—Courts Ordinance, sections 75 and 79.

The plaintiff sued the defendant in the Court of Requests for damages in a sum of Rs. 290 for wrongful possession of a half share of a land admittedly worth over Rs. 300. Objection was taken to the monetary jurisdiction of the Court and a preliminary issue was raised on that ground. The Commissioner, on the authority of 31 N. L. R. 152, held in favour of the plaintiff and awarded damages on the ground that plaintiff had prescribed to a half share of the land. The defendant appealed.

Held: (1) *That on the facts of the case, it is just and fair that it should be tried by the District Court.*

(2) *That it is open to the Supreme Court on an appeal to order the transfer of the proceedings under section 79 of the Courts Ordinance for the purpose.*

PERERA *vs.* WIJESINGHE AND ANOTHER ... ... XXXIV. 12

Execution of writ—Obstruction to Fiscal—Order under section 330 of the Civil Procedure Code against parties not originally before Court—Is such order appealable—Courts Ordinance, section 36.

Held: *That an order made by a Commissioner of Requests under section 330 of the Civil Procedure Code against persons, who, being not bound by the decree, resisted the execution of a writ by claiming rights, is one having the effect of a final judgment with the meaning of section 36 of the Courts Ordinance.*

ARLIS APPUHAMY AND OTHERS *vs.* ANDRAYES APPUHAMY AND OTHERS ... ... XXXV. 20

Action for damages over Rs. 100 instituted in Court of Requests—Damages assessed at Rs. 60 after trial—Should the matter be referred to Rural Court—Rural Courts Ordinance No. 12 of 1945, section 12.

Held: *That section 12 of the Rural Courts Ordinance No. 12 of 1945 has no application where the actual value claimed by the plaintiff can be determined by the Court only after the conclusion of the case.*

SOPIHAMY AND OTHERS *vs.* ABEYARATNE ... ... XXXIX. 105

Denial of jurisdiction by defendant—Onus on plaintiff.

DAVID SILVA *vs.* BABY NONA ... XL. 16

Jurisdiction—Action for ejectment of defendant who was plaintiff's watcher and in occupation of a room in plaintiff's house free of rent—Value of action.

PONNIAH *vs.* SELLAN ... XLIX. 92

COURTS ORDINANCE

for Contempt of Court *See under* **that heading**

for Rules on Advocates and Proctors *See under* **ADVOCATE, PROCTOR**

§ 17

Advocate guilty of an offence—Conviction for an offence under Ordinance No. 5 of 1910—Is Advocate so convicted unfit to remain on the roll of Advocates.

Held: (1) *That an advocate who is convicted of an offence under section 8 of Ordinance No. 5 of 1910 is not fit to belong to the profession of Advocates.*

(2) *That in hearing a rule against an Advocate on the ground of conviction of a criminal offence the Supreme Court will not allow a conviction which has been affirmed in appeal or against which there has been no appeal to be re-argued on the evidence on which that conviction was based.*

IN *Re* KANDIAH ... ... XXV. 87

Advocate undertaking conduct of defence of accused and receiving part of the fee without having been previously instructed by a Proctor—Does such conduct amount to malpractice.

IN *Re an* ADVOCATE ... XLVI. 56

§ 19

Application for revision before Bench of two Judges—Disagreement—Referred to "another Bench"—Can it go before another Bench of two Judges.

Where a Bench of two Judges hearing an application for revision of a decision made by a District Court, could not agree, and referred the matter to "another Bench."

Held: *That, by virtue of sections 19 (b) and 38 of the Courts Ordinance, the matter should be heard by a Bench of three Judges.*

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Per BASNAYAKE, J.—Section 38 of the Courts Ordinance prescribes how a Bench hearing appeals should be composed but says nothing about the composition of a Bench hearing a matter in revision. In the absence of express provision in that behalf one has to turn to section 21 of the Courts Ordinance which declares:

"Subject to the limitations in that behalf in this or any other Ordinance for the time being in force prescribed, the several jurisdictions and all powers and functions by any such Ordinance conferred upon the Supreme Court may be exercised in different matters at the same time by the several Judges of the said Court sitting apart." This provision is authority for a single Judge of this Court to exercise its powers of revision regardless of whether the Court whose proceedings are revised is a District Court or any other Court.

PABILIS APPUHAMY *vs.* DIAS XXXVIII. 24

§ 31

Applicability of, to case where re-trial is ordered by Court of Criminal Appeal.

Held: *That section* 31 *of the Courts Ordinance does not apply where a re-trial is ordered by the Court of Criminal Appeal.*

Per ROSE,J..... "the words 'committed for trial' should be limited in their application to persons committed for trial by a Magistrate."

REX *vs.* JINASEKERA ... XXXII. 16

§ 36

Supreme Court's powers of revision—Cannot revise an order made under section 133 (5) of the Companies Ordinance.

LAWRIE MUTTUKRISHNA *vs.* CEYLON EXPORTS LTD. ... ... XXIII. 95

Supreme Court can revise an order by a District Judge that an appeal has abated by operation of Rule 4 of the Civil Appellate Rules.

PALANIAPPA CHETTIAR *et al vs.* MERCANTILE BANK *et al* ... ... XXIII. 93

An order by the Court of Requests under § 330 of the Civil Procedure Code against persons who, being not bound by the decree, resisted the execution of a writ by claiming rights, is one having the effect of a final judgment.

ARLIS APPUHAMY AND OTHERS *vs.* ANDRAYAS APPUHAMY AND OTHERS ... ... XXXV. 20

An order of the Court of Requests setting aside a judgment entered by default is not an appealable order.

ANA HABBIBU MOHAMADO *et al vs.* KAWANNA HAMMEDU LEBBE MARIKAR ... ... XXXV. 39

Application of—Failure to comply with section 54 of the Wages Board Ordinance.

M. G. PERERA *vs.* THE INSPECTOR OF LABOUR MATUGAMA ... XL. 17

§ 37

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

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

WIJESINGHE (INSPECTOR, C. I. D.) *vs.* MATHER ... ... XV. 34

Where a magistrate has convicted and sentenced an accused person to a term of imprisonment the Supreme Court can under section 37 of the Courts Ordinance direct the magistrate to deal with the accused under section 325 of the Criminal Procedure Code.

FERNANDO *vs.* ALWIS ... XXIV. 135

Powers of Supreme Court to act in revision where appeal which lies is not taken.

ATTORNEY GENERAL *vs.* PODISINGHO ... ... XLII. 110

§ 38

Application for revision before bench of two Judges — Disagreement — Refered to

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"another bench"—Can it go before another bench of two Judges.

PABILIS APPUHAMY *vs.* DIAS XXXVIII. 24

§ § 38, 48A and 51—Constitution of Bench thereunder.

SELLAPPAH *vs.* SINNADURAI AND OTHERS ... ... XLVI. 17

§ 42

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

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

FERNANDO *vs.* REX ... ... XVI. 13

The words " other person or tribunal" in section 42 of the Courts Ordinance must be understood to mean person or tribunal under a duty to act judicially.

DANKOTUWA ESTATES CO., LTD. *vs.* THE TEA CONTROLLER ... XIX. 41

Writ of Quo Warranto to question election of the Chairman of an Urban Council.

DE SILVA *vs.* DE SILVA ... XXI. 41

Writ of Certiorari—Does writ lie to quash an order made by an Election Judge.

A. E. GOONESINGHE APPLICANT XXIII. 41

Circumstances in which a mandate in the nature of a writ of prohibition will be issued.

WICKRAMANAYAKE *vs.* NAGALINGAM D. J. KANDY ... ... XXVIII. 111

The Controller of Textiles, in making an order under regulation 62 of the Defence (Control of Textiles) Regulations acts judicially and is a "person or tribunal" within the meaning of § 42. The "eiusdem generis" **rule cannot be applied in the interpretation of the words "or other person or tribunal" in § 42. The words "according to law" should be interpreted to mean "according to English law"**

MOHAMED THASSIM *vs.* CONTROLLER OF TEXTILES ... ... XXXIV. 42

Jurisdiction of Supreme Court to issue writs of certiorari **on person like the Controller of Textiles—Meaning of "other person or tribunal" and "according to law."**

NAKKUDA ALI *vs.* JAYARATNE XLIII. 33

§ 43

Application for retransfer of case transferred by fiat of the Attorney-General. Criminal Procedure Code sections 262, 265 and 274.

Held: *That the fact that* 40 *out of a list of* 109 *jurors were members of the club, the funds of which the accused was indicted for embezzling, was a good ground for not retransferring the case which was transferred by the fiat of the Attorney-General to a venue other than that at which it should have been normally tried because it may not be possible in the present state of the law to draw a panel of jurors to the entire exclusion of the members of the club.*

THE KING *vs.* LUDOWYKE ... III. 41

§ 62

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

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

AMIJEE AND OTHERS *vs,* LEWIS AND OTHERS ... ... XVI. 114

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§ 68

An application under section 68 for conferring sole testamentary jurisdiction or for the transfer of a testamentary action is a testamentary proceeding for the purposes of stamping.

IN *Re* THE ESTATE OF HARRY DOUGLAS GRAHAM ... ... XX. 44

Estate in Ceylon of British domiciled person—Application for sole testamentary jurisdiction by executor resident in Ceylon—Power of Court to entertain application.

IN *Re* BERESFORD BELL ... XXXVI. 7

§ 68—meaning of "it shall be lawful"

IN *Re* WILLIAM SWIRE ... XXXVII. 105

Interpretation of words " it shall be lawful"—Application for order conferring sole testamentary jurisdiction — Alternative procedure provided for in British Courts Probates (Re-Sealing) Ordinance—Has the applicant for probate or letters of administration option to decide which procedure to adopt.

Held: (1) *That section 68 of the Courts Ordinance confers on the Supreme Court a power coupled with a duty to exercise that power when called upon to do so, subject to its discretion as to the District Court on which it will confer sole and exclusive testamentary jurisdiction.*

(2) *That the Supreme Court has the power under section 68 of the Courts Ordinance to make an order conferring sole testamentary jurisdiction on a District Court in cases falling within the ambit of the British Courts Probates (Re-Sealing) Ordinance.*

(3) *An applicant is free to choose whether to make his application before the Supreme Court under the Courts Ordinance or the District Court under the Re-Sealing Ordinance.*

IN *Re* CHARLES WILLIAM NOBLE XXXVIII. 44

§ 75

Partition Action—Defendants resident within the jurisdiction of different Courts—Where may action be brought.

Held: *That 'a party defendant' and in* § 9 *(a) of the Civil Procedure Code means 'any party defendant' and a partition action may be brought in any District Court wherein any party defendant resides.*

TIRIMANDURA *vs.* DISSANAIKE 2 N. L. R. 290 (OVER-RULED.) HUSSEN *vs.* PEIRIS *et al* ... ... II. 53

§ 78

An order of the Court of Requests setting aside a judgment entered by default is not an appealable order.

MOHAMADU *et al vs.* MARIKKAR XXXV. 39

§ 79

Action in Court of Requests for damages for wrongful possession of half share of land admittedly worth over Rs. 300—Appeal—Power of Supreme Court to order transfer of case to District Court.

PERERA *vs.* WIJESINGHE AND ANOTHER ... ... XXXIV. 12

Tenancy action in the Court of Requests—Prayer for ejectment—Tenant in arrears—Tenant's claim in reconvention for rent charged in excess of authorised rent—Tenant's claim beyond jurisdiction of Court of Requests — Application for transfer to District Court.

The plaintiff in the Court of Requests sought to eject his tenants under section 13 (1) of the Rent Restriction Act for being in arrears of rent. The tenants claimed in reconvention a sum of Rs. 1,868 being rent recovered by the plaintiff in excess of the authorised rent.

In an application by the tenant for the transfer of the action to the District Court.

Held: *That the application should be granted.*

WAIDYACHANDRA *vs.* NANAYAKKARE ... ... XLIX .63

§ 87

Injunction

Held: (1) *That section 87 of the Courts Ordinance does not empower a Court to remove a defendant from possession of the subject-matter of an action and to place the plaintiff in possession pending the decision of the action.*

(2) *That a Court's power to grant relief by way of injunction is confined by*

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the provisions of section 87 of the Courts Ordinance.

POUNDS AND ANOTHER *vs.* GANEGAMA ... ... XI. 111

§ 88

Transfer of magistrate—Power of successor to continue proceedings.

WILLIAM PERERA *et al vs.* INSPECTOR OF POLICE MAHARAGAMA ... XLII. 1

COURT RECORD

Loss of—pending an appeal—Application for retrial by appellant—When should retrial be allowed.

GUNASEKERA HAMINE *vs.* ABEYKOON IV. 135

CREDITOR AND DEBTOR

See under **CO-DEBTORS**

DEBTOR AND CREDITOR

CRIMINAL LAW

Penal Code sections 272, 328 and 329—Criminal negligence—What must be proved to establish—Criminal Procedure Code section 183.

Held: (1) *That in order to establish criminal liability the facts must be such that the negligence of the accused goes beyond a mere matter of compensation between subjects and shows such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment. Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence and a very high degree of negligence is required to be proved before the offence is established.*

(2) *That the criminal law principle regarding negligence formulated for cases of manslaughter is applicable to cases of grievous or simple hurt caused by negligence.*

(3) *That acts which by themselves do not constitute negligence, cannot, though they be statutory offences, be regarded as minor offences for the purposes of section 183 of the Criminal Procedure Code.*

LOURENSZ (INSPECTOR OF POLICE) *vs.* VYRAMUTTU ... ... XX. 101

Previous conviction of accused—When should it be taken into account in imposing sentence.

Held: *That a previous conviction is relevant only when a Court has to consider the applicability of some ordinance, such as the Prevention of Crimes Ordinance, and should not otherwise be taken into account in imposing sentence.*

THANGARASA *vs.* THARRONACHARI .XXX 56

Indictment—Offences of conspiracy and of abetment to commit criminal breach of trust—Joinder of charges—Multiplicity of—Prejudice—Sections 113B, 391 Penal Code—Sections 168 (2), 180 (2) Criminal Procedure Code.

Four persons were indicted on several counts, the first count being that they agreed to commit or abet or agreed together with a common purpose for or in committing or abetting criminal breach of trust of money being the property of the National Bank of India, Ltd., Nuwara Eliya and that they did thereby commit an offence punishable under section 391 read with section 113B of the Penal Code.

Counsel objected to the charge on the ground that the count put together four different conspiracies to commit criminal breach of trust of money, and in so far as it referred to abetment it was bad for vagueness and for want of particulars.

Counsel objected to joining in one and the same indictment counts 7 and 8 as these counts alleged commission of an offence separate and distinct from the conspiracy charged in count 1.

Counsel also objected to count 3 in that it sought to charge all the accused with having abetted the second accused in regard to criminal breach of trust of gross sum between two terminal dates. Instead the prosecution should have selected any three items and charged the accused with having abetted the offence of criminal breach of trust in respect of those three specific items only and not more.

Held: (1) *That the objection to count 1 must be over-ruled on the ground that the Crown alleged one single conspiracy between all the accused in which they put their heads together and agreed to act with one single common purpose of design, namely, to misappropriate the money of the Bank and that*

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it was not possible antecedently to allocate to each separate accused a definite part to play.

(2) *That the objection to counts* 7 *and* 8 *and* 3 *cannot be sustained as there was a single conspiracy in furtherance of which at different stages the first, third and fourth accused abetted the second accused in the misappropriation and that at other stages the first accused furthered the common objective of misappropriation by falsifying the documents.*

(3) *That it is permissible under the provisions of section* 180 (2) *of the Criminal Procedure Code to join charges in one and the same indictment where the same facts constitute the offences of conspiracy under section* 113B *and also of abetment under section* 102 *of the Penal Code.*

(4) *That count* 3 *adequately sets out the mode of abetment coupled with section* 100 *of the Penal Code.*

Per CHOKSY, A.J—The principle that seems to emerge from that case is that once there is a charge of conspiracy to commit a certain specified offence all the accused can be charged not only for that conspiracy but also for the various criminal offences committed by the different conspirators individually, or abetted by some of them and committed by others of them, even though all the conspirators may not have been aware of or been party to the various individual offences of their co-conspirators, so long as those offences were committed or abetted in pursuance of that same conspiracy.

REX *vs.* KANAGARATNAM *et al* XLVII. 42

CRIMINAL PROCEDURE

Charge of not paying motor car tax—Admission of non-payment—Is it a plea of guilty.

HUNTER *vs.* ALADIN PERIS ... I. 191

Accused charged with offence not triable summarily—Charge not proved—Offence triable summarily disclosed in evidence in non-summary proceedings—Accused charged and convicted of the summary offences—No evidence recorded afresh on charges summarily triable—Proceedings irregular.

An accused was charged with an offence not summarily triable by a Police Magistrate and the offence was not established but the evidence disclosed offences triable summarily. The magistrate charged the accused with these offences and convicted him without recording fresh evidence or reading over the evidence already given in the non-summary proceedings to the witnesses.

Held: *That this was an irregularity sufficient to vitiate the whole proceeding in the case.*

FERNANDO *vs.* DON PABILIS ... I. 358

Charge of Non-Summary offences,—Accused discharged and tried for Summary Offencees—Procedure to be followed in such a case.

Held: *That an accused who is charged summarily after being discharged on a non-summary charge should be so informed and given an opportunity of defending himself and cross-examining afresh the prosecution witnesses.*

COREA (S. I. POLICE) *vs.* KANAGARATNAM ... ... II. 339

Duty of prosecution in placing evidence before jury.

Held: (1) *That where the Crown does not rely on any portion of the evidence given by a witness for the prosecution at the Police Court inquiry the proper course for the prosecuting counsel to adopt is to omit any reference in his opening to the evidence on which he does not rely and leave it to counsel for the accused to deal with it in cross-examination if he so desires.*

(2) *That the prosecuting counsel should place before the jury all the evidence for the prosecution which he refers to in his opening.*

REX *vs.* KENNEDY ... ... II. 467

Accused charged from summons—Convicted of charge in Police charge sheet but not in summons.

Held: *That the conviction of an accused who was charged from summons on a charge not in the summons but in the police charge sheet filed in Court was bad as it amounted to a conviction for an offence with which the accused was not charged.*

POLICE SERGEANT *vs.* PETER SINGHO *et al* ... ... II. 469

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When may magistrate acquit before hearing entire prosecution case.

KUPASAMY *vs.* SIMON ... II. 515

Withdrawal of action—Fresh plaint—Failure to charge accused and record evidence de novo.

Held: *That where a plaint upon which an accused has been charged is withdrawn and a fresh plaint is substituted a conviction upon the second plaint cannot be sustained if the accused is not charged afresh and the evidence recorded* de novo.

KHAN *vs.* PETER PERERA ... III. 121

Charges of robbery and hurt—Is accused entitled to be acquitted of the charge of hurt on failure of charge of robbery.

Held: *That a person charged with causing hurt while committing robbery can be convicted of voluntarily causing hurt even if the charge of robbery fails.*

AMADORIS *vs.* RAJASIN AND OTHERS. ... ... IV. 19

Evidence recorded in one case—Accused convicted in another case on the evidence so recorded the facts being the same—Is this procedure legal.

Held: (1) *That even though the facts be identical an accused cannot be convicted on the evidence recorded in another case.*

(2) *That before a conviction can be had evidence must be called to support it.*

COREA (S. I. POLICE) *vs.* TIKIRI BANDA ... ... VIII. 110

Criminal trial—Taking of evidence after close of the trial—When such evidence should not be taken—Criminal Procedure Code section 429—Identification of accused—Principles which should be kept in view in testing the evidence given as to the identity of the accused.

Held: (1) *That evidence for the prosecution must not be taken after the case for the prosecution has been closed, when such evidence will have the effect either of filling in a gap left in the evidence or of resolving some doubt in favour of the prosecution.*

(2) *That an identification of an arrested person must be carried out in such a way that not only must the identifying witness be given every reasonable chance of being right but must also be given every reasonable chance of being wrong.*

(3) *That it is suffcient if an accused, without absolutely convincing the Magistrate of his innocence, does enough to produce a reasonable doubt of his guilt.*

VANDENDRIESAN (SUB INSPECTOR) *vs.* HOWWA UMMA ... ... IX. 17

Failure of the Trial Judge to consider the case for the defence—Identification—How should arrangements be made for the identification of an accused by the prosecution witnesses.

Held: (1) *That the Trial Judge must scrutinise the evidence for the defence and that failure to do so is an injustice to the accused, unless it is overwhelmingly obvious that witnesses for the defence are so contradictory of each other as to be unworthy of credit.*

(2) *That the witnesses should not be allowed an opportunity of seeing beforehand the persons they have to identify, in such circumstances as to indicate to them in any way that the persons they see are the persons they will be required to identify later.*

THE KING *vs.* THOLIS DE SILVA AND THREE OTHERS ... ... IX. 37

Principles governing the decision of a criminal case by the Trial Judge—Both the prosecution and the defence must be considered.

Held: (1) *That a defence, unless it is on the face of it fantastic or contradictory, must be properly examined and if it is rejected reasons should be given.*

(2) *That a Magistrate cannot reject evidence for the defence merely because it appears to him that the evidence for the prosecution is the more likely.*

PEIRIS (INSPECTOR OF CRIMES) *vs.* CHERKKAM ... ... IX. 39

Inspection of scene of offence after conclusion of trial—Examination of witness for the prosecution at the inspection—Is such inspection contrary to the principles of justice.

Held: (1) *That the inspection of the scene of an offence after the conclusion of the trial is irregular.*

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(2) *That if an inspection is considered desirable, it should be made during the course of the trial.*

PERUMAL (EXCISE INSPECTOR) *vs.* FONSEKA AND ANOTHER ... ... IX. 131

Criminal trial—Procedure—Statement by prosecution witness amounting to admission of guilt by the accused and his counsel—Assurance by Trial Judge that he would not act on it—No cross-examination on the point on account of the judge's assurance—Statement taken into account by judge in his finding—Conviction—Is such irregularity fatal—Evidence discussed with witness by Judge before he was called to give evidence—Is it proper.

Held: (1) *That, in the circumstances, the irregulairty was fatal to the conviction.*

(2) *That it is undesirable that a Trial Judge should give a witness in a criminal case, even though he be the judge who held the preliminary inquiry, an opportunity of stating his evidence in any place other than in open court.*

KING *vs.* CALDERA ... ... XI. 1

Offence against more than one section—Prosecution is entitled to select the section under which to prosecute.

JOSEPH *vs.* SUGATADASA ... XII. 16

Charges under sections 314 and 332 of the Penal Code—Charge under section 314 referred to Village Tribunal—After evidence completed charge under section 314 again added—Acquittal on charge under section 332—Conviction under section 314—Can conviction be sustained.

Held: (1) *That, in the circumstances, it was not open to the Magistrate to add the charge under section* 314.

(2) *That the conviction under section* 314 (*being on offence within the exclusive jurisdiction of the Village Tribunal*) *cannot be sustained, since the accused was acquitted on the charge in respect of which the Magistrate had jurisdiction.*

ROGUS *vs.* TISSERA ... ... XII. 39

Five persons charged with unlawful assembly and offences under sections 146, 314, 315 and 380—Acquittal of four persons—Adjournment of trial of the other—Failure to frame fresh charge—Conviction under section 315—Is failure to frame fresh charge a fatal irregularity.

Held: (1) *That the Magistrate should have framed a fresh charge against the appellant.*

(2) *That the failure to frame a fresh charge was an irregularity which cannot be cured under section* 425 *of the Criminal Procedure Code.*

KASINATHER (POLICE VIDANE) *vs.* AIYAM ... ... XII. 106

Inspection of the scene of offence by a District Judge or Magistrate.

Held: *That the Criminal Procedure Code* (*Chapter* 16) *makes no provision for inspection of scenes of offences by District Judges and Magistrates.*

Per SOERTSZ, A.C.J. "The Criminal Procedure Code makes no provision for inspection of scenes of offences by District Judges and Magistrates. Section 238 provides for a view by the Jury of the place where the offence was committed, but, perhaps, there can be no objection to an inspection by a District Judge or a Magistrate provided it is held with due care and caution."

JAYAWICKREME *vs.* SIRIWARDENA AND OTHERS ... ... XIV. 83

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

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

WIJESEKERA (EXCISE INSPECTOR) *vs.* ARNOLIS ... ... XVII. 138

Retrial—Is it open to Magistrate to come to a conclusion by reading the evidence given at the former trial.

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

COREA (EXCISE INSPECTOR) *vs.* MARTIN SILVA ... ... XVII. 140

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Evidence of character of accused given after conviction—Should such evidence never be received except on oath.

REX *vs.* GOVINDA PULLE ... XVIII. 36

Right of reply of prosecuting counsel

REX *vs.* KADIRGAMAN *et al* ... XVIII. 41

At what stage of a trial and in what circumstances may an accused person be permitted to withdraw a plea of guilty.

SIRIWARDENE *vs.* JAMES *et al* XVIII. 47

Village Communities Ordinance section 90—Where several charges are laid against a person and the only charge proved against the accused is one triable exclusively by the Village Tribunal, the Magistrate without aquitting the accused should refer the parties to such Tribunal.

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS ... ... XX. 77

New trial should not be ordered to enable the prosecution to fill up the deficiencies in the evidence which it was bound to produce and which by its own negligence it failed to produce.

ROBINS *vs.* PHYLLIS GROGAN ... XXII. 83

Commencement of proceedings on charges triable summarily—Addition of charge not triable summarily except under section 152 (3) of the Criminal Procedure Code—Should the magistrate start proceedings de novo.

Held: *That where a Magistrate, who has started summary proceedings on charges triable summarily, adds a charge which is not triable summarily unless he assumes jurisdiction under section* 152 (3) *of the Criminal Procedure Code, it is not incumbent upon him to start proceedings* de novo.

THENNAKONE *vs.* MARADUMUTTU AND OTHERS ... ... XXII. 110

Can evidence in rebuttal be led in Magistrate's Court.

Held: *That there is no provision for the calling of evidence in rebuttal in the Magistrate's Court.*

WELIPENNA POLICE *vs.* PINESSA XXVI. 72

The proper time to raise an objection on the ground of misjoinder is before the accused has pleaded.

REX *vs.* PONNASAMY ... XXVI. 99

A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

REX *vs.* PEDRICK APPUHAMY KADIRESU AND TWO OTHERS ... XXVIII. 78

Criminal Appeal—Counsel assigned to accused in appeal—Counsel unable to attend on date of hearing—Appeal heard in absence of counsel—Is hearing regular—Interpretation of provisions as regards the right of a convicted person.

Held: (1) *That the provisions of a statute as regards the right of a convicted person are not of a merely directory character.*

(2) *That the necessity for an assignment of counsel for the purpose of conducting an appeal involves the necessity of seeing that it will be possible for the counsel to be present at the hearing.*

(3) *That the failure to grant an adjournment of the hearing to enable counsel to be heard has resulted in the appeal not being effectively heard.*

GALOS HIRAD AND ANOTHER *vs.* REX ... ... XXVIII. 97

Plaint filed within time—Amended plaint filed out of time—Is prosecution barred.

REV. FR. COLLEREE *vs.* BENEDICT XXXI. 27

Magistrate assuming jurisdiction as District Judge and reading over to accused evidence previously recorded—Regularity.

WILFRED *vs.* SOMASUNDARAM XXXI. 57

Trial by District Court upon indictment—Absence of prosecuting Crown Counsel—Refusal of application for postponement—Discharge of accused without calling upon him to plead—Nullity of trial

On the date fixed for a criminal trial in the District Court the prosecuting Crown Counsel was absent, being held up in another case. A postponement was applied for, but was refused by the District Judge, who thereafter discharged the accused as there was no prosecutor.

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Held: (1) *That the District Judge had no power to discharge the accused without trial in a case where they were tried upon indictment.*

(2) *That the discharge of the accused without calling upon them to plead to the indictment rendered the trial a nullity.*

(3) *That the District Judge might have granted an adjournment on the costs of accused being paid by the Crown.*

KING *vs.* FONSEKA AND FIVE OTHERS ... ... XXXI. 83

Conviction set aside due to irregularity in proceedings—Re-trial—When it may not be ordered.

The conviction was quashed on the ground that the proceedings were irregular, and the Supreme Court refused to direct further proceedings to be taken against the accused as it was satisfied that it was not safe to act on the evidence for the prosecution.

RAPHIEL APPUHAMY *vs.* ALAGIAH (S. I. POLICE) ... ... XXXII. 83

Criminal Trial—Trial Judge mentioning during the course of the examination of 1st prosecution witness that even if accused were found guilty facts of case would not justify sentence of imprisonment—Plea of guilt by accused—Influence of the Judge's remarks on.

The Trial Judge in a criminal case in the course of the examination of the 1st prosecution witness stated that "judging from the facts and circumstances of the case as revealed by the evidence", he felt that that was not a case in which a sentence of imprisonment was called for even if he found the accused guilty after trial. Later the accused pleaded guilty to the two indictments against him and was convicted and sentenced to a fine of Rs. 50 on each of the three counts of the 1st indictment and to imprisonment till the rising of the Court on the 2nd indictment. On an application by the Attorney-General for enhancement of sentence the accused pleaded that he would not have pleaded guilty to the indictments but for the suggestion thrown out by the Court that if he pleaded guilty he would be leniently dealt with.

Held: *That the pleas of guilt cannot be regarded as unqualified admissions of guilt.*

THE ATTORNEY-GENERAL *vs.* FERNANDO ... ... XXXIII. 6

Conviction for criminal breach of trust of goods—Power of Court to order restoration of goods to complainant.

Held: *That a Criminal Court has no power to order goods in respect of which criminal breach of trust has been committed to be restored to the owner.*

MARTIN SINGHO AND ANOTHER *vs.* THAMBIAH AND TWO OTHERS XXXIII. 27

Undefended accused—Failure to comply with section 296 (1) of the Criminal Procedure Code.

Held: *That the failure to comply with the requirements of section* 296 (1) *of the Criminal Procedure Code is a fatal irregularity.*

SUMANAPALA *vs.* JAYETILEKE, S. I., POLICE ... ...XXXIII. 46

Charge—Reference to Gazettes which did not disclose offence charged—Validity of conviction.

In a charge reference was made to certain Gazettes which, however, did not contain the provision of law under which the charge was made.

Held: *That a conviction, based on such charge, was bad.*

APPUHAMY AND ANOTHER *vs.* EKANAYAKE S. I. POLICE ... ... XXXIII. 76

Absence of material witness for defence though served with summons—Intimation to Court after close of prosecution—Application for postponement on that ground—Refusal by Magistrate—Is it justifiable.

After the prosecution was closed, the defence intimated to Court that a material witness for the defence was absent, though served with summons, and made an application to court for a postponement of the trial on that ground. The Magistrate refused the application.

Held: *That in the circumstances, the refusal to postpone was justified.*

JAYAWARDENE *vs.* SARUSUDEEN XXXIII. 105

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Charge of cattle theft—Failure of the prosecution witness to refer to description of animal in the charge.

Held: *That, where the only evidence for the prosecution in a case of cattle theft was that the "head of cattle described in the charge sheet" was removed by the accused without a reference to the details given in the charge, the conviction could not be sustained.*

BABBU SINGHO *vs.* JOSEPH, INSPECTOR OF POLICE ... ... XXXIII. 106

Expiry of Defence Regulation pending trial —Can trial be proceeded with.

ATTORNEY GENERAL *vs.* FRANCIS XXXIII. 89

Charge of contravening Price Order—Conviction after revocation of order—Validity of conviction—Interpretation Ordinance, section 6 (3).

Where a person was charged with an offence committed while a Price Order made under the Control of Prices Ordinance was in force but was convicted after the revocation of such Order.

Held: *That the conviction was in order in view of section* 6 (3) *of the Interpretation Ordinance.*

MAZAHIM *vs.* THE CONTROLLER OF PRICES ... ... XXXIV. 51

Charge of theft joined with alternative charge of disposing the stolen property—Is such joinder bad.

Held: *That it is not a misjoinder to charge a person with theft and alternatively with a charge of assisting in the concealment or disposal of the stolen property.*

KARUNARATNE *vs.* INSPECTOR OF POLICE, BAMBALAPITIYA ... XXXIV. 104

Evidence for prosecution—Contradictions not on material points—Magistrate acquitting accused without calling on defence.

Held: *That an accused person should not be acquitted without being called upon for his defence merely because the witnesses for the prosecution contradict themselves on points which do not matter.*

A. S. RAJENDRA *vs.* R. VISUVALINGAM ... ... XXXIV. 111

Charges of house-breaking and theft—Summary trial under section 152 (3) of Criminal Procedure Code—Several accused—Statement of one accused recorded by another Magistrate under Section 134 of Criminal Procedure Code—Failure to produce such statement at trial—Indications in judgment that Magistrate's mind influenced by such statement—Can conviction stand.

At the summary trial of several accused on a charge of house-breaking and theft under the provisions of Section 152 (3) of the Criminal Procedure, the Magistrate appeared to have read a statement of one of the accused recorded earlier by another Magistrate under section 134 of the Criminal Procedure Code, in which one of the accused implicated the others. This statement was not produced at the trial. The Magistrate convicted the accused who appealed.

The Supreme Court set aside the convictions and sent the case back for non-summary proceedings.

SUB-INSPECTOR OF POLICE, URAGASMANHANDIYA *vs.* T. CHILINIS MENDIS AND THREE OTHERS ... XXXIV. 112

Charge—Breach of rule made under the Forest Ordinance—Failure to refer in charge to Gazette in which such rule published—Reproduction of the rule in Subsidiary Legislation—Is the omission fatal.

Where a person was charged with having cleared land at the disposal of the Crown, but not included in a reserved or village forest, in breach of Rule 2 of the rules framed under section 20 of the Forest Ordinance (Chap. 111).

Held: *That the failure to refer in the the plaint, on which the charge was based, to the Gazette in which Rule* 2 *was published, is a fatal irregularity although the rule in question is reproduced in the volumes of the Subsidiary Legislation of Ceylon.*

EMMANUEL *vs.* APPUHAMY ... XXXV. 4

Accused appearing in Court before process on him is issued—Charge framed without examination of complainant or material witness—Regularity of procedure—Criminal Procedure Code, sections 127, 148, 150, 151 and 187.

The proceedings, were initiated under section 148 (1) (*b*) of the Criminal Procedure Code and the accused, who had been enlarged on "police bail," was present in Court in terms of his bail bond without

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process having been issued on him. The Magistrate then framed the charge himself without examining on oath the complainant or some material witness.

Held: *That there was no irregularity in the Magistrate's procedure.*

Per DIAS, J.—"An appearance in Court to show cause against a complaint when a summons or warrant has been issued is, in my opinion, an appearance on a summons or warrant, even although the summons has not been served or the warrant executed, the issue of the summons or warrant in such a case being the occasion of the appearance."

HENRY DIAS *vs.* NADARAJA XXXV. 11

Summary trial by Magistrate—Decision to test prosecution evidence by inspection and experiment at the scene of offence—Test carried out by Magistrate personally—Failure to record evidence of proceedings at the scene—Prejudice to accused—Irregularity of procedure—Does it vitiate conviction.

In a summary trial, the Magistrate, after the prosecution evidence had concluded and before calling upon the defence, decided to test a material portion of the prosecution story, by visiting the scene where the alleged offence was committed. He, although a demonstration was made by another person, carried out the test himself at which the accused and his proctor were present without their taking part in the proceedings. After the test, the Magistrate called upon the defence and the accused was convicted.

The person who gave the demonstration was not called as a witness, nor was other evidence recorded of the things said and done at the scene.

Held: *That the procedure adopted by the Magistrate was irregular and vitiated the conviction.*

MARADANA POLICE *vs.* ARON SINGHO ... ... XXXV. 13

Defect in charge—Accused not misled by such defect—Conviction of accused not vitiated.

KALLADI PITCHE AND ANOTHER *vs.* INSPECTOR OF POLICE PUTTALAM ... ... XXXVI. 5

Prosecuting officer giving evidence—Does it vitiate conviction.

SANTIYA PILLAI *vs.* S. SITTAMPALAM ... ... XXXVI. 49

Prosecution for Excise offence—Evidence given by prosecuting Inspector first—Later evidence of other witnesses led by him—Does this vitiate a conviction.

Held: *That the mere fact that an Excise Inspector, who gave evidence first led subsequently the evidence of the other witnesses for the prosecution, did not vitiate the proceedings.*

LOKUHAMY *vs.* BLAKE, EXCISE INSPECTOR ... ... XXXVI. 51

Right of reply—Single Counsel for several accused—Witnesses called on behalf of one accused only—Does Counsel lose right to reply with respect to others.

Held: *That where several accused are represented by one Counsel, and evidence is called on behalf of one of them only, the defending Counsel loses the right to reply only with respect to this accused.*

REX *vs.* H. A. WILSON AND FIVE OTHERS ... ... XXXVI. 64

Failure to give correct number of case in labels attached to productions—Does it justify acquittal of accused.

Held: *That the mere fact that the labels attached to the production in a case bore a number, which was not the number of that case, is no justification for the acquittal of the accused.*

MADUGALLE (EXCISE INSPECTOR) *vs.* BEMPO SINGHO ... ... XXXVII. 52

Power of Judge sitting without jury to inspect place where offence is committed—Criminal Procedure Code, section 238.

Held: *That although there is no specific provision to that effect in the Criminal Procedure Code, a Judge sitting without a jury, has power to inspect the place where an offence is committed provided that he observes the usual rule of fairness, viz., that he notifies the parties and allows them to attend him at the view.*

GNANAPRAGASAM *vs.* THE KING XXXVIII. 67

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Prosecution conducted by Police officer who was a material witness but was not the complainant—Denial of justice—Police officer acting as detective and participating in offence—Is he an accomplice—Need his evidence be corroborated—Evidence Ordinance, section 114—Criminal Procedure Code, section 199—Betting on Horse-racing Ordinance.

A Police Officer who had played a leading part in the detection of an offence conducted the prosecution though he was not the complainant. He was a material witness in the case. It was argued that there had been a denial of justice, that the only evidence in the case was the evidence of police officers who had participated in the offence committed by the accused, that they were, therefore, in the position of accomplices whose evidence should have been corroborated in material particulars.

Held: (1) *That, on the facts, it did not appear that the interests of justice had suffered by reason of the police officer acting as prosecutor and witness.*

(2) *That the police officers were not in the position of accomplices whose evidence needed corroboration.*

(3) *That the words 'any officer of any Government department' in section* 199 *of the Criminal Procedure Code cannot be regarded as authorising a material witness for the prosecution to act as prosecutor.*

NANDASENA *vs.* WICKREMARATNE (S. I. POLICE, PANADURA) ... XXXIX. 66

Trial of accused on several charges some of which are outside Magistrate's jurisdiction—Conviction on charge within jurisdiction—Validity of conviction.

Held: *That the trial of an accused by a Magistrate on charges within his jurisdiction as well as on charges outside his jurisdiction is no ground for setting aside a conviction on a charge within his jurisdiction.*

BUHARY AND OTHERS *vs.* PASSARA POLICE ... ... XXXIX. 73

Criminal Trial—Both prosecution and defence versions untrue—Presumption of innocence to prevail.

Where a Magistrate was of opinion that the complainant and his witnesses gave perjured testimony and was equally sceptical as to the accused's version of the incident.

Held: *That in the circumstances, the presumption of innocence should prevail.*

LIYANAPATHIRANA *vs.* S. I. POLICE, BELIATTA ... ... XL. 80

Charge of causing simple hurt—Evidence at trial disclosing charge of robbery—Fresh charge on robbery—Trial continued on same day though accused undefended—Conviction—Desirability of giving time to accused.

Held: *That it is undesirable that the trial on a serious charge should be sprung upon an undefended accused person without taking every reasonable precaution to ensure that he fully understands and appreciates the implications of the new course which has been taken to his detriment.*

SIMEN COORAY *vs.* WEERASURIYA XLII. 96

Trial—Prosecuting officer contradicting prosecution-witness by reference to statements recorded in course of investigation—Regularity—Is oral evidence of statements recorded in course of investigation admissible—Oaths Ordinance—Witness dealt with under section 11—Necessity to frame charges.

Held: (1) *That it is irregular for a prosecuting officer to seek to contradict prosecution witnesses in the course of the prosecution case by reference to statements made by them to the Police Officer who investigated into the complaint.*

(2) *That oral evidence of statements recorded by Police Officers is inadmissible and should not be permitted.*

(3) *That before a witness is dealt with summarily under section* 11 *of the Oaths Ordinance, it is necessary that a proper charge should be framed against him.*

JOHN PERERA *vs.* JOHNSON (S. I. POLICE, BAMBALAPITIYA) ... XLII. 97

Police officer, sole witness for prosecution, conducting prosecution—Undesirability.

MARIYAI *vs.* SENANAYAKE ... XLIII. 46

Two similar offences alleged within twelve months—Institution of separate nonsummary proceedings in respect of each offence—Committal of accused in each case—Amalgamation of charges in one indictment by Attorney-General—Objection by defence—Is it justifiable—Prejudice to accused—Criminal Procedure Code, sections 172, 179.

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On 21-3-1950 the Police instituted non-summary proceedings in case No. 4124 M. C., Kanadulla, charging the accused with having on 12-12-49 used as genuine a forged or counterfeit five rupee note, knowing or having reason to believe the same to be forged or counterfeit, an offence punishable under section 478 (*b*) of the Penal Code.

On the same day in a separate case, the accused was charged with the commission of a similar offence on 9-12-49 and non-summary proceedings commenced thereon.

The accused was subsequently committed for trial in the Supreme Court on both charges.

The Attorney-General amalgamated both charges and presented a single indictment to the Supreme Court and at the trial Counsel for the defence took objection thereto.

At the argument it was conceded by the Crown that there was probably insufficient evidence in either case, when separately considered to justify the committal of the accused on either charge, and that it was felt that the pooling of the evidence led in the two separate non-summary proceedings would have furnished sufficient evidence for a conviction by a jury.

Held: (1) *That although it is not illegal for the Crown to join in the same indictment under section* 179 *of the Criminal Procedure Code two charges which had formed the subject of separate proceedings terminating in separate committals, such a procedure is not proper and should not be permitted by the Trial Judge where the avowed intention of the Crown is to supplement at the trial the insufficient evidence relied on in one preliminary magisterial investigation by the evidence recorded in a different investigation.*

(2) *That section* 172 *of the Criminal Procedure Code was never intended to authorise the Crown to supply vital gaps in the case against a person who had been improperly committed for trial on insufficient evidence.*

(3) *That on the facts of this case the accused should be separately tried as the accused was likely to be prejudiced in his defence.*

THE KING *vs.* NISSANKA MICHAEL FERNANDO ... ... XLIII. 97

Right of Judge sitting alone to inspect scene of offence—Scope of such right—Criminal Procedure Code, sections 238 and 422 (1) —Evidence Ordinance, section 60, proviso 2—Officer taking leading part in detecting offence acting as prosecutor—Undesirability.

After hearing the prosecution and defence on a charge under the Excise Ordinance, the Magistrate, before recording his verdict, visited the scene the following day. After inspection of the spot he carried out certain tests for the purpose of verifying the veracity of witnesses. The accused was convicted and it was submitted in appeal on his behalf that the procedure adopted by the Magistrate was irregular and has prejudiced the accused.

Held: (1) *That the learned Magistrate had the right to visit the scene of offence, but the procedure adopted by him to test the veracity of the oral evidence given is not sanctioned by law and hence the accused was prejudiced thereby.*

(2) *That Section* 422 (1) (*c*) *of the Criminal Procedure Code appears to recognise the existence of the right of a Judge sitting alone as Judge of both fact and law to view the scene of the offence he is trying.*

(3) *That the decisions of the Supreme Court recognise the necessity of such a right, which, quite apart from statute, may be regarded as inherent in a Court of Justice.*

(4) *That power must be exercised within the limits allowed to a jury, for as a Judge of fact his role is the same.*

(5) *That a view by the jury is intended only for the purpose of enabling them to better understand the evidence and it is not open to a jury on a view to carry out tests for the purpose of verifying the veracity of witnesses or testing their evidence.*

(6) *That the evidence given by a witness should be tested in one or more of the ways prescribed by the Evidence Ordinance.*

(7) *That the rule that an officer, who has played the leading role in the detection of a crime or offence, should not in the interests of justice act as prosecutor in that case, should be strictly observed.*

SAMARANAYAKE *vs.* WIJESINGHE (INSPECTOR OF POLICE, GALLE) ... ... XLIV. 74

Correct procedure to be followed when accused person who had previously pleaded not guilty seeks, after trial has commenced before a jury, to retrace his earlier plea and to plead guilty of a lesser offence.

REX *vs.* K. SITTAMPALAM *et al* XLIV. 110

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Mandamus — Criminal Procedure—Commencement of proceedings under Chapter 18—Assumption of summary jurisdiction by Magistrate under section 152 (3) Criminal Procedure Code—Pleas of accused recorded —Attorney-General's order to Magistrate to discontinue summary proceedings and to take non-summary proceedings — Validity of—Section 390 (2) of Criminal Procedure Code—Scope of.

Held: *That the power of the Attorney-General under section* 390 (2) *of the Criminal Procedure Code to give instructions to a Magistrate is limited to non-summary inquiries under Chapter* XVI *of the Criminal Procedure Code and does not extend to trials either of summary offences or of non-summary offences in respect of which the Magistrate may have assumed jurisdiction under section* 152 (3) *of the Criminal Procedure Code.*

Per GRATIAEN, J.—"In England a Magistrate is expressly precluded from assuming, without the express consent of the Director of Public Prosecutions, summary jurisdiction to try indictable offences in cases in which the Director has taken over the conduct of the prosecution. In this country, however, the Attorney-General enjoys no such power of veto. In my opinion, it is very desirable that the provisions of section 152 (3) of the Criminal Procedure Code should be amended in this as well as in certain other respects."

THE ATTORNEY-GENERAL *vs.* SRI SKANDARAJAH ... ... XLVII. 1

Right of Privy Council to entertain an appeal by the Crown in a criminal case.

ATTORNEY-GENERAL OF CEYLON *vs.* K. D. J. PERERA ... ... XLVIII. 42

Evidence given by accused at inquiry in Magistrate's Court—"All statements of the accused recorded in the course of the inquiry in the Magistrate's Court....."—Meaning and scope of the words "All statements"—Do they include the sworn testimony given by the accused at the inquiry, as well as his statutory unsworn statements?—Duty of Crown to read in evidence the entirety of the accused's deposition recorded by the committing Magistrate—Criminal Procedure Code, sections 159, 160, 161, 233, 302 Criminal Procedure (Amendment Ordinance No. 13 of 1938, section 8.

At an inquiry held under Chapter 16 of the Criminal Procedure Code into a charge of murder the prisoner, apart from making the statutory unsworn statements in terms of sections 160 and 161, elected to give evidence on his own behalf. Thereafter, he gave his evidence on affirmation, and was duly cross-examined and re-examined. The entirety of this deposition was included in the list of documents annexed to the indictment.

On an application by the Crown to prove and to rely on a number of extracts selected from the deposition, and containing (as alleged) admissions which to some extent supported the case for the prosecution.

Held: (1) *That section* 233 *of the Criminal Procedure Code applied to the entirety of the accused's deposition duly recorded, as well as to all statutory unsworn statements made by him, at the inquiry.*

(2) *That it is the duty of the Crown, whether or not the prisoner elects to give evidence at the trial, to put in the whole of the prisoner's deposition in terms of section* 233 *of the Code—subject of course, to any directions which the presiding Judge may give for the exclusion of any portions which are irrelevant or inadmissible.*

(3) *That section* 233 *of the Code is enacted in the interests of accused persons as well as of the Crown.*

THE QUEEN *vs.* MAHADEVA SATHASIVAM ... ... XLVIII. 111

Should distinction be drawn between a conviction by a lay jury and a conviction by a trained Judge.

PETER SINGHO *vs.* WERAPITIYA XLIX. 23

Summary trial—Postponement—All parties absent on postponed date—Accused acquitted —Application by complainant to have order of acquittal set aside—Procedure to be adopted by Magistrate—Is Attorney-General's sanction necessary for appeal against order refusing to vacate order of acquittal?—Criminal Procedure Code, sections 152 (3), 194, 336, 190, 210, 214.

Where, in a summary trial, all parties and their legal representatives were absent on the date to which the trial was postponed and the Magistrate made order "discharging the accused."

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Held: (1) *(On an application by the complainant to have the order set aside) that the Magistrate should have issued notice on the accused to show cause why the application of the complainant should not be allowed on the grounds set out in his affidavit, and that the matter of the complainant's explanation should have been fixed for* "inter partes" *inquiry.*

(2) *That the refusal by the Magistrate to vacate his order of acquittal was, therefore premature.*

(3) *That the refusal to apply the proviso to section* 194 *of the Criminal Procedure Code was a final order from which an appeal lay to the Supreme Court, and that the sanction of the Attorney-General under section* 336 *of the Code was, accordingly, not necessary.*

(4) *That section* 336 *of the Criminal Procedure Code applies only to orders of acquittal made by a Magistrate after trial under the provisions of section* 190 *of the Code, or by a District Judge after trial under section* 210 *or* 214.

Per GRATIAEN, J.—"If a complainant seeks to obtain the necessary sanction of the Attorney-General to an appeal in a case such as the present, he might well be faced with the substantial objection that his appeal has been preferred out of time. The correct view, I think, is that an appeal can be preferred as of right against an order refusing to vacate an order of acquittal passed under section 194."

N. SEEVARATNAM *vs.* K. M. A. GOPALASAMY ... ... XLIX. 25

Circumstances in which prosecution could be permitted to treat its own witness as adverse.

KANAPATHIPILLAI *vs.* FERNANDO ... L. 9

Verdict pronounced by District Judge immediately after defence was closed—Accused deprived of right of having his case summed up by Counsel.

Held: *That the pronouncement of his verdict by the Trial Judge immediately after the defence was closed, and before the accused's Counsel could sum up his case, was a denial to the accused, of the fundamental right of having his case summed up by his Counsel.*

K. P. D. WIJESINGHE *vs.* THE ATTORNEY-GENERAL ... ... L. 32

Criminal Trial—Failure of accused to state defence to Police—Does this justify an inference of guilt—Prisoner's replies to committing Magistrate — Effect on his defence.

Held: *That a failure or refusal by an accused person to make a voluntary statement to the police disclosing his defence does not justify the inference that he is guilty. The same applies to a prisoner's replies to a committing Magistrate.*

Per GRATIAEN, J.—"In other words, a delay in disclosing one's defence may, in any particular case, go to the weight of the evidence which is led in support of it; but such delay can never be regarded as evidence of guilt. The learned Magistrate seems to have misunderstood the purport of the legitimate cross-examination of the appellant on this aspect of the case

G. L. JAYASINGHE *vs.* THE LINDULA POLICE ... ... L. 77

CRIMINAL PROCEDURE CODE

§ 2

Definition of "fine"—wide enough to embrace pecuniary forfeiture provided in § 15 of the Explosives Ordinance.

DINAPALA *vs.* INSPECTOR OF POLICE GALLE ... ... XL. 53

Is an excise officer a peace officer

ANDIYA VIDANA *vs* JANSZE ... L. 95

§ 6

Accused person in pending proceedings—Can he be compelled to produce any document in evidence or for inspection by complainant.

HANIFA *vs.* DE MEL AND OTHERS XLVI. 97

§ 11

A magistrate is not justified in trying summarily under § 152 (3) a breach of rule 30 of § 25 of the Notaries Ordinance merely because the maximum punishment is only a fine of Rs. 200.

DE SILVA *vs.* DALPATADU ... XXII. 65

§ 15 A

Sentence of imprisonment till rising of Court—Regularity.

ATTORNEY-GENERAL *vs.* PODISINGHO ... ... XLII. 110

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§ 15B

Sentence of imprisonment till rising of Court—Regularity.

ATTORNEY-GENERAL *vs.* PODISINGHO XLII. 110

§ 16

Imprisonment in default of payment of fine—Must be in addition to any other punishment.

GUNASEKERA *vs.* PERERA ... XXXVIII. 94

§ 32

Arrest without warrant—Necessity to comply with provisions of §§ 37, 126 and 126 A.

MUTTUSAMY *et al vs.* INSPECTOR OF POLICE KAHAWATTA ... XLIV. 33

§ 33

Right of police officer to demand from person against whom complaint is made his name and address.

SILVA *vs.* ABEYSEKERA ... XXXI. 14

§ 35

Meaning of words "running away"

REX *vs.* WEERASAMY AND VELAITHAN ... ... XXII. 103

Contemplates an arrest at the time of the commission of the offence or immediately afterwards.

PONNIAH KUMARESU *et al vs.* D. R. O. VAVUNIYA ... ... XLI. 38

§ 42

Order remanding accused—Accused produced in Court before expiry of 15 days and order remanding again—Warrant of detention—Escape of accused—Immediate unsuccessful search—Accused found after four days—Arrest of accused by Fiscal Officers—Resistance by accused—Rescue of arrested person by others—Causing hurt to Fiscal Officers—Charges under sections 220A and 323 of Penal Code—Legality of arrest—Applicability of sections 92 (1) of the Penal Code—Self-defence.

On 15-9-47, the 1st accused was produced in Court on a charge of causing hurt to two constables and was remanded till 19-9-47. On this latter day he was produced in Court and was again remanded till 3-10-47. Shortly after the Magistrate signed the warrant of detention on 19-9-47 and the Fiscal's Marshall had entrusted the 1st accused to his officer, the 1st accused escaped. The Fiscal's officer pursued him immediately and searched for him unsuccessfully. This was reported to the Fiscal's Marshall who handed the warrant of detention to his officer directing him to search for and arrest the accused. The search was continued by two officers till the 1st accused was found eventually on 23-9-47.

Despite resistance, the two officers, who were not wearing their uniforms, handcuffed the 1st accused whereupon one of them was stabbed by the 2nd accused at the instigation of the 3rd accused. The 1st accused bit both officers and all the accused ran away.

The accused were charged under 3 counts

(1) The 1st accused under section 220A of the Penal Code for offering resistance to the lawful apprehension of himself by the Fiscal's Officers upon a warrant of detention.

(2) The 2nd and 3rd accused under section 220A of the Penal Code for rescuing the 1st accused from the custody of the Fiscal's Officers,

(3) All the 3 accused under section 323 for voluntarity causing hurt to the Fiscal's Officers to prevent them from discharging their duties as public servants.

Held: (1) *That the order of detention made by the Magistrate had the effect of making the Fiscal's Officers custody a lawful custody on* 19-9-47, *though the detention of the* 1*st accused in custody after the expiry of* 15 *days from* 15-9-47 *would have been unlawful.*

(2) *That the arrest on* 28-9-47 *is not the arrest contemplated by section* 42 *of the Criminal Procedure Code and the officers had exceeded their authority in attempting the arrest of the* 1*st accused on that day.*

(3) *That as the attempted arrest on* 23-9-47 *could not have caused the* 1*st accused reasonable apprehension that he would be killed or grievously hurt, if he did not resist the arrest, section* 92 (1) *of the Penal Code is applicable to him.*

(4) *That as the* 2*nd &* 3*rd accused could not be said to have known that the* 1*st accused escaped from the custody of the*

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Fiscal's officer who attempted to arrest him, they may claim to have exercised the right of self-defence.

(5) *That in stabbing the Fiscal's officer they exceeded the right of self-defence and should be held guilty under section 325 of the Penal Code.*

PONNIAH KUMARESU *et al vs.* THE DIVISIONAL REVENUE OFFICER, VAVUNIYA ... ... XLI. 38

§ 44

Magistrate is not relieved of the responsibility for the statement of particulars of the offence contained in the summons.

SOLICITOR GENERAL *vs.* ARADIEL XXXIX. 17

§ 45

Meaning of "other like officer" in § 45 (3).

EASTERN BUS CO. *vs.* INSPECTOR OF LABOUR BATTICALOA. ... XLV. 85

§ 51

Section 51 of the Criminal Procedure Code applies to a warrant issued under § 62 (1) (a) of the Code. The direction regarding endorsement on the warrant is mandatory and the omission of the endorsement from the warrant makes it ex-facie defective.

SITTAMPARAMPILLAI *vs.* MURUGAN XIX. 118

Failure to endorse warrant as required by § 51—Legality—Is obstruction to execution of such warrant justifiable.

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS ... ... XX. 77

Bailable offence—Summons reported served on accused person—Failure to attend Court—Issue of warrant—Should it be issued without endorsement as to bail.

Held: (1) *That section* 51 (1) *of the Criminal Procedure Code makes it imperative that in the case of any bailable offence the warrant issued for the arrest of an accused person should have endorsed on it a direction as to bail irrespective of the fact whether summons had already been served or not.*

(2) *That section* 51 (1) *of the Criminal Procedure Code applies to a warrant issued under section* 62 (1) (b) *of the Code.*

SAMARASINGHE (S.I. POLICE, CHILAW) *vs.* W. A. WILLIAM ... ... XLVI. 23

§ 59

There is nothing in section 87 of the Indian Criminal Procedure Code which—

(a) makes the proclamation legal evidence of the issue of the warrant or order of arrest, or

(b) imputes to the accused notice of the proclamation or its terms.

GOUNDAN *vs.* EMPEROR ... XXIX. 33

§§ 59 & 60

An attorney of a person proclaimed under section 59 is not competent to move to set aside an order of attachment made under section 60.

IN *Re* MRS. VIVIENNE GOONEWARDENE ... ... XXIV. 3

§ 62

§ 51 (b) of the Criminal Procedure Code applies to a warrant issued under § 62 (1) (b).

SAMARASINGHE *vs.* W. A. WILLIAM XLVI. 23

§ 64

Summons served outside jurisdiction of issuing Court without the endorsement required.

KING *vs.* SENEVIRATNE ... XVIII. 103

§ 66

A person summoned to produce a document may authorise any person by letter to produce the document he is summoned to produce.

IYER *vs.* KARUNARATNE ... XXI. 123

Summons on accused to produce document in his possession—Failure to produce—Acquittal of accused—Complainant's right to lead secondary evidence.

SARANADASA *vs.* CHARLES APPUHAMY XXXI. 62

Accused person in pending proceedings—Can he be compelled to produce any document in evidence or for inspection by complainant—Principle of English Law—Its applicability in Ceylon—Evidence Ordinance, section 100.

Held: (1) *That a Magistrate has no power under section* 66 *of the Criminal Procedure Code to compel an accused person to produce any document either in evidence against himself or with a view to its possible*

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production in evidence (after prior inspection by the complainant) by some competent witness for the prosecution in pending criminal proceedings.

(2) *That the special English rule, which protects a person against whom criminal proceedings have actually been instituted and are pending, from compulsion to produce from his custody a document whose contents are likely to provide evidence of his guilt, is a part of our law.*

(3) *That section 6 of the Criminal Procedure Code keeps alive this special rule and protects it from the impact of section 66.*

(4) *That in exercising his judicial discretion under section 66 of the Criminal Procedure Code, a Magistrate should do so cautiously and only upon proper material, so as not to cause more hardship than the necessities of the case require.*

HANIFA *vs.* DE MEL AND OTHERS XLVI. 100

§ 68

Issue of search warrant under—only when prima facie **an offence is disclosed by legal evidence on record.**

DARLEY BUTLER & CO., LTD. *vs.* SUPPRAMANIAM CHETTYAR ... I. 294

Accused person in pending proceedings—Can he be compelled to produce a document in evidence or for inspection by complainant.

HANIFA *vs.* DE MEL AND OTHERS ... XLVI. 97

§ 70

Search without warrant—Powers of Police.

MUTHUSAMY *et al vs.* INSPECTOR OF POLICE KAHAWATTA ... ... XLIV. 33

§ 76

Failure to make and serve a list of the articles found in the premises searched as required by the section—Search without a warrant.

Held: *That where a search is made without a search warrant by an Excise Officer by virtue of the powers of search granted by the Excise Ordinance No. 8 of 1912 the failure to make a list of the articles seized in the course of the search is not necessarily fatal to a conviction.*

PERERA *vs.* PAULU ... ... I. 399

§ 80

Theft and subsequent slaughter of bull calf—Accused ordered to give a bond to be of good behaviour in addition to other punishment.

Held: *That where the evidence proved that the accused not only stole a bull calf but actually killed it, the Police Magistrate was justified in law in ordering the accused to furnish a bond to be of good behaviour for six months in addition to a sentence of imprisonment.*

ELORISA *vs.* ROMA AND ANOTHER ... III. 132

Conviction for theft—Order to enter into bond to be of good behaviour—Is it valid.

Held: *That a person convicted of theft, unless he is a habitual thief, cannot be ordered to execute a bond to be of good behaviour.*

GINIGE *vs.* DE SARAM (INSPECTOR OF POLICE) ... ... XXXVIII. 48

§ 81

Application to have a person bound over to keep the peace—Should such person be afforded an opprotunity of showing cause against the order.

Held: *That, before an order under section 81 of the Criminal Procedure Code is made, the person, in respect of whom the Order is to be made, should be given an opportunity of showing cause against the order.*

SALGADO (POLICE SERGEANT) *vs.* JOHN SINGHO ... ... VIII. 107

Proceedings conducted speedily—Non-compliance with provisions of sections 81, 84 and 85 of the Code—Binding over—Person not given sufficient opportunity to meet the case against him.

Held: *An order requiring a person to enter into a bond to be of good behaviour cannot be allowed to stand, where it has been made after proceedings conducted with extraordinary speed without full compliance with the provisions of sections 81, 84 and 85 of the Criminal Procedure Code, and in a manner that did not give the person bound over, a sufficient opportunity to meet the case against him.*

REV. SANGARAKKITA THERO *vs.* INSPECTOR OF POLICE, PELIYAGODA ... XXXIX. 61

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§ 83

Allegation that a person is a notorious bad liver—Facts which should be proved for an order under § 83.

Held: *That mere statements that a person walks about the bazaar doing nothing but making a nuisance of himself, that he is a notorious bad liver and a bully and that he has been committing breaches of the peace, unsupported by specific proof of particular instances of such conduct is insufficient to justify an order under Section* 83 *of the Criminal Procedure Code.*

SPROULE (SUB-INSPECTOR OF POLICE) *vs.* NANAYAKKARA ... ... II. 156

§ 84

Proceedings conducted speedily—Non-compliance with § § 81, 84 and 85—Binding over—Person not given sufficient opportunity to meet the case against him—Regularity.

REV. SANGARAKKITA THERO *vs.* INSPECTOR OF POLICE PELIYAGODA ... XXXIX. 61

§ 85

Proceedings conducted speedily—Non-compliance with provisions of § § 81, 84 and 85—Binding over—Person not given sufficient opportunity to meet case against him—Regularity.

REV. SANGARAKKITA THERO *vs.* INSPECTOR OF POLICE PELIYAGODA ... XXXIX. 16

§ 88

Criminal Procedure Code—Does an appeal lie from an order under section 88.

Held: *That an appeal lies to the Supreme Court from an order made by a Police Court under section* 88 *of the Criminal Procedure Code.*

PUBLIS APPUHAMY AND OTHERS *vs.* PERERA ... ... VI. 9

§ 114

Refusal by priest of a Mosque to permit the burial of a dead child at the burial ground attached to the Mosque unless he were permitted to officiate at the burial service—Application for an order under section 114 of the Criminal Procedure Code to compel the priest to permit the burial.

Held: *That section* 114 *of the Criminal Procedure Code does not confer the power on a Police Magistrate to direct a person to permit or suffer a certain act to be done which he says is an infringement of his rights, or to direct a person with regard to property in his possession or under his management to permit something which he claims to be in derogation of his rights as a person in possession of or as manager of such property.*

MAJEED *vs.* HADJIAR AND OTHERS III. 38

§ 121

First complaint of an offence—When is it admissible under § 157 of the Evidence Ordinance.

REX *vs.* RAMU KARTHIGESU *alias* CHELLIAH ... ... XXXIV. 10

§ 122

When may a statement made by a deceased person to a Police Officer investigating a cognizable offence be admitted in evidence.

REX *vs.* JOHN PEIRIS ... ... XIX. 134

The word " witness " in § 122 (3) must be strictly construed as meaning a witness pure and simple and does not include an accused person who testifies on his own behalf.

BABY NONA *alias* MARGARET COORAY *vs.* JOHANA PERERA ... ... VIII. 65

Examination of Police Headman by Magistrate ex mero motu **after the close of the case—Can it be proved by the evidence of a Police Officer that the position taken up by an accused person in his defence in Court was not disclosed to him at the investigation by the Police Officer.**

BABY NONA *alias* MARGARET COORAY *vs.* JOHANA PERERA ... ... VIII. 65

Statement made by accused person to a Police Officer under Section 122 (1) of the Criminal Procedure Code—Statement cannot be used to impeach credit of the accused when giving evidence.

THE KING *vs.* KIRIWASTU AND ANOTHER XIV. 25

§ 122 (3)—Does not preclude admission in a Civil proceeding of a statement in the information book.

PEIRIS *vs.* CHITTY AND OTHERS ... XVI. 58

Can a statement made by an accused person to a Police Officer in the course of an investigation be used to contradict him.

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Held: *That a statement made by an accused person to a Police Officer, in the course of an investigation, can, under section* 122 (3) *of the Criminal Procedure Code, be used to contradict the accused person when he is giving evidence, provided the statement is not a confession falling within section* 25 *of the Evidence Ordinance.*

KING *vs.* EMANIS ... ... XVIII. 121

Section 122 (3) has general application to statements made by all persons whether they are or whether they subsequently become accused persons or not.

Except as provided in section 122 (3) of the Criminal Procedure Code an accused person cannot make use of a statement made by him to a Police Officer in the course of an investigation into an offence.

REX *vs.* DE SILVA *alias* PUNCHI UNNIHE AND FOUR OTHERS ... XVIII. 125

Statement made by deceased as to the cause of the injuries which resulted in his death—Statement made to a Police Officer investigating a cognizable offence under Chapter XII of the Criminal Procedure Code—Is such statement excluded except in the cases specified in section 122 (3) of the Criminal Procedure Code.

Held: *That a statement made by a deceased person as to the cause of the injuries which resulted in his death, to a Police Officer investigating the crime against the deceased, cannot be proved except in the cases specified in section* 122 (3) *of the Criminal Procedure Code.*

KING *vs.* AHAMADU ISMAIL ... XX. 16

Where the accused denies in cross-examination previous statements (not being confessions) made by him, the prosecution is entitled under section 122 (3) of the Criminal Procedure Code and section 155 (c) of the Evidence Ordinance to contradict him by calling evidence to prove the statements.

THE KING *vs.* AHAMADU ISMAIL ... XX. 17

A Police headman is not a Police Officer for the purposes of section 122 (3). To be a "police officer in the course of an investigation under this Chapter" a person must by virtue of section 121 (1) be an officer in charge of a Police Station who keeps an Information Book.

REX *vs.* JAMES SINGHO AND WIJEMANNE ... ... XXI. 1

A statement by an accused person, if made in the course of a Police investigation under chapter XII of the Criminal Procedure Code is admissible under section 122 (3).

REX *vs.* NADARAJAH ... XXIII. 50

Admissibility of written record to contradict a witness after such witness has given evidence.

REX *vs.* HARAMANISA ... XXVIII. 68

Maintenance proceedings—Admissibility of statement by putative father under § 122 (3) to corroborate applicant's testimony.

ZOYSA *vs.* WILBERT ... XXXV. 78

Use of Information Book by Court—Discretion of Judge.

Held: *That the use of the Information Book is a matter entirely within the discretion of the Judge, who is free to exercise that power within the limits prescribed by law.*

CHRISTOFFELSZ *vs.* KITNAPULLE XXXVII. 2

Illegal sentence passed per incuriam—**Can it be altered by the judge who passed the sentence—Can statement made in the course of an inquiry into another offence be used to contradict the accused—Can sentence of imprisonment be imposed in the event of a sentence of whipping not being carried out.**

Held: (1) *That a statement made by an accused in the course of an inquiry under Chapter* XII *of the Criminal Procedure Code can be used under section* 122 (3) *of that Code to contradict him in proceedings against him in regard to an offence which was not the subject of the inquiry in the course of which the statement was made.*

(2) *A Judge who imposes an illegal sentence* per incuriam *has the power to set aside the illegal sentence and to impose a legal sentence.*

(3) *A Judge who imposes a sentence of whippping and imprisonment cannot make an order fixing an extended term of*

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imprisonment if the sentence of whipping is not executed.

REX *vs.* PEDRICK APPUHAMY KADIRESU AND TWO OTHERS ... XXVIII. 78

Chapter XII—A statement made to a Police officer or inquirer by any person, which expression includes a person accused in the course of any investigation under chapter XII must be reduced into writing.

REX *vs.* HARAMANISA ... XXVIII. 68

§ 126A

Order remanding accused—Accused produced in Court before expiry of 15 days and order remanding again—Warrant of detention—Escape of accused—Immediate unsuccessful search—Accused found after four days—Arrest of accused by Fiscal's officers—Resistance by accused—Rescue of accused by others—Causing hurt to Fiscal's officers—Legality of arrest.

PONNIAH KUMARESU *et al vs.* D. R. O. VAVUNIYA ... ... XLI. 38

§ 134

Admissibility of confession recorded by Magistrate who, from time to time, performed the duties of a Police Officer.

KING *vs.* SEPALA AND OTHERS ... VII. 53

Confession made to an Unofficial Police Magistrate—Is it admissible in evidence—Evidence Ordinance section 26.

Held: (1) *That a confession made to an Unofficial Police Magistrate appointed under section* 84 *A of the Courts Ordinance and recorded by him in the manner prescribed by Section* 134 *of the Criminal Procedure Code is admissible in evidence in a case in which the offence with which the accused is charged is not an offence summarily triable.*

(2) *That an Unofficial Police Magistrate acting under section* 134 *of the Criminal Procedure Code in a case in which he is entitled in law so to act should be regarded as a Magistrate for the purposes of section* 26 *of the Evidence Ordinance.*

POLICE SERGEANT HENDRICK *vs.* ARUMUGAM AND ANOTHER ... VIII. 81

Confession to Magistrate made after commencement of non-summary inquiry—Admissibility.

REX *vs.* KARALY MUTTIAH AND OTHERS ... ... XVI. 37

When may an inquiry be said to have commenced for the purposes of section 134—Evidence Ordinance sections 24 and 26.

Held: (1) *That the expression "inquiry" in section* 134 *of the Criminal Procedure Code must be construed as meaning the preliminary inquiry commencing on the appearance of the accused for which Section* 155 *makes provision.*

(2) *That the certificate of the magistrate under section* 134 *of the Criminal Procedure Code notwithstanding, when a statement recorded under that section is sought to be proved, the tribunal trying the case is free to satisfy itself that the statement was a voluntary statement quite independently of the magistrate's certificate.*

(3) *That a voluntary statement duly recorded under section* 134 *of the Criminal Procedure Code can be proved as against the accused making it, even though he was in the custody of a Police officer at the time he made the statement.*

THE KING *vs.* RANHAMY ... XIX. 76

What is the inquiry referred to in section 134 (1)—When may a statement recorded under section 134 in a preliminary inquiry be rejected by the trial Court.

Held: (1) *That a confession recorded under section* 134 *of the Criminal Procedure Code cannot be admitted in evidence if it is irrelevant under section* 24 *of the Evidence Ordinance.*

(2) *That the inquiry referred to in section* 134 (1) *of the Criminal Procedure Code is the preliminary inquiry referred to in section* 155 *of that Code.*

(3) *That section* 134 *of the Criminal Procedure Code is not impliedly repealed by section* 8 *of Ordinance No.* 13 *of* 1938.

REX *vs.* FRANCISCU APPUHAMY XXI. 113

Scope and meaning of the words "at any time before the commencement of an inquiry or trial" in section 134 (1)—Must prosecution prove that the statement was made voluntarily—Evidence Ordinance section 24.

Held: (1) *That the enquiry under chapter* 16 *commences when the charge is read over to the accused.*

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(2) *That the Magistrate is under no duty to read over the charge or charges directly the accused appear. All that is required by section* 156 *of the Criminal Procedure Code is that the Magistrate should read over the charge or charges as early as it may be practicable to do so.*

(3) *That in a case in which all the accused persons do not appear simultaneously before the Magistrate, it is open to the Magistrate within reasonable limits to await the appearance of all the accused before framing charges, and in the meantime to take any evidence that may be addressed.*

(4) *That the Magistrate's certificate under section* 134 *of the Criminal Procedure Code is not decisive of whether or not the confession is voluntary. The certificate only vouches the fact that the confession* vis-a-vis *the Magistrate was voluntary, but that does not preclude the existence of an earlier taint. The prosecution must therefore establish the relevancy of the confession by leading some evidence to show that it was made voluntarily.*

THE KING *vs.* WEERASAMY AND FIVE OTHERS ... ... XXII. 57

For the purposes of section 134 the commencement of the inquiry or trial is the time at which the charge is read over to the accused.

REX *vs.* WEERASAMY AND VELAITHAN ... ... XXII. 103

A statement made by an accused person voluntarily after the commencement of the non-summary inquiry and recorded in the manner prescribed by section 134 cannot be put in evidence at the trial.

REX *vs.* PUNCHIMAHATHMAYA XXIV. 108

§ 147

Court taking cognizance of offence contrary to § 147 (1) (a)—Conviction bad—

SILVA *vs.* RAZAK ... ... I. 213

Is sanction of the Attorney-General required for a prosecution under § 190 of the Penal Code when false evidence is given in other than judicial proceedings.

ELIATAMBY *vs.* KATHIRAVEL ... III. 28

Judgment or final order—Penal Code section 190—Order discharging accused on the ground that the sanction of the Attorney-General is necessary before the charge can be entertained—Appeal from the order of discharge—In what circumstances will an appeal lie from an order of discharge by a Police Magistrate on the ground that the sanction of the Attorney-General is necessary before the charge can be entertained—Meaning of the expression "Court" in section 147 (1) (b) of the Criminal Procedure Code.

Held: (1) *That an appeal lies in a case in which the Police Magistrate discharges the accused, on an erroneous view of the law that the charge cannot be proceeded with, without the sanction of the Attorney-General.*

(2) *That, for a charge under section* 190 *of the Penal Code the previous sanction of the Attorney-General is not necessary in a case where the offence has been committed in the course of an investigation directed by law preliminary to a proceeding in any Court.*

(3) *That the word "Court" in section* 147 (1) (*b*) *of the Criminal Procedure Code should be given the meaning it has in the Courts Ordinance No.* 1 *of* 1889.

DHARMALINGAM CHETTY *vs.* VADEVIEL CHETTY AND ANOTHER ... IX. 3

Prosecution not sanctioned by Attorney-General—Can case proceed after objection has been taken that it has not been sanctioned as required by section 147 (1) (a)—Objection taken at close of case for prosecution.

Held: *That, in the circumstances of the case, the conviction was not bad as the want of sanction did not occasion a failure of justice.*

ATAPATTU (SUPERINTENDENT OF EXCISE) *vs.* PUNCHI BANDA *alias* NILAME XIII. 73

Abetment of forgery—Abetment of fabrication of evidence for the purpose of being used in or in relation to a judicial proceeding—Is the sanction of the Attorney-General necessary to enable a private party to prosecute—Penal Code sections 109, 190 and 454.

Held: *That the abetment of an offence is an offence in itself and that the sanction of the Attorney-General is not necessary to enable a private party to prosecute an alleged offender for the offence of abetment of forgery or abetment of fabrication of evidence for the purpose of being used in or in relation to a judicial proceeding.*

VANDER POORTEN *vs.* VANDER POORTEN AND ANOTHER ... XXXI. 77

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§ 148

Discharge of accused in the absence of the complainant a public officer who had made a report under § 148 (1) (b)—Can the Police Magistrate set aside such an order.

Held: *That a Police Magistrate cannot reopen a case in which he has discharged an accused acting under section* 194 *of the Criminal Procedure Code.*

ROSAIRO (EXCISE INSPECTOR) *vs.* SILVA ... ... II. 121

Case struck off owing to absence of complainant—Can it be reopened.

Under section 148 (1) (*b*) of the Criminal Procedure Code certain proceedings under the Forest Ordinance No. 16 of 1907 were instituted against two persons. The complainant and one of the accused were absent on the day fixed for the hearing of the case. The Magistrate made an order "strike case off". Several months later, on receiving a latter from the Range Forest Officer requesting him to "reopen issue of summons on the accused", the Magistrate started proceedings again.

Held: *That the Magistrate's earlier order "Strike case off" being presumably an order made under section* 191 *of the Criminal Procedure Code, he had no power to vacate it.*

Per SOERTSZ, A.J. "The complainant was also absent on that occasion and the learned Magistrate made order to this effect ' Strike case off.' It is not clear to me at all under which section, the Magistrate was striking a criminal case off the roll. I am not aware of any provision which permits such procedure."

FERNANDO *vs.* APPUSINGHO ... V. 79

Unsworn complaint by an Inspector of the Society for the Prevention of Cruelty to Animals—Issue of summons—Appearance of accused before service of summons—Charge from the plaint—Trial and conviction—Is conviction legal—Can such unsworn statement be regarded as a report under section 148 (1) (b).

Held: (1) *That a statement, made by an Inspector of the society for the Prevention of Cruelty to Animals in writing but not on oath, cannot be regarded as a written report on which proceedings can be instituted under section* 148 (1) (*b*).

(2) *That the fact, that the ingredients of an offence for which a person is tried are contained in the unsworn statement of a complainant other than the persons mentioned in section* 148 (1) (*b*) *does not constitute a charge framed in accordance with the terms of the Criminal Procedure Code.*

(3) *That the absence of a charge vitiates proceedings.*

ABEYESEKERA (INSPECTOR S. P. C. A.) *vs.* GUNAWARDENE ... ... X. 175

Appearance of accused in Court after issue but before service of summons—Charge read from summons—Is the Magistrate justified in dispensing with the framing of a charge.

Held: (1) *That the Magistrate was justified, in the circumstances, in dispensing with the framing of a charge and reading the charge from the summons.*

(2) *That an appearance in Court to show cause against a complaint, when a warrant or a summons had been issued, is an appearance on the summons or warrant, even though the summons had not been served or the warrant executed.*

TENNAKOON (POLICE INSPECTOR) *vs.* DAHANAYAKE ... ... XI. 140

Complaint regarding loss of money—Absence of formal complaint under § 148—Magistrate has no jurisdiction to make order restoring the money.

MARTIN SILVA *vs.* KANAPATHYPILLAI ... ... XIV. 41

A prosecution under the Weights and Measures Ordinance can be instituted by a Police Sergeant under § 148 (1) (b).

KULATUNGE *vs.* PERUNAM PULLE XVIII. 31

Evidence of witness recorded in the presence of accused produced in Court before charged—Can such evidence be read over to witness at the trial or should evidence be recorded afresh.

Held: *That when proceedings against an accused person were instituted under paragraph (d) of section* 148 (1) *of the Criminal Procedure Code, any evidence given by a witness recorded by the Magistrate before charging the accused could be read over to such witness at the trial.*

DHANAPALA *vs.* SABAPATHYPILLAI, D. R. O. ... ... XXXII. 63

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Offence triable summarily—Plaint filed under § 148 (1) (b)—Evidence of witness recorded under § 187 before framing of charge Previous evidence read over after framing of charge and witness cross-examined at length—Legality of procedure.

DE SARAM *vs.* WIMALASINGHE AND ANOTHER ... ... XXXV. 32

Who is the complainant, the aggrieved party or the Police—Has the aggrieved party right to be represented by a pleader—Right to conduct prosecution.

Held: (1) *That in summary proceedings commenced before a Magistrate by a Police Officer acting under section* 148 (1) (*b*) *of the Criminal Procedure Code. the "complainant" is the Police Officer and not the aggrieved party.*

(2) *That in such proceedings, the aggrieved party has no right to displace the Police Officer by a pleader to conduct the prosecution.*

ATTORNEY-GENERAL *vs.* HERATH SINGHO ... ... XXXVI. 36

Direction under section 93 of Village Communities Ordinance—Proceedings need not be commenced afresh under Criminal Procedure Code § 148.

ABDUL AZIZ *vs.* PODIAPPU XXXVII. 38

§ 150

Meaning of words "although no person by name is accused of having committed such offence" in subsection (1).

DIONIS AND ANOTHER *vs.* PIYORIS APPU ... ... XXIII. 77

§ 151

Evidence recorded under—Opportunity for cross-examination not given—Subsequent trial under section 152 (3) of the Criminal Procedure Code—Can evidence so recorded under section 151 (2) be read over to the accused at such trial.

Meaning of the words "although no person by name is accused of having committed such offence" in section 150 (1) of the Criminal Procedure Code.

Held: (1) *That evidence recorded by a Magistrate under section* 151 (2) *of the Criminal Procedure Code in the presence of accused brought before the Court under custody, cannot be merely read to the accused at the trial held subsequently under section* 152 (3) *of the Criminal Procedure Code.*

(2) *That the words "although no person by name is accused of having "committed such offence" in section* 150 (1) *of the Criminal Procedure Code mean "notwithstanding the fact that no person is accused by name."*

DIONIS AND ANOTHER *vs.* PIYORIS APPU ... ... XXIII. 77

Evidence of witness recorded in the presence of accused produced in Court before charged—Can such evidence be read over to witness at the trial or should evidence to recorded afresh.

DHANAPALA *vs.* SABAPATHY PILLAI ... ... XXXII. 63

Accused appearing in Court before process on him is issued—Charge framed without examination of complainant or material witness—Regularity of procedure.

HENRY DIAS *vs.* NADARAJA ... XXXV. 11

§ 152

In what circumstances may a Magistrate try summarily an offence under § 443 of the Penal Code.

Held: *That a Magistrate may try summarily under* § 152 (3) *of the Criminal Procedure Code even an offence under* § 443 *of the Penal Code where the facts are extremely simple and the offence is not of an aggravated nature requiring a punishment of more than two years.*

KOTIYAGALA (POLICE SERGEANT) *vs.* ALAGIRI *et al* ... ... II. 418

Should Magistrate try offences of a serious nature under this provision—Is it competent for the Supreme Court to review in appeal whether a Magistrate acted properly in dealing with a case under section 152 (3).

Held: (1) *That it is competent for the Supreme Court to review in appeal whether a Magistrate acted properly in dealing with a case, which was otherwise not triable summarily, under the provision of section* 152 *of the Criminal Procedure Code.*

(2) *That offences involving forgery specially when they are of a serious or grave character should not be tried by a*

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Magistrate under section 152 *of the Criminal Procedure Code.*

SHEDDAN (INSPECTOR OF POLICE) *vs.* AGOSINGHO ... ... II. 432

Trial of offences beyond his jurisdiction by Magistrate—Magistrate also a District Judge—Can he be presumed to have exercised jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code.

Held: *That where a Police Magistrate who is also a District Judge tried offences beyond the jurisdiction of a Police Court but within the jurisdiction of a District Court it is not correct to presume that he exercised jurisdiction as District Judge under section* 152 (3) *of the Criminal Procedure Code.*

SILVA (INSPECTOR OF POLICE) *vs.* KELANITISSA ... ... IV. 3

Can a Magistrate try summarily under section 152 (3) an accused person against whom he has already started non-summary proceedings—Courts Ordinance—Appointment of Magistrate—Is an appointment made by the Attorney-General on the Governor's orders valid.

Held: (1) *That a Magistrate, who is also a District Judge, has power to try summarily under section* 152 (3) *of the Criminal Procedure Code an accused person against whom he has started non-summary proceedings in respect of the same offence.*

(2) *That an appointment of a Magistrate made by the Attorney-General, on the orders of the Governor, is valid.*

GOONERATNE *vs.* MAHADEVA ... V. 132

A Magistrate, who is also a District Judge, when trying an accused under § 152 (3) in respect of a charge not triable summarily by a Magistrate need not, on it being brought to his notice that the accused is a registered criminal, discontinue the trial and commence non-summary proceedings.

GUNATILLEKE *vs.* NEPOSINGHO AND ANOTHER ... ... IX. 52

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

Held: (1) *That a magistrate must make up his mind to act under section* 152 (3) *of the Criminal Procedure Code very early, in fact, before the real inquiry in the presence of the accused begins. Once the inquiry is under-weigh, it should not be turned into a trial.*

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

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

MEDIWAKA (INSPECTOR OF POLICE) *vs.* GUNASEKERE ... XVII. 51

Summary trial of offence not summarily triable by magistrate—Adjournment of trial after complainant's evidence — Objection that the offence was not summarily triable—Assumption of jurisdiction under section 152 by magistrate who is also District Judge—Previous evidence read—Are proceedings regular.

Held: (1) *That the conviction of the accused was based, partly on evidence recorded on the* 4th *March,* 1940, *which evidence was improperly recorded, inasmuch as the magistrate had no jurisdiction to try the offence.*

(2) *That the decision by a magistrate, who is also a District Judge, as to whether or not an accused person should be tried summarily must be the result of the exercise of a judicial discretion vested in him by law.*

(3) *That such discretion should not be exercised belatedly.*

NAIR (POLICE SERGEANT) *vs.* YAGAPPAN ... ... XVIII. 123

Discontinuance of summary proceedings and taking of proceedings under section 152 (3)—Can evidence taken in summary proceedings be read over.

Held: *That when a magistrate discontinues summary proceedings and takes proceedings under section* 152 (3) *of the Criminal Procedure Code he should record evidence*

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de novo *as provided in section* 189 *of that Code and not read over the depositions made in the summary trial.*

ALLES (SUB-INSPECTOR OF POLICE) *vs.* CHARLES APPUHAMY ... XX. 100

Should a magistrate try a person charged with the offence of forgery summarily under section 152 (3).

Held: *That the offence of forgery is too grave an offence for a magistrate to try under section* 152 (3) *of the Criminal Procedure Code.*

SAHABANDU AND ANOTHER *vs.* WIJEMAN SINGHO AND ANOTHER ... XXII. 42

A Magistrate is not justified in trying summarily under section 152 (3) of the Criminal Procedure Code a breach of rule 30 of section 25 of the Notaries Ordinance merely because the maximum punishment is only a fine of Rs. 200/-.

DE SILVA *vs.* DALPATADU ... XXII. 65

Corporal Punishment Ordinance section 7 (1)—Can a magistrate acting under section 152 (3) of the Criminal Procedure Code exercise the power of imposing a sentence of whipping conferred on a District Judge by section 7 (1) of the Corporal Punishment Ordinance.

Held: *That a magistrate acting under section* 152 (3) *of the Criminal Procedure Code is not entitled to impose a sentence of whipping which a District Court may impose under section* 7 (1) *of the Corporal Punishment Ordinance.*

SIVASAMPU (I. P.) *vs.* RATNAYAKE AND TWO OTHERS ... XXIX. 59

Assumption of jurisdiction by Magistrate as District Judge—Reading over at the trial of evidence recorded before assuming jurisdiction—Illegality.

Where in a case of theft, the Magistrate having examined a witness in the presence of the accused, thereafter assumed jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code, and read over to the accused the evidence of the witness recorded before the assumption of jurisdiction and proceeded to convict the accused.

Held: (1) *That section* 297 *of the Criminal Procedure Code did not sanction such a procedure and that the failure to record such evidence* de novo *vitiated a conviction.*

(2) *That the omission to record such evidence* de novo *was not a mere irregularity, but an illegality, which could not be cured under section* 425 *of the Criminal Procedure Code.*

WILFRED *vs.* SOMASUNDRAM, INSPECTOR OF POLICE ... ... XXXI. 57

Charge under section 443 of the Penal Code—Should a conviction under this section be set aside merely because the Magistrate tried summarily.

Held: *That a conviction under section* 443 *of the Ceylon Penal Code will not be set aside merely because the Magistrate tried the accused summarily.*

PINCHA *vs.* VELOO, SUB-INSPECTOR OF POLICE ... ... XXXIII. 78

Summary trial—Penal Code, sections 443 and 369—Discretion of Magistrate.

Where it is contended that a Magistrate has erred in trying summarily an accused charged with house-breaking and theft.

Held: *That the exercise of jurisdiction under section* 152 (3) *of the Criminal Procedure Code is within the discretion of the Magistrate, and where this discretion is properly exercised, the Court will not interfere.*

HORANA POLICE *vs.* ABRAHAM SINGHO AND ANOTHER ... XXXV. 59

Power of Magistrate to conduct summary trial of non-summary offence—Offence of impersonation under Ceylon (Parliamentary Elections) Order-in-Council 1946, sections 54 and 58 (1)—Validity of Procedure—Legality of sentence.

A Magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code and summarily tried an offence of impersonation under section 54 of the Parliamentary Elections Order in Council, 1946. He convicted the accused and fined him Rs. 100. The Attorney-General applied for revision on the grounds (1) That the offence is not triable summarily and (2) that the sentence was illegal because the minimum fine under section 58 (1) (*a*) of the Order in Council is Rs. 250.

Held: (1) *That the Magistrate has the power under section* 152 (3) *of the Criminal Procedure Code, to hold a summary trial of*

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a person charged under section 58 of the Ceylon (Parliamentary Elections) Order in Council 1946.

(2) *That the fine of Rs. 100 is illegal on the grounds that the minimum fine for this offence is Rs. 250.*

ATTORNEY-GENERAL *vs.* DHARMASENA ... ... XXXVI. 26

Discretion of Magistrate to try summarily offence under section 443 of the Penal Code.

KIRIMUDIYANSE AND TWO OTHERS *vs.* POTHUHERA POLICE ... XXXVI. 88

Can Magistrate try offence of personation under § 58 (1) (a) of Ceylon (Parliamentary Elections) order in Council.

THE ATTORNEY-GENERAL *vs.* SINNATAMBY ... ... XXXVII. 48

Magistrate continuing proceedings initiated before his predecessor without making fresh determination under section 152 (3)—Regularity.

A Magistrate decided to try a case under section 152 (3) of the Criminal Procedure Code and charged the accused. His successor in office continued proceedings without deciding for himself whether he should proceed under section 152 (3).

Held: (1) *That there was no irregularity in the procedure.*

(2) *That even if there was an irregularity, it was curable under section 425.*

GUNAWARDENA *et al vs.* THE KING ... ... XXXVIII. 63

Magistrate continuing proceedings initiated before his predecessor without making fresh determination under section 152 (3)—Regularity.

On the date of trial, the Magistrate assumed jurisdiction as District Judge under section 152 (3) of the Criminal Procedure Code, charged the accused, recorded their statements under section 188, and postponed the trial. The Magistrate having been transferred, his successor continued the proceedings, convicted the accused and passed sentence.

Held: (1) *That when the accused were brought before the Magistrate, accused of an offence, which he had jurisdiction to inquire into, he should have acted in accordance with section 152 (1) or section 152 (3), and as he took neither course, the proceedings were not in accordance with the provisions of the Code.*

(2) *That the Magistrate's opinion that the case is one that may properly be tried summarily is a condition precedent to the assumption of jurisdiction under section (3) and that as the successor proceeded to try the case without giving his own mind to the propriety of trying the case summarily, there was no jurisdiction.*

(3) *That as the Magistrate acted without jurisdiction, section 425 was of no avail.*

HENDRICK HAMY AND ANOTHER *vs.* INSPECTOR OF POLICE, KANDANA ... ... XXXIX. 39

Magistrates should not be in too great a hurry to assume jurisdiction under § 152 (3) and deprive persons of the benefit of a trial in a higher Court following upon a non-summary inquiry.

SANGARAKKITA THERO *et al vs.* BUDDHARAKKITA THERO ... XXXIX. 86

Assumption of jurisdiction in charge of housebreaking and theft.

VADIVELU *vs.* THE INSPECTOR OF POLICE BADULLA ... ... XL. 22

Assumption of jurisdiction by Magistrate as District Judge without recording evidence —Transfer of Magistrate after such assumption of jurisdiction—Successor continuing proceedings without recording that he himself assumed or reassumed jurisdiction and without giving his own mind to the propriety of trying the case under section 152 (3)—Is conviction bad—Courts Ordinance section 88.

On the trial date, the Magistrate without proceeding to hear any evidence recorded "I peruse the B reports and as facts are simple I assume jurisdiction as Additional District Judge." Thereafter the accused were duly charged and the trial was adjourned. On the adjourned trial date the Magistrate who charged the accused had been transferred and his successor proceeded to record the evidence and convict the accused.

It was argued for the accused that on the authority of the case *Hendrick Hamy vs. Inspector of Police, Kandana,* (1948) 50

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N. L. R. 116 the conviction was bad inasmuch as the suceeding Magistrate did not give his own mind to the propriety of trying the case under section 152 (3) of the Criminal Procedure Code.

As this view was in conflict with another recent decision—*Gunawardena vs. Veloo*, (1948) 50 N. L. R. 107—the matter was referred to two judges.

Held: (1) *That although the former magistrate, did not—*

(i) *Expressly refer to the section under which he was assuming jurisdiction or to the fact that he was of opinion that the charge might properly be tried summarily under section* 152 (3) *of the Criminal Procedure Code.*

(ii) *Record evidence before he assumed jurisdiction.*

There was a proper assumption of jurisdiction under section 152 (3) *by him.*

(2) *That in view of section* 88 *of the Courts Ordinance, the failure on the part of the succeeding Magistrate to record his independent opinion, whether the case is one that may properly be tried summarily under section* 152 (3) *as District Judge, did not vitiate the conviction.*

Overruled: *Hendrick Hamy vs. Inspector of Police, Kandana,* 50 *N. L. R.* 116

WILLIAM PERERA *et al vs.* INSPECTOR OF POLICE, MAHARAGAMA ... ... XLII. 1

Jurisdiction of Magistrate to try offences indictable under Telecommunication Ordinance.

GUNAWARDENA *vs.* VYTHILINGAM XLIII. 75

Magistrate assuming jurisdiction under—Sentence of two years' rigorous imprisonment and further term of two years' rigorous imprisonment under section 6 of the Prevention of Crimes Ordinance—Legality of the additional sentence.

Held: *That there is no necessity for a District Judge, or for a Magistrate trying a case summarily under section* 152 (3) *of the Criminal Procedure Code in his capacity as a District Judge, to resort to the provisions of section* 6 *of the Prevention of Crimes Ordinance unless the maximum term of imprisonment normally prescribed for o particular offence is less than two years.*

MOHAMED CASSIM *vs.* HEADQUARTERS' INSPECTOR OF POLICE, BADULLA XLVI. 15

Assumption of summary jurisdiction by Magistrate under § 152 (3)—Pleas of accused recorded — Attorney-General's order to Magistrate to discontinue summary proceedings and to take non-summary proceedings—validity of.

ATTORNEY-GENERAL *vs.* SRI SKANDARAJAH ... ... XLVII. 1

§ 154

Plea of guilty tendered by pleader for accused in excise case—should not be accepted unless it is a plea offered under § 154.

FERDINANDO (EXCISE INSPECTOR) *vs.* MUDALIHAMY ... ... I. 297

§ 155

Statement by accused under § 155—Accused abiding by voluntary statement made earlier—Voluntary statement becomes incorporated in statutory statement and is admissible in evidence.

REX *vs.* KARALY MUTTIAH AND OTHERS ... ... XVI. 37

§ 156

Discharge in non-summary case—Appeal from order of discharge—does it lie?

Held: *That no appeal lies from an order of discharge under either §§* 156, 157 *and* 338 *of the Criminal Procedure Code.*

FERNANDO *vs.* FERNANDO ... I. 403

When should Magistrate read over the charge or charges to the accused—

THE KING *vs.* WEERASAMY AND FIVE OTHERS ... ... XXII. 57

§ 157

Non-Summary proceedings—Discharge under section 157.

Held: *That an order made under* § 157 *of the Criminal Procedure Code is not an appealable order.*

SAWARIAMMA *vs.* ARUMUGAM. I. 231

FERNANDO *vs.* FERNANDO ... I. 403

§ 160

Statements which do not come under sections 160 or 165 of the Criminal Procedure Code can be used either by the

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prosecution or the defence if they are relevant and admissible.

REX *vs.* PUNCHIMAHATHMAYA XXIV. 108

§ 163

Meaning of the words "evidence sufficient to put the accused on his trial"—Such "sufficiency" a question of fact for decision by the committing Magistrate—Can Assize Judge inquire into sufficiency of evidence to support indictiment — When Magistrate should not commit an accused for trial in higher Courts.

Held: (1) *That, in the matter of committal for trial, a Magistrate's function under the Criminal Procedure Code is a judicial one, something more thon the finding of a* prima facie *case something less than finding that the case has been "proved."*

(2) *That the question, whether there is "evidence sufficient to put the accused on his trial (in Section* 163 (1) *Criminal Procedure Code)", is one of fact. In trials before the Assize Court, questions of fact are for the Magistrate in the first and for the Jury in the final instance, and it is not possible for the presiding Judge to say that such evidence as has been duly recorded at the non-summary inquiry is insufficent to support the Indictment presented against the accused.*

(3) *That a Magistrate should not commit an accused person for trial unless he considers that the evidence is sufficient to justify the accused being put to the heavy expense and anxiety involved in facing a serious trial.*

REX *vs.* DE MEL AND OTHERS ... XXXVI. 10

§ 165

Statements which do not come under § 165 can be used either by the prosecution or the defence if they are relevant and admissible.

REX *vs.* PUNCHIMAHATHMAYA XXIV. 108

§ 165 B

Election of jury—Subsequent application for altering election.

THE KING *vs.* RAJARATNAM *alias* CHETTIAR AND OTHERS ... ... XXX. 13

Sinhalese prisoners electing to be tried by Tamil-speaking jury—Application by Crown under § 224 for order that accused be tried by an English-speaking jury—

THE KING *vs.* THELENIS APPUHAMY AND OTHERS ... ... XXX. 38

§ 165 F

Powers of Attorney-General under this §

REX *vs.* EMANIS ... ... XVIII. 99

§ 166

Failure to comply with section vitiates conviction.

Held: *That a Magistrate acting under section* 166 *of the Criminal Procedure Code must comply with the requirements of that section and a conviction without such compliance is illegal.*

PIYADASA AND ANOTHER *vs.* VEYANGODA POLICE ... ... XXXIX. 80

§ 167

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

MEERA NATCHIA *vs.* MARIKAR XVI. 79

Failure to draft charge in conformity with section 167 (3)—Accused pleading guilty to charge—Application in revision—Duty of Magistrates in charging accused.

Where an accused person pleaded guilty to a charge which did not conform to the requirements of section 167 (3) of the Criminal Procedure Code, and where it appeared that it is doubtful whether the accused has not been misled by such omission.

Held: *That the defect in the charge is not curable either under sections* 171 *or* 425 *of the Criminal Procedure Code and that the conviction should be quashed.*

NAGALINGAM *vs.* KAYTS POLICE XXXIX. 102

§ 168

Charge of rash and negligent driving alleged in same charge—Failure to give proper particulars of the charge.

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Held: *That it is wrong to allege both rashness and negligence in one and the same charge.*

NAGAIAH *vs.* D. R. O., M. S. AND E. P. ... ... XLI. 42

§ 171

Charge of cheating—Defect in not disclosing offence—Offence disclosed in evidence —Evidence lead for defence—Can such defect be cured under section 171 illustration (b).

The accused was charged with cheating the complainant by issuing a cheque without funds in the bank and thereby inducing the complainant "to enter up payment" in complainant's books of a debt due by the accused on goods purchased.

While giving evidence the complainant stated that as a result of receiving accused's cheque, he was induced to give further goods on credit, a thing which he would never have done, but for this dishonest inducement. The magistrate convicted the accused holding that such giving of further credit had caused definite damage and harm to the complainant and further that the defects in the charge had been cured by section 171, illustration (*b*) of the Criminal Procedure Code.

Held: *That the defect in the charge was not curable under section* 171 *of the Criminal Procedure Code under the circumstances.*

ZAHIR *vs.* COORAY ... ... XIX. 104

Defect in charge—Accused not misled by such defect—Conviction not vitiated.

KALLADI PITCHE AND ANOTHER *vs.* INSPECTOR OF POLICE PUTTALAM XXXVI. 5

Failure to draft charge in conformity with § 167 (3)—Accused pleading guilty—Is defect in charge curable under § 171.

NAGALINGAM *vs.* KAYTS POLICE XXXIX. 102

Failure to give proper particulars in charge —Defect not curable.

NAGAIAH *vs.* D.R.O., M.S. AND E.P. XLI. 42

§ 172

Charge—Powers of Court as regards amendment—Omission to state proper particulars—Powers of Supreme Court to convict accused in appeal under the right offence.

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

MEERA NATCHIA *vs.* MARIKAR XVI. 79

Effect of the withdrawal of a count of an indictment.

Held: (1) *That section* 172 *of the Criminal Procedure Code merely authorises the Court to permit an alteration of the charge.*

(2) *That the words "alter any indictment" in section* 172 (1) *includes the withdrawal of a count in an indictment.*

(3) *That the Attorney-General has no power under the Code to frame a fresh indictment in respect of a charge withdrawn in pursuance of the Court exercising its powers of amendment under section* 172 *of the Criminal Procedure Code.*

(4) *That if it is desired to place an accused person on his trial in respect of a charge which is withdrawn under section* 172, *magisterial proceedings must be commenced* de novo.

REX *vs.* EMANIS ... ... XVIII. 99

Withdrawal of two counts from an indictment containing three counts relating to three separate offences—Does such withdrawal act as a bar against the accused being indicted in respect of the counts withdrawn.

The withdrawal of an indictment or a charge from an indictment under section 217 of the Criminal Procedure Code does not preclude the Attorney-General from indicting the prisoner subsequently in respect of the charge that was withdrawn.

THE KING *vs.* MATARAGE EMANIS XXV. 67

Distinction between addition and alteration of a charge.

PIYASENA *vs.* VAZ ... XXXII. 25

Statement of accused to Headman—Likelihood of it being sole evidence to establish accused's presence at scene of offence—Failure to include such statement in indictment—Application to amend, by including such statement — Prejudice to accused—Matters to be taken into consideration.

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Held: *That an application to amend the indictment, by including in the list of productions the statement made by the accused to the Village Headman and referred to in the lower Court, should be allowed, although such statement is likely to be the only evidence available to the prosecution to establish that the accused was at the scene of the offence.*

REX *vs.* MANUEL COORAY XXXIII. 104

Accused charged with certain offences—Prosecution evidence disclosing only abetment of such offences—Acquittal of accused without amending charges.

Where an accused person was charged with certain offences under the Penal Code, and the evidence for the prosecution disclosed that the accused only incited others to commit the said offences and the Magistrate acquitted the accused on the ground that the charge was not established.

Held: (1) *That as the evidence disclosed offences under sections* 100 *and* 107 *of the Penal Code, the Magistrate should have, without acquitting the accused, amended the charges under section* 172 (1) *of the Criminal Procedure Code.*

(2) *That the offence of criminal intimidation is not triable by a Magistrate summarily if the threat is to cause death or grievous hurt.*

WRIGHT S. I. POLICE, ANURADHAPURA *vs.* S. M. SIRIWARDENA XXXIV. 78

Village Communities Ordinance (Cap. 198) Charges under—Withdrawal and amendment of charges, when should be allowed.

Held: (1) *That the power vested in a Court under section* 172 *of the Criminal Procedure Code to alter a charge at any time before judgment is pronounced is a discretionary one and should be exercised judicially.*

(2) *That where a Magistrate failed to give reasons for the exercise of this discretion, the Supreme Court would consider the question anew.*

(3) *That section* 172 *of the Criminal Procedure Code is wide enough to permit the withdrawal of one or more charges in a plaint.*

(4) *That an amendment of charges should not be refused by a Court unless it is likely to do substantial injustice to an accused.*

Per NAGALINGAM, J.—"Furthermore, when I consider that the charges relate to the commission of offence by a person holding a public office, I am the less reluctant to refuse the amendment."

JOHN PERERA *vs.* JOSEPH PERERA WEERASINGHE ... ... XLIII. 69

Discretion of Court to allow amendment of indictment—Court cannot permit fresh evidence to be led after indictment to supplement evidence which was in the first instance inadequate to justify commitment.

THE KING *vs.* NISSANKA MICHAEL FERNANDO ... ... XLIII. 97

§ 178

Charges under sections 369 and 396 of Penal Code cannot be joined.

RAHIM *vs.* SILVA AND ANOTHER II. 476

An accused cannot, upon being charged with being found in or upon a building for an unlawful purpose, be convicted of being found in a building and failing to give a satisfactory account without a separate charge in respect of the latter offence.

THIEDMAN (S. I. POLICE) *vs.* P. CHARLES ... ... VII. 40

Misjoinder of charges—Distinct offences of different kinds—Can they be joined when not committed in the same transaction.

Held: *That it is illegal to join a charge of attempting to cheat with a charge of cheating in a case where the two offences are not committed in the same transaction.*

GUNERATNE (A.S.P.) *vs.* WIJESINGHE X. 137

Joinder of charges—Distinct offences included in the same charge—Penal Code, sections 484 and 486.

Where offences under sections 484 and 486 were included in the same charge in breach of section 178 of the Criminal Procedure Code.

Held: (1) *That the charge was bad in law.*

(2) *That such breach of section* 178 *was not one curable under section* 425 *of the Criminal Procedure Code.*

MOHAMED LEVVE *vs.* CAREEM XXXVI. 96

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Misjoinder of charges.

Held: *That a charge of causing hurt on a particular day with hot-water and a fire-brand cannot be joined with a charge of causing hurt during the month by striking with a stick.*

SAMUEL *vs.* RODRIGO (S. I. POLICE, JAFFNA) ... ... XXXVIII. 77

§ 179

Joinder of three charges of acts of gross indecency with three different persons within twelve months—Is such joinder bad—Evidence Ordinance section 14—When may evidence of similar acts be lead.

Held: *That section* 179 *of the Criminal Procedure Code does not require that the three offences with which an accused is charged should be against the same person.*

REX *vs.* WICKREMASINGHE ... II. 375

Joinder of charges

The accused were indicted on the following charges.

(i) That on or about 6th September, 1935, at Mullaitivu, you did commit housebreaking by night by entering the house of one Sivaguru Mailvaganam in order to commit theft; and that you have thereby committed an offence punishable under section 443 of the Ceylon Penal Code.

(ii) That at the time and place aforesaid, you did, in a building used as a human dwelling, to wit, the aforesaid house, commit theft of cash about Rs. 39-50, a torch, 3 shirts, 12 sarees and other articles, property in the possession of the said Sivaguru Mailvaganam; and that you have thereby committed an offence punishable under section 369 of the Ceylon Penal code.

(iii) That at the time and place aforesaid and in the course of the same transaction as set out in counts 1 and 2, you did commit housebreaking by night by entering the house of one Gabriel Bastianpillai in order to commit theft; and that you have thereby committed an offence punishable under section 443 of the Ceylon Penal Code.

(iv) That at the time and place aforesaid, and in the course of the same transaction as set out in counts 1 and 2, you did in a building used as a human building, the house last aforesaid, commit theft of a torch, two fountain pens, 2 sarees and other articles, property in the possession of the said Gabriel Bastianpillai; and that you have thereby committed an offence punishable under section 369 of the Ceylon Penal Code.

Objection was taken to the indictment in appeal on the ground that there was a misjoinder of charges.

Held: *That two persons can be jointly charged and tried in respect of two distinct transactions when the offences which are included in these transactions are identical.*

2. C. L. R. 189 (*King vs. Arlis Appu*) overruled.

THE KING *vs.* PONNADURAI AIYAN AND OTHERS ... ... VI. 95

Joinder of three charges of murder in one indictment —Desirability of such joinder —Permissibility—Discretionary power of judge.

REX *vs.* A. PEDRICK SINGHO XXXIV. 5

Joinder of charges — Three charges under section 467 of the Penal Code joined in the same indictment—Particulars of an offence under section 476—Does each particular constitute a separate offence.

Held: *That each of the particulars of the offence in a charge under section* 467 *of the Penal Code does not constitute a separate offence for the purposes of section* 179 *of the Criminal Procedure Code.*

KING *vs.* GOONEWARDENA XXIV. 127

Indictment—Joinder of charges—Conspiracy to commit several offences—Can it be said there are several conspiracies—Offences extending over a period of twelve months—Several persons conspiring to commit several offences—Can they be charged together—Same transaction

Held: (1) *That agreement is the gist of the offence of conspiracy and one agreement to commit cheating* (*or forgery*) *does not become three agreements to commit cheating* (*or forgery*) *because three offences of cheating* (*or forgery*) *are committed in pursuance of the agreement.*

(2) *That if two persons conspire to commit falsification of accounts and criminal breach of trust, they are guilty of two conspiracies.*

(3) *That where several persons conspire to commit several offences all of*

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which are so connected with each other as to form one transaction, all the offences can be joined in one charge as being one conspiracy to commit the acts alleged.

Per HEARNE, J.: "Under the law in India the sections which correspond with sections 179 and 180 (1) of our law are 'mutually exclusive,' but this is not the case in Ceylon by reason of the additional words 'which said sections may be applied severally or in combination' which appear in section 178."

THE KING *vs.* SUNDARAM AND ANOTHER ... ... XXV. 38

Misjoinder of charges—Application to amend charges—when should it be allowed.

JOHN PERERA *vs.* JOSEPH PERERA WEERASINGHE ... ... XLIII. 69

Two similar offences alleged within twelve months—Institution of separate non-summary proceedings in respect of each offence—Committal of accused in each case—Amalgamation of charges in one indictment by Attorney General—Objection by defence—Is joinder justifiable—Prejudice to accused.

THE KING *vs.* NISSANKA MICHAEL FERNANDO ... ... XLIII. 97

§ 180

Joinder of charges—Offences committed in the same transaction.

Held: *That community of purpose and continuity of action are essential elements necessary to link together different acts so as to form the same transaction.*

JONKLAAS (INSPECTOR OF POLICE) *vs.* SOMADASA AND TWO OTHERS XXII. 96

Joinder of three charges of murder in one indictment—Desirability of such joinder—Permissibility — Discretionary power of judge.

REX *vs.* A. PEDRICK SINGHO ... XXXIV. 5

Charge of theft joined with alternative charge of disposing with stolen property—Is such joinder bad.

KARUNARATNE *vs.* INSPECTOR OF POLICE BAMBALAPITIYA ... XXXIV. 104

Joint trial of accused—Prejudice to appellant—Miscarriage of justice—Test in determining.

DHARMASENA *vs.* THE KING ... XLIII. 1

It is permissible to join charges in one and the same indictment where the same facts constitute the offences of conspiracy under section 113B and also of abetment under section 102 of the Penal Code.

REX *vs.* KANAGARATNAM *et al* XLVII. 42

Charge of falsification of accounts under section 467 of Penal Code—Can it be joined with charges of criminal breach of trust under section 392A of the Code.

THE KING *vs.* DON CHARLES GUNATUNGA ... ... XLVII. 49

§ 181

Charges of theft and receiving stolen property in the alternative—Can Magistrate waive or alter the effect of § 330 by his order? Scope of § 181—Is Criminal Misappropriation an offence within its scope?

An accused who was charged with theft and receiving stolen property in the alternative was acquitted by the Magistrate, who while doing so made order reserving to the prosecutor the right to charge the accused for criminal misappropriation in a separate case.

Held: *That the Magistrate had no power to make such a reservation, and that criminal misappropriation being allied to the class of offences specified in* § 181 *of the Criminal Procedure Code comes within its scope and is an offence for which the accused could have been charged in the alternative with theft and receiving stolen property. An acquittal for theft is a bar to a prosecution for criminal misappropriation of the same subject matter.*

CANAGASINGHAM VANNIAH *vs.* MEYADIN BAWA ... ... I. 29

Accused charged under sections 386 and 400 of the Penal Code but convicted of criminal breach of trust under section 388 of the Penal Code without being charged a fresh or being given an opportunity of defending himself against this charge.

Held: *That a person cannot be convicted of an offence with which he is not charged and to which he has not pleaded in a case*

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where there is no doubt as to which of several offences he has committed if the facts as alleged by the prosecution are established.

RASIAH *vs.* RAJADURAI ... III. 104

Alternative charges in respect of distinct offences may be joined under section 181 when the prosecution is faced with a genuine doubt as to whether it could establish exclusively any one offence.

REX *vs.* PONNASAMY AND FOUR OTHERS ... ... XXVI. 99

Applicability of Section—Nature of the doubt referred to—Indictment—Alternative counts for murder and abetment of murder—Can accused be tried at one trial on same indictment.

Held: (1) *That alternative counts for murder and abetment of murder are properly laid in one and the same indictment when on the evidence in the possession of the prosecution at the time when the indictment is framed, it is impracticable of which of such offences the accused may be said to be guilty.*

(2) *That the doubt referred to in section* 181 *of the Criminal Procedure Code must arise from the equivocal nature of the acts of the accused, as alleged by the prosecution and disclosed during the non-summary proceedings, and cannot be affected by questions such as whether the prosecution will be able to produce this evidence at the trial, or whether the jury will believe it.*

Per SOERTSZ, J.: "Section 181 does not apply when the doubt arises from the nature of the evidence, but it applies only in cases in which a doubt arises from the nature of the acts. Where the acts are unambiguous and indicate a definite offence, but in consequence of a failure to appreciate the legal value of the facts, a different offence is charged and that charge fails, it would not be possible to invoke the aid of section 182 of the Criminal Procedure Code in order to substitute a conviction of the accused on the charge that should have been but was not preferred".

KING *vs.* KITCHILAN AND OTHERS XXX. 67

Seven accused charged with theft—Three convicted of theft and four of dishonestly receiving stolen property—Validity of joinder.

THE KING *vs.* JAYASENA AND OTHERS ... ... XXXV. 25

Charges in the alternative—Joinder of charges—Joinder of accused—Discretion of trial Judge—Brothels Ordinance (Chap. 25) section 2.

The first accused was charged in the alternative. The second accused was charged with the commission of an offence in the same transaction. The two accused were tried jointly. On the facts as disclosed before the charge was framed there was a doubt as to which of several offences the first accused had committed.

Held: (1) *That as a genuine doubt existed at the time the charge was framed as to which offence the first accused had committed, the charge was properly framed in the alternative.*

(2) *That the question whether the accused should be tried jointly was one for the Judge to decide in his discretion and he had exercised his discretion judicially.*

RATNAYAKE AND ANOTHER *vs.* DEVENDRA (S. I. POLICE) ... ... XXXVI. 83

§ 182

Cognate offences—Riot and voluntarily causing simple hurt.

Held: *That the offence against section* 314 *of the Penal Code is sufficiently cognate with the offence of riot to make section* 182 *of the Criminal Procedure Code applicable.*

FONSEKA, INSPECTOR OF POLICE *vs.* FRANCIS KARUNE *et al* ... ... I. 190

Cognate offence — Can accused charged with "attempting to cause grievous hurt" be convicted of endangering life by a rash or negligent act?

Held: (1) *That an accused charged with attempting to cause grievous hurt cannot be convicted of endangering life by a rash or negligent act.*

(2) *That the two offences of attempting to cause grievous hurt and endangering life by a rash or negligent act are not "cognate" or "allied" in any way.*

KING *vs.* SABAPATHY ... II. 449

§ 182 is applicable only to cases where the act or series of acts are of such a nature that it is doubtful which of several offences have been committed by the accused.

RASIAH *vs.* RAJADURAI ... III. 104

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Can a person charged with an offence under section 57 (2) of the Motor Car Ordinance No. 20 of 1927 be convicted of an offence under section 57 (3).

Held: *That a person charged with an offence under section* 57 (2) *of the Motor Car Ordinance No.* 20 *of* 1927 *can, where the facts justify such a finding, be convicted of an offence under section* 57 (3).

INSPECTOR OF POLICE (GAMPAHA) *vs.* EDMUND ... ... VI. 50

Seven accused charged with theft—Three convicted of theft and four of dishonestly receiving stolen property — Validity of joinder.

THE KING *vs.* JAYASENA AND OTHERS ... ... XXXV. 25

Charge of murder not proven—Can accused be convicted under § 198 of Penal Code.

REX *vs.* KARUPPIAH SERVAI XLIV. 44

§ 183

Scope of §

KING *vs.* SABAPATHY ... II. 449

Charges of criminal negligence—Charges not established—Can accused be found guilty of minor offence.

Lowrensz *vs.* Vyramuttu ... XX. 101

§ 184

Joinder of persons—Distinct offences committed by each on different days—Conviction based on unsworn testemony of little child.

Held: (1) *That the joinder of persons committing different offences on different dates not in the course of the same transaction is an irrigularity which is fatal to a conviction.*

(2) *That the statements of a child of tender years ca not be admitted in evidence unless made on oath or affirmation.*

POLICE SERGEANT JUMAL *vs.* PERERA AND ANOTHER ... ... I. 208

§ 184 illustration (d)—Affray—Can opposing factions be charged and convicted for affray together?

Held: (1) *That two opposing factions charged with affray can be charged and tried together.*

(2) *That illustration (d) to section* 184 *of the Criminal Procedure Code does not apply to a case of affray.*

WEERASINGHE *vs.* MOHAMADO ISMAIL *et al* ... ... I. 218

A person charged with illicit tapping cannot be tried together with a person charged with failing to give information of illicit tapping in a land of which he is the owner.

ALWIS *vs.* ARALISHAMY ... ... III. 107

The joinder of charges of house-breaking and theft against one accused with a charge of retaining stolen property against another is a fatal irrigularity.

INSPECTOR SOURJAH *vs.* W. A. HINNIHAMY ... ... VIII. 20

Misjoinder of charges—Deaf and dumb accused—Can a person who is unable to understand proceedings be tried—How may such person be tried.

Held: (1) *That the convictions were bad for misjoinder of accused.*

(2) *That section* 288 *of the Criminal Procedure Code enables a Court to try a person though be could not understand proceedings.*

JOSEPH (SUB-INSPECTOR OF POLICE) *vs.* FERNANDO AND ANOTHER ... XVIII. 69

Joinder of charges—Two persons charged under the Excise Ordinance with jointly being in unlawful possession of arrack—Guilty knowledge established only against one person—Can both be acquitted on ground of misjoinder of charges.

Two parcels, one containing four bottles of arrack and the other three bottles of arrack were found in a bus under the seats of the driver and the conductor who were its sole occupants. They were charged with jointly being in possession of seven bottles of arrack. The evidence established that only the conductor, who on the approach of a party of Excise Officers was seen trying to push something under his seat, knew that his parcel contained arrack. The magistrate acquitted both accused on the ground of misjoinder of charges.

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Held: (1) *That there was no misjoinder of charges.*

(2) *That the conductor was in exclusive possession of the four bottles of arrack under his seat.*

Per HOWARD, C.J.: "If he (the magistrate) had come to the conclusion that there was no evidence against the 1st accused, he should have discharged him and considered the case made against the respondent, the 2nd accused."

RODRIGO (EXCISE INSPECTOR) *vs.* PUNCHI-MAHATMAYA ... ... XXIX. 56

Seven accused charged with theft—Three convicted of theft and four of dishonestly receiving stolen property—Validity of joinder.

THE KING *vs.* JAYASENA AND OTHERS ... ... XXXV. 25

Charges in the alternative—Joinder of charges—Joinder of accused—Discretion of Trial Judge—

RATNAYAKE AND ANOTHER *vs.* DEVENDRA ... ... XXXVI. 83

Charge of abetment by facilitation of criminal breach of trust—Liability of alleged abettor to be jointly tried with principal offender is subject to his right under § 179 to claim that not more than three charges of the same kind may be laid against him in the course of a single trial.

REX *vs.* COORAY ... ... XLIII. 49

Joint trial of accused—Prejudice to appellant—Miscarriage of justice—Test in determining — Principles on which Privy Council will interfere in criminal appeals.

The appellant was convicted on two charges (1) conspiracy to commit murder, (2) murder. He was charged and tried together with one B, who, too, was convicted on the charge of conspiracy with the appellant to murder her husband.

The Court of Criminal Appeal quashed the conviction of B, holding that there were irregularities in the trial for conspiracy and granted her a new trial, but the appellant's appeal was dismissed on the ground that there was ample evidence to establish his guilt.

At the re-trial B was acquitted. On an application by the appellant, the Privy Council granted special leave to appeal.

At the hearing the main contentions for the appellant were (*a*) that he suffered a miscarriage of justice as the jury must have been unduly prejudiced against him by the questions put to the other accused at the joint trial; (*b*) that if the jury had not been so prejudiced they might well have acquitted him.

Held: (1) *That as B has been found not guilty of conspiracy, the proper course is to treat her acquittal as a disposal of the charge of conspiracy and as involving the acquittal of the appellant also on that charge.*

(2) *That although there were irregularities in the trial on the conspiracy charge, the joint trial of the two accused could not be said to have seriously prejudiced the appellant in the eyes of the Jury, as the summing-up on the murder charge was plainly separated from the joint charge and contained adequate directions to the Jury.*

(3) *That in determining what amounts to a miscarriage of justice the test to be applied is whether a reasonable Jury properly directed would on the evidence adduced have found the prisoner guilty.*

(4) *That in this case a reasonable Jury properly directed would have found the appellant guilty of the charge of murder inasmuch as there was ample evidence to establish his guilt.*

(5) *That the time at which it falls to be determined whether the condition that the offences alleged had been committed in the course of the same transaction has been fulfilled so as to enable persons accused of different offences to be charged and tried together as provided by section* 184 *of the Criminal Procedure Code, is the time when the accusation is made and not when the trial is concluded and the result known.*

DHARMASENA *vs.* THE KING ... XLIII. 1

§ 185

Withdrawal of charge—Is court precluded from finding accused guilty on this charge.

REX *vs.* SILVA AND OTHERS ... XVIII. 51

§ 186

A prosecutor is not bound to call all the witnesses on the indictment or to tender them for cross-examination.

REX *vs.* CHALO SINGHO ... XX. 21

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§ 187

Appearance of accused in Court after issue but before service of summons—Charge read from summons—Is Magistrate justified in dispensing with the framing of a charge.

TENNAKOON *vs.* DAHANAYAKE XI. 140

Magistrate reading to accused particulars of offence from plaint and not from summons—Regularity.

SILVA *vs.* ABEYSEKERA ... XXXI. 14

Where an accused person is produced before a Magistrate charged with offences punishable with more than three months rigorous imprisonment or a fine of fifty rupees, it is irregular to charge him from the plaint without framing a charge as required by § 187 (1).

THE FOOD AND PRICE CONTROL INSPECTOR *vs.* PUNCHI BANDA ABEYRATNE XXXIII. 62

Accused appearing in Court before process on him is issued—Charge framed without examination of complainant or material witness—Regularity of procedure.

HENRY DIAS *vs.* NADARAJA XXXV. 11

Offence triable summarily—Plaint filed under section 148 (1) (b)—Evidence of witness recorded under section 187 before framing of charge—Previous evidence read over after framing of charge and witness cross-examined at length—Legality of procedure—Prejudice to accused.

Where in an offence triable summarily, the Magistrate, before framing the charge, recorded evidence to satisfy himself that there was sufficient ground for proceeding against the accused as required by section 187 of the Criminal Procedure Code, and after the charge was framed, the evidence so recorded was read over to the accused in the presence of the witness who was thereafter cross-examined at length.

Held: *That the evidence of the witness was properly recorded and that the conviction based on such evidence was valid.*

DE SARAM, INSPECTOR OF POLICE, AMBALANGODA *vs.* WIMALA SINGHE AND ANOTHER ... XXXV. 32

Accused appearing on summons—Instead of framing charge Magistrate may read to him statement of particulars of offence contained in summons. That statement can be amended in the same way as a charge.

SOLICITOR-GENERAL *vs.* ARADIEL XXXIX. 17

Plea of "not guilty"—Plea withdrawn in course of proceedings and plea of "Guilty" tendered—Regularity.

Held: (1) *That the Court can allow a person to withdraw a statement not amounting to an admission of guilt and make another containing an admission of guilt;*

(2) *That such admission of guilt should be recorded in the manner prescribed by section* 188 *for statements made under section* 187 (3).

RAJARETNAM *vs.* GOONESINGHE (MOTOR PATROL INSPECTOR, JAFFNA) XL. 109

§ 188

Failure to record very words used by accused.

Held: *That the failure to record the very words used by an accused upon being addressed by the Magistrate under section* 188 (1) *of the Criminal procedure Code is fatal to a conviction.*

JOSEPH *vs.* FONSEKA ... ... IV. 32

Misjoinder of charges.

Held: (1) *That the statement, "Guilty; I admit I took these articles from my son-in-law's house. They are mine," is not an unqualified admission within the scope of section* 188 *of tne Criminal Procedure Code.*

(2) *That the joinder of charges of house-breaking and theft against one accused with a charge of retaining stolen property against another is a fatal irregularity.*

INSPECTOR SOURJAH *vs.* W. A. HINNIHAMY ... ... VIII. 20

Plea of guilty—Withdrawal of a statement which amounts to an admission that the accused is guilty of the offence with which he is accused—Effect of such a withdrawal.

Held: (1) *That an accused may before a verdict of guilty is recorded withdraw an admission of guilt even though it be unqualified.*

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

LEEMBRUGEN (A. S. P. N'ELIYA) *vs.* PITCHAIPILLAI ... XVII. 49

Plea—Withdrawal of—At what stage of a trial and in what circumstances may an accused person be permitted to withdraw a plea of guilty.

Held: (1) *That where a plea of guilty is tendered by an accused person under a misapprehension as to the facts, he is entitled to withdraw it at any time before sentence is passed.*

(2) *That a magistrate has power to set aside a conviction entered on a plea of guilty if he is satisfied that the plea was tendered under a misapprehension as to the facts, and to allow the accused to withdraw his plea.*

SIRIWARDENE *vs.* JAMES *et al* XVIII. 47

Plea of guilty—Failure to record conviction formally but sentence postponed—Application to withdraw plea—Refusal—Is such failure to record conviction a fatal irregularity.

Held: (1) *That the learned magistrate was justified in refusing to allow the withdrawal of the plea at that stage.*

(2) *That in the circumstances the the omission formally to record the conviction was an irregularity curable under section* 425 *of the Criminal Procedure Code.*

SABARATNAM (D. R. O.) *vs.* SANTHIA ... ... XXI. 101

Non-compliance with provisions of section—Validity of conviction.

Held: *That non-compliance with the provisions of section* 188 (2) *of the Criminal Procedure Code is a fatal irregularity and vitiates a conviction.*

HADLIN SILVA *vs.* ALEXANDER (P. C. RATNAPURA) ... XXXVIII. 94

Plea of "not guilty"—Plea withdrawn in course of proceedings and plea of "guilty" tendered—Regularity—

RAJARETNAM *vs.* GOONESINGHE XL. 109

Admission of guilt in course of trial of offence not charged with—Failure to frame fresh charge before accepting plea and dealing with accused.

Where in the course of a trial of a person charged under sections 440 and 369 of the Penal Code, the accused pleaded guilty to a charge under section 394 of the Penal Code and after accepting the plea without framing a fresh charge and explaining to the accused as required by section 193 of the Criminal Procedure Code, the accused was dealt with under section 325 (1) (*b*) of the latter Code.

Held: *That the order of the Magistrate could not stand.*

RANKIRA *vs.* SERGEANT SCHULLING XLI. 27

§ 189

Discontinuance of summary proceedings and taking of proceedings under § 152 (3). Magistrate must record evidence de novo **and not read over the depositions made in the summary trial.**

ALLES *vs.* CHARLES APPUHAMY XX. 100

Right of accused or his advocate to cross-examine witness for the prosecution recalled by the Magistrate.

The complainant in a case was recalled by the Magistrate and gave further evidence on which no cross-examination by Counsel for the defence was permitted. The Magistrate convicted the accused and referred in his judgment to matters elicited when the complainant was recalled.

Held: *That the conviction cannot be upheld.*

SHERIFF DEEN *vs.* THOMAS ... XXX. 21

Evidence of witness recorded before framing of charge—Not recorded de novo **after framing of charge—Can such evidence be acted upon in reaching a decision.**

FERNANDO AND ANOTHER *vs.* PERERA ... ... XXXIV. 59

§ 190

Magistrate reserving judgment—Regularity

PONNIAH (EXCISE INSPECTOR) *vs.* ABDUL CADER ... ... VII. 43

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Discharge of accused before all the evidence for the prosecution has been taken—Use of word "acquit" in an order of discharge under section 191—Does appeal lie from an order of discharge—What is the limit of time for such an appeal—Sanction of Attorney-General to appeal—Does it have the effect of enlarging the appealable period fixed by law.

Held: (1) *That the earliest stage, at which an order of acquittol under section* 190 *of the Criminal Procedure Code can be entered is at the end of the case for the prosecution.*

(2) *That the mere use of the word "acquit" in an order discharging an accused does not alter its character, if in fact it is an order of discharge under section* 191 *of the Criminal Procedure Code.*

(3) *That an appeal from an order of discharge under section* 191 *of the Criminal Procedure Code must be made within ten days.*

(4) *That an appeal with the sanction of the Attorney-General, in a case where such sanction is not required in law, though lodged within* 28 *days, cannot be regarded as being within time, if in fact it should have been lodged within the shorter period prescribed for appeals not requiring the sanction of the Attorney-General.*

SUMANGALA THERO *vs.* PIYATISSA THERO ... ... X. 110

Where the accused are discharged on a legal point before the complainant has tendered all his evidence, the Magistrate has no power to enter an order of acquittal under section 190, and no sanction of the Attorney-General is necessary to appeal from such an order.

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS ... ... XX. 77

A magistrate is precluded from making an order of acquittal under section 190 till the end of the case for the prosecution.

REX *vs.* WILLIAM ... ... XXIV 115

Accused charged on two counts—Can magistrate acquit accused of one charge and reserve his finding on the other for consideration.

Held: *That where an accused is charged under two counts, it is open to a magistrate under section* 190 *of the Criminal Procedure Code to acquit the accused of one charge immediately he arrives at his finding on that charge, and reserve the other charge for consideration of his finding.*

DE KRETSER *vs.* KANDASAMY XXVI. 56

Power of a magistrate to call evidence ex mero motu **in a summary case—Evidence called by the magistrate after the close of the defence.**

Held: *That a magistrate may call evidence at any stage of a summary case provided that the evidence appears to be essential to the just decision of the case.*

MEEGAHAWATTE POLICE *vs.* MOHAMMADU ... ... XXVII. 109

Meaning of 'forthwith'—Delay in recording verdict—Is it curable under section 425 of the Criminal Procedure Code.

Held: (1) *That the word 'forthwith' in section* 190 *of the Criminal Procedure Code means "immediately after" and not "within a reasonable time after" the taking of the evidence is over.*

(2) *That the failure to comply with the provisions of section* 190 *of the Criminal Procedure Code is not curable under section* 425 *of the same Code.*

VETHANAYAGAM *vs.* INSPECTOR OF POLICE, KANKESANTHURAI ... XXXIX. 93

Forthwith—Should a Magistrate record his verdict immediately after conclusion of trial.

Held: *That section* 190 *of the Criminal Procedure Code does not require a Magistrate who convicts an accused person to record his verdict immediately after he has concluded the taking of his evidence.*

BANDA *vs.* DAVID S. I. POLICE ... XL. 59

Prosecution not ready on trial date—Application for postponement refused—Prosecution not leading evidence—Order discharging accused—Order is one under § 190.

ADRIAN DIAS *vs.* WEERASINGHAM XLIX. 77

§ 191

Order of discharge in case summarily triable—Appeal with sanction of Attorney-

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General—Sanction not required by law—Time within which appeal may be filed.

POLICE SARGEANT BANDA *vs.* DALPADADU I. 2

Discharge under § 191—Magistrate cannot set aside his order.

ROSAIRO (EXCISE INSPECTOR) *vs.* SILVA ... ... II. 121

Can a Magistrate reopen proceedings in a case where accused has been discharged under section 191.

Held: *That a Magistrate has no power to reopen proceedings in a case where the accused had been discharged under section* 191 *of the Criminal Procedure Code.*

SETHU CARUPPEN *vs.* ODAIYAR XI.110

Discharge of accused after issue of summons without reasons for discharge.

Held: *That the order of discharge should be set aside and tnat the appellant was entitled to appeal without the sanction of the Attorney-Genral.*

JINORIS FONSEKA *vs.* MENDIS FERNANDO ... ... XV. 99

Proceedings on written report by Headman in terms of section 148—Accused discharged as Headman not proceeding—Can Magistrate reopen proceedings when complainant appears.

Held: *That the order of discharge was one under section* 191 *of the Criminal Procedure Code and the Magistrate had no power to reopen the proceedings.*

ABDUL MAJEED *vs.* CASSIM ... XV. 150

A discharge under section 191 cannot support a plea of autre fois acquit **even though the judge calls it an acquittal.**

REX *vs.* WILLIAM ... ... XXIV 115

Magistrate dismissing case without calling on the defence—Prima facie **case made out by complainant—**

Held: *That when a* prima facie *case has been made out by a complainant, the power vested in a Magistrate by section* 191 *of the Criminal Procedure Code should not be exercised until after the defence has been called upon.*

DE SILVA *vs.* AMARASEKERE AND OTHERS ... ... XXX. 95

Mere use of word "discharge" does not necessarily indicate that the order comes under § 191.

SOLICITOR-GENERAL *vs.* ARADIEL XXXIX. 17

§ 193

Distinction between addition and alteration of a charge.

PIYASENA *vs.* VAZ ... ... XXXII. 25

Accused charged with house-breaking by night under section 443 of the Penal Code—Order reserved by Magistrate after trial—Charged afresh by Magistrate under section 450 of the Penal Code—Regularity of procedure—Ingredients necessary to constitute an offence under section 450.

The accused was charged with house-breaking by night under section 443 of the Penal Code. After the evidence and addresses the Magistrate reserved his order. On the day on which order was to be delivered the Magistrate charged him afresh under section 450 of the Penal Code and after tendering the witnesses for cross-examination convicted the accused under section 450.

Held: (1) *That as there were no facts admitted or proved at the first trial to show that the accused had committed an offence under section* 450 *of the Penal Code, the learned Magistrate was not justified in framing a new charge under section* 193 (1) *of the Criminal Procedure Code.*

(2) *That in order to maintain a charge under section* 450 *of the Penal Code the prosecution must prove not only that the accused was found in a house but that he failed to give a satisfactory account of himself.*

MASILAMANY *vs.* RODRIGO, S. I. POLICE ... ... XXXIV. 66

Admission of guilt in course of trial of offence not charged with—Failure to frame fresh charge before accepting plea and dealing with accused.

RANKIRA *vs.* SERGEANT SCHULLING XLI. 27

§ 194

Discharge of accused—Magistrate purporting to act under § 194 and re-opening case—Validity.

ROSAIRO (EXCISE INSPECTOR) *vs.* SILVA ... ... II. 121

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Refusal to apply the proviso to section 194 is a final order from which an appeal lies to Supreme Court and Attorney-General's sanction under section 336 is not necessary.

SEEVARATNAM *vs.* GOPALASAMY XLIX. 25

§ 199

Police officer as an advocate before a tribunal—Undesirability of the practice.

Held: *That a Police officer, who is a material witness in a case, should not himself conduct the prosecution in the case in which he is to give evidence.*

KULATUNGA *vs.* MUDALIHAMY AND OTHERS ... ... XVIII. 86

Police officer as prosecutor.

(i) In a case tried summarily by a magistrate the injured person is entitled, in the absence of the Attorney-General, Solicitor-General, Crown Counsel or a pleader generally or specially authorized by the Attorney-General, to appear by pleader and conduct the prosecution and that a police officer is not entitled to conduct the prosecution.

(ii) A Police officer who has made a report under section 148 (1) (*b*) of the Criminal Procedure Code is not "the complainant" for the purposes of section 199 of the Criminal Procedure Code.

DE SILVA *vs.* THE MAGISTRATE, GAMPOLA ... ... XXV. 73

Can material witness act as prosecutor

NANDASENA *vs.* WICKRAMARATNE XXXIX. 66

Report to Court by Police officer under section 148 (1) (b)—Can another Police officer conduct the prosecution in a case summarily triable.

Held: (1) *That in view of section* 199 *of the Criminal Procedure Code, the Police officer, who appears and conducts the prosecution in a case triable summarily need not necessarily be the very Police officer who makes the report under section* 148 (1) (*b*) *of the same Code.*

(2) *That a Police Officer who conducts the prosecution commenced by another is not entitled to exercise any function which, under the Code, may be exercised by the complainant alone.*

DANIEL *vs.* WIJESINGHE, S. I. POLICE, BELIATTA ... ... XL. 39

Police officer initiating proceedings in Magistrate's Court under section 148 (1) (b)—Is he entitled to appear and conduct prosecution at trial.

Held: *That a Police Officer who initiates proceeding in the Magistrate's Court under section* 148 (1) (*b*) *of the Criminal Procedure Code is entitled to appear and conduct the prosecution at the trial in preference to a lawyer retained by the party aggrieved.*

THE ATTORNEY-GENERAL *vs.* KANDE NAIDE ... ... XLII. 74

§ 201

Authority of the Attorney-General to conduct prosecution before the District Court—Should such authority be in writing.

Held: *That the authority of the Attorney-General required by section* 201 *of the Criminal Procedure Code need not be in writing.*

KING *vs.* KALU BANDA ... XXVI. 92

§ 212

Evidence Ordinance section 155—Contradiction of witnesses for the defence by previous statement to the Police—Calling of witness to prove previous statement after close of the defence—Is it evidence in rebuttal—Can such evidence be led in Magistrate's Court.

Held: (1) *That the absence of a provision similar to those of sections* 212 *and* 237 (1) *of the Criminal Procedure Code in regard to trials before the Magistrate's Court does not preclude a contradictory statement put to a defence witness being proved after the close of the case for the defence.*

(2) *That the proof of such a statement, after the close of the defence, by calling the witness who recorded such statement, is not evidence in rebuttal.*

(3) *That the right granted by section* 155 *of the Evidence Ordinance to impeach the credit of a witness by a previous statement made by him implies that every thing indispensable to its proper and effectual exercise is also granted and that the right in this case can only be exercised after the close of the evidence for the defence.*

RASIAH *vs.* SUPPIAH (S. I. POLICE) XL. 10

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§ 217

Withdrawal of two counts from indictment containing three counts relating to three separate offences—Does such withdrawal act as a bar against accused being indicted in respect of the counts withdrawn.

THE KING *vs.* MATARAGE EMANIS XXV. 67

§ 224

Election of Jury—Subsequent application for altering election.

The accused in this case had elected under section 165B of the Criminal Procedure Code to be tried by an English-speaking Jury. After the transfer of the case by fiat of the Attorney-General under section 43 of the Courts Ordinance from the Northern Circuit to the Western Circuit the accused moved the Supreme Court for leave to alter their election and asked that they be tried by a Tamil-speaking Jury.

The application was refused.

KING *vs.* RAJARATNAM AND OTHERS ... ... XXX. 13

The accused had elected to be tried by a Tamil-speaking Jury. Application was made by the Crown for an order under section 224 (1) of the Criminal Procedure Code directing that the accused be tried by an English-speaking Jury. It was urged that the accused were Sinhalese and that all the witnesses were Sinhalese and that there was no special reason why the accused should be tried by a Tamil-speaking Jury. It was also urged that a great deal of time would unnecessarily be taken up in trying the prisoners if a Tamil-speaking Jury were empanelled.

The Court made order directing that the accused should be tried by an English-speaking Jury.

KING *vs.* THELENIS APPUHAMY AND OTHERS ... ... XXX. 38

§ 230

Separation of trials—Joint trial likely to hamper some of the accused materially—Discharge of jury—Stage at which application for separate trials should be made

Held: (1) *That where some of the accused will be materially hampered in their defence if they are tried jointly with the other accused, a trial Court should order separation of trials.*

(2) *That if, after the trial of the accused has been entrusted to a jury duly empanelled, the justice of the case requires that some of the accused should be tried separately, then the only course available in our law is that the jury should be discharged.*

REX *vs.* A CAROLIS AND FOUR OTHERS ... ... XXXVII. 45

§ 232

A prosecutor is not bound to call all the witnesses on the indictment or to tender them for cross-examination.

REX *vs.* CHALO SINGHO ... XX. 21

§ 233

Statements contemplated by section 233 are the statements made under sections 160 and 165 of the Criminal Procedure Code.

REX *vs.* PUNCHIMAHATHMAYA XXIV. 108

Evidence given by accused at inquiry in Magistrate's Court—Meaning of words "All statements"—Do they include sworn testimony given by accused at the inquiry as well as his statutory unsworn statements—Duty of Crown to read in evidence the entirety of accused's deposition recorded by committing Magistrate.

THE QUEEN *vs.* SATHASIVAM XLVIII. 111

§ 237

The production in evidence on behalf of the accused of the deposition of a witness gives the prosecution the right of reply.

REX *vs.* KADIRGAMAN *et al* ... XVIII. 41

Witness called by one of several accused tried together—Evidence touching other accused given by the witness—Has the prosecuting counsel a right of reply against all the accused.

Held: *That the Solicitor-General had no right of reply to counsel for an accused who has called no evidence*

KING *vs.* ROMANIS PERERA AND THREE OTHERS ... ... XIII. 83

In deciding whether the prosecuting counsel should under section 237 of the Criminal Procedure Code be permitted to call witnesses in rebuttal, the following considerations should be taken into account:

(*a*) Whether there has been surprise.

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(*b*) Whether the rebutting evidence could have been given in chief.

(*c*) Whether the rebutting evidence does or does not surprise the defence.

(*d*) Whether the permission to lead evidence in rebuttal would place the defence at a disadvantage.

KING *vs.* AMAMADU ISMAIL XX. 17

Crown's right of reply where some only of the accused persons adduce evidence on their behalf.

Held: (1) *That where a witness called by the Crown to produce documentary evidence out of a Court record is in cross-examination asked by the defence to produce other documents which are in the record or give evidence after reference to the record, the Crown is entitled to reply as against the accused requiring such evidence.*

(2) *The fact that one of several accused, giving evidence on his own behalf after the close of the prosecution case, incriminates his co-accused does not affect the Crown's right of reply.*

THE KING *vs.* FERDINAND AND SEVEN OTHERS ... ... XXVIII. 30

Contradiction of witness for the defence by previous statement to the Police—Calling of witness to prove previous statement after close of the defence—Is it evidence in rebuttal—Can such evidence by led in Magistrate's Court.

RASIAH *vs.* SUPPIAH ... ... XL. 10

Judges exercise of discretion under—Principles governing it.

REX *vs.* THURAISAMY ... XLVII. 105

§ 238

Power of judge sitting without jury to inspect place where offence committed.

GNANAPRAGASAM *vs.* THE KING XXXVIII. 67

Right of judge sitting alone to inspect scene of offence

SAMARANAYAKE *vs.* WIJESINGHE XLIV. 74

§ 244

It is the duty of the judge to decide upon the meaning and construction of all documents given in evidence at the trial.

GODAMUNE *vs.* THE KING ... II. 77

Is the question, whether a particular witness is an accomplice a question that should be left for the jury to decide.

REX *vs.* PEIRIS APPUHAMY AND SOPINONA ... ... XXIII. 101

§ 253 B

Effect of sub-section (4)—Order for Crown costs and compensation—Can an order for payment of compensation be appealed from.

Held: *That the provisions of sub-section* (4) *of section* 253 (*B*) *of the Criminal Procedure Code is a bar not only to an appeal against an order for the payment of Crown costs, but also against an order for the payment of compensation.*

KANDIAH *vs.* RAMALINGAM AND OTHERS ... ... XXXVI. 65

Does sub-section (4) deprive a complainant in a criminal case of the right of appeal against order for payment of compensation.

Held: *That sub-section* (4) *of section* 253 *B of the Criminal Procedure does not preclude a complainant in a criminal case from appealing from an order for payment of compensation made against him under sub-section* (1) *of the same section.*

SABAPATHY *vs.* SINNIAH *et al* XXXVIII. 17

Penal Code—Sections 484, 486—Complaint declared vexatious—Meaning of "vexatious."

Held: *That a complaint is vexatious within the meaning of that expression in section* 253 *B of the Criminal Procedure Code, when a case is instituted without sufficient grounds, for the purpose of harassing, troubling or annoying the person against whom the complaint is made.*

RANASINGHE *vs.* JAYASEKERA XLVI. 52

§ 253 C

Power to order complainant to pay compensation to accused.

Held: *That where an accused person is not arrested but appears on summons, a Magistrate has no power to order payment of compensation under section* 253 *C* (1) *of the Criminal Procedure Code.*

M. A. ANIS APPUHAMY *vs.* SIMON BOYD ... ... XXXV. 16

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§ 262

Number of Jurors who can be summoned to form panel.

THE KING *vs.* LUDOWYKE ... III. 41

§ 265

Name of Juror drawn—When can it be put aside

THE KING *vs.* LUDOWYKE ... III. 41

§ 274

Procedure when summons cannot be served on Jurors.

THE KING *vs.* LUDOWYKE ... III. 41

§ 288

Enables a Court to try a person though he cannot understand the proceedings.

JOSEPH *vs.* FERNANDO AND ANOTHER ... ... XVIII. 69

§ 289

Can the Court order that the costs of the accused be paid in postponing a case under section 289—Are costs included in the words "on such terms as it thinks fit."

Held: (1) *That the Magistrate had power to make the order made by him.*

(2) *That the expression "terms" in section 289 can be regarded as including costs.*

SABAPATHY *vs.* THARMALINGAM AND OTHERS ... ... XII. 127

Section 289 (5)—When may a Magistrate grant a postponement.

Held: *That where the magistrate has satisfied himself that the evidence of a witness who is absent is material to the trial and that reasonable efforts have been made to secure his attendance he should adjourn the trial.*

PERERA *vs.* PERERA ... XXII. 70

Procedure to be followed when Magistrate refuses to grant application for postponement of trial.

Held: *That when a Magistrate refuses to grant an application for the postponement of a trial, he should record his reasons for the refusal and proceed with the trial.*

ANDIRISHAMY DEONISHAMY ... XXIX. 111

Warrant committing accused to custody of Fiscal pending trial—Period of validity.

ATURUPANE *vs.* ANDERSON ... XL. 92

Application for postponement of trial on behalf of accused—Can Magistrate order costs against accused?

Held: *That under section 289 of the Criminal Procedure Code a Magistrate is not empowered to order an accused person to pay costs to the complainant, when an application is made for an adjournment of the trial on his behalf.*

DEEN YUSUPH *vs.* MALLIS SINGHO XLIX. 60

§ 290

Can the mother of an injured minor agree to compound a case where the prosecution is initiated by the Police.

Held: *That it is competent in law for the mother of an injured minor to compound an action instituted by the Police in respect of injuries caused to the minor child.*

SCHARENGUIVEL *vs.* EVARTS ... V. 4

Case compounded on terms—Disagreement regarding terms of settlement—Terms of settlement vacated—Case refixed for hearing—Order for ejectment—Has the Magistrate power to refix hearing—

Held: (1) *That once a case is compounded, the accused is deemed to be acquitted and it should be so recorded.*

(2) *That the Magistrate has no power to refix a case for hearing after it has been compounded under section 290 of the Criminal Procedure Code.*

HAMY AND ANOTHER *vs.* HAMY AND ANOTHER ... ... XIII. 37

When does a settlement in Court amount to a composition.

SIRIWARDENE *vs.* PUNCHI HAMY AND ANOTHER ... ... XV. 152

§ 292

Bearing of § 292 upon § 152 (3)

WILLIAM PERERA *et al vs.* INSPECTOR OF POLICE, MAHARAGAMA ... XLII. 1

§ 296

Undefended accused—Application for time to retain a lawyer—Refusal of application by Magistrate—Failure to explain to the

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accused the chief points in the case against him as required by § 296—Absence of complainant at hearing of Appeal—Order to the prejudice of complainant—What is—

Held: (1) *That the expression "order to his prejudice" in § 345 of the Criminal Procedure Code means some order by which the respondent has to pay money or by which he suffers some damage and not an order of acquittal of the accused.*

(2) *That the requirements of § 296 of the Criminal Procedure Code are imperative.*

FERNANDO *vs.* DE JONG ... I. 336

Is failure to record that the provisions of the section have been complied with fatal to a conviction.

Held: *That the failure to record the fact that the provisions of section 296 of the Criminal Procedure Code have been complied with is not fatal to a conviction.*

THE KING *vs.* JOSEPH ... III. 26

The production in evidence on behalf of the accused of the deposition of a witness gives the prosecution the right of reply.

REX *vs.* KADIRGAMAN *et al* XVIII. 41

Crown's right of reply where some only of the accused persons adduce evidence on their behalf.

THE KING *vs.* FERDINAND AND SEVEN OTHERS ... ... XXVIII. 30

Failure to comply with provisions of § 296 (1) is a fatal irregularity.

SUMANAPALA *vs.* JAYETILEKE XXXIII. 46

Failure to comply with the requirements of—Is it fatal to a conviction.

Held: *That the failure on the part of a Magistrate to call the attention of an unrepresented accused who elects to give evidence, to the principal points in the evidence against him, is fatal to his conviction.*

WILBERT SINGHO *vs.* THARMARAJAH (S.I. POLICE, FORT) ... ... XLII. 69

§ 297

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

Held: (1) *That the evidence was improperly recorded as against the first accused in his absence, and that, therefore, there was no compliance with the law in merely reading it to him.*

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

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

HERATH (INSPECTOR OF POLICE) *vs.* IABBAR ... ... XVI. 125

(1) Section 297 of the Criminal Procedure Code is an imperative provision and the accused is entitled as of right to be present when evidence is taken.

(2) It is not only irregular but also illegal for a Magistrate to order an accused to leave Court while his witnesses are giving evidence.

GANETI *vs.* FONSEKA ... XXV. 71

Assumption of jurisdiction by Magistrate as District Judge—Reading over at the trial of evidence recorded before assuming jurisdiction—Illegality.

WILFRED *vs.* SOMASUNDARAM XXXI. 57

Evidence of witness recorded in the presence of accused produced in court before charged—Can such evidence be read over to witness at the trial or should evidence be recorded afresh.

DHANAPALA *vs.* SABAPATHY PILLAI ... ... XXXII. 63

Evidence of witness recorded before framing of charge—Not recorded de novo after framing of charge—Can such evidence be acted upon in reaching a decision.

FERNANDO AND ANOTHER *vs.* PERERA ... ... XXXIV. 59

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§ 297 cannot be excluded from operation in cases where evidence has been recorded under § 407.

FERNANDO *vs.* S. I. POLICE, WELIKADA ... ... L. 10

§ 298

Evidence must be recorded in English and not merely transliterated into English.

ISMAIL *vs.* THANGIAH ... XL. 63

§ 301

Does the word 'document' in section 301 (2) include a report under section 148 (b)—Meaning of 'foreign language' in section 301 (2).

Penal Code section 484—Charge under—Need to set out and prove the actual words complained of — Inadmissable evidence — When it vitiates a conviction.

Held: (1) *That in a charge under section* 484 *of the Penal Code the actual words complained of must be set out and proved at the trial to have been uttered by the accused.*

(2) *That the word 'document' in section* 301 (2) *of the Criminal Procedure Code is wide enough to include a written report initiating criminal proceedings before a Magistrate under section* 148 (*b*).

(3) *That the word 'foreign' in section* 301 (2) *must be construed as referring to any language other than the official language of the Courts.*

(4) *That inadmissible evidence led by the prosecution, though without objection from the defence, vitiates a conviction where it appears that the Court has taken into consideration such evidence in arriving at the conclusion.*

ISMAIL *vs.* THANGIAH (INSPECTOR OF POLICE) ... ... XL. 63

§ 304

Magistrate not pronouncing reasons in open Court—Is this a fatal irregularity.

MUTHUSAMY *vs.* DAVID ... XXXVIII. 81

Judge passing sentence without assigning "reasons"—Reasons given later on date on which Judge was not duly gazetted to act—Reasons not pronounced in open Court—Validity.

Held: (1) *That the failure to comply with the provisions of section* 304 *of the Criminal Procedure Code is an irregularity curable under section* 425.

(2) *That reasons given by a judge on a date on which he has not been gazetted to act as a Judge of that Court have no legal validity.*

ELIYATAMBY *et al vs.* THE KING XXXIX. 69

Magistrate passing sentence before pronouncing judgment.

Held: *That a judgment may be pronounced on a date subsequent to the date of the verdict but sentence must not be passed before judgment is pronounced.*

R. D. PERERA *vs.* INSPECTOR OF POLICE (KADAWATTA) ... XXXIX. 74

Magistrate stating orally the gist of what he intended to embody in the judgment in the absence of the accused, in a case where his absence could not be dispensed with—Regularity.

THIAGARAJAH *vs.* ANNAIKODDAI POLICE ... ... XL. 57

§ 306

What is sufficient compliance with the section.

Held: *That a mere outline of the case for the prosecution and the defence embellished by such phrases as "I accept the evidence for the prosecution," "I disbelieve the defence" is by itself an insufficient discharge of the duty cast upon a Magistrate by section* 306 (1) *of the Criminal Procedure Code.*

THURAIYA *vs.* PATHAIMANY ... XV. 119

Failure of Magistrate to state reasons for Judgment—Effect of section 425 on this irregularity.

Held: *That where there is a total failure on the part of the Magistrate to deal with the points for consideration placed before him by the defence, such irregularity is not cured by the provisions of section* 425 *of the Criminal Procedure Code.*

TISSERA *vs.* DANIELS, S. I. POLICE XXXVI. 57

Magistrate not pronouncing reasons in open Court—Is this a fatal irregularity.

MUTHUSAMY *vs.* DAVID XXXVIII. 81

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Magistrate passing sentence before pronouncing judgment—Regularity.

R. D. PERERA *vs.* INSPECTOR OF POLICE KADAWATA ... ... XXXIX. 74

Magistrate stating orally the gist of what he intended to embody in judgment—Regularity.

THIAGARAJAH *vs.* ANNAIKODDAI POLICE XL. 57

§ 312

Sentence of imprisonment—Can sentence run concurrently with imprisonment in default of payment of fine.

Held: *That imprisonment in default of payment of a fine must be in excess of any other imprisonment to which the accused may be sentenced.*

SIEBEL SINGHO AND OTHERS *vs.* THE MIRIGAMA POLICE ... XXXVIII. 89

Imprisonment in default of payment of fine—Must be in addition to any other punishment.

GUNASEKERA *vs.* PERERA ... XXXVIII. 94

Section 312 — Must he construed as having been repealed to the extent to which it is inconsistent with the explicit provisions of the Payment of Fines Ordinance of 1938.

REX *vs.* W. A. D. VELIN ... XLIV. 49

Statute providing machinery for recovery of money under section 312—Person making default in payment—Can he be sentenced to term of imprisonment.

MUNMANAI SOUTH AND ERUVIL C. A. P. AND S.SOCIETY LTD. *vs.* THAMBIPILLAI L. 80

§ 313

Bond with a surety for the appearance of an accused who had been given time to pay a fine.

Held: *That there is no provision in the Criminal Procedure Code for requiring a bond in terms of section* 313 *of the Criminal Procedure Code for the appearance, till otherwise directed by the Court, of an accused who has been given time to pay a fine by instalments under section* 312 (4) (*a*) (2) *and against whom a distress warrant had not issued.*

IMAN SAIBU *vs.* AHAMADU LEBBE AND ANOTHER ... ... III. 71

§ 325

Is an order made under section 325 (1) an appealable order.

Held: *That an order made under* § 325 (1) *is not an order from which an appeal lies under* § 338.

RASAK *vs.* CASSIM ... VIII. 75

In dealing with an accused person under § 325 the Magistrate should look at the matter primarily in the interests of the accused.

THE SOLICITOR-GENERAL *vs.* JOHANNES ALWIS ... ... XVI. 8

Order to pay a contribution to a War or Charitable Fund—Can an accused be ordered to pay such contribution.

Held: *That there is no provision of the Criminal Procedure Code under which an accused person can be ordered to make a payment to a War or Charitable Fund.*

DE SILVA *vs.* DE SILVA ... XXI. 126

Can Supreme Court make order under § 325 in revision where Magistrate has convicted accused and sentenced him to a term of imprisonment.

FERNANDO *vs.* ALWIS ... XXIV. 135

Accused found guilty on his own plea—Order to enter into a bond—Confiscation of production—Defence (Control of Textiles) Regulations, regulations 14, 59 and 61.

Held: (1) *That no appeal lies from an order under section* 325 (1) *of the Criminal Procedure Code.*

(2) *That a Magistrate has no power to make an order under section* 325 (1) *of the Criminal Procedure Code after convicting the accused.*

(3) *That under Regulation* 61 (2) *of the Defence (Control of Textiles) Regulations, a Court has power after the conviction of an accused person to order the forfeiture of the productions in the case.*

P. C. 867 FERNANDO *vs.* SENARATNE ... ... XXXV. 61

Offence of a serious nature—Should powers under the section be exercised.

Held: *That the powers under section* 325 (1) *of the Criminal Procedure Code should not be exercised where the offence is*

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of a serious nature and where there is no evidence of any extenuating circumstances.

ATTORNEY-GENERAL *vs.* DIAS AND 3 OTHERS ... ... XXXVIII. 93

Right of appeal by a person dealt with under—Criminal Procedure Code, section 152 (3)—Need for caution before assuming jurisdiction under—Misdirection—Unjustifiable adverse comments on witnesses for defence—Failure to analyse evidence and consider case of each of several accused—Revisionary powers of Supreme Court.

Held: (1) *That Magistrates should not be in too great a hurry to assume jurisdiction under section* 152 (3) *of the Criminal Procedure Code and deprive accused persons of the benefit of a trial in a higher Court following upon a non-summary inquiry.*

(2) *That it is doubtful whether the decision in Cassim vs. Abdurasak* (1937) 38 *N. L. R.* 428 *is correct.*

(3) *That where the Magistrate in finding the charge proved against several accused and in dealing with them under section* 325 (1) (*b*) *of the Criminal Procedure Code had* (*a*) *failed to analyse the evidence and consider the case against each accused separately;* (*b*) *given unsound reasons for rejecting the evidence of witnesses for the defence;* (*c*) *misdirected himself in making adverse comments on the credibility of a material witness for the defence, even if there is no right of appeal, the Supreme Court will interfere with the orders made in the exercise of its revisionary powers.*

SANGARAKKITA THERO *et al vs.* BUDDHA RAKKITA THERO ... XXXIX. 86

Is an order under § 325 (1)(b) a "final order" within the meaning of § 338.

SANGARAKKITA THERO *et al vs.* BUDDHA-RAKKITA THERO ... XXXIX. 86

Section 325—Magistrate acting under—No evidence of antecedents of accused.

Held: *That a Magistrate acting under section* 325 *of the Criminal Procedure Code must have evidence of the good character or antecedents of the accused.*

FERNANDO AND ANOTHER *vs.* EXCISE INSPECTOR, WENNAPPUWA XL. 41

Sentence to be passed on youthful offender

REX *vs.* JAYASENA *alias* JAYASINGHE ... ... XLIII. 71

Supreme Court—Appeal—Order affirming conviction but directing accused to be bound over under section 325 of the Criminal Procedure Code—Bond taken—Accused convicted of another offence while bond in force—Notice to show cause why accused should not be convicted and sentenced—Magistrate discharging accused on the ground that Supreme Court order erroneous—Magistrate's duties—Powers of Supreme Court in appeal or revision—Bond taken not in conformity with section 325 of Criminal Procedure Code—Courts Ordinance, section 37.

Held: (1) *That a Magistrate to whom an order of the Supreme Court is transmitted acts not as a Judge but as the ministerial officer of the Supreme Court and no discretion is vested in him. It is, therefore, not competent to him to act as a Judge and express any opinion on the correctness or otherwise of such order.*

(2) *That it is competent to the Supreme Court in the exercise of its appellate or revisionary powers to affirm the conviction or without disturbing the order of conviction made by the Magistrate to proceed to order the accused person to be discharged conditionally in terms of section* 325 *of the Criminal Procedure Code.*

(3) *That where a bond directed to be taken under section* 325 *of the Criminal Procedure Code conforms more to a bond required to be furnished under section* 82 *and in fact is not in conformity with section* 325, *it cannot be availed of for the purpose of convicting or sentencing an accused for being convicted for another offence while the bond was in force.*

THE ATTORNEY-GENERAL *vs.* DISSANAYAKE ... ... XLIX. 87

§ 326

Police Ordinance 16 of 1865 section 60 (2)—Drunk and disorderly behaviour—Order to enter into a bond under section 326 (2) (b) undertaking to abstain from liquor for a period of one year.

Held: *That an order under section* 326 (2) (*b*) *of the Criminal Procedure Code requiring a person, charged under section* 60 (2) *of Ordinance No.* 16 *of* 1865 *with drunk and disorderly behaviour on the public road to enter into a bond to abstain from liquor for a period of one year cannot be*

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sustained in the absence of a plea of guilt by the accused or a conviction by the Court.

NAIR (SUB-INSPECTOR OF POLICE) *vs.* SILVA ... ... III. 79

Sentence to be passed on youthful offender

REX *vs.* JAYASENA *alias* JAYASINGHE ... ... XLIII. 71

§ 330

Can Magistrate waive or alter the effect of § 330 by his order.

CANAGASINGHAM VANNIAH *vs.* MEYADIN BAWA ... ... I. 29

Charge for failing to transmit duplicates of deeds to Registrar of Lands—Accused convicted—Statutory notice on accused to comply with the law and send duplicates—Failure to comply with notice—Second charge—Accused not entitled to plea of autrefois acquit.

SAMARASINGHE *vs.* DALPATADU XVIII. 26

Is conviction under section 2 of the Lost Property Regulation a bar to a subsequent charge under section 394 of the Penal Code for retaining stolen property (in respect of the same article).

Held: *That a conviction under section* 2 *of the Lost Property Regulation is no bar to a subsequent charge (in respect of the same article) for retaining stolen property under section* 394 *of the Penal Code.*

JOHN MOOTHATHAMBY (D. R. O.) *vs.* PETER *alias* MENDIS SILVA SAMARAWEERA ... ... XXI. 128

Charge and conviction under repealed regulation—Conviction quashed, proceedings held to be a nullity—Subsequent charge and conviction for same offence under proper regulation—Plea of autrefois acquit—**Its availability.**

Where a conviction under a repealed regulation is quashed on appeal, because the proceedings were held to be a nullity, and subsequently the accused was charged and convicted under the proper regulation, and on the plea of *autrefois acquit* being raised on behalf of the accused.

Held: *That the plea of* autrefois acquit *was not available because at the earlier trial the accused was never in peril and had merely been discharged.*

WILBERT PERERA *vs.* JOHORAN (S I.POLICE) ... ... XXXIII. 55

Plea of autrefois acquit—**Is it available when there had been no adjudication upon the merits of the earlier charge.**

An application was made for a postponement of the trial on the ground that the principal witness for the prosecution was absent. The Magistrate refused the applicant and called upon the prosecution to lead evidence of witnesses who were present. This was not done and the accused was discharged.

A fresh plaint was subsequently filed charging the accused on the same facts. Accused raised the plea of *autrefois acquit.*

Held: *That the plea of* autrefois acquit *was not available to the accused as there was no adjudication upon the merits of the earlier charge.*

FERNANDO *vs.* RAJASOORIYA, INSPECTOR OF POLICE ... ... XXXIII. 80

The section does not make any distinction between an acquittal on the merits and an acquittal on any other ground.

SOLICITOR-GENERAL *vs.* ARADIEL XXXIX. 17

A "discharge," after close of case for prosecution and after defence has stated that no evidence would be called is an acquittal.

SOLICITOR-GENERAL *vs.* ARADIEL XXXIX. 17

§ 331

Prosecution not ready on trial date—Application for postponement refused—Prosecution not leading evidence—Order discharging accused—Subsequent proceedings against accused on identical charges—Plea of autrefois acquit.

ADRIAN DIAS *vs.* WEERASINGHAM XLIX. 77

§ 335

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

Held: *That the context of section* 335 (i) *(d) of the Criminal Procedure Code will not permit the application to the word "imprison-*

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ment" therein of the definition in section (2) (i) of the Interpretation Ordinance.

KING *vs.* JOSEPH ... ... XVI. 53

Accused acquitted of charge of retaining stolen property—Order for return of property to lawful owner—Is order appealable.

RANASINGHE *vs.* JUSTIN ... XL. 43

§ 336

Order of discharge under § 191 of the Criminal Procedure Code—Appeal from—Does not require the sanction of the Attorney-General.

JINORIS FONSEKA *vs.* MENDIS FERNANDO ... ... XV. 99

In what circumstances should an appeal from an acquittal be allowed.

VAN ROOYEN *vs* VYTHILINGAM XIX. 86

When the accused are discharged on a legal point before the complainant has tendered all his evidence, the Magistrate has no power to enter an order of acquittal under § 190, and no sanction of the Attorney-General is necessary to appeal from such an order.

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS ... ... XX. 77

Attorney-General's sanction not necessary when Magistrate refuses to apply proviso to section 194—Appeal lies to Supreme Court.

SEEVARATNAM *vs.* GOPALASAMY XLIX. 25

Section 336—Applies only to orders of acquittal made by a Magistrate after trial under section 190, or by a District Judge after trial under section 210 or section 214.

SEEVARATNAM *vs.* GOPALASAMY XLIX. 25

§ 337

An appeal under § 337 cannot be entertained unless the requisite sanction of the Attorney-General has been obtained.

PILLAI *vs.* DEWANARAYANE *et al* II. 115

§ 338

Judgment or final order in terms of sub-section (1)—what is.

DHARMALINGAM CHETTY *vs.* VADEVIEL CHETTY AND ANOTHER ... IX. 3

Appeal out of time—Can Supreme Court treat it as an application in revision—Principles of punishment—How should the appropriate punishment for an accused with previous convictions be determined.

Held: (1) *That the Supreme Court has power to treat an appeal which is out of time as an application in revision.*

(2) *That it is not proper to inflict a more severe punishment than is appropriate to the offence with which the accused is charged merely on account of previous bad record of the accused.*

THE KING *vs.* SEEMAN *alias* SEEMA IX. 76

Meaning of the term "lodging a petition of appeal"—Does the forwarding of a petition of appeal by registered post satisfy the requirements of the Code—Computation of time within which an appeal should be preferred.

Held: (1) *That the forwarding of a petition of appeal by post to a Magistrate's Court does not satisfy the requirements of section 338 of the Criminal Procedure Code.*

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

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

JONES (SUB-INSPECTOR) *vs.* AMARAWEERA ... ... XV. 18

Revision—Penalty prescribed by law—Inadequacy of sentence passed—Right of appeal—Application for revision by Attorney-General—Delay—Criminal Procedure Code sections 338 and 357.

Held: (1) *That where a Magistrate imposed a sentence less than the minimum prescribed by law, it is an error in law, and is appealable under section 338 of the Criminal Procedure Code.*

(2) *That where an application to revise such a sentence was made nearly four months after it was passed, the Supreme Court ought not to exercise its powers under section 357 (1) of the Criminal Procedure Code in view of the delay that had occurred.*

ATTORNEY-GENERAL *vs.* KUNCHINAMBU ... ... XXX. 87

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Accused acquitted of charge of retaining stolen property—Order for return of property to lawful owner—Is order appealable.

RANASINGHE *vs.* JUSTIN ... XL. 43

§ 340

Appeal by a public officer in a Criminal case instituted by him in his official capacity—Should the petition of appeal be stamped.

Held: *That in an appeal by a public officer in a criminal case instituted by him in his official capacity the petition of appeal should be stamped in the manner required by section* 340 (3) *of the Criminal Procedure Code.*

SOURJAH (INSPECTOR OF POLICE) *vs.* HENDRICK. ... ... VI. 21

Certificate on a matter of law—nature of.

SEBASTIAN *vs.* GIRIHAMGAMA POLICE SERGEANT ... ... XXXVI. 86

§ 340 (2)—Application of—to petition of appeal under Workmen's Compensation Ordinance.

THE ADDITIONAL CONTROLLER OF ESTABLISHMENTS *vs.* LEWIS ... XL. 3

Section 340 (2)—Certificate under—Appeal on matter of law.

Held: *That a proper certificate under section* 340 (2) *of the Criminal Procedure Code is a condition precedent to an appeal on a matter of law*

COSMAS *vs* ADDITIONAL CONTROLLER OF ESTABLISHMENTS ... ... XL. 46

Section 340 (2)—Applies to appeal under section 48 of Workmen's Compensation Ordinance.

THOMAS *vs.* CEYLON WHARFAGE CO., LTD. ... ... XLI. 71

§ 344

Appeal—Criminal case—Dismissal after consideration—Application for reinstatement—Should it be allowed.

Held: *That, except in the case of an order made* per incuriam, *the reinstatement of an appeal in a criminal case decided by it is purposeless and cannot be allowed.*

ELO SINGHO *vs.* JOSEPH (INSPECTOR OF POLICE) ... ... XXXVII. 49

§ 345

Meaning of expression "order to his prejudice"

FERNANDO *vs.* DE JONG ... I. 336

§ 347

Supreme Court has power under § 347 to alter a charge in appeal so as to meet an offence that has been disclosed by the evidence already recorded especially when the accused is not prejudiced thereby.

ELIYATHAMBY (SUB-INSPECTOR OF POLICE) *vs.* SUNDARAM PULLE ... III. 61

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

MEERA NATCHIA *vs.* MARIKAR ... XVI. 79

Right of Appeal Court to hear evidence for defence where accused discharged after close of prosecution.

WIJESINGHE *vs.* MATHER ... XV. 34

Conviction under wrong Ordinance. Power of appeal Court to alter finding.

BRERETON *vs.* RATRANHAMY ... XIX. 11

Has Supreme Court on appeal or in revision power to make an order under Chapter 26 of the Criminal Procedure Code.

Held: *That the Supreme Court has power under section* 347 *of the Criminal Procedure Code to make an order under Chapter* XXVI *of the Code on appeal or in revision.*

PERERA (P. S.) *vs.* PUNCHIAPPUHAMY AND ANOTHER ... XXVII. 24

§ 353

Case stated—Trial by Jury—Plea of insanity—Burden of proof—Sufficiency of Judge's direction..

THE KING *vs.* ABRAHAM APPUHAMY *alias* ASSON ... ... XV. 37

§ 355

In cases under this section it is desirable that there should be available to the tribunal dealing with the reference a full note of the judge's summing up.

GODAMUNE *vs.* THE KING ... II. 77

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Penal Code section 293—Death resulting from blow with fist—Direction that it was not necessary that the Crown should prove definitely that each of the accused in fact knew that death could be caused by striking the man with the fist and that knowledge of the consequences likely to follow from the assault must be inferred from the actual consequences of the attack.

Held: *That the direction was wrong in law.*

KING *vs.* SOLOMONS AND OTHERS VI. 116

Case stated—Evidence Ordinance Section 25—Police Magistrate, who from time to time performs the duties of a police officer though in fact not a police officer—Confession of an accused recorded by such Magistrate under section 134 of the Criminal Procedure Code—Is such confession inadmissible in evidence.

Held: *That a confession recorded by a Police Magistrate under section* 134 *of the Criminal Procedure Code does not become inadmissible in evidence under section* 25 *of the Evidence Ordinance merely because the Magistrate, who recorded the confession from time to time, performed the duties of a police officer when, in fact, he was not in law entitled to do so.*

KING *vs.* SEPALA AND OTHERS ... VII. 53

Misdirection—Should the question whether there was provocation be left to the Jury.

KING *vs.* KUMARASAMY ... XVII. 41

§ 357

Power of Supreme Court to act in revision in any matter in which an appeal lies—Procedure to be followed before declaring a bond given under the Criminal Procedure Code to be forfeited.

Held: (1). *The Supreme Court will exercise its powers of revision even in a case in which an appeal lies in the following cases:—*

(*a*) *Where there has been a failure of justice.*

(*b*) *Where a fundamental rule of judicial procedure has been violated.*

(*c*) *Where the person affected by the order made against him had no knowledge of it till the time for preferring an appeal had elapsed.*

(2) *An inquiry is a necessary condition precedent to the reaching of a decision under section* 411 *of the Criminal Procedure Code to forfeit a bond.*

Per SOERTSZ, J.: "The phrase 'whenever it is *proved* to the satisfaction of the Court' necessarily presupposes an inquiry. Indeed, even if the words that had been employed had been less cogent, for instance, 'if the Court is of opinion,' still inasmuch as a judicial officer, as distinct from an administrative officer, is concerned, an inquiry is a necessary condition precedent to the reaching of an opinion."

SUB-INSPECTOR MUTHALIFF *vs.* PEDRICK ... ... XXVIII. 22

Has Supreme Court in revision power to make an order under Chapter 26 of the Criminal Procedure Code.

PERERA *vs.* PUNCHIAPPUHAMY AND ANOTHER ... ... XXVII. 24

Application to revise sentence made nearly four months after it was passed—Supreme Court ought not to exercise its powers under the § in view of the delay.

ATTORNEY-GENERAL *vs.* KUNCHINAMBU ... ... XXX. 87

Powers of Supreme Court to act in revision where appeal which lies has not been taken.

ATTORNEY-GENERAL *vs.* PODISINGHO XLII. 110

Failure of principal to observe terms of bond—Order on surety—Application to set aside order.

THANGAPONNU *vs.* GEORGE ... XL. 40

§ 381

Judge of lower Court exercising special jurisdiction under § —Transmission of record to Supreme Court.

Ebrahim *vs.* Munisamy ... XX. 98

§ 390

Scope of § 390 (2)

ATTORNEY-GENERAL *vs.* SRI SKANDARAJAH ... ... XLVII. 1

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§ 395

Section 395 (1) indicates that an important consideration in an application for bail is whether the case is prima facie **a strong or a weak one against the applicants.**

P. C. DANDAGAMUWA 12412 ... II. 246

Application for cancellation of bail—Can the Supreme Court cause a person who has been released on bail under section 395 to be arrested while the person is awaiting trial.

Held: *That the Supreme Court has no power to cause an accused person, who has been released on bail under section* 395 *of the Criminal Procedure Code, to be arrested under section* 395 (4) *while he is awaiting trial after committal.*

DE SOYSA (A. S. P.) *vs* NANNIYAVAN AIYAVAN ... ... XXI. 66

§ 396

Power of Supreme Court to grant bail—Convicted person appealing against conviction to Privy Council.

LALA JAIRAM DAS AND OTHERS *vs.* EMPEROR ... ... XXXI. 1

Bail—Jurisdiction of Supreme Court to entertain applications for bail.

Held: *That under section* 396 *of the Criminal Procedure Code the Supreme Court is vested, in matters of bail, with jurisdiction, both revisional and concurrent with that of the Magistrate.*

REX *vs.* KARTHELIS AND OTHERS XXXVI. 82

Bail—fixing of—Judicial discretion to be exercised.

ATURUPANE *vs.* ANDERSON ... XL. 92

§ 406

Analyst's Report—Application by accused on trial date for summons on Analyst—Should it be allowed.—Accused's right to summon Analyst.

Held: (1) *That an accused person has the right to have the Analyst present in court to testify to the contents of his report made by him.*

(2) *That an application to summon the Analyst should be treated in the same manner as one for a summons on any other witness for the prosecution.*

PERERA AND ANOTHER *vs.* DHARMARATNE (EXCISE INSPECTOR) ... XXXII. 31

§ 407

Depositions recorded in absence of accused—Later accused surrenders to Court—Trial—Witnesses recalled and their depositions already recorded read in evidence—Cross-examination by proctor for accused. Conviction—When may such depositions be read in evidence—Admissibility.

Depositions of prosecution witnesses were recorded by the Magistrate under section 407 of the Criminal Procedure Code in the absence of the accused. Later when the trial took place on the accused surrendering to Court these witnesses were recalled and their depositions, already recorded, were read in evidence. The proctor for the accused cross-examined them and the accused was convicted.

Held: (1) *That the conviction could not stand as the material on which it was based has not been put in evidence according to law.*

(2) *That depositions so recorded cannot be read in evidence when the witnesses who made the depositions are present in Court.*

JAMES SINGHO *vs.* RATNAPURA POLICE ... ... XXXIX. 79

Recording of evidence in absence of accused—Evidence so recorded read over to witnesses at trial—Admissibility of such evidence.

The accused was absconding, and the depositions of witnesses recorded under section 407 of the Criminal Procedure Code, were at the trial read over to the witnesses, who were further examined in chief, and cross-examined. It was contended on behalf of the accused-appellant that none of the conditions prescribed by section 407 as conditions precedent to the reception of such evidence at the trial, were shown to exist.

Held: (1) *That the reading over at the trial of the depositions of the witnesses was not a fatal error, and that the conviction of the accused was founded on evidence which was properly before Court.*

(2) *That section* 297 *of the Criminal Procedure Code cannot be excluded*

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from operation in cases where evidence has been recorded under section 407.

D. FERNANDO *vs.* S. I. POLICE, WELIKADE ... ... L. 10

§ 411

Surety bond for appearance of accused—Failure of accused to appear—Forfeiture of a portion of the penalty—Money paid and credited to revenue—Surrender of accused to Court after forfeiture of the bond—Application by surety for a remission of part of the penalty paid—Has the Magistrate right to grant a remission in the circumstances.

Held: *That the Magistrate had no power to allow a remission in the circumstances.*

GUNAWARDENA (POLICE SERGEANT) *vs.* GUNAWARDENA ... ... XI. 163

An inquiry is a necessary condition precedent to the reaching of a decision under § 411 to forfeit a bond.

SUB-INSPECTOR MUTHALIFF *vs.* PEDRICK ... ... XXVIII. 22

Forfeiture of bond.

Held: *A bond should not be borfeited without giving the person affected by the forfeiture an opportunity of showing cause.*

PACKEER (S. I. P.) *vs.* PEIRIS XXVIII. 27

§ 413

Disposal of property seized under a search warrant.

Held: *That a Magistrate should not allow an application for the return of property produced in a case without noticing the other side.*

COSTA *vs.* PERIS ... ... II. 248

Conviction under § 5 (2) of Ordinance No. 1 of 1909 for attempting to capture or kill by shooting a game animal without a licence—Can the gun with which the attempt was made be confiscated?

Held: *That section* 413 (1) *does not give power to order a confiscation of the gun with which an offence under* § 5 (2) *of Ordinance No.* 1 *of* 1909 *was committed.*

POLICE SERGEANT *vs.* KANGANY AND OTHERS ... ... III. 45

Charge of capturing a wild elephant without a licence—Can accused be ordered to pay expenses incurred by the Crown for certain services rendered to the elephant.

Held: *That an accused charged with capturing a wild elephant without a licence in breach of section* 5 (2) *of Ordinance No.* 1 *of* 1909 *cannot under section* 413 *be ordered to pay the expenses incurred by the Crown in looking after the animal while the charge was pending.*

COREA *vs.* PERERA ... ... III. 132

Charge of criminal trespass—Order for confiscation of gun.

In acquitting an accused on a charge of criminal trespass the Magistrate made an order for the confiscation of a gun remarking "It is in evidence that the accused drinks and from what has transpired in this case, I am of opinion that the accused is an unfit person to possess or use a firearm."

Held: *That the order was unjustified in the circumstances.*

MEENON *vs.* SUBRAMANIAM ... V. 75

Conviction for criminal misappropriation of property—What order may a Magistrate make regarding the disposal of the property.

K was charged with the theft of a ring belonging to S. K sold the ring to C who sold it to J for Rs. 17/50. The Police produced it in Court from J. On K pleading guilty, the Magistrate fined him Rs. 30/- and further directed that if fine is paid, Rs. 17/50 may be paid to J and the ring returned to S. Also that the ring be kept in Court till 19-2-36. On 19-2-36 J applied for the return of the ring and the Magistrate allowed it. Later S appeared and claimed it. Then the Magistrate noticed both the parties to appear in Court. J, when asked to produce the ring, said he sold it to R. Thereupon the Magistrate ordered J to produce the ring or pay its value Rs. 45/- on or before 15-4-36. In default, distress warrant to issue in terms of section 433 of Criminal Procedure Code.

Held: *That the Magistrate had no jurisdiction to make the last order.*

THANGIAH *vs.* KALUWA AND ANOTHER ... ... V. 109

Complaint by two owners of adjacent boutiques regarding loss of noney—Report by Police that certain money found in one of the complainant's boutiques is claimed by the

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other—Production of such money in Court—Further report by Police that "culprits could not be traced."

Return of money claimed by both complainants — Inquiry — Order made against the complainant from whose possession money was brought to Court--Has Magistrate jurisdiction to make such order—Absence of any formal complaint—Sections 148, 150 (3) and 413 of the Criminal Procedure Code.

Held: (1) *That the Magistrate had no jurisdiction to proceed to make the order restoring the money inasmuch as there was no proper complaint before him as required by section* 148 *of the Criminal Procedure Code that an offence had been committed.*

(2) *That under the circumstances, the report submitted by the Police was not sufficient to confer jurisdiction on the Magistrate to make such order which could have been done only under section* 413 *of the Criminal Procedure Code.*

(3) *That a criminal court should not be employed as a tribunal to investigate rival claims to property.*

MARTIN SILVA *vs.* KANAPATHYPILLAI XIV. 41

Scope of the expression "offence" in subsection (1) of section 413—Does it include offences under the Penal Code only.

Held: *That the trend of legal decision is that section* 413 *of the Criminal Procedure Code does not apply to offences other than those defined in the Penal Code.*

IYER (INSPECTOR OF POLICE) *vs.* JOSHUA ... . XXII. 90

Goods found in the possession of an accused person acquitted of an offence under section 139A of the Customs Ordinance should be returned to him in the absence of evidence that the goods were forfeited under the Customs Ordinance.

THE COLLECTOR OF CUSTOMS, N. P. *vs.* VELUPILLAI ... ... XXVI. 85

The word "disposal" does not include confiscation.

VAN SANDEN *vs.* PERERA ... XXX. 70

Disposal of property brought to Court—Absence of trial or inquiry regarding any offence—To whom should such property be handed over.

Held: (1) *That a Magistrate has no power under section* 413 (1) *of the Criminal Procedure Code to make order regarding disposal of property brought to Court unless an inquiry or trial had taken place regarding an offence committed in respect of it or regarding an offence in the commission of which it has been used.*

(2) *That where no such inquiry or trial is held the property should be returned to the person from whose possession it was taken or to his legal representative.*

AMIRTHARETNAM *vs.* COLLECTOR OF CUSTOMS, JAFFNA ... ... XXXI. 108

Conviction for criminal breach of trust of goods—Power of court to order restoration of goods to complainant.

MARTIN SINGHO AND ANOTHER *vs.* THAMBIAH AND TWO OTHERS ... XXXIII. 27

Accused acquitted of charge of retaining stolen property—Order for return of property to lawful owner—Is order appealable.

RANASINGHE *vs.* JUSTIN ... XL 43

Charge of theft of buffalo—Acquittal of accused—Inquiry to consider claims to buffalo produced in Court—Propriety of order made without hearing evidence.

Accused who was charged with theft of a buffalo was acquitted by the Magistrate without the defence being called upon. An inquiry was subsequently held by the Magistrate under section 413 of the Criminal Procedure Code to consider the claims of the parties to the buffalo produced in Court. An application made for a postponement of the inquiry by the accused petitioner was refused and the Magistrate made order returning the bull to the respondent on a submission by his Counsel without hearing evidence.

Held: (1) *That the Magistrate could not make such an order in the absence of any proof that an offence had been committed in respect of the buffalo.*

(2) *An order under section* 413 *must be based on evidence.*

DE SILVA *vs.* BABA SINNO ... XLI. 54

§ 418

Person against whom order made not in actual possession—Exparte **order by Magis-**

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trate against persons actually in possession—Refusal to vacate order—Does appeal lie.

Held: (1) *That an appeal lies against a refusal to vacate an order, under section* 418 *made without hearing the person affected thereby.*

(2) *That the title of third parties to property cannot be interfered with by an order under section* 418

PERERA *vs.* ALLAN JURIS AND ANOTHER ... ... IV. 6

What constitutes criminal force within the meaning of the section.

Held: *That threats of violence and murder which cause people to go away from their lands could rightly be said to amount to a show of criminal force within the meaning of section* 418.

JOHN *vs.* RICHARD PEIRIS ... XV. 156

§ 419

Section 419 is applicable to property seized on a search warrant.

COSTA *vs.* PERIS ... ... II. 248

A Court may, and frequently will, desist from making an order under § 419 until it is satisfied that § 413 is inapplicable.

COSTA *vs.* PERIS ... ... II. 248

§ 422

Right of Judge sitting alone to inspect scene of offence.

SAMARANAYAKE *vs.* WIJESINGHE XLIV. 74

§ 425

Magistrate using "I acquit" when he did not intend to acquit accused — Irregularity curable under § 425.

JULIHAMY *vs.* FERNANDO *et al* ... II. 95

Refusal by Magistrate to allow accused to call certain witnesses named by him—Failure to record reasons for refusal—Omission curable under § 425.

ADIHETTY *vs.* SENARATNE ... III. 127

The failure to describe, in a charge for illicit possession of opium, the kind of opium in respect of which the offence has been committed is a defect to which the provisions of § 425 would be applicable.

EXCISE INSPECTOR OF NATTANDIYA *vs.* SOMASUNDARAM ... IX. 130

Where an accused is convicted of an offence with which he is not charged, it is an irregularity which cannot be cured under § 425.

KASINATHER *vs.* AIYAM ... XII. 106

§ 425 is not applicable to a case where evidence recorded by a Magistrate in his capacity as inquiring Magistrate is utilized by the same Magistrate in the exercise of his powers under § 152 (3) of the code at a late stage of the inquiry.

MEDIWAKA *vs.* GUNASEKERA XVII. 51

Section 425 does not cure the omission to obtain the Attorney-General's sanction to a prosecution under the Tea Control Ordinance No. 11 of 1933.

BRERETON *vs.* RATRANHAMY ... XIX. 11

Omission to specify in a charge under section 433 of the Penal Code the offence intended to be committed is an omission that cannot be cured.

MEDIWAKA *vs.* DE SILVA AND TWO OTHERS ... ... XIX. 64

§ 425 does not cure the defect of the absence of a certificate under § 97 of the Police Ordinance.

VANDERSTRAATEN *vs.* MRS. N. M. PERERA AND OTHERS ... ... XIX. 131

The omission to specify accurately in a charge against members of an unlawful assembly the common object is a material omission and one which cannot be cured under the provisions of section 425 in a case in which the accused have been prejudiced by the way in which the common object is stated in the charge.

VAN CUYLENBERG (INSPECTOR OF POLICE) *vs.* AMARASEKERA AND FOURTEEN OTHERS ... ... XX. 41

Plea of guilty—Failure to record conviction formally but sentence postponed—Application

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to withdraw plea—Refusal—Failure to record conviction not a fatal irregularity.

SABARATNAM *vs.* SANTHRA ... XXI. 101

The failure to read over to the accused the evidence of a witness who was examined before the issue of process or to tender him for cross-examination is an irregularity which does not vitiate a conviction.

KANAPATHIPILLAI *vs.* NAGARAJAH AND SIX OTHERS ... ... XXVIII. 46

Assumption of jurisdiction by Magistrate as District Judge—Reading over at trial of evidence recorded before assuming jurisdiction—Is it a curable irregularity.

WILFRED *vs.* SOMASUNDARAM XXXI. 57

Exercise of discretion by Appeal Court—Charges under Poisons, Opium and Dangerous Drugs Ordinance, sections 26 and 28—No evidence to prove charges as framed.

Held: *That the Supreme Court will not exercise its discretion under section* 425 *to uphold a conviction on the ground that no miscarriage of justice has occurred, in a case where the prosecution has failed to take due care to see that the charges were properly framed in accordance with the evidence which it was proposed to adduce.*

DIAS *vs.* INSPECTOR OF POLICE, MATALE ... ... XXXI. 63

Failure of Magistrate to state reasons for judgment—Effect of § 425 on this irregularity.

TISSERA *vs.* DANIELS ... XXXVI. 57

Magistrate continuing proceedings initiated before his predecessor without making fresh determination under § 152 (3)—Regularity.

GUNAWARDENA *et al vs.* THE KING ... ... XXXVIII. 63

Magistrate not pronouncing reasons in open Court—Is this a fatal irregularity.

MUTHUSAMY *vs.* DAVID ... XXXVIII. 81

Magistrate continuing proceedings initiated before his predecessor without making fresh determination under § 152 (3)—Regularity.

HENDRICK HAMY AND ANOTHER *vs.* INSPECTOR OF POLICE, KANDANA XXXIX. 39

Judge passing sentence without assigning reasons—Reasons given later on date on which judge was not duly gazetted to act—Reasons not pronounced in open court—Validity.

ELIYATAMBY *et al vs.* THE KING XXXIX. 69

Failure to comply with provisions of § 190 is not curable under § 425.

VETHANAYAGAM *vs.* INSPECTOR OF POLICE KANKESANTURAI ... XXXIX. 93

Failure to draft charge in conformity with § 167 (3)—Accused pleading guilty—Is defect in charge curable under under § 425.

NAGALINGAM *vs.* KAYTS POLICE XXXIX. 102

Failure to comply with section 54 of the Wages Boards Ordinance—Is it curable.

M. G. PERERA *vs.* INSPECTOR OF LABOUR. MATUGAMA ... ... XL. 17

Failure to write out judgment and pronounce it in open Court—Is it an irregularity cured by section 425?

A Magistrate, instead of writing out the judgment and pronouncing it in open Court in the presence of the accused, stated orally the gist of what he intended to embody in the judgment in the absence of the accused, in a case where his absence could not be dispensed with.

Held: *That this amounted to an irregularity which could not be cured by the provisions of sectin* 425 *of the Criminal Procedure Code.*

THIAGARAJAH *vs.* ANNAIKODAI, POLICE ... ... XL. 57

Failure to give proper particulars of the charge—Defect not curable.

NAGAIAH *vs.* D.R.O., M. S. AND EP XLI. 42

§ 428

An affidavit sworn before a Justice of the Peace who has not been generally or specially authorized by the Supreme Court to administer oaths in the Supreme Court cannot be used in a Criminal Court.

REX *vs.* IYASAMY WIJEYERATNAM XXII. 1

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§ 429

The provisions of this section must be interpreted by the trial judge with reasonableness and ought not to be used to remedy a dangerous defect or to fill a gap in the case for the prosecution.

PONNIAH (EXCISE INSPECTOR) *vs.* ABDUL CADER ... ... VII. 43

A Magistrate's powers under § 429 cannot be made use of to elicit from any witness evidence that is inadmissible.

BABY NONA *alias* MARGARET COORAY *vs.* JOHANA PERERA ... VIII. 65

Taking of evidence after close of trial—Regularity.

VANDENDRIESEN *vs.* HOWWA UMMA IX. 17

In what circumstances may a witness be called by the Court ex mero motu.

Held: *That it is within the powers, given by section* 429 *of the Criminal Procedure Code, for a Judge at a criminal trial to call a witness, after the close of the case, to test a defence which is raised* ex improviso.

ARMITAGE (S. I. CRIME POLICE) *vs.* BABAR ... ... XI. 73

A Judge should not call and examine a witness after the close of the case for the prosecution and defence unless it is essential to a just decision of the case. An assize Judge should not recall and examine a prosecution witness in the middle of his summing-up to the Jury.

REX *vs.* CHARLIS ... ... XXI. 99

Fresh evidence called by a Judge ex proprio motu, **after the close of the cases for the prosecution and the defence, unless** ex improviso, **is irregular and will vitiate the trial unless it can be said that such evidence was not calculated to do injustice to the accused—The Court should not call any evidence in the exercise of its power under section 429 in any case in which such evidence puts the defence at an unfair disadvantage.**

REX *vs.* AIYADURAI AND TWO OTHERS ... ... XXIII. 61

Power of Magistrate to take evidence ex mero motu **in summary case—Evidence called by Magistrate after close of defence.**

MEEGAHAWATTA POLICE *vs.* MOHAMMADU ... ... XXVII. 109

Examination of witness by Magistrate after close of prosecution and defence—When Magistrate should not exercise such right.

Charge of retaining stolen property—Defence known to the prosecution—Should prosecution wait to lead evidence in rebuttal.

Where the prosecution failed to call a material witness and the Magistrate in order to test the truth of the defence summoned and called him under section 429 of the Criminal Procedure Code after the cases for the prosecution and defence were closed.

Held: (1) *That the Magistrate was not justified in calling and examining the witness inasmuch as the accused was prejudiced thereby.*

(2) *That where in a charge of retention of stolen property the prosecution knew what the accused's defence would be, it was incumbent on the prosecution to meet such defence without waiting to lead evidence in rebuttal.*

SUB-INSPECTOR IDROOS *vs.* DANIEL XXVII. 93

§ 433

Conviction for criminal misappropriation of property—What order may Magistrate make regarding the disposal of the property.

THANGIAH *vs.* KALUWA AND ANOTHER ... ... V. 109

§ 440

Contradictory statement—How § 440 should be used.

Held: *That section* 440 *of the Criminal Procedure Code should be used very cautiously and that it should not be used to punish a witness for every verbal contradiction.*

Per AKBAR, J...if every witness is to be fined for a verbal contradiction of this kind I am afraid the prosecution in many cases will find it difficult to get the evidence of witnesses.

SUB-INSPECTOR OF POLICE, GAMPAHA *vs.* KAITHAN PERERA ... ... I. 33

This section should only be used in glaring cases of perjury and then only with great caution.

RATNAYEKE (SUB-INSPECTOR OF POLICE) *vs.* KARUNARATNE ... ...III. 135

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Contempt of Court—Perjury—Contradictory statement.

Held: (1) *That section* 440 *is intended for glaring cases of perjury.*

(2) *That section* 440 *should not be used to punish a person where he makes merely contradictory statements in the course of his evidence with no intention to commit perjury.*

(3) *That this section should be used very cautiously.*

D. APPUHAMY *vs.* M. HABIBU ... VII. 42

Conviction for making two contradictory statements—Failure by Magistrate to record reasons—Can conviction be sustained.

Held: (1) *That the language employed by the Magistrate could have occasioned embarrassment to the accused in showing cause.*

(2) *That the requirement with regard to the recording of reasons by a court other than the Supreme Court is peremptory.*

(3) *That in view of the failure, on the part of the Magistrate, to record his reasons for the conviction, either before or after the statement of the witness, the conviction could not be sustained.*

RODRIGO (EXCISE INSPECTOR) *vs.* GUNATILAKE ... ... X. 123

Witness referring to diary and giving oral evidence different from entry in diary—Summary punishment for perjury.

Where a witness read an entry made by him in his diary and told the Court deliberately something different from what was recorded by him.

Held: *That it was an appropriate case for summary punishment under section* 440 (1)

BANDA *vs.* SEEMAN ... XXX. 16

Summary punishment for giving false evidence—Conflict between evidence of two witnesses—Do provisions of the section apply.

A was charged with an offence under the Excise Ordinance and was convicted on the evidence of the Excise Inspector. The village headman who was also a witness gave evidence conflicting with that of the Excise Inspector on a material point. At the conclusion of the trial the Magistrate called upon the headman to show cause why he should not be dealt with under section 440, for giving false evidence. The headman stated "I have made a mistake, I beg the Court's pardon." The Magistrate treated this statement as an unqualified admission of guilt and fined the headman Rs. 50/-.

Held: (1) *That the statement of the headman could not be treated as an unqualified admission of guilt.*

(2) *That the provisions of section* 440 *are not intended to apply to a case where a conflict arises between the testimony of two witnesses.*

DASANAYAKE *vs.* JIRASINGHE, EXCISE INSPECTOR ... ... XXXI. 82

Summary punishment for perjury in open Court—Proper exercise of this jurisdiction.

The provisions of section 440 for summary punishment of a witness for giving false evidence should not be invoked except in a manifest case of attempting to mislead the Court by deliberately giving false evidence.

IN *Re* WITNESS ... ... XXXV. 112

Contradictory statement in evidence given by witness—What a Court should satisfy itself with before conviction.

Held: *That a person who makes irreconcilable or contradictory statements cannot be convicted under section* 440 *of the Criminal Procedure Code, unless the Court forms the opinion that, of such statements one is false, and that the witness knows or believes it to be false, or does not believe it to be true.*

IN *Re* MARY ARULASI ... XXXVIII. 52

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CROSS—EXAMINATION

Cross-examination at inordinate length and on trivial details.

REX *vs.* LIONEL BANDARA WEGODAPOLA ... ... XXI. 21

Character of accused—When may accused be cross-examined as to bad character—Questions which are unfair to accused should not be allowed—Can suspicion alleged to have been entertained by one of his employers on an earlier occasion be a legitimate topic for cross-examination of accused as to credit.

Held: (1) *A question whether the accused, who has put his character in issue, was not suspected of a previous crime of which he was never charged in Court, or if charged was acquitted, is an example of a case where the Judge should intervene.*

(2) *A mere suspicion alleged to have been entertained by his previous employer on an earlier occasion cannot be a legitimate topic for cross-examination of an accused person as to credit.*

Per LORD SIMON: "Apart altogether from the impeached questions (which the Common Serjeant in his summing-up advised the Jury entirely to disregard), there was an overwhelming case proved against the accused. The trial had lasted two full days, but the Jury took only a few minutes to consider their verdict, and the Judge stated that he considered the verdict 'perfectly right.' When the transcript is examined it is evident that no reasonable Jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice, and this is the proper test to determine whether the *proviso* to section 4 (1) of the Criminal Appeal Act, 1907, should be applied."

(**Editorial Note:** Our law on the question arising in this case is to be found in sections 54, 120 (6) of the Evidence Ordinance.)

STIRLAND *vs.* DIRECTOR OF PUBLIC PROSECUTIONS ... XXVIII. 17

CROWN

for Crown lease *See under* **LEASE**

Not bound by final decree entered under Partition Ordinance.

FERNANDO *vs.* SENARATNE ... I. 199

Estate duty overpaid—Subject has a right of action against the Crown for a refund of duty overpaid in any case in which the Commissioner refuses to refund the duty.

N. RAMASAMY CHETTIAR *vs.* THE ATTORNEY GENERAL ... VII. 95

Office under the Crown—Does manager of the State Mortgage Bank hold.

DE ALWIS *vs.* TYAGARAJA ... XVIII. 38

Liability of Crown to pay interest on money paid over to Deputy Financial Secretary by the Commissioners of the Loan Board under § 20 (2) of the Loan Board Ordinance.

DE SOYSA *vs.* THE ATTORNEY-GENERAL. ... ... XIX. 71

Crown costs and compensation—Order for failure to give opportunity to show cause before such order—Is order valid.

Held: *That before making an order for Crown costs and compensation, a Magistrate must give an opportunity to the complainant to urge any objection to the making of such an order.*

HENRY DE SILVA *vs.* EDMUND AND OTHERS ... ... XXIII. 60

Pension of a servant of the Crown—Does it vest in the assignee on the insolvency of the pensioner—Government Minutes on Pensions.

PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION *vs.* ABRAHAMS (ASSIGNEE) ... ... XXIV. 101

An elephant captured without a licence under the Fauna and Flora Protection Ordinance is the property of the Crown.

THE ATTORNEY-GENERAL *vs.* PANNIKAM AND ANOTHER ... XXVI. 112

Crown—Discretion of—To call witnesses named in the indictment.

ADEL MUHAMMED EL DABBAH *vs.* ATTORNEY GENERAL OF PALESTINE ... XXVIII. 49

Crown—When order should be made against—For payment of costs in Privy Council.

P. D. SHAMDASANI *vs.* EMPEROR XXX. 97

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Crown costs—Order for—Does appeal lie.

KANDIAH *vs.* RAMALINGAM AND OTHERS ... ... XXXVI. 65

Crown—Person holding office during pleasure of—Is right to office enforceable by action.

VALLIPURAM *vs.* POSTMASTER-GENERAL ... ... XXXIX. 1

Crown is not bound by Rule 3 (a) of the Appeals (Privy Council) Ordinance.

THE ATTORNEY-GENERAL *vs.* VALLIAMMA ATCHI ... ... XL. 77

Crown—Decree against—For return of Estate duty overpaid—Jurisdiction of Court to enter such decree.

ATTORNEY-GENERAL *vs.* VALLIAMMA ATCHI ... ... XLI. 87

Liability of Crown for breach of contract—Sale of goods by Principal Collector of Customs—Failure to deliver goods to buyer.

SILVA *vs.* THE ATTORNEY-GENERAL XLV. 17

Crown not bound by Customs Ordinance—Power of officer of Crown to bind the Crown.

ATTORNEY-GENERAL OF CEYLON *vs.* A. D. SILVA ... ... XLIX. 7

CROWN LAND.

Crown—Power of Land Commissioner to bind.

ATTORNEY-GENERAL *vs.* WIJESURIYA ... ... XXXII. 89

Crown Land—Lease of—Action for damages against Crown for breach of contract.

ATTORNEY-GENERAL *vs.* WIJESURIYA ... ... XXXII. 89

Crown Land—Permit to occupy—Is it cancelled by death of permit holder.

JAYAWARDENA *vs.* FERNANDO ... XXXIII. 4

Crown Land—Road reservation—Can possessor for over ten years claim rights under encroachment upon Crown Lands Ordinance.

WIJESINGHE *vs.* ATTORNEY-GENERAL ... ... XXXIII. 26

Crown—Prescription against—Proof of possession for over 30 years—Burden of proof.

ATTORNEY-GENERAL *vs.* KIRIMUDIYANSE AND ANOTHER ... XXXV. 43

Instructions by Land Commissioner to Government Agent to issue permit for taking produce of plantations after resuming possession from third party—Assistant Government Agent agreeing to grant permit to appellant on a particular day without reference to resumption of possession—Payment of annual rent as agreed—Failure to put appellant into possession—Action for damages against Crown.

Agent—Assistant Government Agent acting in excess of authority—Absence of proof of ostensible authority—Permit to take produce whether "lease" or "licence" Applicability of Regulation 2 of Land Sales Regulations—Prevention of Frauds Ordinance, sections 2 and 17.

On 7th March, 1942, the Government Agent, Uva Province, on instructions from the Land Commissioner, put up to auction "the lease of the right to tap and take the produce of the rubber trees" on certain Crown Land for a period of five years. One S. was the highest bidder and on the 10th of August a permit was issued to him on certain conditions. S. violated the conditions of the permit, and the Land Commissioner wrote to the Government Agent, Uva, on 28-1-1943, to cancel the permit issued to S. to take possession of the land on behalf of the Crown, and *thereafter* to issue a permit to the appellant to take the produce of the plantations thereon for the balance period. Accordingly the permit issued to S. was cancelled and on the 2nd March, 1943, the Assistant Government Agent informed S. of the cancellation and requested him to deliver peaceful possession of the land to the Divisional Revenue Officer of the area on the 15th March, 1943.

The Appellant alleged (*a*) that on the 11th of March 1943 he interviewed the Assistant Government Agent who agreed to give him the lease and to put him in possession of the land on the 15th March 1943 if he the appellant was willing to deposit Rs. 6,000 being one year's rent. (*b*) that he agreed to the terms proposed and paid the sum of Rs. 6,000 by cheque on the same day for which he received a receipt dated 5-3-1943.

The appellant brought this action for damages against the Attorney-General on

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the ground that he was not given possession of the land in question.

Held: (1) *That the Assistant Government Agent had no authority to make the alleged agreement inasmuch as the instructions given by the Land Commissioner in his letter of the 28th January, 1943, were clear and were inconsistent with either a permit being issued before the Crown resumed possession of the land or an unconditional agreement being made to grant a permit before that event.*

(2) *That there was insufficient evidence of ostensible authority, a defence open to the appellant, if he presented the case on this issue with the particularity, which, such a plea, always difficult to establish requires.*

(3) *That if the appellant wrongly assumed that the instructions given by Land Commissioner to his subordinates went further than they did, he acted at his peril.*

(4) *That the permit to be given, under the alleged agreement was a licence, and not a lease and Regulation 2 of the land Sales Regulations did not apply.*

(5) *That the alleged oral agreement is void as it falls within section 2 of the Prevention of Frauds Ordinance and is not saved by section 17 of the same Ordinance, as that section deals with instruments, i.e., with transactions which have already been reduced to writing.*

Per LORD SIMONDS.—"In this conflict of opinion upon the facts their Lordships have given anxious consideration to all the circumstances of the case and have come to the conclusion that the Supreme Court was not justified in reversing the judgment of the learned Judge, who had in their view ample material for forming the opinion to which he came and though he did not expressly measure the reliability of the appellant's and respondents' witnesses, cannot fail to have been influenced in his decision by the view that he took of them."

WIJESURIYA *vs.* THE ATTORNEY-GENERAL ... ... XLII. 77

CURATOR

Curator of minor failing to obey order of Court to deposit money. Is it contempt of Court.

SINNIAH KANGANY *vs.* ATTORNEY-GENERAL ... ... I. 417

CUSTOM

A custom to be valid must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.

FERNANDO *vs.* FERNANDO AND ANOTHER ... ... XIX. 31

A right of action which lies according to local usage will not be lost because it is inconsistent with the plaintiff's position under the general law—Custom among brokers.

MARIKAR *vs.* DE MEL LTD. ... XXIV. 103

CUSTOMS ORDINANCE

Forfeiture of prohibited goods—Special remedy provided by law—No mandamus **lies.**

MOHAMED SAHIB *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS ... II. 330

Sections 127, 139 A and 144.

(1) Section 144 of the Customs Ordinance does not impose on an accused person the burden of proving his innocence.

(2) The Section applies to a case where goods have been seized for non-payment of duties and not to a criminal prosecution.

ASSISTANT COLLECTOR OF CUSTOMS, TRINCO *vs.* SOMASUNDERAM AND TWO OTHERS ... ... XXV. 72

Section 139A—Criminal Procedure Code Section 413—Goods found and seized in the possession of the accused—Customs authorities not entitled to their return.

Held: *That goods found in the possession of an accused person acquitted of an offence under section 139A of the Customs Ordinance should be returned to him in the absence of evidence that the goods were forfeited under the Customs Ordinance.*

THE COLLECTOR OF CUSTOMS, N. P. *vs.* VELUPILLAI ... XXVI. 85

A public servant acting under the Customs Ordinance in attempting to seize contraband is liable if he causes damage to any person by a negligent act even though such negligent act be bona fide.

PARAMASOTHY *vs.* VENAYAGAMOORTHI ... ... XXVI. 68

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Section 146—Who should be made party defendant to proceedings under section 146.

Held: (1) *That the Attorney-General is the proper person to be made party defendant to proceedings under section* 146 *of the Customs Ordinance.*

(2) *That the special remedy provided by section* 146 *of the Customs Ordinance is the only remedy open to a subject whose goods are seized as forfeited under that Ordinance.*

SANGARAPILLAI *vs.* PRASAD ... XXVIII. 5

Sections 34 and 139A—Meaning of the expression "fine."

Held: (1) *That the word "fine" in sections* 34 *and* 139*A of the Customs Ordinance does not mean a "fine" imposed by a Court of Law.*

(2) *That the words "such fine and dues" used in the latter part of section* 34 *clearly refer to the penalties mentioned earlier.*

(3) *That a penalty imposed under section* 34 *of the Customs Ordinance in respect of each missing package is a "fine" within the meaning of that expression in sections* 34 *and* 139*A.*

Editorial Note—Since the date of this action section 34 of the Customs Ordinance has been amended and the expression "fines and dues" no longer occurs in that section—*Vide* section 4 of Ordinance 8 of 1944).

COLLECTOR OF CUSTOMS N. P. JAFFNA *vs.* ARUNASALAM ... XXVIII. 11

Sections 64, 128 and 128A—Export of goods the exportation of which is restricted—Forfeiture of vessel used in exportation—Owner unaware that vessel used in contravention of Ordinance—Is forfeiture justified.

The master of a vessel used the vessel, unknown to the owner, for taking certain goods, the exportation of which was restricted, out of the Island in contravention of the Customs Ordinance. He was convicted under section 128 and the vessel was declared to be forfeited under section 128A. The owner appealed.

Held: (1) *That in order to justify the forfeiture, it was not essential to prove guilty knowledge on the part of the owner;*

(2) *That section* 128 *applies to a case where goods the export of which is restricted, are taken out of the Island without compliance with the special conditions applicable to the case;*

(3) *That goods are "exported" as soon as they are taken in a vessel outside the limits of the port.*

ATTORNEY-GENERAL *vs.* NAGAMANY XL. 86

Mandamus—**Customs Ordinance—Alleged contravention of section 46 read with Defence (Control of Exports) Regulations—Cargo detained for further examination—Subsequent intimations declaring goods forfeited—Does detention of goods temporarily for examination constitute seizure of goods as forfeited within the meaning of section 146 of the Customs Ordinance—Section 123—Does the power to seize include power to detain.**

Held: (1) *That the detention of cargo (suspected to be contraband) temporarily pending a decision by the authorities as to whether or not they should be seized does not constitute a seizure of the goods as forfeited within the meaning of section* 146 *of the Customs Ordinance.*

(2) *That the power of seizure conferred by section* 123 *of the Customs Ordinance includes the power for the purposes of examination to detain for a reasonable period any goods which a Customs officer suspects to be seized as forfeited goods.*

PALASAMY NADAR AND OTHERS *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS ... ... XLI. 67

Sections 108, 148 and 150—Sale of goods by Principal Collector for failure to pay ware-house dues—Goods not delivered to buyer—Liability of Crown.

SILVA *vs.* THE ATTORNEY-GENERAL ... ... XLV. 17

§§ 59 and 103—Export of coconut oil—Procedure to be adopted in respect of shipments—Requests for information in regard to such procedure ignored—Insistence by authorities upon procedure subsequently admitted to be incorrect—Refusal to perform public duty—Mandamus.

WIJESEKERA AND CO. LTD. *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS XLV. 81

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Failure to pay duty—Accused charged with offences under section 128—Fraud essential element under the section—Onus on prosecution to prove fraud—Section 59 Customs Ordinance (Chap. 185)—Section 139A Customs (Amendment) Ordinance No. 3 of 1939.

The accused, the managing director of a company, was charged under section 128 of the Customs Ordinance in that (1) he was knowingly concerned in the fraudulent evasion of the Customs duties payable on the exportation of coconut oil, (2) he exported coconut oil, being goods liable to duty the duties for which had not been paid or secured, (3) he dealt with coconut oil being goods liable to duties of Customs with intent to defraud the revenue of such duties.

Evidence led in this case established that the accused had purchased the coconut oil from the Commissioner of Commodity Purchase after obtaining the necessary licence from him, that he had secured the loading of the oil on a vessel and had attended to all arrangements regarding the export of this oil. The Customs Authorities were aware of the loading of this oil by the accused or his company. The accused as Director of the company was also aware that export duty on the coconut oil had to be paid.

Held: (1) *That to convict the accused under section* 128 *of Customs Ordinance, the prosecution must prove fraud on the part of the accused in respect of the offences.*

(2) *That the prosecution should have established that the accused or the company for whom he was acting resorted to misrepresentation, or underhand contrivance or any other unlawful act, deliberately or purposely, with the evil intent of depriving the revenue of duties and dues.*

(3) *That section* 128 *of the Customs Ordinance read as a whole, clearly indicates that the following words "with intent to defraud the revenue of such duties or any part thereof" qualified both the sentences "every person who shall export any goods liable to duty, the duties for which have not been paid or secured" and "in any manner deal with any goods liable to duties of Customs."*

THE PRINCIPAL COLLECTOR OF CUSTOMS *vs.* T. M. A. WIJESEKERA OF WIJESEKERA AND CO., LTD. ... XLVIII 59

Contract—Sale by auction of Crown property by Principal Collector of Customs to plaintiff—Refusal to deliver property—Action for damages by plaintiff—Validity of Contract—Power of officer of Crown to bind the Crown—Principles governing thereof—Customs Ordinance (Chapter 185)—Sections 17, 18, 22, 47, Schedules A and C—Interpretation Ordinance, section 3.

The Principal Collector of Customs, with the authority of the Chief Secretary acting under the Customs Ordinance, sold certain goods lying at the warehouse after advertising the sale in the Government Gazette. The plaintiff bought the goods at the auction sale, but the Principal Collector refused to deliver them, and the plaintiff sued the Crown for damages for breach of contract between himself and the Crown. The goods sold were Crown property.

The question which arose for their Lordships' decision was whether the Principal Collector had authority to enter into a contract binding on the Cown for the sale of goods to the plaintiff.

It was argued for the plaintiff that the Collector had authority to enter into the contract (*a*) under the Ordinance, by reason of the provisions of sections 17 and 108 of the Customs Ordinance, (*b*) by reason of the fact that apart from the Ordinance he had actual authority to sell the property of the Crown, (*c*) by reason of the fact that the Principal Collector, having been appointed to his office under the Customs Ordinance and being the proper officer to administer it, must be regarded as having had ostensible authority on behalf of the Crown to represent to the public that goods advertised for sale under the Customs Ordinance were in fact saleable under that Ordinance.

The Customs Ordinance does not expressly state that the Crown is to be bound thereby, and in terms of section 3 of the Interpretation Ordinance, the plaintiff sought to establish that the Crown was bound by the Customs Ordinance by necessary implication, and for this purpose relied upon sections 22, 47 and certain items in the Schedules A and C of the Ordinance.

The ground upon which it is contended that the Ordinance generally is applicable to the Crown is that the legislature has expressly made certain specific exemptions in favour of the Crown and thereby by implication negatived the general exemption from the provisions of the Ordinance.

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Such exemptions would have been unnecessary if the Crown had not been bound by the Ordinance as a whole and the implication that arises therefrom is that the Crown is bound except where exemptions are expressly conferred on it.

Held: (1) *That the Customs Ordinance did not bind the Crown and consequently did not give the Principal Collector the right to enter into the contract for the following reasons:—*

(a) *That section 22, upon a correct view, confers no exemption on the Crown and does not imply necessarily, or at all, a liability which would exist but for such exemption. The section is effective in respect of articles imported or exported by private persons and only in that respect. Articles imported or exported by the Crown enjoy exemption from duty under the general immunity of the Crown.*

(b) *That the effect of section 47 in its application to the property of the Crown is not to grant exemption to the Crown but merely to provide a convenient procedure whereby the Crown can assert the immunity from duty which it enjoys.*

(c) *That the implications that arise from the items in the Schedules A and C of the Ordinance are not strong enough to oust the applicability of the general principle that the Crown is not bound by the statute.*

(2) *That the Principal Collector had no actual authority to enter into the contract, because there was no evidence to show that he had any authority to sell the property or enter into a contract on behalf of the Crown for its sale or that the Chief Secretary who authorized the sale had any such authority.*

(3) *That nothing done by the Principal Collector or Chief Secretary amounted to a "holding out" by the Crown that the Principal Collector had a right to enter into the contract as in fact he had no right to do so under the Ordinance.*

(4) *That the Principal Collector cannot be regarded as having authority on behalf of the Crown to represent to the public that the goods advertised for sale under the Customs Ordinance were in fact saleable as he was not empowered under the Ordinance to enter into sale of such goods which were Crown property.*

(5) *That on a question of law their Lordships are not bound by an admission which in their opinion would involve an erroneous construction of the Ordinance.*

THE ATTORNEY-GENERAL OF CEYLON *vs.* A. D. SILVA ... ... XLIX. 7

DAMAGES

See also under NEGLIGENCE

Action for Damages—Destruction of cattle—Licensed cattle shooter—

The Contagious Diseases (Animals) Ordinance, 1909—Regulations under § 9—Regulation 17—Government Agent may grant permit to shoot cattle—Permit not signed by Government Agent. Is permit holder acting *bona fide* liable in damages?

The facts shortly stated are as follows:

The first defendant a Velvidane a Veterinary Surgeon and the second defendant a licensed cattle-shooter were going their rounds in a village called Eppawela where the Contagious Diseases (Animals) Ordinance 1909 had been proclaimed on account of the prevalence of rinderpest. Seeing some stray cattle the 2nd defendant shot and killed two head of them on the orders of the Veterinary Surgeon who was accompanying them. The owner of the cattle thereupon instituted an action claiming Rs. 150 as damages from the 1st defendant the Velvidane and the 2nd defendant the licensed cattle-shooter. The trial judge dismissed the action as against both defendants. In appeal the finding of the trial Judge was set aside as respects the 2nd defendant on the ground that his permit was invalid and the case sent back for a decision of the issue of the quantum of damages.

Held: (1) *That a person who causes damage in the* bona fide *belief of the sufficiency and validity of a written authority he holds, when in fact such authority is bad, is not exempt from civil liability because when he did the act he believed that he was authorised to do so by law.*

(2) *That where a regulation (Regulation 17 Gazette of 27-2-1925) requires a written permit to be granted by the Government Agent it must be signed by the Government Agent by his own hand. Such a permit signed by anyone else for the Government Agent is invalid.*

MOHAMMADU KANDU *vs.* APPUHAMY VELVIDANE AND ANOTHER ... I. 57

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Action for damages—Malicious prosecution—What must plaintiff prove.

SUNDRAM *vs.* KANAKAPULLE ... I. 66

Measure of damages—Trespass—Cutting down of trees.

PERERA *vs.* PERERA *et al* ... I. 210

Damages—Plaintiff obtaining writ to seize defendants property before judgment.

RAJADURAI *vs.* THANAPALASINGAM *et al* ... ... II. 147

Action for damages against judgment debtor—Judgment debtor's property seized—Seizure not registered—Alienation of property two days before sale in execution—Alienation for valuable consideration—Is there a cause of action against judgment-debtor.

WIJEGOONESINGHE *vs.* GUNASEKERA XII. 49

Agreement to recovery land—Embodied in terms of settlement of action and accepted by Court—Terms not embodied in formal decree and not executed before a notary—Agreement is enforceable and party failing to carry out terms is liable in damages.

FERNANDO *vs.* COOMARASWAMY XVII. 1

To succeed in an action for damages for wrongful seizure under a writ of execution, the plaintiff must aver in his pleadings and prove that the person seizing the property has *mala fide* set the law in motion.

KANDASAMYPILLAI *vs.* SELVADURAI ... ... XVIII. 65

Damages—Mistake by notary—Loss to client—Circumstances in which notary is liable in damages.

DANIEL *vs.* COORAY ... ... XX. 59

Damages arising from motor collision—Liability of owner for damnges caused while vehicle driven by person not employed by him.

WIJERATNE *vs.* PILLAI ... XXII. 20

Damages suffered by malicious sequestration proceedings—Action lies even though no actual sequestration is effected.

HADJIAR *vs.* ADAM LEBBE ... XXII. 99

Damages—For breach of promise of marriage—Factors to be considered in assessing damages.

MASLIN *vs.* DE SILVA ... XXIII. 107

Damages—Death of person caused by negligent act of another—Can the mother of the deceased claim damages for material loss sustained—Measure of damages.

Held: *That the mother of a person killed by the negligent act of another is entitled to claim damages from the guilty party provided she can prove some material loss sustained by her as a result of such death.*

AGIDAHAMY *vs.* FONSEKA ... XXIII. 65

Wrongful dismissal of school teacher—Quantum of damages.

THURAISAMY *vs.* THAIALPAGAR XXV. 41

A person who, though not the registered owner, has a limited interest in a motor car of which he is in lawful possession, is entitled to maintain an action for damages caused to it consequent on the negligent act of another party.

PARAMASOTHY *vs.* VENAYAGAMOORTHI ... ... XXVI. 68

Damages—Injury caused by X-ray burns—Negligence of nurse—Private nursing home—Are the employers of the nurse liable for the negligence.

Held: *That the owners of a private nursing home are liable for the negligence of their servant even though the work which the servant is employed to do is of a skilful or technical character as to the method of performing which the employer is himself ignorant.*

THE TRUSTEES OF THE FRASER MEMORIAL NURSING HOME *vs.* OLNEY XXVII. 7

Damages—In divorce action—Are compensatory and not punitive.

ALLES *vs.* ALLES AND SAMAHIM XXX. 25

Breach of contract—Principle on which damages for loss in special circumstances are recoverable—Is it the same as in actions for tort.

Held: (1) *That in an action for breach of contract no damages for special loss are recoverable unless the defendant had been*

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informed of the special circumstances in which the loss would be incurred and had entered into contract subject to them.

(2) *That the rule as to the remoteness of damages is the same whether the damages are claimed in actions of tort or of contract.*

DAVID *vs.* SENEVIRATNE AND TWO OTHERS ... ... XXXII. 9

Damages—Jurisdiction of tribunal under Essential Services (Avoidance of Strikes and Lockouts) Order 1942 to award damages.

BROWN AND CO. LTD. *vs.* ROBERTS ... ... XXXIII. 48

Action for damages—Search of plaintiff's house by police without judicial sanction on complaint of theft made by defendant—Stolen property not found—Charge made on inadequate information—Need "malice" on the part of the defendant be proved.

Held: *That, in an action for damages for causing unjustified search of plaintiff's residence by the police without judicial sanction, on an alleged charge of theft made by defendant on inadequate materials, the plaintiff need not prove malice on the part of the defendant.*

RAMIAH *vs.* RAYNER ... XXXIII. 81

Damages for failure to execute building contract—

MOHAMED *vs.* WIJEWARDENA XXXIV. 17

Land sold in execution of decree—Obstruction to Fiscal's surveyor proceeding to prepare plan—Irregular decree—Is obstruction justified—Liability of person so obstructing.

Held: (1) *That the fact that a decree entered in a case was irregular is no justification for a person to obstruct a surveyor who proceeds to a land sold in execution of such decree for the purpose of preparing a plan as required by section 286 of the Civil Procedure Code.*

(2) *That a person so obstructing is liable in damages to the purchaser for direct loss caused to him.*

CAROLIS APPUHAMY *vs.* PODI NONA AND OTHERS ... ... XXXIV. 96

Damages—For injury resulting from negligence—Passenger just alighted at halting place run over by rear wheel of vehicle—Driving off from halting place without due care and caution.

GAMAGE LUISA PERERA *vs.* GAMINI BUS. CO. LTD. ... ... XL. 49

Seduction—Plaintiff's evidence contradicted by defendant—Corroboration of plaintiff's evidence.

Held: *That to succeed in a claim for damages for seduction, the plaintiff's evidence, when contradicted by the defendant, must be corroborated in some material particular.*

VEDIN SINGHO *vs.* MENCY NONA XLII. 31

Fire spreading to adjoining land—Degree of care required of person starting the fire—Failure to take necessary precautions—Contributory negligence—Roman-Dutch Law.

The plaintiff sued the defendant to recover damages caused by a fire that spread from the defendant's land which adjoins the plaintiff's.

It was established (*a*) that the defendant knew that the south-west monsoon was on, but took no precautions on that account.

(*b*) That although the defendant's land was 8 acres in extent, he lit the fire about 20 fathoms from the plaintiff's land.

(*c*) That he failed to inform the plaintiff or his servants.

(*d*) That he had no watchers to watch the fire and prevent it from spreading on to the plaintiff's land.

Held: *That the circumstances proved that the defendant failed to take the care which the law required him to take and therefore he was liable.*

Per BASNAYAKE, J.—"On the plea of contributory negligence raised by the defendant, I wish to observe that it has not been shown that the plaintiff was under any legal duty to take precautions against the spread of fire from the defendant's land to his. In the circumstances there can be no question of contributory negligence on the part of the plaintiff."

SELVADURAI *vs.* JAMIS APPUHAMY XLII. 53

Action for damages against Crown for failure to put person into possession of Crown land.

WIJESURIYA *vs.* THE ATTORNEY-GENERAL ... ... XLII. 77

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Damages—Defendant Bank undertaking to negotiate drafts drawn on plaintiff by foreign merchant on surrender of shipping documents in respect of goods of specified weight and quantity—Payment by defendant's agent to foreign merchant of full sum on bill of lading showing less weight—Payment by plaintiff to defendant honouring draft—Action for damages to recover value of difference in weight—Bill of lading, when conclusive evidence.

Plaintiff, having entered into a contract with one M in Basrah for the purchase of 52 tons of dates, requested the defendant Bank by letter to negotiate drafts drawn on him by M to the extent of Rs. 15 860, provided M surrendered to the defendant (*a*) an on board bill of lading, (*b*) an invoice, (*c*) a policy of insurance representing a shipment of about 1,000 bundles of dates weighing 52 tons C. I. F. Colombo and further promised to honour such draft in Colombo at maturity.

The defendant Bank agreed to do so and arranged with the Ottoman Bank, Basrah, to honour M's drafts. The Ottoman Bank paid Rs. 15,860 as against the invoice, the bill of lading and a policy of insurance. The bill of lading stated the "quantity or number of packages" to be 940 and weight as 47,000 *kilos* which according to the evidence was equal to 47 tons.

The invoice stated the number of packages to 940 and the weight of each bundle as 124 *kilos*—Total 1,040 cwts.

The plaintiff claimed from the defendant Bank the value of 5 tons of dates being the difference between the weights in plaintiff's letter to the defendant and the weight of the shipment as given in the bill of lading.

Held: (1) *That there was negligence on the part of the defendant's agent in honouring M's draft which was not accompanied by a bill of lading showing that 52 tons of dates had been shipped.*

(2) *That as the plaintiff failed to prove satisfactorily the damages sustained by him, the Court would award only nominal damages.*

(3) *That under the Bills of Lading Act, the bill of lading is conclusive evidence only in favour of a consignee or endorsee for valuable consideration of the shipment of goods against the maker or the person signing the bill of lading. In other cases the statements in the bill of lading are prima facie evidence which the person disputing them must prove.*

H. P. M. ESSACK *vs.* NATIONAL BANK ... ... XLIII. 30

Measure of damages—Contract of bailment—Loss of goods entrusted to bailee—Sentimental value of goods.

MOHAMED SALIH *vs.* FERNANDO *et al* ... ... XLIV. 17

Damages—Excavations causing damage to contiguous land—Measures of damages.

Where the defendant excavated earth along the boundary of plaintiff's land, which resulted in damage to plaintiff's fence and subsidence of his land, and the defendant for the purpose of preventing subsidence and erosion of his soil in the future erected a wall along the excavated boundary and claimed the cost of the wall as damages.

Held: (1) *That the plaintiff was entitled to only actual physical damages caused by the subsidence and such damages flowing naturally from them.*

(2) *That the plaintiff could not claim as damages the cost of the wall as future washaways on the land could not be regarded as prospective damage from the first subsidence.*

(3) *That a right of action for damages accrues each time damage is caused by subsidence resulting from excavations.*

BANDAPPUHAMY *vs.* SWAMY PILLAI ... ... XLIV. 41

Damages—Sale of land to two purchasers—Action by third party against one of them—Eviction—Right of other purchaser to sue vendor—Actio de evictione—**Ingredients of.**

Where one of two joint-purchasers of a land was evicted by a third party under a decree against him and the two purchasers jointly claimed damages from the vendor for breach of warranty against eviction.

Held: (1) *That no cause of action to sue the vendor accrued to the purchaser who was not bound by the decree and who was therefore not judiciolly evicted from the land.*

(2) *That in an* actio de evictione *the plaintiff must prove that "the whole or part of the property of which he was placed in possession under a contract of sale had*

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been recovered from him by a third party by judicial process per judicem facta recuperatio."

MOHAMMADO CASSIM *vs.* MAHMOOD LEBBE *et al* ... ... XLV. 38

Tort—Damages—Assessment of, by trial Judge—When may Appellate Court interfere?

The Court of Appeal has a right to interfere with a finding as to the question of damages by a trial Judge, but before the Court interferes it must be satisfied that the Judge has acted on a wrong principle of law or misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered.

DIAS *vs.* SILVA ... ... XLIX. 20

Damages—Breach of contract—Breach by buyer—Sale in open market—Assessment of damages.

ABDUL LATIFF ABDUL HAMID *vs.* ODHAVJI ANANDJI AND CO., LTD. XLIX. 37

Damages—Action against co-respondent—Malicious desertion and adultery by wife. Basis of assessment.

DEAN *vs.* ANTHONISZ AND ANOTHER ... ... XLIX. 41

Action for damages—Plaintiff generally engaged by defendant Co. on a fee for medical examination of clients—Plaintiff engaged by employee of the Co. to examine prospective proponents for insurance—Injury to plaintiff while travelling with employer in Co's car—Car driven at time of accident by person not in the employ of the Co.—Liability of Co.

DE SILVA *vs.* TRUST CO., LTD. ... L. 28

Damages—Car damaged beyond repair—Basis of valuation—English Law followed.

Held: *That in valuing a car damaged beyond repair, the principles laid down in* Edney *vs.* de Rougement 28 LL. L. R. 215 *should be followed:—*

(1) *The value of the car at the time of loss is to be calculated upon a basis of depreciation.*

(2) *The rate of depreciation is to be ascertained by finding upon the evidence in each case what was the theoretical life of the car.*

(3) *The depreciation for the first year will be the rate per cent. so found plus something in respect of the dealer's commission on the car.*

(4) *The depreciation for the last year will be the rate so found less the scrap value of the car at the end of its life.*

(5) *The rate of depreciation is to be applied from year to year to the car's value at the beginning of each year, and not yearly to its original cost.*

(6) *Special factors, such as the use to which the car has been subjected, recent repairs or renovations, the value of special accessories, must also be taken into account.*

THE GENERAL INSURANCE COMPANY OF CEYLON *vs.* SOMASUNDERAM ... L. 94

DANGEROUS AND OFFENSIVE TRADES

See also under **BYLAW**

Dangerous and offensive trade—By-law for the regulation of—Local Government Ordinance No. 11 of 1920 § 168 (10) (K)—Storage of copra.

Held: *That where a by-law prohibited the storage of copra without a licence it was a breach of it to do so without such licence regardless of the purpose for which the copra was stored.*

TENNAKOON *vs.* MUTTHUWAPPU I. 229

Municipal by-laws declaring storage of furniture offensive or dangerous trade—Auctioneer displaying customer's furniture—No charge made for such display—Does he carry on the business of storing furniture.

GUNASEKERA *vs.* MUNICIPAL REVENUE INSPECTOR ... ... XLVI. 59

Carrying on a tile factory—No conditions prescribed by law to which factory must conform —Conviction for carrying on factory without a licence—Validity of conviction.

JANSEN *vs.* SANITARY INSPECTOR DEHIWALA MT. LAVINIA U. C. ... L. 97

DEAF AND DUMB ACCUSED

Interpretation of signs made by.

THE KING *vs.* APPUHAMY *alias* GOLUWA ... ... XII. 79

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How may deaf and dumb accused be tried.

JOSEPH *vs.* FERNANDO AND ANOTHER ... ... XVIII. 69

DEATH CERTIFICATE

Proper method of production.

PONNAMMAH *vs.* RAJAKULASINGHAM ... ... XXXVII. 67

DEBT CONCILIATION ORDINANCE

No. 39 of 1941, Sections 24 and 55—Jurisdiction of Court to entertain action after application made by debtor to Debt Conciliation Board—Order made staying proceedings—Correctness of such order.

Plaintiff instituted this action on a Mortgage Bond on 29th June, 1946. Before the summons returnable date the defendant appeared and applied for stay of proceedings on the ground that prior to the date of the institution of this action he had made an application to the Debt Conciliation Board under the provisions of the Ordinance (No. 39 of 1941). He filed a certificate dated 12th June, 1948 duly signed by the Secretary of the Board in support of his statement.

The preliminary inquiry required by section 24 of the Ordinance had not been held so far. It was contended for the plaintiff that the matter could not be said to be pending before the Board within the meaning of section 55 of the Ordinance until after the Board had assumed jurisdiction to effect a settlement following the preliminary inquiry under section 24.

The learned District Judge rejected this contention and granted the defendant's application to stay proceedings.

The plaintiff appealed.

Held: *That in view of the language of section 55 of the Debt Conciliation Ordinance, the proper order should have been to dismiss the plaintiff's action on the ground that the Court has no jurisdiction to entertain it after application was made by the defendant to the Board.*

THE AGRICULTURAL AND INDUSTRIAL CREDIT CORPORATION OF CEYLON *vs.* DE SILVA AND ANOTHER ... XLI. 96

DEBTOR AND CREDITOR

See also under **CO-DEBTORS**

Remedy of co-debtor who has satisfied entire debt.

HARIET DIAS AND ANOTHER *vs.* SILVA I. 214

Part payments of judgment debt—How should they be set off.

Held: *That a judgment debt is one sum, whatever its component parts may be, and in whatsoever manner it is made up, and that part payments made by the judgment-debtor can be set off against the total sum, and need not be set off against that part of the debt which, according to the Roman Dutch Law, is the more onerous.*

SILVA *vs.* LEIRIS APPU ... ... V. 95

Debtor and creditor—Death of creditor—Several lands belonging to the debtor devolving on sole heir—Sale of one of the lands by the devisee—Sale during administration of the deceased debtor's estate—Sale not for purposes of administration—Seizure of property sold by creditor of deceased under a writ of execution on a mortgage decree against the deceased—Can purchaser resist the seizure on the ground that there was other property left by the deceased sufficient to cover the creditor's claim.

Held: *That the plaintiff was not entitled to resist the seizure on the ground that there were other lands of the estate of sufficient value to cover his claim which the defendant could have seized in execution.*

TILLAKARATNE *vs.* KURUPPU WIJEWARDENA ... ... VIII. 148

A judgment against one of two joint debtors is a bar to an action against the other joint debtor unless it is otherwise provided by some statute or rule of Court.

SUPPRAYAR REDDIAR *vs.* MOHAMED AND ANOTHER ... ... X. 44

Debt due on a promissory note—Waiver of claim after judgment—Can party waiving claim change his mind and recover the debt——Is the matter governed by English Law or Roman-Dutch Law.

Held: (1) *That although the law governing promissory notes is the English Law, once judgment has been entered on a note, the law applicable to the judgment-debt is the Roman-Dutch Law.*

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(2) *That a person, who has waived a judgment-aebt for consideration according to Roman-Dutch Law, cannot afterwards recover the debt.*

RAMALINGAM *vs.* JONES ... XIV. 89

Death of debtor—Each of the adiating heirs becomes liable for the debt pro rata— **Acknowledgment or payment of debt by one such heir does not interrupt prescription as regards the rest.**

PERERA *vs.* PERERA AND FIVE OTHERS XX. 35

Acknowledgment in writing of money borrowed on interest—Absence of promise to pay sum borrowed—An undertaking to pay can be implied.

NADAR *vs.* FONSEKA ... XXVI. 88

Creditor cannot recover more than double the principle which has been lent.

ELIYATHAMBY *vs.* MIRCANDO AND OTHERS ... ... XXXII. 15

Debtor—Sale in execution of hypothecary decree—Can he buy his own property in his own name or in name of third party—If property purchased by third party is it held in trust for debtor.

MARIKKAR *vs.* MARLIYA ... XXXVI. 18

DECISORY OATH

See under **OATHS ORDINANCE**

DECLARATION OF TITLE

Action for—*See under* **REI VINDICATIO**

DECOY

See also under **CORROBORATION**

Testimony of — Uncorroborated — Unsafe to convict.

WIJESURIYA *vs.* BABA SHERRIDAN LYE I. 44

LAWRENCE PULLE *vs.* KATTALINGAM I. 56

One decoy cannot corroborate another decoy.

PEIRIS *vs.* SENEVIRATNE ... ... I. 118

Excise offence—Decoy not called as a witness—Validity of conviction.

(EXCISE INSPECTOR) RODRIGO *vs.* KARUNARATNE ... ... I. 222

Excise offence—Decoy not called as witness —Validity of conviction.

REX *vs.* VALLEY AND ANJALINGAM ... I. 227

Decoy's evidence uncorroborated—Conviction invalid.

EKANAYAKE (EXCISE INSPECTOR) *vs.* FONSEKA ... ... I. 310

Decoy not called—Nature of other evidence that should be led.

Held: *That when the decoy is not called the evidence of sale in an excise offence must be given with sufficient detail to enable a Court to Judge its truth.*

WIJERATNE *vs.* RUPASINGHE ... II. 284

Evidence of decoy—Is it essential for success of prosecution.

Held: (1) *That the evidence of a decoy is not essential for a successful prosecution for the illicit sale of an excisable article.*

(2) *That a conviction can be sustained if there is other evidence even though the deocy contradicts the rest of the prosecution.*

DHARMARATNE (EXCISE INSPECTOR) *vs.* KANDASAMY ... ... II. 365

Evidence of decoy—Should it be treated in the same way as the evidence of an accomplice.

Held: (1) *That a decoy or spy must not indiscriminately be dubbed an accomplice, and his evidence should not be invariably regarded as that of an accomplice.*

(2) *That there is no rule that one must not convict on the uncorroborated testimony of a decoy.*

VANDERSTRAATEN (INSPECTOR OF POLICE) *vs.* SIRIWARDENA ... ... XI. 121

Can one accomplice corroborate another.

REX *vs.* NUGAWELA ... XVII. 71

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Evidence of decoy—Should a decoy's evidence be treated in the same way as an accomplice's evidence.

BEDDEWELA *vs.* ALBERT ... XIX. 13

Evidence of decoys—Natural caution to be exercised by Court—Explanation given by accused raising doubt as to his guilt.

Accused was charged with selling a pound loaf of bread for 11 cents more than the control price. He stated that in charging 11 cents extra he was recovering a debt of that sum owed to him by the decoy. The decoy admitted having an account with the accused, debts of a few cents at a time being occasionally outstanding, but stated that on the day in question the deduction of such a sum was not discussed.

Held: *That,"having regard to the natural caution which a Court must always adopt in cases in which decoy witnesses are produced by the prosecution", the Magistrate should have in the circumstances felt some doubt as to the guilt of the accused and acquitted him.*

GUNADASA *vs.* WIJESEKERA ... XXXI. 64

Decoy—Price Control Inspector acting as—Is he an accomplice—Interest in conviction of accused—Need to accept such evidence with care and caution.

Held: (1) *That whether a person is or is not an accomplice is not a question of law, but one of fact for decision in each case.*

(2) *That where a decoy acts like an ordinary customer, and without tempting the accused to commit the offence, or abetting or instigating its commission, the accused commits the offence, such a decoy cannot be regarded as an accomplice, although being interested in the conviction of the accused or the reward he hopes to obtain, his evidence should be accepted with care and caution.*

LYRIS SILVA *vs.* KARUNARATNE PRICE CONTROL INSPECTOR ... XXXIV. 109

Accomplice—Participation in crime without being a guilty associate—Does not render such person an accomplice and his evidence does not require corroboration.

PERIES AND ANOTHER *vs.* DOOLE S. I. POLICE ... ... XXXVI. 23

Question whether a witness is an accomplice is one for the Jury to decide.

THE KING *vs.* PIYASENA ... XXXVIII. 30

Police Officer acting as detective—Is he an accomplice.

NANDASENA *vs.* WICKREMERATNE XXXIX. 66

What weight should be attached to evidence of decoy—

RAJAPAKSE *vs.* FERNANDO ... XLV. 6

Decoy going back on evidence—Availability of other evidence—Can conviction be sustained.

KONSTZ *vs.* SUB-INSPECTOR THARMARAJAH ... ... XLVII. 58

DECREE

Court's power to alter decree—*See also under* **JURISDICTION**

Foreign judgment—Action on—Decree for costs—Variance between wording of decree and allocatur.

Held: *That in so far as the* allocatur *varies from the words of the decree, it is of no effect and the words of the decree will have to be followed.*

VAITHALINGAM AND ANOTHER *vs.* MURUGESU ... ... I. 99

Seizure of decree—Can judgment creditor obtain process under the decree so seized.

SIVASAMPOE *vs.* CHELVRAYAN I. 108

Decree of consent—Has full effect of res judicata **between the parties.**

SINNIAH *vs.* ELIAKUTTY ... I. 253

Final decree in partition action—Court cannot set aside.

SINNAMMAH *et al vs.* SELLAMMA *et al* I. 369

Decree—Execution of without obtaining copy as required by Stamp Ordinance.

SILVA *vs.* WIJESEKERA ... III. 11

Assignment of decree not yet in existence—Can procedure under section 339 of Civil Procedure Code be availed of.

Held: *That it is lawful to assign a decree not yet in existence but that until it comes into existence the procedure in section* 339

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of the Civil Procedure Code cannot be availed of.

SILVA *vs.* SUPRAMANIAM CHETTIAR III. 99

Mortgage decree—Power to enter instalment decree—Exclusion of money due on mortgages of movable or immovable property.

THE BANK OF CHETTINAD *vs.* PULMADAN CHETTY ... ... I. 255

Mortgage decree—In mortgage action minor heirs of the wife of a deceased mortgagee subject to thesawalamai not parties—Decree not binding on them.

AMBALAVANAR *vs.* SINNACHCHY IV. 29

Judgment against several defendants—Decree that they should pay the amount decreed jointly and severally.

Held: (1) *That where judgment is given against several defendants it is wrong to enter decree condemning them to pay the amount decreed* in solidum.

(2) *That the amount each defendant should pay should be decreed separately.*

HERATH SINGHO *vs.* PEDRIC APPU AND ANOTHER ... ... IV. 102

Assignment of decree—Decree not entered at time of assignment—Does assignment pass title to the decree?

Held: *That upon the decree being entered rights thereunder passed to the assignee by virtue of the assignment.*

ARUNACHALAM CHETTIAR *vs.* SEYED MOHAMMED ... ... VII. 36

Mortgage action—Several defendants—Death of one of them—Decree entered against all defendants including deceased defendant—Court not aware of death—Application to vacate decree against deceased defendant and substitute his legal representatives—Application allowed—Decree entered again against all defendants—Need the mortgagor defendant's consent be obtained before entering decree.

Held: (1) *That the first decree is binding on the mortgagor, the first defendant, and that the Judge had no power to set it aside and enter a second decree on the ground that one of the defendants was not alive at the time it was entered.*

(2) *That the first decree was a nullity so far as the deceased second defendant was concerned, as he was not alive at the time it was entered.*

(3) *Where decree is entered against several persons and it is later reopened on the ground that one of the persons against whom it was entered was not alive at the time, the other persons, against whom a valid decree has been entered, cannot make use of the opportunity and claim a rehearing of their case.*

THE COMMISSIONER OF LOAN BOARD *vs.* FELSINGER ... ... IX. 126

Parties cannot by agreement vary a decree, and a variation of a decree by agreement of parties is invalid.

CHETTINAD CORPORATION *vs.* RAMAN CHETTIAR ... ... X. 58

Decree entered of consent—Can it be set aside later by trial Judge—Objection based on the failure to comply with the provisions of the Registration of Business Names Ordinance No. 6 of 1918—Can objection be raised after judgment.

Held: (1) *That a Court has no jurisdiction to set aside its own decree, entered of consent, in pursuance of a warrant of attorney to confess judgment.*

(2) *That a party should not be allowed, after judgment in a case, to lead evidence to prove non-compliance with the terms of the Registration of Business Names Ordinance.*

VALLIAPPA CHETTIAR *vs.* SUPPIAH PILLAI ... ... X. 149

Decree in appeal entered in terms of petition of appeal—Decree not consistent with judgment of Supreme Court—Relief sought in the petition of appeal not asked for in trial Court—Amendment of decree by Supreme Court to conform with judgment in appeal.

Held: (1) *That the order of the Supreme Court allowing the appeal should be construed as allowing the appeal to the extent of setting aside the order appealed from and no more.*

(2) *That the Supreme Court had no power to grant the injuction prayed for by the defendants in their petition of appeal.*

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(3) *That the Supreme Court had no power to amend the decree in the circumstances so as to bring it into line with the decision in appeal.*

POUNDS AND ANOTHER *vs.* GANEGAMA ... ... XI. 168

Decree of consent—Surety undertaking to be liable if defendant makes default—Default of defendant—How can surety be proceeded against.

CHARLES *vs.* JAYASEKERA ... XII. 118

Decree unintelligible—Court may examine the judgment in order to ascertain the meaning of the decree.

ARANAPPU DE SILVA *vs.* WILLIAM AND THREE OTHERS ... ... XIV. 81

Decree—Once entered—Can it be altered to give effect to an agreement reached by the parties after decree is entered.

HUNTER AND ANOTHER *vs.* DE SILVA ... ... XIV. 123

Decree in favour of administrator—Action instituted by administrator before obtaining letters of administration—Letters of administration obtained subsequently but before decree—Is decree good.

KUDHOOS *vs.* JOONOOS ... XV. 133

Can decree in appeal be executed unless the parties first obtain a copy of the decree in appeal.

PALANIAPPA CHETTIAR *vs.* RAMANATHAN CHETTIAR ... ... XXI. 80

Decree—Execution of—After death of judgment debtor.

SIRIWARDENE *vs.* KITULGALLA XXI 106

Decree—Description of land by reference to plan—Plan essential part of description.

MURUTHAPPAH *vs.* ZOWHAR XXIV. 38

Judgment-creditor applying for execution of decree, pending appeal by judgment-debtor, must make judgment-debtor respondent to application.

DE SILVA *vs.* EDWARD ... XXX. 81

Decree—Whether terms of settlement should be embodied in—Requisites of a decree—Civil Procedure Code section 188.

The plaintiff (wife) sued her husband for a divorce *a vinculo matrimonii* on the ground of malicious desertion. The defendant (husband) counter-claimed a divorce and prayed for the custody of the children and for an order settling certain property on himself and his children. When the case came up for trial on 7th March 1925 both parties, who were represented by counsel, intimated to Court that parties were agreed as to the custody of children and the disposal of the property and the terms of the agreement were recorded by the Judge at the request of the parties.

On the evidence led for the plaintiff on the issue of malicious desertion, the Judge directed decree *nisi* to be entered returnable on 9th June, 1925. On 9th June 1925 when a draft decree was submitted the judge made the following entry: "I do not think the terms of the agreement need be embodied in the decree. Usual form of decree should be followed and in addition the custody of the children, etc., to be as in the terms of the agreement embodied in the record."

In view of this order the final decree settled and signed by the Judge did not embody any of the terms of the agreement.

The defendant moved that the decree be amended embodying the terms of the agreement. The learned District Judge refused and the defendant appealed.

Held: (1) *That when the parties asked that the terms of the agreement be entered on the record, their purpose was that there should be evidence of the agreement and not that the Court should pass a decree in conformity with the agreement in the event of a divorce being granted.*

(2) *That the purpose of a decree is not to embody and enshrine the terms of a settlement, but when an action or part of an action is determined by a settlement, to give effect to that settlement by orders capable of being executed.*

DASSENAYAKE *vs.* DASSENAYAKE XXXI. 29

Is decree under § 247 Civil Procedure Code an instrument affecting land.

EBERT SILVA *vs.* WIJESEKERA XXXII. 1

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Decree against administrator—When is it binding on heirs.

MACKEEN AND ANOTHER *vs.* PULLE AND TWO OTHERS ... XXXIII. 28

Rights of heirs to intervene after interlocutory partition decree.

MACKEEN AND ANOTHER *vs.* PULLE AND TWO OTHERS ... XXXIII. 28

Decree—Sale in execution—Defendant lunatic—Bona fide purchaser—Can transfer be set aside.

S. APPUHAMY AND ANOTHER *vs.* S. RAMASAMY PILLAI'S DAUGHTER THAILAMMAH ... ... XXXIV. 79

Decree directing delivery of trust property to trustees is executable and not declaratory.

CHINNATHAMBY AND OTHERS *vs.* SOMASUNDARA AIYAR AND OTHERS XXXV. 91

Decree entered of consent—Error made by counsel in stating terms of settlement—Has Court power to review such consent decree.

WICKRAMANAYAKE *vs.* HINNIHAMY AND ANOTHER ... ... XXXVI. 89

Decree against tenant is binding on sub-tenant.

KUDOOS BHAI *vs.* VISVALINGAM XXXIX. 20

Decree—Ex parte—When can it be set aside.

RODRIGUES *vs.* SOMAPALA XXXIX. 85

Decree—obtained by fraud or collusion—Court has inherent power to vacate decree in same proceedings.

MARJAN AND OTHERS *vs.* MOWLANA AND ANOTHER ... ... XL. 81

Decree for ejectment against tenant—Is a sub-tenant who was not made party to the action bound by its decree.

JUSTIN FERNANDO *et al vs.* ABDUL RAHAMAN AND ANOTHER ... XLI. 1

Decree entered embodying agreement reached independently of allegations in pleadings relating to a trust—Absence of any indication for or against existence of trust in decree—Does decree operate as res judicata **on issue of trust.**

MENIKRALA VIDANE *vs.* PUNCHI MENIKA *et al* ... ... XLI. 47

Amendment of decree—Powers of Court.

PIYARATANA UNNANSE *et al vs.* WEHAREKE SONUTTARA UNNANSE *et al* XLII. 89

Action—Terms of settlement agreed upon by parties—Duty of Judge in recording terms of decree.

NEWTON *vs.* SINNADURAI ... XLV. 89

Declaratory decree—Power of Court to grant.

NAGANATHAR *vs.* VELAUTHAM AND WIFE SARASWATHY ... ... L.

GASPER SELVAM *vs* KUDIPPILAI *et al* L. 24

DEED

See also under

ACCEPTANCE

DONATION

CONSTRUCTION OF DOCUMENTS

RECTIFICATION

MUSLIM LAW

INTERPRETATION

Construction of deed—Words used unmeaning in reference to existing facts—Evidence admitted to explain the reference.

Where by a deed a white washed tiled house of 32 ft., in length and 49 ft., in breadth was conveyed and there was only one white washed tiled house of 32 ft. in length and 72 ft., in breadth in the land in question.

Held: *That the description applied to the existing house of* 32 *ft., in length and* 72 *ft., in breadth on the principle of the maxim* falsa demonstratio non nocet.

DE SILVA AND ANOTHER *vs.* ABEYETILLEKE AND ANOTHER ... ... I. 53

Deed—Notary and attesting witnesses all dead—Signature by a mark—Deed how proved—

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Held: *That where the Notary and attesting witnesses are dead on proof of the Notary's signature his statement in the attestation clause with regard to his knowledge of the person executing the deed is admissible in evidence.*

DE SILVA *vs.* SINNATHAMBY AND ANOTHER ... ... I. 350

Allegation that deed of sale was in fraud of creditors—Burden of proof.

PALANIAPPA CHETTY *vs.* FERNANDO AND ANOTHER ... ... II. 512

Statement in attestation clause—Can evidence be led to contradict such statement.

PERERA *vs.* ALICE ... ... VIII. 109

The burden of proving that a deed was executed by an officer who had no authority to do so is on the person who challenges the validity of the deed.

WIJEWARDENA *vs.* PERERA ... XI. 57

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

Held: (1) *That the plaintiff was entitled to maintain the action.*

(2) *That the words "reserving to myself the right of repurchase" by implication created an obligation on the part of the defendant to reconvey.*

BABUN SINGHO *vs.* SEMANERIS SINGHO *et al* ... ... XVI. 83

Deed admitted without objection in partition case—Deed not proved as required by § 68 of the Evidence Ordinance—Objection to deed cannot be taken in appeal.

SIYADORIS *vs.* DAINIS AND OTHERS XX. 33

Deed—Construction of—Two mutually repugnant clauses—To which clause should effect be given.

CHINNIAH *vs.* FERNANDO ... XXII. 73

Gift—Kandyan, for securing succour and assistance—Revocation of gift as no succour and assistance received—Subsequent gift subject to condition that property should devolve on certain named persons if donee had no legitimate children—Rights of purchaser of title under 1st gift contested by the legitimate children of 2nd donee—Rights of competing claimants—Registration—Fidei commissum.

M and K who were jointly entitled to a land gifted it by P2 of 1897 to K's son Kirihamy, on whose death, the administrator executed a conveyance P3 of 1903 in favour of Kirihamy's two children P and D. P conveyed his half share to the plaintiff in 1916 on P4 which was registered in the same year.

Contesting defendants, who are the children of P, proved at the trial that, by 2D2 of 1904, M revoked P2 in respect of his half share and by 2D1 of 1904 gifted it to P subject to the following clause:

"And after the demise of both of us (namely Mudalihamy and his sister-in-law Kiri Etana) the said Punchirala shall possess the aforesaid lands and premises as long as possible and in the event of his having legitimate children, born of a wedded wife of his, that he may convey the said premises unto them; but in the event of his having no legitimate children, then and in such case, he shall possess the said premises during his lifetime; and thereafter the said lands and premises shall devolve on Madanwala Vidanalagedera Ukku Menika and Punchi Menika, the daughters of Kaluhamy Arachchi, deceased, who was the brother of mine the said Mudalihamy, and their respective descendants and the said premise shall not devolve on any other person."

2D2 and 2D1 were unregistered deeds. The deed of gift P2 was executed with the object of "securing all necessary succour and assistance" and it was revoked as the donor received no succour or assistance.

Held: (1) *That the deed* P2 *was revocable.*

(2) *That the clause in* 2D1 *did not create* fidei commissary *rights in favour of* P*'s children (the contesting defendants) as they were not the descendants of* M *and no burden was imposed on them.*

(3) *That on the question of registration, the title, if any, of the contesting defendants is not defeated by the prior registration of* P4.

HOLLOWAY AND ANOTHER *vs.* KIRIHAMY AND OTHERS ... ... XXV. 52

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Deed—Construction of—In a deed of transfer the words "together with all my right title and interest and all things belonging thereunto" are wide enough to convey the right to claim compensation for the improvements effected by the transferor.

JASOHAMY AND ANOTHER *vs.* PODIHAMY AND TWO OTHERS . ... XXV. 100

Deed—Description of boundaries of land conveyed—Discrepancy in description—How construed.

Held: *That the general description of the boundaries of the* corpus *of a land conveyed by deed does not enlarge the effect of the prior description.*

ISMAIL AND ANOTHER *vs.* SILVA AND ANOTHER ... ... XXVI. 46

Deed of transfer—Agreement to repurchase within eight years—Absence of vendee's signature on deed—Is vendee bound to retransfer.

NANDUWA AND ANOTHER *vs.* JUNGA AND TWO OTHERS ... XXVII 1

Deeds—Construction of.

The principle that "if there be two clauses or parts of a deed repugnant one to the other, the first part shall be received and the latter rejected" should be applied only in the last resort if a Judge can find nothing else to assist him in determining the question.

VICTOR MATHES *vs.* VICTOR APPUHAMY ... ... XXVII. 90

Deed—Interpretation of—Effect should be given if possible to every word contained therein but too much regard must not be had to the natural and proper significance of words to prevent the simple intention of the parties from taking effect.

FERNANDO AND OTHERS *vs.* FERNANDO AND OTHERS ... XXIX. 19

Interpretation—Deed of gift subject to fidei commissum—**Sale of interests of some** fidei commissaries **together with life interest of** fiduciarius—**Recital containing words "granted unto W.....the premises fully described in the schedule hereunder written together with life interest of the said T"—Schedule describing as two-thirds share or part of property—Did T** (fiduciarius) **convey entirety of life-interest or only two-thirds.**

G by deed of gift No. 2505 of 1886 donated the property in question to T subject to a *fidei commissum* in favour of T's children. T married C who died leaving his widow T and three children. T and two of her children conveyed their interests to plaintiff by deed P 8 the relevant part of which reads as follows:

> "We Dolly.....and.....George, wife and husband.....Elsie.....and .....Theresia..... (hereinafter, sometimes referred to as the vendor) in consideration of the sum of.....paid by .....William have granted..... unto William.....the premises fully described in the schedule hereunder written together with the life interest of the said.....Theresia.....mentioned in deed No. 2505.....and together with all and singular the rights, ways, easements, advantages, servitudes and appurtenances whatsoever to the said premises belonging or in anywise appertaining.....and together with all the estate right, title, interest..... of the said vendor into upon or out of the said premises....." The schedule mentioned above refers to the interest sold as two-thirds parts or shares of the property.

The plaintiff brought this action for sale of the property under Ordinance 10 of 1863 and the question that arose for determination was whether on the said deed P 8 T conveyed her life interest in the entire property or only a two-third share of it.

Held: *That the deed* P8 *did not convey to the plaintiff the entirety of the life interest of* T, *but only a two-third part of it.*

WILLIAM PERERA *vs.* THERESIA PERERA ... ... XXXI. 45

Conveyance of land—Vendor entitled to 3/16 purporting to convey 1/2 of land—Title recited in deed only as to 2/16—Conveyance by vendor of all his right, title and interest in the land—Does conveyance pass 2/16 or 3/16 of the land.

A vendor, who was entitled to 3/16 of a land, purported to convey 1/2 the land. In the conveyance the title recited pointed to a deed whereby only 2/16 of the land was acquired by the vendor. The question was whether the conveyance passed 3/16 or only 2/16 of the land. In the conveyance, the vendor conveyed to the vendee "all the

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estate, right, title, interest, claim and demand whatsoever of the said vendor in to or upon the said premises and every part thereof." For over a third of a century the vendor did not make any claim to the land.

Held: *That 3/16 of the land passed under the conveyance.*

FERNANDO *vs.* SILVA AND OTHERS XXXI. 73

Deed of gift—Recital in deed that it is irrevocable—Gross ingratitude of donee—Revocability of deed—Roman-Dutch Law.

Held: (1) *That under the Roman-Dutch Law a deed of gift can be revoked on the ground of ingratitude even though the donor may have expressly agreed not to revoke it.*

(2) *That such an agreement not to revoke is null and void as being* contra bonos mores.

NAKANTHAR *vs.* SINNAMMAH ... XXXI. 78

Deed—Interpretation of—Incumbency of Buddhist temple—Deed executed by Incumbent gifting the temple property to a particular pupil and expressly giving him the right to give the said lands on a similar instrument to any one of his pupils to succeed him as chief Incumbent—Construction.

Held that: (1) *To interpret a deed, the expressed intention of the parties must be discovered.*

(2) *The words used by the donor in the deed contain a plain intention to appoint the donee as his successor to the incumbency.*

JINARATANA THERO *vs.* SOMARATANA THERO AND ANOTHER ... XXXII. 11

Deed of rectification—Does title vest from the date of rectification or from date of original deed—Can vendee avail himself of vendor's prescriptive possession from date of original deed.

Held: (1) *That where a "deed of rectification" is executed the vendor's title vests in the vendee as from the date of the original deed and not from the date of the rectification.*

(2) *That the vendee could regard himself as successor in title to the vendor as from that date and also avail himself of any prescriptive possession by the vendor.*

COSTA AND ANOTHER *vs.* REITH XXXIII. 17

Deed—Consideration acknowledged to have been received earlier—Finding by Court that consideration not paid—Does this fact justify Court in holding that deed is a donation.

Held: *That the mere fact that the transferor did not receive the consideration mentioned in the deed, does not justify a Court holding that such a deed is a donation.*

NONA KUMARA *vs.* PATHUMA NATCHIA AND ANOTHER ... XXXIII. 30

Deed attested in British India—Declaration of due execution by notary attesting—Is evidence necessary to prove signature of notary or identity of executant—

SREENIVASARAGHAVA IYENGAR *vs.* JAINAM BEEBEE AMMAL AND OTHERS ... ... XXXIV. 1

Deed—of transfer pending a claim for unliquidated damages against transferor—Action to set aside such deed after obtaining decree for damages—Fraud and collusion—Can such action be maintained.

PUNCHI APPUHAMY *vs.* SEDERA AND ANOTHER ... XXXIV. 73

Deed—In favour of bona fide **purchaser of property sold in execution of a decree against a defendant who had been adjudged a lunatic at the time the decree was entered cannot be set aside merely on the ground that such decree and subsequent orders thereon were null and void.**

APPUHAMY AND ANOTHER *vs.* RAMASAMY PILLAI'S DAUGHTER THAILAMMAH XXXIV. 79

Ambiguity in operative part—Accurate description of land followed by erroneous description—How Court should determine true meaning and effect of language used—Plan contradicting clear description in deed—Value of such plan.

Held: (1) *That where there are several descriptions of a land which are not consistent with each other, the Court must in every case do the best it can to arrive at the true meaning of the parties upon a fair consideration of the language used and the facts properly admissible in evidence.*

(2) *That a subsequent erroneous description of a land in a deed will not vitiate an earlier adequate and sufficient definition with certainty of what is intended to pass by such deed.*

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(3) *That a plan will not prevail over a description which does not require a plan to explain it, nor will inaccuracies prevail when a property is indicated with sufficient certainty.*

NOORDEEN LEBBE *vs.* SAHUL HAMEED ... ... XXXVI. 58

Deed—Leading of evidence to contradict statement in attestation clause.

PENDERLAIN *vs.* PENDERLAIN XXXVII. 35

Deed executed through attorney—Power of Attorney not registered—Need to prove due execution for establishing that attorney was lawfully authorised agent for executing valid conveyance — Proving signature by person acquainted with the hand writing of a person.

NADARAJAH *et al vs.* THILLAIRAJESWARI *et al* ... ... XXXVII. 60

Donation of immovable property by deed—Muslim law—Revocability of deed.

SARA UMMA *vs.* MAIMOOR AND OTHERS ... ... XXXIX. 5

Interpretation of—Conveyance of entire land by two deeds—Deeds conveying two portions of one land in specified proportions—Three boundaries clearly defined—Fourth boundary separating one portion from other not sufficiently clear—Remedy—Action for partition or action for definition of boundaries.

R, who was entitled to the entirety of land E conveyed it on two deeds to (*a*) the plaintiff describing a part of it as "all that northern 1/3 part or share in extent 2 pelas paddy sowing"; (*b*) the defendant describing the other part as "all that southern portion being a 2/3 share in extent one amunam paddy sowing." In each of the deeds three boundaries were clearly defined. The fourth demarcating one portion from the other was not clear.

The plaintiff instituted an action to partition the land and the defendant disputed his claim on the ground that the deeds transferred specific parcels of land falling within defined boundaries.

Held: (1) *That as the language used in the deeds is insufficient to demarcate the lands exactly the grants must be interpreted as conveying only undivided shares in the land in the proportions specified in the deeds and a partition action was the proper remedy in such a case.*

(2) *That the action for definition of boundaries* (actio finium regundorum) *only lies for defining and settling boundaries between adjacent owners whenever the boundaries have become uncertain whether accidentally or through the act of owners or through some third party.*

PONNA *vs.* MUTHUWA AND ANOTHER XLI. 62

Rectification—Action for—When relief will be granted—Admissibility of parol evidence—Refusal of party to take oath without sufficient reason when required by opponent—Should it be taken into consideration by Judge—Oaths Ordinance, section 8.

Held: (1) *That a rectification of a deed will not be allowed—*

(*a*) *Where there has been an unreasonable delay in enforcing the right. (The material date for the purpose of deciding whether there has been delay is the date of the notice of the error and not the date when the error was committed).*

(*b*) *Where it would affect prejudicially interests which third parties have acquired for valuable consideration on the assumption that the instrument in the form in which it was originally drawn was good.*

(*c*) *Where the evidence does not clearly and unambiguously establish that there was an actually concluded agreement antecedent to the instrument sought to be rectified and that the term the inclusion of which is sought is a term of the agreement between the parties and continued concurrently in their minds down to the time for execution of the instrument and that by mistake in drafting there has been a failure to make the instrument conformable to the agreement.*

(2) *That parol evidence is admissible to make out a case for rectification and the Court can act even on the evidence of the plaintiff alone where no further evidence can be obtained.*

SINNAPODY AND ANOTHER *vs.* MANNIKAN AND ANOTHER ... XLI. 76

Interpretation—Deed conveying portion of land—Correct description by boundaries—

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Extent inaccurately stated—Does it affect land conveyed—Falsa demonstratio.

Held: *That where in a deed the portion of land conveyed is clearly described and can be precisely ascertained a mere inconsistency as to the extent thereof should be treated as a mere* falsa demonstratio *not affecting that which is already sufficiently conveyed.*

GABRIEL PERERA *vs.* AGNES PERERA AND OTHERS ... ... XLIII. 82

Deed—Interpretation—Amicable partition—Co-owners acquiring prescriptive title to divided portions in lieu of undivided shares in larger land—Notwithstanding amicable partition and exclusive possession transfer of co-owner's interests by referring to fraction in larger land—Failure to refer to fraction in divided land—Action to partition divided corpus by such transferee—Is such transferee entitled only to fractional share out of the divided corpus.

C was entitled to a 1/6 share of land. He sold 1/36 to O and his two daughters S and B became entitled to the balance 5/36 share. Thereafter all the co-owners, by an amicable arrangement, divided it up into separate allotments and in lieu of C's 1/6 share a definite block, approximately 1/6 of its total acreage, was allotted to C's successors in title. All the divided allotments were separately and exclusively possessed for over ten years by the respective co-owners or groups of co-owners.

O's interests ultimately devolved on the plaintiff under a series of deeds which referred to the undivided 1/36 share of the larger land and not to the 1/36 share of the divided block.

The plaintiff instituted an action to partition the divided *corpus* possessed by him and the defendant, on whom the interests of S and B had devolved.

It was contended on behalf of the defendant that out of the divided *corpus* to be partitioned the plaintiff was not entitled to anything more than the 1/36 share referred to in his deeds.

Held: *That the plaintiff was entitled to* 1/6 *share of the divided* corpus.

JAYARATNE *vs.* RANAPURA ... XLIV. 97

Deed of gift—Action to set aside—Deed obtained under duress and undue influence—Presumption of undue influence.

ABDUL CADER *vs.* SITTINISA *et al* XLV. 107

Conditional gift by one Muslim to another—Validity—Applicability of Roman-Dutch Law.

MOHAMED CASSIM *vs.* ABDUL JABBAR AND ANOTHER ... ... XLVI. 3

Deed—Construction of—Sale of land "with appurtenances" belonging thereto—Omission to refer to servitude in schedule to deed—Effect of—Does the word "appurtenances" include servitudes.

The owner of lots 1 and 2 of a certain land sold lot 1 to the 1st plaintiff's mother, together with a share of the well in lot 2, and the right of way and water-course over it. The 1st plaintiff, on whom devolved his mother's rights to this lot, transferred the same to his mother-in-law by a deed which purported to sell the land "with the appurtenances" thereto, but the schedule did not expressly refer to the share of the well or other rights in lot 2. It was contended that the share to the well, or other rights, did not pass on this deed.

Held: (1) *That as the word "appurtenances" included servitudes, and servitudes followed the dominant tenement, the right to the share of the well, together with the other rights, passed on this deed.*

(2) *That the omission of the express reference in the schedule, did not detract from the effect of the grant as expressed in the body of the deed.*

SELLATHURAI AND ANOTHER *vs.* CHELLIAH AND ANOTHER ... XLVI. 12

Deed—Rectification of—Transfer of undivided shares of whole land—Parties intention to deal with divided interests of specific portion of whole land—Mistake—Courts power to give relief—Equitable principles—Evidence Ordinance, section 92, proviso (1).

Held: (1) *By* GUNASEKARA, J. *and* CHOKSY, A.J. (NAGALINGAM, A. C. J. *dissenting*). *Where deeds conveyed undivided shares of the whole land, when in fact the parties to the deed intended to deal with shares of a divided portion of that land, resulting in a misdescription of the property that was dealt with, the Court guided by principles of justice, equity, and good conscience, has the power to rectify the mutual mistake of the parties and give effect to their real intention.*

(2) *That the Court has power to grant this relief even though the plea of*

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mistake and a claim for rectification had not been set up in the suit.

(3) *That the case of* Jayaratne *vs.* Ranapura (1951) 52 N. L. R. 499 *was correctly decided.*

GIRIGORIS PERERA *vs.* ROSALINE PERERA ... ... XLVII. 65

Deed—in favour of minor—Acceptance by maternal uncle—Validity of acceptance.

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM ... XLVIII. 1

Deed of gift—Action to set aside on grounds of fraud and undue influence—English Law —Applicability of, in Ceylon.

The plaintiff instituted an action in the District Court of Colombo to set aside a deed of gift made by the plaintiff in favour of the first defendant on the ground that it had been obtained by the second defendant "by pressure and surprise, and without making plaintiff aware of the contents and through the exercise of undue influence and by fraudulent representations."

The District Judge dismissed the action, and on appeal the Supreme Court affirmed the judgment.

Evidence in the case established that the second defendant had not at any time gained ascendancy over the mind of the plaintiff and that the reason for the execution of the deed of gift was the idea entertained by the plaintiff that she had gifted away properties to her son and that immediate provision should be made for the first defendant, her grand-daughter.

Held: (1) *That the English Law relating to undue influence applied, as it is part of the law of Ceylon.*

(2) *That their Lordships agree with the findings of the District Court and concurred by the Supreme Court that on the evidence led in the case there was no undue influence, pressure, surprise or fraudulent misrepresentation of any kind which would justify the setting aside of the deed of gift.*

The principles upon which a deed of gift will be set aside on the ground of undue influence discussed.

BRIDGET ANTHONY *vs.* WEERESEKERA AND ANOTHER ... ... XLIX. 44

Deed—Interpretation of—Recital "House and outhouse excluding any portion of the soil on which they stood"—Conveyance to grantess, their heirs, executors, administrators and assigns—Servitude of habitatio**—Nature of—Limitation of grant—Municipal Councils Ordinance (Chapter 193) section 145.**

The predecessors in title of the plaintiff had been co-owners of a property in certain specified shares, whereas Mr. and Mrs. S. were only entitled to the house and out-house exclusive of any portion of the land on which they stood. In 1920 the property was vested free of all encumbrances in the Municipal Council on a sale for non-payment of rates, but in 1929 the Council by P6 reconveyed the said premises to all the co-owners their heirs, executors, administrators and assigns so that each co-owner was restored to the same title or interest which he or she claimed to have enjoyed in the property before it became vested in the Council. Mr. and Mrs. S. died before the action commenced leaving the defendants as their children. The plaintiff to whom the title of all the other co-owners passed sued the defendants, who were in possession of the house and out-house for a declaration of title to the entire property including the buildings and for ejectment. The plaintiff however offered to pay the defendants compensation for the house, as in his view the defendants enjoyed nothing more than a right to be compensated.

Held: (1) *That when the property became vested in the Municipal Council absolutely and free of all encumbrances the absolute* dominium *over it passed to the Council extinguishing all prior rights which the plaintiffs predecessors-in-title and Mr. and Mrs. S. enjoyed.*

(2) *That the instrument* P6 *granted the ownership of the land and the buildings to the plaintiffs' predecessors in title, subject only to a personal servitude of* habitatio *in favour of Mr. and Mrs. S. their heirs, executors, administrators and assigns.*

(3) *The word "heirs" in this case should be limited to the grantee and the first generation.*

(4) *That the action for ejectment was premature as the defendants were the children of Mr. and Mrs. S. in whose favour the servitude of* habitatio *was created.*

SUWARIS AND OTHERS *vs.* SAMARAJEEVA ... ... L. 89

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DEFAMATION

Reading of defamatory letter before an extra judicial tribunal—Privilege.

The defendant, a bhikku, was the member of a chapter of bhikkus appointed to inquire into an allegation against a certain bhikku that he misconducted himself with an unmarried woman. At the meeting a letter written by the woman was handed by the Chairman to the defendant to be read. The Chairman was the defendant's superior. The letter while exculpating the bhikku inculpated the plaintiff and contained a good deal of matter defamatory of the latter. The defendant read the whole letter although the portion defamatory of the plaintiff had nothing to do with the subject of the inquiry. The plaintiff took no part in the meeting nor was he present. In answer to the action the defendant pleaded inter alia that.

(i) The occasion was privileged.

(ii) That he read the letter on the orders of his superior.

(iii) That the reading of the letter was necessary to the investigation.

Held: (1) *That the defendant was not entitled to plead privilege as against the plaintiff.*

(2) *That it is no defence to an action for defamation to say that the act of publication was done on the orders of a superior.*

WICKRAMATUNGA *vs.* PANNAWASA THERO ... ... IV. 121

Written communication regarding the conduct of a neighbour to the Superintendent of Police—No legal duty to communicate the information in question—Pleas of privilege, absence of malice, and truth.

Held: (1) *That under the Roman-Dutch Law it is not sufficient in answer to an action for defamation to prove that the defamatory words are true. It must also be proved that the publication was made for the public good.*

(2) *That the true criterion as to whether an occasion is privileged both in English and the Roman-Dutch Law is to be found in the following dictum of Baron Parke in Toogood vs. Sprying* (1 C. M. and R. 181 at p. 193).

"In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander) and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned.....If fairly warranted by any reasonable occasion or exigency, honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

(3) *That where it is found that the defendant has transgressed far beyond the proper limits of a privileged occasion it is not incumbent on the plaintiff to establish express malice. The necessary element of* animus injuriandi *can be inferred.*

M. CHELLIAH *vs.* C. FERNANDO ... VII. 65

Petition to Government Agent regarding rival candidate for Chairmanship of Village Committee—Privileged communication—Privileged occasion—Matters requiring proof in an action for defamation.

Held: (1) *That under the Roman-Dutch Law.*

(*a*) *The truth of a defamatory statement is no defence.*

(*b*) *A defamatory statement made on a privileged occasion is not actionable unless it is made with express malice.*

(*c*) *The fact that a defamatory statement is made raises a presumption that it was made maliciously.*

(*d*) *The presumption of malice can be rebutted by proof that the allegation was made on a privileged occasion.*

(*e*) *The defence of privilege cannot prevail if there is proof of express malice.*

(*f*) *A privileged occasion means an occasion when a right exists or a duty is imposed to give* bona fide *utterance or publication to what one believes to be the truth.*

(*g*) *A privileged communication means a communication made* bona fide *upon any subject matter in which the party making it has an interest or in reference to which he has a duty to a person having a corresponding interest or duty.*

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(*h*) *Duty means not only duties legally enforceable but even moral and social duties of imperfect obligation.*

(2) *It is not necessary in the first instance to prove special damage. If the words uttered or published are clearly defamatory on the face of them, it will be presumed that damage has resulted from them as a natural consequence, and the Courts will give judgment for general damages, not only as compensation for the damage which the law presumes to have resulted therefrom, but also for the insult (contumelia) suffered by the person defamed.*

(3) *That the defendant's petition to the Government Agent cannot in law be regarded as a privileged communication.*

(4) *That in the circumstances of this case there was proof of express malice on the part of the defendant.*

S. KANAPATHIPILLAI *vs.* K. SUBRAMANIUM ... ... VII. 84

Publication of defamatory report in a newspaper—Publication of apology by newspaper—Damages for pain of mind and injury to reputation—Principles of Roman-Dutch Law applicable to a case of defamation—Extent to which an apology may be regarded as minimising damages.

Held: *That where words are defamatory they are* prima facie *actionable and it is unnecessary to give proof of special damage. The plaintiff may recover a verdict for damages without giving any evidence of actual pecuniary loss.*

WICKRAMANAYEKE *vs.* THE TIMES OF CEYLON LTD. ... ... IX. 157

Defamation of medical practitioner—Privileged occasion—Malice—Circumstances in which findings of fact by the trial judge will not be reviewed by the appellate tribunal.

Held: (1) *That the respondent's plea of justification was not entitled to succeed.*

(2) *That the occasion, on which the respondent wrote his letter to the Chairman of the Planters' Association, was not privileged.*

(3) *That the defendant was actuated by malice when he wrote the letter in question.*

(4) *That the statements made at the interview of April 7th,* 1933, *to the Director of Medical and Sanitary Services, were made on a privileged occasion but that, as they were maliciously made, they are unprotected.*

SABAPATHY *vs.* HUNTLEY ... X. 87

Defamation—Master and Servant—Dismissal of servant—Intercession by President of Trade Union on behalf of dismissed servant—Reply of employers addressed to the Secretary of the Trade Union—Is the communication privileged.

VAITILINGAM *vs.* VOLKART BROTHERS ... ... XIV. 73

Defamation—Roman-Dutch Law and English Law—Publication of an extract from the report of the Bribery Commissioner concerning plaintiff—Pleas of justification, fair comment, privileged occasion—Burden of proof—Is the Bribery Commission a Judicial Tribunal—Is his report a matter in which the public is interested, and is its publication for the public benefit—Right of Appeal Court to decide whether what was published was a matter of public interest—Commissions of Inquiry Ordinance (Chap. 276)—Special Commission (Auxiliary Provisions) Ordinance, No. 25 of 1942—Sections 5, 6 and 9.

The plaintiff sued the defendants—the publisher and the owner of the "Ceylon Daily News"—for the recovery of Rs. 50,000, being alleged damages sustained in consequence of the publication in the issue of the "Ceylon Daily News" of 25-5-43 of the following words which are an extract from Appendix C. attached to the report of the Commissioner appointed by the Governor to inquire into charges of bribery and corruption made against the members of the State Council:—

> Appendix C.—"Dr. M. G. Perera (the plaintiff) who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The plaintiff alleged that these words imputed dishonesty to him and implied that he gave false evidence before the Bribery Commission, which evidence was taken in *camera* and that they are defamatory of him.

The defendants answered that they published the statement complained of concerning the plaintiff, but denied that

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the words were defamatory or that the plaintiff suffered any damages. Further answering they stated *inter alia:*

(*a*) That they published an accurate report of Appendix C. which is a part of the finding of the Commissioner which was a Judicial Tribunal and, therefore, the publication was privileged;

(*b*) That the said report was issued by the Government of Ceylon as a Sessional Paper and was available for purchase at the Government Record Office, and, therefore, privileged;

(*c*) That the said extract consists of comment on a matter of public interest and that the words complained of were true in substance and in fact;

(*d*) That they are *bona fide* comments on matters of public interest and were published *bona fide* for the benefit of the public without malice;

To supplement the provisions of the Commissions of Inquiry Ordinance a special Ordinance, No. 25 of 1942 was enacted.

The material provisions of which are as follows:—

Section 5: "The Commissioner may, in his discretion, hear the evidence or any part of the evidence of any witness in *camera* and may for that purpose exclude the public and the press from the inquiry or any part thereof.

Section 6 (1): "Where the evidence of any witness is heard in *camera* the name and the evidence or any part of the evidence of that witness shall not be published by any person save with the authority of the Commissioner.

(2): "A disclosure, made *bona fide* for the purposes of the inquiry, of the name or of the evidence or part of the evidence of any witness who gives evidence in *camera* shall not be deemed to constitute publication of such name or evidence within the meaning of sub-section (1)."

Evidence was led to show (*a*) that the Commissioner in his report to the Governor requested that certain Appendices (among which Appendix C. was not included) be not published.

(*b*) That the Government Printer was requested by the Acting Secretary to the Governor to print the report as a Sessional Paper.

(*c*) That 472 copies of the report were printed of which some were circulated and others were sold.

(*d*) That of the circulated copies one was sent to the defendants by the Government Printer free of charge.

(*e*) That the events leading up to the appointment of the Commission was a matter of considerable public interest and the report was eagerly awaited by the public.

(*f*) That the extracts selected for publication quoted the Commissioner *verbatim.*

(*g*) That the plaintiff was a stranger to the 1st defendant who authorised the publication.

There was no evidence that the defendants in publishing the report were actuated by express malice.

Held: (1) *That the words complained of are defamatory of plaintiff.*

(2) *That since the words are defamatory, whether they are true or not, the law presumes that they were used with an* animus injuriandi *or with malice.*

(3) *That the presumption of malice is rebutted by proof that the words used were in substance and in fact true and that the publication was for the public benefit.*

(4) *That the defendants had led sufficient evidence to negative the* animus injuriandi.

(5) *That the evidence on which the Commissioner has founded his report is a matter in which the public is interested and that its publication was for the public benefit.*

(6) *That the Appellate Court was in as good a position as the original Court to decide the question whether what was published was a matter of public interest.*

(7) *That the publication of the report of the Bribery Commissioner is a matter of considerable public interest on which the newspapers could fairly be expected to report in due course and as express malice had been negatived, the publication was privileged.*

(8) *That the proceedings before the Bribery Commissioner could not be regarded as those before a Judicial Tribunal.*

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(9) *That the Commissioner must be taken to have authorised the publication of Appendix C. inasmuch as it was not included in the Appendices that were not to be published.*

(10) *That sub-section* (1) *of section* 6 *of Ordinance No.* 25 *of* 1942 *does not prohibit the publication of the name, but "the name and the evidence or any part of the evidence."*

PERERA *vs.* PEIRIS AND ANOTHER XXXI. 97

Publication in newspaper of Report of Commissioner appointed under statutory powers to inquire into allegations of bribery against members of the State Council—Observations in Report of Commissioner regarding manner in which plaintiff testified before him—Publication of full Report without comment—Lack of express malice—Justification—Public interest—Privilege—Basis of Privilege in Publication of reports of judicial and parliamentary proceedings—Divisibility of publication—Ordinance No. 25 of 1942, section 6 (1).

The report of the Commissioner appointed under statutory powers to inquire into allegations of the bribery of members of the State Council, contained the following passage:—

"Dr. M. G. Perera who gave evidence was completely lacking in frankness and pretended that he knew very much less about the transaction than he actually did."

The Ceylon Daily News published a full report of the Commissioner without comment. The plaintiff brought an action for defamatory libel against the printer and owners of the 'Daily News.' No issue as to express malice was set up. The respondents raised all defences open to them.

The District Judge decided that, in the absence of evidence to the contrary, there was a presumption that the findings of the Commissioner were true and correct. Accordingly he held that the publication was true in substance and in fact, but was not for the public benefit.

On appeal, the Supreme Court affirmed the decision, but held that the publication was privileged. On appeal to the Privy Council—

Held: (1) *That the publication of the Report was in the interests of the public of Ceylon and, therefore, its publication negatived* animus injuriandi, *which is an essential element of the Roman Dutch Law relating to defamation.*

(2) *That, therefore, the publication as a whole was privileged.*

(3) *That the reference to the appellant's conduct as a witness is not divisible from the rest of the Report, because his conduct was a factor on which the Commissioner based his conclusions.*

(4) *That section* 6 (1) *of Ordinance No.* 25 *of* 1942 *prohibits the publication of both the name and evidence of any witness, and not of the name only.*

M. G. PERERA *vs.* ANDREW VINCENT PEIRIS AND ANOTHER ... XXXIX. 42

Money borrowed on promissory note by public servant—Creditor's complaint to Head of Department that debtor defaulted in repaying loan—Is it defamatory—Privileged occasion—Malice.

Plaintiff and his brother were the makers of a promissory note dated 11-6-1938 for Rs. 300 in favour of the defendant. By letter dated 18-11-43 the defendant wrote to the Principal Collector of Customs in whose department the plaintiff was employed, complaining of plaintiff's failure to repay the loan. The letter contained the following paragraph:—

"Mr. Ondatjee employed under you along with his brother employed.....borrowed from me a sum of Rs. 300. Although I have repeatedly asked for my money neither of the brothers would pay me a cent."

Plaintiff alleged that the statements in the paragraph were capable of the following meanings:—

(*a*) That plaintiff was in pecuniary difficulties;

(*b*) That there had been prior demands but long delay on plaintiff's part;

(*c*) That the plaintiff was slow in paying his debt that it was necessary to get someone to urge him to do so;

(*d*) That there was a culpable refusal to pay money borrowed.

Held: (1) *That the words complained of are defamatory of the plaintiff.*

(2) *That they were written on a privileged occasion as the head of the department had an interest in the Government*

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servants employed in his department fulfiling their obligations to their creditors and in upholding the respectability of the Public Service.

(3) *That, as the evidence established that the defendant was actuated by malice in writing the letter complained of, plaintiff, was entitled to damages.*

YAR *vs.* ONDATJEE ... XXXIX. 81

DEFENCE (COIN AND CURRENCY NOTES) REGULATIONS

Regulations 3 (c) and 6—Penal Code section 72.

Held: *That where a trader acts honestly in refusing to accept currency notes because he considers them not good money, section 72 of the Penal Code applies and he commits no offence.*

MIRIHANA POLICE *vs.* MARIKAR XXIV. 59

DEFENCE (COMPENSATION) REGULATIONS

Requisitioning of land—Claim for compensation—Claim referred to Tribunal under the Defence (Compensation) Regulations—Jurisdiction of Tribunal to determine compensation—Validity of Defence (Compensation) Regulations—Defence (Miscellaneous) Regulation 34.

The Defence (Compensation) Regulations, 1941, and Defence (Miscellaneous,) Regulation 34 were, on the expiry on February 24, 1946, of the Emergency Powers (Defence) Acts, 1939 and 1940, continued in force by a Governor's Order under the Emergency Laws (Transitional Powers) (Colonies, etc.) Order in Council, 1946, subject, in the case of Defence (Miscellaneous) Regulation 34, to certain modifications. This regulation as modified discontinued the right to take possession of lands after February 24, 1946, but provided for the continuance of the retention of the possession of lands possession of which had already been taken and enabled the competent authority to use for certain specified purposes the lands, possession of which had been retained.

The petitioner's land was requisitioned on January 15, 1944, and a dispute as regards compensation was referred to a Tribunal under the Defence (Compensation) Regulations. The petitioner moved for a Writ of Prohibition on the Tribunal and urged—

(i) That the Tribunal had no jurisdiction to act as the Defence (Compensation) Regulations were *ultra vires* of the powers conferred on the Governor by section 1 of the Emergency Powers (Defence) Acts, 1939 and 1940 as adapted, modified and extended to Ceylon; and

(ii) That even if the Regulations were *intra vires*, the Tribunal had no jurisdiction to determine the compensation in respect of the possession of the land from February 24, 1946, as those Regulations governed the compensation payable in respect of the taking possession and retention of any land in the exercise of "emergency powers" as defined in Regulation 17, and that possession of the land in question was retained from February 24, 1946, not under the Regulations made under the Defence Acts but under a regulation brought into operation by a Governor's Order.

Held: (1) *That the Defence (Compensation) Regulations were* intra vires *of the powers conferred on the Governor.*

(2) *That the Tribunal had jurisdiction to award compensation in respect of the possession of the land from February* 24, 1946.

VERNON RAJAPAKSA *vs.* THE TRIBUNAL OF APPEAL *et al* ... XXXIV. 52

DEFENCE (CONTROL OF IMPORTS) REGULATIONS

Effect of—On contract for importation of textiles of Japanese origin.

ISMAIL *vs.* LYE ... ... XXIX. 66

DEFENCE (CONTROL OF PRICES) REGULATIONS

See under CONTROL OF PRICES

DEFENCE (CONTROL OF TEXTILES) REGULATIONS

The Defence (Control of Textiles) (No. 1) Regulations 1943—Judicial notice of date on which regulation 25 came into force.

Where a charge was laid under regulation 25 of the Defence (Control of Textiles) (No. 1) Regulations which was brought into operation by a notification of the Governor published in the "Gazette," but no reference to this notification was made in the charge.

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Held: *That the Court will take judicial notice of this date on which the regulation was brought into operation.*

CASSIERE *vs.* EDIRISINGHE ... XXX. 94

Possession of sarongs 50 inches wide without a permit—No ration points allocated to such sarongs—Legality of possession.

The accused was convicted of having had in his possession, without a permit from the Controller of Textiles, a quantity of sarongs, 50 inches in width, in excess of that which he as a consumer could purchase from a dealer surrendering all coupons issued to him. Sarongs were "regulated textiles" within the meaning of the Defence (Control of Textiles) Regulations, 1942, but no ration points had been allocated for sarongs 50 inches in width.

Held: *That the conviction was bad.*

VANNIASINGHAM *vs.* JAYASUNDERA XXXI. 15

Prosecutions to be instituted only with the sanction of the Controller of Textiles—Powers of Controller exercisable by Deputy Controller—Validity of prosecution sanctioned by Deputy Controller.

Prosecutions under the Defence (Control of Textiles) Regulations, 1945, have, under regulation 57, to be sanctioned by the Controller of Textiles. By regulation 53 any Deputy Controller of Textiles was empowered to exercise, subject to the general direction of the Controller, any power or function conferred upon or assigned to the Controller by the regulations. A Deputy Controller sanctioned a prosecution under the regulations.

Held: *That the Deputy's sanction was valid.*

BUYZER (SUB-INSPECTOR OF POLICE) *vs.* SUMANAPALA ... XXXI. 31

Regulation 14 (1)—Meaning of the word "dealer"—Does it include an unlicensed dealer—Applicability of section 67 of the Ceylon Penal Code to Defence Regulations.

Held: (1) *That the word "dealer" in "no other person than a dealer" in Regulation* 14 (1) *of the Defence (Control of Textiles) Regulations means a dealer holding a textile license.*

(2) *That section* 67 *of the Ceylon Penal Code applies to breaches of the Defence Regulations.*

PERERA *vs.* INSPECTOR GORDON XXXIII. 73

Cancellation of textile licence under regulation 62—Application for writ of certiorari—**Jurisdiction of Supreme Court to issue such writ.**

MOHAMED THASSIM *vs.* CONTROLLER OF TEXTILES ... ... XXXIV. 42

Order by Textile Controller under Reg. 62—Bias on the part of Controller—Is it a ground for quashing such order.

THASSIM *vs.* EDMUND RODRIGO CONTROLLER OF TEXTILES ... XXXIV. 82

Regulation 61 (2)—Court has no power, after conviction of accused, to order forfeiture of the productions in the case.

FERNANDO *vs.* SENARATNE XXXV. 61

Certiorari, **writ of—Order under rule 62 of Defence (Control of Textiles) Regulations cancelling licence of textile dealer—Notice of accusation and opportunity for explanation granted to dealer—When should Court review such order.**

Acting under rule 62 of the Defence (Control of Textiles) Regulations, the Textile Controller cancelled the licence granted to the petitioner to deal in textiles, on the ground that he was unfit to be allowed to continue as a dealer. Before this order was made, the Controller gave (*a*) notice to the petitioner of what he was accused of, and of the evidence on which the accusation was based (*b*) an opportunity to send his explanation.

An application for a Writ of *Certiorari* was made to quash the order cancelling the licence.

Held: (1) *That inasmuch as the Controller gave notice of the allegations against the petitioner and an opportunity to tender his explanation thereon before making the order, mere insufficiency of evidence placed before the Controller is not a ground for setting aside the order.*

(2) *That the order cannot be challenged except on the ground that the Controller has acted in a way in which no person preforming such functions, in the opinion of the Court, ought to act, or unless a rule laid down by the regulations under which he acts is violated, or failed to pay due regard to the dictates of natural justice.*

MOHAMED HUSSAIN AND CO. *vs.* JAYARATNE, CONTROLLER OF TEXTILES ... ... XXXV. 94

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Controller's order cancelling dealer's licence—Writ of Certiorari **quashing Controller's order—Appael lies to Privy Council.**

THE CONTROLLER OF TEXTILES *vs.* MOHAMED AND CO. ... XXXVI. 40

Charge of possessing excess quantity of textiles—What must prosecution prove.

SCHARENGUIVEL *vs.* DE ALWIS XXXIX. 16

Privy Council—Certiorari—**Jurisdiction of Supreme Court to issue—Court Ordinance, section 42—Interpretation of words "or other person or tribunal."**

Textile Controller—Defence (Control of Textiles) Regulations, Regulations 62—Revocation of licence granted to dealer in Textiles — Does certiorari lie against Controller.

Rule 62 of the Defence (Control of Textiles) Regulations, 1945, reads as follows:—

"Where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer, the Controller may cancel the textile licence issued to that dealer."

Acting under this regulation, the respondent as the Controller of Textiles revoked the licence granted to the appellant to deal in textiles on the ground that he was a person unfit to hold a textile licence.

This decision to cancel the licence was preceded by certain exchanges between the parties, which arose out of the discovery of what appeared to be grave falsifications in the books of that branch of the respondent's office known as the Textile Coupon Bank. The final result of the falsifications was to credit the appellant with a much larger number of surrendered coupons than the records of the receiving clerks and their checkers appeared to justify.

The appellant obtained from the Supreme Court a rule *nisi* directed on the respondent to show cause why a writ of *certiorari* should not be issued to him for the purpose of quashing the order cancelling the licence.

The Supreme Court after hearing the parties held that the rule *nisi* must be discharged with costs on the ground that the respondent, though exercising a quasi-judicial function, had not departed from the rules of natural justice in arriving at his decision.

The question whether section 42 of the Courts Ordinance gave the Supreme Court power to direct the prerogative writs to a person such as the respondent or the question, whether the respondent, in acting under the powers of Regulation 62, is acting in a capacity that would make him amenable to *certiorari* even assuming that he is a person or tribunal within the meaning of section 42 of the Courts Ordinance, was not dealt with in these proceedings in view of a decision of a Bench of Five Judges in *Abdul Thassim vs. Edmund Rodrigo* (*Controller of Textiles,* 48 N. L. R. 121.

Held: (1) *That the words "other person or tribunal" in section* 42 *of the Courts Ordinance are not to be interpreted as meaning persons who are* ejusdum generis *with District Judges, Magistrates or Commissioners. They include bodies or tribunals which while not existing primarily for the discharge of judicial functions, yet have to act analogously to a Judge in respect of certain of their duties.*

(2) *That the words "according to law" in section* 42 *means according to the relevant rules of English Common Law.*

(3) *That the respondent is not amenable to a mandate in the nature of a* certiorari *in respect of action under Regulation* 62, *as the requirement that the Controller must have reasonable grounds of belief is insufficient to oblige him to act judicially and as there is nothing else in the context or conditions of his jurisdiction that suggests that he must regulate his action by analogy to judicial rules.*

(4) *That the words "where the Controller has reasonable grounds to believe that any dealer is unfit to be allowed to continue as a dealer" should be treated as imposing a condition that there must in fact, exist such reasonable grounds known to the Controller before he can validly exercise his power of cancellation.*

NAKKUDA ALI *vs.* M. F. DE S. JAYARATNE ... ... XLIII. 33

DEFENCE (ENEMY PROPERTY) REGULATIONS

Regulations 7 (1) and 49 (1) (c)—Meaning of "enemy" and "property".

BOGSTRA AND ANOTHER *vs.* THE CUSTODIAN OF ENEMY PROPERTY. ... XXVI. 5

DEFENCE (FOOD CONTROL) REGULATIONS

Part III. Regulation 11 (6)—Meaning of "forthwith."

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Held: *That the word "forthwith" in Regulation* 11 (6) *in Part III. of the Food Control Regulations is used to mean "in a reasonable time," that is to say, when the act is one which can be done without any delay at all, and there are no special circumstances occasioning delay, documents must be made available for inspection at once.*

WEKUNAGODA *vs.* DE ALWIS XXXIII. 56

DEFENCE (MISCELLANEOUS) REGULATIONS

Regulations 19 (1) (a) and 20 (1) (a)—Proof of circumstances sufficient to make it necessary for the accused to explain them and show that they are consistent with his innocence—Effect of failure to offer such explanation—Meaning of "disaffection" in the regulations.

Held: (1) *That where the facts proved invest the accused with such a degree of suspicion as to demand from him an explanation of the suspicious circumstances, and no such explanation is tendered, it is reasonable and justifiable to conclude, that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest.*

(2) *That a statement that "the Government in Ceylon does not hesitate to do any wrong, whether it is to kill the people in cold blood or to disseminate falsehood in order to bring about race-hatreds," is the expression of an endeavour to cause disaffection among His Majesty's subjects.*

REX *vs.* WICKREMESINGHE ... XX. 111

Lighting Restriction Order made under Regulation 43—Judicial notice—Can Court take judicial notice of the fact that a blackout had been ordered by the Minister and notified to the public as provided by law.

Held: *That judicial notice cannot be taken of the fact that a blackout had been ordered by the Minister and notified to the public as provided by law. It must be proved by evidence.*

S. G. DE ZOYSA (A. S. P. JAFFNA) *vs.* CUMARASURIER ... XXIII. 114

Request made under regulation 50—Failure of person requested to comply with request.

Held: *That a person requested to furnish or produce information under regulation* 50 *commits an offence upon failure to furnish or produce the information asked for.*

C. V. GOONERATNE (SUPDT. OF POLICE) *vs.* DE ALWIS ... XXIII. 118

Defence (Miscellaneous) Regulations—Criminal Procedure Code sections 59 and 60—Order by Governor for arrest of person—Inability to execute warrant as person wanted is absconding or concealing—Application to magistrate for proclamation and attachment of property—Can Attorney of proclaimed person move to rescind magistrate's order.

Held: *That the attorney of a person proclaimed under section* 59 *of the Criminal Procedure Code is not competent to move to set aside the order of attachment made under section* 60 *of that Code.*

IN *Re* MRS. VIVIENNE GOONEWARDENE ... ... XXIV. 3

Regulation 20A—Publication in a newspaper of an article likely to cause alarm and despondency.

Held: (1) *That the Regulation penalizes the publication of a rumour even though it is expressly stated to be a rumour.*

(2) *That the article in question was likely to cause alarm or despondency.*

(3) Mens rea *is not an ingredient of the offence created by Regulation* 20*A*.

(4) *In a charge under Regulation* 20*A once the Crown proves—*

(*a*) *The publishing by the accused of the report or statement;*

(*b*) *That the report or statement related to matters connected with the war; and*

(*c*) *That the report or statement was likely to cause alarm or despondency, the accused must prove the matters mentioned in the proviso in order to escape conviction.*

THE ATTORNEY-GENERAL *vs.* GUNARATNE AND ANOTHER ... XXIV. 89

Order under regulation 43 (D)—Sale of sugar wholesale to a person other than a retail trader—Meaning of "wholesale" and "retail."

The accused who was both a wholesale and a retail trader in sugar sold 3 bags of sugar to B who was not a retail trader in sugar. He contended that the sale was a

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retail sale and did not constitute a breach of paragraph 9 of the Controlled Articles (Sugar) No. 2 Order 1942.

Held: *That the sale of 3 bags of sugar was not a retail sale and that the sale constituted a breach of paragraph 9 of the Controlled Articles (Sugar) No. 2 Order 1942.*

DISSANAYAKA (SUB-INSPECTOR OF POLICE *vs.* JOTIDASA ... ... XXVI. 9

Defence (Miscellaneous No. 3) Regulations —Detention Order under Regulation 1 (1)— Does the non-recital of the grounds on which the Governor has reasonable cause to believe that the detainee is a person of hostile origin etc. invalidate the order.

Held: *That the non-recital in the Detention Order of the fact that the Governor has reasonable cause to believe that the detainee is a person of hostile origin etc. or the grounds for such belief does not invalidate the order.*

PERERA (A. S. P.) *vs.* GUNEWARDENE ... ... XXVIII. 8

Regulation 52—No express power of forfeiture—Such power cannot be implied

VAN SANDEN *vs.* PERERA ... XXX. 70

Regulation 17 B—Possession of service petroleum—Certificate of Government Analyst—Burden of proof as to service, on accused, of the certificate—Evidence Ordinance, section 114.

The accused was charged under Defence Miscellaneous Regulation 17B with having been in possession of service petroleum, which was defined to be petroleum containing certain specified compounds. The regulation enacted that a certificate by the Government Analyst to the effect that any petroleum contained the specific compounds shall be sufficient evidence of the facts stated therein and that before such a certificate is tendered an evidence, a copy thereof shall be served on the accused. At the trial the accused did not object to the reading of the certificate. The Magistrate acquitted the accused on the ground that there was no evidence to show that a copy of the certificate had been served on the accused.

Held: (1) *That as the regulation enacted that a copy of the certificate "shall be served" on the accused—and not "shall be shewn to have been served"—the presumption of regularity arises in the absence of any objection by the accused;*

(2) *That it is not incumbent on the prosecution, as a condition precedent to the production of the certificate, to prove that a copy thereof has been served on the accused.*

UDALAGAMA *vs.* GIRIGORIS APPUHAMY ... ... XXX. 77

Order requisitioning paddy—Failure to deliver quantity requisitioned—Conviction— Validity of—Regulation 37.

By an order made by the Governor on 15th September, 1942, under Defence (Miscellaneous) Regulation 3, all Government Agents, Assistant Government Agents and Assistant Government Agents (Emergency), were appointed to be competent authorities for the purpose of requisitioning under D. R. 37 any article of food or drink. The accused was required by order of one of the competent authorities to deliver a certain quantity of paddy which had been requisitioned. He was charged and convicted with having failed to deliver this quantity. The evidence disclosed that, on a certain calculation, the accused ought to have had the quantity of paddy requisitioned. There was also no satisfactory evidence to show that a requisition order had been seved on the accused.

Held: *That in these circumstances the conviction cannot stand.*

BANDARANAYAKE *vs.* SILVA ... XXX. 89

Charge under Regulation 17 (1) for having addressed persons engaged in the performance of essential services—Act likely to prevent or interfere with performance of their duties—Failure to set out in the charge the actual words used in the language spoken— Can conviction be maintained.

Held: *That in a prosecution under Regulation 17 (1) of the Defence Regulations (Miscellaneous) for addressing persons engaged in the performance of essential services, having reasonable cause to believe that such act will be likely to prevent or interfere with the carrying on of their work, the failure to set out the actual words of the speaker in the language in which the speech was made is fatal to a conviction.*

WALDRON (SUPDT. OF POLICE) *vs.* JAMES PERERA ... ... XXXII. 37

Regulation 17 (1)—Charge under, for addressing persons engaged in essential services—Act likely to prevent or interfere

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with performance of duties of such persons—Meaning of the word "act" in Regulation 17 (1).

Held: *That the "act" specified in Regulation* 17 (1) *of the Defence Regulations (Miscellaneous) is some action which by itself would interfere with the work of persons engaged in essential services and not an argument which leaves the option to the person addressed to follow it or ignore it.*

PERERA (ASST. SUPDT. OF POLICE) *vs.* DR. N. M. PERERA ... XXXII. 40

Certiorari—**Defence (Miscellaneous) Regulation 43C—The Essential Services (Avoidance of Strikes and Lock-outs Order, 1942)—Settlement of trade dispute by Tribunal—Jurisdiction of Tribunal to award damages—Meaning of "trade dispute."**

The Controller of Labour, acting under section 6 (2) of the Essential Services (Avoidance of Strikes and Lock-outs Order, 1942), referred a dispute between a workman and an employer engaged in performing essential services to the Tribunal appointment under section 5. The Tribunal was appointed for the *settlement* of trade dispute in essential services. Section 8 of the Order enacted that the award of the Tribunal was to be final and was not to be called in question in any Court. The Tribunal, in settling the dispute, amongst other things, awarded a sum as damages to the workman. The employer moved for a writ of *certiorari* to quash the award on the ground that the Tribunal acted without jurisdiction or in excess of jurisdiction. It was submitted that the dispute, being one between the employer and a single workman, was not a "trade dispute" within the meaning of the Order of 1942, and that the Tribunal had no jurisdiction to award damages.

Held: (1) *That the definition of "trade dispute" in the Order of* 1942 *was wide enough to include a dispute between an employer and a single workman.*

(2) *That the dispute in question was a trade dispute in an essential service.*

(3) *That the duty of the Tribunal was to settle the dispute and that in awarding damages to that end the Tribunal was acting within its jurisdiction.*

BROWN AND CO., LTD. *vs.* ROBERTS ... ... XXXIII. 48

Charge under Regulation 17 (1) —Expiry of the regulation pending trial—Can trial be proceeded with—Interpretation Ordinance section 6 (3).

Held: (1) *That the question, whether proceedings can be taken upon a statute which has expired, is purely one of construction.*

(2) *That, in the absence of a provision that offences committed before the expiry of a regulation can be dealt with as though the expiry had not taken place, no charge based on such regulation pending at the time of such expiry can be proceeded with thereafter.*

(3) *That, section* 6 (3) *of the Interpretation Ordinance does not apply to written laws that have expired.*

ATTORNEY-GENERAL *vs.* FRANCIS XXXIII. 89

Regulation 34—Requisitioning of land—Claim for compensation—Claim referred to Tribunal under the Defence (Compensation) Regulations—Jurisdiction of Tribunal to determine compensation—Validity of Defence (Compensation) Regulations.

VERNON RAJAPAKSE *vs.* THE TRIBUNAL OF APPEAL *et al* ... XXXIV. 52

Order requisitioning paddy—Failure to place paddy at the disposal of the competent authority on demand—What prosecution must prove—Absence of evidence that accused had the quantity requisitioned in his possession or under his control—Conviction—Can conviction stand.

Appellant was convicted under Regulation 52 of the Defence (Miscellaneous) Regulations for failing on demand to place at the disposal of the Village Headman 8 measures of paddy in his possession or under his control after he was served with an order requisitioning the same.

It was in evidence (*a*) that the appellant's paddy had been removed from the threshing floor without a permit in contravention of the Regulations in Gazette No. 9653 of 24-1-47; (*b*) that appellant stated to the Village Headman, when he handed over the requisition order to him, that "he had paddy."

There was no evidence to show that the appellant had eight measures of paddy in his possession or under his control.

Held: *That the conviction could not stand.*

SENANAYAKE *vs.* GUNASEKERE (INSPECTOR OF POLICE) ... XXXVI. 13

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DEFENCE (MOTOR CARS) (SPECIAL PROVISIONS) REGULATIONS

Permit to buy car in favour of 1st defendant—Car bought with money advanced by plaintiff Co. and hired to 1st defendant—Default in paying instalments by 1st defendant—Action against hirer and guarantor—Plea of illegal contract.

WARNAKULASOORIYA *vs.* TRANSPORT AND GENERAL FINANCE CO. LTD. XLIX. 90

DEFENCE (PURCHASE OF FOODSTUFFS) REGULATIONS

Transporting country rice without permit—Regulation 6 (c)—Order of confiscation—Can both cart and bull be confiscated.

Where, the owner of a cart and a bull, which had been used by another preson to transport country rice without a permit failed to show cause to the satisfaction of the Magistrate that they were so used without his knowledge and consent an order was made under regulation 6 (*c*) of the Defence (Purchase of Foodstuffs) Regulations 1942 confiscating both the cart and the bull,

Held: *That that part of the order confiscating the bull cannot be sustained.*

MUTHAI (P. S. 2059) *vs.* SILVA AND OTHERS ... ... XXVI. 111

Accused charged with transporting kurakkan without a permit—Transport of kurakkan not an offence under the principal regulations but made an offence by an amending regulation—No reference made, in the charge, to the Gazette in which the amending regulation was published—Validity of conviction.

Where the transport of kurakkan without a permit was made an offence by an amendment of the Defence (Purchase of Foodstuffs) Regulations, 1942 and no reference was made in the charge to the Gazette in which the amending regulation was published.

Held: *That the failure to refer to such Gazette invalidates the conviction.*

A. G. A., HAPUTALE *vs.* CAROLIS APPU ... ... XXIX. 112

Charge under Regulation 4—Facts to be proved.

Held: *That in a charge made under regulation 4 of the Defence (Purchase of Foodstuffs) Regulations* 1942, *for transporting country paddy without a permit, the prosecution must establish that the paddy transported was country paddy.*

MAHAMOOR *vs.* AUSTIN SINGHO AND ANOTHER ... ... XXX. 24

An unauthorised quantity of rice found in premises belonging to accused—No specific evidence that accused purchased or acquired the rice—Validity of conviction.

A quantity of rice, in excess of the authorised quantity, was found and seized in business premises of which one of the accused was tenant. The other accused was the manager of the business. No specific evidence was given as to the date of purchase or acquisition of the rice by the accused, but evidence given by the prosecution to the effect that the rice had been purchased or acquired on the date of the seizure was not controverted by the defence. Both accused were convicted.

Held: (1) *That the contention that the accused had acquired the rice on the date of seizure was entitled to prevail.*

(2) *That both accused must be held responsible for the acquisition of the rice.*

CHITTAMPALAM *vs.* RAJASOORIYA, I. P. ... ... XXXIII. 79

Offence under Defence (Purchase of Foodstuffs) Regulations—Transporting rice without a permit—Arrest without warrant of persons so transporting—Escape from custody—Can such escape be basis of criminal charge.

JAINUDEEN MOHAMED SHERIFF AND OTHERS *vs.* BONGSO ... XXXIV. 63

DEFENCE (RESTRICTION OF MEALS) (NO. 3) REGULATIONS

Regulation 2 (1)—Serving of chicken and milk at restaurant—Essential question—Was restaurant in existence on September 1st, 1939.

Accused, the proprietors of Shanghai Restaurant, were charged with having on 30th November, 1944, served chicken and milk to a customer in contravention of

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Regulation 2 (1) of the Defence (Restriction of Meals) (No. 3) Regulations, 1944, which prohibited the serving of chicken and milk in any catering establishment, which was not in existence on September 1st, 1939, and were convicted by the Magistrate. The prosecution admitted that on that date there was an eating-house at the said premises which was run by one Iyer. The accused had not purchased that business and could not therefore be said to be their successor. It was contended in behalf of the accused that as meals were sold by Iyer at the said premises on September 1st, 1939, the premises were excluded from the application of Regulation 2(1).

Held: *That "catering establishment" in the Regulation did not mean merely the building in which business was carried on, but meant the business itself and that the accused were rightly convicted.*

Per JAYATILAKE, J.: "The Regulation is in a group of regulations which deal with restrictions of meals, and in my opinion, it shall be so interpreted, if it presents any ambiguity, as to promote the restriction of meals."

CHOW AND TWO OTHERS *vs.* DE ALWIS PRICE CONTROL INSPECTOR XXXI. 84

DEFENCE (SERVICE EMPLOYEES) REGULATIONS

Regulations 2 and 3—Person employed by the Admiralty—Condition of leaving such employment—Agreement to terminate contract of employment by notice—Effect of notice—Meaning of term "employed by the military."

Held: (1) *That the effect of the Defence (Service Employees) Regulations 2 and 3 is to prevent any employee of the Admiralty, irrespective of the terms of his contract, from leaving his employment without prior written consent from the Captain Superintendent, Ceylon, or any other officer acting under his authority.*

(2) *That a person is deemed to be employed by the Admiralty if the name of that person appears in any salary book, pay book or muster book kept for the purposes of any naval establishment in Ceylon.*

LA BROOY (S. I. P.) *vs.* AMARADASA ... ... XXIX. 107

DEFENCE (TRADING WITH THE ENEMY) REGULATIONS

Effect of—On contract for importation of textiles of Japanese origin.

ISMAIL *vs.* LYE ... ... XXIX. 66

DEFENCE (WAR EQUIPMENT) (PURCHASE BY CIVILIANS) REGULATIONS

Held: (1) *That in a charge under Regulation 2 of the Defence (War Equipment) (Purchase by Civilians) Regulations, 1944, the prosecution need not prove that the accused knew the article to be the property of His Majesty.*

(2) *That the onus of proving any fact or circumstance which brings the accused within the defence in regulation 2 (2) is on the accused.*

CALDERA (S. I. P.) *vs.* THAMBY LEBBE ... ... XXIX. 61

Defence (War Equipment) (Purchase by Civilians) Regulations, 1944—Applicability of to property intended for Admirality Civilian Personnel.

Held: *That the Defence (War Equipment) (Purchase by Civilians) Regulations, 1944, do not apply to property intended for the use of Admiralty Civilian Personnel.*

WILLIAM SINGHO *vs.* SELVADURAI (S. I. POLICE) ... ... XXXII. 72

DEFENCE (WHOLESALE DEALERS IN FOOD) REGULATIONS

Regulation 2—Goods usually stored at two places—Removal from one store to another—No offence.

Held: *that, where a trader usually stored his goods both in his boutique and in an annexe of his house, it was not an offence under regulation 2 of the Defence (Wholesale Dealers in Food) Regulations 1942 to remove without a permit any article of food from his boutique to his house.*

SIEBEL (INSPECTOR OF POLICE) *vs.* SILVA ... ... XXIV. 87

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DEFINITION OF BOUNDARIES ORDINANCE

Recovery of costs of Survey by Crown—Section 8 of Ordinance No. 1 of 1844 section 2 of Ordinance No. 28 of 1919.

Held: *That the two procedures provided in section 8 of Ordinance No. 1 of 1844 and section 2 of Ordinance No. 28 of 1919 are alternative, and that if the Crown Officer elects to proceed under section 8 of Ordinance No. 1 of 1844 he cannot afterwards rely on section 2 of Ordinance No. 28 of 1919 to justify his application for a recovery of the actual costs incurred by means of the procedure prescribed for Criminal Courts.*

THE ASSISTANT GOVERNMENT AGENT PUTTALAM *vs.* PEIRIS ... I. 232

Recovery of costs of survey by Crown—Application for—Not a criminal matter—

GOVERNMENT AGENT (ASST.) PUTTALAM *vs.* CHETTY ... ... II. 113

DELEGATED LEGISLATION

Doctrine of Ultra Vires.

GUNASEKERA *vs.* MUNICIPAL REVENUE INSPECTOR ... ... XLVI. 59

DENTIST

See also under **MEDICAL ORDINANCE**

Meaning of "dental operation" and "dental service" for the purposes of the Registration of Dentists Ordinance No. 3 of 1915.

Held: *That the expression "dental operation" does not include an operation done on an incomplete set of teeth; but only covers an operation done upon a living person. That the expression "dental service" would include the making of artificial teeth fit to the person to whom the service is done.*

RUBEN (S. I. POLICE) *vs.* SHEENGHYE II. 354

Medical Ordinance No. 26 of 1927—Ordinance No. 9 of 1933—Dentists not qualified to be registered—Use of title after passing of new Ordinance prohibiting its use.

Held: *That dentists not possessing the qualifications prescribed by Ordinance No. 9 of 1933 are not entitled to use the title of "dental surgeon" after the Ordinance became law even though they were entitled to use the title before the passing of the Ordinance.*

SAIBO (SUB-INSPECTOR OF POLICE) *vs.* WAMBEEK ... ... IV. 16

Practising dentistry for gain without being a registered dentist—Meaning and scope of the expressions "practising dentistry" and "performing dental service."

Held: *That to take an impression of a person's mouth and to make artificial teeth on the strength of that impression, and to fit those teeth into the mouth when completed, amounts to practising dentistry and to performing dental service.*

BORHAM (POLICE SERGEANT 448) *vs.* CHIANG FONG CHING ... ... IX. 121

DEPORTATION

See under **HABEAS CORPUS**

DEWALE

Succession to office of Kapurala—Is it by hereditary right.

Held: *That the right of succession to the office of Kapurala of a dewale is a hereditary right.*

NUGAWELA AND THREE OTHERS *vs.* MOHOTTALA AND OTHERS ... XXXII. 70

DIES NON

Notice of security for costs of appeal served on a public holiday other than a Sunday, Good Friday, or Christmas day is valid.

WANIGASEKERA *et al vs.* LOUISZ *et al* ... ... XXV. 33

DISCRETION

Of Trial Judge to accept explanation of insolvent—Appeal Court should be slow to interfere.

MUTTU MOHAMMADO *vs.* RAMASAMY CHETTY *et al* ... ... II. 317

The appeal Court will not interfere in a case where the judge of original jurisdiction has properly exercised his discretion.

ABRAHAM *vs.* ALWIS ... XXI. 10

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Discretion—Exercise of—By Appeal Court.

DIAS *vs.* INSPECTOR OF POLICE MATALE ... ... XXXI. 63

Discretion—How to be exercised.

SUNDARAM AND ANOTHER *vs.* GONSALVES ... ... XXXVII. 57

Discretion of Court to make order of certiorari **although alternative remedy is available.**

SIRISENA *vs.* REGISTRAR OF CO-OPERATIVE SOCIETY ... ... XLI. 1

Discretion—Plaintiff's application to proceed with action for recovery of penalty under § 14 (2) of Ceylon (Constitution) Order in Council—District Judge's discretion to allow or withhold application—When may Supreme Court interfere with such discretion.

EGRIS *vs.* ISMAIL ... XLVII. 108

Discretion—of appellate court—to interfere with Trial Judge's finding.

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM ... XLVIII. 1

Discretion—Of District Court in application to set aside a sale under a mortgage decree.

BAPTIST *et al vs.* EKANAYAKE XLVIII. 64

Discretion of Judge to whom order of Supreme Court is transmitted.

ATTORNEY-GENERAL *vs.* DISSANAYAKE ... ... XLIX. 87

DISTRICT COURTS

Jurisdiction of—*See under* **JURISDICTION.**

DISTRICT ROAD COMMITTEE

Power of D. R. C. to enter prosecution under Road Ordinance No. 10 of 1861 in respect of a road under control of Village Committee.

CHAIRMAN D. R. C. *vs.* DE SILVA I. 346

DIVORCE

See also under **"CIVIL PROCEDURE" CODE AND HUSBAND AND WIFE**

A vinculo matrimonii—**Petition by wife for—Allegation of adultery by wife in defendant's answer—Co-respondent not made a party by defendant—Can action be finally determined without the co-respondent being added?**

Held: (1) *That where in answer to a petition for divorce a* vinculo matrimonii *by the wife the husband filed answer alleging adultery by the wife with a named person but did not make him a party to the cross petition, the alleged adulterer should be made a party.*

(2) *That the jurisdiction to grant a divorce* a vinculo matrimonii *depends upon the domicile of the husband.*

ANNEKEDDE *vs.* MAYAPPEN ... I. 168

Grounds on which a separation a mensa et thoro **might be granted.**

Held: *That continuous quarrels and dissensions or other equally valid reasons which render the living together of the spouses insupportable, will justify a judicial separation.*

VETHANAYAGAM *vs.* ARUMUGAM II. 387

Circumstances in which a Court may grant a divorce on the ground of malicious desertion.

Held: *Where there was proof of malicious desertion the plaintiff was entitled to a divorce.*

BEATRICE GNANAWATHIE ATTANAYAKE *vs.* LOKU BANDA ATTANAYAKE VIII. 4

Divorce—Decree nisi**—Marriage of divorcee with co-respondent several months after decree** nisi **but before decree absolute—Death of plaintiff in divorce action before entry of decree absolute—Can decree absolute be entered after such death** nunc pro tunc**—Is the marriage by a party to a divorce action after decree** nisi**, but before entry of decree absolute, a valid marriage.**

Held: (1) *That a party to a marriage, in respect of which a decree* nisi *for dissolution of marriage has been entered, is not entitled to contract another marriage until decree absolute is entered.*

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(2) *That if a party to a divorce action contracts another marriage after decree* nisi *but before decree absolute and during the lifetime of the other party;*

(*a*) *The second marriage is invalid;*

(*b*) *On the death intestate of either of the contracting parties to the second marriage, the survivor is not entitled to any share of the estate of the deceased.*

SATHIYANATHAN *vs.* SATHIYANATHAN IX. 135

Divorce—Decree Nisi—Subsequent marriage before decree absolute—Is such a marriage valid.

Held: (1) *That the marriage of a party to a divorce action after decree* nisi *but before decree absolute is invalid.*

(2) *That, where a party to a divorce action marries before decree absolute, even though it be after decree* nisi, *the presumption of a valid marriage does not arise after the lapse of a period of even fourteen years.*

WEERAPERUMA *vs.* WEERAPERUMA AND OTHERS ... ... X. 134

The Ceylon Divorce Jurisdiction Order-in-Council of 1936—First section of the Indian and Colonial Divorce Jurisdiction Act 1926—Jurisdiction of the Supreme Court to decree dissolution of marriage between parties who are British subjects domiciled in England or Scotland—Husband an Englishman domiciled in England—Wife a permanent resident of Ceylon—Can the Supreme Court entertain a petition by the wife—Does the wife acquire the domicile of her husband.

Held: *That the wife acquired the domicile of her husband and therefore the Supreme Court had jurisdiction to entertain the petition.*

HELEN MORRIS *vs.* WILLIAM MORRIS ... ... XIII. 27

Alimony—Decree for divorce obtained by husband against the wife—Can the District Court order permanent alimony in favour of such wife—Civil Procedure Code—Section 615.

Held: *That the District Court has no power, under section* 615 *of the Civil Procedure Code, to order alimony to a wife against whom her husband has obtained a decree for divorce.*

EBERT *vs.* EBERT ... ... XIII. 91

Decree for separation obtained by husband—Order for alimony cannot be made under section 615 of the Civil Procedure Code.

MAARTENSZ *vs.* MAARTENSZ XVI. 32

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

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

NELSON *vs.* FOENANDER ... XVII. 28

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

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

MUTTUCUMARASAMY *vs.* MUTTUCUMARASAMY ... ... XVII. 37

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

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

JOSEPH *vs.* JOSEPH ... XVII. 86

Allegation of adultery with co-respondent—No proof of such adultery—Can divorce be granted on ground of adultery with person unknown.

Held: (1) *That in a case where the only adultery put in issue is the adultery alleged between the two defendants it is not open to the judge on finding the allegation unproved to base his decree on adultery with a person unknown without an allegation made to that effect and an issue raised thereon.*

(2) *That where the co-respondent's conduct is such as to lead to a reasonable suspicion in the mind of the plaintiff that he had been guilty of adultery, the Court will not allow the co-respondent costs.*

BLOK *vs.* BLOK ... XVIII. 85

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An order requiring the husband to pay maintenance to his wife ceases to be operative on the parties being divorced.

MENIKI *vs.* SUJATHUWA ... XIX. 37

Alimony pendente lite—**Civil Procedure Code section 614—Deductions that may be made in assessing husband's average nett income.**

Held: (1) *That in assessing the husband's average nett income under section* 614 *of the Civil Procedure Code, contributions to the Widows' and Orphans' Pension Fund, income tax and instalments on the purchase of a motor car are deductible.*

(2) *That in assessing the husband's average nett income under section* 614 *of the Civil Procedure Code money spent in maintaining children should not be deducted.*

SCHOKMAN *vs.* SCHOKMAN ... XXIII. 130

Ceylon Divorce Jurisdiction Order in Council, 1936—Confession of defendant to an action for divorce—Letters written by the defendant to the plaintiff confessing adultery—Can they be put in evidence for establishing adultery.

Held: (1) *That letters written to the plaintiff by the defendant wife confessing that she has committed adultery can be admitted in evidence for the purpose of establishing adultery on her part.*

(2) *That a Court can grant a divorce on such evidence even though it be the sole evidence of adultery where it is satisfied that the confession of the wife was beyond doubt* bona fide.

TODD *vs.* TODD ... XXVI. 39

A decree of a divorce Court for alimony and maintenance does not oust the jurisdiction of the Magistrate to make an order under the Maintenance Ordinance.

TULIN FERNANDO *vs.* AMARASENA ... ... XXVI. 81

Condonation.

Held that: (1) *It is fraudulent misstatement of fact, not assurances as to future conduct, which may remove the disabling consequences of condonation.*

(2) *There cannot be such a thing as contingent condonation by a husband of his wife's adultery when the condonation includes the irrevocable act of sexual connexion.*

HENDERSON *vs.* HENDERSON XXVIII. 14

Withdrawal of allegations of malicious desertion—Does it amount to collusion.

BULATHSINGHALA *vs.* MATILDA PERERA ... ... XXIX. 44

Divorce—Non compliance with order for payment of alimony pendente lite—**Consequences of non payment.**

ASLIN NONA *vs.* PERERA AND ANOTHER ... ... XXIX. 79

Condonation by wife of husband's adultery—What amounts to—Section 602 of Civil Procedure Code.

Held: *That mere residence of husband and wife in the same house for a few months does not amount to "conjugal cohabitation" within the meaning of section* 602 *of the Civil Procedure Code. There should be in addition proof of forgiveness and reinstatement of the offending spouse.*

Per KEUNEMAN, J.: "No doubt where the husband after knowledge of the wife's adultery shares her bed the law presumes condonation, but this is a special rule applicable to the husband, and not to the wife in similar circumstances."

MENSALINE HAMINE *vs.* DIAS AND ANOTHER ... ... XXIX. 109

Divorce action—Damages are compensatory and not punitive.

ALLES *vs.* ALLES AND SAMAHIM XXX. 25

Permanent alimony to wife—Order made by consent of parties—Subsequent application to modify order under section 615 of the Civil Procedure Code—Has the Court jurisdiction to grant such application.

Held: *That where an order for payment of permanent alimony was entered of consent, such order cannot be varied later under section* 615 *of the Civil Procedure unless such variation had been agreed upon in the consent decree.*

ROWLANDS *vs.* ROWLANDS ... XXXIV. 93

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Divorce—Action by muslim wife against her husband for—Right of civil Court to entertain action.

NOORUL NALEEFA *vs.* MARIKAR HADJIAR ... ... XXXV. 62

Decree nisi in favour of plaintiff—Before making decree absolute defendant filed petition alleging grounds not raised as issue at the trial—Trial of new issue—Reversal of decree, dismissal of plaintiff's action—Civil Procedure Code, section 604—Doctrine of res judicata.

In an action for divorce by a husband on the ground of malicious desertion by the wife, decree *nisi* was entered in favour of the plaintiff. Before the decree was made absolute, the defendant filed a petition alleging the plaintiff's adultery, which was not raised as an issue, although it was mentioned in the course of evidence led at the trial. Despite the plaintiff's objections, the Judge heard evidence on the new issue, reversed the decree and dismissed the plaintiff's action.

Held: (1) *That the words "any person" in section* 604 *of the Civil Procedure Code, which gives the right to intervene before a decree* nisi *is made final, does not include a party to the action.*

(2) *That the doctrine of* res judicata *does not permit a party to an action to raise matters not taken up at the trial.*

FERNANDO *vs.* FERNANDO ... XXXVI. 33

Divorce action—Alleged adulterers not made co-defendants—Excuse from compliance with provisions of sections 598 and 599 of Civil Procedure Code—In what circumstances excuse granted.

The plaintiff, the husband of the defendant, brought this action for divorce, and although the names of two persons with whom the defendant was alleged to have committed adultery were stated in the plaint to be dead, even the other person was not made a co-defendant to the action.

At the stage of framing of issues, plaintiff's counsel stated to Court that this other person was also dead, and that the unnamed adulterers were too numerous to mention as the defendant was living the life of a prostitute.

The District Judge made order excusing the plaintiff from complying with the provisions of section 598 of the Civil Procedure Code.

Held: (1) *That the District Judge was wrong in so excusing the plaintiff.*

(2) *That section* 598 *of the Civil Procedure Code makes it imperative that the adulterer shall be made a co-defendant to an action in which adultery of the wife is the cause or part of the cause of action, unless the plaintiff is excused from doing so on any one of the grounds mentioned therein. The application for excuse must be embodied in the plaint wherein there must be special prayer in that behalf. The allegations of fact upon which the application is founded must be supported by an affidavit or affidavits or other sufficient evidence.*

JOSLINE NONA *vs.* SAMARANAYAKE ... ... XXXVII. 46

Divorce—Action for—Effect of an application for maintenance.

WIMALAWATHIE KUMARIHAMY *vs.* IMBULDENIYA ... ... XXXIX. 75

Divorce—Action by wife for—Husband's answer disclosing persons committing adultery with plaintiff—Only one adulterer made party to action and divorce counter-claimed on the ground of adultery with that party—No claim for divorce on ground of adultery with others—Failure to obtain excuse under section 598 of Civil Procedure Code—Rejection of answer—Is it justified—Is counterclaim for divorce a reconventional claim—Sections 75 and 603 of the Civil Procedure Code.

In an action for divorce instituted by the wife, the defendant husband filed answer denying the plaintiff's allegations and accusing the plaintiff of misconduct with three named persons but averring that he was all along willing to condone the plaintiff's adultery with them. He however, counterclaimed for a divorce on the ground of plaintiff's adultery with his brother.

This answer was rejected by the learned District Judge on the ground that the defendant had without obtaining an excuse under section 598 of the Civil Procedure Code failed to bring in as parties the said three adulterers disclosed in the answer.

Held: (1) *That the defendant—husband was under no obligation to make the three adulterers disclosed in his answer parties*

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to the action as he did not make their adultery the "cause or part of his cause of action" for a divorce.

(2) *That the learned Judge was in error when he rejected the answer.*

(3) *That the principle of reconventional claims has no application to a case where a defendant to an action for dissolution of marriage asks for divorce in his or her favour. Such a claim is permissible only by virtue of section 603 of the Civil Procedure Code.*

KARUNATILLEKE *vs.* KARUNATILLEKE ... ... XLIV. 29

Divorce—Action by wife for—Husband's brother-in-law living with parties in matrimonial home—Brother-in-law carrying tales to wife about her husband—Frequent disputes—Assaults on husband by brother-in-law—Husband finally compelled to leave home due to such assault—Malicious desertion—Husband's alleged refusal to cohabit with wife after nineteen years of connubial happiness—Wife herself disdaining sexual relations with husband—Does defendant's conduct amount to constructive malicious desertion?

In an action for divorce instituted by the wife on the grounds of (1) constructive malicious desertion and (2) malicious desertion, by her husband, it was *inter alia* established in evidence that the parties, who were married in 1920, had lived happily together for at least nineteen years. In 1942, the plaintiff's brother took up his abode with the parties in the matrimonial home, and indulged in the habit of carrying tales to his sister, about the defendant. Frequent disputes resulted between husband and wife, and in 1943, the defendant was assaulted by his brother-in-law. Finally, on 29th June, 1949, when the defendant remonstrated with his wife and her brother—(who had refused to accept an urgent telegram addressed to the defendant by his adopted son)—he was promptly assaulted by his brother-in-law, and finally left home thereafter.

It was further clearly established in evidence that,—despite an allegation that the defendant was "guilty of constructive malicious desertion since 1939, in that he intentionally ceased to cohabit with the plaintiff and thereby repudiated the state of marriage between the parties,"—the plaintiff-wife herself was averse to having sexual relations with the defendant.

Held: *That the defendant had not in law maliciously deserted his wife, and that, on the evidence as established, the legal concept of constructive malicious desertion did not arise for consideration.*

Per GRATIAEN, J.—".....in my opinion, the legal concept of constructive malicious desertion is not involved in a husband's alleged lack of interest in a mutual matrimonial obligation which his wife herself admittedly disdained."

SINNATHAMBY *vs.* ANNAMAH XLV. 86

Adultery—Damages against co-respondent—Why Privy Council should not interfere with award.

ALLES *vs.* ALLES AND ANOTHER XLIII. 17

Divorce—Wife ordered out of matrimonial home—Unfounded charge of adultery—Malicious Desertion.

Where a husband ordered his wife out of the matrimonial home because he honestly believed that she had committed adultery with another person and refused to take her back unless she confessed to adultery in writing, and the evidence showed that the husband had no reasonable grounds for entertaining such a belief.

Held: *That the husband's conduct amounted to desertion and the wife was entitled to a divorce.*

Per PULLE, J.—"A knowingly unfounded charge of adultery accompanied by a request to leave the matrimonial home, is to my mind a final repudiation of the marriage state, where such a charge, as in this case, is persisted to the end."

DE MEL *vs.* DE MEL *et al* ... XLVIII. 13

Divorce—Malicious desertion and adultery by wife—Husband's action against co-respondent for damages—Assessment, basis of.

In assessing damages to be awarded to an injured husband in a divorce action the Court should be mainly governed by (*a*) the actual value of the wife to the husband (*b*) compensation to the husband for injury to his feeling, the blow to his marital honour and the loss to his matrimonial and family life.

DEAN *vs.* ANTHONISZ AND ANOTHER ... ... XLIX. 41

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Divorce—Action for—Adultery—Standard of proof as in criminal case—Condonation——Not pleaded— Provisional presumption of condonation raised by evidence—Duty of Court—Civil Procedure Code, section 602—English Law followed.

Held: (1) *That the words "satisfied on the evidence" in section 602 of the Civil Procedure mean that in actions for divorce the Court must demand "the same general standard—proof beyond reasonable doubt"—as is required to support a conviction in a criminal case.*

(2) *That the fact that condonation is not pleaded does not relieve the Judge of the necessity of a full investigation whenever there is evidence of condonation.*

(3) *That the gravity of the issues involved in a divorce case imposes a special obligation on the Trial Judge whenever there is material "of sufficient cogency to raise a provisional presumption of condonation" which the innocent spouse must displace before the innocent spouse can be granted a divorce on the ground of adultery.*

JAYASINGHE *vs.* JAYASINGHE ... L. 84

DOCTRINE OF ELECTION

Does not arise where party is not aware of his rights, and does not know that he is under a legal obligation to make a choice.

KIRTHISINGHE *vs.* ARCHBISHOP OF COLOMBO ... ... XXXVIII. 19

DOCUMENT

See also under **CONSTRUCTION OF DOCUMENTS, INTERPRETATION**

Objection cannot be taken in appeal to a document admitted without objection at the trial.

HASSAN *vs.* OPALAGALLA TEA AND RUBBER ESTATES LTD. ... XXVII. 77

Documents—Power of Court to order production.

SUNDARAM AND ANOTHER *vs.* GONSALVES ... ... XXXVII. 57

DOMESTIC TRIBUNAL

Principles applicable to decisions of—Court cannot intervene where Tribunal acts honestly and in good faith—Effect of prejudiced person sitting on enquiry—Meaning of "warned off" under Trinidad Turf Club Rules.

The defendants, the Stewards of the Trinidad Turf Club, "warned off" the respondent, an owner and trainer of horses, and made him a "disqualified person" under the Club Rules after an inquiry at which the respondent was represented by counsel, on the ground that the respondent's horse was found to be drugged after a race. The respondent admittedly, had nothing to do with the administration of the drug.

The respondent brought an action in the Supreme Court of Trinidad for a declaration that the defendants had either no jurisdiction to entertain the inquiry or make the order or had exceeded their jurisdiction and that two Stewards were disqualified from participating in the inquiry by reason of their personal animosity to the respondent and that the order was contrary to dictates of natural justice.

The Supreme Court held (1) That the order of the defendants was *ultra vires* the powers conferred upon them by the Trinidad Turf Club; (2) that the defendant's ruling that the respondent had failed to safeguard his horse was contrary to natural justice in that the defendants adjudged the respondent by a rule which precluded them from making a proper inquiry.

On appeal to the Privy Council it was held:—

(1) That under the Turf Club General Rules the defendants had power to "warn off" the respondent resulting in the respondent becoming a "disqualified person" within the Trinidad Rules of Racing.

(2) That where the Tribunal does not exceed its jurisdiction and acts honestly and in good faith, the Court cannot intervene, even if it thinks the penalty is severe or that a very strict standard has been applied.

(3) That the presence of the prejudiced Stewards on the Tribunal did not inject such an element of bias into the Tribunal as to give rise to a reasonable suspicion that the trial was not a fair one and that the defendants sitting as a Tribunal discharged the

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obligation to act honestly and in good faith.

LENNOX ARTHUR PATRICK O'REILLY AND OTHERS *vs.* CYRIL CUTHBERT GITTENS ... ... XL. 100

Parties voluntarily submitting dispute to nonjudicial or domestic tribunal—When are they bound by decision of tribunal.

KIRIKITTA SARANANKARA *vs.* MEDEGAMA DHAMMANANDA AND OTHERS L. 43

DOMICILE

Jurisdiction to grant divorce—Depends on domicile of husband.

ANNEKEDDE *vs.* MAYAPPEN ... I. 168

MORRIS *vs.* MORRIS ... XIII. 27

Action for nullity of marriage brought by husband on ground of wife's pregnancy at time of marriage. Husband domiciled in Ceylon, and wife of Indian domicile, prior to marriage.

Held: *That wife must be regarded as having husband's domicile up to date of decree of nullity.*

NAVARATNAM *vs.* NAVARATNAM XXX. 90

DONATION

See also **ACCEPTANCE, DEED, MINOR, MUSLIM LAW, ROMAN-DUTCH LAW.**

Gift—Revocation of—Gross ingratitude to donor—Does elopement of the donee with a man of lower caste constitute gross ingratitude to her mother the donor.

Held: *That the elopement of a donee with a man of lower caste does not constitute "gross ingratitude" to her mother the donor.*

SINNACUDDY *vs.* VETHATTAI ... IV. 133

Donation—Ingratitude—In what circumstances may a deed of gift be set aside on the ground of ingratitude.

Held: *That the evidence did not disclose "gross ingratitude" in law on the part of the donee.*

SAVARASIPILLAI *vs.* ANTHONIPILLAI VIII 121

Gift—Must gift be accepted to be valid—Can any person other than the donor raise the issue that the deed is invalid for want of acceptance—In what circumstances may the possession by the donee of the gifted property be regarded as acceptance.

Held: (1) *That a gift is not valid unless it is accepted or there are sufficient circumstances from which it can be inferred that there was acceptance.*

(2) *That the objection to the validity of the gift for want of acceptance can be taken by persons other than the donee.*

KANAPATHYPILLAI *vs.* KASINATHER AND ANOTHER ... ... X. 34

Donation of lease in contravention of term not to assign without written consent of lessor—Effect of donation—Rights of lessor.

JAYAWARDENA *vs.* JAYAWARDENA AND OTHERS ... ... XIV. 13

Donation—Deed in favour of woman living with the donor as his wife—Is donor entitled to revoke—Roman-Dutch law—Law relating to gifts to concubines.

Held: *That under Roman-Dutch law, the mere fact that a gift was in favour of a concubine does not entitle the donor to revoke such gift.*

WANIGARATNA AND TWO OTHERS *vs.* SELLOHAMY AND TWO OTHERS ... ... XIX. 137

Donation by Muslim lady to her adopted son—Reservation of donor's life interest and covenant not to revoke donation.

Where a donation *inter vivos* has not been completed by transfer or delivery, what passes to the donee is only a right to enforce the contract.

ABDUL CAFFOOR *vs.* PACKIR SAIBU AND OTHERS ... ... XX. 81

Gift

(1) For a gift to fall into the class of gifts intended to advance a child in life it must be reasonably clear from all the circumstances that when the parent made the gift he had in contemplation the fact that the child would inherit a certain share of his estate on his death, and that in anticipation of that event decided to draw on

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the ultimate share in order, presently to advance or establish the child in life.

(2) The liability to collation of a gift in contemplation of marriage remains whether the marriage takes place or not.

(3) A gift made on the occasion of marriage is liable to collation unless it can be proved that the deceased parent, expressly or impliedly, released the property from collation.

(4) Once it is shown that the impending marriage was the occasion for the gift, it is for the donee to show that the donor expressly or impliedly released the gift from collation.

(5) Failure to sue for a recovery of the gift is by itself not a sufficient indication of a wish to exempt.

KALIAMMA AND ANOTHER *vs.* SELLASAMY ... ... XXI. 6

Donation—Kandyan—Transfer by father to daughter—Retransfer to father—Gift again to same daughter to secure for donor future assistance—Gift not declared irrevocable—Power to revoke neither reserved nor renounced—Revocation of gift—Sale to 3rd parties — Oral evidence of daughter that gift in her favour was as reparation for the act of father in getting the retransfer under exercise of undue influence—Is such oral evidence admissible—Evidence Ordinance—Proviso (1) of section 92—Is the deed of gift irrevocable.

A, having transferred a certain property to his daughter B, obtained a retransfer. Again A gifted the property to B to secure to donor future assistance. The deed contained no clause as regards revocability. A subsequently revoked the gift and transferred the property to two other persons. It was found at the trial that the retransfer by B to A was induced by exercise of undue influence. Oral evidence was given by B that the subsequent gift to her was as an act of reparation for obtaining the retransfer under exercise of undue influence and not made out of love and consideration.

Held: (1) *That such oral evidence to vary the terms of the deed of gift was admissible under proviso* (1) *of section* 92 *of the Evidence Ordinance.*

(2) *That in the circumstances the deed of gift must be regarded as irrevocable.*

BELGASWATTE *vs.* UKKUBANDA AND OTHERS ... XXII. 93

Prescription does not begin to run against a donee of property subject to the donor's life interest until the donor's death.

PODIMAHATHMAYA AND OTHERS *vs.* HENDRICK APPUHAMY AND OTHERS ... ... XXIV. 51

Kandyan law—Donation for specific object—Revocation.

WIJESINGHE *vs.* MOHOTTY XXVI. 48

Donation—Deed subject to certain conditions—Acceptance of donation by donee but not by those benefited by the donation in certain contingencies—Alteration of terms of donation by agreement of donor and donee only—Is such alteration binding on those benefited by the donation in its original form— fidei commissum.

Held: *That a deed of gift which was accepted by the donee alone can be altered by common consent of the donor and donee although such alteration affects persons (not parties to the original deed of donation) who stood to benefit in certain contingencies under the original deed of donation.*

DON CAROLIS AND OTHERS *vs.* ALWIS ... ... XXVII. 33

Donation—Property gifted without title—Subsequent acquisition of title—Does it accrue to the benefit of donee—Exceptio doli**—Is a donee entitled to raise such plea—Roman-Dutch law.**

Held: *That a donee in possession can avail himself of the equitable plea of* exceptio doli *as against the donor or those who claim under him.*

TISSERA *vs.* WILLIAM SINGHO AND ANOTHER ... ... XXVII. 95

Gift

Where a husband donates the whole of the *thediathetam* property to a son and the donee conveys it to a *bona fide* purchaser, the latter acquires good title and the wife's only remedy is a claim for compensation.

VAITHYLINGAM *vs.* SEENIVASAGAM ... ... XXVIII. 63

Gift—By Kandyan minor is ipso jure **void. Remedy of minor who has executed such a conveyance.**

HATURUSINGHE *vs.* UKKU AMMA XXVIII. 107

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Donation—Gift to P or his heirs, executors and administrators—Its validity—Fidei commissum.

A deed of gift contained the following conditions:

"(1) That owing to the affection we had towards our daughter the deceased Dehiwalage Lucia Fernando.....the wife of Dombawalage Peduru Fernando..... we the aforesaid hereby gifted and set over .....unto Peduru the husband of the said Lucia Fernando or his heirs, executors, and administrators.....

(2) To have and to hold the said portion of garden.....unto the donee or his heirs, executors and administrators for ever.....and after our death the aforesaid portions of land shall be possessed by the said Peduru Fernando and his descendants without selling, mortgaging or alienating the same or letting on lease for a period exceeding from generation to generation and when their generations cease to exist the same shall devolve on the Roman Catholic Church built by the Durawa people of Pitipane."

The main contentions in appeal were (*a*) that the deed did not constitute a valid gift inasmuch as there was an ambiguity as to the person or persons to whom the land was donated, (*b*) that the deed did not create a valid *fidei commissum.*

Held: (1) *That the gift is a valid one as it is clear from the words used that the donors intended to gift the property to P and not to his heirs.*

(2) *That the deed created a valid* fidei commissum.

FERNANDO AND OTHERS *vs.* FERNANDO AND OTHERS ... ... XXIX. 19

Gift—Acceptance by donee—Sale of gifted property by donor to third party—Improvements made by the third party—Subsequent revocation of conditions of gift by donor—Can donor revoke such conditions—Sale in execution against third party—Action by fidei commissarii **against such purchaser—Compensation**—Jus retentionis.

N and S were entitled to a certain land. In 1906 N gifted his half-share by deed P 3 to his daughter C who accepted it subject to the conditions:

(*a*) That she should not sell, mortgage or otherwise alienate the property.

(*b*) That upon her death the property should devolve upon certain persons designated as "all her children being heirs descending from her and those who have obtained authority as her executor or administrator.

In 1911, N purchased S's half-share and transferred the entirety of the land to E, who planted and otherwise improved it.

In 1918 by deed D 1, N purported to cancel the conditions subject to which gift on P 3 was made and by deed D 6 of the same year gifted the property absolutely to C.

At a sale in execution of a decree against E the property was sold and the defendant-appellant purchased it and obtained conveyance D 4.

C died leaving the four plaintiffs, who in this action claimed a half-share as *fidei commissarii* on deed P 3. The plaintiffs succeeded and the defendant appealed.

Held: (1) *That P 3 created a valid* fidei commissarii *donation which involved 'the benefit of the family.'*

(2) *That N, the donor had no power to revoke the gift to the* fidei commissarii *without their consent.*

(3) *That a fiduciary is entitled to claim compensation for improvements against the* fidei commissarii.

(4) *That a purchaser from a fiduciary is in the same position as a fiduciary as regards a claim for improvements.*

(5) *That the defendant-appellant was a* bona fide *possessor and was entitled to recover compensation for improvements made by E from the plaintiffs and to a* jus retentionis *until compensation is paid.*

MUDALIYAR WIJETUNGE *vs.* DUWALAGE ROSSIE ... ... XXXII. 108

Deed—Consideration acknowledged to have been received earlier—Finding by Court that consideration not paid—Does this fact justify Court in holding that deed is a donation.

NONA KUMARA *vs.* PATHUMA NATCHIA AND ANOTHER ... XXXIII. 30

Revocability—Gift of half-share of property subject to fidei commissum**—Acceptance not shown on deed—Extract of encumbrance showing mortgage of entire land by**

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donor and donee—Is it sufficient to prove acceptance.

Held: *That the mere production of an extract of encumbrances showing that a fiduciary donee of a half-share of a property joined the donor who was entitled to the remaining half-share in executing a mortgage bond in respect of the entire land does not prove that there was acceptance of the gift by the fiduciary donee.*

Per WIJEYEWARDENE, C.J.—"Relying on the authority of *Carolis et al vs. Alwis* (1944) 45 New Law Reports 156, the District Judge stated in the course of his judgment that 'where a deed of gift creates a valid *fidei commissum* there must be acceptance not only by the donees but also by the *fidei commissarii* on their behalf and if a deed has not been so accepted the donor is entitled to revoke the gift with the concurrence of the donee.' I am unable to accept this view as correct and I adhere to the view expressed by me in *Mudaliyar Wijetunga vs. Duwalage Rossie et al* (1946) 47 New Law Reports 361."

PODI APPUHAMY *vs.* MOHAMEDU ABUSALI ... ... XLI. 61

Expression of intention on death-bed to donate a sum of money—Acceptance by donee who was present—Death of donor—Is donee entitled to recover gift from donor's estate—Nature of donee's right—Registration of Documents Ordinance, sections 17 and 18.

An employer on his death-bed, in the presence of witnesses expressed his intention to give his servant, the plaintiff, a donation of Rupees 10,000. The plaintiff was present and by words and signs signified his thankful acceptance of the gift. Shortly after the donor died.

The plaintiff sued the Public Trustee as executor of the deceased to recover the gift and succeeded in the District Court. The Public Trustee appealed.

Held: (1) *That in the circumstances the gift was* a donatio inter vivos *and did not require any specific mode of execution.*

(2) *That the plaintiff's right under the donation was a* chose in action *and was not a 'bill of sale' needing registration under the Registration of Documents Ordinance.*

PUBLIC TRUSTEE *vs.* UDURUWANA XLII. 17

Deed of gift subject to fidei commissum**—Muslim minors—Acceptance by mother of minors—Validity of acceptance.**

NOORUL MUHEETHE *vs.* LEYANDUN XLII. 86

Donation—Revocability—Grounds for—Ingratitude—Personal violence—Laying of impious hands—Meaning of—Roman-Dutch Law.

Held: *That a donor who suffers personal violence at the hands of the donee is entitled to an order of Court revoking the gift on the ground of "ingratitude."*

Per BASNAYAKE, J.—"Whether the Latin word "impias" is rendered impious as de Sampayo, J., has done or 'sacrilegious' as Krause has done, the legal position is the same. It is impious or sacrilegious for a donee who has derived benefits from a donor to strike him or use personal violence on him."

MANUELPILLAI *vs.* NALAMMA XLIV. 6

Donation—Deed of gift subject to conditions—Property to devolve on donee's brothers—Devolution—Does jus accrescendi **apply?—Wills Ordinance, section 7—Civil Procedure Code, section 247.**

Where under a deed property is gifted to a person prohibiting alienation and subject to certain conditions, and the deed contained a direction that in the event of the donee dying issueless, the property was to devolve on the donee's brothers, subject to the said conditions, and where, after the death of such donee, an action under section 247 of the Civil Procedure Code was instituted to have a share of the property declared liable to be sold in execution of a decree on the ground that at the time of death of one of the brothers, his share devolved on his heirs and not on his other brothers.

Held: (1) *That the rule of* jus accrescendi *did not apply.*

(2) *That the gift was valid and as the prohibition in the deed of gift was good and did not extend beyond the life-time of each of the donor's sons, the share of each son would pass to his heirs on his death free of all obligations and restrictions and could therefore be sold in execution against them.*

Per BASNAYAKE, J.—Questions of *jus accrescendi* can arise only where property is bequeathed to certain legatees or heirs jointly and one of them dies in the *lifetime*

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of the testator. Once interests under a will vest there is no room for the *jus accrescendi*."

IBRAHIM *vs.* ALAGAMMAH AND OTHERS
XLV. 35

Donation—Gift subject to fidei commissum **in favour of donee's children and grand-children — Subsequent revocation—Second gift to donee absolutely subject to donor's life-interest—Sale of gifted property to defendant by donee—Action by first donee's children as** fidei commissaries **for declaration of title**—Quia timet **action—Ingredients of—Discretion—Exercise of by Court**—Fidei commissarii **rights in partition action—Partition Act No. 16 of 1951.**

The donor having gifted by deed a property to the donee subject to a *fidei commissum* in favour of the donee's children and grand-children, revoked it with the consent of the donee, and by another deed donated it to the same donee absolutely reserving to himself a life-interest. The donee sold the property to the defendant.

The plaintiffs, who are children of the donee, brought an action, (the donor and the donee both being alive and no breach of the prohibitions in first deed of gift having occurred), alleging that the defendant might sell the property to their prejudice or institute a partition action without notice to them. They asked for a declaration of title to the property subject only to the life-interest of the defendant, and contended that the defendant's title to the property was subject to their interests as *fidei commissaries* under the first deed of gift, which by reason of the donee's acceptance could not be validly revoked to their prejudice without their consent.

Held: (1) *That no cause of action had arisen entitling the plaintiffs to the relief claimed by them as the facts in the case did not establish an actual or threatened infringement of their alleged* fide commissary *rights.*

(2) *That a* fidei commissarii *may in certain circumstances legitimately claim a judicial declaration for the protection of his rights, even though such rights can be classified only as future or contingent, provided that he can prove that there is a present risk of their infringement to his ultimate prejudice.*

The learned Judge considered it unnecessary and undesirable to decide as to the proper construction of the first deed of gift and as to the validity or otherwise of the purported deed of revocation, as the ultimate beneficiaries under that deed could not at present be ascertained with certainty.

HEWAVITHARANA *vs.* CHANDRAWATHIE *et al*
... ... XLV. 73

Deed conveying property absolutely subject to prohibition against sale or mortgage—Does it create a fidei commissum.

PATHIRANA *et al vs.* GUNAWARDHENA
... ... XLVII. 14

Donation—Subsequent birth of illegitimate child to donor—Child legitimated by marriage later—Action by donor four years after to have gift annulled and cancelled—Is the action prescribed—Prescription Ordinance, (Cap. 55) sections 6 and 10.

Held: (1) *That the right to have a gift revoked on the ground of the subsequent birth of a child is based on a cause of action "not expressly provided for" in the Prescription Ordinance and therefore comes within the ambit of Section* 10 *of the Ordinance and becomes prescribed within three years from the time when the cause of action has accrued.*

(2) *That in such a case the cause of action arises as soon the child is born.*

Per GRATIAEN, J.—"Section 6 of the Prescription Ordinance does not apply for the simple reason that the cause of action involves no "breach" of any obligation by the donee, for it would be facetious indeed to impute any "blame" to him for the happy event which had taken place in the donor's household. In fact, no obligation to restore the property could arise unless and until a decree for cancellation had been pronounced. The decisions of this Court in *Govt. Agent, Western Province vs. Pallaniappa Chetty* (1908) 11 N. L. R. 151 and *Ponnamperuwa vs. Gunasekere* (1921) 23 N. L. R. 235 are distinguishable because they were concerned only with deeds of gift which expressly empowered the donor to revoke the gift *by his own act* and without the intervention of the Court. In such an event, the donee's repudiation of the right of revocation would clearly have constituted a 'breach' of the contract giving rise to a cause of action contemplated by section 6.

APPUHAMY *vs.* MARY NONA AND ANOTHER
... ... XLVII. 46

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Donation—Deed accepted by maternal uncle—Revocation—Subsequent donation subject to conditions—Life interest and fidei commissum—**Devolution**—jus accrescendi—**Partition.**

The property sought to be partitioned was gifted by Deed P 4 to K, who was a minor and was accepted by the maternal uncle on his behalf. Subsequently the donors revoked P4 by P5 and executed in favour of K another deed of donation P6 subject to the reservation of life-tnterest in their favour, and creating a *fidei commissum* in favour of his three brothers in equal shares. K who had by now attained majority signed P6, signifying his acceptance. The contesting respondents, the sons of K, after his death, claimed the property to the exclusion of K's two surviving brothers, the present plaintiff and the first defendant.

Held:(1) *That the deed of gift P4 was invalid for want of due acceptance.*

(2) *That under the Roman Dutch Law, acceptance of a deed of donation on behalf of a minor donee by a maternal uncle is bad, unless he is lawfully authorised for that purpose. The only persons who are regarded as natural guardians of a minor are the father, mother, grand father and grandmother.*

(3) *That P4 should be regarded as having been revoked by P5 and P6 read together.*

(4) *That P6 was valid in law and that the Supreme Court erred in holding that the position was governed by P4 alone.*

(5) *That P6 did not create a separate* fidei commissum. *in favour of each of the three brothers of K, but was a gift of the whole to the three brothers jointly with benefit of survivorship and K's sons were, therefore, not entitled to any rights in the property.*

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM XLVIII. 1

Donation by Muslim subject to fidei commissum **Acceptance by mother on behalf of infant donees—Validity of acceptence—Is Muslim Law or Roman Dutch Law applicable.**

NOORUL MUHEETHA *vs.* SITTIE RAFEEKA LEYANDEEN AND OTHERS XLVIII. 74

DOWRY

Dowry deed affecting immovable property —Should it be notarially attested.

THAMBY LEBBE AND ANOTHER *vs.* JAMALDEEN ... ... VIII. 99

A wife under Roman Dutch Law is entited to claim restitution of her dowry in a case where the marriage did not take place in community of property—Such right may be forfeited by misconduct on her part.

KARUNANAYAKE *vs.* KARUNANAYAKE IX. 109

DRUNKENNESS

See also **INTOXICATION**

Plea of drunkenness and provocation.

THE KING *vs.* MARSHALL APPUHAMY ... ... XLI. 49

DYING DEPOSITION

How should dying deposition be recorded.

REX *vs.* ASIRVADAN NADAR XLIII. 25

Must there be corroboration of a dying deposition.

REX *vs.* B. FRANCIS FERNANDO XLVII. 101

EARNEST MONEY

Earnest money paid under agreement for the purchase of land—Transaction not completed—Liability to refund.

SUPPIAH AND ANOTHER *vs.* SITUNAYAKE ... ... XLIII. 28

EJECTMENT

Power to eject from Crown Land held on permit.

JAYAWARDENA *vs.* FERNANDO XXXIII. 4

ELECTIONS

See aslo under **CEYLON (STATE COUNCIL ELECTIONS) ORDER IN COUNCIL**
CEYLON (PARLIAMENTARY ELECTIONS) ORDER IN COUNCIL
MUNICIPAL COUNCILS
URBAN COUNCILS

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VILLAGE COMMITTEES

LOCAL AUTHORITIES ELECTIONS ORDINANCE

Where the right of a voter to go to the poll without molestation or fear of molestation is violated the election is void on the ground that there has been no real electing by the constituency at all.

PIYADASA *vs.* GOONESINGHE XXI. 85

A Village Committee election was adjourned from the time fixed to another time. It was held that the election cannot be declared invalid unless it can be proved that the result would have been different if the election had been held at the time for which it had originally been fixed.

RANASINGHE *vs.* GOVT. AGENT SABARAGAMUWA ... ... XXVI. 58

Election—Disqualified person voting at election of Chairman of village committee—Validity of election.

FERNANDO *vs.* GOONESEKERA XXXIII. 41

Election—Avoidance of on ground of impersonation.

MOHAMED NOOR *vs.* SINNAPPAH ... XL. 21

An Election to Municipal Office cannot be questioned by a Councillor who has concurred in the Election.

THASSIM *vs.* WIJEKULASURIYA AND OTHERS ... ... XLVII. 5

ELECTRICITY ORDINANCE

Electricity Ordinance section 6— Telegraphs Ordinance section 10—Penal Code section 183.

Held: (1) *That a power conferred under section 6 of the Electricity Ordinance in the following terms,*

"It is hereby notified for general information that the Governor has been pleased, in pursuance of the powers vested in him under section 6 of the Electricity Ordinance, and with the advice of the Executive Council, to confer upon the Director of Electrical Undertakings and upon all officers of the Electrical Department duly empowered by the Director in that behalf the powers which the Telegraph authority possesses with respect to the placing of the telegraph lines and posts for the purpose of a telegraph established or maintained by the Government or to be established or maintained,"

carries with it a power to maintain the appliances and apparatus placed in pursuance of the power.

(2) *That refusal to unlock a gate to permit a public officer who has a right to enter the premises for the execution of his duty amounts to obstruction by the person who can, but refuses to unlock the gate with full knowledge that the person seeking admission is a public servant, and that he is seeking admission to execute his duty.*

INSPECTOR OF POLICE *vs.* KALUARATCHI ... ... XXIV. 74

ELEPHANT

An elephant captured without a licence under the Fauna and Flora Protection Ordinance is the property of the Crown.

THE ATTORNEY-GENERAL *vs.* PANNIKAM AND ANOTHER ... XXVI. 112

EMERGENCY POWERS (DEFENCE) ACT 1939

Emergency Powers (Defence) Act, 1939 section 1—Palestine Defence (Judicial) Regulations 1942 regulation 3—Constitution of Court by direction by Chief Justice under regulation 3—Is formal order necessary—Overriding effect of a Regulation which modifies a local Ordinance—Delegation of power—Ultra vires—Discretion of prosecuting counsel to call witnesses named in the indictment—Alteration of judgment by Judge after it had been dictated in Court.

The facts which are fully set out in the judgment, shortly, are as follows:

On March 24th 1943, the Chief Justice of Palestine sitting alone as the Court of Criminal Assize at Haifa, convicted the appellant of murder under the Palestine Criminal Code Ordinance, 1936 Section 214 (b), and sentenced him to death. An appeal by the appellant was dismissed on April 17th 1943, by the Supreme Court of Palestine, sitting as the Court of Criminal Appeal. The appellant by special leave appealed against that judgment.

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It was contended by the appellant that :

(*a*) Regulation 3 which was made by the High Commissioner under the powers vested in him by the Emergency Powers (Colonial Defence) Order-in-Council, 1939, article 3, and the Emergency powers (Defence) Act, 1939, was not within the powers thus vested in him, and was, therefore, *ultra vires* of the High Commissioner;

(*b*) Assuming that regulation 3 was *intra vires* of the High Commissioner, any direction made by the Chief Justice under it fell to be made by the Chief Justice himself, and there was no such direction in the present case;

(*c*) In any event, such a direction was an order within the meaning of the Palestine Interpretation Ordinance, 1933, section 7, which was applied to the Defence (Judicial) Regulations, 1942, by regulation 9 thereof, and which required publication in the Gazette before such an order could have the force of law;

(*d*) The Chief Justice, in his judgment as finally issued by him, made material alterations in the judgment as orally delivered by him;

(*e*) There was no sufficient evidence before the Chief Justice to justify a finding of "premeditation" within the meaning of the Palestine Criminal Code Ordinance, 1936, sections 214 and 216, and, in any event, that the Chief Justice had neither considered this essential question, nor made any finding thereon; and

(*f*) The refusal by the Chief Justice, at the close of the evidence for the Crown, to rule that there was an obligation on the Crown to tender for cross-examination by the defence, witnesses, whose names were on the information but had not been called, was wrong, and prejudiced the appellant's right to a fair trial.

Of the above points (3) and (5) are of little or no local interest; but the other points are of assistance to us. The decision of the Privy Council on points (1), (2), (4) and (6) is as follows:—

(i) That the discretion conferred on the Chief Justice involved no delegation of the High Commissioner's powers but was an executive discretion necessary to the carrying out of the High Commissioner's conclusion and was therefore *intra vires*.

(ii) The constitution of the Court which was to try the appellant was prescribed in the cause list of the Supreme Court of Palestine for the week ending Saturday, March 20th 1943, which had been approved by the Chief Justice prior to Monday, March 15th 1943. There was no objection to this course for fixing the constitution of the Court which was to try the appellant, and which is obviously the usual method of administering the business of the Court. In the absence of any provision for the form which the direction by the Chief Justice is to take, the Chief Justice was free to adopt the course he did.

(iii) The changes in the judgment finally issued, in view of the information obtained from the Chief Justice at the request of the Board and the limited argument submitted at the hearing before the Board, render it unnecessary for the Board to consider at length the value of the transcript by the shorthand stenographer of the oral judgment as delivered by the Chief Justice on April 17th 1943, which the Chief Justice now states was full of errors and obvious mistakes, and the latter part of which had to be rewritten by him. in view of this explanation, which was not before the Court of Criminal Appeal, their Lordships would have difficulty in taking the transcript into consideration, but they are relieved from any final conclusion on this point, as the only change from the judgment as orally delivered which the appellant founds upon is admitted by the Chief Justice in his statement, *viz.* the mention in the oral judgment of Ibrahim Bishara as a witness along with a reference to his evidence which was in fact not given at the trial, but was contained in his disposition at the preliminary inquiries, and which mention was omitted in the judgment finally issued. This point was raised before the Court of Criminal Appeal, and their Lordships agree with their view that, apart from this reference, which was an obvious mistake, there was sufficient evidence on which it could be found that there was enmity not only between the villagers, but also between the families of the deceased and the appellant, and that this alteration in the judgment cannot be regarded as a substantial one, which would affect the conclusions arrived at by the Chief Justice.

(iv) The prosecution is under no obligation to tender witnesses whose names are in the indictment and are not called for the prosecution. The prosecutor has a discretion as to what witnesses should be called

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for the prosecution, and the Court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

On the question of the conflict of the defence regulation with the Courts Ordinance of Palestine the Privy Council decided that the regulation prevailed.

ADEL MUHAMMED EL DABBAH *vs.* ATTORNEY-GENERAL OF PALESTINE XXVIII. 49

ENCROACHMENT

Encroachment of building on another's land—Bona fide act—What are the rights of the person whose land is encroached on.

Where the defendant erected on his land, *bona fide*, a building which was afterwards found to encroach on the plaintiff's land.

Held: *That the plaintiff can only claim compensation and that he is not entitled to ask that the building be pulled down.*

GNANAPRAKASAM AND ANOTHER *vs.* MARIAIPILLAI ... ... VIII. 135

Encroachment upon Crown Lands Ordinance—Can possessor of road reservation for over ten years claim rights refered to in § 9 of Ordinance—Effect of § 10.

WIJESINGHE *vs.* ATTORNEY-GENERAL ... ... XXXIII. 26

Encroachment upon Crown Lands Ordinance—Provisions of Ordinance are not operative before 1840. Surveyor-General's plans showing paddy fields, cultivated by defendants, as part of abandoned tank. No evidence of the date the tank was abandoned or whether it was a public tank. Applicability of § 7 of Ordinance.

ATTORNEY-GENERAL *vs.* KIRIMUDIYANSE AND ANOTHER ... XXXV. 43

ENEMY

A company carrying on business in enemy occupied territory is an "enemy"

BOGTSTRA *vs.* THE CUSTODIAN OF ENEMY PROPERTY ... ... XXVI. 5

The Custodian of Enemy Property may, as added plaintiff, proceed in the plaintiff's absence with an action instituted by an alien enemy.

BOGTSTRA AND OTHERS *vs.* RANASINGHE ... ... XXVIII. 79

ENEMY OCCUPIED TERRITORY

A partition action can be maintained against a defendant resident in enemy occupied British territory.

Service of summons on a person in possession of the land on behalf of defendants who are in enemy occupied territory is sufficient service under section 3 of the Partition Ordinance.

YOKKOMUTTU *vs.* SAMINATHER AND ANOTHER ... ... XXVII. 111

ENEMY PROPERTY

Enemy property—Action arising on an infringement of rights under a trade mark—Plaintiff company carrying on business in Holland—Holland occupied by the enemy subsequently—Plaintiff company under enemy control—Does right to proceed with such action vest in the Custodian of Enemy Property—Defence (Enemy Property) Regulations, 1939—Regulations 7 (1) and 49 (1) (c).

Evidence Ordinance—Can Courts take judicial notice of facts other than those mentioned in section 57.

Held: (1) *That on the materials before it, the Court would be justified in drawing the inference that the plaintiff was an "enemy" within the definition in regulation* 49 (1) (*c*).

(2) *That an action arising out of an alleged infringement of rights under a trade mark is movable property, within the meaning of regulation* 7 (1).

(3) *That it is open to a Court to take judicial notice of facts other than those mentioned in section* 57 *of the Evidence Ordinance.*

BOGTSTRA *vs.* THE CUSTODIAN OF ENEMY PROPERTY ... ... XXVI. 5

ENTAIL AND SETTLEMENT ORDINANCE

Is the requirement regarding notice in section 6 imperative.

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Held: *That a Court is not bound in every case to give the notice required by section 6 of the Entail and Settlement Ordinance No. 11 of 1876.*

ABEYSINGHE *vs.* ABEYSINGHE ... III. 31

Exchange of land subject to fidei commissum **for land not subject to** fidei commissum—**Conditions of** fidei commissum **not mentioned in deed conveying land taken in exchange—Mistake of Court—Do the conditions of the** fidei commissum **attach in spite of such omission.**

Held: (1) (*a*) *That where a land subject to a* fidei commissum *is exchanged, under section 8 of the Entail and Settlement Ordinance, for another land the* fide commissum *attaches to the land taken in exchange even though the order of Court authorising the exchange does not expressly state that the conditions of the* fidei commissum *should attach to the land taken in exchange; and*

(*b*) *The deed conveying the land taken in exchange does not contain language sufficient to create a* fidei commissum *over the land.*

(2) *That section 8 of the Entail and Settlement Ordinance applies to a first exchange of property subject to a* fidei commissum *as well as to any subsequent exchange of property.*

ABEYWARDENA AND TWO OTHERS *vs.* HON. SIR GRAEME TYRRELL AND OTHERS ... ... X. 125

Partition of land subject to a fide commissum. **In what circumstances will it be allowed.**

FERGUSON (NEE) HAWKE AND OTHERS *vs.* SABAPATHY AND OTHERS XIV. 61

§ 15 of the Public Trustee Ordinance does not apply to all cases under the Entail and Settlement Ordinance.

DAISY LAW *vs.* FERNANDO AND OTHERS ... ... XVI. 137

Sale under section 5—Upset price fixed by Court—Auction sale subject to confirmation by Court—Offer of considerably higher price by another party before confirmation by Court—Should the Court set aside the sale already taken place.

Held by the Divisional Court, (Jayetileke, J., dissentiente): *That, where an upset price was fixed by Court and the property was sold by auction at or above the upset price, the Court should not set aside the sale merely because a considerably high price was offered subsequently by another even though the sale was subject to confirmation by Court, and minors were interested in getting the highest possible price for the property.*

ELAINE MUTHUMANI *vs.* MUTHUMANI *et al* ... ... XXXVII. 82

Transactions amounting to an exchange for the purpose of the Ordinance.

PERERA AND OTHERS *vs.* DE FONSEKA AND OTHERS ... ... XLI. 17

Section 5—Proper person to make application for exchange—Effect of order on such application—Fidei commissum **impressed under section 8 on property exchanged—Can such effect be avoided by execution of deeds—Validity of order made on application by wrong party.**

WEST *vs.* ABEYWARDENE AND OTHERS ... ... XLV. 92

EQUITY

He who seeks equity must do equity.

MOLEGODA *vs.* MOLEGODA ... XXIX. 8

Grant of equitable relief to prevent Statute of Frauds being used to cover what would amount to a fraud.

FERNANDO *vs.* THAMEL AND ANOTHER ... ... XXXII. 66

ESSENTIAL SERVICES (AVOIDANCE OF STRIKES AND LOCKOUTS) ORDER

See also under **DEFENCE (MISCELLANEOUS) REGULATIONS**

Essential Services (Avoidance of Strikes and Lockouts) Order paragraph 11 (1)—Minimum Wages Ordinance sections 8 and 10.

Held: (1) *That the minimum wage fixed by the Estate Wages Board under section*

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8 (1) *of the Minimum Wages Ordinance must be an ascertained sum and it is not in order to provide for the fixing of an allowance by the Controller according to certain instructions prescribed in the notification under section* 10.

(2) *That where a part of the minimum wage remains to be ascertained in some prescribed way it cannot be said to have been fixed under section* 8 (*i*) *of the Minimum Wages Ordinance.*

(3) *That the power to approve conferred by section* 10 (1) *of the Minimum Wages Ordinance implies a power to withhold approval.*

(4) *That the approval required by section* 10 (1) *of the Minimum Wages Ordinance cannot be given in advance.*

(5) *That hearsay evidence based on information received under paragraph* 11 (3) *of the Order is inadmissible.*

(6) *That the correct way of determining the question of favourableness for the purposes of paragraph* 11 (1) *of the Order is not by dividing the sum of money received by a labourer for any given month by the number of days he worked but by multiplying the amount of the minimum daily wage, which is the recognized term of employment in the district, by the number of days on which the labourer worked.*

RAMANATHAN *vs.* COL. WRIGHT XXVII. 65

Certiorari—**Jurisdiction of tribunal—Reference of petition to District Judge by Commissioner of Labour—Commissioner stating that he was satisfied that petition related to a trade dispute—Must District Judge be satisfied in his own mind.**

LIPTONS LTD. *vs.* GUNASEKERA XXXIV. 22

ESTATE

Estate—Labourer remaining in occupation of line-room after acquisition of estate by Crown for village expansion.

SELVANAYAGAM *vs.* HENDERSON XXXII. 94

ESTATE DUTY

Estate Duty Ordinance No. 8 of 1919—Citation under section 31.

Held: (1) *That the application for a citation under section* 31 *of the Estate Duty Ordinance No.* 8 *of* 1919 *in Form K of the Forms prescribed by the Commissioner of Stamps under section* 4 *must be signed by the Commissioner of Stamps himself.*

(2) *That, before a citation under section* 31 *can issue, the Commissioner of Stamps must satisfy the Court-*

(i) *That the person on whom the citation is required is a person accountable.*

(ii) *That he has made default in delivering the statement and declaration required of him.*

(iii) *That the District Judge, to whom the application is made, has jurisdiction to administer the estate, or that the citee resides within his jurisdiction.*

KAGOO *vs.* THE COMMISSIONER OF STAMPS ... ... V. 90

Estate Duty Ordinance No. 8 of 1919—Estate duty payable on death of a person domiciled in India and subject to Hindu Law—Hindu undivided family—Joint property.

Held: (1) *That even where it is admitted that a Hindu merchant of Indian domicile trading in Ceylon is a member of a Joint Hindu family the burden of proving that the assets of such person is Joint property is on the person who alleges that it is Joint property.*

(2) *That in order to establish that the property of a Hindu member of a Joint family is Joint property it must be proved either that the property was purchased with Joint family funds, or that it was produced out of Joint family property.*

(3) *That money received from an ancestor by way of a gift or a loan is not ancestral property within the meaning of the expression in Hindu Law.*

(4) *That the conduct of the deceased member of a Joint Hindu family and his surviving heirs can be taken into account in considering a claim that the property standing in the name of the deceased is Joint property.*

PERIYACARUPPAN CHETTYAR *vs.* THE COMMISSIONER OF STAMPS ... VI. 133

Estate Duty—Application for refund of duty overpaid—Section 27 of the Estate Duty Ordinance No. 8 of 1919—Death of Member of Undivided Hindu Family—Claim that property on which duty was paid was Joint Property—Business carried on with

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ancestral funds—Burden of proof—What amount of duty is payable in such a case—Money paid under a mistake of law.

Held: (1) *That the burden of proving that a business carried on by a member of an undivided Hindu Family is a joint business is on the person who claims it to be joint-property.*

(2) *That the joint-property of a Hindu Family is not property the managing member is "competent to dispose" within the meaning of the expression in the Estate Duty Ordinance.*

(3) *That the subject has a right of action against the Crown for a refund of duty overpaid in any case in which the Commissioner refuses to refund such duty.*

N. RAMASAMY CHETTIAR *vs.* THE ATTORNEY-GENERAL ... VII. 95

Estate Duty—Ordinance No. 8 of 1919 section 16—Meaning of the expression "estate duty" in section 16 (2).

Held: (1) *That in this case no estate duty was payable on the widow's death.*

(2) *That the expression "estate duty" does not anywhere in section* 16 (2) *of the Estate Duty Ordinance No.* 8 *of* 1919 *mean "settlement estate duty."*

MARTIN AND OTHERS *vs.* THE COMMISSIONER OF STAMPS ... VIII. 77

Estate Duty—Ordinance No. 8 of 1919—Section 8 (1)—Ordinance No. 7 of 1840 section 21 (4)—Partnership—No written agreement of partnership—Ordinance No. 22 of 1866—Evidence Ordinance sections 32 and 109.

Held: (1) *That section* 109 *of the Evidence Ordinance, when examined in the light of section* 21 *of Ordinance No.* 7 *of* 1840, *means that the presumption created thereby operates only when the existence of a partnership has been duly proved according to law i.e. by the production of the instrument of partnership.*

(2) *That the declaration* A4 *coupled with the evidence was sufficient to establish a gift falling under section* 8 (1) *of the Estate Duty Ordinance No.* 8 *of* 1919.

(3) *That the failure to keep separate accounts, to show the dealings of each of the partners, does not by itself negative an immediate gift.*

(4) *That to make an effective gift of a share of the business, no writing was necessary. A declaration coupled with a delivery of the subject-matter was sufficient.*

(5) *That a statement made by the deceased to one of his sons that the arrangement was that the former and his two sons should carry on business in equal shares, and that the business had been registered in pursuance of that arrangement, was admissible in evidence under section* 32 *of the Evidence Ordinance to establish a gift of one-third share to his sons by the deceased.*

RAJARATNAM *vs.* THE COMMISSIONER OF STAMPS ... ... XI. 15

Estate Duty Ordinance No. 8 of 1919—Section 32—Can the correctness of an assessment, which should have been questioned by way of appeal under section 22 (3), be questioned in proceedings under section 32.

Held: *That the correctness of an assessment which should have been questioned by way of appeal under section* 22 (3) *of the Estate Duty Ordinance No.* 8 *of* 1919, *cannot be questioned in proceedings under section* 32 *of the Ordinance.*

IBRAHIM SAIBU *vs.* THE COMMISSIONER OF STAMPS AND ESTATE DUTY XII. 125

Estate Duty Ordinance sections 34 and 73—Res judicata—**Does decision of Board of Review under the Income Tax Ordinance operate as** res judicata.

Held: (1) *That a person aggrieved by the decision of the Commissioner under section* 73 *of the Estate Duty Ordinance is entitled to appeal from that decision under section* 34 *of that Ordinance.*

(2) *That a decision of the Board of Review under the Income Tax Ordinance does not operate as* res judicata.

THE ATTORNEY-GENERAL *vs.* ATCHI ... ... XXVII. 40

Testamentary action—Sale of land by order of Court—Land gifted by deceased to third party subject to his own life interest—Does land pass to administrator—Jurisdiction of Court to order sale—Estate Duty Ordinance, No. 8 of 1919, sections 18, 19, 32 and 79.

The deceased gifted a land to the defendant reserving a life interest to himself. On his death, the land was sold in the

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testamentary action by order of Court and purchased by the plaintiff.

Held: *That on the death of the deceased no property in the land passed under Ordinance No.* 8 *of* 1919 *to the administrator and that the Court had no jurisdiction to order the sale of the land in the testamentary action.*

FRANCINA *et al vs.* GUNAWARDENE ... ... XXXVIII. 76

Estate Duty Ordinance Claim under section 73—Hindu undivided family—Money lending business assets in Ceylon—Effect of Ordinance No. 76 of 1938—Jurisdiction of District Court to order repayment of estate duty overpaid.

K. M. N. Natchiappa Chettiar died on 30th December, 1938 leaving the assets of a money lending business as his property in Ceylon. The executrix of his estate objected to the assessment of the Commissioner of Estate Duty, claiming total exemption from estate duty under section 73 of the Estate Duty Ordinance, on the ground that the deceased was a member of a Hindu undivided family, and that the property was the joint property of that family.

The District Judge entered a declaratory decree in favour of the executrix on the basis that the property belonged to a Hindu undivided family of which the deceased was a member, and that the exemption conferred by section 73 accordingly applied. But he held that he had no jurisdiction under the Ordinance to enter a decree against the Crown for the return of the estate duty recovered from the executrix by the Crown.

Held: (1) *That the evidence established that the assets in Ceylon were the joint property of a Hindu undivided family.*

(2) *That the business carried on jointly by the members of a Hindu undivided family is presumed to be joint family property and not an ordinary commercial partnership, unless the business is separately acquired and carried on by a single member of the family.*

(3) *That section* 73 *of the Estate Duty Ordinance cannot be said to be wholly inoperative on the ground that although the legislature intended to give recognition to the Law of South India, no such Hindu Law has in fact been introduced by express legislation as part of the Law of Ceylon.*

(4) *That section* 73 *was amended by Ordinance No.* 76 *of* 1938 *in order to resort to a fiction which would remove in the case of immovable property the difficulties which do not attach to the movable property belonging to a Hindu undivided family.*

(5) *That a District Court has jurisdiction under the Estate Duty Ordinance to enter a decree against the Crown for the return of Estate duty overpaid and also for payment of legal interest thereon under section* 192 *of the Civil Procedure Code.*

ATTORNEY-GENERAL. *vs.* VALLIAMMA ATCHI ... ... XLI. 87

Shares in private Company—Company engaged in business of highly speculative nature—Valuation under section 20 (1) of Estate Duty Ordinance Chapter 187—Amending Ordinance No. 8 of 1941 inoperative—Proper basis of valuation.

C. W. Makie, a life-director of a private incorporated company, engaged in the business of purchasing and selling rubber, died leaving as assets cummulative preference and management shares in the company.

The Company's business was admittedly of a highly speculative nature. The course of its business from 1922, the date of its inception, to 6th September, 1940, the death of Mackie, showed violent fluctuations in profits and losses. The articles of association of the company restricted the sale and transfer of shares in the company and provided for the compulsory acquisition of the shares of the members in certain circumstances. The future prospects of the rubber business on 6th September, 1940 were uncertain and conjectural, and as a form of capital investment the business was manifestly hazardous. Under these conditions it was contended that no goodwill attached to the business.

The Commissioner of Income Tax based the valuation of the deceased's shares on the profits basis and refused to accept the valuation of the deceased's executors, which was based on the "tangible assets" value. The learned District Judge accepted the Commissioner's valuation.

On appeal, the Supreme Court had to decide the principle of valuation which was most appropriate to this case under section 20 (1) of the Estate Duty Ordinance. It was common ground that the Amending Ordinance No. 8 of 1941, which laid down

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the mode of assessing the value of shares in a similar Company, did not apply as it came into operation after the death of the deceased.

Section 20 (1) of the Estate Duty Ordinance provides:—Subject to the provisions of subsection (2), the value of any property shall be estimated to be the price which, in the opinion of an Assessor, such property would fetch if sold in the open market at the time of the death of the deceased; and no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time:..... provided that.....

Held: (1) *That the measure of value under the section is the price which a willing vendor could reasonably expect to obtain and a willing purchaser could resonably expect to have to pay for the shares.*

(2) *That to determine the market value of the shares all the relevant factors as known at the date of the deceased's death to a prudent investor willing to pay for the shares should be taken into consideration.*

(3) *That in valuing shares in a highly speculative business, whose past history lacks evidence of any steady earning power and in which it is not possible to assess logically the future maintainable profits, the "balance sheet method" is the most appropriate method.*

MACKIE *vs.* THE ATTORNEY-GENERAL ... ... XLII. 33

Estate duty—Deed of partnership—Provision for partners to purchase share of deceased or retiring partner—Is value of such share exempt from duty under section 10 of Estate Duty Ordinance (Chap. 187)—Sections 6, 20, 21, 24, 25.

A deed of partnership between three solicitors provided *inter alia* that "in case of the death or retirement of any partner during the continuance of the partnership the share of such deceased or retiring partner in the Reserve Fund and in the capital assets and goodwill of the partnership and in the office furniture books and papers shall accrue to and be purchased by the surviving or continuing partners or partner in the proportions in which they are entitled to the net profits of the business."

The question at issue was whether by reason of this provision exemption from estate duty in respect of the property of a deceased partner could be claimed under section 10 of the Estate Duty Ordinance.

The Crown conceded (1) that in terms of the provision the 'property' passed to the surviving partners by reason of a *bona fide* business or commercial transaction between the parties founded on each side upon business or commercial considerations only". and (2) that the amount of duty paid by the executor of the deceased partner in respect of the share in the goodwill represented "full consideration in money or money's worth" within the meaning of section 10.

The Crown however contended that the benefit of section 10 was not available on the grounds that:—

(*a*) The consideration was not in fact paid to the deceased himself "for his own use and benefit," within the meaning of section 10.

(*b*) The admittedly *bona fide* transaction whereby the property passed on death to the surviving partners did not constitute in law a "purchase" from the deceased within the meaning of section 10, as at the time of the contract the vendor did not divest himself unconditionally and irrevocably of his title in the property.

Held: *That section* 10 *of the Estate Duty Ordinance applied and that the estate duty on the market value of the deceased's interest in the goodwill and other partnership assets was not recoverable under the section for the reasons:—*

(1) *That in the present case the consideration was "paid" to the deceased for his use and own benefit" just as effectively as if it had been received personally before he died.*

(2) *That the words "paid to the vendor.... for his own use and benefit" in section* 10 *are applicable to any transaction where "the vendor's purpose is to make himself master of a sum of money over which he and he alone has power of disposition."*

(3) *That the word "purchase" in section* 10 *is not restricted only to transactions which are* perfectae venditiones *from their very inception, but applies to contracts which are entered into subject to "suspensive conditions."*

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Per GRATIAEN, J.—(*a*) "Section 10 of the Estate Duty Ordinance is intended to grant immunity from duty to a person "who has bought something and paid for it at a price—consideration in money or money's worth, but who is not to get the benefit of his purchase until the death of his vendor."

(*b*) "The section (section 10) is specially designed to prevent the levying of a double duty first from the *bona fide* purchaser on the marked value of the property which has accrued to him and secondly from the executor on the full consideration which may be—or, as happened in this case, is in fact—available in its entirety to attract duty under section 6 (*a*)."

ATTORNEY-GENERAL OF CEYLON *vs.* GEOFFREY THOMAS HALE XLVI. 37

Estate Duty—Hindu undivided family—Property left by manager of such family—Exempt from Estate Duty—Sections 29, 34, 40, 43, 73—Amending Ordinance No. 76 of 1938 and No. 8 of 1941.

Where the managing member of a Hindu undivided family domiciled in S. India and carrying on business in Ceylon purports by his last will to dispose of the assets of the business on the footing that he was the absolute owner thereof, and the Commissioner of Estate Duty assessed the Estate on the footing that it belonged to the deceased in his individual capacity, and not to the undivided family, and the widow as executrix of the said last will contended that it belonged to the undivided family, and consequently not assessable, and where it was argued that as a matter of procedural law no new evidence could be led before the District Court in an appeal against the Commissioner's order.

Held: (1) *That as the evidence clearly established that the estate belonged to the joint family and that the deceased did not die possessed of it as separate estate, it is property falling within the provisions of section 73 of the Estate Duty Ordinance, and consequently no sum was payable in respect of it as Eastate Duty.*

(2) *That in an appeal to the District Court under section 34 of the Estate Duty Ordinance, the appeal is not limited to the question whether the Commissioner had misdirected himself on the evidence before him, and under section 40 of the Ordinance the appellant has the right to lead evidence when he comes before the District Court to contest the validity of an order of assessment approved by the Commissioner.*

ATTORNEY-GENERAL *vs.* VALLIYAMMAI ATCHI ... ... XLVII. 88

Estate duty—Father and deceased son, Nattucottai Chettiars, domiciled in Mad as—The only coparcenary members of Hindu undivided family—Does the "interest" of the deceased in the joint property "pass" to father?—Estate Duty Ordinance (Chap. 187), sections 7, 8 (1) (a), (b), 17 (6), 24—Joint Hindu family property—Nature of interest in—Hindu Law Mitakshara—Wills Ordinance (Chap. 49), section 7,—Partition Ordinance (Chap. 56), section 18—Do they affect devolution of joint Hindu family property?—Immovable property—Application of lex situs—Are the Assessees liable to payment of estate duty?

Father and son, who were Natucottai Chettiars and domiciled in India, were the only "co-parcenary members" of properties, which prior to and until the time of the death of the son in Madras in 1931, were the joint property of a Hindu undivided family. The son predeceased the father at a time when the Estate Duty Ordinance No. 8 of 1919 was in operation and on the father's death in 1938, the Crown claimed estate duty in respect of the estate of the son from the administrators of the father's estate.

According to the Crown, the property in respect of which estate duty has been claimed was the son's "share" in the Ceylon assets of the joint property of the Hindu undivided family of which he was a "co-parcener" at the time of his death and that "share" represented "some real and definite proprietary interest which could be the subject of a legal transfer of property" and that this proprietary interest which the deceased acquired by birth into his family was by operation of the *Mitakshara* Law, as it is applied in the Madras Presidency, "passed" on his death to the sole surviving "co-parcener" within the meaning of section 7 of the Estate Duty Ordinance.

The Crown alternatively contended that an undivided half share of the joint property must "deemed to have passed" on the son's death within the meaning of section 8 (1) (*a*) or section 8 (1) (*b*) of the Ordinance. In regard to section 8 (1) (*a*) the Crown submitted (*a*) that a "co-parcener" is at any point of time "competent

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to dispose" of a fractional share of the joint property *for value*, the appropriate fraction being ascertained by reference to the total number of "co-parceners" then alive; (*b*) that a "co-parcener" may at any time form a unilateral intention to separate himself from the undivided family and to communicate that decision to the other co-parceners, he would thereupon become vested with a "definite and certain share" of which he would be "competent to dispose" in any way he pleased.

In regard to section 8 (1) (*b*) the Crown argued that upon the death of the deceased there was a "cesser of the deceased's interest" in the joint property and that a benefit accrued or arose to the father by reason of that cesser.

Held: (1) *That section 7 of the Ordinance did not apply for the reason that during the life-time of the deceased son there had been neither a complete nor a partial division of title or separation of interests in the joint property of the undivided family of which he was at all material times a "co-parcenery member," and upon his death therefore, no effective change occurred in the title of possession of the joint property belonging to the undivided family. His father who survived him did not in consequence of that event receive any "property" which he did not have before.*

(2) *That section 8 (1) (a) did not apply—*

(*a*) *An alienee for value does not become vested immediately with a definite share* in specie *of any part of the joint property. No share is "carved out," so to speak, of the joint property until the Court has subsequently "worked out the equities" between the purchaser and the non-alienating "co-parceners" in appropriate proceedings.*

(*b*) *A "co-parcener" immediately becomes "competent to dispose of" the definite share which he acquires for the first time upon communicating his unilateral decision to separate himself in status and title from the undivided family. In the facts of the present case the son had until he died, formed no intention to separate himself from the family, still less had he communicated such an intention to his father, in the circumstances he enjoyed at best an option (which he could have exercised) of attaining competency to dispose of a fractional share of the property, and that option being personal died with him.*

The section does not apply unless the formation of an intention to separate and the communication of that intention to others have preceded *the effective "disposition" of property by a "co-parcener."*

(3) *That section 8 (1) (b) is inapplicable to the present case. To satisfy the section there must be (a) a "cesser" of the deceased or anyone else's interest in the property upon his death; (b) a benefit accruing or arising to someone by reason of that cesser; (c) that the interest must be capable of valuation according to the scheme presented by section 17 (b) of the Ordinance.*

(4) *That the deceased in the present case did not enjoy during his life-time an interest which "extended" either to the whole or to a fractional part of the income. He merely had a right to be maintained by the* karta *out of the common fund to an extent which was at the Karta's absolute discretion.*

(5) *That it is not possible to conceive of a basis of valuation, which in relation to such an "interest" would conform to the scheme prescribed by section 17 (b) of the Ordinance, and it cannot be said that upon a cesser of the so-called "interest" a benefit of any value accrued to the surviving "co-parcener" when the deceased's interest lapsed.*

(6) *That section 7 of Wills Ordinance and section 18 of the Partition Ordinance have no relevancy to the devolution of a "co-parcener's" interest in any part of the joint property of a Hindu undivided family.*

(7) *That the present assessees cannot be made accountable for any estate duty levied under section 8 (1) (a) as under section 24 of the Ordinance only the "executor" of a deceased estate is the person primarily accountable for duty levied on property which he was "competent to dispose." The assessees in this case are the administrators only of the deceased's father's estate and were not "executors" of the deceased.*

Obiter: *Section 8 (1) (a) is satisfied if a man can "dispose of" specific property only*

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for valuable consideration but not in any other way.

ATTORNEY-GENERAL OF CEYLON *vs.* RAMASWAMI AYENGAR AND ANOTHER ... ... XLIX. 98

Estate duty—Hindu joint family—Father and son, only members of—Father the sole surviving "co-parcener"—Did the joint family cease on father's death?—Females only survivors—Sole "co-parcener"—Juridical nature of—Estate Duty Ordinance (Chap. 187), section 73—Ordinance No. 76 of 1938, section 5.

Father and son were the only "co-parcenary members" of a Hindu undivided family, which owned considerable properties. On the son's death, the father became "the sole surviving co-parcener," and when he died he left no male issue in existence to continue the line, but only females—his step-mother, his widows, his unmarried daughter and his daughter-in-law. The joint family remained undivided up to the time of the father's death.

The Crown claimed estate duty in respect of the deceased's estate but the assessees, who are the administrators of the father's estate claimed exemption from duty under Section 73 of the Estate Duty Ordinance on the ground that they had established (*a*) that the father continued, until he die, to be a member of a Hindu undivided family, (*b*) that all the property in his possession at the time was the *joint property* of the undivided family.

The learned District Judge took the view that the death of the son operated to divest the family of the *joint property*, and that the property thereafter became vested (albeit provisionally) in the father as absolute owner.

Held: (1) *That a Hindu undivided family cannot be brought finally to an end while it is possible in nature and in law to add a male member to it and that a male line cannot be regarded as extinct until the death of the widow of the deceased renders the continuation of the line by adoption impossible.*

(2) *That so long as the co-parcenary unit (irrespective of the number of persons who comprise it at any point of time) continues to hold that property, there can be no change of ownership until the family, as a corporate entity, has itself finally ceased to exist.*

(3) *That so long as a single "co-parcener" refrains from exercising his power to place the property beyond the reach of the undivided family by alienation, the property continues to belong to the family.*

(4) *That although the father was "competent to dispose" of the joint property throughout the relevant period following his sons's death, he did not do so, and continued the undivided status of the family up to the time of his death, and the assessees were entitled to claim exemption under section* 73.

(5) *That the term "of an undivided family" in section* 73 *means "belonging to an undivided family" and that the phrase "joint property" merely emphasises the element of unity attaching to the entire undivided family, and did not import the meaning that there should be* at least two co-parceners *actually alive to hold the property in "community of interest and unity of possession."*

RAMASWAMY AYENGAR AND ANOTHER *vs.* THE ATTORNEY-GENERAL OF CEYLON ... ... XLIX. 108

Estate Duty Ordinance Section 40—Decree of District Court—Final judgment pronounced by Supreme Court on appeal—Is there a right of appeal to the Privy Council.

ATTORNEY-GENERAL *vs.* RAMASWAMY IYENGAR AND ANOTHER ... L. 46

ESTATE LABOUR (INDIAN) ORDINANCE

Notice to terminate contract of service. Computation of time—Can superintendent of estate be said to be in occupation of the rooms in the lines to enable him to maintain a charge of criminal trespass.

PERIANEN KANGANY *vs.* EBBELS XVI. 15

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

Held: (1) *That a notice, given on the* 2nd *of December,* 1939 *to an Indian labourer terminating his services on the* 2nd *of January,* 1940, *is a valid notice.*

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

FORBES *vs.* RENGASAMY ... XVII. 45

ESTOPPEL

Facts not existing at time of judgment—Matter which could not have been brought before Court—Does res judicata **apply.**

JANE NONA *vs.* MOHAMADU AND ANOTHER ... ... I. 158

Estoppel and Res Judicata—**Claim to property seized—Claim withdrawn without inquiry—Fresh action for value of property seized and sold—Extent to which withdrawal acts as estoppel.**

Held: (1) *That in order to effect an estoppel, it must appear on the record that the question of title to the property seized had been put in issue and decided.*

(2) *That the doctrine of* res judicata *would only apply to matters which the parties had an opportunity of bringing before the Court.*

RANA RIDI *vs.* LAPAYA ... I. 239

Person participating in and bidding at sale in execution is estopped from questioning its validity.

DIAS *vs.* SILVA ... ... XVI. 75

Evidence Ordinance section 115—Can person who bid at the sale of a land deny the title of the vendor.

Plaintiff brought hist action against the defendant claiming to be entitled to a land purchased by the defendant at a sale in execution of a writ against one Pabilis Appuhamy. The defendant pleaded that the plaintiff was estopped by his conduct from denying the vendor's title. It was proved that the plaintiff was present at the Fiscal's sale which took place on the land itself and that he bid twice at the sale.

Held: *That the plaintiff was by his conduct estopped from denying the defendant's vendor's title.*

TISSAHAMY KAPURALA *vs.* PERERA XXIV. 98

Land sold in execution—Purchase by defendants—Transfer of land to plaintiff by judgment-debtors prior to such sale—Presence of plaintiff at sale in execution—Absence of any protest—Is the plaintiff estopped from claiming title to the land.

Held: *The mere presence of a person at a sale and his remaining silent is not sufficient in law to create an estoppel against him.*

WIJESURIYA *vs.* SAMARASURIYA XXIX. 27

Where, at the trial, a party fails to raise issues on matters which he could have put in issue, he ought not to be allowed to rely on such matters in the Appeal Court. Such default creates an estoppel by election against such party.

PEMA AND OTHERS *vs.* JINALANKARA TISSA THERO ... ... XXXI. 43

Person taking part and concurring in irregular election—Can he later question validity of election.

THASSIM *vs.* WIJEKULASURIYA AND OTHERS ... ... XLVII. 5

EVICTION

Actio de Evictione—**Ingredients of.**

MOHAMMADO CASSIM *vs.* MAHMOOD LEBBE *et al* ... ... XLV. 38

EVIDENCE

Evidence of child—Manner of taking.

SUB-INSPECTOR OF POLICE, CHILAW *vs.* MARIA UMMA ... ... I. 1

Statements of child—Cannot be admitted in evidence unless made on oath or affirmation.

POLICE SERGEANT JUMAL *vs.* PERERA AND ANOTHER ... ... I. 208

Of child of eight years—Admissibility when evidence not given on oath.

REX *vs.* RAMASAMY ... ... XXI 83

Of character and repute of accused is admissible on indictment for being a habitual criminal.

ATTORNEY-GENERAL *vs.* ABDUL RAHIMAN ... ... I. 368

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Evidence discovered in the course of illegal arrest—How far admissible.

Held: *That the fact that an arrest may have been illegal does not make inadmissible evidence of an offence discovered at the time of or by reason of that arrest.*

BASTIANSZ (EXCISE INSPECTOR) *vs.* PUNCHIRALA ... ... I. 281

Two accused charged with theft—Statement made by the one against the other—Evidence of accomplice—Nature of corroboration needed.

Held: *That the evidence needed to corroborate an accomplice must be the evidence of some person, not the accomplice in some way implicating the accused and thus corroborating the accomplice.*

IYER (POLICE SERGEANT) *vs.* HENDRICK APPU AND ANOTHER ... I. 375

Evidence of the intention of the makers of a document given by persons who made it or read it is not admissible.

GODAMUNE *vs.* THE KING ... II. 77

Production of plans unauthenticated by Surveyor General. Conviction set aside.

MARAMBE *vs.* KIRIAPPU ... II. 121

Instrument insufficiently stamped admitted in evidence—Order of Judge admitting document in evidence cannot be reviewed in appeal.

ENDORIS *vs.* DHARMAWICKRAMA II. 256

Witness within hearing of Court—Can he be debarred from giving evidence.

VAN ROOYEN (SUB-INSPECTOR OF POLICE) *vs.* PERERA ... ... II. 282

Letter written by defendant to plaintiff—Admission in evidence—Writer not called to give evidence.

Held: (1) *That where the plaintiff admits having received a certain letter from the defendant the letter can be properly admitted in evidence even though the writer is not called to give evidence.*

(2) *That the failure to call the writer does not affect the admissibility of the letter but only its evidentiary value as the facts stated in the letter cannot be tested by cross-examination.*

COULTER *vs.* CRICHTON ... IV. 1

Evidence—Taking of after close of trial—When such evidence should not be taken—

SUB-INSPECTOR VANDENDRIESEN *vs.* HOWWA UMMA ... ... IX. 17

Circumstantial evidence—Charge of aiding and abetting—Sufficiency of evidence to justify conviction—Absence of explanation by accused.

Held: *That the evidence for the prosecution was sufficiently strong to amount to proof of guilt of the accused, in the absence of an explanation from him.*

INSPECTOR ARENDSTZ *vs.* WILFRED PIERIS ... ... X. 121

Circumstances in which party will be allowed to lead parol evidence to prove existence of partnership.

BALA SUBRAMANIAM *vs.* VALIAPPA CHETTIAR ... ... XI. 87

ONUS OF PROOF

Under § 62 (3) of the Motor Car Ordinance No. 20 of 1927.

WIJESINGHE DHANAPALA ... XII. 1

Action to enforce debt due under foreign judgment—How is the judgment to be proved.

MOHIDEEN MARIKAR AND THREE OTHERS *vs.* KOWLA UMMA ... XII. 44

Admissibility in evidence of a document not stamped in accordance with Stamp Ordinance.

DON CORNELIS APPUHAMY *vs.* KIRIBANDA AND THREE OTHERS ... XII. 166

Evidence—Credit sale of arrack—Only evidence against accused an entry in a book kept for recording the transactions relating to arrack in the tavern—Expert evidence to prove that entry in accused's handwriting not called.

Held: *That the conviction was not justified in the absence of some independent corroborative evidence, especially as the witnesses were not qualified to express the*

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opinion they gave as to the writer of the entry in question.

TENNEKOON *vs.* PONNIAH ... XIII. 21

Arrest by private person—Evidence discovered by reason of arrest—Admissible.

DE SILVA *vs.* LIYORIS SINGHO XVI. 52

Circumstantial evidence—Duty of trial Judge to explain to the Jury the principle to be followed by them in dealing with such evidence.

REX *vs.* DE SILVA ... ... XVII. 61

Sole direct evidence against accused that of a girl who had made inconsistent statements at different times on how the deceased came by his injuries—Evidence by accused on his own behalf.

Where the sole direct evidence against the accused as to how the deceased came by his injuries was unsatisfactory and where the accused in his evidence explained the injuries on the deceased.

Held: *That the accused's explanation must be preferred to the unsatisfactory testimony of the little girl.*

REX *vs.* EDWIN *alias* VIDANE XVIII. 21

Evidence of character of accused given after conviction—Should such evidence never be received except on oath.

Held: *That there is nothing in the law which prohibits a Court from taking, before passing sentence, the unsworn statement of a witness regarding the character of an accused who has been convicted.*

REX *vs.* GOVINDA PULLE ... XVIII. 36

Evidence of threat—A witness' evidence of a threat uttered by the accused in the course of a trial is relevant and admissible.

REX *vs.* KADIRGAMAN *et al* ... XVIII. 41

In a prosecution for rape the first statement that the appellant ravished her made by the prosecutrix to her father under threat of bodily injury cannot be admitted in evidence.

REX *vs.* WADUGE ARTHUR FERNANDO ... ... XIX. 21

Evidence of co-accused—Admissibility of against the other accused—Precaution to be observed in directing the Jury on such evidence — Charge of rape—Extent to which evidence of prosecutrix should be corroborated.

Held: (1) *That where sworn evidence is given by a co-accused, the proper direction to give to the Jury is that they should be very careful in acting upon such evidence, in view of the temptation which always assails a prisoner to exculpate himself by inculpating another, yet, subject to such warning, they must weigh and consider evidence so given by one prisoner against another.*

(2) *That the confirmation of the evidence of a prosecutrix in a charge of rape must be confirmation as to a material circumstance of the crime and of the identity of the accused in relation thereto.*

REX *vs.* ANA SHERIFF ... XIX. 87

Evidence—Prosecution witness saying he knew accused when he was in jail with him—Judge not influenced by statement—Is conviction good.

Held: *That the statement of a prosecution witness that he knew the accused when they were in jail together, is not fatal to a conviction, if there is evidence to convict the accused, and there is nothing to indicate that the magistrate was influenced by the statement that the accused had previously been in jail.*

KING *vs.* PERERA ... ... XX. 138

Affidavit made by an accused person cannot be admitted in evidence against him without proof by either an admission of his signature by the accused or by the evidence of the Justice of the Peace before whom it was sworn.

REX *vs.* IYASAMY WIJEYERATNAM XXII. 1

When may evidence of injuries to persons other than those in respect of whom a charge is made be put in evidence.

REX *vs.* IYASAMY WIJEYERATNAM XXII. 1

Evidence—Fresh evidence called by Judge after close of prosecution and defence—Does it vitiate conviction.

REX *vs.* AIYADURAI AND TWO OTHERS ... ... XXIII. 61

Magistrate's record how proved.

A magistrate's record to the effect that the accused wished certain witnesses to be

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summoned to prove an *alibi* cannot, in a case in which it is not clear whether the Magistrate recorded the words of the accused or merely his own opinion as to the nature of the testimony the accused intended to call, be proved without calling the Magistrate who recorded the statement, or someone who heard what the accused said.

REX *vs.* M. M. DINGIRI BANDA XXIII. 79

Evidence—Standard of proof of all general or special exceptions in the Penal Code, including insanity, is the same.

REX *vs.* JAMES CHANDRASEKERA XXV. 1

A Court is bound to take judicial notice of the date on which an Ordinance has been brought into operation.

JAYAKODY *vs.* PAUL SILVA AND ANOTHER ... ... XXV. 45

There is no provision for calling evidence in rebuttal in the Magistrate's Court.

WELIPENNA POLICE *vs.* PINESSA XXVI. 72

So much of an accused's statement to a Police Officer as does not amount to a confession is admissible in evidence.

REX *vs.* VASU ... ... XXVII. 16

A conviction based on the uncorroborated testimony of the prosecutrix in a case of rape is valid.

REX *vs.* THEMIS SINGHO ... XXVII. 76

Document admitted at trial without objection. Can objection be taken later in appeal.

Title by prescription—Possession through agent—Acknowledgment in writing of opponent's title by agent—Absence of evidence of authority to grant such acknowledgment—Does it affect acquisition of prescriptive title by principal.

Held: (1) *That once a document is admitted in evidence without any objection being raised by the opposite party, no objection can be taken to its reception in the Appeal Court.*

(2) *That an admission made by an agent of a landowner with regard to the latter's title does not bind such landowner in the absence of evidence that the agent had special or general authority to made such admission.*

HASSAIN *vs.* THE OPALAGALLA TEA AND RUBBER ESTATES, LTD. ... XXVII. 77

The consent of counsel for the accused to the admission of evidence which is not admissible does not rectify the wrong admission of evidence.

REX *vs.* AMARAKOON ... XXVIII. 4

Character of accused. Cross-examination as to credit. A mere suspicion alleged to have been entertained by his previous employer on an earlier occasion cannot be a legitimate topic for cross-examination of an accused person as to credit.

STIRLAND *vs.* DIRECTOR OF PUBLIC PROSECUTIONS ... ... XXVIII. 17

Circumstantial evidence—Matters to be considered in deciding whether it excludes possibility of hypothesis consistent with innocence.

THE KING *vs.* APPUHAMY ... XXX. 10

Evidence—Burden of proof—Transfer of land by minor—Action rei vindicatio **and for** restitutio *in integrum.*

SIMAN NAIDE *vs.* JANE NONA XXX. 84

Evidence necessary to prove that State Councillor sat and voted in State Council while disqualified.

DE ZOYSA *vs.* WIJESINGHE XXXI. 5

Onus of proof in transaction falling within § 6 of Money Lending Ordinance.

EDWARD *vs.* DE SILVA ... XXXI. 49

Reference by Crown, in opening case to the Jury, to evidence which is not subsequently led.

REX *vs.* APPUHAMY ... XXXI. 60

Evidence recorded before charging accused —When can such evidence be read over to witness at trial.

DHANAPALA *vs.* SABAPATHY PILLAI ... ... XXXII. 63

Admissibility of unstamped receipt.

KURUKKAL *vs.* SARMA ... XXXII. 85

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Evidence of system.

DIAS *vs.* WIJETUNGE ... XXXII. 86

Evidence—Register of lands belonging to a charitable trust kept at Kachcheri—Is a certified copy of such register admissible—Absence of proof of authority to keep such register or of purpose for which it was made or of the nature of sources of information entered therein—Weight to be attached to such document—Hearsay.

Held: (1) *That a "register of gifted lands" belonging to a charitable Trust kept at a Kachcheri is not a public document and a certified copy thereof is inadmissible in evidence.*

(2) *That even if it is admissible, in the absence of proof of the purpose for which or on whose authority it was made, or of the nature of the knowledge which the persons who supplied the details as regards title to the lands therein had, no weight can be attached to such evidence.*

CHELLIAH AND ANOTHER *vs.* SAIVA PARIPALANA SABHAI ... XXXIII. 9

Admittance of documents in appeal.

The appellant sought to produce in appeal the records of two Village Tribunal cases, relevant to the subject matter of the appeal and discovered after the appeal had been filed.

Held: *That the documents may be admitted.*

ENDRIS DE SILVA AND ANOTHER *vs.* ARNOLIS ... ... XXXIII. 39

Evidence—Conspiring to smuggle paddy on forged permit—Charge of fraudulently or dishonestly using as genuine a forged permit—Only evidence is that one of the conspirators pointed out accused as the person who gave the permit—Denial by such conspirator at trial that he pointed out—Is such evidence admissible—Evidence Ordinance, section 10.

The appellant was charged (as first accused) with having fraudulently or dishonestly used as genuine a document forged for the purpose of cheating, namely the document P 2 which purported to be a permit purporting to have been issued by the Deputy Food Controller of Vavuniya in favour of the second accused authorising him to transport paddy.

It was established by evidence (*a*) that the document was a forged one, (*b*) that the appellant knew that it was a forged document. As regard the fact that the appellant used P 2 either fraudulently or dishonestly as genuine the only evidence was that of witnesses who stated that soon after the police brought to the Deputy Food Controller's Office a man called Ponnambalam found to be transporting paddy on permit P2, Ponnambalam, when questioned as to who gave him permit P 2, pointed out the appellant, who was a clerk in the Office.

At the trial this evidence was objected to on the ground that this evidence was not admissible until after Ponnambalam was called. When subsequently Ponnambalam was called he denied having pointed out the appellant on that occasion.

The learned District Judge accepted the evidence of the witnesses that Ponnambalam pointed out the appellant and convicted the accused who appealed.

Held: (1) *That the evidence objected to was admissible under section* 10 *of the Evidence Ordinance as there was sufficient evidence to establish a conspiracy between the appellant, the second accused and Ponnambalam.*

THE KING *vs.* SABAPATHY POOPALASINGHAM VAVUNIYAN ... XXXIII. 65

Statement by one accused to Magistrate implicating other accused—Admissibility.

REX *vs.* PUNCHI BANDA AND TWO OTHERS ... ... XXXIII. 110

Evidence—True copy of a copy of original power of Attorney not issued by Registrar General of Ceylon but by a registering officer under the Indian Registration Act 1908—Is it admissible without evidence of due execution.

SREENIVASARAGHAVA IYENGAR *vs.* JAINAMBEEBEE AMMAL AND OTHERS XXXIV. 1

Evidence—Admissibility of first complaint of offence.

REX *vs.* RAMU KARTHIGESU *Alias* CHELLIAH ... ... XXXIV. 10

Burden of proof—Maintenance of child—Husband admitting marriage but denying paternity.

UKKUMENIKA *vs.* VIDANE XXXIV. 21

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Evidence—Statement alleged to have been made by person not called by Crown elicited in cross-examination from procecution witness—Denial of statement by such person when called by defence—Effect of such denial.

REX *vs.* CASSIM ... XXXIV. 77

Evidence—Charge of theft and retaining stolen property—Court should not act on the evidence of police witnesses who merely state that the explanation given by the accused was in their opinion unsatisfactory without confronting the accused with the statement recorded by them, if inconsistent with the evidence given by him in Court.

SOLOMON PETER DE SILVA *vs.* PERERA ... ... XXXIV. 105

Admissibility of parol evidence to establish trust.

VALLIYAMMAI ATCHI *vs.* ABDUL MAJEED ... ... XXXV. 1

Evidence—Cross-examination of accused on statements made to Police and recorded in Information Book—Denial by accused—Failure to prove such statement—Does it vitiate conviction—Evidence Ordinance Section 155 (*c*)—Evidence in rebuttal in Magistrate's Court.

Where an accused is asked leading questions in cross-examination, based on alleged statements made by the accused and recorded in the Information Book, without proving such statements.

Held: *That where no prejudice is caused to the accused, the omission to prove such statement does not vitiate a conviction.*

SUB-INSPECTOR OF POLICE, KADUGANNAWA *vs.* D. B. WIJERATNE XXXV. 18

Evidence—Witness summoned to give evidence—Appearance in Court on several dates of trial—Postponement of trial—Absence in India on last trial date. Should Court presume under section 114 (g) of the Evidence Ordinance that his evidence would, if produced, be unfavourable to the party who summoned him.

Criminal Procedure—Prosecuting officer giving evidence—Does it vitiate a conviction.

Held: (1) *That, where it appeared that a witness summoned to give evidence was present in Court on several postponed dates of trial, but was absent on the date on which the trial took place, owing to his absence from the Island, the presumption under section* 114 (*g*) *of the Evidence Ordinance, that his evidence would, if produced, be unfavourable to the party who summoned him, does not arise.*

(2) *That the mere fact, that the officer who conducts a prosecution gives evidence in the course of it, is not fatal to a conviction.*

SANTIYAPILLAI *vs.* S. SITTAMPALAM, PRICE CONTROL INSPECTOR XXXVI. 49

Onus of proof as to whether bet is a taxable bet.

LANTIS *vs.* MUSAFER ... XXXVII. 4

Evidence as to survey plans.

AMARAWARDENA *vs.* MINODARAHAMY AND ANOTHER ... XXXVII. 5

Documents—Alleged forgery—Oral evidence—Decision by comparing signatures without expert assistance.

In deciding the genuineness of a document, which one party claimed was forged, and the other party supported by oral evidence, the Judge compared the signatures and without the aid of expert evidence held that it was a forgery.

Held: *That such a procedure should not be followed, as it is unsafe and inconclusive.*

SAIBO *vs.* AHAMADU ... XXXVII. 51

Evidence of expert—First occasion on which expert testifies in a Court—Rejection of evidence.

Held: *That the evidence of the expert should not be rejected on the ground that he had not given evidence in Court on any previous occasion.*

STORK (I. P.) *vs.* PERERA XXXVIII. 80

Evidence—Same facts capable of inference in favour of accused and also of inference against him.

Held: *That where the same facts are capable of an inference in favour of the accused and also of an inference against him, the inference consistent with his innocence should be preferred.*

ALIM *vs.* WIJESINGHE (S. I. POLICE, BATTICALOA) ... XXXVIII. 95

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Control of Textiles—Charge of possessing textiles in excess of quantity prescribed by law—What the prosecution has to prove.

Held: *That a person, charged with having in his possession a quantity of textiles in excess of the quantity prescribed by law, cannot be convicted unless the prosecution proves that he had intentional control over such goods.*

SCHARENGUIVEL (INSPECTOR OF POLICE) *vs.* DE ALWIS ... XXXIX. 16

Witness of tender years—Affirmation—Trial judge satisfied regarding competency—Value of such evidence.

REX *vs.* DINGO *et al* ... XXXIX. 52

What evidence is necessary to prove terms of road service licence.

JAYASEKERA AND OTHERS *vs.* COOPER ... ... XXXIX. 104

Relevancy of evidence of good character of accused.

THE KING *vs.* HAPITIGE DON MARSHALL APPUHAMY ... ... XLI. 49

Evidence of bad character given by accused—Failure of judge to warn jury not to take that evidence into account.

REX *vs.* RAIGAMA BADALGE DINESHAMY ... ... XLI. 72

Trial Judge—Failure to give due consideration to circumstances relevant to issues and to examine significance of documents—Weight to be attached to findings of fact by such Judge.

Where the trial judge, in weighing the evidence, has not given due consideration to some of the circumstances relevant to the issue which he was called upon to try, and failed to examine the significance of important documents as they stand in relation to each other.

Held: *That the conclusions arrived at by the Judge are not entitled to as much weight as normally attaches to findings of fact of a Court of trial.*

The case was sent back for a fresh trial.

SILVA *vs.* KUHAFA ... ... XLI. 95

Illegal entry into premises by Police—Admissibility of evidence gathered in the course of such entry.

Held: *That evidence gathered in the course of an illegal entry on property is admissible, if relevant.*

PETER SINGHO *vs.* INSPECTOR OF POLICE, VEYANGODA ... ... XLII. 15

Oral evidence of statements recorded by Police Officer—Admissibility.

JOHN PERERA *vs.* JOHNSON ... XLII. 97

Admissibility of evidence obtained through a search without a search warrant.

MURIN PERERA *vs.* WIJESINGHE XLIII. 8

Excise notification—Should it be proved—Excise Ordinance, section 58.

Held: *That there is no obligation for the prosecution to prove by evidence a notification made under the Excise Ordinance.*

EXCISE INSPECTOR OF WELIGAMA *vs.* JAMIS SILVA ... ... XLIII. 59

Burden of proof—Civil action—Defendant not calling any evidence in rebuttal when called upon—Assessment of oral evidence—Onus on the defendant to lead evidence in rebuttal.

The plaintiff sued the defendant for the recovery of Rs. 2,500 alleged to have been advanced on a paddy transaction which was illegal. The defence was a complete denial of the transaction. The plaintiff gave evidence and also called one S to support his case. The defendant's proctor when called upon for the defence stated that he was not calling any evidence. The learned District Judge disbelieved the plaintiff and his witness and accordingly dismissed his action.

Held: *That where a defence was called upon and no evidence was at all forthcoming a verdict that the plaintiff's evidence is palpably false cannot be supported.*

Per PULLE, J.— "With great respect, the learned Judge's approach to the question whether the three telegraphic money orders had been sent is open to the criticism that, before drawing an adverse inference from the fact that the money order receipts had not been produced, he should have considered whether the reason given by the plaintiff for his failure to produce them was itself false. The reason given by the plaintiff for the non-production of the corroborative documentary evidence was

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inexcusable but it cannot be a fair appraisement of the oral evidence of the advance of Rs. 1,700 to characterize it as false from the bare circumstance that the plaintiff failed to produce the receipts.

KANDAPPA *vs.* SIVAGNANAM XLIII. 79

Admissibility of evidence obtained through a search without a search warrant.

KARALINA *vs.* EXCISE INSPECTOR MATARA ... ... XLIII. 81

Evidence—Charge of selling arrack illicitly—Excise Inspector raiding dwelling house illegally without search warrant—Is evidence obtained in the course of such raid admissible—Excise Ordinance, section 36—Evidence Ordinance and "Public Policy" Evidence of decoy.

Held: (1) *That evidence obtained in the course of a raid illegally carried out by an Excise Inspector is evidence admissible under our Evidence Ordinance and upon which a conviction could be based.*

(2) *That the cases of* Murin Perera vs. Wijeysinghe (1950) 51 *N. L. R.* 377, Andiris vs. Wanasinghe (1950) 52 N. L. R. 83 and David Appuhamy vs. Weerasooriya (1950) 52 *N. L. R.* 87 *have been wrongly decided.*

(3) *That our Evidence Ordinance contains the whole law of evidence except where the Legislature in other enactments has provided otherwise.*

(4) *That the Courts cannot import into the Evidence Ordinance new principles based on public policy.*

Per DIAS, S. P. J.—(*a*) I agree that it would be immoral and undesirable that *agents provacateur* and others should tempt or abet persons to commit offences; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict.

(*b*) I cannot part with this record without condemning in the strongest terms the practice which appears to be prevalent of Excise Officers in making raids and searches without obtaining a search warrant or complying with the provisions of section 36 of the Excise Ordinance. I approve and adopt the language of my brother Gratiaen in *Karalina vs. Excise Inspector, Matara,* (1950) 52 N. L. R. 89 and trust that cases of this kind in the future will be the exception and not the rule.

RAJAPAKSE (EXCISE INSPECTOR) *vs.* FERNANDO ... ... XLV. 6

Evidence obtained in the course of illegal search and arrest—Admissibility of—

PONNUDURAI *vs.* JALALDEEN XLV. 28

Stolen property—House-breaking by night—Theft—Stolen property discovered at a place of concealment pointed out by accused—Place of concealment not within sole control of accused—Circumstantial Evidence—Evidence Ordinance, section 114 (a).

The accused, along with two others was charged with (*a*) having committed house-breaking by night on 31st December, 1949, by entering into a Magazine belonging to the Morrison Knudson International Corporation at Inginiyagala in order to commit theft; (*b*) having, in the course of the same transaction, committed theft of 10 cases of detonators and 50 rolls of fuse valued at Rs. 13,170. The accused were found guilty of both charges.

The case against the accused was that, within a few hours of the theft, he was observed in the company of the other two accused (who had been proved to have participated in the burglary) at a public place about a mile away from the scene of the offence. There was also the testimony of a Police Officer that, after the accused had been arrested on suspicion, he had pointed out a spot 100 miles away from the scene of the offence, and that on the vicinity being searched, a large quantity of stolen property was discovered there. It was also in evidence that the accused had pointed out to another Police Officer (on another occasion) a spot in the jungle at which stolen property was discovered, in close proximity to the scene of the offence.

Held: (1) *That these facts alone did not establish beyond reasonable doubt that the accused had himself participated in the crimes.*

(2) *That the case against the accused would only have been established*

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if this circumstantial evidence was sufficient to justify the inference that he had himself been in possession of some of the stolen property before it was concealed in the places pointed out by him to the Police.

V. B. SUMENASENA *et al vs.* THE KING ... ... XLVI. 44

Evidence—Charge of murder—Statement amounting to confession—General principle regarding admissibility of—Evidence Ordinance, section 25—Court of Criminal Appeal Ordinance, section 5 (1) proviso.

Held: (1) *That the statement "I took the knife which I had in my waist and stabbed him (the deceased) with it" alleged to have been made by the appellant accused to a Police Officer in the course of preliminary investigation under Chapter* 12 *of the Criminal Procedure Code is inadmissible because it purports to admit facts which are capable of being construed as establishing a* prima facie *case against the accused.*

(2) *That the proviso to section* 5 (1) *of the Court of Criminal Appeal Ordinance cannot apply to a case where the inadmissible evidence was of an extremely damaging character and virtually destroyed the defences relied on by an accused.*

Per GRATIAEN, J.—"A confession made to a Police Officer is inadmissible as proof against the person making it *whether as substantive evidence or in order to show that he has contradicted himself.*"

"If in the course of making a "confession" to a Police Officer, an accused person makes certain additional statements which do not fall within the ambit of section 25, the reception of evidence of those latter statements would not be objectionable provided (*a*) that they are otherwise relevant and admissible and (*b*) that, in the context in which the statements relied on were made, they are demonstrably separable from those parts which were 'confessional' in character."

REX *vs.* SEYADU ... ... XLVI. 46

Evidence admitted at trial and in the Court of appeal—Objection cannot be taken in Privy Council.

SATHAR *vs.* BOGSTRA *et al* ... XLVII. 53

Decoy going back on evidence—Availability of other evidence—Can conviction be sustained.

KONSTZ *vs.* SUB-INSPECTOR THARMARAJAH ... ... XLVII. 58

Evidence in rebuttal led by Crown after close of prosecution case—Regularity.

REX *vs.* THURAISAMY ... XLVII. 105

Order by Minister conferring power on Assistant Registrar of Co-operative Societies—Gazette publication—Judicial notice—Evidence Ordinance, section 57 (1) Co-operative Soceties Ordinance, section 57.

Section 17 of the Co-operative Societies Ordinance empowers only the Registrar to cause the accounts of a registered society to be audited by some person authorised by him. Section 2 as amended by a proclamation issued by the Governor-General dated 4-2-48, provided (*a*) for the appointment of a Deputy or Assistant Registrars as may be necessary; (*b*) for the conferring by the Minister by general or special order published in the Government Gazette on any Deputy or Assistant Registrar all or any of the powers of the Registrar.

Held: *That such an order by the Minister published in the Government Gazette conferrring intended functions on the Deputy or Assistant Registrar must be duly proved and a Court cannot take judicial notice of it.*

ROMANIS SINGHO *vs.* ABEYSINGHE XLVIII. 97

Duty of Crown to read in evidence the entirety of accused's deposition recorded by committing Magistrate.

THE QUEEN *vs.* SATHASIVAM XLVIII. 111

Ingredient of offence involving negative averment—Burden of proof—Facts which in their nature are such, as to be within the knowledge of the accused as well as of others—Presumption of innocence—Burden cast on prosecutor of proving every ingredient of offence—Regulations framed under the Quarantine and Prevention of Diseases Ordinance, Regulation 46; Evidence Ordinance, sections 105, 106, 107—114.

A charge was preferred against the accused under the Quarantine and Prevention of Diseses Ordinance in that he did, "being permanently or temporarily resident in a building in which was a person affected

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by a contagious disease, to wit, small-pox, fail to inform the proper authority thereof forthwith in contravention of Regulation 46 of the Regulations made under the Ordinance." There was no evidence placed before the Magistrate to show that the accused had failed to inform the proper authority of the presence of the person so afflicted with the disease. The accused was acquitted, and the complainant filed an appeal with the sanction of the Attorney-General.

It was contended on behalf of the complainant appellant that whether notice was given or not, was a fact especially within the knowledge of the accused, and that under section 106 of the Evidence Ordinance, the burden lay on him of establishing such fact.

Held: (1) *That section* 106 *of the Evidence Ordinance contemplates facts which in their nature are such, as to be within the knowledge of the accused and of nobody else. The section has no application to cases where the fact in question, having regard to its nature, is such, as to be capable of being known not only by the accused, but also by others, if they happen to be present when it took place.*

(2) *That there is no burden cast on the accused to prove that he gave information, till some* "prima facie" *evidence, at least, has been given of the failure on his part to do so.*

(3) *That in the present case the ingredient (failure to give information to the proper authority) though a negative averment, is an essential element of the offence, and must be established by the prosecution.*

Per NAGALINGAM, A. C. J.—"That the burden of proving a fact especially within the knowledge of a person is thrown upon him by section 106 of the Evidence Ordinance does not mean that in a criminal case the principle that the burden of proving every essential ingredient necessary to constitute the offence lies at every stage of the case on the prosecution, is in any way modified or whittled down or that the golden thread of the presumption of innocence of the accused thereby gets snapped and that the prosecutor could say that merely because a particular fact is within the knowledge of the accused person he need not lead any evidence of such fact though it may constitute an essential element of the offence."

SANITARY INSPECTOR, MIRIGAMA *vs.* THANGAMANI NADAR ... XLIX. 81

Private car used for hire—Prosecution case consisting of evidence negativing its case, as well as of evidence which was inadmissible—Circumstances in which the prosecution could be permitted to treat its own witness as adverse.

Where, in a charge of using a private car for hire, the case for the prosecution consisted of the evidence of Police Officers of statements made by persons who were in the vehicle on different occasions, and who were not called as witnesses, as well as of the owner of the vehicle and a Village Headman, both of whom supported the defence.

Held: (1) *That the evidence of the Police Officers was inadmissible as hearsay, and should be excluded.*

(2) *That in the result, the admissible evidence placed before the Magistrate, negatived the case which the prosecution sought to establish.*

Per NAGALINGAM, A. C. J.: "Where the prosecution, knowing full well that a witness will not support its case, yet decides to call such witness, the prosecution cannot be permitted to treat such witness as an adverse witness and to ask a Court to hold that that witness is not a reliable witness and that his evidence should be discounted. If, on the other hand, the prosecutor had no reason to believe that the witness would not support his case and in the firm belief that such witness will establish, sustain or strengthen his case, calls such witness, but to his horror discovers as the examination of the witness proceeds that the witness's attitude has undergone a transformation, resulting in evidence of an unexpected character undermining his case being given by such witness, then the prosecutor will be justified in applying to the Court, on satisfying the Court of the changed circumstances, to treat such witness as an adverse witness and if need be to discredit the evidence of such witness.

KANAPATHIPILAI *vs.* W. P. FERNANDO, S. I. POLICE ... ... L. 9

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Recording of evidence in absence of accused —Evidence so recorded read over to witness at trial—Admissibility of such evidence.

FERNANDO *vs.* S. P. POLICE, WELIKADA ... ... L. 10

Spouses—Charge of criminal intimidation —Competency of wife as a witness against husband—Applicability of English Law— Evidence Ordinance No. 14 of 1895, sections 100, 118 and 120 (4).

Held: (1) *That, where a wife charges the husband with criminal intimidation under section* 486 *of the Penal Code, she is a competent witness for the prosecution under section* 120 (4) *of the Evidence Ordinance.*

(4) *That a charge of criminal intimidation would come under sub-section* (4) *of section* 120 *of the Evidence Ordinance and is covered by the words "attempt to cause any bodily injury or violence."*

Per K. D. DE SILVA, J.—"If sub-section (4) of section 120 of the Evidence Ordinance is not wide enough to include a charge of intimidation the provisions of section 100 of the Ordinance can be invoked to bring in the English Law of Evidence to operate on this point."

SEETHEVI *vs.* S. ARUMUGAM AND OTHERS ... ... L. 21

EVIDENCE ORDINANCE

The Evidence Ordinance contains the whole law of Evidence except where the Legislature in other Enactments has provided otherwise.

RAJAPAKSE *vs.* FERNANDO XLV. 6

§ 3

Meaning of "prove"—Burden of proof where plea of insanity is taken.

THE KING *vs.* ABRAHAM APPUHAMY *alias* ASSON ... ... XV. 37

Nature of the burden on the accused of proving the statutory exceptions.

REX *vs.* JOHANIS ... XXIV. 137

Onus of proof of any general or special exception in the Penal Code.

REX *vs.* JAMES CHANDRASEKERA XXV. 1

§ 4—"Shall presume"

IYER *vs.* KARUNARATNE ... XXI. 123

§ 5

In what circumstances may evidence of injuries inflicted on persons other than the one mentioned in the charge be admitted.

REX *vs.* HEWA WALGAMAGE MENDIAS ... ... XIX. 98

§ 6

Statements made by witnesses in anticipation of corroboration—Denial of such statements by accomplice witness—Is such evidence inadmissible? Hearsay—Sections 6, 8, 10, of the Evidence Ordinance—Res Gestae—Facts tending to show preparation—Things said or done by a conspirator in reference to a common design—Admissible even without the corroborative evidence of the conspirator who uttered them.

Where three persons were charged with forgery of currency notes and two other connected offences of abetment of such forgery and their utterance and evidence was given by two witnesses Ramanathan and Canagaratnam of statements made to them relating to the transaction by one Dantanarayana a convicted accomplice of the accused who was made a witness against them and where such accomplice witness when called later denied making such statements as R. and C.

Held: *That the statements made to Ramanathan and Canagaratnam were admissible in evidence under* § 8 *of the Evidence Ordinance and they were also admissible under* § 10 *as being things said or done by a conspirator in reference to the common design.*

KING *vs.* ATTANAYAKE AND TWO OTHERS ... ... I. 128

Statement of injured person as to how he came by his injuries—When admissible as part of res gestae.

REX *vs.* HERAS HAMY AND TWO OTHERS ... ... XXXIII. 91

§ 8

Statement made by accused to a Police Officer to the effect that he had been assaulted by someone cannot be admitted under section 8.

REX *vs.* PITCHORIS APPU ... XXIII. 32

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§ 10—Conspiring to smuggle paddy on forged permit—Charge of fraudulently or dishonestly using as genuine a forged permit—Only evidence is that one of the conspirators pointed out accused as the person who gave the permit—Denial by such conspirator at trial that he pointed out—Is such evidence admissible.

THE KING *vs.* SABAPATHY POOPALASINGHAM VAVUNIYAN ... XXXIII. 65

§ 11—Presence of gonorrhoea in the accused when relevant in a case of attempted rape.

REX *vs.* BURKE ... ... XXII. 7

Admissibility of statement by accused to Police Officer that he had been assaulted by someone.

REX *vs.* PITCHORIS APPU ... XXIII. 32

Speech reproduced from a recording machine—Is document containing speech admissible.

REGINA *vs.* ABU-BAKR ... XLVIII. 107

§ 14

Evidence of similar acts when admissible.

Held: *That evidence of similar acts is not admissible under section* 14 *unless it can be shown to establish the existence of a state of mind of the nature referred to in the section.*

REX *vs.* WICKREMASINGHE ... II. 375

Statements by testatrix, shortly after execution of will, showing state of her mind—Admissibility.

RAJASURIAR *vs.* RAJASURIAR AND TWO OTHERS ... ... X. 10

Cheating—Evidence of system.

DIAS *vs.* WIJETUNGE ... XXXII. 86

In a charge under the Brothels Ordinance, evidence that the accused on a previous occasion accosted a person and took him to the brothel in question and that he was seen in front of the pavement in front of the brothel on an earlier date is admissible under § 14 to show intention or knowledge on the part of the accused.

SOLOMON APPU *vs.* R. C. PERERA XXXIII. 58

§§ 14 and 15

Charges of cheating two different persons on two different dates—Proof of similar transactions—Admissibility.

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

SHEDDON (INSPECTOR OF POLICE) *vs.* NATCHIAPPA PILLAI ... XVI. 73

§ 15 Cheating—Evidence of system.

DIAS *vs.* WIJETUNGE ... XXXII. 86

§ 17

Deaf and dumb accused—Signs made by—Impression conveyed by such signs to a witness—Can the witness's interpretation of the signs be admitted in evidence.

Held: (1) *That a witness's interpretation of the signs made by a deaf and dumb accused is not admissible in evidence.*

(2) *That the signs made by an accused are admissible in evidence to prove that a particular sign or signs were made on a particular occasion.*

THE KING *vs.* APPUHAMY *alias* GOLUWA ... ... XII. 79

Admission by conduct.

IYER *vs.* KARUNARATNE ... XXI. 123

When is statement made by accused to Police Officer inadmissible.

REX *vs.* ALLIS SINGHO AND ANOTHER ... ... XXII. 63

§ 21

Admissibility of statement by accused to Police Officer that he had been assaulted by someone.

REX *vs.* PITCHORIS APPU ... XXIII. 32

Statement in the nature of a confession by witness—Subsequent charge against witness—Admissibility of statement — Confession prompted by hope of advantage at suggestion of Police — Admissibility — Evidence Ordinance sections 21 and 24.

Held: *That a statement in the nature of a confession made by an accused person in the capacity of a witness before he was charged, in the course of proceedings against other parties in respect of the same incident,*

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is admissible under section 21 *of the Evidence Ordinance, unless otherwise tainted.*

KING *vs.* PUNCHI BANDA ... XXIV. 95

§ 24—Confession to Superintendent of Prisons—Confession admissible so long as it does not offend against the provisions of § 24.

REX *vs.* KARALY MUTTIAH AND OTHERS ... ... XVI. 37

A confession made to a person by an accused is not inadmissible merely because the accused has retracted it.

ROCKWOOD *vs.* DE SILVA ... XIX. 19

A voluntary statement duly recorded under § 134 of the Criminal Procedure Code can be proved as against the accused making it, even though he was in the custody of a Police Officer at the time he made the statement.

THE KING *vs.* RANHAMY ... XIX. 76

The Magistrate's certificate under § 134 of the Criminal Procedure Code is not decisive of whether or not the confession is voluntary.

THE KING *vs.* WEERASAMY AND FIVE OTHERS ... ... XXII. 57

"Person in authority."

REX *vs.* WEERASAMY AND VELAITHAN ... ... XXII. 103

A confession prompted by a suggestion by a Police Officer, that some advantage would be gained by the accused if he spoke the truth, is rendered inadmissible by section 24 of the Evidence Ordinance.

KING *vs.* PUNCHI BANDA ... XXIV. 95

Confession made by employee of Bank to person in authority.

Held: *That the mere fact that leading questions are asked by a person in authority does not make the answers inadmissible when they contain confession by the accused.*

KING *vs* GOONEWARDENA ... XXIV. 125

Admissibility—Confession to person in authority—Made under threat and inducement.

The first and second accused were convicted solely on the statements made by the second accused to the Chief Storekeeper of the Co-operative Wholesale Establishment, who was acting under orders of the Deputy Commissioner when threatened by the latter to take them to the police.

The second accused also made a statement in the presence of the Storekeeper acting on an inducement by a third person.

Held: (1) *First statement was made under a threat to a person in authority, and therefore is inadmissible.*

(2) *The second statement is also inadmissible because of the inducement under which it was made.*

AGRIS APPUHAMY AND ANOTHER *vs.* RAJASURIYA (INSPECTOR OF POLICE) ... ... XXXII. 82

§ 25

Confession of intention to commit an offence—Admissibility of.

Held: *That section* 25 *does not apply to a statement made by an accused person before the offence was committed or while committing the offence.*

KING *vs.* TISSERA *et al* ... I. 244

Magistrate who from time to time performs the duties of a Police Officer though in fact not a Police Officer—Confession of an accused recorded by such Magistrate—Is such confession inadmission in evidence.

KING *vs.* SEPALA AND OTHERS VII. 53

Criminal Procedure Code sections 122 (3) and 429—Examination of Police Headman by Magistrate ex mero motu **after the close of the case—Statement made by accused to Headman elicited by Magistrate—Statement not the same as that made by accused to Court in defence—Can it be proved by the evidence of a Police Officer that the position taken up by an accused person in defence in the Court was not disclosed to him at his investigation.**

Held: (1) *That the statement made to the Police Headman was inadmissible in evidence by reason of section* 25 *of the Evidence Ordinance.*

(2) *That a Magistrate's powers under section* 429 *of the Criminal Procedure Code cannot be made use of to elicit from any witness evidence that is inadmissible.*

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(3) *That it is contrary to section 25 of the Evidence Ordinance to admit the evidence of a Police Officer (a) that the accused did not in the statement made to him set up the defence he set up before the Court or (b) that the accused made to him a statement not consistent with the position taken up in his defence in Court.*

(4) *That the word "witness" in section 122 (3) of the Criminal Procedure Code must be strictly construed as meaning a witness pure and simple and does not include an accused person who testifies on his own behalf.*

BABY NONA *Alias* MARGARET COORAY *vs.* JOHANA PERERA ... VIII. 65

Statement made by accused to Police Officer when excluded as containing an inference of guilt.

The accused in giving evidence at his trial denied certain statements made by him to a police constable. At the close of the case the prosecuting counsel recalled the police constable with the leave of the judge. The constable gave evidence of the statement made by the accused to him. It was as follows:

"22 years, of Kesselawawa. To-day at about 1 p.m. I was returning from Batagoda with Jayasena. On the high road, near Mr. Gunatilaka's rubber land, (1) Adiris, (2) John, (3) Aron came from Adiris's house. John had a gun and John shouted to us to stop. We ran. Then John shot at us twice. We were about 50 yards away from them. I received injuries on left leg. Jayasena also received injuries. We ran a distance and fell down. Later people collected and brought us here."

It was contended for the accused that this statement is inadmissible as it amounts to a confession.

Held: *That the statement is not a confession and is not excluded by section 25 of the Evidence Ordinance.*

REX *vs.* LAMBERT GUNAWARDENE XIX. 124

Statement made by accused person to a Police Officer under section 122 (1) of the Criminal Procedure Code—Can such a statement be used to impeach the credit of the accused as a witness when giving evidence on his behalf—Case stated under section 355 (3) of the Criminal Procedure Code.

Held: *That a confession made to a Police Officer is inadmissible as proof against the person making it whether as substantive evidence, or in order to show that he has contradicted himself.*

THE KING *vs.* KIRIWASTHU AND ANOTHER ... ... XIV. 25

In what circumstances may statement made by the accused to the Police be elicited in cross-examination (of the accused) to prove that he made a statement to the Police different to that given in the witness-box.

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

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

REX *vs.* FERNANDO ... XVI. 10

When is statement made by accused to Police Officer inadmissible.

REX *vs.* ALLIS SINGHO AND ANOTHER ... ... XXII. 63

Can confession made to a Police Officer by the respondent to maintenance proceeding be admitted in evidence.

Held: *That a confession to a Police Officer made by the respondent to maintenance proceedings is not excluded by section 25 of the Evidence Ordinance as the respondent to maintenance proceedings, which are civil in nature, cannot be regarded as "a person accused of any offence."*

SOPIYA *vs.* WILBERT ... XXII. 67

A confession to a Police Officer by an accused person can, if it is relevant, be proved to assist him.

REX *vs.* PITCHORIS APPU ... XXIII. 32

Statement amounting to confession—General principle regarding admissibility.

REX *vs.* S. SEYADU ... XLVI. 46

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§ 26

Confession made to an Unofficial Police Magistrate—Is it admissible in evidence.

POLICE SERGEANT HENDRICK *vs.* ARUMUGAM AND ANOTHER ... VIII. 81

Confession made to Assistant Government Agent when in custody of a Police Officer—Scope of section 26.

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

POULIER (INSPECTOR OF POLICE) *vs.* ABEYGUNAWARDENA ... XVII. 33

Voluntary statement recorded under § 134 of Criminal Procedure Code—Can be proved against the accused making it, even though he was in the custody of a police officer at the time he made the statement.

THE KING *vs.* RANHAMY ... XIX. 76

§ 27

Stolen property—Charge of—Evidence discovered in consequence of information given by accused—Duty of Courts of Law receiving and interpreting such evidence.

EDWIN SINGHO *vs.* INSPECTOR OF POLICE, CHILAW ... ... XLVI. 52

§ 30

Accused giving evidence on his own behalf implicating his co-accused—Is the evidence admissible as against the co-accused.

Held: (1) *That the evidence of an accused which implicates his co-accused is admissible in evidence.*

(2) *That the confession made by a co-accused in the witness-box cannot be shut out on the ground that it is prejudicial to the other accused.*

THE KING *vs.* FERDINAND AND SEVEN OTHERS ... ... XXVIII. 28

§ 32

Statement in attestation clause of deed—when admissible.

DE SILVA *vs.* SINNATHAMBY AND ANOTHER ... ... I. 350

Dying declaration—Signs made by person unable to speak—Nod of injured woman fully conscious and able to understand what was said to her and to make signs and nod her head—Can a nod of a deceased person be admitted in evidence?

Held: *That the nod of assent of the dying woman was a verbal statement and was admissible in evidence under section* 32 (1)

ALEXANDER PERERA CHANDRASEKERA *Alias* ALISANDIRI *vs.* THE KING VII. 11

Statements in a confession made by a deceased affecting not only himself but another—Can the statements be admitted in evidence in a charge against the other person affected by the confession.

Held: *That at the trial of the accused for criminal breach of trust of monies belonging to the Galle Gymkhana Club and falsification of club accounts so much of the deceased's statement as referred to the misappropriation by him of stand members' subscriptions and the deposit by him on the instruction of the accused of club monies to accused's private account at the bank were admissible in evidence to prove respectively the fact of the misappropriation by the deceased and the misappropriation by the accused.*

THE KING *vs.* E. F. C. LUDOWYKE III. 125

Admissibility of statement of deceased to one of his sons that the former and his two sons should carry on business in equal shares. No written agreement of partnership.

RAJARATNAM *vs.* COMMISSIONER OF STAMPS ... ... XI. 15

In what circumstances may a statement made by a deceased person as to the cause of his death to a police officer investigating a cognizable offence be admitted in evidence.

REX *vs.* JOHN PEIRIS ... XIX. 134

Statement made by deceased as to the cause of injuries which resulted in his death—Statement made to a Police Officer investigating a cognizable offence under chapter XII of the Criminal Procedure Code—Is statement admissible under § 32.

KING *vs.* AHAMADU ISMAIL ... XX. 16

Statement by deceased person re **circumstance resulting in his death—Admissibility.**

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M (accused) was charged with the murder of W, who lived with his mistress Mary Nona in the same estate lines as M. On the day of murder M went off to obtain bees' honey in the jungle. In his absence W is alleged to have come to his lines and after the midday meal left the place with some scrap rubber and a box of matches. When Mary Nona questioned W as to where he was going, W is alleged to have said "Mudalihamy (accused) wanted me to go and collect honey and I am going to meet him."

W was not heard of since. Twelve days later his body was found wedged in between two rocks in the middle of a stream.

Objection was taken to the admissibility of the statement made by W to Mary Nona.

Held: *That the statement was admissible under section* 32 (1)

REX *vs.* MUDALIHAMY ... XXXII. 12

Death of injured man before trial—Cause of death unconnected with injuries caused—Statements of injured man as to how he came by his injuries—Admissibility.

REX *vs.* HERAS HAMY AND TWO OTHERS ... ... XXXIII. 91

Admissibility of first information given under § 121 of the Criminal Procedure Code.

REX *vs.* RAMU KARTHIGESU *alias* CHELLIAH ... ... XXXIV. 10

Statement by deceased two or three days prior to death to her mother that accused made improper suggestions to her—Admissibility.

REX *vs.* H. D. M. APPUHAMY ... XLII. 4

Admissibility of dying deposition.

REX *vs.* ASIRVADAN NADAR XLIII. 25

Dying depostion—Must it be corroborated.

REX *vs.* B. FRANCIS FERNANDO XLVII. 101

§ 33

The evidence of a witness who is unable to attend the trial owing to temporary illness cannot be read in evidence under section 33.

REX *vs.* AMARAKOON ... XXVIII. 4

When may the deposition of an absent witness be read in evidence.

REX *vs.* FERNANDO ... XL. 55

Evidence admitted on all issues—Judge holding on one issue that he had no jurisdiction—Admissibility in later judicial proceeding of evidence given in former proceeding by witness since dead.

Held: *That where all the conditions laid down by section* 33 *for the admission of the evidence of a deceased witness were satisfied, that evidence, having been given before a person authorised by law to take it, was admissable in a later proceeding, although the Judge in the former proceeding had held that he had no jurisdiction.*

RUITHAN *vs.* GREGORY ... XLI. 8

§ 41—Protects all orders made by a Court having jurisdiction although such orders be erroneous in law.

HANIFFA *vs.* CADER AND OTHERS XXI. 44

§ 45

Footprint—Is the opinion of a Fingerprint expert as to the identity of footprints relevant under section 45.

Held: *That section* 45 *does not entitle a Court to convict a person of theft merely on the opinion of a fingerprint expert, that a footprint found at the place where an offence has been committed is that of the accused.*

DOOLE (S. I. POLICE) *vs.* CHARLES. VI. 79

Footprint—When may a conviction be based on the evidence of a footprint expert.

Held: (1) *That the words "Science" or "art" in section* 45 *are wide enough to entitle a Court to form an opinion as to the identity of a footprint on the testimony of a person who has studied footprints and is capable of distinguishing and identifying footprints.*

(2) *That a conviction can rest on the evidence of the similarity of footprints alone.*

SINGHO APPU *vs.* THE KING XXIX. 46

§ 47

Proving signature by person acquainted with the handwriting of a person.

NADARAJAH *et al vs.* THILLAIRAJESWARI *et al* ... ... XXXVII. 60

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§ 50 Proof of pedigree—When is opinion of a witness as to relationship relevant.

Held: (1) *That in proving pedigrees referring to matters which occurred in times gone by and among persons who have passed away, courts are obliged to allow derivative evidence to be given in certain circumstances.*

(2) *That the opinion of a witness as to the relationship of one person to another is relevant provided such opinion is expressed by conduct, and the witness has a special means of knowledge on the subject.*

ANTHONIPILLAI *vs.* THYIRAINETHAN AND OTHERS ... ... XXXII. 24

§ 54

Evidence of bad character of accused when relevant—What amounts to evidence of good character.

REX *vs.* KOTHALAWALA ... XXIV. 47

When may accused be cross-examined as to his bad character.

STIRLAND *vs.* DIRECTOR OF POLICE PROSECUTIONS ... ... XXVIII. 17

Proof of bad character of accused—Question in cross-examination of accused whether criminal charge pending against him—Admission by accused—Admissibility—Does such evidence disprove good character—Effect of inadmissible evidence on conviction—Should a distinction be drawn between a conviction by a lay Jury and a conviction by a trained Judge.

Held: (1) *That in proving the bad character of an accused person under section* 54 *of the Evidence Ordinance it is irrelevant to ask him whether a criminal charge is pending against him and such a question is therefore inadmissible.*

(2) *That the mere existence of a charge, which has not yet been established cannot be regarded as a slur on the character of the person charged.*

(3) *That a distinction should not be drawn between a conviction by a lay Jury and that by a trained Judge, where the latter has, through an improper appreciation of the law allowed evidence to be led, which was of such a character as to prejudice the chances of a fair trial on the real issues in the case.*

Per GRATIAEN, J.—"The charges against the accused are of a serious nature and it may be that, upon the relevant and admissible evidence, his conviction would have been justified. But we are here concerned with offences alleged to have been committed over four years ago, and it does not seem to me just to call upon him to defend himself a second time after such an unconscionable lapse of time. I therefore set aside the convictions and acquit the accused.

PETER SINGHO *alias* P. M. PETER WIJESIRI *vs.* WERAPITIYA S.I. POLICE HAPUTALE ... ... XLIX. 23

§ 57

Judicial Notice—Is a notification published under section 16 of the Excise Ordinance No. 8 of 1912 a publication of which a Court shall take judicial notice.

Held: (1) *That a notification under section* 16 *of the Excise Ordinance No.* 8 *of* 1912 *is not a form of legislation of which the Courts must take judicial notice.*

(2) *That such a notification must be proved by the production of the Gazette containing the notification.*

J. C. A. DUNUWILA (EXCISE INSPECTOR) *vs.* M. UKKUWA ... ... VI. 150

Charge under a statutory rule published in the Gazette—Is production of Gazette in which the rule appears imperative.

Held: *That where a charge is laid under a statutory rule, regulation, or by-law, which is required by law to be published in the Gazette, the prosecution is under no obligation to produce the Gazette in which the rule, regulation or by-law appears in proof thereof in order to establish the charge.*

P. SIVASAMPU (S. I. POLICE) *vs.* JUAN APPU ... ... VIII. 21

Can the Court take judicial notice of the fact that a place is a highway for the purposes of the Motor Car Ordinance.

Held: *That the Court can take judicial notice of the fact that a place is a highway within the meaning of that expression as defined in section* 176 *of the Motor Car Ordinance.*

MENON *vs.* LENTIN ... ... XXII. 24

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It is open to a Court to take judicial notice of facts other than those mentioned in section 57 of the Evidence Ordinance.

BOGTSTRA *vs.* THE CUSTODIAN OF ENEMY PROPERTY ... XXVI. 5

Proclamation under section 3 of the Buddhist Temporalities Ordinance—Is a Court bound to take judicial notice of such proclamation.

Held: *That a Court is bound to take judicial notice of a proclamation under section 3 of the Buddhist Temporalities Ordinance.*

GUNANANDA THERO *vs.* ATHUKORALE AND OTHERS ... ... XXIX. 77

§ 63

Can an English translation be regarded as secondary evidence of an original in some other language—Res judicata—**Civil Procedure Code section 207.**

Held: (1) *That an English translation cannot under section 63 of the Evidence Ordinance be regarded as secondary evidence of an original document in some other language.*

(2) *That the mere admission by the parties to a partition action of the existence of a document which is not produced cannot be regarded as amounting to proof of the document.*

(3) *That where an appeal has been taken from a decision of a Court and the Appeal Court disposed of the appeal on issues other than those on which the original Court made its decision, the decision of the original Court cannot be regarded as* res judicata.

DE LIVERA AND OTHERS *vs.* AMARASEKERA AND OTHERS ... XIII. 157

§ 65

Nature of the notice under—Procedure in Criminal Proceedings — Summons on accused to produce document in his possession — Failure to produce — Acquittal of accused—Complainant's right to lead secondary evidence—Criminal Procedure Code section 66.

Held: (1) *That the notice to produce referred to in sections 65 and 66 of the Evidence Ordinance is a notice issued by process of Court under the Civil or the Criminal Procedure Code.*

(2) *That the principle on which notice to produce a document is required is merely to give sufficient opportunity to the other side to produce it.*

(3) *That, where in criminal proceedings, an accused person, who was summoned to produce a document in his possession failed to do so, the complainant is entitled to lead secondary evidence of the contents of such document.*

SARANADASA, INSPECTOR OF LABOUR *vs.* CHARLES APPUHAMY XXXI. 62

§ 66

Nature of notice under.

SARANADASA *vs.* CHARLES APPUHAMY ... ... XXXI. 62

§ 67

Letter written in breach of Defence Regulations produced—No admission that accused wrote it—Can conviction be sustained without proof of handwriting.

Retrial—In what circumstances should it not be ordered.

Held: (1) *That a document cannot be used in evidence unless its genuineness has been either admitted or established by proof which should be given before the document is accepted by the Court.*

(2) *That a new trial should not be ordered to enable the prosecution to fill up the deficiencies in the evidence which it was bound to produce and which by its own negligence it failed to produce.*

ROBINS (ASSISTANT SUPERINTENDENT OF POLICE) *vs.* PHYLLIS GROGAN XXII. 83

§ 68

Failure to prove deed as required by section 68—Partition case—Deed admitted without objection—Can objection be taken in appeal.

Held: *That in a partition action, if a deed is admitted in evidence without objection, it is too late to take the objection in appeal that the deed had not been duly proved.*

SIYADORIS *vs.* DAINIS AND OTHERS XX. 33

§ 69

Deed executed by making a mark—Notary and attesting witnesses dead—How is deed proved.

DE SILVA *vs.* SINNATHAMBY AND ANOTHER ... ... I. 350

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§ 78

Proof of State Council Hansard.

DE ZOYSA *vs.* WIJESIGHE ... XXXI. 5

§ 80

Evidence taken down by shorthand writer under the direction of the Judge—Does presumption in § 80 apply to Court record in a prosecution for intentially giving false evidence in a judicial proceeding.

REX *vs.* WIJESEKERA ... XVII. 81

§ 80—Scope of—

REX *vs.* KADIRGAMAN *et al* ... XVIII. 41

Where it is sought to prove that a person gave certain evidence in an earlier judicial proceeding it is not sufficient to produce the record of the case but there should be some independant evidence to show that the person who gave such evidence is the person against whom it is sought to be proved.

DE ZOYSA *vs.* WIJESINGHE ... XXXI. 5

§ 81

Presumption of genuineness of document purporting to be a newspaper or a journal.

IYER *vs.* KARUNARATNE ... XXI. 123

§ 82

Certification of foreign judgment—How should such judgment be proved.

MOHIDEEN MARIKAR AND THREE OTHERS *vs.* KOWLA UMMA ... XII. 44

§ 83

Survey plans—Remarks thereon by surveyor—Party relying on them—Need for proof.

Held: *That where a party producing a figure of survey relies on the existence of certain physical features depicted on it, the remarks made thereon by a Surveyor, who is not called as a witness to testify on oath as to the facts which the Court is asked to believe, cannot be preferred to the sworn testimony of witnesses.*

AMARAWARDENA *vs.* MINODARAHAMY AND ANOTHER ... XXXVII. 5

§ 85

Power of attorney executed by purdanishin lady-Notary standing outside purdah—Is it entitled to presumption under § 85.

SREENIVASARAGHAVA IYENGAR *vs.* JAINAMBEEBEE AMMAL AND OTHERS ... ... XXXIV. 1

§ 91

An account stated in following terms is a contract within the meaning of § 91 "All accounts looked into today and there is due from me to X Rs. 11,982.29."

MARIKAR *vs.* STRONG ... II. 257

Is this § intended to cover Court records of evidence or does it contemplate only documents inter partes.

REX *vs.* WIJESEKERA ... XVII. 81

By reason of section 91 of the Evidence Ordinance only the written record of a statement made to a police officer under Chapter XII of the Criminal Procedure Code is admissible in evidence.

REX *vs.* HARAMANISA ... XXVIII. 68

Motor car licence—required by law to be reduced to writing—Mode of proof.

MUDIYANSE *vs.* DISSANAYAKE XL. 37

§§ 91 and 92

Applicability when whole contract not reduced to form of document.

VALLIYAMMAI ATCHI *vs.* ABDUL MAJEED ... ... XXXV. 1

A pawner may establish by evidence other than that contained in the pawn ticket the value of the articles pawned.

MOHAMED ISMAIL *vs.* MUTTIAH CHETTIAR ... ... XXIII. 81

§ 92

Document within the meaning of § 91—Parol evidence cannot be given which would contradict, destroy and nullify the effect of the written contract.

MARIKAR *vs.* STRONG ... ... II. 257

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Statement in attestation clause of a bond that consideration passed in the notary's presence—Is evidence to contradict such statement inadmissible.

Held: *That the evidence that no consideration passed on the mortgage bond was not inadmissible although the attestation clause stated that consideration passed in the notary's presence.*

PERERA *vs.* ALICE ... ... VIII. 109

§ 92 does not prevent a variation or modification in a notarial instrument from being proved by a subsequent non-notarial writing provided that the latter writing is not itself of such a nature as to require notarial execution.

KUMARAHAMY AND ANOTHER *vs.* GNANAPANDITHAN ... ... XIV. 30

Meaning of the words "decree or order relating thereto" in proviso (1) to § 92—What oral evidence is allowable under the section.

VELAN ALAN *vs.* PONNY AND OTHERS ... ... XV. 75

§ 92 (1)—Proviso—When may oral evidence be given to vary the terms of a deed of gift.

BELGASWATTA *vs.* UKKUBANDA AND OTHERS ... ... XXII. 93

Trust—Transfer of property by debtor to creditor on the agreement that the latter is to retransfer the property after the debts have been liquidated out of the income therefrom—Can parol evidence of agreement be led—

VALLIYAMMAI ATCHI *vs.* ABDUL MAJEED ... ... XXVIII. 81

Sale of land for a consideration expressed and acknowledged therein—Action for recovery of part of the consideration—Can opposing party say that the transaction was not a sale but a gift—Equitable rule applicable to a case where a party seeks to vary by extrinsic evidence the contents of a written document—Maxim that he who seeks equity must do it.

Held: *That where the Court allows a party to lead oral evidence under section 92 of the Evidence Ordinance to vary the terms of a deed the opposing party is entitled to lead oral evidence to meet the claim put forward by the first party who has been allowed to vary the terms of the deed.*

MOLEGODA *vs.* MOLEGODA ... XXIX. 8

Trust—Equitable doctrine of—Plaintiffs transferring property to defendant to pay of mortgage—No consideration paid to plaintiffs—Agreement to retransfer in non-notarial writing—Nature of transaction—Defendants refusal to retransfer—Conditions necessary to establish trust.

FERNANDO *vs.* THAMET AND ANOTHER ... ... XXXII. 66

Document signed by one of the parties—Is it a written agreement—Can oral evidence be led to prove intention different from that expressed in document.

Held: *That a document signed by one party is not a written agreement within the meaning of section 92 of the Evidence Ordinance, and, oral evidence, therefore, is admissible to show that the real intention of the parties was different from the language of the document.*

EDDED CO-OPERATIVE SOCIETY LTD. *vs.* LEVI GEFFEN ... XXXIII. 97

Action for declaration that a deed is null and void—Title of transferor based on fictitious transaction—Can evidence be led to contradict statement in attestation clause that consideration had been received—Evidence Ordinance, section 92.

The plaintiff, the lawful owner of a land called M constructed a fiber mill thereon, and placed her brother, the 2nd defendant, in charge of such mill. In order to enable another brother, the 1st defendant, to obtain the property qualification necessary before applying for a post of Vidane Aratchi, the plaintiff transferred to him the land M with the fibre mill thereon, the 1st defendant promising to re-transfer within a month. No consideration was paid for this transfer, nor was there a change in possession as a result of the transfer.

The 1st defendant failed to re-transfer within a month as promised, and eventually effected a retransfer only some years later, but the fibre mill was excluded from such re-transfer. The plaintiff did not discover the exclusion until another year and a

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half elapsed, when the 3rd defendant entered into possession of the mill on the strength of a transfer by the 1st defendant effected two days prior to the re-transfer to plaintiff. The plaintiff brought this action to have the deed of transfer to the 3rd defendant declared null and void.

Held: (1) *That the original transaction was fictitious and that the plaintiff's transfer to the 1st defendant was not a sale; consequently the 3rd defendant could not get title from the 1st defendant.*

(2) *That section 92 of the Evidence Ordinance does not preclude the reception in evidence of the fact that no consideration was received by the vendor although the notary in his attestation says that the vendor declared in his presence that she received the consideration prior to the execution of the deed.*

(3) *That section 92 of the Evidence Ordinance does not extend to a case where it is sought to prove that the transaction is a sham or that an instrument was never intended to be acted upon.*

PENDERLAN *vs.* PENDERLAN XXXVII. 35

Transfer of land by deed—Circumstances showing transaction in nature of security for money advanced—Oral promise to re-transfer later to transferee—Can Court act on such oral evidence and hold that transfer was anything other than absolute conveyance.

Transfer of land subject to oral agreement to transfer to third party on payment of a sum of money—Can third party enforce such oral agreement

Held: (1) *That where a party transferred a land by deed in circumstances clearly showing that the transaction was in the nature of a security for money advanced and relying on an oral promise by the transferee to transfer the land later, a Court is precluded by section 92 of the Evidence Ordinance (as between the parties to the deed) from acting on the oral evidence and holding that the transfer was anything other than an absolute conveyance.*

(2) *That a person who is not a party to a deed, is not affected by section 92 of the Evidence Ordinance and can, therefore, enforce an oral promise or condition in his favour subject to which such deed was executed.*

APPUHAMY *vs.* UKKU BANDA ... XLI. 43

Admissibility of oral evidence to vary notarial agreement.

SUPPIAH AND ANOTHER *vs.* SITUNAYAKE ... ... XLIII. 28

Mutual mistake—Parties expressing in deed an intention different from their actual intention—Admissibility of evidence of such mistake.

GIRIGORIS PERERA *vs.* ROSALINE PERERA ... ... XLVII. 65

§ 100

Accused person in pending proceedings—Can he be compelled to produce any document in evidence or for inspection by complainant—Principle of English Law—its applicability in Ceylon.

HANIFA *vs.* DE MEL AND OTHERS XLVI. 97

Competency of wife as a witness against husband in case under § 486 of Penal Code.

SEETHEVI *vs.* ARUMUGAM AND OTHERS ... ... L. 21

§ 105

Plea of insanity—Burden of proof—

THE KING *vs.* ABRAHAM APPUHAMY *alias* ASSON ... ... XV. 37

The burden which rests on a prisoner of proving that he comes within any of the general exceptions in the Penal Code is not so heavy as that which lies on the prosecution of proving its case beyond all reasonable doubt.

REX *vs.* HARAMANISA *alias* THIMISA ... ... XXIV. 25

An accused person who puts forward the plea that he acted in self-defence must prove that he was exercising that right.

REX *vs.* MUDIYANSELAGE MUDIYANSE ... ... XXIV. 111

Onus of proving an exception within which the accused seeks to bring himself—Extent and nature of the onus on the accused.

REX *vs.* JOHANIS ... XXIV. 137

Onus of proof of any general or special exception in the Penal Code.

REX *vs.* JAMES CHANDRASEKERA XXV. 1

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Accused indicted for murder—Defence of drunkeness—Burden of proof.

REX *vs.* VELAIDEN ... XXXV. 49

§ 106

Held: *That it is not the law of Ceylon, that the burden is cast upon an accused person of proving that no crime has been committed.*

(2) *That the mere fact, that there has been some mistake of law, does not afford sufficient ground in itself for granting special leave to appeal.*

THE KING *vs.* ATTYGALLE AND ANOTHER ... ... VI. 41

§ 106 does not impose a general onus on an accused person to explain everything that might be within his knowledge.

STEPHEN SENEVIRATNE *vs.* THE KING ... ... VI. 51

Has no application to cases where fact in question, having regard to its nature, is such as to be capable of being known not only by the accused but also by others, if they happen to be present when it took place.

SANITARY INSPECTOR, MIRIGAMA *vs.* THANGAMANI NADAR ... XLIX. 81

§ 108

Presumption—Person not heard of for seven years—Burden of proving that he is alive not discharged—Does his property devolve on heirs.

Held: *That where the burden of proving that a person, who has not been heard of for seven years, is alive, has not been discharged, such person's rights to property devolve on his heirs.*

VELMULADENIYA *vs.* SIYATU AND ANOTHER ... ... XXIX. 104

§ 109

Section 109, when examined in the light of § 21 of Ordinance No. 7 of 1840, means that the presumption created thereby operates only when the existence of a partnership has been duly proved according to law, i.e. by the production of the instrument of partnership.

RAJARATNAM *vs.* THE COMMISSIONER OF STAMPS ... ... XI. 15

§ 110

Presumption created by—When defendant entitled to rely on—Possession for the purposes of this section must not be obtained by force or fraud.

KATHIRAMATHAMBY *vs.* ARUMUGAM ... ... XXXVIII. 27

Tattumaru possession of property by arrangement—Can party in possession under such arrangement claim benefit of section 110—Subsequent repudiation of arrangement—Burden of proof.

Held: (1) *That when two persons have acknowledged, however erroneously, each other's rights of co-ownership, and have agreed to work what is believed to be the common property in* tattumaru, *the occupation of the property at any point of time by either party to the mutual arrangement must, in law, be deemed to be the possession of both.*

(2) *That the burden of proving that the assumed bond of co-ownership does not in fact exist is on the party who repudiates the earlier arrangement and claims legal title thereto exclusively.*

(3) *That a party in possession under such an arrangement is not entitled to the benefit of section* 110 *of the Evidence Ordinance.*

W. DINGIRI MENIKA *et al vs.* M. HEEN APPU ... ... XLIV. 65

§ 112

Presumption of legitimacy of a child born during the continuance of a valid marriage.

Held: *That a child born during the continuance of a valid marriage is under section* 112 *presumed to be legitimate no matter how soon the birth be after the marriage.*

MARY *vs.* JOSEPH ... ... IV. 46

Child born during wedlock—Legitimacy of child—Burden of proof—

ALLES *vs.* ALLES AND SAMAHIM XXX. 25

Meaning of "access"

RANASINGHE *vs.* SIRIMANNE ... XXXI. 111

PESONA *vs.* BABONCHI BAAS XXXVII. 97

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Meaning of the word "access"—Observations by Privy Council in an Indian case—Effect—Maintenance Ordinance, (Cap. 76,) section 4—Wife living in adultery—Burden of proof.

Held: (1) *That the observations by the Privy Council in* Karupaya Servai vs. Mayandi *A.I.R.* (1934) *P.C.* 49 *regarding the interpretation of the word "access" in section* 112 *of the Evidence Ordinance are not mere* obiter dicta, *but embody a decision overruling* Jane Nona vs. Leo *reported in* 25 *N. L. R.* 241.

(2) *That the burden of proving that the wife is living in adultery, disentitling her to receive an allowance from her husband under section* 4 *of the Maintenance Ordinance (Chap.* 76), *is on the husband, if he asserts it.*

VELUPILLAI SELLIAH *vs.* SINNAMMAH ... ... XXXIV. 97

Presumption of legitimacy—Rebuttal—Onus.

Divorce action—Adultery—Damages against co-respondent—Why Privy Council should not interfere with award.

The plaintiffff (1st respondent) sued her husband the (appellant) for a decree for judicial separation and for an order for payment to her of maintenance in respect of two children P and R born during the period of marriage. The appellant in his answer denied (*a*) her right to a judicial separation, (*b*) that the boy R was any son of his and asserted that she committed adultery with the 2nd respondent. Also he counter-claimed a decree for divorce and damages against the 2nd respondent.

The District Judge granted a divorce to the appellant on the ground that the 1st respondent committed adultery with the 2nd respondent and further held that the boy R could not be the son of the appellant. He also awarded damages in a sum of Rs. 15,000 against the 2nd respondent.

The respondents appealed and the supreme Court upheld the findings as to adultery and decree for divorce but reduced the damages awarded to Rs. 10,000 and further declared that the appellant had failed to disprove the legitimacy of the boy R.

The appellant thereupon appealed to the Privy Council on the issues as to the paternity of the child and the quantum of damages.

There was evidence to establish (*a*) that the only date on which the appellant had access to his wife, during the material period was on the 9th of August, 1941; (*b*) that the child was born on the 26th March, 1942, the interval between the dates being 229 days inclusive of both dates; (*c*) that the labour was a normal one and the child was a mature child of complete uterine development.

The expert evidence left no doubt (*a*) that a fully developed child normally appears after a uterine existence of 280 days from the commencement of the last menstrual flow (*b*) that an insemination delivery period of 229 days could not produce this fully developed child.

Held: (1) *That in the circumstances the appellant had discharged the burden that lay on him to rebut the presumption created by section* 112 *of the Evidence Ordinance.*

(2) *That under section* 112 *of the Evidence Ordinance the ostensible father who denies paternity must prove that he had no access to the mother at a time when the child could have been begotten. In many cases this onus is a heavy one.*

ALLES *vs.* ALLES AND ANOTHER XLIII. 17

§ 114

Presumption of theft—Carcases of stolen goods found in a car in which seven persons, including the owner and driver of the car, were travelling—What evidence is necessary to create the presumption of theft.

KHAN *vs.* KANAPATHY AND FOUR OTHERS ... ... IX. 21

Presumption of regularity of appointment—Power of District Judge to make acting appointment.

WIJEWARDENA *vs.* PERERA ... XI. 57

When property worth Rs. 10,000 has fetched only Rs. 55 and there has been an irregularity in publishing the sale, a Court is justified in presuming that the inadequacy of the price is due to the irregularity.

KUNJIKUTTY *vs.* MATURUVALLIACHY ... ... XIII. 5

Presumption that official acts of Commissioner appointed under the Partition

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Ordinance have been regularly performed.

FRANCISCU *vs.* PERERA ... XIV. 71

Accomplice's evidence—Can one accomplice corroborate another.

Held: (1) *That one accomplice cannot be corroborated by another accomplice.*

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

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

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

REX *vs.* NUGAWELA ... XVII. 71

Should the judge refer to the presumption under § 114 (*f*) in cases in which the procecuting counsel does not call or tender for cross-examination the witnesses whose names are on the indictment and who are not called by the prosecuting counsel.

REX *vs.* CHALO SINGHO ... XX. 21

The natural presumption when a young man abducts a girl of marriageable age is that he abducted her with the intention of having sexual intercourse with her either forcibly or with her consent after seduction or after marrying her.

REX *vs.* LIONEL BANDARA WEGODAPOLA ... ... XXI. 21

Presumption under section 114 (a)—Its applicability.

Held: *That the presumption under section* 114 (*a*) *of the Evidence Ordinance is not confined to cases of theft.*

UDAYAR, MANNAR *vs.* CASSIM XXVI. 16

Possession by a person of property recently stolen from a house in the course of house-breaking gives rise to the presumption that the possessor was either concerned in the house-breaking or received the goods knowing them to be stolen. The strength of the presumption which arises from such possession is in proportion to the shortness of the interval which has elapsed since the commission of the offence.

REX *vs.* WILLIAM PERERA AND ETIN ... ... XXVIII. 43

Omnia praesumuntur rite esse acta.

UDALAGAMA *vs.* GIRIGORIS APPUHAMY ... ... XXX. 77

Nature of participation in a crime that makes a person an accomplice—Corroboration.

Held: *That a person who participates in a crime without being a guilty associate, or is present in circumstances which do not render him liable to be charged jointly with the accused, is not an accomplice, and his evidence does not require corroboration.*

PERIES AND ANOTHER *vs.* DOOLE S. I. POLICE ... ... XXXVI. 23

Witness absent on trial date—Appearance in Court on several earlier dates fixed for trial—Should presumption under § 114 be drawn.

SANTIYAPILLAI *vs.* S. SITTAMPALAM ... ... XXXVI. 49

Presumption—Failure of accused to call co-accused as witness.

Held: *That the presumption in section* 114, *illustration* (*g*) *of the Evidence Ordinance does not apply where an accused person fails to call on his behalf as his witness a co-accused.*

WIJEYERATNE *et al vs.* DE NIESE (INSPECTOR OF POLICE. PUTTALAM) ... ... XXXVIII. 112

Res ipsa loquitur—Applicability to criminal cases.

PERERA *vs.* AMARASINGHE ... XLI. 92

Where the only evidence against an accused is that he has produced stolen property from a place which is not in his possession, that evidence is not sufficient to support a conviction for theft.

SUMANASENA *et al vs.* THE KING XL VI.

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Last Will in testator's possession—Will not forthcoming—Presumption of destruction animo revocandi.

ABDUL HAMID RALIYA UMMA *vs.* ABDUL LATIFF MOHAMED AND ANOTHER ... ... L. 101

§ 115

Estoppel—Person bidding at sale cannot deny title of vendor.

TISSAHAMY KAPURALA *vs.* PERERA XXIV. 98

§ 116

Privity of contract between plaintiff and tenant—Tenant precluded from disputing plaintiff's title.

DE ALWIS *vs.* PERERA ... XLIV. 100

Servant given free room by employee—Servant's employment terminated and action for ejectment filed—Can servant put title in issue.

PONNIAH *vs.* SELLAN ... XLIX. 92

§ 118

Persons competent to testify—Child of tender years.

POLICE SERGEANT JUMAL *vs.* PERERA AND ANOTHER ... ... I. 208

Child of eight years—Oaths Ordinance sections 4 and 9—Can evidence given by a child of tender years be admitted in a case where the evidence is given without an oath or affirmation being administered, on the ground that the child is unable to understand the significance of an oath or affirmation.

Held: (1) *That the unsworn testimony of a child of tender years cannot be admitted in evidence in a case where the Judge had deliberately refrained from administering an oath or affirmation to such child on the ground that such child is unable to understand the significance of an oath or affirmation.*

(2) *That deliberate non-administration of an oath or affirmation amounts to a case of commission and does not therefore come within the ambit of section 9 of the Oaths Ordinance which provides that no omission to take any oath or make any affirmation shall render inadmissible any evidence.*

REX *vs.* RAMASAMY ... XXI. 83

§ 120

To exclude a woman's evidence under section 120 (2) there must be proof that she is the wife of the accused. There must be proof of a legal marriage and mere evidence that there was a marriage ceremony and celebrations of some sort and that the two lived as man and wife is insufficient.

REX *vs.* VELOO ... ... XXIV. 119

When may accused be cross-examined as to his bad character—Questions which are unfair to accused should not be allowed—Can suspicion alleged to have been entertained by one of his employers on an earlier occasion be a legitimate topic for cross-examination of accused as to credit.

STIRLAND *vs.* DIRECTOR OF PUBLIC PROSECUTIONS ... XXVIII. 17

The evidence of an accused which implicates his co-accused is admissible in evidence.

THE KING *vs.* FERDINAND AND SEVEN OTHERS ... ... XXVIII. 28

Charge of criminal intimidation by wife against husband—Wife is a competent witness for prosecution.

SEETHEVI *vs.* ARUMUGAM AND OTHERS ... ... L. 21

§ 123

The police information book is not a document in respect of which privilege can be claimed.

PEIRIS *vs.* CHITTY AND OTHERS XVI. 58

§ 125

The police information book is not a document in respect of which privilege can be claimed.

PEIRIS *vs.* CHITTY AND OTHERS XVI. 58

§ 133

Though a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice, Magistrate should have clearly before his mind the fact that he is dealing with the evidence of an accomplice and he must give reasons for convicting in the absence of corroboration.

REX *vs.* NUGAWELA ... XVII. 71

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Evidence of decoy—Should a decoy's evidence be treated in the same way as an accomplice's evidence.

Held: (1) *That a conviction is not illegal merely because it proceeds on the uncorroborated testimony of an accomplice.*

(2) *That if, after a close scrutiny of his evidence, the Court believes the accomplice is speaking the truth, it must convict.*

(3) *That a "decoy" or "informer" is not an accomplice and that the rule of practice relating to the corroboration of accomplices does not apply to "decoys" or "informers."*

BEDDEWELA (INSPECTOR OF POLICE) *vs.* ALBERT ... ... XIX. 13

§ 145

To make use of a deposition of a witness the deposition must be proved by some witness producing it in evidence.

REX *vs.* KADIRGAMAN *et al* XVIII. 41

Statement of an accused person not made in the course of a police investigation under Chapter XII of the Criminal Procedure Code is admissible under sections 145 and 155.

REX *vs.* NADARAJAH ... XXIII. 50

§ 155

Statements in information book can be used in civil proceedings to impeach the credit of a witness.

PEIRIS *vs.* CHITTY AND OTHERS XVI. 58

To make use of a deposition of a witness, the deposition must be proved by some witness producing it in evidence.

REX *vs.* KADIRGAMAN *et al* XVIII. 41

Where the accused denies in cross-examination previous statements (not being confessions) made by him, the prosecution is entitled under § 122 (3) of the Criminal Procedure Code and § 155 (c) of the Evidence Ordinance to contradict him by calling evidence to prove the statements.

THE KING *vs.* AHAMADU ISMAIL XX. 17

Statement of accused person not made in the course of a public investigation under Chapter XII of the Criminal Procedure Code is admissible under §§ 145 and 155.

REX *vs.* NADARAJAH ... XXIII. 50

The written record of the statement of a witness made under Chapter 12 of the Criminal Procedure Code can be used for impeaching the credit of that witness under section 155 of the Evidence Ordinance.

REX *vs.* HARAMANISA ... XXVIII. 68

Cross-examination of accused on statements made to Police and recorded in information book—Denial by accused—Failure to prove such statement—Does it vitiate conviction.

SUB-INSPECTOR OF POLICE KADUGANNAWA *vs.* WIJERATNA. XXXV. 18

Contradiction of witnesses for the defence by previous statement to the Police—Calling of witness to prove previous statement after close of the defence—Is it evidence in rebuttal—Can such evidence be led in Magistrate's Court.

RASIAH *vs.* SUPPIAH ... XL. 10

§ 157

Statement admissible under § 157—Is it corroboration for the purposes of the Maintenance Ordinance.

DONA CARLINA *vs.* JAYAKODY ... I. 88

§ 157 does not permit of the admission in evidence of statements made by a witness without previous cross-examination of the person as to such statements. Hearsay evidence is not admissible as corroboration under § 157.

STEPHEN SENEVIRATNE *vs.* THE KING VI. 51

Corroboration must proceed from something extraneous to the witness who is to be corroborated—One accomplice cannot corroborate another.

REX *vs.* NUGAWELA ... XVII. 71

Criminal Procedure Code section 122 (3)—Can accused elicit in evidence a statement made by him to a Police Officer in the course of an investigation in order to corroborate his defence.

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Held: (1) *That section* 122 (3) *of the Criminal Procedure Code has general application to statements made by all persons whether they are or whether they subsequently become accused persons or not.*

(2) *That an accused person cannot make use of a statement made by him to a Police Officer in the course of an investigation into an offence, except as provided in section* 122 (3) *of the Criminal Procedure Code.*

REX *vs.* DE SILVA *alias* PUNCHI UNNEHE AND FOUR OTHERS ... XVIII. 125

Statements elicited in reply to questions put to a witness are admissible under section 157 if the question merely anticipates a statement which complainant was about to make. But such statements are inadmissible, if the circumstances indicate that but for the questioning, there probably would have been no voluntary complaint.

REX *vs.* LIONEL BANDARA WEGODAPOLA ... ... XXI. 21

A statement made by the accused to a Police Officer to the effect that he had been assaulted by someone would become admissible under section 157 to corroborate the evidence of an accused person who elects to give evidence.

REX *vs.* PITCHORIS APPU ... XXIII. 32

Admissibility of first complaint of offence made under § 121 of the Criminal Procedure Code.

REX *vs.* RAMU KARTHIGESU *alias* CHELLIAH ... ... XXXIV. 10

§ 165

Powers of Judge under.

REX *vs.* NANDIAS SILVA ... XLI. 81

§ 167

Improper admission of confession—Other evidence which, if accepted, would have justified conviction—Appeal Court not in a position to state that Magistrate would have come to the same conclusion without the evidence of the confession—Conviction quashed.

POULIER *vs.* ABEYGUNAWARDENA XVII. 33

Evidence of witness recorded before framing of charge—Not recorded de novo **after framing of charge—Can such evidence be acted upon in reaching a decision—**

Held: *That evidence recorded in the presence of the accused before a charge is framed, and not recorded* de novo *after the framing of the charge, should not be used in reaching a decision against the accused.*

FERNANDO AND ANOTHER *vs.* PERERA, INSPECTOR OF POLICE, NEGOMBO ... ... XXXIV. 59

Evidence improperly admitted in Court of trial—Appellate Court will not set aside conviction where it is satisfied that there is sufficient admissible evidence to justify such conviction.

KALLADI PITCHE AND ANOTHER *vs.* INSPECTOR OF POLICE, PUTTALAM ... ... XXXVI. 5

Sections 62, 64 and 65 of the Indian Evidence Act define the only evidence which the law permits in order to prove a warrant of arrest and that is under section 62 of the Act by production of the original order, or, under the conditions specified in section 65, of a certified copy.

GOUNDAN *vs.* EMPEROR ... XXIX. 33

EXCEPTIO DOLI

See under **Fraud**

EXCEPTIO REI VENDITAE ET TRADITAE

Is it available against party claiming title under Settlement Order.

PERIYACARUPPEN CHETTIAR *vs.* PROPRIETORS AGENTS LTD. ... XXXII. 19

Conveyance of land by person without title —Subsequent acquisition of title—Exceptio rei venditae et traditae— **Extent to which doctrine operates.**

Where A, who had no interests in a land purported, with three others, to convey the entirety of the land and later acquired title to an undivided half-share of the land.

Held: (1) *That as no specific undivided shares had been conveyed by the four original transferors, each must be deemed to have conveyed a fourth share in the land.*

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(2) *That the doctrine of* exceptio rei venditae et traditae *operated against A only in respect of an undivided one fourth share in the land.*

CARLINA *alias* HAMINE *vs.* NONHAMY XLI. 7

Sale of land—No consideration—No delivery of deed or possession—Is plea available to vendor.

PETER SINGHO *vs.* SIYADORIS AND ANOTHER ... ... XLVIII. 49

EXCESS PROFITS DUTY ORDINANCE NO. 38 OF 1941.

The proviso to section 6 (3) of the Excess Profits Duty Ordinance applies only to a case in which there is complete identity between the personnel forming the old and the new businesses.

COMMISSIONER OF INCOME TAX *vs.* BONAR AND CO. ... ... XXV. 36

Section 10 (1)—Proper deductions for depreciation in the case of buildings—Amount of deduction is question of fact.

The Court held that what should be a proper deduction for depreciation under section 10 (1) of the Excess Profits Duty Ordinance was a question of fact and dismissed the appeal.

WALKER AND GREIG, LTD. *vs.* THE COMMISSIONER OF INCOME TAX XXVII. 107

Held: *Debts appearing in the books of an assessee and in respect of which no reduction has been allowed under section* 9 (1) (*d*) *of the Income Tax Ordinance, though prescribed, are nevertheless "debts due to the business" for the purposes of Section* 10 (1) (*b*) *of the Excess Profits Ordinance No.* 38 *of* 1941.

Per JAYETILEKE, J: "Section 10 (1) (*b*) of the Excess Profits Duty Ordinance provides that the capital of a business shall be taken to be, so far as it consists of assets being debts due to the business, the nominal value of these debts less any reduction which has been allowed for bad and doubtful debts under section 9 (1) (*d*) of the Income Tax Ordinance. It seems to me that on the true construction of section 10 (1) (*b*) it is quite plain as a matter of language that the legislature regards both bad and doubtful debts for which a reduction has not been claimed or allowed under section 9 (1) (*d*) of the Income Tax Ordinance as 'debts due.' In the present case no claim having been made or allowed at any time in respect of the debt in question under section 9 (1) (*d*) of the Income Tax Ordinance, the appeal must fail."

RAVANNA MANA EYANNA AND CO. *vs.* THE COMMISSIONER OF INCOME TAX XXIX. 70

Agreement between Commissioner and assessee as to amount of tax due—Part payment of tax by cheque—Notice given to assessee of balance tax due and date of payment—Payment of cheque stopped by assessee—Can whole tax be held to be in default in the absence of a fresh notice.

An agreement having been reached between the Commissioner and an assessee as to the amount of tax due, the assessee paid part of the tax by cheque. The Commissioner then sent him a notice specifying the balance tax due. The assessee stopped payment of the cheque, and the Commissioner thereupon issued his certificate for the summary recovery of the full amount of the tax. The assessee maintained that the entire tax could not be said to be in default until a fresh notice had been issued by the Commissioner.

Held: *That the notice issued by the Commissioner was not one contemplated by the Ordinance and that the entire tax was in default when he issued his certificate.*

COMMISSIONER OF INCOME TAX *vs.* VAZ ... ... XXX. 4

Section 3 (1)—Question whether assessee carrying on a "business" or whether he is an "employee" is a question of fact—Case stated under section 74 of the Income Tax Ordinance.

Held: (1) *That the question whether a person is carrying on business or whether he is an "employee" is a question of fact.*

(2) *That the Supreme Court will not, on a case stated under section* 74 *of the Income Tax Ordinance which is also applicable to the Excess Profits Duty Ordinance, interfere with a finding of fact of the Board of Review if there is evidence to support the finding.*

WIGNARAJAH *vs.* COMMISSIONER OF INCOME TAX ... ... XXX. 45

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Excess Profits Duty—Rejection of returns by assessor—Estimated assessment—Appeal to Commissioner—Increase of assessment by Commissioner—Appeal to Board of Review—Absence of evidence at the appeal—Confirmation of Commissioner's assessment—Case stated to Supreme Court—Power of Court to interfere in the absence of evidence from appellant to show that assessment was wrong.

SILVA *vs.* COMMISSIONER OF INCOME TAX ... ... XXXVI. 46

Partnership—Business conducted by surviving partners on partner's death on the same terms— Deceased partner's share bequeathed to his son by last will—Manager of dissolved partnership and another appointed executors under will—Business to be conducted by executors for son for a stipulated period — Dispute whether Manager, a partner in the business after deceased's death or merely an employee—Circumstances establishing a de facto **partnership—Excess Profits Duty Ordinance 38 of 1941—Prevention of Frauds Ordinance (Chap. 57)—Section 18 (*c*) scope of—Contracts between executor and beneficiary—Principles governing fiduciary relationship.**

By last will a partner of a Company bequeathed his share to his son A and directed that the business was to be continued by the manager of the partnership, one E, for a certain period of time. E and another were made co-executors of the will. After the death of the partner in 1937 the business was carried on as usual and on the same lines as before by E, the manager who continued to draw his allowance and his share of the profits. There was evidence to show that E as surviving partner had sent to the Registrar of Business Names a notification of the death of the partner, and subsequently the name of E and his co-executor were included in the Register of Business Names as "added partners" carrying on the business in partnership with E in his personal capacity and also as functioning in a representative capacity for the benefit of A. Both A and E had declared in 1940 and thereafter in the Income Tax returns the profits derived from the Company as income received from business carried on in partnership. In 1946 E entered into a formal agreement with A to continue to carry on the business on the basis of a partnership.

The assessor computed the profits of the business for 1944, on the footing that E was a partner. It was contended for the assessee that after the death of the partner, E ceased to be a managing partner and managed the business as an employee of A and that the payments made to E should be deducted from the profits of the business.

The Board of Review on an appeal by the assessee decided that as a matter of law it was not open to the assessor to prove the existence of a partnership because the capital of the business exceeded Rs. 1,000 and there was no written agreement until 1946; and that in any event E as executor of the will could not enter into a partnership with himself as this would amount to a breach of trust.

Held: (1) *That the facts in this case establish that a* de facto *partnership subsisted during the relevant accounting period between E on the one hand, and himself and his co-executor on the other, the executors functioning in a representative capacity for the benefit of A, and that the profits had in fact been distributed between E and A on that basis.*

(2) *That the evidentiary prohibition contained in section* 18 (*c*) *of the Prevention of Frauds Ordinance does not apply as in this case it was the assessee who "sued" the assessor in claiming a reduction of the assessment and the assessor was not precluded from proving the partnership for the purpose of resisting the assessee's claim to have the assessments reduced upon a false hypothesis.*

(3) *That a transaction which a man enters into* qua *executor with himself in his personal capacity is not automatically void but is voidable on the ground of fraud and bad faith.*

COMMISSIONER OF INCOME TAX *vs.* ALLAUDIN ... ... XLVIII. 91

EXCISE ORDINANCE.

Excise Officer acting under § 36 of the Ordinance—Offence under §§ 219 and 323 of the Penal Code—Meaning of the term "charged" in § 219.

Held: (1) *That hurt caused to an Excise Guard acting under the orders of an Excise Inspector acting in the discharge of his duty under* § 36 *of the Excise Ordinance is hurt*

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within the meaning of § 323 *of the Penal Code.*

(2) *That the expression "charged" in* § 219 *of the Penal Code is not restricted to a judicial charge formu'ated after recording evidence in a Court.*

An arrest of a person by a duly authorized officer is "charging" within the meaning of this section.

KARUNARATNE *vs.* SIYATU ... I. 31

Possession of ganja—Evidence of decoy—No conviction can take place in the absence of independent evidence.

On certain information received an Excise Inspector gave a decoy a marked coin and sent him with instructions to buy ganja. The Inspector followed about an hour later. When he came up he found the decoy seated in a barber's shop, and a bag or attache case containing ganja on the counter. The accused was standing near the bag and this led the Inspector to infer that he was about to open or close it. In the bag was found the marked coin handed to the accused by the decoy.

Held: (1) *That these facts are insufficient to establish a charge of illicit sale of ganja.*

(2) *That in the absence of any independent evidence corroborative of that of the decoy the facts are insufficient to prove possession.*

LAWRENCE PULLE *vs.* KATTALINGAM I. 56

Prohibition that no person shall possess ganja and cannabis indica—Notification under § 16 (3) of the Excise Ordinance—Rules under § 31 permitting possession of cannabis indica or tincture of it with licence—Can a notification under § 16 (3) be repealed by a rule under § 31? Section 11 of the Interpretation Ordinance No. 21 of 1901.

A notification was published in the Gazette of March 27, 1914 in the following terms:—

"It is hereby notified that His Excellency the Governor in Executive Council, in exercise of the powers vested in him by section 16 (3) of "The Excise Ordinance No. 8 of 1912 prohibits absolutely throughout the whole Island the possession by any person of ganja, bhang, and every preparation and admixture of the same, and every intoxicating drink or substance prepared from any part of the hemp plant (Cannabis sativa or indica).

Excise notification No. 18 dated, October 2, 1913 is hereby cancelled. 'See also Excise Notifications 24, 25, 46, 135, and 139)"

In the Gazette of July 27, 1923 certain rules purporting to be made under § 31 (1) of the Excise Ordinance were published. They *inter alia* permitted the possession of cannabis indica or its tincture by qualified medical practitioners and approved chemists with a licence. These rules contained a rule No. 16 to the following effect:—

All rules made under "The Excise Ordinance No. 8 of 1912 before the passing of these rules relating to the importation, possession, use, sale, or dispensing of ganja, bhang, and cannabis indica are hereby repealed."

As a matter of fact, there were no rules existing prior to this rule above mentioned on the subject. The question arose as to whether the expression "all rules" in the rule quoted above included the notification of March 27, 1914, above cited.

Held: *That a notification under a different section cannot be repealed by a rule under* § 31 *of "The Excise Ordinance."*

BARTHOLOMEUSZ (INSPECTOR OF POLICE) *vs.* SINNATHAMBY ... ... I. 116

Possession of toddy—House occupied by three—Presence of more than the maximum quantity a person may legally possess.

Held: *That it is not an offence to keep in a house occupied by three persons a quantity of toddy greater than the maximum one person may legally possess.*

HOLSINGER (EXCISE INSPECTOR) *vs.* FRANCINA FONSEKA ... I. 225

Illicit sale of toddy—Decoy not called as a witness.

Held: *That the mere fact that a marked coin was found in the accused's possession and the decoy is found with a coconut shell of toddy, cannot in a criminal case be held to be sufficient evidence of a sale.*

(EXCISE INSPECTOR) RODRIGO *vs.* KARUNARATNE ... ... I. 222

Illicit sale of brandy—Decoy not called as a witness.

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Held: *That a conviction can be based on such evidence as the possession of an excisable article and the marked notes by the accused without the evidence of the decoy.*

REX *vs.* VALLEY AND ANJALINGAN I. 227

Motor Car used for transporting toddy—Circumstances in which confiscation may be ordered.

Held: (1) *That before confiscation of a vehicle used for transporting an excisable article without a permit is ordered the owner should be given an opportunity of being heard against the order.*

(2) *That where the owner himself is not convicted of the offence no order should be made against the owner unless he is implicated in the offence which renders the thing liable to confiscation.*

EXCISE INSPECTOR FERNANDO *vs.* MARTHER AND SONS ... ... I. 249

Entry of premises without search warrant or making the entry required by § 36—How far conviction can be based on evidence discovered in the course of such entry.

Held: *That a Court cannot for the reason that the entry is illegal discharge the accused for if an offence has been committed the illegality of the entry and search is no bar to conviction.*

THE ATTORNEY GENERAL *vs.* HARTHEWYCK ... ... I. 280

Illegal possession of fermented toddy—Seizure of excisable article by excise officers—Excisable article seized not packed and sealed in presence of accused—Plea of guilty tendered by pleader for accused—Appeal—Fines aggregating Rs. 25 and over.

Held: (1) *That it is imperative that excisable articles seized by an excise officer should be packed and sealed in the presence of the accused.*

(2) *That where the aggregate fines on all counts amount to over Rs. 25 the accused has an appeal both on the law and on the facts, irrespective of the question whether he is appealing from only one portion of the conviction.*

(3) *A Magistrate should not accept a plea of guilty tendered by the pleader for the accused in an excise case unless it is a plea offered under § 154 of the Criminal Procedure Code.*

FERDINANDO (EXCISE INSPECTOR) *vs.* MUDALIHAMY ... ... I. 297

Is constable aratchi an Excise Officer within the meaning of section 49.

Held: *That a constable Aratchi is an Excise Officer within the meaning of section 49 of the Excise Ordinance.*

WICKREMANAYAKE *vs.* FERNANDO II. 335

Prohibition of transport of toddy—Is mere presence of toddy within the prohibited area an offence.

Held: *That mere presence with a quantity of toddy in a train passing through a prohibitted area was an offence against a notification prohibiting transport within the limits of the place where the accused was found.*

FONSEKA (EXCISE INSPECTOR) *vs.* FERNANDO ... ... II. 348

Onus of Proof—Accused in possession of postal article containing ganja.

Held: *That the onus lies on an accused found in possession of a postal packet containing ganja addressed to him to prove that his possession is innocent.*

BURAH (S. I. POLICE) *vs.* SALIE II. 381

Evidence of Sale—Can conviction be based on circumstantial evidence.

Held: *That a conviction can be based on circumstantial evidence of illicit sale of an excisable article.*

JAYATILLEKE (EXCISE INSPECTOR) *vs.* DONA ANA ... ... II. 391

Sealing of production. Is delay in sealing excisable article seized in the course of a raid fatal to a conviction.

Held: *That delay in sealing excisable articles seized in the course of a raid is not necessarily a fatal irregularity.*

KUPASAMY (EXCISE INSPECTOR) *vs.* CADER SAIBO ... ... II. 416

Possession of ganja—Arrest of person in possession of ganja in a tea boutique without a search warrant or an entry in notebook of Excise Inspector making arrest.

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Held: *That an Excise Inspector can legally arrest a person found in possession of ganja in a tea-boutique even though he has no search warrant or he has not made an entry in his notebook.*

PERUMAL *vs.* AHAMADU *et al* ... II. 465

Possession of an excisable article—What constitutes possession.

Held: *That a person who has the key to a box found to contain an amount of toddy beyond the quantity a person may lawfully possess without a permit was guilty of the offence of illicit possession even though the toddy was meant for the consumption of three persons and did not exceed the quantity which three persons may lawfully possess.*

WIJESEKERA *vs.* SILVA ... II. 471

Charge of possession of ganja—Acceptance of parcel of ganja sent by post—No proof of possession under section 16 (3)—When should a retrial of a charge which fails for want of observance of the requirements of the law be allowed.

Held: *That the acceptance by a person of a parcel, found to contain ganja, sent to him by post does not amount to possession under section* 16 (3).

MENDIS (S. I. POLICE) *vs.* KAITHAN APPUHAMY ... ... III. 68

Charges of tapping without a licence and failing to give information of illicit tapping being the owner of a land—Can these be joined where different persons are charged—Is joinder in order—What must be proved to establish a charge of failing to give information of illicit tapping.

Held: (1) *That a person charged with illicit tapping cannot be tried together with a person charged with failing to give information of illicit tapping in a land of which he is the owner.*

(2) *That before a person can be convicted of the offence of failing to give information of illicit tapping it must be proved that he is the owner of the land on which the illicit tapping took place and that his failure to give information of the offence was intentional.*

ALWIS (EXCISE INSPECTOR) *vs.* ARALISHAMY ... ... III. 107

Transporting arrack in excess of the quantity a person may transport without a pass—Property transported owned by several persons.

Held: *That it is no defence, to a charge of illicit transportation of arrack in excess of the quantity a person may transport without a pass, to say that the arrack belongs to several persons each of whom was entitled out of the total amount transported to a quantity which might be lawfully transported without a pass.*

DEWASUNDERA (EXCISE-INSPECTOR) *vs.* LETCHIMAN CHETTY ... III. 112

Illicit possession of toddy—Charge against married woman living with her husband.

Held: *That the presumption is that the house occupied by a married couple is in the possession of the husband rather than of the wife and that to succeed in a charge of illicit possession of toddy against a married woman living with her husband the prosecution must rebut this presumption.*

SAMARAWEERA *vs.* BABEE ... IV. 48

Sale of toddy on credit—Prohibition of such sale by law—Can money due on such sale be recovered.

Held: *That where toddy is sold on credit in contravention of a prohibition imposed by a regulation made under the Excise Ordinance the money due on the sale cannot be recovered.*

ALWIS *vs.* SEDORIS ... ... IV. 63

Prosecution for breach of a rule made under the Ordinance—Gazette containing rule not produced.

Held: *That in a charge for a breach of a statutory rule the prosecution should produce the Gazette containing the rule or a certified copy thereof.*

INSPECTOR OF POLICE *vs.* PUNCHIRALA V. 38

Excise Ordinance No. 8 of 1912 section 50—Criminal Procedure Code, sections 190 and 429—Information Book—Extract from—How proved.

Held: (1) *That where it is sought to prove, by the production of a certified copy, a statement recorded in the Information Book of a police station, that copy must be produced by the police officer who recorded the statement.*

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(2) *That the provision of section* 429 *of the Criminal Procedure Code must be interpreted by the trial Judge with reasonableness and ought not to be used to remedy a dangerous defect or to fill a gap in the case for the prosecution.*

(3) *That it is illegal for a Magistrate to recall a prosecution witness and hear other evidence in support of the prosecution case after he has reserved his order at the close of the case.*

(4) *That the presumption created by section* 50 *of the Excise Ordinance does not arise merely because a man behaves in a suspicious way in respect of any excisable article.*

(5) *That section* 50 *of the Excise Ordinance comes into effect when from the suspicious behaviour of the person charged an element of an offence under section* 43 *of the Ordinance can be proved.*

PONNIAH (EXCISE INSPECTOR) *vs.* ABDUL CADER ... ... VII. 43

Unauthorised possession of Excisable Article—Evidence of conduct—When may a conviction be sustained on such evidence.

Held: *That the evidence was sufficient to justify the finding that the accused was in possession of the pots of fermented toddy.*

EXCISE INSPECTOR OF MATALE *vs.* HEEN MENIKA ... ... VIII. 83

Excise Ordinance No. 8 of 1912 section 50—Criminal liability of a holder of a licence.

Held: *That for the presumption created by section* 50 *of the Excise Ordinance No.* 8 *of* 1912 *to arise and for the burden of rebuttal to be cast on the licence-holder it must be established by the prosecution that an offence has been committed by a person in his employ.*

ALLEGACONE (EXCISE INSPECTOR) *vs.* MAILVAGANAM AND ANOTHER VIII. 85

Section 34—Meaning of the words "any person found committing.....any offence punishable under § 43 and section 44".

THE KING *vs.* GUNASEKERA AND TWO OTHERS ... ... IX. 40

Powers of arrest of Excise Officers.

THE KING *vs.* GUNASEKERA AND TWO OTHERS ... ... IX. 40

Illicit possession of toddy—Possession by husband and wife—House in which toddy found occupied by three persons—Can occupants jointly possess a quantity of toddy which when divided by the number of inmates of the house is a permissible quantity.

Held: *That where two persons are charged with illicit possession of toddy in a house, they are not entitled to be acquitted on the mere showing that the toddy found, when divided among all the inmates of the house, is less than the prohibited quantity in respect of each inmate.*

GRENIER (INSPECTOR OF EXCISE) *vs.* SIRIMALE AND ANOTHER ... IX. 167

Illicit possession of toddy by husband and wife—Mere existence of toddy in a house occupied by husband and wife insufficient to establish possession by husband as chief occupier.

Held: (1) *That the evidence was insufficient to convict the second accused of the offence of illegal possession of toddy.*

(2) *That the mere presence in a man's house of property, the possession of which is illicit, is not* per se *sufficient to raise the presumption that it is there with his knowledge and consent.*

PERUMAL (EXCISE INSPECTOR) *vs.* LUCIA ANTHONY AND ANOTHER X. 21

Production—Failure to seal productions at the spot—When does such failure affect a conviction.

Held: *That the failure to seal the productions at the spot at which they were seized immediately after the seizure was, in the circumstances, not fatal to the conviction.*

IMBULDENIYA (EXCISE INSPECTOR) *vs.* ROMANIS APPUHAMY ... X. 55

Charge of possessing fermented toddy in excess of the prescribed quantity—Conscious and exclusive possession.

Held: *That the facts were not sufficient to establish conscious and exclusive possession on the part of the appellant.*

WANASINGHE *vs.* SOPHIA HAMINE X. 140

Decoy—Onus of proof—Possession.

Held: *That there is no obligation on the prosecution to prove that the arrack found was not introduced by the decoy in a case*

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where the decoy's evidence is believed unless the defence contends that the arrack was introduced by the decoy.

EXCISE INSPECTOR *vs.* PALANIMUTTU XI. 4

Sale of arrack on credit—Charge against renters—Conviction based on books kept by tavern-keeper—Is such evidence admissible against renters—Section 50 of No. 8 of 1912.

Held: *That the convictions cannot be sustained inasmuch as the books produced were inadmissible in evidence as against the appellants.*

SUPERINTENDENT OF EXCISE (TRINCOMALEE) *vs.* DHARMALINGAM AND ANOTHER ... ... XI. 34

Licence-holder for sweet-toddy charged with tapper—Fermented toddy found in the presence of licence-holder in a vessel attached to a kitul tree authorised to be tapped—Acquittal of tapper—Absence of explanation by the licence-holder—Is he entitled to acquittal.

Held: (1) *That the mere fact of the acquittal of the tapper does not entitle the licence-holder to an acquittal.*

(2) *That the onus of proving that the terms of condition* 5 *of the Sweet-Toddy Licence have been complied with is on the holder of the licence.*

SAMARASINGHE (EXCISE INSPECTOR) *vs.* PUNCHI BANDA ... ... XI. 63

Excise Ordinance No. 8 of 1912—Section 50—Meaning of the words "account satisfactorily"—Is knowledge (mens rea) **necessary for conviction in respect of offences under section 43 of Excise Ordinance.**

Held: (1) *That the words "account satisfactorily" in section* 50 *of the Excise Ordinance mean an explanation satisfactory in the eye of the law, and not merely one that is reasonable.*

(2) *That the absence of knowledge* (mens rea) *is no ground of defence in respect of offences made punishable under section* 43 *of the Excise Ordinance.*

GRENIER (EXCISE INSPECTOR) *vs.* BABA ... ... XI. 109

Credit sale of arrack—How should it be proved.

TENNEKOON *vs.* PONNIAH ... XIII. 21

Charge of unlawful possession of toddy—Toddy found in house occupied by husband and wife—Circumstances which may warrant a presumption of guilt against wife.

The 1st and 2nd accused are husband and wife, living toghether in the house where fermented toddy beyond the prescribed limit was found. The Magistrate found that when the Excise party approached the 1st accused started to run away, that the fermented toddy spoken to by the Inspector was found in the kitchen of that house, that the 2nd accused was in the compound when the Excise party were approaching and that she rushed in and broke a pot in the kitchen and fermented toddy was spilt on the floor. The Magistrate convicted both accused.

Held: *That on these facts the wife cannot be said to have been in possession of the toddy.*

DUNUWILA *vs.* POOLA AND ANOTHER XIV. 118

Search for excisable article—When may search be unlawful.

DISSANAYAKE *vs.* MARIMUTTU XV. 121

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

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

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

DE SILVA (EXCISE INSPECTOR) *vs.* LIYORIS SINGHO ... ... XVI. 52

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

The Magistrate convicted the accused on the following evidence: That the decoy was standing in the boutique near the accused with a glass in his hand which was wet and smelling of arrack. In a drawer

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of a table the marked one rupee note was found in a tin receptacle. The decoy's mouth smelt of arrack. On the table was found an open bottle of arrack.

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

DHARMARATNE (EXCISE INSPECTOR) *vs.* DAVITH SINGHO ... XVI. 81

Charge of sale of bulk arrack at a price higher than the current rate displayed on the sign-board—What is necessary to be proved in such a charge.

Held: *That where a person is charged with selling bulk arrack at a price higher than the current rate appearing on the sign-board on a particular date, it is essential to lead evidence to show that a certain price was displayed on the sign-board on the day in question.*

BARTHOLOMEUZ (EXCISE INSPECTOR) *vs.* KANDIAH ... ... XX. 140

Excise Ordinance section 2—Sale—Scope and meaning of expression.

Held: *There is a sale within the meaning of the Excise Ordinance where A to oblige B buys arrack and later transfers it to B for a money consideration.*

ATHAPATHU ASSISTANT COMMISSIONER OF EXCISE *vs.* MENDIS APPUHAMY ... ... XXVII. 32

Exclusive possession of arrack.

RODRIGO *vs.* PUNCHI MAHATMAYA XXIX. 56

Excise Ordinance section 50—Presumption—When does it arise.

Held: *That the presumption under section* 50 *of the Excise Ordinance only arises once possession has been established.*

LABROOY *vs.* FERNANDO ... XXX. 23

Possession of Arrack in excess of prescribed quantity—Arrack kept by accused for the benefit of another who possessed a permit—Can accused be convicted.

Held: *That a person who merely keeps arrack in his possession for the benefit of another who is a permit-holder, cannot be said to have committed an offence.*

SIMAN *vs.* MUSAFER, S. I. POLICE XXXIII. 16

Sale of brandy without a licence—What constitutes a sale—Liquor procured for private use. Burden of proof.

Held: (1) *That a transfer of the goods by acceptance of a cheque in payment of the article constitutes a sale within the meaning of section* 2 *of the Excise Ordinance.*

(2) *That when the prosecution proves that a sale has taken place, the burden is cast on the accused to show that the foreign liquor he sold was what had been legally procured for his private use.*

B. JAMIS *vs.* A. F. C. BENEDICT, INSPECTOR C. I. D. ... XXXIII. 84

Section 17 (d)—Interpretation of— Transposing of words to give effect to the object of the Statute—Sale without licence of brandy purchased for private use—Is it an offence.

Held: *That according to section* 17 (*d*) *of the Excise Ordinance, the right to sell without a licence liquor purchased by a person for his private use, is limited to sale by him or by auction on his behalf only on his quitting the station, or by his representatives in interest after his decease.*

SELLIAH EXCISE INSPECTOR *vs.* DE SILVA ... ... XXXVI. 17

Manufacture and possession of arrack and possession of utensils for its manufacture—Conscious possession—Sufficiency of evidence to establish.

The accused was charged and convicted of the offences of (*a*) the unlawful manufacture of arrack, (*b*) possession of arrack, (*c*) possession of utensils for its manufacture.

The evidence established (*a*) that the Excise Inspector saw smoke rising from the scrub jungle and when he approached the place he saw the accused getting up from by the still that was in operation and the accused ran away,

(*b*) that at the spot where the accused ran away he found a complete still with arrack dripping into a bottle and that there was a small bucket for changing water in the condenser pan.

Held: (1) *That the evidence was sufficient to show that the accused had been in conscious possession of the arrack and utensils.*

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(2) *That the conviction on all three counts should be upheld.*

JAMES SINGHO *alias* ATAKOTA BANDA *vs.* W. L. FERNANDO, EXCISE INSPECTOR ... ... XXXVI. 81

§ 34—Has no application to offences under the Poisons, Opium and Dangerous Drugs Ordinance.

APPUSINGHO AND THREE OTHERS *vs.* VAN BUREN ... ... XXXVI. 91

Charges of possessing fermented toddy and transporting same toddy—Conviction on both charges—Propriety Penal Code, section 67.

Where a person was charged with possessing fermented toddy and with transporting the same toddy himself and was convicted on both charges.

Held: *That as the act of possession was incidental to the act of transporting, the conviction for possessing should be set aside.*

LAZARUS *vs.* DE ZYLVA (EXCISE INSPECTOR JA-ELA) ... ... XXXIX. 64

Excise Ordinance, Powers of search and arrest.

Held: (1) *That an Excise Inspector who searches premises without a search warrant must first make the record required by section 36 of the Excise Ordinance, and that such record can be proved only by the document itself or by secondary evidence of its contents, if secondary evidence is admissible.*

(2) *That under section 34 of the Excise Ordinance there is no power to effect an arrest within a dwelling house.*

SAMANIS AND ANOTHER *vs.* DHARMARATNE (EXCISE INSPECTOR, GAMPAHA) XXXIX. 99

Raid of dwelling house without search warrant—Evidence obtained is admissible under Evidence Ordinance—But the practice is one that should be condemned.

RAJAPAKSE *vs.* FERNANDO ... XLV. 6

Search without warrant—Admissibility of evidence so obtained.

An Excise party entered a house without a search warrant and arrested without a warrant the accused, who was alleged to have sold to a decoy the arrack, which the decoy was drinking at the time of entry. At the trial evidence was admitted of similar offences committed by the accused.

Held: (1) *That the search without a warrant of the whole of a building, the verandah of which was used as a boutique and the rest as a human habitation, cannot be justified on the ground that such building was a place other than a dwelling-house.*

(2) *That the arrest of the accused without a warrant for the commission of the alleged offence and without compliance with the requirements of section 36 is unlawful.*

(3) *That the evidence obtained by such search is inadmissible.*

(4) *The admission of evidence of similar offences committed by the accused was prejudicial to the accused.*

MURIN PERERA *vs.* WIJESINGHE, EXCISE INSPECTOR, KESBEWA ... XLIII. 8

Search without warrant or complying with section 36—Evidence obtained by such search—Should a conviction be based on such evidence.

Held: (1) *That a Police Officer, who is the sole witness for the prosecution, should not undertake the conduct of the prosecution in Court.*

(2) *That a conviction should not, save in exceptional circumstances, be based on evidence gathered in the course of an illegal entry on a person's house, although such evidence is not declared by the Evidence Ordinance to be inadmissible.*

MARIYAI *vs.* SENANAYAKE ... XLIII. 46

Excise Notification—Should it be proved.

EXCISE INSPECTOR, WELIGAMA *vs.* JAMIS SILVA ... ... XLIII. 59

Illegal search—Evidence discovered on—Is such evidence admissible—Weight to be attached to such evidence.

Held: (1) *That evidence discovered on an occasion when the accused's premises had been illegally raided without the authority of a search warrant and in contravention of the provisions of section 36 of the Excise Ordinance is admissible to establish a charge under the Excise Ordinance, but the weight to be attached to such evidence depends on the facts of each case.*

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(2) *That where such evidence has not been challenged as untrue or unreliable, the allegedly illegal entry and search have no bearing on the case.*

S. KARALINA *vs.* EXCISE INSPECTOR, MATARA ... ... XLIII. 81

Bond by persons arrested by Excise Officers—Forfeiture of Bond—Have Excise Officers power to release persons arrested on their own bail—Can a Magistrate forfeit such bond.

ANDIYA VIDANE *vs.* JANDSE ... L. 95

EXECUTION

Execution—Application for writ by plaintiff—Application by defendant to have agreement certified of record as adjustment under section 349 of the Civil Procedure Code—Finding by Court that the agreement did not amount to an adjustment—Is it still necessary for Court to consider under section 344 of the Civil Procedure Code whether right to execution controlled by such agreement.

Held: *That independently of whether the terms of a bargain between a judgment-creditor and a judgment-debtor amounts to an adjustment within the meaning of section* 349 *of the Civil Procedure Code, the terms of the bargain should be considered by the executing Court under section* 344 *of the Civil Procedure Code as to whether the plaintiff's right to execution was controlled, and if so, to what extent and in what manner by such bargain.*

SILVA *vs.* WICKREMASINGHE XXIV. 131

Execution—Sale in Execution of decree—Title of *bona fide* **purchaser from decree holder who purchased at sale not affected by reversal of decree.**

WIJERATNE *vs.* SAPUGODAGE MENDIS APPU *et al* ... ... XXXII. 105

EXECUTORS AND ADMINISTRATORS

An administrator, though subject to stringent liabilities under the Civil Procedure Code may be charged under § 392 of the Penal Code with criminal breach of trust of moneys received by him.

EMMANUEL *vs.* FERNANDO (INSPECTOR OF POLICE) ... ... II. 33

Executor de son tort**—Extent of liability in Ceylon.**

Held: *That an executor* de son tort *is liable only for the amount of assets which have come into his hands.*

That the liability of an executor is the same in Roman Dutch Law as in English Law.

PERERA *vs.* MANUEL HAMINE *et al* II. 343

Letters of Administration—Belated application for—In what circumstances should it be allowed.

Held: *That a belated application for letters of administration should only be granted where the necessity for administration is made known in a responsible manner and not in a casual manner by a mere statement at bar.*

MARIKAR *vs.* MARIKAR AND OTHERS IV. 45

Leasehold right vested in administrator—How may it be surrendered.

Held: *That an administrator cannot legally surrender leasehold rights vested in the estate without the consent of Court.*

RASARATNAM AND ANOTHER *vs.* SINNADURAI ... ... IV. 94

Administration of Estate—Position of deceased executor's executor in relation to the estate administered by the deceased executor.

Held: (1) *That without formal grant of letters the executor of a deceased executor gets no power to represent the estate which was administered by the deceased executor.*

(2) *That when a fresh grant of administration is made on the death of a sole executor the rules prescribed in the Civil Procedure Code for a first grant must be followed.*

KALID *vs.* MARIKAR AND ANOTHER IV. 143

Property devolving on heir of deceased—Transfer of such property by heir—Transfer not for purposes of administration—When may a mortgage creditor of the deceased seize such property in the hands of the transferee.

RAMUPILLAI *vs.* SOMASUNDARAM IX 1

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Mortgage action against executor of last will of deceased mortgagor—Sale of mortgaged property in execution—Balance of mortgage debt remaining unsatisfied—Death of executor—Ex parte order appointing a person administrator of the deceased mortgagor's estate for the purpose of realizing the balance due on the mortgage—Motion for writ—Can District Court set aside order of substitution.

Held: *That the order substituting the defendant as administrator in place of the deceased executor operated as* res judicata *and the District Court had no power to set it aside*

MEEDENIYA *vs.* VANDER POORTEN IX 10

Executor—Power to borrow money for purposes of administration—Promissory note as security—Can successor of the Executor be sued on a promissory note given by the Executor as security for a loan for purposes of administration.

Held: (1) *That an Executor has the power to borrow money on a Promissory note for the purposes of administration.*

(2) *That where an Executor has contracted a debt for the purposes of administration in such a manner as to exclude personal liability the estate is liable to pay the debt.*

RANGANATHAR AND ANOTHER *vs.* AMMAL ... ... IX 142

Persons subject to Thesawalamai—Death of one spouse—Rights of administrator as regards thediatetam property for purposes of administration.

CHELLIAH AND OTHERS *vs.* SINNATHAMBY AND OTHERS ... X. 116

Executor de son tort—**Test of liability for debts of deceased.**

STORER *vs.* SINTHAMANY CHETTIAR X 176

An executor, who is not an express trustee is entitled to claim the benefit of the Prescription Ordinance.

DE SILVA AND OTHERS *vs.* DE SILVA XI. 131

Specific devise by will subject to mortgage by testator—Residue to executor—Duty of executor to redeem the mortgage.

DE SILVA AND OTHERS *vs.* DE SILVA XI. 131

Can an administrator continue an action begun by his predecessor in office—Civil Procedure Code sections 398 and 404—Time when objection may be taken to the status of a party suing.

Held: (1) *That the succeeding administrator may continue an action begun by his predecessor.*

(2) *That the succeeding administrator may defend an action begun against his predecessor.*

(3) *That it is settled law that the executor or administrator in Ceylon has the same powers as regards immovables as an English personal representative had in* 1893 *as regards personal property.*

(4) *That the person summoned to defend an action as legal representative must object that he is not the legal representative, or make any defence appropriate to his character as such.*

(5) *That the objection, that a person is not the legal representative, is one that must be taken and determined in the first instance.*

(6) *That the objection to the continuance of the action by the present plaintiffs is one that should have been taken when the motion for their substitution was made, and that the substitution having been made without objection, the question cannot be raised afterwards.*

THORNTON AND ANOTHER *vs.* VELAITHAN CHETTY ... ... XI. 148

Action on Mortgage bond—Substitution of legal representative of plaintiff—Decree—Irregularity in appointment of legal representation—Can defendant be compelled to pay the same claim a second time to the proper heirs.

Held: *That though there are irregularities in the appointment of a legal representative to a deceased mortgager, a party who has paid a claim to such representation on an order of Court cannot be compelled to pay the same claim again.*

SELONONA HAMINE *vs.* PERERA XII. 144

Administration—Heir in exclusive possession of certain premises—Action for rent by administrator—Can such action be maintained in the absence of a contract of tenancy.

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Held: *That an administrator can, for the purposes of administration, maintain an action against an heir for reasonable rent in respect of premises in the possession of such heir although such action is not based on a contract of tenancy.*

KARUNARATNE *vs.* THE PUBLIC TRUSTEE ... ... XIII. 94

Liability of executor to pay interest on legacy money—When does interest become payable on a legacy.

FONSEKA *vs.* FONSEKA *et al* ... XIII. 121

In a case where the expression lessee is defined to include his heirs, executors, administrators, and permitted assigns, an executor is in terms one of the lessees, and is just as much entitled to hold the lease as is a permitted assign.

JAYAWARDENE *vs.* JAYAWARDENE AND OTHERS ... ... XIV. 13

Does the property of an intestate vest in the administrator—Civil Procedure Code section 472.

Held: *That under our law the property of an intestate vests in the administrator for purposes of administration.*

DE SILVA *vs.* RAMBUKPOTHA ... XIV. 75

Liability of an executor or administrator personally to pay costs in an action instituted by him on behalf of the estate of the testator or intestate.

USOOF JOONOOS *vs.* ABDUL KUDHOOS ... ... XIV. 141

Action instituted by administrator before obtaining letters of administration—Letters of administration obtained subsequently but before decree—Is decree in favour of administrator good.

KUDHOOS *vs.* JOONOOS ... XV. 133

Will—Specific devise subject to mortgage by testator—Executor's failure to redeem mortgage—Devised property sold under hypothecary decree—Action against executor by deceased devisee's heirs for value of land —Liability of Executor—When does cause of action arise.

DE SILVA AND OTHERS *vs.* DE SILVA ... ... XVII. 39

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

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

PONNUSAMY *vs.* AIYADURAI AND ANOTHER ... ... XVII. 136

The administrator of a deceased money lender, who has not kept a regular account of each loan as required by section 8 of the Money Lending Ordinance, is not barred by that section from enforcing a claim in respect of money lent by the deceased in an action commenced by the deceased money lender in his lifetime.

DE SILVA *vs.* EDIRISURIYA ... XVIII. 11

Administrator—Right of a widow governed by Hindu Law to letters of administration in respect of her husband's estate—Should a person resident outside Ceylon be granted letters of administration.

Held: (1) *That the Court has the power to pass over a widow's claim to letters of administration in respect of her late husband's estate for good reason.*

(2) *That it is undesirable that letters of administration should be issued to a person as attorney of a non-resident applicant for letters of administration, where his interests or affection may conflict with his duty to the estate.*

VYRAVAN CHETTIAR *vs.* SEGAPPIACHY ... ... XIX. 61

Debt due from estate of deceased—Admission of debt by administrator in administration proceedings—Does it amount to acknowledgment.

PERERA *vs.* PERERA AND FIVE OTHERS ... ... XX. 35

Property of deceased testator—Sale by heirs and executor—Sale is subject to the debts of the estate if such debts cannot be satisfied without recourse to the lands transferred.

SURIYAGODA *vs.* WILLIAM APPUHAMY ... ... XXI. 77

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Promise by executors to pay expenses of proceedings relating to testamentary disputes —Is such promise binding on the estate of the deceased.

Held: (1) *That a promise made by the executors of an estate to pay expenses incurred by a party, in regard to certain disputes in the testamentary case, is a personal obligation which cannot bind the estate.*

(2) *A co-debtor cannot be made liable* in solidum *unless there is a special agreement to that effect or by operation of law.*

SARAM *vs.* VANDER POORTEN XXIII. 84

Administration—Proceedings de facto **complete—No judicial settlement—Contingent debt owed by deceased testator—Can creditor follow up assets in hands of devisees to recover debt which was merely contingent at time of testator's death—Must he sue the executors—Civil Procedure Code section 472—Can minor devisees be sued—Is judicial settlement** a sine qua non **for completion of administration proceedings.**

Held: (1) *That once the administration proceedings are completed* de facto, *although the estate is not judicially settled, a creditor is entitled to follow up assets in the hands of devisees in satisfaction of a debt which was only contingent at the time of the debtor's decease.*

(2) *That where the devisees are actually in possession of the property devised to them, section* 472 *of the Civil Procedure Code has no application and it is open to the plaintiff to sue the devisees themselves.*

(3) *That under our law there is nothing to prevent a minor being sued through a* guardian-ad-litem *in order to reach assets of a deceased person in his hands.*

RAMALINGAMPILLAI *vs.* ADJUVAD AND ANOTHER ... ... XXIII. 131

Appointment of administrator over estate of deceased creditor after prescription has begun to run—Does it arrest progress of prescription against minor heirs.

UDUMANACHY AND OTHERS *vs.* MEERALEVVE ... ... XXIV. 5

An executor appointed by the last will of a bhikkhu **has no right to have recourse to the** pudgalika **property left by him for the purposes of administration.**

SUMANA THERO *vs.* RAMBUKWELLA ... ... XXV. 86

Administration—Value of estate left by deceased—How to determine—Civil Procedure Code, section 519.

Held: *That, in determining the value of the estate of a deceased person for purposes of section* 519 *of the Civil Procedure Code, allowance must be made for debts or encumbrances incurred or created* bona fide *for full consideration in money or money's worth solely for the deceased's own use and benefit.*

DE SILVA *vs.* PEIRIS ... XXVI. 110

Partition case—Death of party—Administrator party to interlocutory decree—Rights of the heirs of deceased to intervene after such decree.

MACKEEN AND ANOTHER *vs.* PULLE AND TWO OTHERS ... ... XXXIII. 28

Decree against administrator—When is it binding on heirs.

MACKEEN AND ANOTHER *vs.* PULLE AND TWO OTHERS ... ... XXXIII. 28

Probate or letters of administration—Should it be stamped.

HASSAN *vs.* MUTHUWAPPA XXXIII. 108

Estate in Ceylon of British domiciled person—Application for sole testamentary jurisdiction by executor resident in Ceylon—Courts Ordinance, section 68—Amendment by No. 40 of 1938—British Courts Probate Re-sealing Ordinance, section 3. Their effect.

B, a British subject domiciled in Great Britain and who had property in Ceylon, died in England, leaving a Will. Two of the executors proved the Will before the British Courts. The third executor, who resides in Ceylon, applied for sole testamentary jurisdiction in respect of the property situated in Ceylon, under section 68 of the Courts Ordinance.

Held: (1) *That, in the circumstances, the proper procedure is that specified in section* 3 *of the British Courts Probates (Re-sealing) Ordinance.*

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(2) *That the Court will not entertain such an application under section* 68 *of the Courts Ordinance, unless it is satisfied that there are good reasons for not observing the special procedure for re-sealing probate granted in the British Courts.*

IN *Re* BERESFORD BELL ... XXXVI. 7

Executor's action to recover money lent by deceased on promissory note—Defendants granted leave to defend without security—Can executor proceed by way of summary procedure.

DE SILVA AND ANOTHER *vs.* DE SILVA AND ANOTHER ... ... XXXVI. 52

Testamentary jurisdiction—Application under chapter XXXVIII of the Civil Procedure Code—Will already admitted to probate in England—Reasons required for not following special procedure under British Courts Probates (Resealing) Ordinance.

IN *Re* BERESFORD BELL ... XXXVII. 16

Appointment of Secretary of Court as administrator—Proceedings against such administrator—Can they be continued against his successor in office.

SAMARASEKERA *vs.* SECRETARY D. C. MATARA AND ANOTHER XXXIX. 108

Agreement to sell immovable property of deceased for purposes of administration—Action against executor for return of consideration paid at execution of agreement—Is executor entitled to defend action and maintain claim in reconvention personally.

Held: *That where an executor is sued for the return of the consideration paid at the execution of an agreement to sell immovable property of the deceased for purposes of administration, he is entitled to defend the action personally and plead a claim in reconvention, if any.*

DORAISAMY *vs.* WINIFRED XXXIX. 65

Order of ejectment of tenant—Death of landlord before issue of writ—Does right to occupy premises enure to executor of landlord

ISMAIL *vs.* HERFT ... ... XL. 50

Application for letters of administration with Will annexed—Competing claims—No preferential right of widow, whose interest in estate comparatively small.

MARIAM BEEVI *et al vs.* RUQQIAH UMMA ... ... XLIV. 92

Executor—Action against—Executrix in possession of plaintiff's bank pass book—Pass book found amongst testator's belongings—Plaintiff's action against executrix in her personal capacity for return of pass book—Defendant's counter claim as executrix—Maintainability of claim and counter claim.

The defendant as executrix of the last will of one Mrs. B took possession of B's belongings amongst which was a Post Office Savings Bank Pass Book of the plaintiff. The defendant refused to give the pass book as she found that a certain sum of money of Mrs. B had been embezzled by the plaintiff and deposited by him in the Post Office Savings Bank.

The plaintiff sued the defendant in her personal capacity for the return of the pass book and in the same action the defendant counterclaimed from the plaintiff the embezzled sum of money in her capacity as executrix and further denied that she could be sued in her personal capacity.

Held: (1) *That the pass book came into defendant's possession* qua *executrix and there was no evidence that the defendant thereafter at any time took possession of the book on her personal account, and therefore the plaintiff's claim against the defendant in her personal capacity was misconceived.*

(2) *That the defendant's claim in reconvention could not be maintained as a person sued in his personal capacity cannot in the same proceedings claim relief by way of reconvention in respect of a cause of action which is alleged to have accrued to him in a representative capacity.*

BLACKER *vs.* ISRAEL DAVID XLVI. 10

Owner of immovable property in Ceylon dying leaving intestate heirs in India—All heirs except one absent beyond seas since death of deceased—Appointment of administrator after thirteen years—Third party in possession for over ten years — Action rei vindicatio **by administrator—Defence of prescriptive title—Burden of proof.**

CHELLIAH *vs.* WIJENATHAN AND OTHERS ... ... XLVI. 27

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Administrator and heir in possession for over ten years of property of deceased qua administrator—Refusal to acknowledge rights of some co-heirs—Administrator's failure to divest himself of his representative character—Can he acquire prescriptive rights to such interests—Administrator's right to acquire prescriptive right as against some co-heirs—Fiduciary character of administrator's office—Is he an express trustee.

BAHAR *vs.* BURAH AND TWENTY FIVE OTHERS ... ... XLVII. 75

Contract between executor and beneficiary—Principles governing fiduciary relationship.

COMMISSIONER OF INCOME TAX *vs.* ALLANDIN ... XLVIII. 91

EXPERT

Evidence of—Not to be rejected merely because expert gives evidence for the first time.

STORK *vs.* PERERA ... XXXVIII. 80

EXPLOSIVES ORDINANCE

Charge of keeping fireworks in breach of special order under section 28—Is it punishable under section 7—Charge of keeping explosives in an unlicensed store—Is it an offence under section 15 (3). Meaning of 'penalty' in section 15 Criminal Procedure Code, section 2.

Held: (1) *That a breach of a special order under section* 28 *of the Explosive Ordinance is not punishable under section* 7 *of the same Ordinance.*

(2) *That an accused person who had a licence to stock explosives in the premises in which they were found commits no breach of section* 15 *of the Explosives Ordinance, although the premises are not registered for the storage of explosives.*

(3) *That the definition of the expression "fine" in section* 2 *of the Criminal Procedure Code is wide enough to embrace the pecuniary forfeiture provided in section* 15 *of Chap.* 140 *under the nomenclature of "penalty."*

DINAPALA *vs.* INSPECTOR OF POLICE, GALLE ... ... XL. 53

FALSA DEMONSTRATIO

Construction of deed—Words used unmeaning in reference to existing facts.

DE SILVA AND ANOTHER *vs.* ABEYETILLEKE AND ANOTHER ... ... I. 53

Deed conveying land—Boundaries correctly described but extent inaccurately stated.

GABRIAL PERERA *vs.* AGNES PERERA AND OTHERS ... ... XLIII. 82

FALSE EVIDENCE

Giving false evidence in course of proceedings of a Civil Court—When punishable as a contempt of Court.

VANDERPOORTEN *vs.* RANASINGHE ... ... XII. 81

FALSE NAME

Assumption of false name is by itself no offence.

TOUSSAINT (S. I. POLICE) *vs.* MENIKA AND OTHERS ... ... VII. 38

FAUNA AND FLORA PROTECTION ORDINANCE

Prosecution under the Fauna and Flora **Protection Ordinance—(Chapter 325) section 51 (a)—Plea of "guilty" by accused to a charge which did not show that an offence had been committed by them—Who can launch a prosecution under the Ordinance.**

Held: (1) *That the convictions should be set aside inasmuch as the pleas of "guilty" were tendered by the accused to a charge which did not show that any offence had been committed by them.*

(2) *That a prosecution under the Fauna and Flora Protection Ordinance can be instituted only by the warden or with his written sanction.*

FRISKIN AND THREE OTHERS *vs.* VANCUYLENBERG (INSPECTOR) XIV. 114

Section 16 (2)—Capture of elephant except under authority of licence.

Held: *An elephant captured except under the authority of a licence is the property of*

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the Crown, and a Court has no power to order its delivery to the offending captor.

THE ATTORNEY-GENERAL *vs.* PANIKKAM AND ANOTHER ... ... XXVI. 112

Section 22—Charge of being in unlawful possession of tusker—Acquittal of accused—Can the Magistrate order forfeiture of the animal.

Held: *That a Magistrate has no power to order the forfeiture of an elephant or tusker, where the person, charged with being in unlawful possession of it under section 22 of the Fauna and Flora Protection Ordinance, is acquitted.*

BANDARANAYAKE, RANGE FOREST OFFICER *vs.* SIRIMALA ... ... XXXVII. 72

FERRY RIGHTS

Agreement by local body with the purchaser of the exclusive right of ferry—Use of land at both ends—Prevention of user by owner of soil at one end—Is purchaser entitled to quiet possession and the right to land at both ends—Damages for breach of agreement.

SOLOMON SILVA *vs.* THE VILLAGE COMMITTEE OF THE MAMPE KESBEWA VILLAGE AREA ... XXXV. 73

FIDEI COMMISSUM

See also under **MUSLIM LAW**
JUS ACCRESCENDI

Property left to the children of the testator and to their descendants with a prohibition against alienation—Meaning of "descendants"

Held: (1) *That a will containing the following recital created a valid* fidei commissum. *"The testators further declare and desire that the houses and gardens hereinbefore mentioned shall be possessed by the aforesaid sons and daughters and their descendants under the bond of* fidei commissum, *that is to say, that the said properties should not be sold, mortgaged, or alienated, but if any of them should happen to depart this life leaving no descendants that the said bequest or bequests shall devolve and revert to the testators' aforesaid surviving sons and daughters subjects to the same restrictions aforesaid."*

(2) *The word "descendants" is equivalent to children and children's children at least to the fourth generation.*

ISMAIL *et al vs.* MARIKAR ... I. 322

Joint will by husband and wife—Gift—Difference between a gift to ascertainable living persons and to an unascertainable class of persons yet unborn—Disposition of contingent interest by will—Ordinance No. 21 of 1844 section 1.

Held: (1) *That a contingent interest can both be alienated and be disposed of by will.*

(2) *That the words "we do hereby give and devise to the survivor of us all our immovable property whatsoever and wheresoever situate and whether in possession, reversion, remainder or expectancy....." in a will are sufficient in law to create a disposition of a contingent interest.*

(3) *That the disposition of a contingent interest by a joint will made by husband and wife to the survivor of them was not obnoxious to section 1 of Ordinance No. 21 of* 1844.

(4) *That in the case of a joint will by husband and wife, whether they married in community of property or not, even when there is massing and adiation, when the first-dying dies the mutual will is read as his or her will only, and operates to pass dominium to the heirs of only that portion of the joint estate which is bequeathed to them by the first-dying.*

DE SILVA *vs.* DE ALWIS AND THREE OTHERS ... ... X. 63

Fidei commissum inter vivos—**Acceptance of gift by fiduciary alone—Is the gift invalid if it is not accepted by the** fidei commissaries.

Held: *That in order to render a* fidei commissum inter vivos *valid it is not necessary that the donation should be accepted by the* fidei commissaries.

DHARMALINGAM CHETTY *vs.* YOOSOOF ... ... X. 82

Exchange of land subject to fidei commissum **for land not subject to** fidei commissum **—Conditions of** fidei commissum **not mentioned in deed conveying land taken in exchange—Mistake of Court—Do the**

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conditions of the fidei commissum **attach in spite of such omission.**

ABEYWARDENA AND TWO OTHERS *vs.* HON. SIR GRAEME TYRELL AND OTHERS ... ... X. 125

Deed of gift in favour of donee and her children begotten by her and their heirs under the bond of fidei commissum**—Is** fidei commissum **valid—Meaning of the term 'heirs.'**

Held: (1) *That the mere use of the word "heirs," apart from the context in which the term is used, does not indicate who the beneficiaries are.*

(2) *That there is nothing in the context to indicate who are meant by heirs.*

(3) *The clause created a* fidei commissum *binding only on W for the benefit of her children.*

SOMASUNDERAM PILLAI *vs.* LOVISA DE SILVA AND OTHERS ... XI. 7

Do the words "the heirs descending from her, and authorised persons such as executors, administrators and assigns" designate or indicate clearly the parties to be benefited.

Held: *That the deed created no valid* fidei commissum *inasmuch as the words "the heirs descending from her, and authorised persons such as, executors, administrators and assigns" do not designate or indicate with sufficient clearness the parties to be benefited.*

AMARATUNGA *vs.* GEORGE DE ALWIS AND GASPER GOMES ... ... XIII. 130

Partition of land subject to a fidei commissum **—In what circumstances will it be allowed—The Entail and Settlement Ordinance(Chapter 54)—The Partition Ordinance (Chapter 56)—Prohibition against alienation—When is such a prohibition not valid.**

Held: (1) *That a partition of* fidei commissum *property will not be allowed where such a partition will cause serious inconvenience to those becoming entitled to the shares, and it will become necessary on the death of the last surviving* fiduciarius *to ignore the previous partition and consolidate the lots and repartition on entirely new lines.*

(2) *That a prohibition against alienation, wherein the persons for whose benefit the prohibition has been made are not designated, is of no effect in our law.*

FERGUSON (NEE) HAWKE AND OTHERS *vs.* SABAPATHY AND OTHERS ... XIV. 61

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

Held: (1) *That claims to property based on the "*jus accrescendi*" would be accepted or rejected as would best give effect to the testator's intention.*

(2) *That the terms of the deed indicated that the intention of the donor was to create one* fidei commissum *and not six* fidei commissa.

(3) *That as the deed in question created one* fidei commissum, *on the death issueless of Ellen one of the two surviving children, Stewart the other surviving child succeeded to her interests which he passed to his heirs.*

UPASAKAPPU *vs.* DIAS AND ANOTHER XV. 43

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

Held: (1) *That the deed created a* fidei commissum.

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

NADARAJAN CHETTIAR *vs.* SATHANATHAN AND ANOTHER ... ... XV. 90

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

Held: (1) *That the will created a* fidei-commissum.

(2) *That though the property had been sold in violation of the prohibition against alienation the plaintiff had no right to maintain the action during the lifetime*

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of the person on whose death the property would vest in him.

SINNAN CHETTIAR *vs.* MOHIDEEN AND OTHERS ... ... XV. 109

Fidei commissum—**Prescription among co-owners—Division of inheritance among heirs—Different entities of land assigned to heir for his exclusive use in lieu of undivided shares—Does possessor by virtue of such division acquire a prescriptive title by user to such land.**

In 1906 the testator's children divided the properties among themselves, and thereafter each possessed those specific properties in lieu of the undivided shares. One of the children, Ahmsa Natchia, in 1910, 1912 and 1913 conveyed to her three children separate properties, and thereafter each child possessed his or her property separately.

Held: *That each child's possession was adverse to the others and that by common agreement there was an ouster on the part of each child of the other children.*

RAMANATHAN *vs.* SALEEM AND OTHERS ... ... XVIII. 73

Is an express prohibition against alienation necessary to create a fidei commissum.

Held: (1) *That an express prohibition against alienation is not necessary to create* a fidei commissum.

(2) *That the following words were sufficient to create a* fidei commissum:

I bequeath to my daughter, Pitchammal the premises.....so that she may enjoy the income thereof. After her death these properties will go to her children, and if she leaves no children then the husband's share according to religion being set apart, what is left will go to the benefit of the relatives in the paternal line and entitled to inherit.

NOORDEEN *et al vs.* BADOORDEEN *et al* ... ... XX. 51

Fidei commissum—**Property subject to—Partition action by one of the** fiduciarii—**Final decree in favour of the** fiduciarii—**Sale of share so allotted—Can the** fidei-commissum **be enforced against a purchaser from the** fiduciarius **without notice of the** fidei commissum.

Held: *That a* fidei commissum *in respect of a land cannot be enforced against a purchaser without notice of the* fidei commissum *from a* fiduciarius *who has acquired title under the Partition Ordinance.*

ANEES *vs.* BANK OF CHETTINAD XX. 88

Fidei commissum **in Muslim will—expression "heirs from generation to generation" used in will—Expression means heirs according to Muslim Law and not according to Roman Dutch Law.**

JAMEEL *vs.* HANIFFA AND OTHERS XX. 104

Gift by Muslim creating a fidei commissum **reserving life-interest—Applicability of Roman Dutch Law.**

ABU THAHIR *vs.* MOHAMED SALLY XXII. 113

The following clause does not create a fidei commissum:—

"And after the demise of both of us (namely Mudalihamy and his sister-in-law Kiri Etana) the said Punchirala shall possess the aforesaid lands and premises as long as possible and in the event of his having legitimate children, born of a wedded wife of his, that he may convey the said premises unto them; but in the event of his having no legitimate children, then and in such case, he shall possess the said premises during his life time; and thereafter the said lands and premises shall devolve on Madanwala Vidanalagedera Ukku Menika and Punchi Menika, the daughters of Kaluhamy Arachchi deceased, who was the brother of mine the said Mudalihamy, and their respective descendants, and the said premise shall not devolve on any other person."

HOLLOWAY AND ANOTHER *vs.* KIRIHAMY AND OTHERS ... ... XXV. 52

Will of Muslim creating a fidei commissum —Fidei commissum **simplex—Construction of —Meaning of expressions "sokkaran" and "Thakappanai serntha sokkaranukku."**

Held: (1) *That the expression "sokkaran" means relatives entitled to inherit.*

(2) *That the expression "Thakappanai serntha sokkaranukku" means relatives in the paternal line or agnates who are entitled to inherit.*

(3) *That under the Roman-Dutch law the creation of a* fidei commissum *will not lightly be implied and requires both exact language and certainty as to the intention of*

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the testator and as to the persons to be benefited in order to effect creation.

(4) *That in order to constitute a valid* fidei commissum *a prohibition of alienation is not necessary nor is it necessary to use the words "subject to the condition" in the clause in which the words creating the gift occur.*

(5) *That the words "I bequeath to my daughter Pitchammal the premises No. 32, Godown 2nd Cross Street, Pettah and House No. 70 at Slave Island so that she may enjoy the income thereof. After her death these properties will go to her children, and if she leaves no children then the husband's share according to religion being set apart, what is left will go to the benefit of the relatives in the paternal line or agnates who are entitled to inherit" created a valid simplex* fidei commissum.

(6) *That it is open to a testator creating a* fidei commissum *to provide that the income and not the* corpus *should go to the fiduciary.*

(7) *That the words "After her death these properties will go to her children, and if she leaves no children then the husband's share according to religion being set apart, what is left will go to the benefit of the relatives in the paternal line or agnates who are entitled to inherit" mean that the husband is to get his share if entitled thereto by Muslim law, the balance is then to go to the heirs-at-law. If however, by Muslim law the husband would get nothing, there is no deduction to be made, and what is left is the whole property which was devised to Pitchammal.*

M. S. A. NOORDEEN *vs.* M. S. M. BADURDEEN AND OTHERS; MRS. M. A. OTHMAN *alias* RABIA UMMA *vs.* M. S. A. NOORDEEN AND OTHERS; A. R. A. SUPPIAH PILLAI *vs.* M. S. A. NOORDEEN AND OTHERS (*Consolidated Appeal*) XXVII. 49

Fidei commissum—**Intention of donors not clear—Two clauses repugnant to each other—Doubt—How may it be resolved—Roman-Dutch law—Civil Procedure Code, section 772—Cross-objections—Can a respondent support a decree on a point decided against him without filing cross-objections.**

A deed of gift contained the following clauses:

"And it is hereby directed that the said three donees Jayasinghe Aratchchy Eugine Silva Hamine, Jayasinge Aratchchige Isabella Hamine and Jayasinghe Aratchchige Migel Silva Appuhamy shall not sell, mortgage, gift, exchange, lease for a period exceeding 15 years at a time, lease before the expiry of an existing lease or alienate in any manner whatsoever the said properties and on their deaths their children are entitled to deal with the same as they please.

"Therefore all the right, title, claim and interest of the said donors, in and to the said properties hereby gifted shall vest in the said three donees Jayasinghe Aratchchy Eugine Silva Hamine, Jayasinghe Aratchchige Isabella Silva Hamine and Jayasinghe Aratchchige Migel Silva Appuhamy and they may possess the same subject to the said life interest and to the said condition and after their deaths their heirs, executors, administrators and assigns may deal with the same as they please for which the full authority is hereby given."

It was contended that these words created a valid *fidei commissum.*

Held: (1) *That the deed in question did not create a valid* fidei commissum *inasmuch as the intention of the donors is not clear.*

(2) *That the principle that "if there be two clauses or parts of a deed repugnant one to the other, the first part shall be received and the latter rejected" should be applied only in the last resort if a judge can find nothing else to assist him in determining the question.*

(3) *That where "it is a matter of doubt whether a* fidei commissum *has been imposed or not, that construction should rather be adopted which will give the legatee or heir the property unburdened."*

(4) *That a respondent to an appeal can support the decree of the trial judge on a ground decided against him in the trial court without filing an objection in the form prescribed in section* 758 (*e*).

MATHES *vs.* VICTOR APPUHAMY XXVII. 90

Fidei commissum **created by will—Death of fiduciary before testator—Does the devise lapse—Diffference between an "heir" in Roman-Dutch law and a "devisee" under a will of the present day.**

Held: *That a devisee under a modern will, be he a total stranger to the testator or one who would but for the will be his heir according to intestate succession, is more in the position of a legatee under the Roman-*

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Dutch law, and in the case of a fidei commissum *with which a legacy is burdened, it does not lapse by the death of the immediate legatee before the testator.*

YUSUF *vs.* SHERIFF ... XXVIII. 73

Fidei commissum—**Gift to P or to his heirs, executors and administrators—Validity.**

FERNANDO AND OTHERS *vs.* FERNANDO AND OTHERS ... ... XXIX. 19

Deed of gift in favour of donee and her "descendants or her heirs, children, grandchildren.....for ever from generation to generation"—Do the words "or heirs" make the persons to be benefited uncertain.

A deed of gift executed in 1873 contained the following conditions: "After my death this property the aforesaid Menu Ridee and the said Menu Ridee's descendants or her heirs, children, grandchildren, etc, shall possess undisputedly for generations and for ever from generation to generation but (she or they) shall not alienate the same to an outsider to my family by way of transfer, mortgage or security."

It was argued that the use of the words "or her heirs" brought in a class of persons quite distinct from the descendants and uncertainty was created as to the persons to be benefited by the *fidei commissum.*

Held: (1) *That the deed constituted a valid* fidei commissum *in favour of the descendants of the donee operative for four generations.*

(2) *That the word "heirs" in this context should be interpreted as descending heirs from generation to generation.*

HENEYA *vs.* ABDUL CADER XXIX. 22

Fidei commissum **property—Partition decree allotting defined lot—Subsequent sale—Effect of partition decree on rights of** fidei commissarii—**Section 9 of the Partition Ordinance (Chapter 56).**

Held: *That where a* ndei commissum *property is partitioned and a defined lot is allotted under the decree either to a* fiduciarius *or a person deriving title from a* fiduciarius *by way of a gift, sale, etc., the* fidei commissarii, *could in a subsequent action set up their claim against—*

(*a*) *such* fiduciarius *or such person to whom the lot was decreed, or*

(*b*) *any one deriving title from either of them after the decree, if, neither he nor his predecessors in title, if any, is a purchaser for value without notice of the* fidei commissum.

SOYSA *vs.* MISKIN ... ... XXX. 100

Deed of Gift subject to fidei commissum—**Interpretation.**

WILLIAM PERERA *vs.* THERESIA PERERA ... ... XXXI. 45

Gift subject to condition that after donee's death property should vest in donor's daughters—Death of one of donor's daughters before donee—Are her heirs entitled to rights in the property gifted—Interpretation.

A deed of gift contained the following condition:—

That the donee "shall possess and take the produce thereof from the date of my death until his lifetime without usufructting, mortgaging or transferring them, that after his death the said properties shall devolve on my daughters only, that I the donor and my heirs will have no right whatever to the said properties."

At the time of the gift seven daughters were living. One of them predeceased the donee leaving as her heirs her children.

Held: *That the donor's deceased daughter obtained a* spes successionis *when the deed of gift was executed and therefore on her death her rights passed to her heirs.*

IYISHAMMAH AND OTHERS *vs.* RATNASINGHAM ... ... XXXII. 30

Will, Construction of—General rules applicable—Difference between fidei commissum **and trust.**

The last Will of a Muslim testator was in the following terms:—

"I do hereby will and desire that my wife Assenia Natchia, daughter of Seka Marikar, and my children Mohamadoe Noordeen, Mohamadoe Mohideen, Slema Lebbe, Abdul Ryhiman, Mohamadoe Usboe, Amsa Natchia and Savia Umma, and my father Uduma Lebbe Usboe Lebbe, who are the lawful heirs and heiresses of my estate shall be entitled to and take their respective shares according to my religion and Shafie sect—to which I belong, but they, nor

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their heirs shall not sell, mortgage or alienate any of the lands, houses, estates or gardens belonging to me at present or which I might acquire hereafter, and they shall be held in trust for the grandchildren of my children and the grand-children of my heirs and heiresses only that they may receive the rents, income and produce of the said lands, houses, gardens and estates without encumbering them in any way or the same may be liable to be seized attached or taken for any of their debts or liabilities, and out of such income, produce and rents, after defraying expense for their subsistence, and maintenance of their families the rest shall be placed or deposited in a safe place by each of the party, and out of such surplus lands should be purchased by them for the benefit and use of their children and grand-children as hereinbefore stated, but neither the executors herein named or any Court of Justice shall require to receive them or ask for accounts at any time or under any circumstances, except at times of their minority or lunacy.

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

Held: (1) *That the language used in the Will made it sufficiently clear that the intention of the testator was to create a separate* fidei commissum *in the case of each devisee.*

(2) *That the language point clearly to a devise of the "plenum proprietas" of the estate to the devisees, subject to the restrictions so far as binding under the Law of Ceylon, and hence, it is inconsistent with the creation of a trust as known to the English Law.*

ABDUL HAMID SITH KADIJA *vs.* DE SARAM AND OTHERS ... ... XXXII. 46

Fidei commissum **property—Improvements by purchaser—Purchaser unaware of** fidei commissum—**Is he a** mala fide **possessor.**

MARCELINE FERNANDO AND OTHERS *vs.* PEDURU FERNANDO AND OTHERS ... ... XXXIV. 68

Gift to children, their children and grandchildren, heirs, executors, administrators and assigns—Is it valid.

Where a deed of gift stated as follows: "After the death of both of us our said two children, and their children, and grandchildren, heirs, executors, administrators and assigns are entitled to possess..... but they shall not sell, mortgage, or alienate in any manner the said lands....."

Held: (1) *That a valid* fidei commissum *is created in favour of the donors' children, their children and grandchildren.*

(2) *That the* fidei commissum *ceased after the death of the great grandchildren of the donor as there is no clear indication of their successors in whose favour the prohibition against alienation is provided.*

SENEVIRATNE *vs.* SAMARANAYAKE XXXV. 110

Partition action—Fidei commissum **referred to in preliminary decree—Omission in final decree—Is** fidei commissum **wiped out by such omission—Partition Ordinance (Chap. 56) section 4, 6 and 9.**

Held: (1) *That, where in an action for partition, the preliminary decree was entered subject to a* fidei commissum *created over the property, but in the final decree any reference to the* fidei commissum *was omitted inadvertently, such final decree did not extinguish the* fidei commissum.

(2) *That, in considering the effect of a partition decree, both the decree under section* 4 *and the final judgment under section* 6 *must be examined. If a contradiction is found, the effect is to be determined according to the particular circumstances of each case.*

TILAKERATNE AND OTHERS *vs.* DE SILVA AND OTHERS ... ... XXXVI. 1

Gift to two daughters subject to—In the event of one of the donees dying without lawful issue her right to devolve on surviving donee—Transfer of property so gifted with sanction of court by daughters to donor's son in consideration of donors transferring another property—Absence of restrictions upon alienation or designation of beneficiaries in new deed—Do the terms and conditions in the first gift attach to the new deed—Do the transactions amount to an exchange for the purpose of Entail and Settlement Ordinance—Jus accrescendi—**Meaning of 'surviving donee.'**

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On a deed of gift of 1883 (P8) by S and his wife M in favour of their two daughters L and A, premises No. 21, Chatham Street, Colombo, was conveyed subject to the following terms and conditions:—

"To have and to hold the said premises with the easements rights appurtenances thereunto belonging or used or enjoyed therewith or known as part and parcel thereof unto them the said Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando their heirs executors and administrators in equal undivided shares for ever subject however to the conditions following, that is to say, that the said Mututantrige Siman Fernando shall during his life time be entitled to take use and appropriate to his own use the issues rents and profits of the said premises and that after his death and in the event of his wife Colombapatabendige Maria Perera surviving him, she shall during her life time be entitled to take use and appropriate to her own use a just half of the said issues, rents and profits the other half being taken used and appropriated by the donees, to wit the said Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando, and subject also to the conditions that the said donees Mututantrige Leanora Fernando and Mututantrige Arnolia Fernando shall not nor shall either of them be entitled to sell, mortgage, lease, for a longer term than four years at a time or otherwise encumber the said premises nor shall the same or the rents and profits thereof be liable to be sold in execution for their debts or for the debts of any or either of them and the said premises shall after their death devolve on their lawful issues respectively and in the event of any one of the said donees dying without lawful issue her share right and interest in the said premises shall devolve on and revert to the surviving donee subject however to the conditions and restrictions aforesaid."

In 1893 S and M made an application to Court under the Entail and Settlement Ordinance for sanction to transfer the said premises No. 21, Chatham Street, by L and A to their brother J in consideration for the transfer by S and M of No. 20, Baillie Street (now in dispute) to A and of premises No. 22, Baillie Street, to L. This application was granted and the transfers were effected in 1894. The deeds and the decrees of Court granting sanction did not contain the same restrictions upon alienation and designation of beneficiaries as in deed P8 and contained no corresponding gift over to the survivor in the event of any of the two sisters dying without issue.

L died a widow in 1935 leaving nine children who are the plaintiff and the 1—8 defendants respondents. A died in 1941 intestate without having had issue and leaving as her heirs her husband (who left a will) and her brothers and sisters. The appellants claimed premises No. 20, Baillie Street, as the intestate heirs of A or as beneficiaries under the will of her husband.

Held: (1) *That the transactions in* 1894 *aforesaid constituted an "exchange" for the purpose of the Entail and Settlement Ordinance.*

(2) *That the* fidei commissum *to which A's share in No.* 21, *Chatham Street property was subject under deed P8 attached in* 1894 *to No.* 20, *Baillie Street property for which it was exchanged.*

(3) *That P8 created a single* fidei-commissum.

(4) *That upon A dying issueless after the death of L, L's children became entitled to the property in dispute by right of accretion, notwithstanding that L did not survive A.*

(5) *That the expression "surviving donee" in P8 should be interpreted as "other" donee.*

N. S. C. PERERA AND OTHERS *vs.* H. C. DE FONSEKA AND OTHERS ... XLI. 17

Gift of half share of property subject to fidei commissum **— Donation — Acceptance not shown on deed—Extract of encumbrance showing mortgage of entire land by donor and donee—Is it sufficient to prove acceptance.**

PODI APPUHAMY *vs.* MOHAMEDU ABU-SALI ... ... XLI. 61

A testator by last will (Clause 8) devised the land to his two sons, A and P. Clause 9 provided that in the event of the death of either of the sons without lawful issue, the survivor became entitled to the share of the one so dying. By Clause 10 the testator directed that the two sons should only have the right to enjoy the rents, issues and profits derived from land M and all the buildings thereon devised to them by Clause 8, that they should

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not sell, gift, mortgage or otherwise alienate or encumber the same or lease the same for any period exceeding two years at a time, and that after their death their lawful children should become entitled to the same absolutely. By Clause 12, it was provided that the devisees should have the right to enter into possession of all the properties and take the income only after the death of the testator's widow.

A died unmarried and without children. P then transferred to the plaintiff the half-share which he alleged devolved on him absolutely on the death of A. P's widow and children contested plaintiff's title on the ground that on A's death P became entitled to that share subject to a *fidei commissum.*

Held: (1) *That the testator gave a half-share of M to A and P subject to a life interest in favour of his widow.*

(2) *That after the death of the widow, A and P had only a life interest in the half share given to each.*

(3) *That on the death of either A or P the half-share given to the person so dying devolved absolutely on his lawful children.*

(4) *That if A or P died without lawful children the half share devised to the person so dying went to his surviving brother absolutely.*

(5) *That the plaintiff was entitled to a halfshare of the land absolutely by virtue of the transfer from P.*

THINORIS DE SILVA *vs.* PREETHY WEERASIRI *et al* ... ... XLI. 74

Gift, subject to—Donor reserving right to mortgage property gifted—Mortgage by donor—Transfer of property by donee after donor's death in satisfaction of amount due on bond—Claim to property by donee's children—Effect—Revival of mortgage.

N and M, husband and wife, donated by deed P1 a property to Y subject to the following among other conditions:—

(1) That the donation should take effect after their respective deaths.

(2) That each of them should be at liberty to sell mortgage or otherwise dispose of the said lot.

(3) That the donee should not be at liberty to sell or dispose of the said lot.

(4) That after the death of the donee his sons and daughters should be at liberty to sell or otherwise dispose of the said lot after they attained majority.

After the death of M, N and Y mortgaged the property in 1929 to S, who assigned the mortgage to the 1st defendant. N died and Y, in settlement of the debt due on the mortgage bond transferred the property in 1931 to the 1st defendant who entered into possession and improved the land.

On the death of Y, his children claimed the property on the footing that P1 created a valid *fidei commissum.*

Held: (1) *That P* 1 *created a valid* fidei commissum *in favour of Y's children.*

(2) *That the transfer by Y to the* 1*st defendant was void as against Y's children, but the mortgage revived and the* 1*st defendant became entitled to recover the principal and interest due on the mortgage bond up to the date of transfer by Y in* 1931 *and from the date of Y's death to the date of payment.*

CHETTIAPPEN KANGANY *vs.* YOOSOOF *et al* ... ... XLII. 60

Gift subject to fidei commissum——**Muslim minors—Acceptance by mother of minors —Its validity—Is Roman-Dutch or Muslim Law applicable?—Preferential right of a Muslim widow to the custody and guardianship of minor children.**

Where a Muslim lady by a deed of gift created a *fidei commissum* in favour of the minor children of the donees, while reserving to herself the life interest, and the gift was accepted on behalf of the minors by their mother (the father being dead).

Held: (1) *That as the donor created a valid* fidei commissum *the Roman-Dutch Law applied, and that therefore the mother, in the absence of the father, was competent to accept the gift.*

(2) *That where a transaction is intended by the parties to be governed by one system of law, it should not be divided into its component parts, and its validity tested by a different system of law, such as the religious or personal law of the parties.*

NOORUL MUHEETHE *vs.* LEYANDUN XLII. 86

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Fidei commissum—**Deed of gift prohibiting only sale or mortgage—No direction in the event of sale or mortgage—Beneficiaries not clearly designated—Term "authorized person" in deed too vague to denote class of beneficiaries—Translation—Not proper for Judge to substitute his own version in place of official version of document in language other than English.**

By deed the donor gifted certain properties reserving to himself possession of them during his life time and undertaking not to sell or mortgage them. The deed further stipulated that after the death of the donor "the said donee Juan Agonis Perera Appuhamy and his descendants and his heirs executors administrators and assigns and authorized persons shall be at liberty to transact the same among each of their co-heirs but shall not in any manner sell or mortgage any one of the said lands with the intention of alienating the same." The deed contained no direction as to the devolution of properties in the event of the donee or those taking after him violating the prohibition.

Held: *That the deed did not create a valid* fidei commissum *because* (*a*) *the prohibition to alienate property was limited to sale and mortgage only and consequently the donee was permitted to donate or dispose of the property by last will;* (*b*) *the deed did not clearly indicate the class of persons who would be entitled to the property in the event of the donee violating the prohibition;* (*c*) *the use of the term "authorized person" in the deed was too uncertain in meaning and too vague to designate clearly the class of persons the donor intended to benefit under the deed.*

Per BASNAYAKE, J.—Where the parties are not agreed as to the true rendering into English of a document which is in a language other than English they should produce evidence through the testimony of experts versed in the language in which the document is written so that the Court may decide the dispute on the evidence before it. It is wrong for the Judge however well versed he may be in the language in which the document is written to undertake its translation and adopt a version which neither party has placed before him.

FRANCISCO *vs.* SWADESHI INDUSTRIAL WORKS, LTD. ... XLIV. 13

Fidei commissum—**Gift of land by deed to donees with direction at their death to make over their shares to P or P's heirs—Is conveyance by donees to named beneficiaries necessary to effectuate gift?**

Where a deed of gift contained the following terms:—

"I hereby.....grant and make over as a gift unto.....my daughters Tikiri Menika and Dingiri Menika.....(the land is then described) to be possessed by them during their life-time.....

Further, the said Tikiri Menika and Dingiri Menika shall only possess the said lands and premises allotted to them during their life-time and shall not transfer or make the same outside and the said Tikiri Menika and Dingiri Menika shall at their death make over their shares of the lands and premises allotted to them to no other person than Punchirala or to Punchirala's heirs and shall not alienate the same to any other person whomsoever."

Held: (1) *That the donor clearly intended to impress the respective shares in the property donated to each of his daughters with a* fidei commissum, *taking effect on her death, in favour of Punchirala or* (*should Punchirala predecease her*) *in favour of Punchirala's heirs.*

(2) *That the failure of either daughter to obey the direction that she should "make over" her share to her* fidei commissary *did not have the effect of defeating the donor's intention.*

M. KIRI BANDA *vs.* H. PUNCHI APPUHAMY *et al* ... ... XLV. 14

When may fidei commissary **claim a judicial declaration for the protection of his rights though such rights can be classified only as future or contingent.**

HEWAVITHARNA *vs.* CHANDRAWATHIE *et al* ... ... XLV. 73

Risks attaching to fidei commissary **rights which are not expressly reserved in decrees for Partition.**

HEWAVITHARNA *vs.* CHANDRAWATHIE *et al* ... ... XLV. 73

Fidei commissum—**Gift to donee—Prohibition against alienation—Property to devolve on donee's children after donee's death—**

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Donee's children free to deal with property—Failure to accept on behalf of fidei commissaries**—Revocability of such gift with consent of donee.**

Entail and Settlement Ordinance (Cap. 54) section 5—Proper person to make application for exchange—Effect of order on such application—fidei commissum **impressed under section 8 on property exchanged—Can such effect be avoided by execution of deeds—Validity of order made on application by wrong party.**

Held: (1) *That a donation to X with a prohibition against alienation and with a further provision that after X's death, the property gifted is to devolve on X's children, who are free to deal or dispose of it in any manner they like, creates only a* fidei commissum *simplex or unicum. It does not create a* fidei commissum familiae.

(2) *That in the case of a* fidei commissary *donation creating such a* fidei commissum *simplex or unicum, there must be a valid acceptance not only by the immediate fiduciary donee but also by or on behalf of the* fidei commissary *donees, even though the latter are not in ease at the time the donation is made, in order to render the donation irrevocable.* Carolis *vs.* Alwis, 45 *N. L. R.* 156 *approved, and* Wijeyetunge vs. Rossie, 47 *N. L. R.* 361, *not followed.*

(3) *That if there is no such valid acceptance by or on behalf of the* fidei commissary *donees, the donation is revocable by the donor with the consent of the fiduciary donee.*

(4) *That the proper person to make an application under section* 5 *of the Entail and Settlement Ordinance is the fiduciary alone. A person who is not a fiduciary but only an usufructuary, although such a person may be entitled to the rents and profits during his lifetime of property subject to a* fidei commissum *is not entitled to make an application under section* 5 *of the Entail and Settlement Ordinance. Where an application is correctly made under the said section* 5 *and an order is made thereon, the property taken in exchange becomes impressed with the same* fidei commissum *to which the property exchanged was subject to, by operation of section* 8 *of the Entail and Settlement Ordinance. The parties effecting such exchange cannot excape this consequence by executing deeds in such a way as to avoid the* fidei commissum *applying to the land taken in exchange.*

(5) *That where an application is made under section* 5 *of the Entail and Settlement Ordinance, by a person not entitled to make such an application under that section, the order made thereon is not a valid order under the said Ordinance and does not attract to itself the consequences prescribed in the said Ordinance.*

WEST *vs.* ABEYAWARDENA AND OTHERS ... ... XLV. 92

Donation—Deed conveying property absolutely subject to prohibition against sale or mortgage—Fidei commissum.

Where by deed a donor conveyed property to donee, her heirs, executors, administrators and assignes by "way of a gift absolute and irrevocable....." provided that the donee should not sell or mortgage the property except to the donor's children mentioned in the deed.

Held: *That the deed did not create a* fidei commissum *and that the donor intended to pass to the donee full rights of ownership in the property.*

PATHIRANA *et al vs.* GUNAWARDHENA ... ... XLVII. 14

Fidei commissum—**Plaintiff's claim to property under a clause of last will—Clause alleged to create** fidei commissum **binding for generations—Last will with three subsequent codicils admitted to probate—Contents of codicils not proved by plaintiff—Principles of construction of a will creating** fidei commissum—Jus accrescendi.

The plaintiff claimed title to a share in a property which the defendant and his predecessors had possessed *ut dominus* for over half a century. He based his claim on the provisions of a clause in the last will of one Saviel Dias dated 30th August, 1807, which, he submitted, created in respect of the property "a valid *fidei commissum* in perpetual succession binding on (the immediate devisees) and their descendants to the fourth degree of succession," thereby defeating defendant's prescriptive title. In the testamentary proceedings of Saviel Dias' estate in 1811, the last will together with three subsequent codicils had been admitted to probate, but in the present action only the third codicil (the other two codicils being missing) was produced without a translation for the limited purpose of identifying the will.

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Clause 21 of the will is as follows:—

"The testator bequeaths beforehand to his three children (name) and likewise to the two children of the testator's deceased daughter Louisa Dias, named Francisca Waniappu and Louisa Wanniappu..... (the property is here described)..... with the wish that not only must the said portion of the garden and the paddy field remain unsold in order that all his abovementioned children and grandchildren might enjoy the profits therefrom, to wit: a quarter each by the three first named ones and one quarter by the two last named ones or one-eighth of the whole by each of the two, but also if one of the said children or grandchildren of the testator should happen to die without leaving lawful descendants behind, then his or her share must devolve to the testator's other children and grandchildren who are alive."

On behalf of the plaintiff it was submitted (*a*) that the testamentary direction that the property must "remain unsold" amounted in this context to a real (as opposed to a personal) prohibition against alienation, indicating an intention that the property should never pass out of the family of the immediate devisees and their lawful descendants, and (*b*) that in accordance with the principles laid down by the Privy Council in *Tillekeratne vs. Abeyasekere* (2 N. L. R. 313) there was a single bequest to five persons of a property which was intended, not expressly but by necessary implication to be burdened with a *fidei commissum* in favour of a successive series of their descendants.

On behalf of the defendant it was admitted (*a*) that the will does not represent the complete testamentary instrument because the plaintiff's failure to prove the contents of the codicils made it impossible for a Court of law to decide that Saviel Dias' final testamentary disposition of the property was exclusively contained in the provisions of Clause 21 of the will; (*b*) that in any event Clause 21 did not create a valid *fidei commissum* and certainly not a multiplex *fidei commissum.*

Held: (1) *That in the absence of proof by the plaintiff of the contents of the codicils admitted to probate, it cannot be concluded that Clause* 21 *substantially expresses the final testamentary intentions of Saviel Dias as to the devolution of the property, and therefore the plaintiff's claim fails* ab initio.

(2) *That Clause* 21 *did not create a valid* fidei commissum *and that the testator intended the appropriate shares in the property to vest absolutely, and without further restriction, in each institute (or his substitute, as the case may be).*

(3) *That the words "wish", "remain unsold", in Clause* 21 *either by themselves or in relation to the rest of the language do not afford convincing evidence of an underlying intention to conserve the property perpetually for the benefit of succeeding generations of the family concerned. On the contrary the primary object of the prohibition is expressly to ensure the enjoyment of the profits by the five persons named as devisees and* no one else.

(4) *That the principle of* jus accrescendi *does not apply because there is a clear disposition by the testator of a specific share to each of the named institutes indicating very clearly a* separation of interests *which immediately raises a presumption against accrual.*

(5) *That even if it be legitimate to interpret the words under consideration as creating a* fidei commissum *the will unequivocally provides for one grade of* fidei commissaries. *Clause* 21 *does not create "a recurring or multiplex* fidei commissum *circulating as it were throughout the family.*

THE ARCHBISHOP OF COLOMBO *vs.* DON ALEXANDER ... ... XLVII. 26

Deed—Interpretation of—As to whether it creates a separate fidei commissum **in favour of each of three brothers or a single** fidei commissum **in their joint favour.**

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM XLVIII. 1

Donation by Muslim subject to fidei commissum. **Acceptance by mother on behalf of infant donees—Validity of—Is Muslim Law or Roman-Dutch Law applicable.**

NOORUL MUHEETHA *vs.* SITTIE RAFEEKA LEYANDEEN AND OTHERS XLVIII. 74

FINE

Fines—Payment of—

See under Payment of Fines (Courts of Summary Jurisdiction) Ordinance.

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Amount of—Matters to be considered in fixing—Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938.

Where an accused person, 17 years old, was ordered to pay a fine of Rs. 500 forthwith without any inquiry as to whether he possessed the means to do so, and on his failure to pay the fine, was committed to prison.

Held: *That the provisions of the Payment of Fines (Courts of Summary Jurisdiction) Ordinance, No. 49 of 1938 had not been complied with.*

WIJE *vs.* ABEYSUNDERA (EXCISE INSPECTOR) TELDENIYA ... ... XL. 96

FINGERPRINT

See also under **FOOTPRINT**

Evidence of finger-prints—Only evidence against accused finger prints on glass pane—No explanation by accused of presence of finger prints.

Held: *That where the only evidence against an accused charged with housebreaking is his finger-prints on a glass pane, an inference that he was the burglar can rightly be drawn in the absence of any evidence by the accused that he was in the house before, or entitled to go there.*

KING *vs.* LOGUS ... ... I. 250

Can conviction be based on evidence of finger prints alone.

Held: *That a conviction can be based on the evidence of finger prints alone in the absence of a satisfactory explanation from the accused.*

THE KING *vs.* JAYASENA ... II. 279

FIRE

Fire—Damage by—Liability for

SELVADURAI *vs.* JAMES APPUHAMY XLII. 53

FIREARMS

Ordinance No. 1 of 1909 section 19 (3)—Order for confiscation of gun—No provision for such order in the Ordinance—Can an order of confiscation be made.

Held: *That in the absence of express provision in the Ordinance an order for confiscation cannot be made upon a conviction under section* 13 (*b*).

THE SOLICITOR-GENERAL *vs.* SEPANELAI AND OTHERS ... ... V. 78

Firearms Ordinance No. 33 of 1916—Refusal to renew gun licence—Mandamus to compel its issue.

Held: (1) *That where a Government Agent has reasons for refusing to renew a gun licence, he cannot be compelled by mandamus to issue a licence.*

(2) *That a Government Agent is not bound to hear the appellant before making his decision to refuse to renew a gun licence.*

(3) *That once a gun licence is granted its renewal can be refused only on the grounds mentioned in section* 6 *of the Firearms Ordinance No.* 33 *of* 1916.

(4) *That a Government Agent must exercise his discretion in granting or withholding the grant of a gun licence in a judicial manner.*

APPLICATION FOR A WRIT OF MANDAMUS ON THE A. G. A. UVA PROVINCE IX. 154

Firearms Ordinance—Dog shooter employed by Urban District Council—Use of gun without licence in his own name—Can he lawfully use a gun which the Chairman of the Urban District Council is authorised to use.

Held: *That a dog shooter employed by an Urban District Council cannot lawfully use, for the purpose of shooting dogs, a gun for which he has no licence but which the Chairman of the Urban District Council is licensed to use.*

MEDAWALA (INSPECTOR OF POLICE) *vs.* ERNST ... ... XIII. 82

FIRST OFFENDERS

Principles governing punishment of young offenders.

DHARMARATNE (EXCISE INSPECTOR) *vs.* DAVITH SINGHO ... XVI. 81

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FISCAL

Right of Fiscal to enter land without an order of Court in terms of § 12 (3) of the Mortgage Ordinance No. 21 of 1927.

SEKAPPA CHETTY *et al vs.* SENANAYAKE *et al* ... ... II. 171

Power of District Judge to give Fiscal directions for delivery of possession of land and for removal of persons bound by the decree.

ZEINADEEN *vs.* SAMSUDEEN AND ANOTHER ... ... XIV. 133

Fiscal's process server executing a warrant which is exfacie defective cannot be said to be acting in the discharge of his public functions.

SITTAMPARAM PILLAI *vs.* MURUGAN XIX. 118

The Fiscals' Ordinance, 1867—Licence of process server—Scope of § 8—Process server licensed to serve process in a division of a district executing process outside his division—Is resistance to such officer illegal?

Where a process server who was licensed under § 8 of Ordinance No. 4 of 1867 to serve process in a division of a district proceeded to execute process outside his division in pursuance of an order issued to him by the Deputy Fiscal and was resisted.

Held: (1) *That resistance to a process server acting outside his jurisdiction is no offence under* § 181 *of the Penal Code.*

(2) *A licence issued under* § 8 *of Ordinance No.* 4 *of* 1867 *cannot be given retrospective effect.*

Per MAARTENSZ, A. J.–"A person licensed to serve and execute processes in a division of a district clearly has no authority to serve and execute processes outside his division."

DE ZOYSA *vs.* WIMALASURIYA AND ANOTHER ... ... I. 40

The purchaser at a fiscal's sale is bound by a mortgage decree even though he is not a party to the mortgage action, unless his conveyance had been duly registered at the date of the institution of the mortgage action.

WIJEWARDENA *vs.* PERERA ... XI. 57

FISHING RIGHTS

Right to fish in a "paduwa" with "madel" nets—When may a custom regarding fishing become a right.

Held: *That a custom to be valid must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.*

FERNANDO *vs.* FERNANDO AND ANOTHER ... ... XIX. 31

FIXTURES

Sale of fibre mill by a Bill of Sale—Parts of mill fixed to the soil—Is fibre mill movable or immovable property.

On 29th April, the first defendant by bill of sale sold to the second defendant a fibre mill standing on a land which was held by the first defendant and others in undivided shares. By a lease executed on the same date the first defendant leased to the second defendant the land on which the fibre mill stood. The mill consisted of an engine, factory buildings and all other buildings, five pairs of machinery boxes, seive screen, belting, axle, water pump and baling presses. The engine was screwed on to a concrete foundation. It could not be removed without breaking the foundation. The other machinery could be removed without damage to the floor. The mill had been established in 1925 and the mode in which the mill had been operated for a number of years indicated an intention that the mill should remain permanently fixed to the building in which it was installed. There was no indication that its removal was ever contemplated.

Held: (1) *That the various structures which constituted the fibre mill became part of the soil on which they stood.*

(2) *That the bill of sale, together with the lease, passed good title to the mill.*

TISSERA AND FOUR OTHERS *vs.* TISSERA ... ...XIX. 1

FLORA

See under **FAUNA AND FLORA PROTECTION.**

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FOOD CONTROL

Food Control Regulations—Sections 16 and 7—Failure to obtain valid coupons from ration book for rice supplied in the form of meals—Liability of servants.

The 1st accused a waiter, and the 2nd accused a cashier of a hotel were convicted under section 16, Part 3, of the Food Control Regulations for having sold rice in the form of meals without obtaining the surrender of a valid coupon for rice as required by section 7 of the regulations.

Held: (1) *That the conviction against the accused could not be sustained inasmuch as the rice could not be said to have been in the control of the accused.*

(2) *The rice found in a hotel, whether cooked or uncooked, is in the control of the manager or proprietor of such hotel.*

WIJESINGHE *vs.* DAVOOD AND ANOTHER ... ... XXVI. 87

Food Control Regulations 1938 and 1943—Power to issue authority to inspect and search premises.

DARLIS *vs.* RAJENDRA ... XXXIII. 94

Food Control Guard—Is he a public servant.

SEENITHAMBY AND OTHERS *vs.* JANSZ ... ... XXXIII. 22

Food Control Ordinance and Regulations—Supply of rice to persons resident on estate—Dismissed labourer remaining on estate—Must Superintendent supply such person with rice?

Held: (1) *That a Superintendent of an estate is the distributor of supplies of rice to all persons resident on the estate.*

(2) *That a person who is resident on the estate, though not a labourer, is entitled to such supply of rice.*

WATSON *vs.* RAMIAH KANGANY XXXIV. 4

FOOTPRINT

See also under **FINGER PRINT**

Evidence as to identity of footprint by finger print expert.

DOOLE *vs.* CHARLES ... VI. 79

When may conviction be based on evidence of footprint expert.

SINGHO APPU *vs.* THE KING XXIX. 46

FOREIGN JUDGMENT

Foreign Judgment—When binding.

Held: *That parties who have taken part in the proceedings in a foreign country are bound by the foreign judgment even though they have not been served with summons in the first instance.*

DADA *vs.* PONNAMAH AND OTHERS IV. 11

Action to enforce debt due under a foreign judgment—Judgment of Court in British territory — How proved — Evidence Ordinance, sections 78, 74, 76 (6) and 82.

Held: (1) *That the judgment was wrongly admitted in evidence.*

(2) *That the copy of judgment of a Court in British territory cannot be admitted in evidence unless it is sealed with the seal of the Court to which the original document belongs or, if the Court has no seal, unless it is signed by the Judge or one of the Judges of the Court.*

(3) *That, where the Court has no seal, the Judge signing the copy of the judgment must attach to his signature a statement in writing on the copy that the Court has no seal.*

MOHIDEEN MARIKAR AND THREE OTHERS *vs.* KOWLA UMMA ... XII. 44

Foreign Court—Judgment of—Does an action lie on it in other Courts.

NARAYANSWAMI *vs.* MARIMUTTUPILLAI ... ... XLI. 112

FOREST ORDINANCE

When may the Crown proceed with a prosecution under the Forest Ordinance even though there is a question of title in dispute between the Crown and a subject.

Held: *That a prosecution under the Forest Ordinance No.* 16 *of* 1907 *may proceed even though there is a dispute as to the Crown's title to the land where the real object of the prosecution is to protect Crown land.*

WIJESUNDERA *vs.* KARAMANIS APPU *et al* ... ... II. 86

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Failure to specify in a charge the Gazette in which the rules offended against are to be found.

Held: *That failure to specify in a charge for breach of rules under the Forest Ordinance No.* 16 *of* 1907 *the Gazette in which the rules appear is fatal to a conviction.*

MARAMBE *vs.* KIRIAPPU ... II. 122

Forest Ordinance No. 16 of 1907—Charge under rules made under section 21 (1) (c)—Failure to specify Gazette containing rules in the charge.

Held: *That in a charge for breach of a statutory rule the Gazette in which the rule is published should be specified and that the Gazette should be produced.*

ALMEIDA *vs.* SINGHOAPPU AND ANOTHER ... ... V. 21

Application for refund of security deposited in respect of timber released from seizure—Has a Police Magistrate jurisdiction to entertain such application.

Held: *That a Police Magistrate has no jurisdiction to entertain an application for the refund of security deposited in respect of timber released from seizure under section* 42 *of the Forest Ordinance, unless a report is forwarded to him by the Government Agent or the Assistant Government Agent as required by section* 39 *of the same Ordinance.*

DE SILVA *vs.* THE GOVERNMENT AGENT (UVA) AND ANOTHER ... XIII. 54

Scope of expressions "reason to believe" in section 37 and "good faith" in section 61.

SILVA AND ANOTHER *vs.* THE ATTORNEY-GENERAL ... ... XIX. 91

Transport of timber by accused on permit—Refusal of Forest Guards to allow them to proceed—Attempt to take accused to Headman to get permit read—Is such conduct legal—Does it amount to arrest.

Held: (1) *That there is nothing in the Forest Ordinance (Chap.* 311*) which empowers a Forest Guard to stop a person who is transporting timber on a permit and to take him out of his way in order to get the permit read.*

(2) *That the refusal of a Forest Guard to allow such person to proceed on his journey amounted to an illegal arrest of that person.*

SINNA LEBBE AND ANOTHER *vs.* KANDIAH (INSPECTOR OF POLICE) XXXII. 84

Charge for offences under—Accused acquitted—Disposal of timber seized in connection with such offences.

Held: *That on the acquittal of the accused of certain offences under the Forest Ordinance, timber seized in connection with the accusation should be delivered to them and that an order for the delivery of the timber to the Crown cannot be made.*

CROOS *et al vs.* SELVADURAI, FOREST RANGER ... ... XXXIV. 61

Charge under section 20—Magistrate assuming jurisdiction as Additional District Judge—Fine and order of ejectment—Forest Ordinance, sections 20,21, 47 and 53.

At the trial of a person for an offence under section 20 of the Forest Ordinance, the Magistrate wrongly assumed jurisdiction as an Additional District Judge and imposed a fine of Rs. 150 and made an order of ejectment.

Held: (1) *That the sentence is illegal because the maximum fine under section* 21 *of the Forest Ordinance is Rs.* 100.

(2) *That the Magistrate had no power to make an order of ejectment.*

(3) *That the case will not be sent back for retrial because of the unsatisfactory features in the evidence.*

APPUHAMY *vs.* D. R. O. UDA HEWAHETA ... ... XXXVII. 107

FORFEITURE

Forfeiture or confiscation is a penal provision and the power to confiscate should clearly be given by law.

POLICE SERGEANT *vs.* KANGANY AND OTHERS ... ... III. 45

Forfeiture—Judge's discretion—If discretion exercised in favour of forfeiture reasons should be given.

PANDITHARATNE *vs.* KONSTZ XXV. 64

An order of forfeiture under Control of Prices (Supplementary Provisions) Regulation 2 (7) should not be made without giving

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the person or persons affected by such an order an opportunity of showing cause against it.

AMBALAVANAR *vs.* WAIDYARATNE XXVIII. 23

A bond should not be forfeited without giving the person affected by the forfeiture an opportunity of showing cause.

PAKEER *vs.* PEIRIS ... XXVIII. 27

Forfeiture—Court has no power, after convicting accused under Reg. 61 (2) of the Defence (Control of Textiles) Regulations, to order the forfeiture of the productions in the case.

FERNANDO *vs.* SENARATNE ... XXXV. 61

Forfeiture of Elephant—Can magistrate order when accused acquitted on charge of being in unlawful possession of the animal.

BANDARANAYAKE *vs.* SIRIMALA XXXVII. 72

Export of goods the exportation of which is restricted—Forfeiture of vessel used in exportation—Owner unaware that vessel used in contravention of Customs Ordinance—Is forfeiture justified.

ATTORNEY-GENERAL *vs.* NAGAMANY XL. 86

Forfeiture of goods under § 146 of the Customs Ordinance.

PALASAMY NADAR AND OTHERS *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS ... ... XLI. 67

FORGERY

Forgery of a valuable security—Aiding and abetting the offence—No proof of intention with which forgery was committed—Such omission fatal to a conviction—Assumption of false name is by itself no offence.

Held: (1) *That a charge which alleges forgery but does not allege the intention with which the forgery was committed is bad.*

(2) *That a person who takes to himself a false name does not for that reason assume a false personality.*

TOUSSAINT (S. I. POLICE) *vs.* MENIKA AND OTHERS ... ... VII. 38

FRAUD

See also under **PREVENTION OF FRAUDS ORDINANCE**

Fraud must be specifically pleaded.

SIDAMBARAM CHETTIAR *vs.* ANNAMALAY CHETTIAR *et al* ... ... I. 138

RAMANATHAN CHETTIAR *et al vs.* KURERA *et al* ... ... I. 396

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

Held: (1) *That, where a claim for unliquidated damages has been reduced to the form of a decree, the decree-holder is entitled to impeach as fraudulent a deed alienating property executed after the claim arose but before decree was entered.*

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

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

ROSA MARIA FERNANDO *vs.* JAMES FERNANDO AND ANOTHER XVII. 121

When does the cause of action arise in the case of a fraudulent alienation.

RAJAH *vs.* NADARAJAH AND ANOTHER ... ... XXV. 97

Exceptio doli—**Donee in possession can avail himself of the plea as against the donor or those claiming under him.**

TISSERA *vs.* WILLIAM SINGHO AND ANOTHER ... ... XXVII. 95

Fraud—Transaction in fraud of creditors—Court entitled to examine true nature notwithstanding the form.

RAJAH *vs.* NADARAJAH AND ANOTHER ... ... XXV. 97

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Fraud—Land transfered a second time in fraud of prior transferee—Action by subsequent transferee claiming property. Can prior transferee who is in possession raise defence of fraud without making transferor a party to the action.

AMARASEKERA APPUHAMY *vs.* MARY NONA ... ... XXXI. 106

Need to plead and to give specific details of

Held: *That before evidence is led on a question of fraud, specific details of the fraud should be given in the pleadings.*

SILVA *vs.* PERICARUPEN CHETTIAR XL. 10

Fraud must be established beyond reasonable doubt.

LAKSHMAN CHETTIAR *vs.* MUTTIAH CHETTIAR ... ... XL. 65

Fraud—Decree obtained by—Court has inherent power to vacate decree.

MARJAN AND OTHERS *vs.* MOWLANA AND ANOTHER ... ... XL. 81

Fraud—Allegation must be specifically made.

MOHAMED SALIH *vs.* FERNANDO *et al* ... ... XLIV. 17

Fraudulent alienation—Onus of proving fraud.

TOBIUS FERNANDO *vs.* DON ANDRIS APPUHAMY ... ... XLIII. 44

FRUCTUS INDUSTRIALES

Growing crop of tobacco—Seizure by Fiscal—Is such crop to be regarded as movable or as immovable property—Validity of seizure effected under section 227 of the Civil Procedure Code.

Held: *A growing crop of tobacco must be considered as* fructus industriales *and, therefore, as movable property, and a seizure of such crop under section 227 of the Civil Procedure Code is valid.*

THAMBIPILLAI *vs.* KANDIAH AND OTHERS ... ... XXIX. 75

FRUCTUS NATURALES

Agreement to cut and remove trees—Does it create an interest in land—

BALAPPU *vs.* SILAWATHIE *et al* II. 111

FUGITIVE OFFENDERS

Fugitive Offenders Act, 1881—Offender arrested in Ceylon on warrant issued by Indian Court—Warrant defective—Proceedings under the Act abandoned—Order for the release of offender on bail—Validity of order.

The petitioner was alleged to be a fugitive offender for whose arrest a warrant had been issued by an Indian Court. He was arrested and taken before a Magistrate but no one was present to testify to the authenticity of the warrant or to the identity of the petitioner. The police then abandoned their claim for the surrender of the petitioner under the warrant and moved that he be released on bail. The Magistrate made order accordingly.

Held: (1) *That when the police abandoned their claim for surrender under the warrant, the petitioner's detention under the warrant came to an end.*

(2) *That the original arrest was not made under section* 32 (1) (*i*) *of the Criminal Procedure Code and that there had not been a new arrest of the petitioner under that section.*

(3) *That the order for bail was made when the petitioner was not under lawful arrest and was irregular.*

KANDASAMY *vs.* ROSAIRO, S. I. POLICE ... ... XXXIII. 43

Fugitive Offenders Act, sections 13 and 14—Person convicted of criminal offence in British India—Admitted to bail pending appeal—Conviction and sentence of imprisonment affirmed in appeal—Escape to Ceylon without surrendering to Indian Court—Warrant issued by Indian Court brought to Ceylon—Endorsed by Magistrate for execution—Validity of warrant.

Where a person convicted in British India in a Court of Sessions appealed against his conviction and sentence and the appeal was dismissed, and without surrendering to the Sessions Court to serve his sentence, he was found at large

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in Ceylon, and subsequently arrested in Ceylon on a warrant signed by the Sub-Divisional Magistrate of Nagapatam and the Additional District Magistrate, Tanjore District, and endorsed by the Magistrate, Point Pedro.

Held: (1) *That before a warrant issued in India is endorsed for execution in Ceylon under the Fugitive Offenders Act, there should be proof that the person issuing it had lawful authority to do so.*

(2) *That the warrant must be signed by the presiding Judge of the Court in which the person is convicted.*

DIAS BANDARANAIKE, A. S. P. KANKESANTHURAI *vs.* KANTHASWAMY XXXV. 28

GAMING

Search of gaming place under search warrant under section 9 of Ordinance, No. 17 of 1889.

Held: (1) *There is no presumption that a place entered under a warrant under section 9 of the Gaming Ordinance is a common gaming place and this has to be proved at the trial.*

(2) *That a place is a common gaming place must be established by evidence at the trial.*

(3) *That evidence given by an informer before the issue of a search warrant under section 9 of the Gaming Ordinance is not evidence at the trial and cannot be taken into account in basing a conviction.*

(4) *A clerical error in a warrant does not affect its legality.*

RAJENDRAM *vs.* PERERA ... II. 474

Gaming Ordinance—Irregular search warrant.

Held: *That the issue of a search warrant under section 7 of the Gaming Ordinance is irregular where the information upon which it is issued although signed by the informant is not read over to him.*

EDWARDS *vs.* PERERA AND OTHERS IV. 60

Gaming Ordinance No. 17 of 1889—Search Warrant under section 7—How should the place to be searched be described in the warrant—Form A in the Schedule to the Ordinance.

Held: (1) *That if, in a search warrant issued under section 7 of the Gaming Ordinance, the place to be searched is sufficiently described, the search will not be illegal on the ground that the place was not described by a more appropriate name or description.*

(2) *That, in deciding whether the description of the place to be searched is sufficient or not, it is permissible to examine the evidence given both before the issue of the search warrant and at the trial.*

HALALDEEN (INSPECTOR OF POLICE) *vs.* YOTHAN ... ... IX. 133

Gaming Ordinance No. 17 of 1889—Section 5—Gaming carried on in a shed on an estate—Shed in charge of watcher—"Thon" collected from the gamblers by watcher—Refreshments provided by watcher—Is the watcher liable under section 5.

Held: *That the prosecution had made out a case against the accused and that, in the absence of an explanation from the accused, an offence under section 5 of Ordinance No. 17 of 1889 was established.*

HALALDEEN (INSPECTOR OF POLICE) *vs.* YOTHAN ... ... IX. 149

Gaming Ordinance—When may search warrant be issued.

FERNANDO *vs.* LIYANAGE AND SEVENTEEN OTHERS ... ... XV. 73

Gaming Ordinance—Effect of search warrant issued under section 5.

Held: *That it is not necessary to prove that a place is a common gaming place in a prosecution under section 7 of the Gaming Ordinance of persons found in the course of a search under a search warrant issued under section 5 of the Ordinance, unless the defence seeks to rebut the presumption that arises on the search under the search warrant.*

THORADENIYA (INSPECTOR OF POLICE) *vs.* ISMAIL ... ... XVIII. 142

Unlawful Gaming—Common gaming place—Sufficiency of evidence.

The only evidence led with regard to the place where alleged unlawful gaming was carried on was as follows: "an empty hut without any furniture and is unoccupied and desolate." "It was a hut near

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to the boutique of Martin Singho" and that "the hut is leased by Martin Singho together with the boutique from the mosque people."

Held: *That the evidence is not sufficient to prove that gaming took place at a common-gaming place.*

VAN CUYLENBERG (INSPECTOR OF POLICE) *vs.* JALALDEEN AND ANOTHER XIX. 69

Gaming Ordinance section 5—Written information on oath—Information orally given on oath and recorded by magistrate—Is it imperative that the information so recorded should be read over and explained to the accused.

Held: *That where the information is orally communicated on oath to a magistrate who records it the requirements of section 5 of the Gaming Ordinance are satisfied though the recorded statement is not read over and explained to the accused.*

SCHOKMAN *vs.* SIRISENA ... XXIX. 37

Applicability of section 4 to offence under the Betting on Horse Racing Ordinance.

PONNUDURAI *vs.* JALALDEEN XLV. 28

"Common gaming place" — Presumption of—Court not to assume regularity of issue of search warrant—

Where in a charge for the offence of unlawful gaming, the evidence at the trial was insufficient by itself to establish a club as a "common gaming place" the prosecution cannot succeed without leading such evidence as is sufficient to bring the presumption under section 5 of the Gaming Ordinance, if relied on, into operation.

It is not legitimate for a Court to assume that a search warrant was regularly issued upon proper material and to proceed from a presumption of regularity to apply a further statutory presumption under sections 7 and 8 of the Ordinance.

GAMARALAGE WILLIAM *et al* *vs.* WEERAKOON, INSPECTOR OF POLICE, KURUNEGALA ... ... XLVI. 8

GANJA

See under **EXCISE ORDINANCE**

GAZETTE

Breach of rules published in Gazette—Failure to specify gazette in which rules appear is fatal to a conviction.

MARAMBE *vs.* KIRI APPU ... II. 122

ALMEDA *vs.* SINGHO APPU AND ANOTHER ... ... V. 21

WICKREMESINGHE *vs.* NOMIS SINGHO V. 28

INSPECTOR OF POLICE *vs.* PUNCHIRALA V. 38

See also SIVASAMPU (S. I. POLICE) *vs.* JUAN APPU ... ... VIII. 21

Breach of bylaw—Gazette in which bylaw was published should be specified in the charge.

PERKINS *vs.* SRI RAJAH ... XVII. 56

Reference in charge to Gazette which did not disclose offence charged—Validity of conviction.

APPUHAMY AND ANOTHER *vs.* EKANAYAKE ... ... XXXIII. 76

Charge for breach of Forest rule—Failure to refer in charge to Gazette in which such rule was published—Fatal irregularity.

EMMANUEL *vs.* APPUHAMY XXXV. 4

GENERAL ORDERS OF GOVERNMENT

Contract by public officer contrary to general orders of Government — Enforceability.

LUCY THIRUNAYAKAR *vs.* LEONARD THIRUNAYAKAR ... VII. 127

GIFT

See **ACCEPTANCE, DEED, DONATION, MUSLIM LAW**

GOVERNMENT MINUTES ON PENSIONS

See under **PENSIONS**

GUARDIAN

Consent given by guardian ad litem **to convey minor's interests under partition decree—How far binding.**

SINNAMAH *et al* *vs.* SELLAMMA *et al* I. 369

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Advantage obtained by guardian of minor without disclosing his fiduciary relationship. To whose benefit does it enure.

ABEYSUNDERA *vs.* THE CEYLON EXPORTS LTD. AND ANOTHER ... VI. 69

Rights of natural guardian of minor.

RAMALINGAM CHETTIAR *vs.* MOHAMED ADJOOWAD AND ANOTHER XV. 124

Guardian—Appointed by father of minor by deed—Should Court interfere with such appointment.

IN *Re* LESLIE MARK ANTHONY XXXIV. 71

HABEAS CORPUS

Order of deportation of a British subject made under Article III. 3 of a prerogative Order-in-Council of 26th October, 1896—Validity of order of deportation questioned—Powers intended to be exercised on the arising of a state of emergency—Can such powers be exercised when there is no emergency—Action of Governor under powers granted by prerogative Order-in-Council—Can such action be canvassed in a Court.

Held: (1) *That the Order-in-Council of 27th October, 1896, can be legally brought into effect by Proclamation at a time when the national security is likely to be in danger by some widespread activity such as war or extensive civil disorder, and that when the national security is no longer imperilled by the state of affairs, then the Proclamation should be revoked.*

(2) *That the powers of the Governor to issue an order under Article III* (3) *of the Order-in-Council of 27th October, 1896, as amended by the Order-in-Council of 21st March, 1916, is not absolute, and that it can be exercised only under conditions.*

(3) *That the Supreme Court is entitled to inquire into the legality of an order made by the Governor under Article III* (3) *of the Order-in-Council.*

IN *Re* BRACEGIRDLE ... VIII. 31

Person alleged to be detained without charge or trial for an offence under section 24 of the Army Act.

Where members of a military unit were not entitled to leave barracks without passes which were issued as a matter of grace.

Held: *That no* habeas corpus *lay against the authorities who had refused the passes.*

GUNASEKERA *vs.* LT. COL. O. B. FORBES AND TWO OTHERS ... XXI. 91

Claim by father for custody of minor female child under sixteen—What considerations should guide the Court in deciding such an application.

Held: (1) *That the natural parent has a natural right to the custody of a child; but this right is paramount only in a case where there has been no surrender or abandonment of the right to the child's custody.*

(2) *That a Court will not disturb the* status quo *for the mere assertion of a natural right. It must be satisfied that there is good ground for disturbance of the* status quo *and that the granting of the petitioner's application is in the child's best interests.*

SAMARASINGHE *vs.* DE SIMON *et al* ... ... XXIII. 21

Under the Hanafi law a Muslim father is entitled to the custody of his son who has completed his seventh year.

FAIZ MOHAMED *vs.* ELSIE FATHUMMA ... ... XXVI. 40

Minor brought up by petitioner since infancy after mother's death—Appointment of respondent as guardian and curator by father by notarial deed—Should the Court interfere with such appointment after father's death.

Held: *That when by a notarial deed the father of a minor had appointed a guardian and curator in regard to the person and property of the minor, the Court should not interfere with such appointment except for good reasons.*

IN *Re* LESLIE MARK ANTHONY XXXIV. 71

Arrest and detention under deportation Order—Allegation of want of good faith in issuing such order—Plea of malice—When Court can interfere with such order made by a Minister lawfully vested with power—Ultra vires**—"Citizen of Ceylon," its meaning—"Citizen of Ceylon" and "British subject in Ceylon"—Do they enjoy**

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same status—British Nationality Act of 1948—Ceylon (Constitution) Order-in-Council, 1946, Article 29 (2) (b)—Citizenship Act No. 18 of 1948—Immigrants and Emigrants Act No. 20 of 1948, sections 30, 31 (1) (d) and 50.

The Police produced five persons before a Magistrate on charges of illicit entry to Ceylon. On a subsequent date, the prosecuting officer stated to Court that he did not have sufficient evidence for a prosecution under the Immigrants and Emigrants Act No. 20 of 1948 and moved for a discharge of the accused. The Police, however, arrested the five persons immediately after they had gone beyond the Court premises on a Deportation Order issued by the Minister of Defence and External Affairs under section 31 of the Immigrants and Emigrants Act. Thereupon applications for *Habeas Corpus* were made by the petitioner questioning the legality of the arrests and detention. The detenues were released on bail thereafter.

The affidavits filed by the respondent showed that the respective persons did not have valid passports, that on information received from an informant they were suspected of having illicitly entered Ceylon, that they made statements admitting their illicit entry to Ceylon, within a period ranging from four to six months prior to the date of their arrest and that they all had reached Ceylon by a sailing vessel landing at Mannar, which was not an approved port of entry to Ceylon.

Counter-affidavits were filed from each of the detenues denying that they admitted having come to Ceylon illicitly and alleging further *inter alia* that the admissions were obtained under threats of bodily harm, that they migrated to Ceylon in 1941, 1942 and 1943 respectively and each of them was a subject and a citizen of Ceylon, that none of them ceased to be citizens of Ceylon on the grant of Independence to Ceylon or on the enactment of the Citizenship Act of 1948, that they had not acted or conducted themselves in any manner not conducive to the public interest.

At the hearing it was contended *inter alia* on behalf of the petitioner:—

(*a*) That the arrests and detention were illegal as the processes of the Magistrate's Court had been utilised improperly to keep the detenues in Police custody pending the issue of Deportation Orders and for obtaining information for the issue of such Orders.

(*b*) That the Deportation Orders themselves were *ultra vires* of the powers under section 31 of Immigrants and Emigrants Act of 1948, and were a 'fraud upon the statute.'

(*c*) That the Immigrants and Emigrants Act and the connected Acts, *viz.* the Citizenship Act of 1948, Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 are *ultra vires* of the legislature of Ceylon under Article 29 (2) (*b*) of the Ceylon (Constitution) Order-in-Council of 1946 so far as these Acts or any of them make the respective detenues liable to the disability of not being allowed to continue to reside in Ceylon.

(*d*) That the Minister and the other officers concerned, particularly the Police acted not only in bad faith but also with 'malice in law' and 'malice in fact' which fact entitled the Court to examine the true motives which underlay the issue of the Deportation Orders in question.

(*e*) That the status and rights of the respective detenues as Indian born British subjects were not affected by the Ceylon Independence Act, the Ceylon Independence Order-in-Council, 1947, or the Citizenship Act, 1948. The status of a 'British subject in Ceylon' is equivalent to that of a "Citizen of Ceylon."

(*f*) That the detenues were not given an opportunity to prove that they were 'Citizens of Ceylon.'

(*g*) That the Deportation Order was bad as the order does not show on the face of it "the public interest" (Section 31 (1) (*d*) of Immigrants and Emigrants Act) in support of which the order is made.

Held: (1) *That in these applications for* habeas corpus *the Court will not deal with the validity of the earlier arrests and detention under the Criminal Procedure Code as the custody thereunder had terminated before the present applications were filed.*

(2) *That the burden of proving that the Deportation Orders are illegal is on the persons affected by such orders. The mere omission in the Order to state that the*

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persons concerned are not citizens of Ceylon leaves the position unaltered.

(3) *That there is no provision which requires the Minister when acting under section* 31 (1) (*d*) *of Immigrants and Emigrants Acts to give an opportunity to the persons to be deported for showing cause.*

(4) *That the petitioner had failed to make out a* prima facie *case that the Deportation Orders or the arrests and detention under them were motivated by any collateral or indirect or improper purpose.*

(5) *That the mere suggestion that there was an undercurrent of desire, from the Minister downwards, to somehow ensure a deportation of any and everyone against whom there was the slightest suspicion of being an illegal immigrant, or of whose citizenship of Ceylon, under the Citizenship Act, there was the slightest doubt, could not be regarded as malice in fact against the particular detenues concerned.*

(6) *That where it appears, that the detaining authority, instead of directing its mind to the objects of the statute and utilising the extraordinary powers for the purposes contemplated by the statute, has used those powers of arrest and detention indirectly to achieve or facilitate some other object or purpose outside the scope of the statute, or has been influenced by considerations extraneous to the statute to use those powers, then the arrest and detention are bad and the Court has the power to order that the persons affected must forthwith be released or discharged.*

(7) *That where the Court is satisfied that a Deportation Order has been made by a Minister in the exercise of a lawful authority vested in him, the Court has no power to go further and say whether the Minister had material before him which a Court of law would consider sufficient for exercising that power. If the Court did that, it would be virtually stepping into the Minister's place and exercising the power which the legislature has entrusted to him.*

(8) *That the words "Where the Minister deems it to be conducive to the public interest to make a deportation order" in section* 31 (1) (*d*) *of the Immigrants and Emigrants Act of* 1948, *mean that it was for the Minister to decide whether he had reasonable grounds to make the order, in other words, that the condition was subjective and not objective.*

(9) *That after* 1*st January,* 1949 (*the date on which the British Nationality Act of* 1948 *came into operation*) *citizenship of either "the United Kingdom and Colonies" or of any of the Commonwealth countries is an essential qualification for being a British subject, unless the person is within the transitional class of "British subject without citizenship" which had to be specially created to provide for those who are 'potential' citizens of the country until they blossom into actual citizens of that country when laws of citizenship are passed in that country.*

(10) *That the burden of proving that each of the detenues was a 'Citizen of Ceylon' within the meaning of the Citizenship Act of* 1948 *was on the petitioner and as he has not so proved they are not "Citizens of Ceylon" to exempt themselves from the provisions of the Immigrants and Emigrants Act to which those who are not "Citizens of Ceylon" are subject.*

(11) *That the status of a "British subject in Ceylon" is not equivalent to that of a 'Citizen of Ceylon.' The words 'Citizen of Ceylon' in the Immigrants and Emigrants Act must be given the same meaning as is contained in the Citizenship Act.*

(12) (*Following the decision in* Mudanayake vs. Sivagnanasunderam (1951), 53 *N. L. R.* 25). *That the Immigrants and Emigrants Act of* 1948 *and the connected Acts, viz. the Citizenship Act of* 1948, *Indian and Pakistani Residents* (*Citizenship*) *Act, No.* 3 *of* 1949 *are not* ultra vires *of the legislature of Ceylon under Article* 29 (2) (*b*) *of the Ceylon* (*Constitution*) *Order-in-Council,* 1946.

Per CHOKSY, A. J.—"He would not content himself with alleging 'malice in law' which, according to the dictum of Lord Haldane in *Shearer vs. Shields* (1914) A. C. 808, is nothing more than an assumption that a person who inflicts a wrong or an injury upon any person in contravention of the law is taken to have done so knowing the law although so far as the state of his mind was concerned, he may have acted with innocence and without any intention to inflict that wrong or injury."

SUDALI ANDI ASARY *et al vs.* VANDEN DREESEN ... ... XLVIII. 17

Child under care of respondents—Application by mother of child for custody—

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Adoption of Children Ordinance No. 24 of 1941—Section 19—Roman Dutch Law.

The petitioner, the mother of the child, delivered the child to the care of the respondents in 1947, and subsequently asked that the custody of the child be given to her. The respondents had not registered as the custodian of the child under the Adoption of Children Ordinance No. 24 of 1941, which came into operation in 1st February, 1944.

Held: (1) *That the petitioner was entitled to the custody of the child as the respondent's custody was illegal and infringed the provisions of the Ordinance.*

(2) *That the principle what is the best interest of the child is inapplicable to such custody.*

ABEYAWARDENE *vs.* JAYANAYAKE *et al* ... ... XLIX. 72

HEIR

Liability of in respect of debts of deceased. On the death of a debtor each of the adiating heirs becomes liable for the debt pro rata, **and an acknowledgment or payment of the debt by one such heir does not interrupt prescription as regards the rest.**

PERERA *vs.* PERERA AND FIVE OTHERS ... ... XX. 35

Transfers by the heirs of an estate are subject to the payment of the debts of that estate, if, without recourse to the lands transferred, the debts cannot be satisfied.

The fact that the executor is a party to the transfer makes no difference.

SURIYAGODA *vs.* WILLIAM APPUHAMY ... ... XXI. 77

HINDU LAW

See also under **ESTATE DUTY**

Joint family property—On whom lies the onus of proving that the assets of a Hindu domiciled in India are Joint family property—Ancestral property—Circumstances to be taken into account in determining whether the property of a Hindu is Joint property.

PERIYACARUPPAN CHETTIAR *vs.* THE COMMISSIONER OF STAMPS ... VI. 133

Right of widow governed by Hindu Law to letters of administration in respect of her husband's estate.

VYRAVAN CHETTIAR *vs.* SEGAPPIACHY ... ... XIX. 61

Customary marriage—Is tying of thali essential to validity of marriage.

PONNAMMAH *vs.* RAJAKULASINGHAM ... ... XXXVII. 67

Hindu undivided family—Money lending business assets in Ceylon—Liability to pay Estate Duty.

ATTORNEY GENERAL *vs.* VALLIAMMA ATCHI ... ... XLI. 87

Hindu undivided family—Property left by manager of such family—Liability to estate duty.

THE ATTORNEY-GENERAL OF CEYLON *vs.* VALLIYAMMAI ATCHI XLVII. 88

Joint Hindu family property—Nature of interest in—Hindu Law Mitakshara—Does section 7 of Wills Ordinance or section 18 of Partition Ordinance affect devolution of joint Hindu family property.

ATTORNEY-GENERAL *vs.* RAMASWAMI IYENGAR AND ANOTHER XLIX. 98

Hindu joint family—Father and son only members of—Father the sole surviving co-parcener—Does joint family cease on father's death—Females only survivors—Sole "co-parcener"—Juridical nature of.

RAMASWAMI IYENGAR AND ANOTHER *vs.* ATTORNEY-GENERAL ... XLIX. 108

HINDU RELIGIOUS TRUSTS

See under **TRUSTS**

HINDU TEMPLE

Officiating priest of Hindu Temple claiming declaration to office on prescriptive right and hereditary right—Can such right be acquired by prescription.

MUTTUKUMARU KASIPILLAI *et al vs.* SAMINATHA KURUKKAL XLVII. 61

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HIRE PURCHASE

Sale of car—Hire purchase—Insurance of car in joint names of seller and purchaser—Accidental destruction of car by fire—Liability of purchaser to pay instalments remaining due.

Held: *That where a car which had been purchased on a hire purchase agreement was accidentally destroyed by fire, the purchaser is not liable to pay the remaining instalments of hire.*

THE UNITED MOTOR FINANCE COY. *vs.* MOHAMADO SHERIFF ... I. 163

Hire-purchase agreement—Right of owner to retake possession on non-payment of instalments due—Is intervention of Court necessary—Applicability of the Roman-Dutch law.

Held: *That a clause in hire-purchase agreement, reserving to the owner a right to retake possession of the thing hired on non-payment of instalments due, gives the owner the right to exercise this remedy without the intervention of the Court, provided he uses no more force than is reasonably necessary for the purpose.*

DE SILVA *vs.* KURUPPU ... XXI. 28

The pledgee of an article purchased on a hire-purchase agreement cannot be deprived of his rights by a sale to another of that article by the pledgor on his becoming absolute owner.

JAYAMANNE *vs.* PERERA ... XXVII. 70

Hire—purchase Agreement—Defence (Motor Cars-Special Provisions) Regulations—Section 3 (1)—Permit to buy in favour of 1st defendant—Car bought with money advanced by plaintiff company and hired to 1st defendant—Default in paying instalments by 1st defendant—Action against hirer and guarantor—Plea of illegal contract.

1st defendant being anxious to buy a secondhand motor car belonging to one R obtained a permit under section 3 (1) of the Defence (Motor Cars Special Provisions) Regulations and approached plaintiff, a financing company, who paid R the value of the car and executed a hire-purchase agreement signed by the 1st defendant as principal and the 2nd defendant as guarantor. The 1st defendant was given the option of purchasing the car provided he complied with the conditions of the agreement. 1st defendant defaulted after a few months and plaintiff terminated the agreement and sued the defendant for arrears of hire and return of the car or in the alternative for damages. 2nd defendant pleaded that as plaintiff had no permit to buy the car the transaction was illegal and R was still the owner thereof and the plaintiff had no right to hire the car and therefore was not entitled to the relief claimed.

Held: *The contract of sale between R and the plaintiff company was completed by delivery and payment, and notwithstanding the imputation of illegality, ownership of the vehicle passed to the company before the hire-purchase agreement sued on was entered into with the defendant. The appellant's defence, therefore, fails* in limine.

Per GRATIAEN, J.—"But we are here concerned with a transaction in which both parties had fulfilled their obligations, so that there was nothing left to be performed which required the aid of a Court of Justice for its enforcement. The English Law is to the same effect. "If there has been a completely executed transfer of property made in pursuance of an unlawful agreement..... the transfer cannot be upset merely on the ground of illegality"—*Cheshire and Fifoot Contracts* (1st Edn.), p. 240. The position would have been different if, for instance, Rajapakse had been induced by misrepresentation to sell the car to the Company."

WARNAKULASOORIYA *vs.* TRANSPORT AND GENERAL FINANCE CO., LTD. ... ... XLIX. 90

HOLIDAYS ORDINANCE

Service of notice of security for costs of appeal on public holiday—Validity.

WANIGASEKERA *et al vs.* LOVISZ *et al* ... ... XXV. 33

HOSPITAL

The owners of a private nursing home are liable for the negligence of their servant even though the work which the servant is employed to do is of a skilful or technical character as to the method of performing which the employer is himself ignorant.

TRUSTEES OF THE FRASER MEMORIAL NURSING HOME *vs.* OLNEY XXVII. 7

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HOTCHPOT

See under **COLLATION**

HOUSING AND TOWN IMPROVEMENT ORDINANCE NO. 19 OF 1915

§§ 13 (2) 18 (1) (b) and rule 7 (a)—Order for demolition of building for nonconformity with requirements of § 18 (1) (b). Failure to apply rule 7 (a)—Is order of demolition in such circumstances good?

Held: *That, where a mandatory order under* § 13 (2) *Ordinance No.* 19 *of* 1915 *for demolition of a building for non-compliance with the requirements of* § 18 (1) (*b*) *had been made without the accused being called upon to show cause, such order was bad.*

That an order under § 13 (2) *cannot be maintained where the only ground for such order is non-compliance with the requirements of* § 18 (1) (*b*) *and the facts of the case show that Rule* 7 (*a*) *is applicable and there is no evidence that the Chairman had acted thereunder.*

BARTHOLOMEUSZ *vs.* DEEN ... I. 77

When need compensation under section 18 (4) be awarded.

Held: *That the compensation contemplated in section* 18 (4) *of Ordinance No.* 19 *of* 1915 *is compensation for the damage which a person actually sustains by acting in compliance with the requirements of the law and setting his building back.*

JANSZ *vs.* MUNICIPALITY OF COLOMBO. ... ... II. 105

Erection of building without sanction—Mandatory Order for demolition.

Held: *That a mandatory order under* § 13 (2) *need not necessarily be granted in every case where a person is convicted of deviating from an approved plan without the permission of the Chairman.*

That a person who is not allowed to build within street lines is entitled to compensation.

That where a building is erected with street lines without the Chairman's permission the mandatory order should be only as respects that part of the building within the street lines.

VANDERSMAGHT *vs.* GUNASEKERA II. 192

Mandatory Order under section 13 (2).

Held: *That a mandatory order made under section* 13 (2) *of the Housing and Town Improvement Ordinance No.* 19 *of* 1915 *without notice of the application to the accused and without affording him an opportunity of showing cause against the application is bad.*

URBAN DISTRICT COUNCIL, JAFFNA *vs.* APPATHURAI ... ... III. 122

Section 25—Street widening scheme.

Held: (1) *That the true construction of the proviso to sub-section* (4) *of section* 25 *of the Housing and Town Improvement Ordinance* 1915 *is not, what is the degree of benefit to be derived from any particular premises, but whether premises owned by a person, who says he is aggrieved by the apportionment, derived a lesser benefit from those owned by the frontagers to such an extent, that it would be unjust to assess his share of the apportionment according to the length of frontage.*

(2) *That where a frontager, who had an opportunity of objecting to the apportionment of cost according to the frontage of his premises, did not avail himself of that opportunity, the Chairman was under no obligation to consider, as regards him, the circumstances mentioned in the proviso to section* 25 (4).

(3) *That a person affected by resolution under section* 25 (1) *of the Ordinance does not, unless he has placed his objection before the Chairman under section* 25 (2), *have a right of appeal to the tribunal of appeal under section* 25 (7).

FERNANDO *vs.* THE CHAIRMAN, MUNICIPAL COUNCIL, COLOMBO ... V. 136

Construction and improvement of street under section 25—Meaning of work of "Construction" in section 2 of the Ordinance—Is a mansergh drainage scheme a work of "Construction" within the meaning of section 25?—Under section 25 is it ultra vires **for the Municipality to include in a resolution a work of construction not included in section 2?—Meaning of the words "such construction" in section 25 (1)—**

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How may the validity of a resolution under section 25 (1) be tested?—Can the appeal tribunal in an appeal under section 92 (1) go into the question of the validity of such a resolution?

Held: (1) *That the expression "such work" in section* 25 (1) *of Ordinance* 19 *of* 1915 *means the work of construction resolved on by the Council.*

(2) *That there is no appeal from a resolution of the Council under section* 25 (1).

(3) *That in an appeal under section* 25 (7) *the tribunal of appeal is only empowered to go into the question of apportionment among the owners of the premises liable under the ordinance.*

(4) *That the tribunal cannot inquire into the necessity or otherwise of the expenditure involved in a work of construction.*

(5) *That the Supreme Court has power under section* 46 *of the Courts Ordinance to prevent any action by the Council* ultra vires *of its powers under section* 25 (1).

COLOMBO MUNICIPAL COUNCIL *vs.* S. D. M. IBRAHIM AND OTHERS ... VII. 119

Conversion of building—Is using a store as a dwelling-house an alteration within the meaning of section 6.

Held: *That using, as dwelling-house, a building meant to be a store, is not an alteration within the meaning of section* 6 *of Ordinance No.* 19 *of* 1915.

NESADURAY (COURTS INSPECTOR) *vs.* AMERASINGHE ... ... IX. 93

The provisions of the Housing and Town Improvement Ordinance cannot be invoked for the purpose of supplementing the provisions of § 84 of the Local Government Ordinance No. 11 of 1920.

THE CHAIRMAN U. D. C. PANADURA *vs.* ALFRED DIAS ... ... X. 27

Section 5 of the Housing and Town Improvement Ordinance (Chapter 199)—Meaning of "re-erection"

Held: (1) *That the question whether a building has been repaired, altered or re-erected is a pure question of fact.*

(2) *That the expression "re-erect any building" in section* 5 *of the Housing and Town Improvement Ordinance (Chapter* 199) *is equivalent to the words "erect a new building."*

COURTS INSPECTOR, MUNICIPAL ENGINEER DEPT. *vs.* MURUGAPPA CHETTIAR AND ANOTHER ... ... XIV. 21

Breach of provision of Local Government Ordinance—Can remedy given by Housing and Town Improvement Ordinance be utilised for remedying the breach of the Local Government Ordinance.

EYHANGHERT *vs.* DE SILVA ... XIV. 98

Effect of definition of street lines under section 19 (4) of the Ordinance so as to include land on which there are buildings at the time of such definition on the market value in the event of compulsory acquisition.

THENUWARA *vs.* THE COLOMBO MUNICIPAL COUNCIL ... XXIV. 41

Sections 19 (4) and 108 of the Housing and Town Improvement Ordinance should not be regarded as prohibiting the owner of a land in every case from building beyond a street line laid down on his land.

COLOMBO MUNICIPAL COUNCIL *vs.* K. M. N. S. P. LETCHIMAN CHETTIAR XXV. 25

Land situated between street lines defined under the Housing and Town Improvement Ordinance — Compulsory acquisition—Market value—Meaning of and how to determine—

MUNICIPAL COUNCIL OF COLOMBO *vs.* LETCHIMAN CHETTIAR ... XXXIV. 46

Does the word "building" in the Ordinance include a boundary "wall."

Held: *That the word "building" in section* 5 *of the Housing and Town Improvement Ordinance does not include a boundary "wall."*

PETER SILVA *vs.* WANIGASEKERA, SANITARY INSPECTOR ... XXXV. 99

Placing of wooden platforms for exposing vegetables for sale with an awning abutting on road without approval of prescribed authority—Does such arrangement come

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within the meaning of the word "building" in section 5.

The appellant who is a dealer in firewood and vegetables, without obtaining the approval of the prescribed authority placed two portable wooden platforms in an open space abutting on the road for exposing his vegetables for sale. At either end of the platforms were two removable racks. He also had a makeshift device for fixing a canvas awning for protection from sun and rain.

The appellant was charged with and convicted of a breach of section 5 of the Housing and Town Improvement Ordinance.

Held: *That the accused is not guilty, as portable platforms, though accompanied by awnings, do not come within the meaning of "building" in section 5 of the Housing and Town Improvement Ordinance.*

NESADURAY *vs.* D. S. FERNANDO XXXVI. 79

Construction of external wall across land—Wall having no connection with a building—Is it an offence under section 6 (1) of Housing and Town Improvements Ordinance.

Held: *That the mere construction of an external wall across one's land is not an offence under section 6 (1) of the Housing and Town Improvements Ordinance.*

CANAGASINGHAM *vs.* URBAN COUNCIL, TRINCOMALEE ... XXXVIII. 88

HUSBAND AND WIFE

See also **DIVORCE**
MARRIAGE

Extent of husband's liability for wife's contracts.

Held: *That a wife who is living with her husband, is entitled under the law to make contracts in connection with the household and may to that extent bind herself and her husband.*

LALCHAND *vs.* SARAVANAMUTTU *et al* II. 394

Right of wife to claim restitution of her dowry.

KARUNANAYAKE *vs.* KARUNANAYAKE IX. 109

Separation a mensa et thoro**—Malicious desertion—Can a judicial separation be granted for malicious desertion.**

Held: *That a judicial separation can be granted on the ground of malicious desertion.*

KEERTHIRATNA *vs.* KARUNAWATHIE X. 113

Land possessed by husband as wife's agent—Divorce of husband by wife—Possession of land by husband after divorce—Claim of land by husband in land settlement proceedings—Issue of Crown grant to him—Is husband entitled to land.

TILLAKERATNE AND ANOTHER *vs.* DASSANAIKE ... ... XIV. 7

Toddy found in house occupied by husband and wife—Presumption of guilt against wife.

See under **EXCISE ORDINANCE**

Order by District Court in the exercise of its matrimonial jurisdiction making provision for the maintenance of the children of the marriage—Is order a bar to proceedings under the Maintenance Ordinance.

ARIYANAYAGAM *vs.* THANGAMMA XVI. 33

An order requiring the husband to pay maintenance to his wife ceases to be operative on the parties being divorced.

MENIKI *vs.* SUJATHUWA ... XIX. 37

Husband and wife—Agreement to live in separation—Is it enforceable.

Held: *That an agreement by which husband and wife agreed to live separately and by which the husband agree to pay his wife a monthly allowance while they lived apart was enforceable.*

LILIAN FRUGTNIET *vs.* EDWARD FRUGTNIET ... ... XXI. 118

Matrimonial suit—Scope of—

SENADIPATHY *vs.* SENADIPATHY XXIII. 1

Action for divorce on the grounds of adultery and malicious desertion—Withdrawal of allegations of adultery before filing of answer in view of settlement arrived at between the parties in a money case which was pending between them—Does such withdrawal amount to collusion—What evidence is sufficient to constitute malicious desertion.

Held: (1) *That the withdrawal of allegations of adultery in a plaint, in view of a*

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settlement arrived at in a money case pending between the parties, which allegations were denied in the answer, does not, where a feasible explanation is given of such withdrawal, amount to collusion,

(2) *That the refusal of a wife to live with her husband and to go back to him in spite of repeated requests amounts, in the absence of any evidence to the contrary, to malicious desertion.*

BULATHSINGHALA *vs.* MATILDA PERERA ... ... XXIX. 44

Action by wife for separation—Claim by husband for divorce on ground of wife's adultery—Child born during wedlock—Legitimacy of child—Burden of proof—Damages—Costs—Evidence Ordinance section 112—Civil Procedure Code section 612.

The plaintiff brought this action against her husband for a separation *a mensa et thoro* on the ground of malicious desertion and claimed the custody of the two children of the marriage. The husband denied that he deserted his wife and asked for a dissolution of the marriage on the ground of his wife's adultery with the second defendant. He also denied that he was the father of the younger child, who was born on March 26th, 1942, on the sole ground that he had no access to the wife at any time when the child could have been begotten.

The case for the wife was presented on the footing that the husband had sexual intercourse with her on April 17th, 1941, and August 9th, 1941, and that the younger child was born as a result of the act of coition on August 9th, 1941. The child having been born during the subsistence of a valid marriage, the burden, under section 112 of the Evidence Ordinance, was on the husband to prove that he was not the father of the child. The husband led evidence as regards the wife's adultery. The medical evidence which was given by five witnesses, was considered on the footing that the last menstrual period of the wife was about 11th to 14th, 1941, and dealt with the questions whether a coitus on August 9th, 1941, could have resulted in conception and whether the child could have been begotten as a result of a coitus on that date. The evidence was at times conflicting, hesitating and doubtful. Apart from this the opinions of textbook writers threw a great deal of doubt on the husband's case. It could not therefore be said with certainty that the medical evidence proved that the younger child could not have been begotten on August 9th, 1941.

Held: (1) *That the evidence led by the husband had established the charge of adultery.*

(2) *That the husband had failed to discharge the burden of disproving that the younger child born during wedlock was not his child.*

(3) *That as the damages awarded in a divorce action are compensatory and not punitive, the amount awarded by the trial Judge should be reduced.*

ALLES *vs.* ALLES AND SAMAHIM XXX. 25

Marriage—Action for nullity of—Husband having Ceylon domicile—Wife having Indian domicile before marriage—Jurisdiction—Application of Prescription Ordinance—Prescription Ordinance sections 10 and 15—Civil Procedure Code sections 597, 602, 604, 607 and 756.

The parties to this action were married on 12th March, 1936. About three months after the marriage, the wife gave birth to a child. The husband who had a Ceylon domicile brought this action for a declaration of nullity of marriage against the wife, who until her marriage had an Indian domicile, on the ground that he was unaware that the wife was pregnant and that before the marriage he never had access to the wife. The action was not instituted until more than seven years after the birth of the child. The trial Judge entered a decree absolute for the husband and the wife appealed and moved that security for cost be dispensed with.

A preliminary objection to the appeal was taken on the ground that the appellant (wife) had not given notice in accordance with section 756 of the Civil Procedure Code that she would tender security.

This was overruled.

It was argued in appeal—

(1) That the Ceylon Courts had no jurisdiction as, the action being one for a declaration of nullity or marriage, the wife cannot be regarded as having acquired the domicile of the husband.

(2) That the action was prescribed under section 10 of the Prescription Ordinance.

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(3) That as the husband had been guilty of unreasonable delay in presenting his plaint, judgment should not have been pronounced in his favour—Civil Procedure Code section 602.

Held: (1) *That the claim in the present action for a decree of nullity was akin to a claim for nullity on the ground of impotence and not to a claim for nullity on the ground of bigamy, that the marriage must be regarded as good until the decree for nullity was entered, that the wife must be regarded as having the domicile of the husband up to the date of the decree and that, therefore, the Ceylon courts had jurisdiction in the action.*

(2) *That the term "divorce" in section* 15 *of the Prescription Ordinance applied to cases where a decree for nullity of marriage was prayed for and that the action was not prescribed.*

(3) *That in all the circumstances of the case the husband's delay in filing his plaint could not be said to be unreasonable.*

(4) *That section* 604 *of the Civil Procedure Code applied to the present action and that a decree* nisi *should have been entered in the first instance.*

NAVARATNAM *vs.* NAVARATNAM XXX. 90

Adultery—Confession of—Whether sufficient provocation to reduce murder to manslaughter.

HOLMES *vs.* DIRECTOR OF PUBLIC PROSECUTIONS ... ... XXXIII. 12

Application of wife for maintenance of child—Husband admitting marriage but denying paternity—Burden of proof—

UKKUMENIKA *vs.* VIDANE XXXIV. 21

Contraband found in house—Is husband rather than wife guilty.

SUDU BANDA AND ANOTHER *vs.* INSPECTOR OF EXCISE, PASSARA ... XXXV. 6

Right of Muslim wife to resort to civil courts to divorce her husband.

NOORUL NALEEFA *vs.* MARIKAR HADJIAR ... ... XXXV. 62

Customary marriage—Validity of—impeached—Burden of proof—

PONNAMMAH *vs.* RAJAKULASINGHAM ... ... XXXVII. 67

Second marriage of surviving spouse—Resulting in revocation of previous last will.

MARY NONA *vs.* EDWARD DE SILVA ... ... XXXVII. 94

Massing of Estate—Presumption against.

MARY NONA *vs.* EDWARD DE SILVA ... ... XXXVII. 94

Competency of husband to give evidence of non-access in maintenance proceedings.

PESONA *vs.* BALONCHI BAAS XXXVII. 97

Disposition by woman married before July 1, 1924, without husband's consent—Validity.

PERERA *vs.* PERERA ... XXXVIII. 49

Action by wife for nullity of marriage—Husband's incurable impotency—Onus of proof—Delay in coming into Court—Civil Procedure Code, sections 602 and 607.

A wife sued for a decree of nullity of marriage on the ground of the husband's incurable impotency at the date of marriage. The evidence showed that there was no *vera copula* between husband and wife at any period of their married life, that the marriage had not been consummated, and that the wife was *virgo intacta* after over five years of cohabitation.

Held: (1) *That in the circumstances, a presumption of latent impotency is raised against the husband.*

(2) *That the onus lies on him to show that the non-consummation of the marriage by him was due to causes other than his impotency.*

(3) *That, as he had failed to discharge this onus, the wife was entitled to a decree of nullity of marriage.*

FERNANDO *vs.* PEIRIS ... XXXVIII. 74

Marriage—Not registered—Long cohabitation—Acknowledgment of marriage by relations and friends—Statement by husband in child's birth certificate that parents were not married—Presumption.

The claim by two persons, as wife and daughter of the deceased to his property as intestate heirs, was resisted on the ground that no marriage had taken place between the parties. There was proof that the man and the woman had gone

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through a customary marriage ceremony, lived together as man and wife for a long time and were acknowledged as such. The marriage however, was not registered, and in the birth certificate of the daughter, the man had stated that the parents were not married.

Held: *That in the circumstances, it must be presumed that a valid marriage had taken place.*

LADDU ADIRISHAMY *et al* *vs.* PETER PERERA *et al* ... XXXVIII. 87

Kandyan widow's right to mortgage deceased husband's lands for payment of his debts.

BANDARAMENIKA *vs.* IMBULDENIYA XL. 36

Competency of wife as witness against husband.

SEETHEVI *vs.* ARUMUGAM AND OTHERS L. 21

IDENTIFICATION

Identification Parade—How may identification be proved.

Held: *That the fact that the accused was identified at an identification parade can be established by the evidence of anyone present at the identification parade.*

BARTHOLOMEUSZ *vs.* KULARATNE II. 116

Principles which should be kept in view in testing the evidence given as to the identity of the accused.

VANDENDRIESEN *vs.* HOWWA UMMA IX. 17

How should arrangements be made for the identification of an accused by prosecution witnesses.

THE KING *vs.* THOLIS DE SILVA AND THREE OTHERS ... ... IX. 37

IGNORANTIA LEGIS NEMINEM EXCUSAT

THASSIM *vs.* WIJEKULASURIYA AND OTHERS ... ... XLVII. 5

IMMEMORIAL USER

See under **RIGHT OF WAY**

IMMIGRANTS AND EMIGRANTS ACT No. 20 OF 1948.

Deportation Order under section 31—Can Court interfere with such order.

SUDALI ANDY ASARY *vs.* VANDEN DRESEEN ... ... XLVIII. 17

Immigrants and Emigrants Act 1948—Not ultra vires under § 29 of Ceylon (Constitution) Order in Council.

SUDALI ANDY ASARY *vs.* VANDEN DRESEEN ... ... XLVIII. 17

Immigrants and Emigrants Act Temporary Residence Permit—Residence after expiry of permit—Does Part III of the Act apply to a person resident in Ceylon before 1st November, 1949?—Sections 15 (b) 45 (1)(a)—Citizenship Act No. 18 of 1948, section 2.

A non-national of Ceylon applied for and obtained a Temporary Residence Permit under the Immigrants and Emigrants Act No. 20 of 1948, which entitled him to remain in Ceylon for one year after his return from India. He continued to remain in Ceylon even after the expiry of the permit and was charged and convicted under section 45 (1) (*a*) of the said Act for contravening the provisions of section 15 (*b*).

In appeal it was argued that Part III of the Immigrants and Emigrants Act which deals with the control of entry into Ceylon of persons other than citizens of Ceylon did not apply to him, as he was a person who had been in Ceylon before the 1st November, 1949, and was hence entitled to remain in Ceylon indefinitely and the fact that he had applied for and obtained a Temporary Residence Permit was no bar to his exercising his former rights.

Held: *That Part III became applicable to him once he sought to re-enter Ceylon under the permit, as he became bound by the conditions therein.*

SEREENIVASAM *vs.* SITTAMPALAM XLVIII. 87

INCOME TAX ORDINANCE

Ordinance No. 2 of 1932—Section 11 (4)—Meaning of expression "employment."

Held: (1) *That the word "employment" in section* 11 (4) *of the Income Tax Ordinance No.* 2 *of* 1932 *refers to occupations*

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other than trades, businesses, professions or vocations and is not used in the sense of a particular contract of service,

(2) *That an accountant who left one master and sought service under another also as an accountant during the year preceding the year of assessment did not commence to carry on an employment within the meaning of section* 11 (4) *of the Ordinance on the day he joined the new master.*

COMMISSIONER OF INCOME TAX *vs.* RODGER ... ... II. 275

Sections 79 and 80 (1)—Procedure to be followed in recovery of tax.

Held: *That proceedings under section* 80 *of the Income Tax Ordinance are not of a criminal nature and no appeal lies from an order made thereunder.*

(2) *That the Commissioner need not proceed under section* 79 (2) *and* (3) *before he takes proceedings under section* 80.

(3) *That the proviso to section* 80 (1) *does not preclude a Court from deciding whether the Commissioner had properly exercised his discretion.*

THE COMMISSIONER OF INCOME TAX *vs.* DE VOS ... ... II. 351

Section 10 (a)—Expenses incurred by an advocate in travelling from his residence to the Courts.

Held: *That the expenses incurred by an advocate in travelling from his residence to the Court at which he practises his profession are not "expenses" incurred in travelling between the residence and place of business within the meaning of section* 10 (*a*) *of the Ordinance.*

RAJAPAKSE *vs.* COMMISSIONER OF INCOME TAX ... ... II. 479

An appeal as of right does not lie to the Privy Council from a decision of the Supreme Court under section 74 of the Ordinance.

R. M. A. R. A. R. R. M. *vs.* THE COMMISSIONER OF INCOME TAX ... ... V. 2

Veterinary Surgeon, Trainer and dealer in horses carrying on horse-racing—Are the winnings from horse-racing taxable.

Held: *That racing as carried on by the assessee and his wife formed no part of the business of trading in and training horses and that the winnings derived by them from horse-racing were not taxable.*

G. N. G. WALLES *vs.* THE COMMISSIONER OF INCOME TAX ... ... VII. 73

Section 65, 69 and 75—Agreement with assessor re amount of assessable income—Does an appeal lie—Meaning of the words "additional amount" in section 65.

Held: (1) *That, where an agreement as to the amount at which the appellant is liable to be assessed is reached between the assessor and assessee under section* 69 (2) *of the Income Tax Ordinance, no appeal lies against the adjustment of the assessment made by the assessor in order to give effect to the agreement.*

(2) *That an adjustment of the assessment made under section* 69 (2) *is not a determination on appeal for the purposes of section* 75 *of the Income Tax Ordinance.*

(3) *That the words "determined on appeal" in section* 75 *of the Income Tax Ordinance mean decided by an authority adjudicating in the matter.*

(4) *That the words "additional amount" in section* 65 *of the Income Tax Ordinance is wide enough to cover an amount previously reached by some miscalculation or by the subtraction of an allowance which ought not to have been made or which by the correction of the error is then augmented to a proper figure.*

THE COMMISSIONER OF INCOME TAX *vs.* SAVERIMUTTU CHETTY ... VIII. 57

Sections 5 and 34—Sale brought about through the instrumentality of a person in Ceylon—Sales of goods arranged by indent agents.

Held: (1) *That the indent agents (F. X. Pereira and Sons) were acting on behalf of a non-resident person within the meaning of section* 34 *of the Income Tax Ordinance.*

(2) *That the indent agents were instrumental in selling or disposing of property within the meaning of section* 34 *of the Income Tax Ordinance.*

(3) *That section* 34 *must be read along with section* 5, *and the effect of section* 34 *is to include, under profits arising in or derived from Ceylon, all profits from the sale of goods where such sale has been brought about through the instrumentality of a person in Ceylon acting on behalf of*

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the seller who is outside Ceylon, and in spite of the fact that legally the transactions of the business or the sale takes place outside Ceylon.

CHIVERS AND SONS, LTD. *vs.* THE COMMISSIONER OF INCOME TAX ... IX. 145

Section 74—Case stated by the Board of Review for the opinion of the Supreme Court—Delay in complying with the provisions of section 74 (3)—Is such delay fatal to the appeal.

Held: *That the delay in complying with the provisions of section* 74 (3) *of Ordinance No.* 2 *of* 1932 *is fatal to an appeal to the Supreme Court from a decision of the Board of Review constituted under the Ordinance.*

COSMAS *vs.* THE COMMISSIONER OF INCOME TAX ... ... XI. 75

Solicitor in the employment of a firm of Solicitors becoming a partner of the firm—Does the Solicitor commence to exercise a profession—Section II of the Income Tax Ordinance.

Held: (1) *That the assessee did not commence to exercise a profession on the day he became a partner.*

(2) *That the assessee commenced to exercise his profession on the day he became a paid assistant of the firm, and that there was no cessation of employment on his becoming a partner.*

COMMISSIONER OF INCOME TAX *vs.* ROWAN ... ... XIII. 85

Interest payable by a resident in Ceylon to a bank in England in respect of a debt contracted in England—Is the bank liable to be assessed in respect of this income on the ground that it is income arising in or derived from Ceylon—Section 5 of the Income Tax Ordinance.

Held: *That the interest payable by Mr. A. while resident in Ceylon, was not income arising on or derived from Ceylon.*

NATIONAL BANK *vs.* COMMISSIONER OF INCOME TAX ... ... XIII. 104

Sections 9 (1)—Outgoings and expenses—Tea Factory—Depreciation of building in which plant and machinery is housed—Can an allowance be allowed for such depreciation.

Held: *That an allowance for the depreciation of the building in which the plant and machinery of a tea factory is housed cannot be made under the Income Tax Ordinance.*

THORNHILL *vs.* THE COMMISSIONER OF INCOME TAX ... ... XIV. 37

Section 9—Expenses incurred by lawyer in purchasing law books—Do they fall within the ambit of the expression "outgoings and expenses" in section 9—Can a deduction in respect of purchase of law books be allowed.

Held: *That the expenses incurred by a lawyer in purchasing law books is not "outgoings and expenses" within the meaning of section* 9 *of the Income Tax Ordinance and is not a deduction allowable under the Ordinance.*

CHELVANAYAGAM *vs.* THE COMMISSIONER OF INCOME TAX ... ... XIV. 54

Section 6 (2) (a)—Bonus to employee—In what circumstances is income tax payable on bonus.

The assessee-appellant was paid a sum of Rs. 10,000/- in terms of the following resolution of the Directors of the Company by which he was employed:

"In view of Mr. Craib's exceptional services to the Company, and in consideration of the fact that he has to undergo medical treatment while at home, it was resolved to grant him a special bonus of Rs. 10,000/-" The income tax authorities claimed income tax on this amount. The assessee resisted the claim. The Board of Review decided against him and he applied for a case stated to the Supreme Court.

Held: *That the payment was in the nature of a gift and did not attract Income Tax.*

CRAIB *vs.* THE COMMISSIONER OF INCOME TAX ... ... XIV. 102

Bonus shares issued out of reserve for depreciation of buildings—Is the recipient of such shares liable to pay income tax on their capital value—Definition of dividend—Is it wide enough to include bonus shares issued out of reserve.

Held: *That the assessee was not liable to pay income tax.*

THE COMMISSIONER OF INCOME TAX *vs.* SIR MOHAMED MACAN MARKAR XV. 164

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Section 84—Double tax relief—Sections 45 and 46—Can relief be given when claim is not made within three years of the end of the year of assessment in respect of which the relief is claimed.

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

NADAR *vs.* THE ATTORNEY-GENERAL ... ... XVI. 85

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

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

THE COMMISSIONER OF INCOME TAX *vs.* THE PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION ... ... XVII. 11

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

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

THORNHILL *vs.* THE COMMISSIONER OF INCOME TAX ... ... XVII. 21

Section 9 and 10 (c)—What is expenditure of a capital nature.

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

THEOBALD *vs.* THE COMMISSIONER OF INCOME TAX ... ... XVII. 91

Sections 9 and 10—Expenditure incurred in replanting estate—In what circumstances may the expenditure be deducted for the purpose of ascertaining the profits or income of any person.

The appellant purchased an estate known as Siriniwasa Estate in 1936. Shortly after the purchase the appellant started to replant the estate in stages, In 1936 he replanted 5 acres, 139 in 1937 and 100 acres in 1938.

The appellant claimed that the expenditure incurred in replanting should be deducted for the purpose of ascertaining the profits or income. The Commissioner ruled that in view of the Law Shipping Case (12 Tax Cases 621) the appellant was not entitled to the deduction he claimed.

Held: *That the Law Shipping Case* (12 *Tax Cases* 621) *did not apply to the appellant's case.*

THE HAUGHTON TEA CO., LTD. *vs.* THE COMMISSIONER OF INCOME TAX XX. 11

Liability of Indian State to pay income tax in respect of its trading profits arising in Ceylon—Section 34—Is an Indian State a "person" within the meaning of that expression as used in the Income Tax Ordinance—Can the Ceylon legislature according to International Law tax an Indian State trading in Ceylon without the consent of such Indian State—Recovery of tax due from a foreign state.

Held: (1) *That the state of Mysore is a "person" within the meaning of that expression as used in the Income Tax Ordinance.*

(2) *That an Indian State trading in Ceylon through an agent comes within the ambit of section* 34 *of the Income Tax Ordinance.*

(3) *That an Indian State is not a sovereign state for the purposes of International Law and cannot call in aid the immunities of a sovereign state.*

THE SUPERINTENDENT, GOVERNMENT SOAP FACTORY, BANGALORE *vs.* THE COMMISSIONER OF INCOME TAX XXIII. 68

Section 11 (11)—Pecuniary legacy of a lump sum payable out of the income of the estate of the deceased—Legacy paid in instalments—Is the legatee liable to pay income tax on the amount of the legacy received by him each year—Scope of expression "beneficiary of the estate of a deceased person" in section 11 (11).

Held: *That a lump sum pecuniary legacy paid to a legatee out of the income of the estate is not liable to income tax by virtue of the provisions of section* 11 (11) *of the Income Tax Ordinance inasmuch as a pecuniary legatee cannot be said to be a "beneficiary of the estate of a deceased person."*

VANDERPOORTEN *vs.* THE COMMISSIONER OF INCOME TAX ... XXIII. 137

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The power conferred by section 2 of the Income Tax Ordinance on the Commissioner to approve certain persons before they can be authorized to act on behalf of assessees carries with it an implied power to disapprove a person who has been approved or to revoke an approval once given.

An approval given by the Commissioner of Income Tax does not extend beyond the year of assessment in which the approval is given.

VALUE *vs.* THE COMMISSIONER OF INCOME TAX ... ... XXVI. 65

Decision of Board of Review—Does not operate as res judicata.

THE ATTORNEY-GENERAL *vs.* ATCHI ... ... XXVII. 40

Sections 2 and 11 (3) and (4)—Meaning of "business" in section 11 (3) and (4)—Person with one agricultural undertaking acquiring or obtaining interests in other agricultural undertakings—Does he "commence to carry on or exercise a business" each time he acquires or obtains an interest in another agricultural undertaking.

Held: (1) *That each of the expressions "trade," "business," "profession," "vocation" and "employment" in section* 11 (3) *of the Income Tax Ordinance must receive attention individually, inasmuch as it must be conceded that some may have wider meaning than others.*

(2) *That the owner of an agricultural undertaking cannot on his purchasing or acquiring by gift the part or whole of another agricultural undertaking or undertakings escape the application of section* 11 (3) *and* (4) *of the Income Tax Ordinance merely because the new acquisitions are also agricultural undertakings.*

(3) *That section* 11 (3) *contemplates the possibility of a planter who buys several estates commencing several agricultural undertakings in respect of those estates.*

DIAS *vs.* THE COMMISSIONER OF INCOME TAX ... ... XXVII. 81

§ 74—Case stated under—Supreme Court will not interfere with a finding of fact of the Board of Review if there is evidence to support the finding.

WIGNARAJAH *vs.* COMMISSIONER OF INCOME TAX ... ... XXX. 45

Rules made under section 90 of the Income Tax Ordinance—Scope of expression "bank" in Rule 1. (1) and 1. (2).

Held: (1) *That for the purposes of Rule* 1. (1) *and* (2) *a banker means a company or persons carrying on as its or his principal business the acceptance of deposits of money on current account or otherwise subject to withdrawal by cheque, draft or order.*

(2) *That it is for the person claiming relief to establish affirmatively that he is a "bank" within the meaning of the rule.*

Per ROSE, J.: "I consider nevertheless that the question as to whether by the evidence adduced before the Board the Chettinad Bank and its Branch can reasonably be held to have satisfied the test to which I have referred is a matter of law, or at least of mixed fact and law, to which it is proper that this Court should apply its mind."

COMMISSIONER OF INCOME TAX *vs.* BANK OF CHETTINAD, LTD. ... XXXI. 65

Prosecution under section 87 (1) (b) and 87 (1) (d) for making false statement in return and signing statement or return without reasonable ground for believing same to be true—Can person making and signing such return deny knowledge of contents thereof—Criminal Procedure Code, sections 172 and 193—Distinction between addition and alteration of a charge.

Held: (1) *That, when a return, statement or form required under the Income Tax Ordinance is furnished by a person or by his authority, it is not open to such person, in the absence of proof to the contrary, to say that although he signed the return statement or form, he was not cognisant of its contents.*

(2) *That, in view of sections* 172 *and* 193 *of the Criminal Procedure Code, it is open to a Magistrate to add a charge without producing the result that thereby the charge is altered. It is only the substitution of one charge for another that amounts to an alteration of a charge in the Magistrate's Court.*

PIYASENA ASST. ASSESSOR, DEPT. OF INCOME TAX *vs.* VAZ ... XXXII. 25

Last Will—Trust for relief to poor relations of testatrix—Is it a trust of a public character established for a charitable purpose within the meaning of section 7 (1) (c) of the Income Tax Ordinance.

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A testatrix devised certain properties to the appellants who were to hold the same in trust and to use the net income thereof for three purposes one of which was as follows:—"To aid either occasionally or regularly my relations who are or may become poor including members of my own family and who, in the judgment of my Trustees are in need of such aid in consequence of illness, financial difficulties and the like or on the occasion of marriage, deaths and the like."

The assessor held that the income derived from the said properties was liable to income tax as the trust created by the above terms was not for a charitable purpose within the meaning of section 7 (1) (*c*) of the Income Tax Ordinance.

The Commissioner and the Board affirmed the assessment and a case was stated for the opinion of the Supreme Court whether the trust in question for the relief of poor relations of the settler constituted a valid charitable trust and therefore is exempt from taxation.

Held: *That the trust created by the testatrix for the benefit of her poor relations is a trust of a public character established for a charitable purpose within the meaning of section 7 (1) (c) of of the Income Tax Ordinance.*

THE TRUSTEES OF THE WIJEWARDENE CHARITABLE TRUST *vs.* THE COMMISSIONER OF INCOME TAX XXXII. 72

Remuneration paid to Arbitrator—Does it form part of his income or profits chargeable with tax—Income Tax Ordinance, Cap. 188 of 1932, section 6 (1) (a), (1) (b) and (1) (h)—Delay in sending notice to Commissioner as required by section 74 (3) of the Ordinance.

Held: (1) *That the remuneration received by a person nominated to act as arbitrator by a party in arbitration proceedings forms part of such person's taxable income.*

(2) *That the mere fact that such person had so acted and received remuneration only once does not make it a profit of a "casual and non-recurring nature" within the meaning of section 6 (1) (h) of the Income Tax Ordinance.*

(3) *That the word "employment" in section 6 (1) (b) of the Income Tax Ordinance includes a case where a person employs himself to earn money.*

(4) *That where a case was transmitted to the Supreme Court on 22nd January, 1947, and notice in writing was sent to the Commissioner on 24th January, 1947, as provided in section 74 (3) of the Income Tax Ordinance, the delay did not deprive the Supreme Court of its jurisdiction to hear the appeal.*

WICKREMASINGHE *vs.* THE COMMISSIONER OF INCOME TAX XXXV. 54

Section 74 (4)—Excess Profits Duty Ordinance No. 38 of 1941, section 13—Returns of income for 4 years—Rejection of returns by assessor—Estimated assessment—Appeal to Commissioner—Increase of assessment by Commissioner—Appeal to Board of Review—Absence of evidence at the appeal—Confirmation of Commissioner's assessment—Application to Board of Review to state case for the opinion of the Supreme Court—Application for amendment of Case Stated.

The petitioner, a tax-payer, furnished returns of his income for 4 years to the Income Tax Assessor who rejected the returns and made an estimated assessment of his income and called upon him to pay Rs. 3,000 as Income Tax. On an appeal by the assessee to the Commissioner, the assessor who had obtained further documentary evidence regarding increases in the Bank balance and purchase of, properties by the assessee during the period, moved to have the assessment increased. The Commissioner, in the absence of evidence produced by the assessee himself, or on his behalf increased the assessment to Rs. 43,000. On an appeal from this finding to the Board of Review it was contended on behalf of the appellant that the assessment was excessive, but no evidence was produced. The Board confirmed the assessment of the Commissioner. At the hearing before the Supreme Court it was argued that certain sums were wrongly included in the profits and that the money for the purchase of property may have come from "carry forward profit" and that the increase in the Bank balance may be sums of capital or non-duty-leviable incomes.

Held: (1) *That in the absence of evidence from the appellant to show that the assessment was wrong, the Supreme Court could not say that the assessment was excessive.*

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(2) *That it was unnecessary in those circumstances to send the case back for amendment of the case stated.*

SILVA *vs.* THE COMMISSIONER OF INCOME TAX ... ... XXXVI. 46

Ceylon branch of non-resident bank—Head Office in Rangoon—Business in Ceylon mainly lending money on securities, management of estates and house property owned by the bank in Ceylon—Few current and deposit accounts—No issue of cheque books—No evidence of withdrawal of deposits by cheque or draft or order—Can Ceylon branch be said to be carrying on banking business within the meaning of Rule I of Rules made under section 90 of Income Tax Ordinance, Chap. 188—Deduction claimed under such Rules—Is the Ceylon branch entitled to the deduction.

The appellant Company, the Bank of Chettinad Ltd., had its head office in Rangoon and a branch in Ceylon, which had been mainly carrying on the business of lending money on promissory notes or on the mortgage of immovable property in Ceylon and the management of estates and house properties owned by the bank in Ceylon. The only current and deposit accounts with the local branch were those of the Chettinad Corporation Ltd. (a company closely connected with the bank) and seven other persons. These seven persons were stated to have closed their accounts during the year ending 31-3-40. The branch was financed mainly from its head office in Rangoon. No cheque books have been issued from the bank, there was no evidence that any moneys in deposit could have been withdrawn by cheque, draft or order.

The Ceylon branch credited a sum of Rs. 53,226 to the head office in Rangoon by way of interest for the year ending 31-3-40 and claimed that this sum should be allowed as a deduction under the Rules (made under section 80 of the Income Tax Ordinance) in assessing the profits of the Ceylon branch for the year under review.

Held: (1) *That in the circumstances, the Ceylon branch is not entitled to the deduction claimed as it cannot be said to have carried on the business of a banker within the meaning of Rule I of the Rules made under section 90 of the Income Tax Ordinance.*

(2) *That, in order to be entitled to the deduction claimed it is necessary to prove that the business in Ceylon of a non-resident banker should be banking business.*

(3) *That the proper test for determining whether the Ceylon branch carried on the business of banking at the material time is to consider whether that branch at that time could fairly be described as "a company which carries as its principal business the accepting of deposits of money on current accounts or otherwise subject to withdrawal by cheque, draft or order."*

THE BANK OF CHETTINAD LTD. OF COLOMBO *vs.* THE COMMISSIONER OF INCOME TAX ... ... XXXVII. 53

Appeal—Partnership—Some of the partners minors—Is it a bar to the formation of a partnership.

Held: *That the minority of a partner is no bar to existence of a partnership.*

EBRAHIMJEE *vs.* THE COMMISSIONER OF INCOME TAX ... ... XL. 79

Company registered in India having branch business in Ceylon—Claim under section 46 of Income Tax Ordinance in respect of tax paid in Ceylon for years of assessment 1940/41 and 1941/42—Claim made after lapse of three years—Is it barred by section 84 (1) of Income Tax Ordinance—What should be taken into consideration in ascertaining the amount with which taxpayer is properly chargeable within the meaning of section 84 (1).

The appellant Company (registered in Bombay), having a branch business in Colombo claimed in this action under section 46 of the Income Tax Ordinance (Chap. 188) a sum of Rs. 13,175.91 being the aggregate of half of two sums of money paid as income tax in Ceylon for the years 1940/41 and 1941/42 respectively.

The claim for relief in respect of 1940/41 was made on 30th May, 1945 and for the year 1941/42 on 18th June, 1945.

The defendant (The Commissioner of Income Tax) filed answer stating *inter alia* that the claim was barred by section 84 (1) of the Income Tax Ordinance as it was made after the lapse of three years.

The District Court upheld this plea of prescription and the Company appealed.

In appeal it was contended for the appellant company that section 84 (1) did not apply to the present claim inasmuch

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as when the appellant paid the two sums for the two years of assessment (charged under section 20 (1) of the Ordinance) without making any deduction on account of the relief provided for under 46 (1), it could not be said to have paid tax by deduction or otherwise in excess of the amount with which it was properly chargeable for those years.

Held: (1) *That section* 84 (1) *of the Income Tax Ordinance applied to the applicant's claim and therefore was barred by prescription.*

(2) *That in ascertaining the amount with which a taxpayer is "properly chargeable" within the meaning of section* 84 (1) *attention should be paid not only to section* 20 (1) *but also to provisions of such sections as section* 43 *and* 46 (1) *in appropriate cases.*

THE ASSOCIATED CEMENT COMPANIES OF BOMBAY *vs.* THE COMMISSIONER OF INCOME TAX, ESTATE DUTY AND STAMPS ... ... XLI. 97

Appellant charged with false return of Income under section 87 of Income Tax Ordinance (Chap. 188)—What must be proved—Onus on the prosecution to establish offence—Meaning of "wilfully with intent to evade."

The appellant, who carried on a variety of businesses under different limited liability companies, was charged under section 87 of the Income Tax Ordinance in that in his return of the profits derived from his building contracts for the period January 1942 to December 1944, he wilfully with intent to evade tax both omitted and declared certain items of profits and thereby falsified the returns.

The appellant had omitted in the returns certain payments made to him in his contract business but he explained these omissions as being due to clerical error of his book-keeper or as appropriations for materials supplied by him to his sub-contractors or as secret commissions paid to military officials for obtaining the contracts or as being in his view not profits from his business.

No evidence was led by the prosecution to prove that the alleged items of payments were in fact profits from the contract business of the appellant.

Held: (1) *That the appellant should be acquitted of the charges as the prosecution had failed to prove that the acts complained of under the section were committed deliberately or purposely by the appellant with the intention to avoid fraudulently the payment of tax.*

(2) *That it is not an offence under the section for a person to make in his return an omission of income on a mistaken view of law or facts or to enter a false statement inadvertently or in the belief that it is true.*

CHELLAPAH *vs.* COMMISSIONER OF INCOME TAX ... ... XLIV. 54

Sections 80 (1) and (2) and 62—Tax due from limited liability company—Proceedings under section 80 in Magistrate's Court against Director—Objection that director not "defaulter" within meaning of section—Personal obligation of director as "principal officer" to pay tax—Magistrate's power to decide correctness of statement in Commissioner's certificate—Conviction of director—Right to appeal—Revisionary powers of Supreme Court.

Held: (1) *That the provisions of section* 62 *of the Income Tax Ordinance do not make the principal officer of a Company chargeable out of his personal assets with income tax levied on the company's assessable income.*

(2) *That proceedings for the recovery of such tax under section* 80 *of the Income Tax Ordinance are not available against him as a "defaulter" and he is entitled to raise in such proceedings the objection that the company and company alone must be regarded as the "defaulter."*

(3) *That a defaulter for the purpose of section* 80 *of the Ordinance is a person who, having been duly assessed under section* 84 *as being "chargeable with tax," has omitted, as required by section* 76 *to pay such tax on or before the date specified in the notice of assessment served on him as the person so chargeable.*

Per GRATIAEN, J.—"Learned Crown Counsel has submitted, and Mr. Choksy concedes, that no appeal lies against an order purporting to have been made by a Magistrate under section 80 (1) of the Ordinance. *Commissioner of Income Tax vs. de Vos* (1933) 36 N. L. R. 349 and *Vas vs. Commissioner of Income Tax* (1945) 46 N. L. R. 201. In both these decisions, however, it

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was indicated that the correctness of such orders could appropriately be examined by this Court in the exercise of its revisionary powers."

M. E. De Silva *vs.* The Commissioner of Income Tax ... XLVI. 33

Oral contract of employment understood to be four-year contract with six month's leave on full pay—Money set aside as leave pay paid to executrix on death of employee—Is such payment a profit under section 6 (2) (a) (i) or 6 (2) (a) (v) of Income Tax Ordinance (Chapter 188) as amended by section 3 of Income Tax Amendment Ordinance No. 25 of 1939?—Construction, a matter of law not of evidence—Section 73 (7) of Income Tax Ordinance.

The respondent's husband, Mr. Sutherland, was employed by a company on an oral contract for a period of four years with six months' leave on full pay, and the passage money to be paid by the company for him and his wife. The company paid to the respondent as executrix a sum of money as leave pay which Mr. Sutherland would have been entitled to if he had survived. It was the normal practice of the company to pay leave pay in proportion to the length of sevice which has elapsed without leave.

The Commissioner of Income Tax sought to assess the amount on the footing that this sum was a profit of the deceased's employment under section 6 (2) (*a*) (i) or 6 (2) (*a*) (v) of the Income Tax Ordinance (Chapter 188) as amended by section 3 of the Income Tax Amendment Ordinance No. 25 of 1939. The respondent's contention was that the amount was paid to her personally as a gratuitous payment and not *qua executrix* as a profit of employment due to her husband's estate.

The company in their correspondence expressed contradictory opinion about the character of the sum in question.

Held: (1) *That the contract between Mr. Sutherland and the company was a contract for four years' service with six months' leave on full pay and there was no basis for a claim by Mr. Sutherland's executrix for pay in lieu of off leave on his death without having had leave.*

(2) *That there was no justification for implying a term by which the company would be bound to pay leave pay when no leave was taken, where the normal practice of the company in so doing was not expressly incorporated.*

(3) *That the payment was made* ex gratia *and not in discharge of a contractual obligation and therefore could not be assessed under section* 6 (2) *of the Income Tax Ordinance.*

(4) *That though opinion of the company about the intendment of the contract may have been received under section* 73 (7) *of the Income Tax Ordinance they are irrelevant and are not in law admissible as aids to the construction of the contract.*

(5) *That the language of section* 73 (7) *is very wide but it does not go so far as to authorize the Board of Review to ignore the rule that construction is a matter of law and not of evidence.*

The Commissioner of Income Tax Colombo *vs.* Mr. A. J. Sutherland ... ... XLVII. 84

Appellant Company's returns rejected and differently assessed by Income Tax Authorities—Assessment based on data available to the authorities—Objection to assessment as being arbitrary and violating secrecy under section 4 (1) of Income Tax—Authorities powers to assess—Scope of—Income Tax Ordinance (Chapter 188)—Sections 69, 64, (2) 70, 71, 73, (4) 86 (2).

The appellant, a bus company, submitted returns of Income Tax for 4 years, which the assessor rejected and assessed at substantially larger sums, as the margin of profits according to the tendered accounts was smaller than they should have been according to the assessor. The Commissioner reduced the assessments of the assessor, and in so doing the Commissioner relied upon data which supported the view that the profits of a bus company in the area the appellant was operating bore a fairly constant ratio to the company's expenditure on oil and petrol. The data contained in a document R 14 related to the expenditure of seven other bus companies, whose names were not given and were extracted from files in the Income Tax Department, which were not available for inspection by the appellant.

The Commissioner's assessment was confirmed by the Board of Review and by the Supreme Court.

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It was contended by the appellant that (*a*) that there was no evidence or material on which the Board could justifiably reject the appellant's accounts; (*b*) that the document R 14 was wrongly admitted at the hearing by the Commissioner of Income Tax, and that the document infringed the duty of secrecy enjoined under section 4 (1) of the Income Tax and consequently invalidated the Commissioner's assessment; (*c*) that the Commissioner in making his order did act on material which was not properly in evidence at the hearing of the Appeal by him.

Held: (1) *That the Income Tax authorities had the power under the Ordinance to reject the appellant's returns and substitute their estimates of the assessable income and that it was not necessary for them to give reasons for so doing.*

(2) *That before the Board of Review the onus was on the appellant to disprove the correctness of the estimates and to establish some lower figure, which the appellant had failed to do.*

(3) *That the reliance on the data contained in document R* 14 *as showing a ratio between net profit and expenditure on oil and petrol was legitimate for the purpose of calculating the appellant's proper assessment and did not infringe the principles of fair play and natural justice.*

(4) *That the reception of document R* 14 *did not violate section* 4 (1) *of the Income Tax as it contained no name except that of the appellant and the data contained thereon were extracted anonymously, and that it was unnecessary to decide whether, if it was infringed, this would in itself invalidate the assessment.*

GAMINI BUS CO., LTD. *vs.* THE COMMISSIONER OF INCOME TAX XLVII. 109

INCURIAM—PER

The Supreme Court cannot revise its judgment on the ground that it has been given per incuriam **except for the purpose of correcting some clerical or typing error or in a case in which a judgment has been based** per incuriam **on a repealed enactment.**

WIJESEKERE *vs.* A. G. A., MATARA XXVI. 52

INDIAN AND COLONIAL DIVORCE JURISDICTION ACT 1926

See under **DIVORCE**

INDIAN AND PAKISTANI RESIDENTS (CITIZENSHIP) ACT NO. 3 OF 1949

Section 6 (2) (ii)—Meaning of "Ordinarily resident"—Date in relation to which question of ordinary residence has to be decided.

The appellant applied on 19th November, 1949, for registration as a citizen of Ceylon under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949. He was born in India, but was resident in Ceylon since 1928. In 1938 he married in India where his wife remained till march, 1948. Two children were born to them in India in 1938 and 1945 respectively. In March, 1948, the wife and children came to reside in Ceylon with the appellant intending to settle down in Ceylon permanently. The elder child has been attending school since September, 1948.

Held: (1) *That in the circumstances the wife and each of the two minor children had been "ordinarily resident" in Ceylon within the meaning of section* 6 (2) (ii) *of the Act and the application should be granted.*

(2) *That there is no requirement in section* 6 (2) (ii) *or elsewhere in the Act that the residence should have commenced at a given period of time or that it should have a minimum duration.*

(3) *That the date in relation to which the question of ordinary residence under this section has to be decided is the date of the application.*

BADURDEEN *vs.* COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS ... XLIV. 86

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, section 6 (2) (ii)—Interpretation of the words "Ordinarily resident"—Section 22—Applicant for registration—Does the minimum period of uninterrupted residence required for the husband have any application to his wife and children.

Held: *That a married man, permanently settled in Ceylon, can be registered as a*

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citizen under the Indian and Pakistani Residents (Citizen) Act No. 3 of 1949, although his wife, though ordinarily resident in Ceylon at the date of his application, had not been so resident for the seven years prior to 1st January, 1946 (as required by section 3), and though his minor children have not been ordinarily resident in Ceylon during the whole period of their dependency on him.

WIRASINGHE COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS, COLOMBO *vs.* (1) MOHIDEEN ABDUL CADER BADURDEEN (2) MOHAMED MOHIDEEN ABDUL CADER ... XLVII. 92

Indian and Pakistani Residents (Citizenship) Act 1949—Not ultra vires **§ 29 of Ceylon (Constitution) Order-in-Council 1946.**

SUDALI ANDY ASARY *vs.* VANDEN DRESEEN ... ... XLVIII. 17

Citizenship—Application for—Refusal by Commissioner—No right of appeal therefrom—Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949 as amended by Act No. 37 of 1950—Sections 9 (2), 10, 15 (1).

An order by the Commissioner under section 9 (2) of the Indian and Pakistani Residents (Citizenship) Act is purely administrative and no appeal lies from such an order. The Supreme Court will not interfere with such an order upon an application for writs of *Certiorari* or *Mandamus*. It is only when cause is shown by an applicant under section 9 (2) or by a member of the public under section 10 that a *quasi-lis* comes into being and *quasi*-judicial functions are superimposed on the Commissioner.

R. SIVAN PILLAI *vs.* COMMISSIONER FOR THE REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS ... XLIX. 17

INDIAN CRIMINAL PROCEDURE CODE

Sections 426, 496, 497, 498 and 561 A

LALA JAIRAM DAS AND OTHERS *vs.* EMPEROR ... ... XXX. 1

INDIAN STATE

Can the Ceylon legislature according to International Law tax an Indian State trading in Ceylon without the consent of such Indian State.

Indian State is a "person" for the purposes of the Income Tax Ordinance.

THE SUPERINTENDENT, GOVERNMENT SOAP FACTORY, BANGALORE *vs.* THE COMMISSIONER OF INCOME TAX XXIII. 68

INDICTMENT

Indictment—Witness named in—Discretion of prosecuting counsel to call.

ADEL MUHAMMED EL DABBAH *vs.* ATTORNEY-GENERAL OF PALESTINE XXVIII. 49

Power of District Court to discharge, without trial an accused person indicted by Attorney-General.

KING *vs.* DAYARATNE AND ANOTHER ... ... XXXI. 68

Indictment—Crown Counsel absent at trial—Postponement refused—Has Court power to discharge accused.

KING *vs.* FONSEKA AND FIVE OTHERS ... ... XXXI. 83

Indictment—For murder—Provocation—Wife's confession of adultery—Whether sufficient provocation to reduce murder to manslaughter—Functions of Judge and Jury.

Held: (1) *That a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter.*

(2) *That this rule applies to either spouse alike.*

HOLMES *vs.* DIRECTOR OF PUBLIC PROSECUTIONS ... ... XXXIII. 12

Indictment — application to amend — prejudice to accused—Matters to be taken into consideration.

REX *vs.* MANUEL COORAY XXXIII. 104

Joinder of murder charges in the same indictment.

EBERT SILVA *vs.* THE KING ... XLV. 21

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Indictment—Discretion of Court to allow amendment of

THE KING *vs.* NISSANKA MICHAEL FERNANDO ... ... XLIII. 97

Offences of conspiracy and of abetment to commit criminal breach of trust—Joinder of charges—Multiplicity of charges—Prejudice.

REX *vs.* KANAGARATNAM *et al* XLVII. 42

INFORMATION BOOK

Use of Information Book—Perusal of Information Book after close of summary case—Regularity of such procedure?

Held: *That the Information Book must not be used in a summary case in order to assist the Court to come to a decision upon the evidence recorded. A Judge desiring to use the contents of the Information Book for such a purpose should have them put in evidence as provided by* § 157 *of the Evidence Ordinance.*

The wrong use of the Information Book is sufficient to vitiate a conviction.

BARTHOLOMEUSZ *vs.* VELU (SON OF VELUPILLAI) ... ... I. 27

Use of Information Book—Chapter XII of the Criminal Procedure Code—Refusal to issue process after reference to the Information Book after hearing the complainant's evidence—Such use of the Information book irregular.

Held: *That, where a Magistrate after recording the evidence of the complainant, referred to the Information Book and refused to issue process and made the following remarks, "I have seen the entry in the Information Book in the Police Station. This is a false case. Process "refused." It was a wrong use of the Information Book.*

SUPRAMANIAM *vs.* KATHIRASAPULLAI AND ANOTHER ... ... I. 135

Examination of information book by Magistrate at the request of the pleader for the accused—Conviction not bad for this reason.

Held: *That there is no objection to the examination by a Magistrate of the information book when he does so on being asked to do so by the pleader for the accused.*

INSPECTOR OF POLICE *vs.* UPASAKA APPU AND ANOTHER ... ... IV. 9

Information Book—Magistrate referring to after close of cases for prosecution and defence.

Held: *That the Magistrate made an improper and irregular use of the Information Book.*

TENNAKOON (POLICE SERGEANT) *vs.* PONNIAH ... ... XI. 68

Information Book is not a document in respect of which privilege can be claimed under §§ 123 and 125 of the Evidence Ordinance.

PEIRIS *vs.* CHITTY AND OTHERS XVI. 58

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

PEIRIS *vs.* CHITTY AND OTHERS XVI. 58

Failure of prosecution to prove statements from information book put to accused under cross examination and denied by him—Does it vitiate conviction.

SUB-INSPECTOR OF POLICE KADUGANNAWA *vs.* WIJERATNE ... XXXV. 18

Information Book—Use of by Court—Discretion of Judge.

CHRISTOFFELSZ *vs.* KITNAPULLE XXXVII. 2

INFORMERS' REWARD ORDINANCE

Section 2—Order under—Should be made at the same time as the order imposing the fine.

ATTORNEY-GENERAL *vs.* LETCHIMAN NADAR ... ... XLII. 64

INHERENT POWERS

See under **Jurisdiction.**

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INHERITANCE

See also under **Kandyan Law.**

Matrimonial Rights and Inheritance Ordinance, Jaffna Matrimonial Rights and Inheritance Ordinance, Thesawalamai.

Inheritance—Property of deceased testator—Sale by heirs and executor—Is the sale subject to the debts of the estate.

Held: (1) *That it is well settled law that transfers by the heirs of an estate are subject to the payment of the debts of that estate, if, without recourse to the lands transferred, the debts cannot be satisfied.*

(2) *That the mere fact that the executor is a party to the transfer does not affect the rights of creditors of the deceased.*

SURIYAGODA *vs.* WILLIAM APPUHAMY ... ... XXI. 77

INJUNCTION

Issued by Court of Requests—Disobedience of—Power of Court to punish as for contempt.

PERERA *vs.* ABDUL HAMID ... I. 141

A Court's power to grant relief by way of injunction is confined by the provisions of the Courts Ordinance.

POUNDS AND ANOTHER *vs.* GANEGAMA ... ... XI. 111

A Court will not prohibit a person from building on his land so as to affect the light and air of his neighbour unless the diminution of light and air will be so substantial as to render the building unfit for the purpose for which it is used.

PERERA *vs.* SIRIWARDENE XXVIII. 12

Injunction—To restrain use of similar trade name.

CEYLON INSURANCE CO. LTD. *vs.* THE UNITED CEYLON INSURANCE CO. LTD. ... ... XXXV. 45

Mandatory Injunction to demolish building—When granted.

ELPI NONA *vs.* PUNCHI SINGHO *et al* ... ... XLIII. 90

IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS

JAFFERJEE AND OTHERS *vs.* SUBBIAH PILLAI AND OTHERS ... XLVIII. 83

INSANITY

Burden of proving—In murder case.

THE KING *vs.* ABRAHAM APPUHAMY *alias* ASSON ... ... XV. 37

Plea of insanity—Burden of proof.

REX *vs.* DON NIKULAS *alias* BUIYA ... ... XXIII. 90

INSOLVENCY

Insolvency of a mortgagor.....Shares pledged with a Bank—Written authority to sell or dispose of them given by the insolvent pledgor to the bank—Right of a bank to sell property pledged without reference to Court—How far this right exists in Ceylon—English Law of banking to what extent applicable—Ordinance No. 22 of 1866—Insolvency Ordinance—Right of preference of creditors who hold a mortgage of immovable property.

Held: (1) *That the English Law of banking with regard to the realising of securities pledged does not obtain in Ceylon. The right of a pledge to sell his security without recourse to a Court of Law is peculiar to the English Law of pledge and the common law of the land in the matter of rights of mortgage and pledge does not give place to the English Law when the mortgagee or pledgee is a bank.*

(2) *The Roman Dutch Law will not recognise an agreement authorising the pledge to sell the security pledged except in the case of movable of small value and in the case of shares held by a bank in which case the right to do so depends on custom by which the law has been abrogated. Such a custom does not exist in Ceylon and has not been recognised in the Courts.*

(3) *A bank may legally sell shares held by it by way of pledge with the consent of and by arrangement with the assignee of an insolvent pledgor.*

HONG KONG *vs.* SHANGHAI BANKING CORPORATION *et al vs.* FRANCIS F. KRISHNAPILLAI ... ... I. 149

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Insolvency Ordinance No. 7 of 1853—Sections 36, 132, 133 and 152—Appeal to Privy Council from Order of Supreme Court refusing certificate—Application to the District Court for protection from arrest under § 36 till hearing by Privy Council of application for leave to appeal—Conditional protection granted by District Court—Can such protection be granted by the District Court?

Held: (1) *That a District Court has no power to grant protection till the hearing of his application to an insolvent who had applied to the Privy Council for special leave to appeal against an Order of the Supreme Court refusing a certificate.*

(2) *That when a Court of first instance has refused a certificate and such refusal has come before an appeal Court the proper tribunal to which to make application for protection is the Appeal Court.*

MOHAMED *vs.* RAMASAM CHETTIAR AND ANOTHER ... ... I. 388

Protection from arrest to insolvent who has appealed to the Privy Council from the decision of the Supreme Court—Who may grant.

Held: (1) *That the Supreme Court has inherent power to grant protection from arrest to an insolvent who has appealed to the Privy Council from its order refusing a certificate of conformity.*

(2) *That the Supreme Court has inherent power to control action taken on its own decree while that decree is under appeal to the Privy Council so as to prevent irreparable loss or injury to the appellant in the event of the appeal being allowed.*

MOHAMED *vs.* ANNAMALY CHETTIAR *et al.* ... ... II. 195

Do civil appellate rules apply to appeals in insolvency proceedings.

Held: *That appeals in insolvency proceedings are not governed by the Civil Appellate rules.*

DIAS *vs.* PALANIAPPA CHETTIAR II. 138

Adjudication of insolvent—How petitioning creditor's debt should be proved.

Held: *That the petition and affidavit of the petitioning creditor should be supported by further evidence and that an order of adjudication of insolvency made on the petition and affidavit only without such further evidence is bad even where the adjudication is undisputed.*

IN THE MATTER OF THE INSOLVENCY OF ROBERT DE ZOYSA ... ... II. 307

Discretion of trial judge to accept explanation of insolvent as to his conduct of business—Are Licences which are not transferable assets.

Held: (1) *That the acceptance of the explanation of an insolvent regarding his conduct as a trader is a matter mainly in the discretion of the trial judge and that an appeal court should be slow to interfere with that discretion.*

(2) *That licenses held by an insolvent which are not transferable do not form assets of the insolvent.*

W. M. S. MUTTU MOHAMADO *vs.* S. K. R. A. A. R. RAMASAMY CHETTY *et al* II. 317

Costs of petitioning insolvent—Can they be paid out of his assets.

Held: *That the costs up to the time of choice of assignees of a petitioning insolvent can be paid out of the assets of the estate.*

SENEVIRATNE BROS. *vs.* DE SILVA II. 503

Insolvency Ordinance No. 7 of 1853—Section 82—Action by assignee of an insolvent's estate without the permission of Court as required by section 82—Is it a good defence to such an action to plead that the assignee has not obtained the requisite permission.

Held: *That the absence of the permission required by section 82 of the Insolvency Ordinance No. 7 of 1853 is no bar to an action against a debtor of the insolvent's estate and that it is not a valid defence to an action by an assignee against a debtor of the insolvent to plead that the permission required by § 82 has not been obtained.*

KANAGARATNE *vs.* YAPA ... III. 15

Insolvency Ordinance No. 7 of 1853—Section 152—Is a person who has obtained a certificate in form R entitled to a warrant of arrest of the insolvent as a matter of right.

Held: (1) *That a creditor, who has obtained a Certificate in form R, is not entitled to a warrant of arrest as a matter of right.*

(2) *That the D. J. can, in certain circumstances, refuse a warrant of arrest to*

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a creditor who has obtained a certificate in form R.

PERERA *vs.* PERERA ... ... V. 81

Arrears of maintenance ordered under the Maintenance Ordinance No. 19 of 1889—Are such arrears a debt provable in Insolvency Proceedings.

Held: *That such arrears of maintenance ordered under the Maintenance Ordinance No. 19 of 1889 as have accrued at the date of adjudication of an insolvent who has been condemned to pay maintenance can be proved in insolvency as a debt due from the insolvent.*

V. M. R. SITHAYAMMA *vs.* R. SINNIAH *alias* KANNIAH ... ... VIII. 1

Insolvency Ordinance No. 7 of 1853 section 36—Imprisoned judgment-debtor released on bail pending appeal—Abatement of appeal—Insolvency petition before abatement of appeal—Protection of Court under section 36—Withdrawal of protection—Can the Court withdraw protection in the circumstances.

Held: *That the Court had no right, in the circumstances, to withdraw the protection granted by it.*

APPADURAI *vs.* PONNAMMAH AND ANOTHER ... ... X. 147

Is a woman exempt from arrest under the provisions of the Insolvency Ordinance—Section 298 of the Civil Procedure Code.

Held: (1) *That a woman is not exempt from arrest under the provisions of the Insolvency Ordinance.*

(2) *That the exemption created by section 298 of the Civil Procedure Code applies only to cases arising under that Code.*

VELUPILLAI *vs.* PARAMASIVAMPILLAI XIII. 119

Insolvency Ordinance (Chapter 82) section 51—Prescription Ordinance (Chapter 55) section 10—Proceedings to set aside transfer of property made by insolvent.

Held: (1) *That proceedings under section 51 of the Insolvency Ordinance are proceedings distinct from the certificate proceedings.*

(2) *That in proceedings under section 51 of the Insolvency Ordinance it is not permissible merely to read the evidence given in the course of the certificate proceedings.*

(3) *That in an application under section 51 of the Insolvency Ordinance to sell property transferred by the insolvent it must be proved that the insolvent was in fact insolvent at the time of the transfer.*

(4) *That an application under section 51 of the Insolvency Ordinance is an action within the ambit of section 10 of the Prescription Ordinance and is prescribed within three years of the adjudication of insolvency.*

CASSIM *vs.* SUPPIAH PILLAI ... XV. 158

Insolvency Ordinance—Sale under section 51—Need such sale be confirmed—Has the Court power to prevent the grant of conveyance—Inherent powers of Court—Applicability of provisions of the Civil Procedure Code to such sales.

Held: (1) *That a sale ordered under section 51 of the Insolvency Ordinance is not governed by the provisions of the Civil Procedure Code relating to Fiscal's sales.*

(2) *That such a sale did not require confirmation by Court.*

(3) *That the Court had no power either by any provision of law or by virtue of its inherent jurisdiction to prevent the grant of the conveyance following such sale.*

KARUNARATNE AND OTHERS *vs.* MOHIDEEN AND ANOTHER ... ... XXII. 33

Payments made by or at the instance of a pensioner of the Crown to a creditor after the insolvency of the pensioner vest in the assignee who is entitled to compel the creditor to pay the money so received by him to the credit of the assignee in the insolvency proceedings.

PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION *vs.* ABRAHAMS (ASSIGNEE) ... ... XXIV. 101

Insolvency—Application by creditor to re-open proceedings after grant of certificate of conformity to insolvent—Matters to be taken into consideration in determining whether the application ought to be allowed—Insolvency Ordinance (Chapter 82) sections 127, 129 and 133.

Held: *That an application by a creditor of an insolvent to re-open proceedings after the insolvent has been granted a certificate of conformity will not be allowed where the creditor has delayed to made the application and has refrained, for his own benefit, from*

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disclosing to the Court facts which were within his knowledge.

HAY *vs.* ABDUL GANY ... XXIX. 84

Proof of debts—Can a creditor prove a debt due from an Insolvent after certificate had been granted—Insolvency Ordinance, section 93.

Held: *That it is open to a creditor of an Insolvent to prove his debt after the grant of certificate to such Insolvent, provided he obtains from the Court a sitting for the proof of the debts after due notice thereof has been given in the Government Gazette and in such other manner as the Court may direct.*

IBRAHIM BAI *vs.* HERFT ... XXXIV. 24

Fraudulent preference—Refusal of certificate of conformity and withdrawal of protection from arrest—Insolvency Ordinance, section 151.

Held: (1) *That an insolvent who makes payments to some of his creditors, influenced by the poverty of some and out of gratitude to others, is guilty of fraudulent preference and the Court is right in refusing him a certificate of conformity and withdrawing protection from arrest.*

(2) *That where there are extenuating circumstances the certificate should not be refused for all time.*

JANSZ *vs.* WEERASEKERA *et al* ... XL. 97

Mortgage—Mortgagor subsequently adjudicated insolvent—Mortgage disclosed among liabilities—Certificate of conformity granted—Action on mortgage bond—Assignee, only defendant, consent to judgment — Hypothecary decree—Sale — Purchaser's title contested by mortgagor's heirs—Validity of title.

HAFEELU, PALITHUMMA AND OTHERS *vs.* UMMA SULAHI AND OTHERS XLVI. 58

INSPECTION

The Criminal Procedure Code makes no provision for the inspection of the scene of any offence by a District Judge or Magistrate.

JAYAWICKREMA *vs.* SIRIWARDENE AND OTHERS ... ... XIV. 83

Inspection—Of scene of offence—By Judge sitting without a jury.

GNANAPRAGASAM *vs.* THE KING XXXVIII. 67

Inspection in Criminal case—Charge of rash and negligent driving—Scene of accident visited and inspected in the presence of parties—Object, better understanding of case—Fresh evidence not taken—Is such inspection irregular.

Held: *That an inspection of a scene of an accident (in the course of a trial of a person accused of rash and negligent driving) carried out in the presence of parties in order to arrive at a better understanding of the case and not for the taking of fresh evidence is not irregular and does not vitiate a conviction.*

MARTIN *vs.* S. I. POLICE, KURUNEGALA ... ... XLII. 16

Inspection of scene of offence by Judge sitting alone.

SAMARANAYAKE *vs.* WIJESINGHE XLIV. 74

INSURANCE

Contracts of Accident Insurance—Law applicable to in Ceylon—Where should action on such a contract be brought.

Held: (1) *That the law applicable to contracts of accident insurance in Ceylon is the Roman Dutch Law.*

(2) *That under the Roman Dutch Law the place where the cause of action arose must be ascertained with reference to the rule that in the absence of a special agreement the obligation must be performed at the place at which the contract was entered into.*

HANIFFA *vs.* THE OCEAN ACCIDENT AND GUARANTEE CORPORATION LTD. II. 311

Policy of life Insurance of a bhikkhu—Does death of bhikkhu without assigning policy vest the property in the Sangha.

DHAMMADARA THERO *vs.* SEDARANHAMY AND OTHERS ... ... XV. 20

Contract of Insurance—Condition of policy that proof of age of the deceased shall be furnished to the satisfaction of the directors before payment of the sum assured—Statement in proposal that the deceased had no birth certificate or horoscope and that the only evidence of age was his declaration—Can directors insist on proof of age other than the deceased's declaration.

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Held: (1) *That even though a person indicates in a proposal for life insurance that he has no proof of his age beyond his declaration the Directors are entitled to insist on compliance with a term of the policy that proof of age of the insured shall be furnished to the satisfaction of the Directors before payment.*

(2) *That a policy of insurance is not avoided by an untrue statement in the proposal and declaration unless designedly untrue.*

SUPPIAH *vs.* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED ... ... XXII. 78

Insurance—Contract of—Clause that differences between parties to be referred to arbitration—Effect of.

WIJEYANARAYANA *vs.* GENERAL INSURANCE CC., LTD. ... XXXII. 57

Policy of Insurance—Alternative modes of payment on maturity—Stamp duty payable.

MANUFACTURERS LIFE INSURANCE CO., LTD. OF CANADA *vs.* THE COMMISSIONER OF INCOME TAX ESTATE DUTY AND STAMPS ... ... XL. 71

Insurance—Third party risk—What is sufficient and adequate notice of action to the insurer?—Should the particular forum be expressly stated in such notice?—Sections 133 and 134. Motor Car Ordinance No. 54 of 1938.

A person who had been injured in a car accident wrote a letter to the Insurance Company, with which the car that had caused the accident was insured, stating that he intended filing action against the insured for the recovery of damages caused to him by the accident. The letter further stated the number of the car and that it had been insured with the Company, the date of the accident, the amount of damages and also alleged negligence on the part of the insured.

Held: *That the notice as given in the letter sufficiently complied with the requirements of section* 133 *of the Motor Car Ordinance No.* 54 *of* 1938 *and the forum where the action was to be filed was not necessary.*

CEYLON MOTOR INSURANCE ASSOCIATION LTD. *vs.* THAMBUGALA ... XLVII. 9

INTEREST

Compound interest—When may it be charged.

Held: *That persons not carrying on a banking business, who make advances against produce to suppliers cannot charge compound interest.*

VELUPILLAI *et al vs.* MARIKAR ... II. 314

Can compound interest be recovered even where it is expressly agreed.

Held: *That compound interest cannot be recovered even though it is expressly stipulated.*

OBEYESEKERA *vs.* FONSEKA ... II. 349

Compound interest may be lawfully charged in Ceylon where there is a definite contract to pay such interest.

ABEYDEERA *vs.* RAMANATHAN CHETTIAR ... ... VI. 143

Interest is not recoverable in respect of the period prior to the date of action in the absence of an agreement or of any provision of law.

ANNAMALAY CHETTY *vs.* THORNHILL III. 56

Is mortgagee entitled to interest for the period between the sale of the mortgaged premises and the confirmation of the sale.

COOMARASAMY *vs.* FERNANDO ...VIII. 125

Interest is not payable unless it is expressly agreed upon or fixed by statute.

DE SOYSA *vs.* THE ATTORNEY-GENERAL ... ... XIX. 71

The charging of compound interest is not illegal in our law if the parties have agreed to compound interest.

The agreement to pay compound interest need not necessarily be by written or spoken words but may result from a clear and unambiguous course of dealings between the parties.

MARIKAR *vs.* SUPRAMANIAM CHETTIAR ... ... XXVI. 17

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Interest—Exorbitant sum claimed as interest on loan—How much can be recovered.

ELIYATHAMBY *vs.* MIRCANDO AND OTHERS ... ... XXXII. 15

Rate of interest agreed on in mortgage bond—Amount that can be recovered—Money Lending Ordinance—Civil Law Ordinance.

GUNATILLEKE AND OTHERS *vs.* DE ZOYSA ... ... XLV. 48

INTERMEDDLING WITH SUITORS

Nature of communications that are penalised under section 5 of Ordinance No.11 of 1894.

Held: *That only communication with respect to the suit or business which bring the person into Court are penalised under section* 5.

ZAIN *vs.* THOMAS ... ... II. 372

Intermeddling with Suitors—What constitutes intermeddling.

Held: *That a person who draws up a plaint for a suitor at the suitor's request cannot be said to meddle with the suitor without lawful excuse.*

SOUTH (COURT INSPECTOR) *vs.* ALWIS II. 421

Ordinance No. 11 of 1894—Sections 2 and 5—Accosting Proctor—Scope of expression "other person" in section 5.

Held: (1) *That the expression "other person" in section* 5 *of Ordinance No.* 11 *of* 1894 *is wide enough to include a legal practitioner.*

(2) *That a person who accosts a Proctor about his business or prospective business without lawful excuse can be convicted under section* 5 *of Ordinance* 11 *of* 1894.

SWAMINATHAN *vs.* SUPPIAH ... XI. 167

INTERNATIONAL LAW

Liability of Foreign State to pay Ceylon income tax.

THE SUPERINTENDENT GOVERNMENT SOAP FACTORY BANGALORE *vs.* THE COMMISSIONER OF INCOME TAX XXIII. 68

INTERPRETATION

See also under **Construction of Documents**

Interpretation Ordinance. Can notification under one section be repealed by a rule made under a different section.

BARTHOLOMEUSZ *vs.* SINNATHAMBY I. 116

Interpretation Ordinance—Meaning of "action, proceeding or thing" in section 5 (3) (c)—Amendment of Municipal Council (Constitution) Ordinance—Notification published before amendment came into operation—To what extent may the repealed provisions be regarded as alive after the amendment came into operation.

Held: *That section* 5 (3) (*c*) *of the Interpretation Ordinance kept alive only the notification, and that all steps following on the notification after the date on which the Amending Ordinance came into operation should be taken according to the provisions of the Principal Ordinance as amended.*

GOONESINGHE *vs.* THE MUNICIPAL COMMISSIONER ... ... XII. 99

The words "action proceeding or thing" in § 5 (3) mean something in the nature of proceedings which are of a judicial or quasi—**judicial nature.**

PELPOLA *vs.* GOONESINGHE ... XII. 114

§ 11 (e)—The words "execution of the functions of an office" must be interpreted as meaning "lawfully executing the functions of an office."

WICKREMESINGHE *vs.* ABEYGUNAWARDENE ... ... XVI. 1

Interpretation Ordinance § 2 (i)—Meaning of "imprisonment"—provision probably applies to penal sections of various Ordinances

KING *vs.* JOSEPH ... ... XVI. 53

Section 9 of the Interpretation Ordinance is no bar to the prosecution of a notary both for a breach of section 30 rule 25 of the Notaries Ordinance and for failure to comply with a written notice under proviso (a) to section 30 of the same Ordinance.

SAMARASINGHE *vs.* DALPATADU XVIII. 26

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Interpretation Ordinance section 9—Offence falling within both Article 51 of the Ceylon State Council (Elections) Order in Council 1931 and section 169 (f) of the Penal Code—Can the offender be prosecuted under section 169 (f) of the Penal Code.

Held: *That a person who commits an offence falling within both Article* 51 *of the Ceylon State Council (Elections) Order in Council* 1931 *and section* 169 *(f) of the Penal Code can be prosecuted under section* 169 *(f) of the Penal Code.*

THIEDEMAN (INSPECTOR OF POLICE) *vs.* GEORGE ... ... XXII. 9

§ 16—"Vehicle" in Municipal bylaw has same meaning as in the Municipal Councils Ordinance and therefore does not include a Motor Car.

COOPER *vs.* SIRISENA ... XXII. 38

§ 12—Omission from revised edition of statutes of § 56 of Ordinance No. 4 of 1916—Does it repeal the bylaws kept alive by that §.

WEERASINGHE *vs.* SAMY CHETTIAR XXII. 51

Interpretation—Of deed—Expressed intention of parties must be discovered.

JINARATANA THERO *vs.* SOMARATANA THERO AND ANOTHER ... XXXII. 11

Interpretation Ordinance— § 2 (x)—"workmen" construed to include a single workman.

BROWN AND CO., LTD. *vs.* ROBERTS ... ... XXXIII. 48

Interpretation Ordinance—Application of § 6 (3) to written laws that have expired.

ATTORNEY-GENERAL *vs.* FRANCIS ... ... XXXIII. 89

§ 6 (3)—Charge of contravening price order—Conviction after revocation of order—Validity of conviction.

MAZAHIM *vs.* CONTROLLER OF PRICES ... ... XXXIV. 51

Interpretation of Will—Variation between clause of Will and Schedule.

THE ARCHBISHOP OF COLOMBO *vs.* VEERAPATHIRAPILLAI ... XXXVIII. 22

Interpretation of deed—One boundary of land not clearly defined

PONNA *vs.* MUTHUWA AND ANOTHER ... ... XLI. 62

Interpretation Ordinance section 11 (c)—Its applicability to a Deputy performing the functions of his chief.

BELIGAMMANA *vs.* RATWATTE XLIII. 47

Interpretation Ordinance section 5— Constructions of words—Amending Ordinance shall be read as one with the principal Ordinance.

KATHIRITHAMBY *vs.* SUBRAMANIAM ... ... XLIII. 65

Interpretation Ordinance § 6 (3) (a)—Effect of.

SELLAPPAH *vs* SINNADURAI AND OTHERS XLVI. 17

AKILANDANAYAKI *vs.* SOTHINAGARATNAM *et al* ... ... XLVI. 67

KANDAVANAM *vs.* NAGAMMAH WIDOW OF VYRAMUTTU *et al* ... XLVI. 104

Interpretation Ordinance section 3—Is the Crown bound by the Customs Ordinance by necessary implication

ATTORNEY-GENERAL OF CEYLON *vs.* A. D. SILVA ... ... XLIX. 7

INTERROGATORIES

See also under **CIVIL PROCEDURE CODE**

Interrogatories—When may party be compelled to answer.

WIJESEKERA *vs.* THE EASTERN BANK LTD. ... ... XXII. 28

In a running-down case in which the assessment of damages formed no part of the defendant's case the defendant was not entitled to compel the plaintiff to answer an interrogatory as to the assessment of his damages.

JUSTINAHAMY *vs.* OBIS APPUHAMY XXII. 88

Interrogatories—Delivery by plaintiff to defendant—Failure to answer—Defence struck off—Civil Procedure Code sections 94, 99, 100 and 109—Has the District Court any

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discretion to grant indulgence under section 109.

Held: (1) *That where a defendant fails to answer interrogatories delivered to him, an order striking off his defence should not be made unless a clear and specific order has been made earlier under section* 100 *of the Civil Procedure Code.*

(2) *The Court has a discretion to grant indulgence to a party on an application for an order under section* 109 *of the Civil Procedure Code.*

RAGSOOBHOY *vs.* NAMASIVAYAM CHETTY ... ... XXIX. 32

Interrogatories—Failure to answer—Defence struck off—Discretion of District Court to grant indulgence.

RAGSOOBHOY *vs.* NAMASIVAYAM CHETTY ... ... XXIX. 32

INTOXICATION

See also **DRUNKENNESS**

Where the evidence was that the accused smelt of toddy and was somewhat drunk. Held that a finding that the accused's faculties were in fact impaired by intoxication was unjustified.

REX *vs.* PITCHORIS APPU ... XXIII. 32

IRRIGATION ORDINANCE

Rules made under section 7 Rule 21—Channel cut without compensation or acquisition through field of proprietor who was not present at meeting summoned to make such rule—Is such rule ultra vires.

Held: *That Rule* 21 *framed under section* 7 *of the Irrigation Ordinance (Chap.* 312*), which provides that a channel may be cut across a nonconsenting proprietor's field without payment of compensation is* ultra vires.

SIVAGURU *vs.* VAITHILINGAM XXXVI. 56

ISSUES

Issue of law not arising on pleadings—When should it be allowed.

Held: *That an issue of law which goes to the root of the case should be allowed in the interests of justice, even though it does not arise on the pleadings.*

DHARMADASA *vs.* GUNAWARDENE II. 385

Issue not expressly framed in trial Court—When may such issue by taken in appeal.

THAMBU *vs.* ARULAMPIKAI AND ANOTHER ... ... XXVIII. 40

After trial has commenced for the determination of all issues of fact and law which arise, it should not be interrupted for the intermediate disposal of some only of the issues.

SOOTHIRETNAM *vs.* ANNAMMAH L. 35

JAFFNA MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE

See also under **THESAWALAMAI**

Section 19—Thediathetam—Sale of property by one spouse to the other—Does such property fall within section 19 (a)—Evidence Ordinance (Chapter 11) section 92.

Held: (1) *That section* 19 (*a*) *of the Jaffna Matrimonial Rights and Inheritance Ordinance covers the case of one spouse acquiring property from the other for valuable consideration.*

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

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

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

VELAN ALAN *vs.* PONNY AND OTHERS ... ... XV. 75

Section 40 repeals paragraphs 9,10 and 11 of Part I of the Thesawalamai.

AMBALAVANAR *vs.* PONNAMANA AND THE SECRETARY DISTRICT COURT COLOMBO ... ... XX. 1

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Jaffna Matrimonial Rights and Inheritance Ordinance—has no application in deciding the devolution of property on the death of a spouse subject to Thesavalamai and married before 1911.

SOOSAPILLAI *vs.* SWAMIPILLAI XXXVI. 14

Section 27—Devolution of property on death of person leaving a mother and children of paternal uncle—Intestate succession to property derived from father's side—Mother's rights—Determination of persons coming within the expression "all the persons above enumerated failing" in section 27.

On the death of X, intestate his widow, W, inherited half his property and his two daughters, P and S, a quarter each. P died intestate and without issue, whereupon S inherited her share. Then S died intestate and without issue, leaving the quarter share from "her father's side," a quarter share derived from P and other acquired property. Her property was claimed by her mother, who survived her, and the children of her paternal uncle, the brother of X.

Held: (1) *That the mother was not, one of the "persons above enumerated" within the meaning of section 27 of the Ordinance, and hence she was not entitled to S's property inherited from father's side.*

(2) *That the children of the paternal uncle are entitled to S's property derived from the father's side.*

(3) *That the persons, coming within the expression "All the persons above enumerated failing" in section 27 of the Matrimonial Rights and Inheritance (Jaffna) Ordinance, must be determined by reference to sections 23 and 25 only and not by reference to all the sections 23, 24, 25 and 26 of the same Ordinance.*

ANNAM *vs.* KATHIRAVETPILLAI AND OTHERS ... ... XXXIX. 14

Sections 19 and 20—Is Amending Ordinance No. 58 of 1947 restrospective in effect.

KATHIRITHAMBY *vs.* SUBRAMANIAM ... ... XLIII. 65

Is the Amending Ordinance No. 58 of 1947 retrospective in effect?

SELLAPPAH *vs.* SINNADURAI AND OTHERS ... ... XLVI. 17

AKILANDANAYAKI *vs.* SOTHNIAGARATNAM *et al* ... ... XLVI. 67

KANDAVANAM *vs.* NAGAMMAH WIDOW OF VYRAMUTTU *et al* ... XLVI. 104

§ 6—Effect of.

NAGANATHER *vs.* VELANTHEM AND WIFE SARASWATHY ... L. 13

Property bought before Ordinance 58 of 1947 by husband subject to law of Thesawalamai—Death of husband—Last Will—Widow executrix—Corpus to be administered.

KANAMMAH *vs.* SANMUGALINGAM *et al* ... ... L. 105

Insurance policy taken by husband—Premiums paid out of his salary—Is such payment thediathetam.

SHAMMUGALINGAM *vs.* AMIRTHALINGAM AND OTHERS ... XLI. 59

JOINDER

Joinder of parties and causes of action. *See under* **Civil Procedure Code and Civil Procedure.**

Joinder of charges—Same act constituting two different offences—Two separate charges—Is it proper to treat the charges as cumulative.

ANGAMMANA *vs.* LEWIS DE SILVA ... ... VIII. 49

Joinder—Of subtenant in an action for ejectment against tenant—Irregular.

KUDOOS BHAI *vs.* VISVALINGAM ... ... XXXIX. 20

JOINT AND SEVERAL LIABILITY

See also under-**Co-Debtors**

Drawer of cheque and successive endorsees sued by last endorsee—Judgment entered against some defendants—Plaintiff

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not precluded from recovering judgment against others.

KUHAFA *et al vs.* VAIRAVAM CHETTIAR ... ... XLI. 16

JOINT STOCK COMPANIES

Joint Stock Companies Ordinance No. 4 of 1861—Appeal from decision of District Judge—Provisions regulating such appeal—Forced sale of a shareholder's shares—Extent of the Company's right to register the transfer made in pursuance of such sale.

The plaintiff, who obtained a transfer of 1500 shares in the defendant Company from the purchaser at a sale in execution of a mortgage decree entered against the shareholder in respect of the shares, applied under section 32 of Ordinance No. 4 of 1861, to have his name registered as a shareholder. The defendant Company resisted the application on the ground that the Directors had, in the exercise of the discretion vested in them by Article 29 of the Articles of Association, refused the application on the ground that the shareholder was indebted to the Company.

The Article 29 was to the following effect. "The Board may, at their own absolute and uncontrolled discretion, decline to register any transfer of shares by a shareholder who is indebted to the Company, or upon whose shares the Company have a lien or otherwise; or in case of shares not fully paid up, to any person not approved of by them, and in no case shall a shareholder or proposed transferee be entitled to require the Directors to state the reason of their refusal to register, but their declinature shall be absolute."

Held: (1) *That Article 29 does not apply to an application made by a person, who becomes entitled to shares by virtue, of a sale in execution against a share-holder and that it applies only to voluntary transfers.*

(2) *That the Civil Appellate rules do not apply to appeals under Ordinance No. 4 of 1861.*

(3) *That, in an appeal under the Companies' Ordinance No. 4 of 1861, security for costs of appeal need not be given.*

NADARAJAH *vs.* H. DON CAROLIS AND SONS LTD. ... ... V. 83

How may summons be served on a Joint Stock Company in voluntary liquidation.

MENDIS *vs.* THE INDEPENDENT PUBLISHING CO. LTD. ... ...X. 145

Joint Stock Companies Ordinance—Jurisdiction of District Court to wind up company incorporated abroad.

AMIJEE AND OTHERS *vs.* LEWIS AND OTHERS ... ... XVI. 114

JOINT TORT - FEASORS

See under **Tort-Feasors.**

JUDGE

Should judge who has come to know the facts of a case outside his functions try the case.

Held: *That a Magistrate who has come to know the facts of a case outside Court and has formed an opinion thereon should not in the interests of Justice try the case.*

BANDARANAYAKE (SUB-INSPECTOR OF POLICE) *vs.* RASANAYEKE *et al* II. 280

Importation by Judge into a case of knowledge gained from sources outside the case—Bias—Can witness who has heard evidence be called.

Held: *That a Magistrate should not import into a case his knowledge of witnesses gained aliunde.*

(2) *That there is nothing in law to prevent a witness who has been within hearing of the Court from giving evidence in the case.*

VAN ROOYEN (SUB-INSPECTOR OF POLICE) *vs.* PERERA ... II. 282

Bias—Assistant Government Agent who sanctioned prosecution acting as judge.

Held: *That where an Assistant Government Agent, who sanctioned a prosecution and, whose name was in the list of witnesses for the prosecution, as judge*

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issued summons and explained the charge to the accused, a conviction was bad even though the case was actually tried by another Magistrate.

RATEMAHATMAYA OF VAUNIYA SOUTH *vs.* RANASINGHE ... II. 411

Bias—Trial of accused by District Judge who in his capacity as Police Magistrate had made an order, in connection with the non-summary inquiry, remanding the accused and ordering that their finger prints be taken.

Held: *That there is no objection to the trial of an accused by a District Judge who had in his capacity of Police Magistrate made an order remanding the accused and directing his finger prints to be taken before the commencement of the non-summary inquiry.*

KING *vs.* PODIAPPUHAMY AND ANOTHER ... ... III. 101

Appointment of a Magistrate, made by the Attorney-General on the orders of the Governor, is valid.

GOONERATNE *vs.* MAHADEVA V. 132

Bias—Interlocutory order made by Judge—Acting as counsel later in ignorance of the fact that he had made an order as judge—Counsel requested by Court to proceed with the conduct of the case after he had brought to its notice the fact that he had made a judicial order in the case—Waiver—What are the characteristics of a money-lender?

Held: (1) *That the rule that justice should manifestly be seen to be done had not been transgressed.*

(2) *That the plaintiff's conduct in not raising any objection to the counsel appearing in the case after he had brought to the notice of the Court the fact that he had made a Judicial order would cure the impropriety if any.*

(3) *That a money-lender does not cease to be a money-lender merely because he is also a dairyman or the number of the loans granted by him are small or the borrowers belong to a restricted class.*

RUTHIRA REDDIAR *vs.* SUBBA REDDIAR AND ANOTHER ... ... VII. 59

Judge discussing the evidence with witness before witness called with the box—Propriety.

KING *vs.* CALDERA ... XI. 1

Direction by Supreme Court to Judge who pronounced decree to review his own decision—Judge who pronounced decree transferred to another Court—Decision reviewed by his successor after obtaining directions of Supreme Court—Effect of order made after such review.

RAHIM BHAI *vs.* WEERASINGHE XI. 152

Judgment—Evidence in case heard earlier referred to by Magistrate—Indication that Magistrate's decision was influenced by such evidence—Can the decision be sustained.

Held: *That it is highly irregular for a judge to import into a trial before him evidence which has been given in another case.*

ABIDEEN (INSPECTOR OF POLICE) *vs.* PERERA AND ANOTHER ... XI. 165

Possibility of Judges' mind being prejudiced against accused by admitting inadmissible confession.

RANHOTTY *vs.* POORANAM XII. 55

Can a Court dismiss an action because plaintiff fails to supply the necessary exhibits.

Held: *That if a party fails to produce evidence which he is required to produce, the Court has no power to dismiss the action, but must adjudicate on the material that is before it.*

RAJASINGHAM AND ANOTHER *vs.* SUPPIAHPILLAI ... XIII. 42

Judge—Power of—To inspect scene of offence.

JAYAWICKREME *vs.* SIRIWARDENA AND OTHERS ... ... XIV. 83

When may a Judge call evidence not produced by either party in civil proceedings

REWATA THERO *vs.* HORATALA XIV. 155

Judge having jurisdiction over subject matter exercises such jurisdiction in an

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irregular manner at the invitation of a party —Legality of proceedings cannot be challenged by such party.

KARUPPEN CHETTIAR *vs.* AMARASEKERA AND OTHERS ... ... XV. 70

Judge—Duty of—To explain to the jury the principle to be followed by them in dealing with circumstantial evidence—

REX *vs.* DE SILVA ... ... XVII. 61

Judge—Convicting on uncorroborated testimony of an accomplice—Must give clear and satisfactory reason for convicting.

REX *vs.* NUGAWELA ... XVII. 71

Judge cannot act on suggestion made by counsel unsupported by evidence.

WIJESEKERA *vs.* ARNOLIS ... XVII. 138

Judge—Duty of—To put to the jury every defence that may reasonably be raised on behalf of the prisoner on the evidence given at the trial regardless of whether the prisoner has raised such defence or not.

REX *vs.* LANTY ... ... XX. 71

Judge should not call and examine a witness after the close of the case for the prosecution and defence unless it is essential to a just decision of the case. Assize judge should not recall and examine a prosecution witness in the middle of his summing-up to the jury.

REX *vs.* CHARLIS ... XXI. 99

Judge—Imposing illegal sentence per incuriam—Power of Judge to set aside order and impose a legal sentence.

REX *vs.* PEDRICK APPUHAMY KADIRESU AND TWO OTHERS ... XXVIII. 78

Counsel and Judge—Questions asked in re-examination disallowed—Refusal by judge to record the questions he had disallowed—New trial—Justice should not only be done but be seen to be done.

Held: *That the refusal by the judge to record, when requested by counsel, certain questions he had disallowed was sufficient for ordering a new trial.*

SIVASAMBU AND ANOTHFR *vs.* ARUMUGAM ... ... XXIX. 29

Trial Judge taking large part in examining witnesses—Whether ground for new trial—Discretion of judge—Limits of judicial intervention—Submission of no case at close of petitioner's evidence—Judge's ruling against such submission—Can respondent call evidence thereafter—Election.

Witnesses—Their demeanour—Judge's duty to test demeanour of witness in the light of whole evidence — Appellate court's power to review trial judge's view involving demeanour of witness.

YUILL *vs.* YUILL ... ... XXIX. 97

Failure of trial Judge to consider all the evidence or to appreciate evidence correctly or to give adequate reasons for his conclusions.

KARTHELIS APPUHAMY *vs.* SIRIWARDENA ... ... XXXI. 86

Judge—Mentioning during trial that if accused guilty, sentence of imprisonment not justified.—Effect on accused's plea of guilt.

THE ATTORNEY GENERAL *vs.* FERNANDO ... ... XXXIII. 6

Judge and jury—Functions of—

HOLMES *vs.* DIRECTOR OF PUBLIC PROSECUTIONS ... ... XXXIII. 12

Judge—Deciding to test prosecution evidence by inspection and experiment at the scene of offence—Test carried out by Judge personally—Irregularity of procedure.

MARADANA POLICE *vs.* ARON SINGHO ... ... XXXV. 13

Judge—Unduly long cross-examination of witness by judge—Contradictions so elicited—Judge's views on credibility of witnesses—Weight to be attached to such views.

GANDION *vs.* ROMPI SINGHO AND ANOTHER ... ... XXXV. 87

Judge—Discretion of—As to use of information book.

CHRISTOFFELSZ *vs.* KITNAPULLE ... ... XXXVII. 2

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Expression of opinion on question of fact by trial judge—Probability of misunderstanding by jury.

REX *vs.* HEWAGE ROMEL XXXVII. 70

Judge—Power of—To inspect place where offence is committed.

GNANAPRAGASAM *vs.* THE KING ... ... XXXVIII. 67

Judge—Influenced by extraneous considerations in imposing sentence.

BRAMPY PERERA *vs.* GOONEWARDENA ... ... XXXVIII. 69

GUNASEKERA *vs.* KANAGANAYAGAM ... ... XXXVIII 91

Judge—Power of—To vacate order made in error.

RODRIGUES *vs.* SOMAPALA XXXIX. 85

Judge assuming role of arbitrator—Irregular.

MUDALIHAMY *vs.* APPUHAMY AND OTHERS ... ... XXXIX. 103

Irrelevant statements made to judge—Likelihood of bias.

SUDERIS *vs.* KOSGODA POLICE XL. 70

Judge—Not to substitute his own version in place of official version of document in language other than English.

FRANCISCO *vs.* SWADESHI INDUSTRIAL WORKS LTD., ... XLIV. 13

Right of Judge sitting alone to inspect scene of offence—Scope of such right.

SAMARANAYAKE *vs.* WIJESINGHE XLIV. 74

Settlement of action—Duty of judge in recording terms of settlement.

NEWTON *et al vs.* SINADURAI XLV. 89

Judge should follow decision of English Court of Appeal on the construction of words identical with those used in a Ceylon Ordinance.

NADARAJAN CHETTIAR *vs.* T. W. MAHATMEE AND ANOTHER XLIII. 11

Judge commenting in his summing-up on defence Counsel's conduct in unduly attacking the credibility of prosecution witness—Does it cause prejudice.

REX *vs.* (1) KIRIWANTHIE AND (2) MALHAMY ... ... XLVII. 31

Trial Judge's findings based largely on his impression of the demeanour of parties—When may Appellate Court interfere.

M. A. A. SATHAR *vs.* W. L. BOGSTRA *et al* ... ... XLVII. 53

Trial Judge not setting out all the reasons that may be urged for rejecting a defence—Does not necessarily mean that he has not considered the defence.

KONSTZ *vs.* SUB-INSPECTOR THARMARAJAH ... ... XLVII. 58

Judge—Commenting adversely on accused's failure to give evidence—When does it amount to misdirection.

REX *vs.* B. FRANCIS FERNANDO XLVII. 101

Discretion of Appellate Judge to arrive at conclusion contrary to that arrived at by trial Judge.

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALESINGHAM ... ... XLVIII. 1

Order made per incuriam—Power of Judge to vacate.

ANTHONIMUTHU *vs.* SOOSAPILLAI ... ... XLVIII. 16

Judge—Inordinate delay in pronouncing judgment—Impressions regarding demeanour of witnesses rendered of little value thereby.

JAYATILLEKE *vs.* PERAGASTENNALE BABY ... ... XLIX. 43

Judge to whom order of Supreme Court is transmitted acts, not as Judge but as the Ministerial officer of the Supreme Court and no discretion is vested in him—Not competent to him to express any opinion on the correctness or otherwise of such order.

ATTORNEY-GENERAL *vs.* DISSANAYAKE ... ... XLIX. 87

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Judge—Not giving accused's counsel opportunity to sum up case for accused—Validity of verdict.

WIJESINGHE *vs.* ATTORNEY GENERAL L. 32

Misdirection by—

See under **Court of Criminal Appeal.**

JUDGMENT

Judgment of lower court affirmed without reasons—Cannot be treated either as a judgment of the Supreme Court or as having any binding effect on the Supreme Court.

KATHIRITHAMBY *vs.* SUBRAMANIAM ... ... XLIII. 65

JUDICIAL NOTICE

Notification under Excise Ordinance—Should Court take Judicial notice of

DUNUWILA *vs.* M. UKKUWA VI. 150

Court can take judicial notice that a place is a highway for the purposes of the Motor Car Ordinance.

MENON *vs.* LENTIN ... XXII. 24

Lighting Restriction Order—Judicial notice cannot be taken of the fact that a blackout had been ordered by the Minister.

DE ZOYSA *vs.* CUMARASURIER XXIII. 114

Judicial Notice must be taken of the date on which an Ordinance is brought into operation.

JAYAKODY *vs.* PAUL SILVA AND ANOTHER ... ... XXV. 45

Courts can take judicial notice of facts other than those mentioned in § 57 of the Evidence Ordinance.

BOGSTRA AND ANOTHER *vs.* CUSTODIAN OF ENEMY PROPERTY. XXVI. 5

Judicial notice—must be taken of Proclamation under the Buddhist Temporalities Ordinance.

GUNANANDA THERO *vs.* ATUKORALE AND OTHERS ... XXIX. 77

Judicial Notice of date on which Defence Regulation came into force.

CASSIERE *vs.* EDRISINGHE XXX. 94

Judicial Notice cannot be taken that Food Control Guard is a public servant.

SEENITHAMBY AND OTHERS *vs.* JANSZ ... ... XXXIII. 22

Judicial Notice—Of proclamation bringing Ordinance into operation.

DE SILVA *vs.* SIRIWARDENA XXXIII. 35

Is Court bound to take judicial notice of the publications "Subsidiary Legislation of Ceylon"

EMMANUEL *vs.* APPUHAMY XXXV. 4

Judicial notice—Of fact that a Price Control Inspector is a public servant within the meaning of § 148 (1) (b) of the Criminal Procedure Code.

RAZIK MARIKAR *vs.* MOHOMED ABDULLA ... ... XXXV. 86

Judicial notice—Of Price Control Inspectors

RODE *vs.* SEEMEE SILVA ... XXXVII. 50

Closing order made under Shops Ordinance—Court not bound to take judicial notice.

SOLICITOR-GENERAL *vs.* ARADIEL ... ... XXXIX. 17

Relative ranks of Sub-Inspector and Sergeant in charge of police station—Motor Car Ordinance, No. 45 of 1938, section 124.

In the absence of any evidence to show that a Sub-Inspector of Police is a police officer of a rank not below that of sergeant in charge of a Police Station, the Court refused to take judicial notice of the matter.

JAYASEKERA (S. I. POLICE, GALLE) *vs.* DALADAWATTEGE ALEXANDER XL. 94

Judicial Notice—Of excise notification

EXCISE INSPECTOR WELIGAMA *vs.* JAMIS SILVA ... ... XLIII. 59

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Judicial Notice of order under Co-operative Societies Ordinance conferring additional powers on Deputy and Assistance Registrar.

ROMANIS SINGHO *vs.* ABEYSINGHE ... ... XLVIII. 97

Judicial Notice of such matters as the reports of Parliamentary Commissions.

KODAKAN PILLAI *vs.* MUDANAYAKE AND OTHERS ... XLIX. 33

JUDICIAL SEPARATION

See under **Husband and Wife.**

JUDICIAL TRIBUNAL

Judicial Tribunal—Bribery Commission is not.

PERERA *vs.* PEIRIS AND ANOTHER ... ... XXXI. 97

JURISDICTION

Of Supreme Court—To hear appeal from election judge.

TILLEKEWARDENA *vs.* OBEYESEKERA I. 112

Of Supreme Court to control action taken on its own decree while that decree is under appeal to Privy Council.

MOHAMED *vs.* ANNAMALY CHETTIAR *et al* ... ... II. 195

Of Supreme Court—In appeal to enhance punishment imposed by trial court.

INSPECTOR PEIRIS *vs.* PUNCHI BANDA AND OTHERS ... VIII. 139

Of Supreme Court to treat an appeal, which is out of time, as an application in revision.

THE KING *vs.* SEEMAN *alias* SEEMA ... ... IX. 76

Of Supreme Court in appeal to alter convictions of causing grievous hurt and of simple hurt under sections 317 and 315 of the Penal Code read with section 146, to convictions under sections 317 and 315 read with section 32 of the Code.

THE KING *vs.* SAYANERIS ALIAS SAYA AND OTHERS ... ... IX. 95

Of Appeal Court to send back a case for amendment of pleadings.

GRACE FERNANDO AND OTHERS *vs.* FERNANDO ... .. IX. 99

Of Supreme Court—To interfere with an order for costs made by original Courts.

YAPA APPUHAMY *vs.* DON DAVITH X. 25

Of Supreme Court—To amend decree so as to bring it into line with the decision in appeal.

POUNDS AND ANOTHER *vs.* GANEGAMA ... ... XI. 168

Of Supreme Court to vacate its own order made per incuriam.

MOHAMAD BAI *vs.* MRS. DIYAWA AND TWO OTHERS ... XII. 20

Of Supreme Court to act in revision in respect of a case decided by itself.

MAPALATHAN AND ANOTHER *vs.* ELAYAVAN ... ... XIV. 92

Of Appeal Court to hear the evidence for the defence where accused was discharged by Magistrate at the close of case for prosecution.

WIJESINGHE *vs.* MATHER ... XV. 34

Of Supreme Court to hear argument on matters of law (in appeal from Court of Requests) not stated in the petition of appeal.

NANDIRIS SILVA *vs.* ARTHUR DE ZOYSA AND ANOTHER ... ... XV. 104

Of Supreme Court—To stay proceedings in action in Ceylon pending final decision in case in a foreign Court when parties are same and matters in dispute substantially same.

RAMAN CHETTIAR *vs.* VYRAVAN CHETTIAR ... ... XVI. 65

Of Supreme Court to convict accused in appeal under the right offence where

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Magistrate has convicted him under a wrong section.

MEERA NATCHIA *vs.* MARIKAR XVI. 79

Of Supreme Court to issue writ of certiorari against an election court appointed under the Ceylon (State Council Elections) Order in Council 1931.

A. E. GOONESINGHE, APPLICANT, ... XXIII. 41

Of Supreme Court—To revise its judgment on the ground that it has been given per incuriam.

WIJESEKERA *vs.* A. G. A. MATARA ... ... XXVI. 52

Of Supreme Court to allow application for amendment of plaint.

MUTUMENIKA *vs.* SUDU MENIKA AND OTHERS ... ... XXVI. 91

Of Supreme Court—To readmit to the profession a proctor who has been disenrolled.

IN *Re* WICKREMASINGHE ... XXIX. 87

Of Supreme Court to order Postmaster-General to produce a telegram.

NANAYAKKARA *vs.* THE G. A. WESTERN PROVINCE ... ... XXX. 37

Of Supreme Court to interfere with findings of lower Court on questions of fact.

KARTHELIS APPUHAMY *vs.* SIRIWARDENA ... ... XXXI. 86

Of Supreme Court to transfer case from Court of Requests to District Court.

PERERA *vs.* WIJESINGHE AND ANOTHER ... ... XXXIV. 12

Of Supreme Court to issue writ of certiorari on Controller of Textiles in respect of cancellation of a licence under regulation 62 of the Defence (Control of Textiles) Regulations.

MOHAMED THASSIM *vs.* CONTROLLER OF TEXTILES ... XXXIV. 42

Of Supreme Court to entertain appeal against order for costs.

SUNDARAM AND ANOTHER *vs.* GONSALVES ... ... XXXVII. 57

Of Supreme Court to issue writ of Prohibition on Commissioner appointed under the Commissions of Inquiry Act No. 17 of 1948.

THE MAYOR OF COLOMBO *vs.* THE COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER ... XLI. 28

Of Supreme Court to issue writ of certiorari on person like Textile Controller.

NAKKUDA ALI *vs.* JAYARATNE XLIII. 33

Of Supreme Court to vary its own decree.

WIJESINGHE *vs.* MIGEL AND OTHERS ... ... XLIII. 86

Of Supreme Court to entertain objection where objection was not taken in lower court.

SIVAGURUNATHAN *vs.* DORESAMY *et al* ... ... XLIV. 38

Of appellate court to interfere with finding of trial Court.

SATHAR *vs.* BOGSTRA *et al* XLVII. 53

Of Appellate Court to interfere with assessments of damages by trial Judge.

DIAS *vs.* SILVA ... ... XLIX. 20

Of Supreme Court—Witness disbelieved by magistrate—Questions of fact—When will appeal Court interfere.

NAGU *vs.* SANGARALINGAM XLIX. 70

Of Supreme Court, in exercise of appellate or revisionary powers, to affirm conviction or, without disturbing order of conviction made by Magistrate, to proceed to order accused to be discharged conditionally in terms of section 325 of the Criminal Procedure Code.

ATTORNEY-GENERAL *vs.* DISSANAYAKE ... ... XLIX. 87

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Of District Court to grant protection till hearing of application to an insolvent who had applied to Privy Council for special leave to appeal against order of Supreme Court refusing a certificate.

MOHAMED *vs.* RAMASAN CHETTIAR AND ANOTHER ... ... I. 388

Of District Court to alter its own decree —A District Court has no power to set aside its own decree or to reopen an order of dismissal in a partition case even with consent of parties.

PAULAUSZ *vs.* PERERA ... II. 252

Of District Court to set aside its own order wrongly made.

THE KING *vs.* NAKEEM ... II. 255

Of District Court—Within whose jurisdiction any party defendant resides—To hear partition action.

HUSSEN *vs.* PERIS *et al* ... II. 53

Of District Court to vacate order obtained on inaccurate or insufficient information.

WIJESINGHE *et al vs.* ULERWITA *et al* II. 153.

Of District Court to set aside a final decree in partition action when the procedure followed has been irregular.

KANNANGARA *vs.* DE SILVA AND OTHERS ... ... II. 267

Of District Court to wind up company incorporated abroad.

AMIJEE AND OTHERS *vs.* LEWIS AND OTHERS ... ... XVI. 114

Of District Court to discharge accused without proceeding to trial in case where indictment is forwarded by Attorney-General.

KING *vs.* DAYARATNE AND ANOTHER ... ... XXXI. 68

Of District Court—To order repayment of Estate Duty overpaid.

ATTORNEY-GENERAL *vs.* VALLIAMMA ATCHI ... ... XLI. 87

Of District Court—Defendant residing outside Ceylon—Service of summons out of Island duly effected—Action for breach of promise of marriage—Section 9, Civil Procedure Code—Does it apply only to persons domiciled in Ceylon?—Civil Procedure Code, sections 9, 69.

The plaintiff-appellant sued the defendant-respondent to recover damages for breach of promise of marriage. Service of summons on the defendant-respondent, who had been residing outside Ceylon, was duly effected, in accordance with the provisions of section 69 of the Civil Procedure Code.

A preliminary issue was raised as to whether the Court had jurisdiction to hear the case, as the defendant was living outside Ceylon, and this was decided in favour of the defendant.

The plaintiff appealed, and the appeal was argued on the basis that if the matter was justiciable in Ceylon at all, the Kandy District Court was the appropriate Court.

Held: (1) *That there was no good cause for accepting the respondent's contention that section* 9 (*Civil Procedure Code*) *applied only to persons domiciled in Ceylon.*

(2) *That, in consequence, the matter was justiciable in Ceylon.*

Per ROSE, C.J.—Moreover in a comparatively recent case in *re Liddell's Settlement Trusts* (1936) 1 Ch. Div. 365, Romer, L.J., has said, at page 374, in considering the effect of Order XI Rule 1 (*c*) (of the United Kindom Supreme Court).

"The moment a person is properly served under the provisions of Order XI that person, so far as the *jurisdiction of this Court is concerned*, is precisely in the same position as a person who is in this country."

MILLER *vs.* MURRAY ... XLVII. 51

Of Court of Requests—To punish, as for contempt, person disobeying injunction issued by the Court.

PERERA *vs.* ABDUL HAMID ... I. 141

Of Court of Requests—Action for declaration that watercourse "rightfully appurtenant" to land—Also claim for accrued damages and continuing damages—Are accrued damages incidental or subsidiary to the main action.

Held: *That the claim of Rs.* 300 *as damages that had already accrued was incidental to the main cause of action and*

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therefore did not affect the jurisdiction of the Court of Requests.

ASEERVATHAN AND ANOTHER *vs.* SEVEITY AND FOUR OTHERS ... XIII. 167

Of Court of Requests—Plaintiff admittedly entitled to half share of land worth less than Rs. 300/-—Action for declaration of title and ejectment from entire land—Test of jurisdiction.

Held: *That the prayer in the plaint could not alter the matter in dispute between the parties as formulated in the issue,* viz. *the title to an undivided half share of the land valued at Rs.* 150/- *and that therefore, the court had jurisdiction.*

DIONIS APPU *vs.* DON SAMEL XXVI. 90

Of Court of Requests—Possessory action by lessee—Value of action.

APPUHAMY AND ANOTHER *vs.* APPUHAMY AND ANOTHER ... ... XXXI. 33

Of Court of Requests—Action for return of jewellery valued at over Rs. 300 on payment of sum less than Rs. 300—Demand together with interest claimed exceeding Rs. 300—Jurisdiction of Court—Courts Ordinance section 75.

The plaintiff claimed the return of certain articles of jewellery on payment of a sum of Rs. 231, or in the alternative, judgment for the sum of Rs.269, (being the value of the articles, which for the purposes of the alternative claim were assessed at Rs. 500, less Rs. 231) together with legal interest from date of plaint till payment. The plaintiff admitted that the value of the jewellery was Rs. 735. The legal interest brought the demand to a sum exceeding Rs. 300.

Held: (1) *That the claim for the return of articles valued at Rs.* 735 *on payment of Rs.* 231 *was outside the jurisdiction, of the Court of Requests.*

(2) *That the interest claimed in the alternative claim brought the demand to a sum exceeding Rs.* 300 *and that the claim was therefore outside the jurisdiction of the Court of Requests.*

HAMID *vs.* BADURDEEN ... XXXI. 75

Of Court of Requests—Action for definition of boundaries—Test of jurisdiction.

Held: *That in an action for definition of boundaries it is wrong to regard the value of the land as the test of jurisdiction.*

CHANDRANAYAKE HAMINE *et al vs.* GUNASEKERA *et al* ... XXXIII. 4

Of Court of Requests—Action for damages for wrongful possession of half share of land admittedly worth over Rs. 300.

PERERA *vs.* WIJESINGHE AND ANOTHER ... ... XXXIV. 12

Of Court of Requests—Partition action—Objection to jurisdiction raised in answer—Duty of court.

DON LEWIS AND OTHERS *vs.* JAYAWICKREME AND ANOTHER ... XXXVII. 6

Of Court of Requests—Denial of jurisdiction by defendant—Onus on plaintiff.

Held: *That where the jurisdiction of the Court of Requests is denied by the defendant, the plaintiff must prove that the court had jurisdiction and that a statement in the plaint that the value of the claim is within the jurisdiction is insufficient.*

DAVID SILVA *vs.* BABY NONA ... XL. 16

Of Magistrate to try breaches of Village Committee rules.

IBRAHIM SAIBO *vs.* ABAREN APPU AND ANOTHER ... ... I. 76

Of Magistrate to convict person on a charge within the exclusive jurisdiction of a Village Tribunal.

ROGUS *vs.* TISSERA ... ... XII. 39

Of Magistrate court—Charges under §§ 380 and 314 of the Penal Code—Acquittal of accused on charge under § 380 and conviction under § 314—Has Magistrate jurisdiction.

KUMARASAMY *vs.* RANHAMY AND OTHERS ... ... XXVII. 47

Of Magistrate to order ejectment from Crown Land held on permit.

JAYAWARDENA *vs.* FERNANDO XXXIII. 4

Of Magistrate to try offence of personation under § 58 (1) (a) of Ceylon (Parliamentary Elections) Order in Council.

THE ATTORNEY-GENERAL *vs.* SINNETAMBY ... ... XXXVII. 48

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Of Municipal Magistrate to try offences under Motor Car Ordinance No. 20 of 1927.

MISSO *vs.* DE ZOYSA ... IV. 81

Of Municipal Magistrate to try offences under the Quarantine and Prevention of Diseases Ordinance.

SALY *vs.* LIYANAGE ... XXXII. 71

Jurisdiction of Court to lay by an action pending the decision of another action affecting the same subject matter.

See under **ACTION**

Of Court—To make order dismissing action if costs of the day were not paid before a certain date.

PERERA *vs.* ASSEN ... ... XVII. 8

Jurisdiction of court to entertain action where parties had agreed to refer all differences to arbitration.

WIJAYANARAYANA *vs.* GENERAL INSURANCE CO., LTD. ... XXXII. 57

Of Court—Making exparte decree—To set such order aside.

LOKUMENIKE *vs.* SILINDUHAMY AND FOUR OTHERS ... ... XXXIV. 102

Of Court in action for specific performance of agreement.

ELIYA LEBBE *vs.* ABDUL MAJEED XXXIV. 107

Of Court to amend consent order containing error due to a slip on the part of counsel.

WICKRAMANAYAKE *vs.* HINNIHAMY AND ANOTHER ... ... XXXVI. 89

Of Court to order sale of land which does not pass to administration of estate of deceased.

FRANCINA *et al vs.* GUNAWARDENA ... ... XXXVIII. 76

Of Court to set aside Exparte decree.

RODRIGUES *vs.* SOMAPALA XXXIX. 85

Of Court to act as arbitrator.

MUDALIHAMY *vs.* APPUHAMY AND OTHERS ... ... XXXIX. 103

Of court to vacate decree obtained by fraud or collusion.

MARJAN AND OTHERS *vs.* MOWLANA AND ANOTHER ... ... XL. 81

Of Court to intervene—Domestic tribunal acting honestly and in good faith.

O'REILLY AND OTHERS *vs.* GITTENS XL. 100

Of Court to give effect to lawful compromise entered into pending action between parties.

NUGARA *vs.* RICHARDSON ... XLI. 41

Of Court to entertain action after application made by debtor to Debt Conciliation Board.

THE AGRICULTURAL AND INDUSTRIAL CREDIT CORPORATION OF CEYLON *vs.* DE SILVA AND ANOTHER XLI. 96

Of Court to allow amendment of indictment.

THE KING *vs.* NISSANKA MICHAEL FERNANDO ... ... XLIII. 97

Of Court to rectify on equitable grounds a written agreement which, owing to a common mistake, does not substantially represent the real intention of the parties.

NEWTON *et al vs.* SINNADURAI XLV. 89

Jurisdiction of Ceylon Court—Action for nullity of marriage brought by Ceylon domiciled husband where wife was domiciled in India prior to marriage—

NAVARATNAM *vs.* NAVARATNAM XXX. 90

Jurisdiction of tribunal under Essential Services (Avoidance of strikes and lockouts) Order 1942 to award damages.

BROWN AND CO. LTD. *vs.* ROBERTS ... ... XXXIII. 48

Of tribunal under Essential Services (Strikes and Lockouts) Order, 1942.

LIPTONS LTD. *vs.* GUNASEKERA XXXIV. 22

Of Village Tribunal to try action involving title to land.

WALLIAMMAI *vs.* KANTHIAH AND OTHERS ... ... XXXVII. 112

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Indictment charging accused under section 317, Penal Code—Discharge of accused without proceeding to trial on ground that injury did not constitute grievous hurt and consequently committal was a nullity—Legality of order.

Held: *That once an accused is committed for trial before the District Court after a preliminary inquiry, on an indictment forwarded by the Attorney-General, it is not open to the District Judge to "embark upon an inquiry as to whether the proceedings were irregular. In fact the only remaining step was for the District Judge to try the case."*

KING *vs.* DAYARATNE AND ANOTHER ... ... XXXI. 68

JURY

Trial by Jury—Composition of Jury—Bias—Members of Jury alleged to be partial—Not challenged at the time the Jury was empanelled because material for making challenge not available then—Can objection be taken at a later stage or at the end of the trial?—In what circumstances the Privy Council will interfere where injustice is alleged on the ground that the jurors in case tried by jury were open to objection.

Held: (1) *That from these facts it would not be just or fair to presume partiality.*

(2) *That the decision in the case* Ras Behari Lal *vs.* The King Emperor (1933) 60 *I.A.* 354 *does not warrant the proposition that in every case, in which there was material for a successful challenge by a juror, and it was not made for excusable reasons, an adverse verdict should be set aside.*

Per LORD ROCHE.—"It was said that such partiality would under section 225 of the Criminal Procedure Code of Ceylon be a ground upon which if objection had been made to the jurors in question it must have been allowed: that objection was not made because the appellant and his advisers were ignorant of the facts at the material time; but that nevertheless on the authority of the decision of this Board in *Ras Behari Lal vs. The King Emperor* (1933) 60 I.A.354 if a conviction resulted to which a juror open to objection was a party the conviction would be quashed. In that case a juror had been empanelled and joined in a verdict of guilty who could not understand the language in which the evidence was given. Such inability is a good ground for objection under the law of India and was unknown to the accused until after the event. Their Lordships held that there was on those facts a grave injustice or in the words of an analogous case in the English Courts "a scandal and perversion of justice." Accordingly on principles frequently laid down by this Board the conviction was set aside and the Crown was left to take such course as to a new trial as the law of India would allow it to take. Their Lordships see nothing in that decision to warrant the wide proposition contended for that in every case in which there was material for a successful challenge and it was not made for excusable reasons an adverse verdict should be set aside. Their Lordships as at present advised are of opinion that such a proposition is ill-founded and is contrary to the well settled principles laid down by this Board with regard to its intervention in criminal matters."

ALEXANDER KENNEDY *vs.* THE KING VII. 107

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

REX *vs.* DE SILVA ... ... XVII. 61

Jury—Suggestion by counsel that there is in existence a document prejudicial to the defence—Suggestion must not be made unless counsel is in a position to produce that document in due course of law.

REX *vs.* LIONEL BANDARA WEGODAPOLA ... ... XXI. 21

Jury—Application to alter election of jury.

THE KING *vs.* RAJARATNAM *alias* CHETTIAR AND OTHERS ... ... XXX. 13

Jury—Application to be tried by Tamil speaking jury.

THE KING *vs.* THELENIS APPUHAMY AND OTHERS ... ... XXX. 38

Jury—And judge—Functions of

HOLMES *vs.* DIRECTOR OF PUBLIC PROSECUTIONS ... ... XXXIII. 12

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JUS ACCRESCENDI

See also under **FIDEI COMMISSION**

Jus accrescendi—**When does it arise.**

IBRAHIM *vs.* ALAGAMMAH AND OTHERS ... ... XLV. 35

Deed—Interpretation as to whether on death of a fidei commissary **there is a** jus accrescendi **in favour of the other** fidei commissaries **or whether the heirs of the deceased** fidei commissary **acquired his interest.**

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM ... XLVIII. 1

JUS RETENTIONIS

Right of person planting land to retention—Circumstances in which jus retentionis **is granted and to whom—Compensation for improvements.**

Held: (1) *That under our law the right of retention is only granted to persons who have the* possessio civilis *and to certain special classes of persons whose position has been held to be akin to that of a "possessor."*

(2) *That this right of retention has been extended by decisions of our Courts to certain classes of persons who may not come under the strict definition of "possessors"* e.g. *persons who are entitled to a planter's share and to persons who make the improvements in the* bona fide *expectation of receiving a formal title.*

(3) *That a person entitled to compensation for improvements is not entitled to a* jus retentionis *unless he falls within the class of persons to whom the right is granted under our law.*

WIJESEKERA *vs.* MEEGAMA ... XIII. 136

Jus retentionis—**Compensation—Rights of a person in the position of a tenant effecting improvements—Can an improving lessee or tenant claim compensation from any party seeking to recover possession from him or only from the lessor or landlord.**

Held: (1) *That a person who is in the position of a tenant and who effects improvements on the premises is not entitled to* jus retentionis.

(2) *That an improving tenant or lessee is entitled to claim compensation only from the lessor or landlord and not from any party seeking to recover possession from him.*

DE SILVA AND OTHERS *vs.* PERUSINGHE XIV. 137

Jus Retentionis—**Improvements effected on land of which at the time the party was owner.**

PERIYACARUPPEN CHETTIAR *vs.* PROPRIETORS AGENTS LTD. ... XXXII .19

Improvements effected by one co-owner on undivided land—Jus Retentionis—**When is it not available to an improving co-owner**

DON JOHN APPUHAMY *vs.* MATHTHES. ... ... XXXV. 23

JUSTA CAUSA

Written promise to pay money—Promise made deliberately and not irrational or motiveless—Enforceability of promise.

EDWARD *vs.* DE SILVA ... XXXI. 49

JUS TERTII

Action for declaration of title—Plea of Jus tertii **by defendant—Third parties claim dismissed on previous action—Does it operate as a bar to defendant's plea.**

DADALLE DHARMALANKARA THERO *vs.* MARIKKAR ... ... XLVII. 12

JUSTICE OF THE PEACE

A Justice of the Peace may decline to administer an oath if he honestly believes that an affidavit which it is proposed to swear before him is false.

SARAM *vs.* SRI SKANDA RAJAH XXVI. 108

KANDYAN LAW

Adultery of a high caste Kandyan woman with a man of low-caste—Consequence of.

Held: *That the adultery of a Kandyan woman with a man of low-caste does not involve a forfeiture of her vested rights in property.*

MOHAMMADU THAMBI *vs.* DINGIRI MENIKA *et al* ... ... II. 327

Devolution of acquired property from a collateral—Is property that comes from a

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collateral to be treated as acquired property or as ancestral property for the purposes of inheritance.

Held: *That property coming by intestacy from a collateral cannot be called ancestral property or inherited property. Such property falls under the category of acquired property.*

APPUHAMY *vs.* WIJETUNGE AND ANOTHER ... ... III. 22

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

Held: (1) *That the three females were entitled to succeed to the deceased's property notwithstanding their marriage in* deega.

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

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

KIRI BANDA *vs.* DINGIRI BANDA XV. 85

Acquired property—Wife dying issueless leaving brothers and sisters—Deega **widower's rights.**

Held: (1) *That under the Kandyan law a* deega *widower succeeds to the acquired property of his deceased wife dying issueless as against her brothers and sisters.*

(2) *That the fact that the property is acquired* before *marriage is immaterial. As regards immovable property there is no distinction between property acquired before and after marriage known to the Kandyan law.*

DUNUWEERA *vs.* MUTTUWA AND TWO OTHERS ... ... XXIV. 61

Donation with the object of getting services and work performed when any festivity or mourning shall occur in connection with either of the donors—Services performed partly—Absence of a clause renouncing power to revoke—Can such deed be revoked.

Held: (1) *That the plaintiff's revocation of the deed of gift was valid inasmuch as the donors' intention to renounce the power of revocation could not be gathered therefrom.*

(2) *That it is not inequitable to permit revocation as the donee was in possession of the land during the time he was rendering services and is also entitled to make a claim for improvements effected by him.*

WIJESINGHE *vs.* MOHOTTY AND ANOTHER ... ... XXVI. 48

Intestate succession—Property acquired by Kandyan woman before marriage—Death of woman leaving illegitimate child and deega **married widower—Does the widower inherit any rights to such property.**

A Kandyan wife, possessed of property acquired by her before marriage, died leaving her surviving her *deega* married husband and an illegitimate child.

Held: *That the illegitimate child inherited the property and that the husband had neither title nor life-interest in it.*

ELLEN NONA AND OTHERS *vs.* PUNCHI BANDA ... ... XXVI. 70

Adoption—Evidence necessary to prove valid adoption.

Held: *That the evidence of the Buddhist priest and the ex-aratchi to the effect, that Edward Banda stated to them that he was adopting S for the purpose of inheriting him, is sufficient to prove a valid adoption under the Kandyan law.*

UKKUBANDA AMBAHERA *et al vs.* SOMAWATHIE KUMARIHAMY ... XXVI. 104

Adoption—Public declaration without formal announcement—Is it sufficient—Meaning of public declaration.

Held: (1) *That to constitute a valid adoption under the Kandyan law, there must be a declaration to the public, as distinct from the members of the adoptive parents' household or relatives, that the child was adopted for the purpose of inheritance.*

(2) *That it is not necessary that the declaration should be made on a formal occasion.*

TIKIRIKUMARIHAMY *vs.* NIYARAPOLA *et al* ... ... XXVI. 105

Minor—Does marriage confer majority on a Kandyan minor—Is a gift by a Kandyan minor void—What is the remedy of a minor

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who has executed a conveyance which is ipso jure **void.**

Held: (1) *That marriage does not confer majority on a Kandyan minor.*

(2) *A gift by a Kandyan minor is* ipso jure *void.*

(3) *A minor who has effected a conveyance which is* ipso jure *void need take no legal action to have it set aside unless he has lost possession of the property conveyed. In such a case the remedy is by* actio rei vindicatio.

HATURUSINGHE *vs.* UKKU AMMA XXVIII. 107

Donation with intention of receiving succour and assistance during life-time—Succour and assistance rendered—Can deed be revoked.

Where a Kandyan donated property with the intention of receiving assistance and necessary succour during the donor's lifetime and where the donee rendered such assistance and necessary succour.

Held: *That the power to revoke the gift was not exercisable.*

HAPUMALI *vs.* UKKU ... XXIX. 40

Kandyan woman—Does not attain majority by marriage.

SIMAN NAIDE *vs.* JANE NONA XXX. 84

Inheritance to acquired property—Married woman dying intestate and issueless.

Held: *That on the death of a Kandyan married woman, intestate and issueless, leaving a brother and two sisters, her acquired property passed to the brother and sisters in equal shares.*

UKKU BANDA AND OTHERS *vs.* TIKIRIBANDA AND OTHERS ... ... XXXIV. 38

Inheritance—Rights of woman marrying in deega after father's death.

Held: *That a woman who (prior to the Kandyan Law Amendment Ordinance* 37 *of* 1938) *married in* deega *after her father's death forfeited her rights to the paternal inheritance.*

DINGIRI MAHATMAYA AND TWO OTHERS *vs.* KIRI BANDA ... ... XXXIV. 62

Kandyan Law—Person subject to—Dying intestate leaving illegimate children—Immovable property which such person inherited from his father would be "paraveni property"

SETUWA *vs.* SIRIMALIE AND ANOTHER ... ... XXXV. 17

Sisters married in deega after father's death—Possession by sisters of their shares in ancestral lands with knowledge and acquiescence of brother for over thirty years—Can brother deny their right to such lands.

Where two sisters, married in deega after their father's death, enjoyed a two-third share of an ancestral land as their own for over thirty years with the knowledge and acquiescence of their only brother.

Held: *That in the circumstances, the brother cannot be allowed to deny his sisters' rights to the land.*

APPU NAIDE *vs.* HEEN MENIKA AND ANOTHER ... ... XXXVIII. 35

Brothers as associated husbands—Death of one without issue—Inheritance.

Held: *That on the death, without issue, of one of two brothers, who were married to one wife, the other brother becomes his sole heir.*

LAPAYA *vs.* SURUWAMIE AND ANOTHER ... ... XXXVIII. 79

Mother dying leaving children of two marriages—Rule of succession to her property whether per stirpes **or** per capita.

Held: *That the rule governing the succession of children of different marriages of a mother, subject to Kandyan Law, should be* per stirpes *as in the case of the property of a father subject to the same law.*

MOHOTIHAMY *vs.* ALBINONA XXXIX. 97

Widow's right to mortgage husband's lands for payment of his debts.

Held: *That a Kandyan widow is at liberty to mortgage the whole of her husband's estate for the purpose of paying her deceased husband's debts.*

BANDARAMENIKA *vs.* IMBULDENIYA XL. 36

Child inheriting property from mother—Child predeceasing father who was married in deega—Does the father inherit the child's estate.

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Held: *That a deega married widower is entitled to only a life interest in the estate of his deceased child.*

BISONA *vs.* JANGA AND OTHERS XLI. 40

Deed of gift—Revocability—Kandyan Law Ordinance No. 39 of 1938—Its applicability.

One P. Bandiya made a gift of lands to his children by a deed dated 11-3-1911, subject to his life-interest and certain other conditions. Subsequently by a deed dated 5-7-1943 he revoked the previous deed of gift.

Held: *That the revocation was valid. In Kandyan Law deeds of gift are revocable unless it could be shown in the case of a particular deed that "the circumstances which constitute non revocability appear most clearly on the face of the deed itself."*

ROMANIS *vs.* HARAMANISA AND OTHERS ... ... XLII. 94

Intestate succession—Children of two marriages—Daughters married in deega **during lifetime of father—Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938, sections 13, 11.**

F, a Kandyan, was married twice. By his first marriage he had one son S and four daughters, and by his second marriage only one child, a daughter. F died intestate on 18th October, 1942 (after the commencement of the Kandyan Law Declaration and Amendment Ordinance No. 39 of 1938), leaving him surviving his widow by the second marriage and the sole child by her, his only son S and two daughters by his first marriage—two of the daughters having pre-deceased him. All the five daughters were married in *deega* during the lifetime of the deceased. The District Judge held that the daughter by the deceased's second marriage was entitled to a half share of the acquired and inherited immovable property subject to her mother's life interest in her half of the acquired property.

Held: (1) *That the rights of S and the sole child by the second marriage, in relation to the immovable property of the deceased, were governed by section* 13 *of the Kandyan Law Declaration and Amendment Ordinance No.* 39 *of* 1938.

(2) *That the four daughters of the deceased by his first marriage and the only daughter by his second marriage were not entitled to inherit the immovable property of the deceased, since they were married in* deega *during the deceased's lifetime.*

(3) *That S was accordingly entitled to the entirety of the deceased's immovable property, subject to the life-interest of the deceased's widow over one-half of the acquired immovable property.*

Per BASNAYAKE, J.—"The effect of the statute is to place the children of two or more marriages on the same footing as if they were children of the same marriage."

SIRISENA *vs.* DINGIRI AND OTHERS XLV. 24

Binna association—Husband living with wife in wife's mulgedera without registering marriage — Subsequent registration of marriage as diga and departure to husband's village—Does such subsequent severance affect her vested rights.

A and D lived as husband and wife in the wife's mulgedera for three years without registering their marriage and a son was born to them. Subsequently they having registered their marriage as one in diga, went with the child and settled down in the husband's village.

Held: (1) *That the marriage should be considered as a binna marriage notwithstanding the entry in the marriage register as the registration of the marriage gave validity to the uninterrupted association which had originally commenced in the mulgedera.*

(2) *That the subsequent change of residence, even if it could be construed as a severance of her connection with the mulgedera, left her vested rights unimpaired.*

DISSANAYAKE *vs.* PUNCHI MENIKE *et al* ... ... XLIX. 74

KANDYAN LAW DECLARATION AND AMENDMENT ORDINANCE

Section 10 (1)—Proviso—Meaning of the word "child"—Paraveni and acquired property.

Held: (1) *That the word "child" in the proviso to section* 10 (1) *of the Kandyan Law Declaration and Amendment Ordinance No.* 39 *of* 1938 *means both legitimate and illegitimate children.*

(2) *That where a person subject to Kandyan Law died intestate leaving illegitimate children, any immovable property which*

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such person inherited from his father would be "paraveni property" in view of section 10 (1) of the Kandyan Law Declaration and Amendment Ordinance.

SETUWA *vs.* SIRIMALIE AND ANOTHER ... ... XXXV. 17

Section 11 and 13—Intestate succession—Children of two marriages.

SIRISENA *vs.* DINGIRI AND OTHERS XLV. 24

KAPURALA

Kapurale of dewale—Is office held by hereditary right.

NUGAWELA AND THREE OTHERS *vs.* MOHOTTALA AND OTHERS XXXII. 70

KATHI

See under **Muslim Marriage and Divorce Registration Ordinance.**

LABOUR (INDIAN) ORDINANCE

See under **Estate Labour (Indian) Ordinance.**

LAND

Conditional transfer of with agreement to retransfer within stipulated period.

See under **Agreement.**

Conveyance of land by person without title—Subsequent acquisition of title—Extent to which doctrine of exceptio rei venditae et traditae **operates.**

CARLINA *alias* HAMINE *vs.* NONHAMY XLI. 7

Transfer of land by deed—Circumstances showing transaction in nature of security for money advanced—Oral promise to retransfer later to transferee—Can court act on such oral evidence.

Transfer of land subject to oral agreement to transfer to third party on payment of a sum of money—Can third party enforce such oral agreement.

APPUHAMY *vs.* UKKU BANDA XLI. 43

Contract of sale of land by minors jointly with adults—Repudiation of contract by minors—Benefit to minors—Effect of contract on interests of adults.

KANAPATHIPILLAI THANGARETNAM *vs.* ALIARLEVVE UMARULEVVE *et al* ... XLI. 51

Agreement to transfer land in consideration of marriage—Should such agreement be notarially attested—Prevention of Frauds Ordinance, section 2.

Held: *That an agreement to transfer immovable property in consideration of marriage comes under section 2 of the Prevention of Frauds Ordinance and is therefore, of no force or avail in law unless notarially attested.*

NOORUL HATCHIKA *vs.* NOOR HAMEEM *et al* ... ... XLI. 65

Land purchased with plaintiff's money in first defendants' name—Land sold by first defendant to second defendant—Bona fide **purchaser—Plaintiff in occupation for prescriptive period at time of sale—Plaintiff's acquistion of title by prescription—Sale void.**

LUCIA PERERA *vs.* MARTIN PERERA *et al* ... ... XLIV. 60

Possession as agent—When prescription begins to run—Burden of proof.

SIYANERIS *vs.* UEDENIS DE SILVA XLIV. 66

Transfer pending partition—Final decree—Suit for cancellation of deed of transfer—Failure of consideration.

WIJESINGHE *vs.* SONNADARA ... XLV. 64

Registration—Sale of land to defendants—Registration in wrong folio—Sale to plaintiff—Registration in correct folio—Valuable consideration—Burden of proof—Fraud and collusion—Section 7 (2) of Registration of Documents Ordinance No. 23 of 1927.

The plaintiff, being aware that a vendor's interests in a certain land had already been sold by him to the defendants, who were in possession thereof, but whose deed was wrongly registered, purchased a portion of the same interest, and instituted an action to partition the land, making the defendants and his vendor, parties to it.

The main contest was between the defendants and the plaintiff as to the superiority of their respective titles. The plaintiff failed to lead sufficient evidence on the issue of

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valuable consideration on his deed. The learned Judge, too, without recording any specific finding on this issue, proceeded to decide the issue of fraud and collusion, which he held in plaintiff's favour, and gave the interest claimed by him to the plaintiff.

The evidence, however, disclosed that the plaintiff had joined together with the vendor, in order to gain for themselves a mutual advantage against the defendants. The defendants appealed.

Held: (1) *That the burden was on the plaintiff, to establish that valuable consideration had passed on his deed, before he could claim the benefit of prior registration.*

(2) *That in the circumstances outlined above, the plaintiff was guilty of fraud and collusion, as contemplated in section* 7 (2) *of Ordinance No.* 23 *of* 1927.

NAGANATHER ARUMUGAM *et al vs.* E. ARUMUGAM ... ... XLV. 70

LAND ACQUISITION ACT. NO. 9 of 1950

Dispute regarding compensation referred to District Court under Land Acquisition Ordinance (Cap. 203) after Land Acquisition Act of 1950 came into operation—Subsequent application by Government Agent to refer dispute to Board of Review constituted under new Act.

WALLOOPILLAI *vs.* MANDERS GOVERNMENT AGENT SABARAGAMUWA PROVINCE XLVI. 49

LAND ACQUISITION ORDINANCE NO. 3 OF 1876

Sections 30 (2a) and 37. Fidei Commissum property—Costs where reference under § 11 is wrong,

Held: *That where instead of depositing the compensation in Court as required by section* 37 *of Ordinance No.* 3 *of* 1876 *a reference under* § 11 *was made to Court the plaintiff was not entitled to the costs incurred by him.*

CHAIRMAN MUNICIPAL COUNCIL COLOMBO *vs.* ABDUL RAHIM ... ... I. 196

Land—Acquisition of—Market Value—Hypothetical Scheme which cannot be carried out—Municipal by-law—Tests of market value.

Held: *That an improvement scheme which an owner has no right to carry out is too speculative to be treated as a factor which will influence the market value of the land.*

NEWNHAM (CHAIRMAN MUNICIPAL COUNCIL, COLOMBO) *vs.* FERNANDO AND ANOTHER ... ... I. 339

Acquistion of land over which street lines have been laid in pursuance of section 18 (4) of Ordinance No. 19 of 1915—On what basis should compensation be computed.

Held: *That the depreciation consequent on the laying down of street lines under section* 18 (4) *of Ordinance No.* 19 *of* 1915 *can properly be taken into account in deciding the "market value" of land acquired under the Land Acquisition Ordinance.*

NEWNHAM (CHAIRMAN MUNICIPAL COUNCIL) *vs.* GOMES ... ... II. 261

Taxation of costs—Sections 31 and 32—Is there a right of appeal from the taxation of costs in a reference under the Ordinance.
Held: *That no appeal lies from an order of taxation made under section* 31 *of the Land Acquisition Ordinance.*

KANAGASUNDERAM (A.G.A., SABARAGAMUWA) *vs.* PODI HAMINE XIX. 53

Section 44—Acquisition of one room of a row of self contained rooms under one connected roof—Can the owner avail himself of the provisions of section 44—Effect of definition of street lines under section 19 (4) of the Housing and Town Improvement Ordinance, so as to include lands on which there are buildings at the time of such definition, on the market value in the event of compulsory acquisition under the Land Acquisition Ordinance.

Premises No. 528/8 out of a row of rooms numbered 528/5, 528/6, 528/11 and 528/8 was acquired under the Land Acquisition Ordinance. It was proved that the rooms were in a continuous line, with a verandah running the full length in front. The portion of the verandah in front of 528/11 has in some way become 528/7. Each of the five rooms is occupied by a different tenant. The common roof rests on a ridge plate, or beam, which runs the entire length of the building. That beam consists of several parts joined together without any relation to the partitions. The partitions had except in one case no intercommunication.

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Even in that case the door was not in use. It appeared from the evidence of some of the witnesses that not only was the rear portion originally one building but was also connected with the front portion and that the whole formed one residence.

Held: (1) *That the five rooms were five separate houses and that the owner cannot under section* 44 *of the Land Acquisition Ordinance require that all the five rooms be acquired.*

(2) *That in valuing the compensation to be paid for buildings lying within street lines defined under section* 19 (4) *of the Housing and Town Improvement Ordinance account must be taken of the restrictions on the use of the land resulting from the definition of such street lines.*

THENUWARA *vs.* THE COLOMBO MUNICIPAL COUNCIL ... ... XXIV. 41

Market value of land—Effect of laying down of street lines under section 19 (4) of the Housing and Town Improvement Ordinance on the market value of the land within the street line—Extent and effect of the restriction imposed by section 108 of the Housing and Town Improvement Ordinance.

The Municipal Council acquired a strip of land belonging to the defendant 1140 feet in length and varying in width between 28 and 32 feet comprising an area of 2 roods 37.20 perches. It lies on the extreme south of the premises bearing assessment Nos. 123 and 139 Bambalapitiya Road, a property of 11 acres, 1 rood and 12 perches in extent, and bounded on the west by another public street commonly known as the Colombo-Galle Road. This strip of land lay within a street line defined under section 19 (4) of the Housing and Town Improvement Ordinance. It was contended for the Municipal Council that the land acquired had no market value and only nominal compensation was payable as it could not be built on.

Held: (KEUNEMAN, J. dissentiente) (1) *That there was no statutory restriction against building on the land.*

(2) *That as the land was capable of incorporation in a scheme of building blocks so as to constitute and serve as appurtenances to the building erected on those blocks that land acquired must be assessed with the rest of the land as land suitable for building, subject to such restrictions as really exist.*

(3) *That the only express statutory restriction against an owner in the position of the defendant and the only restriction that has to be taken into account in assessing the value of the land in a case like this is that imposed by section* 108 *of the Housing and Town Improvement Ordinance.*

(4) *That sections* 19 (4) *and* 108 *of the Housing and Town Improvement Ordinance should not be regarded as prohibiting the owner of a land in every case from building beyond a street line laid down on his land.*

(5) *That it would be fallacious in assessing the value of a building block to treat the portion of land on which the building will stand as more valuable that the rest of the block which is going to be the garden or courtyard.*

(6) *That upon a proper interpretation of the law, there is no warning necessarily implied by the laying down of a street line that the land within it will be acquired without compensation.*

COLOMBO MUNICIPAL COUNCIL *vs.* K. M. N. S. P. LETCHIMAN CHETTIAR XXV. 25

Sections 21 and 22—Land situated between street lines defined under Housing and Town Improvement Ordinance—Compulsory acquisition—Market value—Meaning of and how to determine—Housing and Town Improvement Ordinance, sections, 5, 7, 19 and 108—Their effect.

A strip of land situated between street lines defined by the Colombo Municipality under section 19 (4) of the Housing and Town Improvement Ordinance, and forming a part of a larger land was acquired under the Land Acquisition Ordinance. The value of the strip was in dispute.

Held: (1) *That the market value in section* 21 *of the Land Acquisition Ordinance is the price which a willing vendor might be expected to obtain in the open market from a willing purchaser.*

(2) *That the fact that the owner of the strip acquired owns other lands in the neighbourhood is irrelevant for the purpose of ascertaining its market value.*

(3) *That such fact is the foundation for a claim for damage for severance and other injurious affection to his other property under heads* (*b*) *and* (*c*) *of section* 21 *of the Land Acquisition Ordinance.*

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(4) *That the value of improvements standing on such land and any loss of income derived therefrom should be included in the market value.*

(5) *That the cases of the* Government Agent, Western Province *vs.* Archbishop (16 *N.L.R.* 395) *and the* Government Agent, Kandy *vs.* Marikar Saibo (6 *S.C.D.* 36) *were wrongly decided.*

(6) *That the effect of sections* 5 *and* 7 *of the Housing and Town Improvements Ordinance is to ensure that no purchaser would buy land between street lines with a view to building upon it and not to render such land sterile and valueless.*

(7) *That such land can be used for any purpose which does not involve the erection of a building.*

(8) *That section* 19 (1) *of the Housing and Town Improvement Ordinance is concerned with the lines of what is physically a street and not with the land between street lines which is not a street.*

THE MUNICIPAL COUNCIL OF COLOMBO *vs.* LETCHIMAN CHETTIAR ... XXXIV. 46

Land acquisition—Proceedings under Land Acquisition Ordinance (Cap. 203)—Dispute regarding amount of compensation payable—Reference to District Court under section 11 (d) of (Cap. 203) after Land Acquisition Act of 1950 came into operation—Subsequent application by Government Agent to refer dispute to Board of Review constituted under new Act—Section 61—Right of party to withdraw from jurisdiction of District Court—Right of appeal from orders made by District Court under Land Acquisition Proceedings.

A dispute that arose as to the amount of compensation payable in proceeings under the Land Acquisition Ordinance No. 3 of 1876 was referred to the District Court under section 11 (*d*) of that Ordinance by the Government Agent after the Land Acquisition Act of 1950 came into operation. The Government Agent subsequently made application to Court that it should be referred under section 61 of the new Act for the decision of the Board of Review constituted under the Act, and this was allowed notwithstanding objection by the party claiming compensation.

Held: (1) *That the Government Agent had no authority under section* 61 *to refer the matter to the Board of Review except on the application of the person interested in claiming compensation.*

(2) *That section* 61 *did not permit either party who submits to the jurisdiction of the District Court to change its mind and at a later stage to invoke the alternative jurisdiction of the Board of Review.*

(3) *That the District Judge was not empowered by any provision of the new Act to divest himself of the duty to determine the amount of compensation in terms of the Land Acquisition Ordinance of* 1876 (*Cap.* 203).

On a preliminary objection taken to the right of appeal, held *also* (*following the ruling in* Government Agent *vs.* Bryan 4 S. C. C. 151).

(4) *That the order of the learned District Judge in allowing the application was an appealable order.*

T. WALLOOPILLAI *vs.* R. H. D. MANDERS, GOVERNMENT AGENT, SABARAGAMUWA PROVINCE ... ... XLVI. 49

LAND DEVELOPMENT ORDINANCE

Permit to occupy Crown land—Cancellation—Should it be registered under section 58 (1) to render it valid.

Order of ejectment—Conditions necessary to be fulfilled before conferring jurisdiction on Magistrate — Section 119 of the Ordinance.

Does death of a permit-hold amount to effecting its "cancellation" within the meaning of Chap. IX of the Ordinance—Sections 106-118.

Held: (1) *That provisions of section* 58 (1) *of the Land Development Ordinance and the allied sections in which reference is made to the necessity for registration refer only to lands alienated by grant under the Ordinance and not lands given on a permit.*

(2) *That a Magistrate would not have the special jurisdiction conferred on him by section* 119 *of the Ordinance to make an order of ejectment in the case of lands given on a permit unless where* (*a*) *the permit has been cancelled,* (*b*) *notice had been given to the party in unlawful possession or occupation after such cancellation.*

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(3) *That there is nothing in sections 106—118 of the Ordinance to indicate that the death of a permit-holder is to be regarded as effecting a cancellation of the permit within the meaning of Chapter IX.*

JAYAWARDENA *vs.* FERNANDO, A. G. A. ... ... XXXIII. 4

LANDLORD AND TENANT

See also under **LEASE**

RENT RESTRICTION

Month's notice of termination of tenancy given by tenant—Overholding for a day after expiry of notice—Landlord loses new tenant in consequence—House tenantless for a month—Liability of overholding tenant in the circumstances for damages.

Held: *That, where a tenant gave the landlord a month's notice of the termination of his tenancy but remained in the house for a day after its termination, in consequence of which the new tenant could not get possession of the house and the landlord lost a month's rent as a result, the overholding tenant was liable to pay the amount of the loss sustained.*

SANGARA PILLAI *vs.* BERRY ... I. 143

Improvements by Tenant.

Held: *That electric lights are a useful improvement in regard to a boutique.*

CHINNYAH *et al vs.* MOHAMADUTAMBY I. 228

Monthly tenancy—Deposit of five month's rent with Landlord—Notice of termination of tenancy given on the first day of the month in which tenancy is to terminate.

The facts shortly are as follows:

The plaintiffs in this action are the partners of a firm called S. E. Sahul Hameed & Co. In September 1928 they became tenants of the defendant of certain premises and on or before the tenth of that month they paid to the defendant the sum of Rs. 375/- described as an advance for five months at the rate of Rs. 75/- per month. On the 1st of Sept. 1930 the plaintiffs gave notice that they would quit the premises "by the end of this month." and they asked the defendant to refund them the sum of Rs. 304.62 that sum being made up as follows:—

Advanced deposited ...	Rs.	375 00
Taxes paid	,,	58 64
Goods supplied	,,	8 50
	Rs.	442 14
Less 11/24 of rent for 4 month's including Sept. 1930 ...	,,	137 52
Balance	Rs.	304 62

Held: *That notice given by a tenant on the 1st of a month that he is going to leave at the end of the month can be considered sufficient notice provided that rent is paid in respect of a full month from the date on which it is given*

SAHUL HAMID AND CO. *vs.* DE SILVA I. 354

Action for rent and ejectment—Purchase by tenant of $\frac{1}{4}$ share of the subject matter of tenancy—Plaintiff's title questioned by defendant—Estoppel of tenant.

Held: *That in an action for rent and ejectment it is not possible for a tenant during the continuance of the tenancy to deny that his landlord had title at the date of the lease.*

EDWIN *et al vs.* WICKRAMARATNE I. 394

Removal by tenant of his property from house after judgment for rent against him but before attachment or seizure.

Held: *That the removal by a tenant of his property from the premises of which he is tenant after his landlord had obtained judgment against him for rent but before attachment or seizure is not an offence even though it is done by stealth.*

KING *vs.* FERNANDO ... ... II. 406

Landlord's lien—How exercised.

Held: (1) *That a landlord's lien on his tenant's property can only become effective by means of judicial process.*

(2) *That a landlord is not entitled to exercise his lien without first obtaining judicial process.*

PERERA *vs.* SILVA ... ... IV. 33

How may a corporation give valid notice to a tenant—Can it do so through an agent.

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Held: (1) *That valid notice to a tenant can be given by the agent of a corporation even without written authority under the seal of the corporation.*

(2) *That where the act of an agent is ratified by the corporation expressly or impliedly the absence of prior written authority does not invalidate it.*

THE INCORPORATED TRUSTEES OF THE CHURCH OF ENGLAND IN CEYLON *vs.* WIJESEKERA ... ... IV. 127

Interference by landlord with the "commodus usus"—Cutting off electric supply of leased premises for tenant's failure to pay meter rent and electric light charges—Can lessee throw up lease.

Held: *That where the landlord interfered with the use of the leased premises by cutting off the electric supply of the tenant because he failed to pay the meter rent and electric dues demanded by the former the latter was entitled to throw up his lease.*

DISSANAYAKE AND ANOTHER *vs.* PAULUSZ ... ... V. 48

Landlord's lien—Sale of tenant's property under decree of Court—Can the Court by mandate under Section 653 of the Civil Procedure Code prevent the sale of the property under the decree in order to protect the landlord's interests.

Held: (1) *That the Court had no power to stay the sale and sequester the goods as it had done.*

(2) *That the case was not one in which a mandate under section* 653 *of the Civil Procedure Code could properly issue.*

KOTALAWELA *vs.* PERERA AND OTHERS ... ... VIII. 61

Action for rent—Joint-lease by two persons—Subsequent variation of the rental by non-notarial writing given by one of the lessors—Does the law require such a writing to be notarially attested—Section 2 of the Prevention of Frauds Ordinance—Evidence Ordinance, section 92—Omission in deed to specify share of rent each lessor entitled to—How should their claims be determined.

Held: (1) *That the non-notarial writing was not a writing which the law required to be notarially attested and therefore was not debarred from being proved by section* 92 *of the Evidence Ordinance.*

(2) *That such writing was legally effective as against A* (1*st plaintiff*) *only.*

(3) *That as the deed of lease failed to specify the rent to which each was entitled and in the absence of evidence to the contrary, the two lessors should* prima facie *be regarded, as being entitled to equal shares of the rent.*

KUMARAHAMY AND ANOTHER *vs.* GNANAPANDITHAN ... XIV. 30

Monthly tenancy—Condition of tenancy that tenant should be "responsible for all Municipal regulations"—Premises sublet by tenant—Premises very filthy and insanitary—Closing order by Municipality—Premises unoccupied for two months—Notice of termination of tenancy—Is tenant liable for rent after closing order.

Held: *That the closing order was due to the tenant's default and that the plaintiff was entitled to rent for January—March at the full rate per mensem, and that as the defendant had given reasonable notice the plaintiff was not entitled to the rent for April.*

JEEVANI *vs.* ARUNACHALAM CHETTIAR ... ... XIV. 86

Tenant effecting improvements—Is he entitled to jus retentionis **or only to compensation.**

DE SILVA AND OTHERS *vs.* PERUSINGHE ... ... XIV. 137

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

FORBES *vs.* RENGASAMY ... XVII. 45

Lease—Surrender—Is formal notarially attested writing necessary to effect.

Held: *That a lease can be terminated by mutual agreement between lessor and lessee and that a notarially attested document is not necessary to make the surrender of a lease effectual and valid.*

GOPALLAWA *vs.* FERNANDO AND ANOTHER ... ... XXVI. 93

Admission of agent of landlord regarding the landlord's title does not bind him in the absence of evidence that the agent

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had special or general authority to make such admission.

HASSAIN *vs.* OPALAGALLA TEA AND RUBBER ESTATES LTD. ... XXVII. 77

Notice to quit—Action for ejectment and recovery of rent and damages—Subsequent acceptance by landlord of money as damages and not as rent—Does such acceptance amount to a waiver of the notice.

Where a landlord gave notice to a tenant to quit and instituted an action for ejectment and recovery of rent and damages but, after service of summons on the tenant, accepted money from him as damages and not as rent,

Held : *That the notice cannot be taken to have been waived.*

PERIS *vs.* VIRASINGHE ... XXIX. 43

Action for ejectment—Premises reasonably required for the use of the landlord—Extent to which landlord's rights should be interfered with—Rent Restriction Ordinance, No. 60 of 1943, section 8.

Plaintiff sued his tenant, the defendant, for ejectment from a room in premises No. 215, Hultsdorf Street, on the ground that the room in question was reasonably required for his occupation. Plaintiff stated in his evidence that his chief business was supplying meals to the Fiscal's Office and others at Hultsdorf and the premises No. 179/181, situated close by, and in which he was carrying on the said business were about to be demolished for a fire gap on the orders of the Civil Defence Commissioner. He further added that when he vacated No. 179/181 he had to prepare the meals he supplied in the back portion of the premises No. 215 and that there was no other suitable place for dishing out the meals except the room occupied by the defendant.

The evidence also indicated (*a*) that premises No. 215 consisted of 7 rooms, kitchen, 3 garages, and some broad verandahs and that the plaintiff was already using one room and the kitchen, that two other rooms were occupied by his own people and the remaining rooms by some Proctors; (*b*) that plaintiff had other premises in the vicinity where his brother and brother-in-law carried on similar business; (*c*) that plaintiff had already converted one of the garages into a room; (*d*) that another room in the same street was available to the defendant.

The defendant's evidence was to the effect (*a*) that he was a Licensed Surveyor who had been practising at Hulstdorf for several years having fairly extensive Court work; (*b*) that the room available in Hultsdorf Street was not suitable for his work; (*c*) that in addition to himself an Auctioneer and Broker occupied the room; (*d*) that the plaintiff could enclose a verandah or use a garage for the purpose.

Held: (1) *That in the circumstances, the landlord reasonably required the premises for his occupation.*

(2) *That a tenant is not entitled to stay on because some sort of makeshift arrangement can be resorted to by the landlord.*

JOHN APPUHAMY *vs.* DAVID XXX. 53

Tenant occupying co-owned property—Transfer pending partition action to one co-owner of interests which might accrue by final decree to others—Covenant that full rent should be paid to such co-owner—Request to tenant to pay by co-owners transferring in pursuance of such covenant—Does this create a new tenancy—Duty of tenant when there are several landlords.

Held: (1) *That where a tenant in possession of co-owned property is requested in pursuance of a covenant among co-owners to pay the whole of the rent to one of them to whom the others had transferred, pending partition proceedings in respect of such property, their right, title and interest, which shall accrue to them under the final decree, no new tenancy is created.*

(2) *That in the case of a plurality of landlords it is the duty of the tenant to pay each of them his or her share of the rent.*

NAZAAR AND TWO OTHERS *vs.* HASSIM ... ... XXXIV. 91

Ejectment—Notice to quit—Acceptance of rent—Waiver of notice—Financial loss to tenant, if ejected.

A landlord who served notice on his tenant on the 30th July, 1946, to quit on 31st August, 1946, accepted the rent for August, and further rents until January, 1947, although the action for ejectment was filed on 3rd September, 1946.

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Held: (1) *That though the acceptance of rent until the expiry of the notice to quit is in order, acceptance of further monthly rents amounted to a waiver of the notice to quit.*

(2) *That the Court would refuse to make an order of ejectment where it would cause severe financial loss to the tenant.*

(3) *That the offer of alternative accommodation should be made before the date of action.*

D. B. JAYARATNE, PROCTOR *vs.* M. D. R. KULAWANSA ... XXXV. 22

Notice to quit—Meaning of calendar month.

Held: *That in a written tenancy agreement one calendar month's notice means the period from the date of notice until the numerically corresponding date of the following month.*

THE HIGHLAND TEA COMPANY OF CEYLON, LTD. *vs.* JINADASA XXXV. 47

Notice to quite—Proceedings under Small Tenements Ordinance—Rule Nisi issued—Discharge of rule nisi—Institution of fresh action within one month—Does the failure of said earlier proceedings operate as waiver of notice—Is the plaintiff precluded by section 34 of the Civil Procedure Code from maintaining the second action.

The appellant brought this action to eject the respondent from premises let to him at Rs. 25 per month and for arrears of rent and damages.

Prior to this action, the appellant, had after due notice given on 30-5-46, instituted proceedings against the respondent in respect of the same premises under the Small Tenements Ordinance, but on affidavit being filed by the respondent, order was made discharging the rule *nisi* issued in the proceedings.

The respondent contended in the present action *inter alia* that the appellant, having withdrawn unconditionally the earlier proceedings under the Small Tenements Ordinance, could not maintain this action. The learned Commissioner held that there has been a waiver of the notice given by the appellant and dismissed the appellant's action. It was further contended in appeal that the appellant was precluded by sections 34 and 406 of the Civil Procedure Code from maintaining this action.

Held: (1) *That the failure of proceedings under the Small Tenements Ordinance to evict the respondent did not operate as a waiver of the notice given by the appellant.*

(2) *That section 34 of the Civil Procedure Code did not apply to proceedings instituted under enactments such as the the Small Tenements Ordinance which provide for special remedies.*

(3) *That a tenant, who alleges waiver of a notice given by the landlord, must prove that the landlord, with full knowledge of his right, decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it.*

BANDARANAYAKE *vs.* PERERA XXXVI. 73

Sale of leased premises to 3rd party—Tenant informed of sale—Can landlord thereafter maintain action for rent and ejectment.

Held: *That a landlord, who sold to a third party the premises he let to his tenant, and informed him that he should pay rent to the purchaser, is not entitled thereafter to maintain an action for rent and ejectment in the absence of a new contract of tenancy.*

SAMSUDEEN *vs.* RAHIM ... XXXVII. 3

Action for rent and ejectment—Proceedings wrongly instituted under Small Tenements Ordinance (Cap. 87)—Action withdrawn and regular action filed in Court of Requests—Plea of res judicata **not available—Termination of contract of tenancy unaffected by irregular proceedings taken—Fresh notice to quit unnecessary—Civil Procedure Code, sections 207, 406.**

Held: *That a decree passed by a Court which has no jurisdiction to try a case is a nullity and cannot operate as* res judicata *even as between the parties to the action.*

BANDARANAYAKE *vs.* PERERA XXXVII. 37

Should sub-tenant be joined in an action for ejectment against the tenant—Effect of decree for ejectment against tenant.

Held: (1) *That our law does not permit the joinder of a sub-tenant in an action for ejectment against the tenant.*

(2) *That a sub-tenant is bound by a decree against the tenant, and it is the*

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duty of the Fiscal to remove the sub-tenant and deliver possession to the landlord.

KUDOOS BHAI *vs.* VISVALINGAM XXXIX. 20

Decree for ejectment of tenant—Acceptance by landlord of higher rent for three months immediately preceding date of ejectment—Is new tenancy created.

Held: *That when a valid notice has been given, a new tenancy can be created only by an express or implied agreement and that the mere acceptance of a payment in excess of what is due to the landlord during the current period of tenancy does not create a new tenancy at the expiration thereof.*

ALLES *vs.* MUTHUSAMY ... XXXIX. 24

Tenancy Action—Compromise—Payment on or before a date—Payment tendered to proctor in the afternoon—Decree obtained in the morning without notice as for default—Validity of decree—Jurisdiction of Court to vacate ex-parte **decree.**

The parties to a tenancy action arrived at a compromise recorded in the following terms:—

"It is agreed that a sum of Rs. 151.80 is due as rent and damages. If the defendant pays this sum to the plaintiff on or before 19th April, 1948, this action is to be dismissed without costs. If he does not pay the sum as aforesaid, judgment is to be entered for the plaintiff as prayed for with costs."

On the morning of the 19th April, 1948, the plaintiff, without express notice to the defendant, applied for and obtained decree, against the defendant on the footing that the defendant was already in default.

The defendant stated that he sent a telegraphic money order for the amount to the plaintiff's proctor on the afternoon of the 19th April, 1948, but the Court failed to inquire into the matter or to vacate the order made in favour of the plaintiff.

Held: (1) *That the order made by the learned Commissioner of Requests on the 19th April, 1948, entering decree in favour of the plaintiff against the defendant was premature and made* per incuriam.

(2) *The learned Commissioner should have vacated this order as soon as the error was brought to his notice.*

(3) *That under the terms of the compromise the defendant was entitled to claim the dismissal of the action on proof of payment of or tender of the amount to the plaintiff or his proctor.*

Per GRATIAEN, J.—"If a Judge makes an *exparte* order the party who has not been heard has a right to apply to have it set aside except in cases where the Judge is expressly empowered to make such an *ex-parte* order."

RODRIGUES *vs.* SOMAPALA ... XXXIX. 85

Order of ejectment of tenant—Death of landlord before issue of writ—Does right enure to landlord's executor.

ISMAIL *vs.* HERFT ... ... XL. 50

Premises let to firm by one partner—Can such partner maintain an action for rent and ejectment against other partner.

Held: *That a landlord who lets his permises to a firm of which he is a partner, cannot maintain an action for rent and ejectment against the other partners of the firm in respect of the premises so let.*

NEINA MOHAMED *et al vs.* SAHUL HAMEED ... ... XL. 61

Right of landlord to appropriate deposit for rent

FERNANDO *vs,* SAMARAWEERA XLIV. 19

Decree for ejectment against tenant—Is a sub-tenant who was not made party to action bound by its decree—When can a sub-tenant be evicted?—Civil Procedure Code, section 524.

Held: (1) *That sub-tenant in occupation of premises, under a contract of sub-tenancy entered into before an action for ejectment has commenced against the tenant, would not be bound by the decree in such an action unless he was joined as a party to the proceedings.*

(2) *That such a sub-tenant cannot be judicially evicted from the premises except in terms of a decree for ejectment entered against him in an action to which he was made a party.*

(3) *That the ruling of de Kretser, J. in* Siripina *vs.* Ekanaike (1944) 45 N.L.R. 403 *on the above points is correct, nd must be regarded as binding authority unless and until it is expressly overruled by a Divisional Bench or set at nought by the Legislature.*

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(4) *That after the tenant's rights have been extinguished to the knowledge of the sub-tenant, the landlord,* qua *owner, is entitled to sue the over-holding sub-tenant,* qua *tresspasser for ejectment.*

(5) *"That a sub-tenant would be bound by a decree for ejectment against the tenant, if the contract of sub-tenancy was entered into after the date of the decree. (If on the other hand, the contract of sub-tenancy was entered into* after *the institution of action, but before the date of the decree, the question whether the sub-tenant was bound by such a decree must presumably be considered with reference to the doctrine of* lis pendens.")

Per GRATIAEN, J.—"Section 9 of the Rent Restriction Act No. 29 of 1948, now prohibits a tenant of any premises to which the Act applies from sub-letting the premises *without the prior written consent of his landlord.* Upon a breach of this statutory provision, the landlord is entitled to a decree ejecting both the tenant and the sub-tenant in occupation, and the Act in this way gives to the landlord the same right of action against both parties which, under the common law, would apparently have been available to him for the breach of an express *contractual* prohibition against sub-letting."

JUSTIN FERNANDO *et al vs.* ABDUL RAHAMAN AND ANOTHER ... XLV. 1

Rent Restriction Act No. 29 of 1948—Retrospective effect—Action for ejectment pending—Section 6 (3) Interpretation Ordinance—Recognised Agent—Special Agent and General Agent—Section 25 (b), (c), Civil Procedure Code.

Where, during the pendency of an action for ejectment, the provisions of the Rent Restriction Act No. 29 of 1948 were, by proclamation, declared to be applicable to the locality in which the premises in question were situated.

Held: *That the coming into operation of the Act after an action for ejectment has already commenced, does not affect the landlord's right to claim ejectment under the common law which governs the relationship of landlord and tenant.*

Held further: (1) *That an action instituted in the name of the landlord by his attorney, holding a* general *power of attorney from the landlord, was properly constituted.*

(2) *That a* special *agent is one who has authority to act on his principal's behalf for some special occasion or purpose; on the other hand, an agency may legitimately be regarded as* general *if, as in the case of a house agent, the person concerned is authorised to act generally on behalf of his principal in relation to that employment.*

Per GRATIAEN, J.—Even if it were correct to say that the language of Section 13 may fairly be interpreted as being retrospective, I would say that it might at any rate be interpreted with equal fairness as being prospective only. In that state of things the law requires that the interpretation which preserves the cause of action which has already accrued to the landlord in a pending action should be preferred.

LANKA ESTATES AGENCY, LTD. *vs.* W. M. P. COREA ... ... XLV. 33

Landlord though not actual owner consenting to or acquiescing in improvements by tenant—Owner conveying premises let to another—Attornment and payment of rent to purchaser—Claim for compensation for improvements by tenant against landlord at the time of improvements—Who is liable for the claim.

The 1st defendant let to the plaintiffs as landlord certain premises, owned by his mother, acting to all intents and purposes as the owner thereof. He consented to, or at least acquiesced in improvements effected by the plaintiffs on the footing that he was the owner of the premises let. The improvements resulted in an increase of the Municipal assessment and accordingly the landlord was benefited by way of an enhanced rental. Subsequent to the improvements and at the request of the 1st defendant, the plaintiffs attorned to the 2nd defendant to whom that 1st defendant's mother had conveyed her title.

Plaintiffs claimed compensation for improvements from the 1st and 2nd defendants jointly and severally. At the trial the 2nd defendant, who had in turn disposed of his interests to a third party, was dismissed from the action by consent of parties and the case proceeded against the 1st defendant. The plaintiffs succeeded in the District Court and the 1st defendant appealed.

It was argued for the appellant that it was the actual owner of the premises at the date of the termination of the tenancy and vacation of the premises by the tenant,

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who is liable to pay compensation and not the landlord who consented to or acquiesced in the improvements.

Held: (1) *That the plaintiffs were right in making their claim against the 1st defendant as the actual owner had nothing to do with the plaintiffs and none of them were bound by any agreement expressed or implied between the plaintiffs and the 1st defendant.*

(2) *That a lessee or tenant cannot claim compensation for improvements effected with the consent or acquiescence of the landlord from a person who does not claim through the landlord but independently of him.*

(3) *That the plaintiffs are entitled to their claim as upon their attornment to the 2nd defendant, the tenancy that existed between them and the 1st defendant terminated.*

Per CHOKSY, A.J.—"Despite the variety of facts and circumstances in the cases I have referred to, the principle that appears to emerge from them is that a lessee or tenant cannot claim compensation for improvements effected with the consent or acquiescence of the landlord from a person who does not claim through tne landlord but independently of him."

ALLES *vs.* KRISHNAM AND ANOTHER ... ... XLVII. 19

Action for rent and ejectment against tenant—Can a sub-tenant be ejected in execution of decree entered against tenant only—Misjoinder plea—Procedure to be followed to make subtenant bound by decree in such action—Civil Procedure Code, sections 324, 325, 327—Effect of constructive delivery of possession—Meaning of "tenant" in proviso to section 324—Rent Restriction Ordinance—Defences open to a sub-tenant at inquiry under section 327.

Held: (1) *That where after the termination of a tenancy agreement, a monthly sub-tenant is in the occupancy of the premises let, the Roman-Dutch Law recognises that the landlord has a distinct cause of action against the tenant (based on contract) for the recovery of the property, and another (based on delict) for the ejectment of the sub-tenant, who remains in occupation after the tenancy has expired.*

(2) *That a landlord is not entitled to eject such a sub-tenant in execution of a decree obtained against the tenant only.*

(3) *That in an action for rent and ejectment the landlord may obtain a decree binding on the tenant as well as the sub-tenant by joining the latter under section 18 of the Civil Procedure Code.*

(4) *That where a landlord has obtained decree against his tenant without making the sub-tenant a party to the action, the former may either (a) sue the latter in a separate action, or (d) take constructive delivery of possession under the proviso to section 324 of the Civil Procedure Code.*

(5) *That such constructive delivery of possession, when made on the orders of a Court of competent jurisdiction, effectively terminates the right to possession, not of the tenant, but also of the sub-tenant and hence the decree-holder can avail himself of the remedies provided by section 325 and 327 of the Civil Procedure Code for the purpose of obtaining a subsequent order for the ejectment of the sub-tenant.*

(6) *That at an inquiry under section 327 of the Civil Procedure Code the sub-tenant has an opportunity of being heard, and subject to such defences as he may raise, an order of ejectment can be made against him.*

(7) *That where the decree for ejectment is against the "tenant" a sub-tenant would be covered by the word "tenant" in section 324 of the Civil Procedure Code.*

The Court proceeded further to consider the precarious position of the sub-tenant in law and the possible defences open to him at an inquiry under section 327 of the Civil Procedure Code.

MOHAMED IBRAHIM SAIBO *vs.* MANSOOR *et al* ... ... XLVIII. 35

Landlord and tenant—Partner requiring premises for himself and other partners in business—Rent Restriction Act No. 29 of 1948—Section 13 (1) (c).

Where a landlord who is a partner in business claims possession of his premises on the ground that he needs them for the purpose of the partnership business.

Held: (1) *That under section 13 (1) (c) of the Rent Restriction Act it is sufficient for the landlord to establish that he requires the premises for himself and it is immaterial*

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whether he requires the premises for himself alone or for himself and others.

(2) *The words "business of..... the landlord" cover the interest of a landlord in a partnership business.*

MOHAMED ABDULLA *vs.* SEYD ISMAIL BUHARI ... ... XLVIII. 47

Defendant in occupation of the premises at the time of purchase by plaintiff—Defendant put in occupation by owners of premises after informal agreement by defendant to purchase the premises—Defendant's failure to complete purchase—Subsequent sale to plaintiff by owners—Action by plaintiff for ejectment of defendant and declaration of title—Does tenancy arise?—Rent Restriction Act—Licensee.

The plaintiff, who had purchased from the owners the premises occupied by the defendant, instituted an action to have him ejected and for a declaration of title. The defendant had agreed informally with the owners to purchase the premises on certain terms and under another contemporaneous agreement the defendant was permitted to occupy the premises in anticipation of the purchase, provided the defendant paid Rs. 200 per mensem as consideration "for the usage of the property." There was no provision for the eventuality of the defendant failing to complete the purchase.

Held: *That on the facts the defendant was at no time a contractual tenant of the premises but that he was at best a licencee and was not entitled to the protection of the Rent Restriction Act.*

Per GRATIAEN, J.—"The question whether or not the parties to an agreement intend to create as between themselves the relationship of landlord and tenant must in the last resort be a question of intention—*Per* Lord Greene M. R. in *Broker vs. Palmer* (1942) 2 A.E.R. 676. Similarly, Denning L.J. said in *Errington's* case (*supra*) "Although a person who is let into exclusive possession is *prima facie* to be considered to be a tenant, nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone may not suffice. Parties cannot turn a tenancy into a license merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a *personal privilege, with no interest in the land,* he will be held to be a licensee only."

SWAMI SIVAGNANDA *vs.* THE BISHOP OF KANDY ... ... XLIX. 51

Defendant, a watcher employed by plaintiff on monthly salary in occupation of a room in plaintiff's house free of rent—Plaintiff's action to eject defendant after terminating employment—Value of action—Proper test of jurisdiction—Court of Requests—Evidence Ordinance, section 116.

The plaintiff instituted an action to eject the defendant, a watcher of his property, from a building, which the plaintiff had permitted the defendant to occupy free of rent during the period of his emplyment, which was indeterminate and could be terminated without notice.

The plaintiff averred in the plaint that he had suffered damages at Rs. 5 a month from the date of the notice to quit and valued the house at Rs. 275.

The Commissioner of Requests dismissed the action on the ground that it had no jurisdiction as the value of the house was over Rs. 300.

Held: (1) *That the action against a person in the position of the defendant should not be valued on the basis of the capital value of the premises occupied, but only a nominal value should be placed upon such a right.*

(2) *That as the plaintiff has by his conduct treated the defendant as being entitled to occupy the premises at least for a month, and has fixed the value at Rs* 5, *for the use and occupation of the premises, the value of the action would be Rs.* 5 *plus damages claimed up to this date of the action, which amount to less than Rs.* 300.

PONNIAH *vs.* SELLAN ... XLIX. 92

Defendants sub-tenants—Consent decree between plaintiff (landlord) and tenant to surrender possession of premises occupied by sub-tenants—Acceptance of rents by plaintiff from tenant subsequent to consent decree—Rei vindicatio **action by plaintiff against defendants.**

Where under a consent decree the tenant, who had lawfully sublet the premises to the defendants, was ordered to be ejected from the premises occupied by the defendants, and the plaintiff thereafter continued to

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receive rents in respect of the premises from the tenant, who also received rents from the defendants in terms of the contract of sub-tenancy.

Held: *That the plaintiff cannot succeed in a* rei vindicatio *against the defendants as there was a renewal of the contractual relationship of landlord and tenant between the plaintiff and the tenant.*

JUSTIN FERNANDO AND ANOTHER *vs.* ABDUL RAHUMAN ... XLIX. 94

Lease of land—Sub-lease by lessee to respondent with lessor's consent under indenture with similar terms—Buildings erected by respondent—Claim for compensation for buildings by respondent—No provision in the lease for compensation—Terms of lease indicate erection of permanent buildings—Claim to compensation—Rights of lessee—Roman-Dutch Law.

Under an indenture of lease one A.J. leased out a land to the Shell Company who sub-leased the land to the respondent under a contemporaneous indenture containing similar terms. According to the indenture of sub-lease the respondent was to maintain the buildings, if he should erect them on the land, and to surrender them in good and tenantable repair and condition at the end of the lease. There were other terms in the sub-lease which showed that the parties contemplated the erection of substantial buildings at the respondents' expense which could not have been exclusively for the temporary use of the respondent but were also intended for the lessor's future benefit. The indenture did not expressly provide for the payment of compensation for such buildings.

The appellants, who are the executors and trustees of A.J. after the expiration of the lease, instituted an action against the Shell Company and the respondent claiming for a declaration that they were entitled to the leased premises and all the buildings and fixtures, which the respondent had erected, without payment of compensation for them.

Held: (1) *That the appellants were entitled to the declaration asked for as the terms of the lease between the parties show that the buildings and improvements effected under the lease were not only for the temporary use of the respondent, but also for the future benefit of the appellants.*

(2) *That consequently the respondent had in effect renounced the option which he would otherwise have had under the general law, of either removing the materials or of claiming compensation for them.*

Per GRATIAEN, J.—He is presumed, in the absence of an agreement to the contrary, to have effected these improvements only "for the sake of temporary and not perpetual use"; he is accordingly regarded as retaining the ownership of the materials affixed to the soil throughout the period of his tenancy, and, at the expiration of that term, he has the option *either* of removing what is in truth his own property *or* of permitting ownership in them to pass to the owner of the land; in the latter event, he must be compensated for the loss of his materials which, by operation of law, passed to the lessor.

ASGAR ABDULHUSSEIN JAFFERJEE AND TWO OTHERS *vs.* CYRIL DE ZOYSA L. 1

Premises let under notarial lease—Premises subject to Rent Restriction Act No. 29 of 1948—Notice by plaintiff to tenant to surrender possession at expiry of lease—Action by plaintiff before expiry of lease for ejectment, cancellation of lease, and arrears of rent—Failure of plaintiff to terminate lease—Maintainability of action.

Where the plaintiff landlord gave notice to the defendant tenant to surrender possession of the premises under a notarial lease on the expiration of the lease, but filed an action against the defendant ten days before the expiry of the lease for (*a*) arrears of rent, (*b*) cancellation of the lease, (*c*) for ejectment.

Held: (1) *That the plaintiff's action for ejectment and cancellation of the lease was premature and could not be maintained as the lease had not been terminated by due notice or effluxion of time.*

(2) *That a landlord cannot maintain an action for ejectment for default of payment of rent against a tenant who claims protection under the Rent Restriction Act, unless the contract of tenancy has been terminated by a notice from the landlord or by effluxion of time.*

THE CHETTINAD CORPORATION, LTD. *vs.* A. M. M. ZANEEK ... ... L. 15

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Landlord and tenant—Reasonable requirement— Conflicting claims — Circumstances which justify appellate tribunal to interfere.

In an action for ejectment under the Rent Restriction Act, the learned trial Judge found that the difficulties of both the landlord and the tenant were equally distressing and held in favour of the tenant. It was however disclosed in the evidence that the plaintiff a widow was forced to live with her adolescent son and her adopted sister in single room.

Held: *The manifest undesirability of allowing the plaintiff's son at his present age to share a single room with two women was an aspect of the matter which should have weighed heavily with the learned trial Judge. His failure to consider this aspect of the case justified the appeal Court taking a different view.*

MAVIS BRACE *vs.* MILDRED SILVA L 104

LAND SALES REGULATIONS

Applicability of Regulation 2 to permit given by Assistant Government Agent to take produce of certain plantations.

WIJESURIYA *vs.* THE ATTORNEY-GENERAL ... ... XLII. 77

LAND SETTLEMENT ORDINANCE

Crown Land (Claims) Ordinance—Land possessed by husband as wife's agent—Divorce of husband by wife—Possession of land by husband after divorce—Claim of land by husband—Issue of Crown grant to him—Is husband entitled to the land.

Held: (1) *That the defendant was not entitled to the land.*

(2) *That even after the divorce the defendant's possession must be regarded as the possession of an agent.*

(3) *That the fact that the Crown had issued a grant in favour of the defendant, acting on his representation that he was entitled to it, did not affect the right of the plaintiff to claim the land from the defendant.*

TILLAKARATNE AND ANOTHER *vs.* DASSANAIKE ... ... XIV. 7

Right of improver of land settled under the Land Settlement Ordinance to claim compensation for improvements from the person on whom the land is settled.

Held: *That the words "to the exclusion of all unspecified interests of whatsoever nature" in section 8 of the Land Settlement Ordinance relate only to unspecified interests in the title and cannot take away a right to compensation where it exists in the possessor on ouster by the true owner.*

HETUHAMY *vs.* BOTEJU ... XXI. 133

Legal effect of settlement orders—

HETUHAMY *vs.* BOTEJU ... XXI. 133

Can proceedings under section 24 of the Land Settlement Ordinance be taken in respect of land settled under the repealed Waste Lands Ordinance No. 1 of 1897— Section 20 of the Waste Lands Ordinance— Does an appeal lie from a decision under section 20.

Held: (1) *That proceedings under section 24 of the Land Settlement Ordinance cannot be taken in respect of land settled under the repealed Waste Lands Ordinance No. 1 of 1897.*

(2) *That an appeal does not lie from a decision under section 20 of the Waste Lands Ordinance No. 1 of 1897.*

(3) *That the words "investigation and trial" in section 20 of the Waste Lands Ordinance No. 1 of 1897 have reference to the inquiry before the Commissioner or District Judge and do not confer a right of appeal from a decision under that section.*

JOSEPH VANDER POORTEN AND TWO OTHERS *vs.* THE SETTLEMENT OFFICER ... ... XXII. 85

Claimant declared purchaser of property— Sale of property pending settlement proceeding by claimant—Improvements made by purchasers—Settlement order made subsequently in claimant's favour—Sale of title under settlement order to third party—Due registration—Plea of exceptio rei Venditae et Traditae**—Is it available against a party claiming title under settlement order—Trust — Compensation for improvements —** Jus retentionis**—Trust Ordinance section 98 (Cap. 72).**

By Deed 3 D4 of 1928 one G, who was declared the purchaser of the property in question under the Waste Lands Ordinance, No. 1 of 1897 transferred it to the 1st defendant, who in turn conveyed the same to the 3rd defendant.

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By a final order dated 27-10-33 made under section 8 of the Land Settlement Ordinance (Cap. 319) and duly registered, G was declared entitled to the property. G's rights were sold in execution against him subsequently and they devolved on plaintiff whose title deeds were registered on the same folio as the Settlement Order. 3 D4 was not registered. No evidence was led to show that plaintiff was not a *bona fide* purchaser. The defendants planted and improved the property for which they claimed compensation and a *jus retentionis*.

Held: (1) *That the Settlement Order vested the property in G and wiped out all previous titles.*

(2) *That in the circumstances the plea of* exceptio rei venditae et traditae *was not available to the defendant against the plaintiff.*

(3) *That as the plaintiff is a* bona fide *purchaser he cannot be said to hold the property in trust for the defendants.*

(4) *That the defendants were entitled to compensation for improvements and to* a jus retentionis *until compensation is paid.*

PERIYACARUPPEN CHETTIAR *vs.* PROPRIETORS AGENTS, LTD. ... XXXII. 19

LAND SURVEYS ORDINANCE

§ 6—Prescription against Crown—Possession over 30 years—Burden of proof.

ATTORNEY GENERAL *vs.* KIRIMUDIYANSE AND ANOTHER ... XXXV. 43

LEASE

See also under **LANDLORD AND TENANT**

Covenant against alienation without prior written consent of Lessor—Alienation in breach of such covenant—Legal effect of such alienation.

Held: (1) *That a clause prohibiting alienation without the written consent of the lessor does not of itself affect the operation of a deed of gift of the leasehold property made in contravention of such prohibition.*

(2) *That an alienation made in contravention of a covenant in a lease prohibiting such alienation without the written consent of the lessor would be effective until set aside by a court of law at the instance of the lessor.*

(3) *That appropriate steps to have an alienation of a lease of land made contrary to the terms of the instrument of lease set aside can be taken only by one of the parties to the lease.*

JAYAWARDENE *vs.* JAYAWARDENE VII. 16

Lease of minor's property by curator without the sanction of the Court—Is such lease null or void.

MOHAMED ANVAR *vs.* ARUMUGAM CHETTIAR ... ... XII. 163

Crown lease—Prohibition against alienation, sub-lease or mortgage of subject-matter of lease without written consent of lessor—Gift of leasehold to sons of lessee without consent of lessor—Fidei commissum**—Subsequent devise of leasehold by lessee by his last will to one of his sons who was also appointed executor—Acceptance of devisee by Crown as lessee on testator's death—Payment of rent by devisee—Is the devise to prevail over the gift.**

Held: (1) *That a donation of a leasehold, made in contravention of a condition of the lease that a donation without the written consent of the lessor shall be absolutely void, was voidable at the instance of the lessor.*

(2) *That an invalid donation of a leasehold did not operate as a breach of a condition prohibiting donation without the lessor's consent.*

(3) *That the passing of property through the executor to the devisee is no breach of convenant not to assign.*

(4) *That in a case where the expression lessee is defined to include his heirs, executors, administrators, and permitted assigns, an executor is in terms one of the lessees, and is just as much entitled to hold the lease as is a permitted assign.*

(5) *That the leasehold did not in the present case pass to the donees.*

JAYAWARDENE *vs.* JAYAWARDENE AND OTHERS ... ... XIV. 13

Joint lease by two persons—Omission in deed to specify share of rent each lessor

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entitled to—How should their claims be determined.

KUMARAHAMY AND ANOTHER *vs.* GNANAPANDITHAN ... ... XIV. 30

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

Held: (1) *That the defendant had no "saleable interest" in the lease within the the meaning of the expression in section* 284 *of the Civil Procedure Code (Chapter* 86) *and that the purchaser-appellant was entitled to have the sale set aside.*

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

JANIS DE SILVA *vs.* KANAKARATNE XV. 8

A transferee of a land has an "adverse interest" to a lessee who claims a right to retain his lease against the transferee under a prior deed of lease although the lessee's deed is unregistered.

A lessee who has been in possession of a land for the prescriptive period can prove that he is entitled to the remainder of the lease on the ground of prescription.

RANHAMY *vs.* KIRA ... XXI. 71

A lease can be terminated by mutual agreement between lessor and lessee and a notarially attested document is not necessary to make the surrender of a lease effectual and valid.

GOPALLAWA *vs.* FERNANDO AND ANOTHER ... ... XXVI. 93

Lease of undivided share by co-owner. Right to institute partition action.

GUNAWARDENA *vs.* BABY NONA AND ANOTHER ... ... XXXI. 81

Lease—Is lessee protected by Rent Restriction Ordinance after expiry of lease.

ASIA UMMA AND OTHERS *vs.* CADER LEBBE ... ... XXXII. 56

Lease of Crown Lands—Breach of contract—Action for damages against Crown—Power of Land Commissioner to bind Crown.

The plaintiff sued the Crown in damages in consequence of the failure of the Government Agent, Uva, who he averred, was acting for and on behalf of the Crown, to fulfil a contract undertaking to lease to him the right to tap and take the produce of rubber trees in certain Crown lands. The Government Agent was acting as the agent of the Land Commissioner.

Held: (1) *That the transaction contemplated by the contract was a lease of Crown land and was governed by the Regulations relating to sales and leases of Crown lands and approved by the Secretary of State.*

(2) *That under those Regulations the Land Commissioner was not competent to enter into this contract or to bind the Crown.*

ATTORNEY-GENERAL *vs.* WIJESURIYA ... ... XXXII. 89

Lease from co-owner—Co-owner effecting improvements on undivided land with another co-owner's consent—Is lessee entitled to benefit of such improvements.

DON JOHN APPUHAMY *vs.* MATHTHES ... ... XXXV. 23

Lease notarially attested—Lessees' right to possession disputed by third party in possession—Can the lessee maintain action against such third party without making lessor a party to action—Roman-Dutch Law—Distinction between short lease and long lease.

Held: *That a lessee who did not get possession of the lands leased under a notarially attested lease can sue third parties disputing his rights without making the lessor a party to the action.*

Per WIJEYEWARDENE, C.J—"I see no reason for drawing a distinction in Ceylon between short leases and long leases spoken of by text book writers, when we are considering the question whether a lessee has rights against third parties. All that we have to consider is whether the lease is duly executed according to law. If a lease for any period exceeding a month is notarially attested it should be regarded as giving "a species of ownership in land" (Lee, Introduction to Roman-Dutch Law, fourth edition page 161), and vesting in the lessee

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proprietary rights which could be enforced between third parties. If the lease is duly registered, it is entitled to prevail even against those claiming title from the lessor under deeds executed prior to the lease but registered subsequently."

UKKU AMMA *et al vs.* JEMA *et al* XLI. 13

LEGACY

Legacy—Liability of executors to pay interest on legacy money—When does interest become payable on a legacy.

FONSEKA *vs.* FONSEKA *et al* ... XIII. 121

Legacy—Cause of action to obtain a legacy accrues to legatee on the death of the testator.

DE SILVA AND OTHERS *vs.* DE SILVA ... ... XVII. 39

LEGAL PRACTITIONERS

See under **Advocate**
Proctor.

LEGITIMACY

Child born during wedlock—Burden of proving illegitimacy.

ALLES *vs.* ALLES AND SAMAHIM XXX. 25

LESSOR AND LESSEE

See under **Landlord and Tenant, Lease.**

LIBEL

See under **Defamation**

LIFE INSURANCE

See under **Insurance.**

LIMITATION OF ACTION

See under **Prescription**

LIQUIDATED DAMAGES

See under **Damages.**

LIS PENDENS

Where the lis pendens in a partition action is by mistake registered in the wrong folio and summons have been issued, the plaintiff can, on discovering the error, rectify it by registering in the proper folio and obtaining fresh summons.

THOCHINA *vs.* DANIEL ... IX 9

Lis Pendens—**Mortgage decree unregistered —Subsequent sale of mortgaged property in execution of a partition decree. Does registration of plaint in mortgage action protect mortgagees' rights as against the purchaser at the partition sale.**

GUNARATNE *vs.* PERERA AND ANOTHER ... ... XXIV. 11

Lis pendens—**later decree entitled to priority by reason of prior registration of** lis pendens.

SARAVANAMUTHU *vs.* MURUGAM AND ANOTHER ... ... XLII. 5

LOAN BOARD ORDINANCE 1865.

Interest payable to a claimant successfully establishing a claim to money deposited with the Loan Board is restricted to the interest that had accrued at the time the amount in deposit was paid over to the Treasurer by the Commissioners of the Loan Board.

FLORA AUGUSTUS PERERA *vs.* MARY JURY AND ATTORNEY-GENERAL ... X. 15

Meaning of the words "such claim, as well the principal money as the interest due thereon" in the proviso to section 20 (2)— Is the Crown liable to pay interest on money paid over to the Deputy Financial Secretary by the Commissioners of the Loan Board under section 20 (2).

Held: (1) *That the words "such claim, as well the principal money as the interest due thereon" in the proviso to section* 20 (2) *of the Loan Board Ordinance refer to the principal money originally deposited and the interest which it has earned while under the administration of the Loan Board.*

(2) *That the Crown is not liable to pay to a claimant establishing a claim under the proviso to section* 20 (2) *of the Loan Board Ordinance interest on the*

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amount paid to the Deputy Financial Secretary by the Commissioners of the Loan Board.

DE SOYSA *vs.* THE ATTORNEY-GENERAL ... ... XIX. 71

LOCAL AUTHORITIES ELECTIONS ORDINANCE NO. 53 OF 1946.

Writ of Quo Warranto—Member of Municipal Council—Later elected Member of House of Representatives—Appointment as Parliamentary Secretary—Is he holder of a Public Office—Right to sit and vote in the Municipal Council—Local Authorities Elections Ordinance, No. 53 of 1946—Section 10 (1) (d).

Held: *That a Parliamentary Secretary is a holder of a Public Office under the Crown in Ceylon within the ambit of Section* 10 (1) (*b*) *of the Local Authorities Elections Ordinance No.* 53 *of* 1946, *and is, therefore, not qualified to sit or vote as a member of the Municipal Council.*

PODI SINGHO *vs.* GOONESINGHA XXXVII. 12

Section 10 (1) (d)—Meaning of "public office."

GIVENDRASINGHE *vs.* DE MEL XXXVIII. 1

Urban Council Election—Impersonation—Validity of election.

MOHAMED NOOR *vs.* SINNAPPAH XL. 21

Person duly elected a member of Urban Council—After election name ordered to be removed from electoral list—Elections officer not giving him statutory notice of first meeting—Mandamus on elections officer.

WIJEANATHAN *vs.* ELECTIONS OFFICER TRINCOMALEE DISTRICT *et al* XL. 7

Teacher in assisted school—Is he disqualified from sitting and voting as a member of a local authority.

JAYASINGHA *vs.* SOYSA ... XLI. 26

Remedy provided by Ordinance read with Chapter IXA of Penal Code available—Writ of Quo Warranto not granted.

SAMARAKOON *vs.* TIKIRI BANDA XLI. 53

Section 78—Conviction for personation—Fine imposed below minimum fixed by ordinance—Imprisonment till rising of court—Regularity.

ATTORNEY-GENERAL *vs.* PODISINGHO ... ... XLII. 110

Mandamus—Election of members to Town Council—Failure of Election Officer to exhibit and publish notice in accordance with sections 17 and 83 (a) of the Local Authorities Elections Ordinance No. 53 of 1946—Validity of election.

In the course of preparing and holding the elections for the newly constituted "Alutgamawidiya Town Council" the Election Officer after preparing the electoral list for Ward No. 7 did not exhibit a notice at the office of the Village Committee stating that the list was open for inspection at the office of the Village Committee, but instead exhibited a notice to that effect at the office of the Muslim Educational Welfare Society. The notice was also not published in Tamil, which was the language of the majority of the inhabitants of the electoral area.

Held: (1) *That the publication of notice under section* 17 *of the Local Authorities Elections Ordinance is vital to the holding of an election and the failure to comply with the requirements of the section avoided the election.*

(2) *That, as the majority of the inhabitants in the area were Muslims, speaking the Tamil language, the notice should be published in the Tamil language too to satisfy the requirements of section* 83 (*a*) *of the Ordinance.*

AMUGODAGE JAMIS *vs.* BALASINGHAM AND OTHERS ... ... XLIII. 83

LOCAL BOARDS ORDINANCE 1898

Section 8 (1)—Preparation of voters lists—Section 6—Qualification of unofficial member—Meaning and scope of expression "hold any office of emolument under Government"—Inquirer who is appointed by Governor and receives fees for holding inquiries.

Held: (1) *That an inquirer who is appointed by the Governor and receives fees from Government for holding inquiries is a person who holds an "office of emolu-*

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ment under Government" within the scope of section 6 of Ordinance 13 of 1898.

(2) *That a person who is under any disqualification on the date of nomination cannot be nominated although he may be otherwise qualified. Nomination is but one stage in the course of election. There is no distinction between eligibility for nomination and eligibility for election.*

SIMON FONSEKA *vs.* THE GOVERNMENT AGENT—CENTRAL PROVINCE I. 145

LOCAL GOVERNMENT

See under **Bylaws, District Road Committee, Local Boards Ordinance, Local Government Ordinance, Municipal Councils, Sanitary Boards, Small Towns Sanitary Ordinance,** Ultra Vires, **Urban Councils, Village Committees.**

LOCAL GOVERNMENT ORDINANCE NO. 11 OF 1920

Objections to voters lodged under § 29—Objections handed to Government Agent in time; but late for due service on the voters. Duty of Government Agent to serve notices of any objection duly lodged in the most expeditious manner—Mode of service..... section 227. Should mandamus issue where it is futile and cannot be obeyed?

Held: (1) *That where objections are duly lodged under* § 29 *of the Local Government Ordinance No.* 11 *of* 1920, *it is the duty of the Government Agent to cause the notices to be served in the best manner that he can adopt. Section* 227 *prescribes a method of service that should be adopted in cases such as this. A Government Agent cannot decline to serve these notices or adopt his own method for their service.*

(2) *A mandamus ought not to go where it is not possible for the person on whom it is issued to carry out the terms of the writ without violating some provision of law or when it is futile and cannot be obeyed.*

SIMON SILVA *vs.* ASSISTANT GOVERNMENT AGENT ... ... I. 109

Storage of copra—Bylaw prohibiting—Purpose for which copra is stored is immaterial.

TENNEKOON *vs.* MUTTHUWAPPU I. 229

Street—Removal of obstruction in by Chairman of Urban District Council.

Held: *That a Police Magistrate is free to go into the facts and circumstances of the case before taking action on a certificate under section* 96 (3) *of Ordinance No.* 11 *of* 1920.

PERERA *vs.* POLICE MAGISTRATE, PANADURA ... ... III. 32

Mandamus—Section 31—Objection to nomination of candidate whose name is on list of persons qualified to be elected.

Held: (1) *That a voter has the right on nomination day to say that a particular candidate for nomination is not duly qualified, that is to say that his name does not appear on the certified roll or that since the date of certification he has rendered himself disqualified by reason of acts set out in section* 27.

(2) *That a voter cannot on nomination day take an objection that he could have taken before the certification of the rolls.*

IN THE MATTER OF AN APPLICATION FOR A WRIT OF MANDAMUS ON THE GOVERNMENT AGENT WESTERN PROVINCE V. 41

Section 31 (4)—Objection which could have been taken to a candidate's name being in the roll before the certification of the rolls, taken on nomination day, though not taken within the time specified in the notice given under § 29—Objection over ruled by presiding officer—Does mandamus lie.

Held: *That where the presiding officer entertains and decides an objection to the nomination of a candidate taken under* § 31 (4) *of the Ordinance No.* 11 *of* 1920, *a mandamus does not lie against such officer on the ground that his decision is erroneous in law.*

IBRAHIM *vs.* ASSISTANT GOVERNMENT AGENT, MATARA ... ... V. 68

Sections 84 (1) and (2) and 229—Commencing to build wall after giving notice—Accused convicted of offence but warned and discharged—Appeal.

Held: (1) *That no question of any permit or permission to build is involved in section* 84 (1) *of the Local Government Ordinance No.* 11 *of* 1920, *and that a building commenced at any time after the requisite notice is not unlawful.*

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(2) *That the provisions of the Housing and Town Improvement Ordinance No. 19 of 1915 cannot be invoked for the purpose of supplementing the provisions of section 84 (1) of the Local Government Ordinance No. 11 of 1920.*

THE CHAIRMAN U. D. C. (PANADURA) *vs.* ALFRED DIAS ... ... X. 27

Meeting of District Council—Election of Chairman—Absence of quorum at election—Is election valid—Quo Warranto to question validity of election.

Held: (1) *That for the transaction of business, a quorum must be present.*

(2) *That by-law 1 (g) is no authority for the proposition that a quorum need not be present for the transaction of business at an adjourned meeting.*

(3) *That the question of the election of the Chairman had not been properly put to the meeting.*

MARIKAR *vs.* PUNCHIHEWA ... X. 101

Section 16 (1)—Meaning of "ordinarily resident"—Quo Warranto to test validity of election of Chairman of Urban District Council.

Held: (1) *That a person can acquire a residential qualifiation at a place other than where his wife and family reside, if he resides there with the prime object of acquiring the residential qualification.*

(2) *That a person can be said to reside at a house specially engaged for him to live in and where he eats and sleeps although his wife and family may not be living there.*

WRIT OF QUO WARRANTO AGAINST THE CHAIRMAN U. D. C. KOLONNAWA X. 171

Appointment of Revenue Works Inspector under § 47 of Ord: 11 of 1920—Appointment is not of a permanent nature and cannot be questioned by application for writ of quo warranto.

DEEN *vs.* RAJAKULENDRAM AND OTHERS ... ... XII. 102

A writ of quo warranto does not lie in respect of the office of secretary of an Urban District Council. In an application for such writ the members of the Council are not necessary parties.

SUMANASURIYA *vs.* FERNANDO AND OTHERS ... ... XII. 111

Notice of action—Action against Urban District Council—Sections 228 and 230 of the Local Government Ordinance—Action filed by the parties mentioned in the notice and another—Is the action bad—Can the action be continued by the parties mentioned in the notice—Civil Procedure Code section 461—Is a notice of action addressed to the Chairman of the Council bad.

Held: (1) *That a communication addressed to the Chariman of the Urban District Council and received and considered by the Council was a valid notice under section 230 of the Local Government Ordinance even though it had not been addressed to the officer authorised by section 228 of the Ordinance to receive notices.*

(2) *That the letter of 30th August, 1937 was a sufficient compliance with the provisions of section 230 of the Ordinance.*

(3) *That in an action brought by several plaintiffs against an Urban District Council some of whom had given notice and some of whom had not, there is no objection to those who have given notice continuing the action in respect of their claim alone.*

DULFA UMMA AND OTHERS *vs.* U. D. C. MATALE ... ... XIII. 151

Can remedy provided by the Housing and Town Improvement Ordinance be utilised for remedying a breach of the provisions of the Local Government Ordinance section 80 (2).

EYHANGHERT *vs.* DE SILVA ... XIV. 98

Section 230—Scope of section—Refusal of vendor to confirm sale—Right of purchaser to a refund of the purchase price and auctioneer's charges paid by him.

Held: (1) *That section 230 of the Local Government Ordinance is not applicable to actions against an Urban District Council for the enforcement of contractual or quasi-contractual obligations.*

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

SIRIPALA *vs.* URBAN DISTRICT COUNCIL, KALUTARA ... ... XV. 49

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

Held: (1) *That the Chairman had no power to revoke the permit arbitrarily.*

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

PERKINS (INSPECTOR OF POLICE) *vs.* SRI RAJAH ... ... XVII. 56

Sections 164 and 168—Matara Urban District Council by-law 16 (1)—Does the expression "vegetables" include betel.

Held: *That the expression "vegetables" in by-law* 16 (1) *of the by-laws of the Matara Urban District Council does not include betel.*

BUULTJENS (REVENUE INSPECTOR) *vs.* SAMITCHIAPPU ... XVIII. 23

LOCAL GOVERNMENT SERVICE COMMISSION

Appointment by—To post in Municipal Council—Council preventing officer from performing his duties—Post suppressed by resolution of Council—Effect of resolution.

WIJESINGHE *vs.* THE MAYOR AND ANOTHER, COLOMBO MUNICIPAL COUNCIL. ... ... XXXVIII. 40

LOCAL GOVERNMENT SERVICE ORDINANCE

Certiorari **and Mandamus—Application for writs against Local Government Service Commission and three others—Allegations of misconduct against employee—Inquiry by Commission—Dismissal of employee—Whether decision to dismiss is a judicial or administrative act.**

The applicant was an employee of the Kandy Municipal Council and was its Maternity and Child Welfare Officer. By Ordinance No. 43 of 1945 he was transferred to the Local Government Service, of which he became a member as from April 1, 1946, while continuing to act in the same capacity.

Allegations of improper conduct against the applicant were made to the Commissioner of the Municipal Council, Kandy. The Council interdicted him. Subsequently an inquiry was held by a properly constituted Local Government Service Commission. The accused and his lawyers were present. The Commission after hearing evidence decided that the applicant should be dismissed from the service.

The applicant moved the Supreme Court for an order of *Certiorari* to bring up and quash "the findings and order of the 1st respondent." He further moved for a writ of mandamus on the 1st respondent.

At the hearing, Counsel for the 1st respondent raised the preliminary point that the Court should not proceed with this matter because *Certiorari* does not lie to the Supreme Court from such an order.

Held: (1) *That the writ of* Certiorari *does not lie in the circumstances, inasmuch as the dismissal resulted from a decision of the Local Government Commission in the capacity of employer of the petitioner.*

(2) *That the action, although involving the exercise of judgment and discretion, is more of an executive or administrative character than judicial.*

SURIYAWANSA *vs.* THE LOCAL GOVT. SERVICE COMMISSION AND THREE OTHERS ... ... XXXV. 36

LOCAL OPTION

Poll—Ballot papers marked with cross on reverse—Rejection by presiding officer—Validity—Local Option Rules, 1928, Rule 21—Form of ballot paper—Mandamus.

In prescribing the manner in which a voter should record his vote at a Local Option Poll. Rule 21 of the Local Option Rules 1928 states: ".....if he wishes to vote for a closure, mark a cross (X) *in the space provided*" and then fold the ballot paper and place it in the ballot-box."

The Form of the ballot paper contains a direction in the following words: "If you wish to vote for closure, mark a cross *below*."

In counting the ballot papers at a Local Option Poll the presiding officer rejected certain ballot papers which had cross marks not on the face of the ballot paper, but on its reverse.

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On an application for writ of mandamus on the presiding officer:—

Held: (1) *That the presiding officer acted rightly in rejecting the ballot papers in question.*

(2) *That a cross made on the reverse of the ballot paper could not be held to be a cross in the space provided on the face of the bailot paper.*

DON AMARASEKERA *vs.* RASIAH XLII. 61

LOTTERIES

Keeping place for the purposes of a lottery —What constitutes "keeping"—Penal Code section 288.

Held: *That to constitute keeping a place for the purposes of a lottery there must be evidence of some habitual use of the place for the purposes alleged.*

PERERA *vs.* PERERA ... XXXI. 16

LUNATIC

Defendant lunatic—Decree entered against him—Decree holder purchasing land and transferring to bona fide **puchaser—Can transfer be set aside.**

APPUHAMY AND ANOTHER *vs.* RAMASAMY PILLAI'S DAUGHTER THAILAMMAH ... ... XXXIV. 79

Lunatic wife—Guardian and manager of her estate can initiate proceedings for her maintenance.

MURUGASU *vs.* SUPPIAH ... XLI. 73

MADEL NETS

Right to fish with madel nets—Common law right of a subject to fish in the high seas.

FERNANDO *vs.* FERNANDO AND ANOTHER ... ... XIX. 31

MAGISTRATE

Jurisdiction of—*See under* **Jurisdiction.**

MAINTENANCE

Corroboration of evidence of applicant —Corroboration from applicant's conduct— How far former statements admissible under § 157 of the Evidence Ordinance, for the purpose of corroboration.

Held: *That the fact to be proved in a proceeding of this nature is that a child was born to the applicant as a result of sexual relations with the appellant. Corroboration must relate to this fact. The other evidence must show or tend to show that the story of the applicant that sexual relations existed between her and the appellant as a result of which the child was born is true.*

DON CARLINA *vs.* JAYAKODY ... I. 88

Maintenance Ordinance—Section 3— Meaning of the word "maintenance" therein.

Held: *That the word "maintenance" in section* 3 *of "The Maintenance Ordinance* 1889" *is wide enough to cover "education" of the children to be affected by the order.*

Per MACDONELL C.J. "...And so far as the authorities go it certainly seems open to me to hold that the word "maintenance" in section 3 is wide enough to cover "education." and it would, I think, be taking an unreasonably narrow view of what seems to be the intention of the statute were I to rule otherwise."

RODRIGO *vs.* RODRIGO ... I. 98

Maintenance Ordinance section 9—Maximum term of imprisonment that may be inflicted thereunder—Default in paying maintenance—Arrears for 18 months—Warrant against defaulter—Sentence of imprisonment of more than a month is in order.

Held: *That where a respondent had fallen into* 18 *months arrears in the payment of the maintenance ordered against him under* § 3, *and a warrant was taken out against him for the whole of the* 18 *months arrears, the Magistrate was justified in inflicting a sentence of six months imprisonment under* § 9.

SIVAKAMEN *vs.* VELAPILLAI ... I. 97

Maintenance Ordinance—Offer by husband to maintain his wife on condition of her living with him—

Held: *That an offer by a husband to maintain his wife on condition of her living with him must be an offer to provide her with her lodgings sufficient for her position as the*

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man's wife, having regard to the man's financial status.

VALLIAMMAI *vs.* ELIATHAMBY ... I. 372

Circumstances to be considered in making an order for maintenance.

Held: (1) *That before an order for maintenance can be made under section* 3 *of the Maintenance Ordinance* 1889 *there must be some definite evidence that the respondent to the application for maintenance has a source of income or that he has wilfully abstained from earning an income.*

(2) *That an order for maintenance should not be based upon a mere expression of an opinion by a witness such as the prosecutrix as to the respondent's ability to maintain his family.*

SIVAPAKIAM *vs.* SIVAPAKIAM II. 462

Maintenance Ordinance No. 19 of 1889—Section 7—Application made seven years after dismissal of first application—Can it be maintained.

Held: (1) *That an application for maintenance cannot be entertained unless it is made within statutory period prescribed in section* 7 *except in the circumstances prescribed therein.*

(2) *That it is open to an applicant for maintenance to make more than one application, but in every case the application should be within the statutory period prescribed in section* 7.

LAISA *vs.* GARDNER ... ... V. 73

Maintenance Ordinance No. 19 of 1889—Default of payment of maintenance—Distress warrant—Application to pay arrears by instalments—Order committing accused to jail—Does an appeal lie from such order?

Objection was taken that no appeal lay from such order.

The objection was upheld and the appeal dismissed.

KATHIRASIPILLAI *vs.* SUBRAMANIUM VII. 94

Maintenance—Arrears of maintenance ordered under Maintenance Ordinance—Are such arrears proveable as a debt in insolvency proceedings.

SITHAYAMMA *vs.* R. SINNIAH *alias* KANNIAH ... ... VIII. 1

Maintenance Ordinance No. 19 of 1889—Arrears of Maintenance—Can more than one month's imprisonment be awarded under section 9 of the Ordinance.

Held: *That under Section* 9 *of the Maintenance Ordinance No.* 19 *of* 1889, *a month's imprisonment can be awarded for each month's allowance remaining unpaid after the execution of the warrant issued under that section.*

LEELAWATHIE E. WIJESURIYA *vs.* W. M. JAMES DE SILVA ... VIII. 11

Maintenance Ordinance—Muslim Marriage and Divorce Ordinance—Does an application to a Kathi for dissolution of marriage oust the jurisdiction of the Police Court to make an order for maintenance under the Maintenance Ordinance.

Held: *That the jurisdiction of a Police Court to entertain an application for maintenance under the Maintenance Ordinance is not ousted by an application to a* Kathi *for dissolution of marriage under the Muslim Marriage and Divorce Ordinance No.* 27 *of* 1919.

SOORIYAMUMMA *vs.* SATHUKEEN VIII. 149

Claim for maintenance of illegitimate children—Claim dismissed on claimant stating that there was no witness present who could corroborate her—Application to Magistrate later to cause the respondent to the application to keep to the terms of a certain settlement that had been arrived at—Case re-opened by Magistrate—Is the Magistrate entitled to do so.

Held: (1) *That the Magistrate had no jurisdiction to try a claim which had been already dismissed, as the respondent had no evidence in support of her claim.*

(2) *That the fact that the appellant acquiesced in the proceedings did not give the Magistrate jurisdiction to do what he was not in law entitled to do.*

SEETI *vs.* MUDALIHAMY ... IX. 86

Child staying with maternal grandfather—Father willing to maintan the child if the child lives with him—Can grandfather insist on keeping the child with him and compel the child's father to pay maintenance.

Held: (1) *That an order for maintenance under section* 3 *of the Maintenance Ordinance can be made only where there is proof*

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of neglect or refusal by the father to maintain a child.

(2) *That the grandfather of a child who is maintaining such child cannot compel the father of the child to pay maintenance under section 3 of the Maintenance Ordinance, if the father has neither neglected nor refused to maintain the child in his own home.*

(3) *That where the father of a child is willing to maintain the child in his own home, he cannot be compelled to pay for the child's maintenance in the child's grandfather's home on the ground that it is in the best interests of the child to remain with the grandfather.*

FERNANDO (ON BEHALF OF LEELAWATHIE FERNANDO) *vs.* FERNANDO ... IX. 97

Circumstantial evidence—Can circumstantial evidence be relied on in corroboration of the mother's evidence.

Held: *That, in an application for maintenance, the corroboration of the mother's evidence may be supplied by circumstantial evidence.*

ALICE NONA *vs.* ARON SINGHO ... X. 37

Maintenance of children by father—Right of father to maintain his children in the custody of their grandmother—Can grandmother of children claim right to their custody—When may Court deprive father of custody of his children—Application of Ordinance to persons governed by Thesawalamai.

Held: (1) *That 'neglect to maintain' for the purposes of section 3 of the Maintenance Ordinance means such inadequate maintenance as to be in reality no maintenance at all.*

(2) *That an application for maintenance, under section 3 of the Maintenance Ordinance, should be decided without recourse to the* Thesawalamai, *even in a case where the parties are persons subject to that law.*

(3) *That the father is not bound under the Maintenance Ordinance to make a montly allowance for the maintenance of his children who are living with their grandmother in a case where he is prepared and able to keep the children in his own home, unless it is proved that he is unfit to look after them.*

ANNAPILLAI *vs.* SARAVANAMUTTU XI. 77

Question of paternity of child—Offer made by respondent to marry the applicant after discovery of her pregnancy—In what circumstances may such offer be regarded as corroboration of applicant's evidence.

Held: *That an offer, by the respondent to an application for maintenance, to marry the applicant can be regarded as corroboration of the applicant's story although such offer is not coupled with an admission of intercourse with the applicant.*

HINNIHAMINE *vs.* DON ALFRED XII. 47

Maintenance—Dismissal of application on merits—Is it a bar to a further application.

Held: *That, once an application for maintenance is dismissed on its merits, a fresh application in respect of the same claim cannot be entertained.*

SEETI *vs.* MUDALIHAMY ... XII. 82

Maintenance—Application by wife living in separation in respect of her minor children—Children given to mother by agreement at separation—Liability of husband to pay maintenance to the children while wife lives apart.

Held: *That a husband who agrees to his wife living apart from him with their children is liable to pay maintenance for the children while she lives apart from him.*

ROSLIN NONA *vs.* ABEYWEERA XIII. 11

Maintenance—Wife's agreement with husband under a notarial deed to live in separation—Waiver of rights to claim future maintenance in consideration of a lump sum of money—Wife without means of support—Offer to return to husband—Refusal—Is wife entitled to an order for maintenance—Ordinance—No 9 of 1889—Section 5.

Held: (1) *That the deed of separation was no bar to maintenance proceedings under the circumstances.*

(2) *That, when the applicant offered to return to the respondent, mutuality ceased to exist, and consequently section 5 of the Maintenance Ordinance was no bar to her claim.*

FERNANDO *vs.* FERNANDO ... XIII. 133

Order made by District Court in the exercise of its matrimonial jurisdiction making provision for the maintenance of the

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children of the marriage who were committed to the custody of the aggrieved spouse —Is the order a bar to proceedings under the Maintenance Ordinance.

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

ARIYANAYAGAM *vs.* THANGAMMA XVI. 33

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

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

EDEMA *vs.* BABUN NONA ... XVI. 63

Muslim Marriage and Intestate Succession Ordinance—Application for maintenance of illegitimate child before its birth—Can such application be continued after the birth of the child.

Held: *That an application for maintenance in respect of an illegitimate child made before the birth of the child is bad* ab initio *and cannot be continued after the child's birth.*

UMMA HANI *vs.* ABDUL HAMID XIX. 36

Order for maintenance of wife—Divorce of husband from wife—Does the order for maintenance continue to operate thereafter.

Held: *That an order requiring the husband to pay maintenance to his wife ceases to be operative on the parties being divorced and that no maintenance falls due after the date of divorce.*

MENIKI *vs.* SUJATHUWA ... XIX. 37

An action for instituting malicious civil proceedings may be brought in respect of a maintenance case falsely instituted.

COORAY *vs.* FERNANDO ... XX. 74

Rule 10 of Part I of the third schedule to the Muslim Marriage and Divorce Registration Ordinance does not apply to maintenance proceedings between Muslims.

UMMA SAIDU *vs.* HASIM MAIKAR XXII. 55

Maintenance proceedings — Confession made to police officer by respondent—Not excluded by § 25 of the Evidence Ordinance.

SOPIYA *vs.* WILBERT ... XXII. 67

Maintenance—Husband's application against wife possessed of separate property—Section 26 of Married Women's Property Ordinance Chapter 46— Burden of proof.

Held: *That in an application by a husband for maintenance against his wife under section* 26 *of the Married Women's Property Ordinance* (*Chapter* 46), *the burden is on the former to establish that through illness or otherwise he is unable to maintain himself.*

PERERA *vs.* PERERA ... XXII. 69

Section 2.

A wife possessed of means is entitled to claim maintenance from her husband provided he has sufficient means himself.

SIVASAMY *vs.* RASIAH ... XXV. 43

Order for alimony and maintenance in divorce case—Does such order oust the jurisdiction of the magistrate to order maintenance.

Held: *That the existence of a decree of a civil court for alimony and maintenance does not oust the jurisdiction of the Magistrate to make an order under the Maintenance Ordinance, where a husband fails to maintain his wife and children.*

TULIN FERNANDO *vs.* AMARASENA XXVI. 81

Maintenance—Agreement by wife to waive future maintenance on receipt of lump sum—Public policy—Does such agreement preclude her from claiming maintenance subsequently.

Held: (1) *That an agreement by the wife in maintenance proceedings to waive all claims for future maintenance in consideration of the payment of a lump sum by her husband is invalid in law inasmuch as it is contrary to public policy.*

(2) *That such an agreement does not bar her from a subsequent claim for maintenance.*

PARUPATHIPILLAI *vs.* ARUMUGAM XXIX. 17

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Maintenance—Children born during the subsistence of marriage—Presumption—Evidence Ordinance—Meaning of the word "access" in section 112.

Held: *That the word "access" in section 112 of the Evidence Ordinance means no more than opportunity of intercourse.*

RANASINGHE *vs.* SIRIMANNE ... XXXI. 111

Application for Maintenance—Absence of applicant on date of inquiry—Dismissal of application—Motion to vacate order of dismissal —Refusal by Magistrate—Is the order refusing to vacate an appealable one—Supreme Court—Powers of Revision—Maintenance Ordinance, section 17.

The applicant in a maintenance action appealed from an order made by the Magistrate refusing to vacate his order dismissing her application as she was absent when the inquiry was taken up.

The respondent's counsel raised a preliminary objection that the order appealed from was not an appealable order. The Supreme Court upheld the objection, but exercising the powers of revision vested in it, set aside the order and sent the matter back for inquiry.

LEELAWATHIE *vs.* HENDRICK XXXIII. 40

Offer by husband to take his wife back—Husband living in adultery—Bona fides of husband.

A wife claimed maintenance from her husband. The husband offered to take his wife back. It was found that the husband was living in adultery.

Held: *That the husband's offer was not a* bona fide *one and that the applicant was entitled to maintenance.*

MANOMANI *vs.* VIJIYERATNAM XXXIII. 72

Maintenance—Application for—Promise of marriage on paternity being imputed—Corroboration.

When the defendant in a maintenance action, on paternity being imputed to him, does not protest, but makes a promise of marriage.

Held: *That this statement furnishes the best corroboration of the mother's testimony as regards paternity.*

JOSLIN FERNANDO *vs.* CHARLES APPUHAMY ... ... XXXIII. 103

Defendant admitting marriage but denying paternity—Burden of proof.

On an application for maintenance by the wife, the defendant admitted marriage, but denied paternity on the ground that the applicant was living in adultery. Thereupon the Magistrate ruled that the burden was on the defendant to prove that the applicant was living in adultery and that he was not the father of the child.

Held: *That the Magistrate erred in law in calling upon the defendant to establish his case before the applicant's case was placed before the court.*

UKKUMENIKA *vs.* VIDANE XXXIV. 21

Maintenance—Allegation by husband that wife living in adultery—Burden of proof.

VELLUPILLAI SELLIAH *vs.* SINNAMMAH ... ... XXXIV. 97

Maintenance Ordinance 1889 (Chap.76) section 6—Necessity to corroborate applicant's testimony—Statement by putative father under section 122 (3) of the Criminal Procedure Code—Is such statement admissible to corroborate the applicant's testimony.

In a maintenance action, the statement admitting paternity made by the putative father of two illegitimate children and recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code, during the investigation of a charge of house-breaking, was admitted as substantive evidence to corroborate the mother's story. This was the only corroboration tendered.

Held: (1) *That the statement so recorded in the Police Information Book under section 122 (3) of the Criminal Procedure Code cannot be admitted as substantive evidence to corroborate the applicant's story.*

(2) *The provisions of section 122 (3) of the Criminal Procedure are applicable to both criminal and civil proceedings.*

ZOYSA *vs.* WILBERT ... XXXV. 78

Maintenance action—Parties living outside jurisdiction of court.

SARASWATHIE *vs.* KANDIAH ... XXXVI. 111

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Presumption of marriage—Meaning of "living in adultery"—Proof thereof.

Held: (1) *That where there is evidence that a marriage is in fact established, a marriage in law is presumed.*

(2) *That without proof of a continuous adulterous relationship, the woman cannot be deprived of relief by virtue of section* 4 *of the Ordinance.*

ATHAI *vs.* ARUMUGAM ... XXXVII. 1

Interpretation of the words "having sufficient means."

Held: *That the words "having sufficient means" in section* 2 *of the Maintenance Ordinance should be given a wide meaning and not restricted in its scope to persons having an income or actually earning at the time of the application. The word "means" should be taken to include capacity to earn money.*

RASAHAMY *vs.* SUBRAMANIAM XXXVII. 63

Copy of death certificate of first wife produced by defendants' proctor—Its admissibility—Proper method of production—Burden on party impeaching validity of customary marriage—Maintenance Ordinance, section 2 and Births and Deaths Registration Ordinance, section 42—Marriage accordng to Hindu rites—Is tying the "thali" essential to the validity of a marriage.

In a maintenance action the applicant proved that her marriage with the defendant had taken place according to Hindu rites on the 29th January, 1940, but without the "thali" ceremony. The defendant did not give or call evidence. His proctor produced a copy of a death certificate signed by an Additional Assistant Provincial Registrar, purporting to be that of his first wife, and this bore the date of death as October, 1940. The plaintiff and her witnesses stated that the first wife died in September, 1939. The object of producing the death certificate was to show that the applicant's marriage with the defendant was invalid as his prior marriage was subsisting at the time.

Held: (1) *That as the copy of the death certificate was not signed by one of the officers prescribed in the section* 42 *of the Births and Deaths Registration Ordinance, it cannot be received as* prima facie *proof of the death to which it referred.*

(2) *That as a certificate of death given under section* 42 *of the Births and Deaths Registration Ordinance, if properly proved and identified, is only* prima facie *proof of the fact of death, but not* prima facie *proof of the date of death, the date of death therein cannot be accepted in view of the evidence contradicting it.*

(3) *That the failure to tie the* "thali" *at a marriage ceremony according to Hindu rites does not invalidate such marriage, provided the evidence established the fact of a marriage ceremony followed by cohabitation of the parties.*

(4) *That a person who alleges that a certain customary ceremony is essential to a valid marriage must prove that it is so.*

PONNAMMAH *vs.* RAJAKULASINGHAM ... ... XXXVII. 67

Child born during the subsistence of a valid marriage—Presumption of legitimacy—Rebuttal—Standard of proof necessary—Meaning of the word "access" in section 112 of the Evidence Ordinance—Competency of husband to give evidence of non-access in maintenance proceedings—Burden on husband to prove beyond reasonable doubt.

Held: (1) *That to rebut the presumption of legitimacy under section* 112 *of the Evidence Ordinance the man must establish beyond a reasonable doubt that he had no access to the mother at any time when the child could have been begotten.*

(2) *That under our law the husband is a competent witness in maintenance proceedings and may himself give evidence that he had no access to the mother at the material time.*

Obiter:(1) *That the decision of the Full Bench in* Jane Nona *vs.* Leo *in* 25 *N. L.R.* 241 *is not overruled by the decision of the Privy Council in* Karapaya Servai *vs.* Mayandi (1934) *A.I.R.P.C.* 49, *which was an appeal from the High Court of Rangoon.*

(2) *That the word "access" in section* 112 *of the Evidence Ordinance connotes not only actual intercourse, but also personal access under circumstances which raise the presumption of actual intercourse.*

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Binding effect on Ceylon Court of decisions of the Privy Council on Appeals from foreign countries discussed.

PESONA *vs.* BABONCHI BAAS XXXVII. 97

Failure to follow procedure prescribed by section 14—Validity of proceedings—When does dismissal of application operate as a bar to subsequent application.

Held: (1) *That the failure of a Magistrate to follow the procedure prescribed by section 14 of the Maintenance Ordinance vitiates all subsequent proceedings on an application for maintenance.*

(2) *That a dismissal of an application without an adjudication on the merits does not operate as a bar to a fresh application.*

NAMASIVAYAM *vs.* SARASWATHY XXXIX. 71

Fixing of monthly allowance under section 2—Effect of divorce proceedings on application for maintenance.

Held: (1) *That in fixing the monthly allowance for maintenance under section 2 of the Maintenance Ordinance, a Magistrate must exercise his discretion.*

(2) *That an application for maintenance is not affected by the institution of an action for divorce by one party against the other.*

WIMALAWATHIE KUMARIHAMY *vs.* IMBULDENIYA ... XXXIX. 75

Magistrate issuing summons without examining applicant on oath—Does this vitiate proceedings.

In this case the Supreme Court, on the facts, varied an order of the learned Magistrate for the payment of a sum of money as maintenance to the wife.

Held: *That a failure to comply with section 14 of the Maintenance Ordinance does not vitiate the proceedings but is an irregularity against which objection can be taken.*

SEBASTIAN PILLAI *vs.* MARY MAGDALENE ... ... XLI. 2

Husband's failure to maintain lunatic wife—Application under section 2 by guardian and manager of her estate—Is the application in order.

Held: *That the guardian of the person of a lunatic wife and manager of her estate is entitled to initiate proceedings for her maintenance against her husband.*

MURUGASU *vs.* SUPPIAH ... XLI. 73

Maintenance—Illegitimate child—Mother's evidence unreliable—Corroboration, does it arise for consideration?

On an application by a mother for the maintenance of her illegitimate child.

Held: *That the question of corroboration does not arise, if the mother's evidence does not convince the Judge.*

Per BASNAYAKE, J.—"What the statute provides is that no order for maintenance of an illegitimate child should be made unless a mother who has given convincing evidence is corroborated in some material particular."

TURIN *vs.* LIYANORA ... XLVI. 32

Maintenance—Application dismissed for want of sufficient evidence—Subsequent application—Does the dismissal of the first application operate as a bar to the subsequent application.

Where an application for maintenance had been dismissed as the applicant's proctor had stated at the trial that his client was withdrawing the case for the reason that she had not sufficient evidence to maintain paternity, and a subsequent application was made.

Held: *That the dismissal of the first application in these circumstance operated as a bar to a subsequent application.*

PUNCHI *vs.* TIKIRI BANDA XLVI. 81

Maintenance—Inordinate delay in pronouncing judgment—Impressions regarding demeanour of witnesses rendered of little value thereby—Facts making it unsafe to act upon the imputation of paternity.

Where, in an application for the maintenance of an illegitimate child, the Magistrate allowed the application, basing some parts of his judgment—(pronounced several months after the commencement of the evidence)—on the impressions which he had formed of the demeanour of the witnesses.

Held: (1) *That the Magistrate's opinions embodied in his judgment were of little value*

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owing to the inordinate delay between the date of his final decision and the date on which the trial commenced.

(2) *That upon a proper appreciation of certain facts which were either admitted by the respondent or established against her beyond reasonable doubt, it was demonstrably unsafe to accept her story as to the paternity of the child.*

JAYATILLEKE *vs.* PERAGASTENNALE BABY ... ... XLIX. 43

MALICE

Malice—Proof of—In action for damages for wrongful search of house.

RAMIAH *vs.* RAYNER ... XXXIII. 81

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

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

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

(*b*) *that the defendant acted maliciously and*

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

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

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

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

PEIRIS *vs.* CHITTY AND OTHERS XVI. 58

Malicious civil proceedings—Action for instituting—What must plaintiff prove.

COORAY *vs.* FERNANDO ... XX. 74

Malicious desertion—Refusal of wife to live with husband or go back to him.

BULATHSINGHALA *vs.* MATILDA PERERA ... ... XXIX. 44

Malicious prosecution—Action for damages—Charges under §§ 180, and 208 of the Penal Code—Plea of guilt—Is it proof of the malicious and false nature of the complaints as a result of which the plaintiff was charged and acquitted?

The facts shortly stated are as follows:—The defendant charged the plaintiff and some others with assault and robbery. They were acquitted and the Police thereupon charged the defendant under §§ 180 and 208 of the Penal Code. To these charges he pleaded guilty and was convicted and punished. Thereafter the plaintiff brought this action claiming damages for malicious prosecution. At the trial the parties admitted these facts and the trial judge holding that the fact that the defendant had pleaded guilty when he was charged under §§ 180 and 208 of the Penal Code was conclusive proof that he had acted falsely and maliciously when he charged the plaintiff among others, allowed evidence to be led only the quantum of damages.

Held: *That in an action for malicious prosecution it is incumbent on the plaintiff to prove malice on the part of the defendant in instituting the criminal proceedings against him. The fact that the defendant pleaded guilty when he was charged under* §§ 180 *and* 208 *of the Penal Code is no doubt an element against him but it is still open to him to prove that he had no malicious intent in instituting the criminal case against the plaintiff.*

Per AKBAR, J. "...It has been held in the case of Patterson vs. Samudiri by the Supreme Court, that depositions in Police Court cases could be admitted in their entirety only by consent of parties, and that under no circumstances could the reasons for the acquittal or discharge of the accused be regarded as relevant or admissible in the subsequent action for malicious prosecution."

SUNDRAM *vs.* KANAKAPULLE I. 66

Malicious prosecution—Defendant honestly believing in truth of charge—Damages.

PERERA *vs.* PERERA *et al* ... I. 210

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Malicious Prosecution—Action for damages.

Held: *That a plaintiff in an action for damages for malicious prosecution must establish not only the element of malicious intention but also the absence of reasonable cause.*

SARNELIS *vs.* APPUHAMY ... I. 299

Malicious Prosecution—When may an action be brought for?

Held: *That an action for malicious prosecution will not lie unless it can be proved that the defendant, in addition to giving the information which resulted in the prosecution, requested or directed the prosecution of the particular person bringing the action.*

KOTALAWELA *vs.* PERERA ... VI. 81

Malicious prosecution—Information to the Police—Arrest of plaintiff in consequence—Statement made at preliminary inquiry held under Chapter XII of the Criminal Procedure Code—Liability of informant.

Held: *That an action for malicious prosecution does not lie against a person in a case where the plaintiff is arrested by the Police in consequence of a statement made by the defendant at a preliminary inquiry by the Police under Chapter XII of the Criminal Procedure Code.*

DISSANAYAKE *vs.* GUNARATNE XI. 12

Malicious prosecution—Malicious civil proceedings—Does an action lie for instigating proceedings under the Maintenance Ordinance falsely.

Held: (1) *That proceedings under the Maintenance Ordinance cannot properly be regarded as proceedings out of which an action for malicious prosecution can arise.*

(2) *That an action for instituting malicious civil proceedings may be brought in respect of a maintenance case falsely instituted.*

(3) *That under our law it is necessary that the plaintiff in an action in respect of malicious civil proceedings should not only prove that the civil proceedings were instituted without lawful justification but also that there was malice as well as want of reasonable or probable cause.*

COORAY *vs.* FERNANDO ... XX. 74

Malicious prosecution—Complaint to Police by defendant—Prosecution by Police after investigation—Absence of proof as to the conduct of defendant—Liability of defendant.

Held: *That in an action for malicious prosecution the fact that on information given by the defendant the Police unsuccessfully prosecuted the plaintiff after investigation is not sufficient to make the defendant liable in the absence of evidence as to the nature of the information given or the part played by him in the prosecution.*

HENDRICK APPUHAMY *vs.* MATTO SINGHO ... ... XXVI. 94

MALICIOUS SEQUESTRATION PROCEEDINGS

Injury caused by sequestration proceedings taken maliciously and without reasonable or probable cause actionable even though no actual sequestration is effected.

HADJIAR *vs.* ADAM LABBE ... XXII. 99

MANDAMUS

Should mandamus **issue where it is futile and cannot be obeyed.**

SIMON SILVA *vs.* ASSISTANT GOVERNMENT AGENT ... ... I. 109

Grant of writ is in the discretion of the court—Not issued as a matter of course.

INNASITHAMBY *vs.* GOVERNMENT AGENT (NORTHREN PROVINCE) ... I. 306

Mandamus **does not lie to correct an an erroneous decision as to a fact.**

GUNASEKERA *vs.* AMARASURIYA II. 14

Does mandamus **lie in a case where a special remedy is provided by law.**

Held: *That no* mandamus *lies where another remedy is provided by law.*

MOHAMED SAHIB *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS ... II. 330

Mandamus **does not lie where remedy of appeal is provided.**

BAND OF CHETTINAD *vs.* THE TEA CONTROLLER ... ... IV. 53

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Mandamus—Circumstances in which a writ will be refused—Improper motive in seeking assistance of Court—Buddhist Temporalities Ordinance No. 19 of 1931, section 41—Expulsion of a Bhikkhu from the Sangha—Is the Registrar-General bound to enter up in his register kept under the Ordinance the fact of such expulsion when it is communicated to him by the Nayaka of the expelled Bhikkhu's Nikaya.

Held: (1) *That the words "all such corrections, additions, or alterations in his registers as may be necessary to keep up to date his register of Upasampada Bhikkhus and Samaneras of his Nikaya and the relevant details regarding them" in section* 41 (5) *of the Buddhist Temporalities Ordinance No.* 19 *of* 1931 *were intended to include the total removal of the names of Bhikkhus from the register.*

(2) *That the words "modification" and "modify" in section* 41 (5) *of the Buddhist Temporalities Ordinance are wide enough to include the removal of a name from the register.*

(3) *That a mandamus will not be granted where the Court is not satisfied of the properiety of the motives of the applicant.*

IN RE THE MAHANAYAKE THERO OF MALWATTE, KANDY ... VIII. 50

When a Government Agent has reasons for refusing to renew a gun licence, he cannot be compelled by mandamus **to issue a licence.**

APPLICATION FOR A WRIT OF MANDAMUS ON THE A.G.A. UVA PROVINCE IX. 154

Mandamus—**Village Fair—Rule regulating establishment of fair made under section 29 of the Village Communities Ordinance No. 9 of 1924—Permit to conduct fair—Can permit holder insist on right to conduct fair so long as he complies with its conditions.**

Held: (1) *That the applicant had no right to conduct the fair without a permit.*

(2) *That the Village Committee was not bound to renew the permit, although the holder had not committed a breach of its terms.*

(3) *That, in terminating the permit in the way it did, the Village Committee was within its rights.*

APPUWA *vs.* HEMAPALA ... X. 51

Application for a writ of mandamus **on the Tea Controller—Board of Appeal constituted under the Tea Control Ordirance—Sections 15 and 17 (5) of the Tea Control Ordinance—Right of appeal to the Board of Appeal—Practice of the court in a case in which the Board of Appeal has power to grant the relief sought by way of** mandamus.

Held: (1) *That a* mandamus *will not be allowed for the enforcement of a legal right which the Board of Appeal can grant in the exercise of its powers as an appellate tribunal.*

(2) *That the words "the Board may, on any such appeal (a) confirm the order" in section* 15 (2) *of the Tea Control Ordinance give the Board the power to decide as to whether the Controller has correctly interpreted the provisions of section* 15 (1).

DANKOLUWA ESTATES CO., LTD. *vs.* THE TEA CONTROLLER ... XVIII. 55

Where an application for a mandamus **has been refused on certain grounds in regard to a certain subject-matter, it is not competent for a petitioner to canvass such decision by applying for a Writ of** Certiorari **in regard to the same matter against the same respondent.**

DANKOLUWA ESTATES CO. LTD. *vs.* THE TEA CONTROLLER ... XIX. 41

Mandamus **on Registrar-General—Buddhist Temporalities Ordinance, section 41—Grounds on which a** mandamus **may be refused even though a public functionary has refused to perform a statutory duty—What interest should a person have in the subjct-matter in order to entitle him to a writ of** mandamus.

Held: (1) *That the Supreme Court will refuse a writ of mandamus,*

(*a*) *where it is not satisfied as to the propriety of the motives of the applicants.*

(*b*) *where there has been considerable delay in making the application.*

(*c*) *where the applicants are seeking to take advantage of the remedy of* mandamus *with the object of solving a dispute which should properly be the subject of a regular suit.*

(2) *That the members of the Malwatta Karaka Maha Sangha Sabha have a special and sufficient interest which entitles them to apply for a* mandamus *on the*

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Registrar-General to compel him to remove from his register under section 41 (5) *the name of a Bihkkhu whom they have expelled from the Sangha.*

SUMANGALA MAHA NAYAKA THERO AND OTHERS *vs.* THE REGISTRAR-GENERAL ... ... XIX. 81

It is not open to the proper authority under the Butchers Ordinance to impose a condition that a licence under section 4 will not be issued to a person, who does not purchase at an auction held by the proper authority the right to obtain the licence.

That where the proper authority has acted arbitrarily and not exercised the discretion vested in it, a mandamus will issue to compel it to exercise its discrition.

MOHAMED NOORDEEN *vs.* THE CHAIRMAN, VILLAGE COMMITTEE, GODAPITIYA ... ... XXV. 62

Urban Councils Ordinance No. 61 of 1939 section 7 (2), and 9 (1) (2)—Can a mandate **issue under section 42 of the Courts Ordinance to compel the Government Agent to exhibit the notice required to be exhibited by section 9 (2).**

Held: (1) *That once the Government Agent informs the public that he proposes to commence the preparation of the list of persons possessing the qualifications specified in sections* 7 *and* 8 *of Ordinance No.* 61 *of* 1939 *on a specified date, he is not free to alter that date.*

(2) *That the Government Agent's functions under section* 9 (1) *of Ordinance No.* 61 *of* 1939 *are ministerial and not judicial.*

(3) *That the Government Agent does not exercise judicial functions until the stage prescribed by section* 9 (2) *of Ordinance No.* 61 *of* 1939 *is reached.*

(4) *That the Supreme Court cannot revise its judgment on the ground that it has been given* per incuriam *except for the purpose of correcting some clerical or typing error or in a case in which a judgment has been based* per incuriam *on a repealed enactment.*

WIJESEKERE *vs.* THE A. G. A. MATARA ... ... XXVI. 52

Mandamus—**Withdrawal of approval of an accountant approved by the Commissioner of Income Tax under section 2 of the Income Tax Ordinance—Exercise of discretion by Commissioner—Delay in applying for** mandamus—**Power to approve—Does it include power to disapprove.**

Held: (1) *That the power conferred by section* 2 *of the Income Tax Ordinance on the Commissioner to approve certain persons before they can be authorized to act on behalf of assessees carries with it an implied power to disapprove a person who has been approved, or revoke an approval once given.*

(2) *An approval given by the Commissioner of Income Tax does not extend beyond the year of assessment.*

(3) *That where a public officer vested with a discretion has exercised it fairly and honestly the Supreme Court will not grant a* Mandamus.

(4) *That the Supreme Court will not grant a* Mandamus *where the applicant had delayed to make the application.*

(5) *That delay of nearly eleven months was unreasonable delay.*

VALUE *vs.* THE COMMISSIONER OF INCOME TAX ... ... XXVI. 65

Mandamus—Writ of—Omission to insert double qualification mark of voter—Omission discovered after certification under section 26 of the Colombo Municipal Council (Constitution) Ordinance (Chapter 194)—Failure to apply under section 23—Should mandamus **issue.**

Where the "enumerators" entrusted with the preparation of lists of voters in a Municipality made an error in preparing such lists and the error was discovered only after the lists were certified as correct and where the law provided a remedy for the rectification of such omissions before such certification.

Held: *That no writ of* mandamus *should issue inasmuch as—*

(*a*) *the Commissioner had not omitted to to perform any duty;*

(*b*) *another remedy was available for obtaining relief.*

RANASINGHE *vs.* MACK (MUNICIPAL COMMISSIONER, GALLE) ... XXVI. 44

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Mandamus—**Writ of** Certiorari—**Courts Ordinance section 42—Colombo Municipal Council (Constitution) Ordinance sections 31, 32 and 37.**

Held: (1) *That a candidate to whose nomination papers no objection has been taken within the time prescribed in section* 32 (2) *must be regarded as duly nominated, even though the nomination paper does not satisfy the requirements of section* 31 (2).

(2) *That the Returning Officer is not required to announce his decision under section* 32 (4) *to the assembled public.*

JOSEPH *vs.* THE RETURNING OFFICER MUNICIPALITY AND OTHERS XXVI. 79

Mandamus—**Writ of** Certiorari—**Courts Ordinance section 42—Colombo Municipal Council (Constitution) Ordinance section 30.**

Held: (1) *That the payment of the deposit required by section* 30 *of the Colombo Municipal Council (Constitution) Ordinance to the Municipal Treasurer does not satisfy the requirements of the Ordinance.*

(2) *That failure to make the prescribed deposit with the Returning Officer renders a candidate's nomination open to objection.*

LIVERSZ *vs.* THE RETURNING OFFICER MUNICIPALITY AND ANOTHER XXVI. 83

A Justice of the Peace can be compelled by Mandamus **to administer an oath where he refuses to do so unreasonably.**

SARAM *vs.* SRI SKANDA RAJAH XXVI. 108

Urban Councils Ordinance No. 61 of 1939 sections 8, 9 (7) and 11—On nomination day can a candidate whose name is not on the lists as certified under section 9 (6) claim the right to be nominated on the ground that he is qualified within the meaning of section 8—Mandamus.

Held: *That a candidate whose name is not on the lists as certified under section* **9 (6)** *of the Urban Councils Ordinance is entitled under section* 11 *to claim nomination on nomination day on the ground he is qualified under section* 8 *to be a candidate.*

DE COSTA *vs.* THE ASSISTANT GOVERNMENT AGENT, COLOMBO XXVIII. 96

Mandamus—**Election under Village Communities Ordinance—Arrival of presiding officer more than an hour after time fixed for the meeting—Electors present and desire election to be held—Election held with consent of all—**Mandamus **will not be granted to set aside such election.**

WEERASEKERA AND ANOTHER *vs.* THE G. A. UVA PROVINCE ... XXIX. 4

Commissions of Inquiry Ordinance section 7—Powers of Commissioner acting under the Commissions of Inquiry Ordinance—Under what circumstances may he hear evidence in the absence of parties who are implicated or concerned in the matter under inquiry.

Held: *That a Commissioner acting under the Commissions of Inquiry Ordinance is not entitled to use for the purpose of compiling his report facts elicited by him in the absence of parties concerned or implicated in the matter under inquiry without having such facts tested at a formal sitting.*

Per ROSE, J.: "I am of opinion therefore that the only reasonable interpretation of the Ordinance as a whole is that if a Commissioner is to avail himself of the powers contained in sections 2, 3 and 4, he must also be liable to the corresponding obligations contained in section 7."

WICKRAMASINGHE *vs.* CROSSETTE THAMBYAH ... ... XXIX. 69

Where there is another remedy does Mandamus **lie—Delay—**Mandamus **will not be granted.**

Held: (1) *That a writ of* mandamus *will not be granted where there is another remedy available.*

(2) *That a writ of* mandamus *will not be granted where the application is belated.*

GOONESINGHE *vs.* DE MEL (MAYOR, COLOMBO MUNICIPAL COUNCIL) ... ... XXIX. 54

Urban Councils Ordinance No. 61 of 1939, sections 11 and 19.

The Assistant Government Agent having rejected the nomination paper of a candidate and a *Mandamus* having been granted, the Supreme Court issued order on the Assistant Government Agent to accept the nomination paper without giving any

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further directions to the Assistant Government Agent. The Assistant Government Agent carried out the order of the Court by accepting the nomination paper but refused to postpone the election the date of which had been duly fixed.

Held: (1) *That the Assistant Government Agent had no power to postpone the election.*

(2) *That where in an application for a Writ of* Mandamus *praying that an election be declared void, any party that may be affected by the order is not made party respondent, a* Mandamus *will not be granted.*

CARRON *vs.* G. A. WESTERN PROVINCE ... ... XXX. 19

Mandamus **is not issued on the ground that a duty has been done erroneously.**

DE ZOYSA *vs.* G. A. KANDY AND ANOTHER ... ... XXX. 66

Mandamus—**No other remedy open to petitioner who is legally entitled to office—Writ will be issued.**

MARCELIN PERERA *vs.* SOCKALINGAM CHETTIAR ... ... XXXIII. 1

Mandamus—**Validity of Election—Failure to make successful candidate party—Application at hearing to add—Should it be allowed.**

Held: (1) *That an application for a Writ of Certiorari or Mandamus for a declaration that an election is void cannot be maintained without making the successful candidate a party to the application.*

(2) *That an application at the hearing to add the successful candidate as a party should not be allowed.*

GOONETILEKE *vs.* GOVT. AGENT, GALLE ... ... XXXIII. 16

Mandamus—**Writ of—Employer and employee—Interdiction of employee—Application to compel reinstatement and payment of arrears—Is writ available.**

Held: *That relief by way of a writ of* mandamus *is not available to a party to a contract of service to compel the performance by the other party of obligations arising out of such contract.*

PERERA *vs.* COLOMBO MUNICIPAL COUNCIL AND ANOTHER XXXIV. 7

Mandamus—**Does not lie where a judge uses his discretion and rejects a plaint for being prolix.**

ORR *vs.* SANSONI ... XXXVI. 22

Mandamus **does not lie where there is no failure to perform a statutory duty.**

BUDDHARAKKITA THERO *vs.* THE PUBLIC TRUSTEE ... ... XXXVI. 68

Application for writ—Petitioner appointed Charity Commissioner of the Colombo Municipal Council by the Local Government Service Commission—Council preventing him from performing his duties—Council's power to create and abolish post—Power of Commission to appoint officer—Does mandamus **lie—Local Government Service Ordinance, No. 43 of 1945, sections 11 (c) and 15 (1)—Municipal Councils Ordinance, No. 29 of 1947, sections 175 and 176.**

The petitioner was appointed the Charity Commissioner of the Colombo Municipal Council by the Local Government Service Commission. The Mayor and the Secretary of the Council prevented him from performing his duties. No salary was paid since the date of appointment. The Council afterwards passed a resolution temporarily suspending the post of Charity Commissioner. The behaviour of the Council was intended to manifest a determined refusal to recognise in any way the petitioner's appointment. The Commission alone had the power of appointment and dismissal in respect of an office which the Council alone had the power to make and abolish. In these circumstances the petitioner applied to the Supreme Court for a writ of *mandamus* ordering the respondents to permit him to perform his duties without let or hindrance.

Held: (1) *That the Council and those entrusted with the administration of its business are under a statutory obligation to recognise and implement appointments made by the Local Government Service Commission.*

(2) *That the right which the petitioner seeks to enforce is a legal right of a public character.*

(3) *That the petitioner is entitled to a writ of* mandamus, *which is the only remedy available to enforce his right to perform the duties of Charity Commissioner.*

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(4) *That the resolution temporarily suppressing the post of Charity Commissioner does not have the same effect as the abolition of the post within the meaning of section* 41 (*e*) *of the Municipal Councils Ordinance.*

(5) *That the appointemt of the petitoner is not affected by this resolution.*

WIJESINGHE *vs.* THE MAYOR AND ANOTHER COLOMBO MUNICIPAL COUNCIL ... ... XXXVIII. 40

No mandamus **lies to order Postmaster-General to hold an inquiry into charges made against a Postmaster.**

VALLIPURAM *vs.* POSTMASTER-GENERAL ... ... XXXIX. 1

Mandamus **on elections officer for failure to serve on member of Urban Council the statutory notice convening the first meeting of the Council.**

WIJEANATHAN *vs.* ELECTIONS OFFICER TRINCOMALEE DISTRICT *et al* XL. 7

Writ of—Appliction for butcher's licence —Refusal by local authority—Remedy available.

Where an applicant for a butcher's licence to a local authority is aggrieved by an order made by such authority, his remedy is to proceed under section 7 (4) of the Butchers' Ordinance, as amended by Ordinance No. 44 of 1947, and appeal against the order to the Minister in the manner set out in section 7B, and not by way of a writ of *Mandamus.*

DON CAROLIS *vs.* THE CHAIRMAN, URBAN COUNCIL, GAMPAHA ... XLI. 15

Election of Village Committee Chairman a nullity—Proper remedy is by way of Mandamus **and not** Quo Warranto.

SAMARAKOON *vs.* TIKIRI BANDA XLI. 53

Time prescribed by statute for performance of duty passed—Court in granting mandamus **has power to appoint a date for its performance.**

AMUGODAGE JAMIS *vs.* BALASINGHAM AND OTHERS ... ... XLIII. 83

Mandamus, Writ of—Export of coconut oil—Procedure to be adopted in respect of shipments—Requests for information in regard to such procedure ignored—Insistence by authorities upon procedure subsequently admitted to be incorrect—Refusal to perform public duty—What constituties such refusal—Payment of costs—Principles which apply—Customs Ordinance, sections 59, 103, and rules passed under section 103.

The petitioner company, which was an exporter of coconut oil and other commodities, applied for a *mandate* in the nature of a writ of *mandamus*, directing the respondent, the Principal Collector of Customs *inter alia* "to permit the company to export the said consignment of 200 tons of coconut oil by the S.S. 'President Buchanan' and to pass the same for shipment on the company making payment of the correct duty and other dues in respect of the same and on its complying with the formalities imposed on it by law." A rule *nisi* was issued by the Supreme Court on 20th February, 1951. Thereafter, and before the application could be finally disposed of, the respondent gave the petitioner an undertaking that it would not be called upon to enter a bill of lading, any quantity of oil in excess of the true quantity. The petitioner was satisfied with this undertaking, and when the application came up for disposal on 18th April, 1951, the petitioner stated that it was no longer necessary to ask that the rule be made absolute, Each party, however, insisted upon an order for costs in his favour, and this outstanding issue came up for adjudication.

Held: (1) *That the petitioner's right to an order for costs against the respondent depended on whether, at the time when the proceedings were instituted, good grounds existed to justify the application for a writ.*

(2) *That, despite a statutory direction to the contrary, the insistence by the respondent upon the bill of entry being incorrectly filled up, in such a manner that, upon the face of the document, the petitioner would be liable to pay a heavier export duty than was justly due, would amount to a refusal to perform a public duty, and that a* mandamus would clearly lie.

Held futher: *That there is a refusal to perform a duty, where it is shown that a party witholds compliance and distinctly determines not to do what is required.*

Per GRATIAEN, J.—"I trust that it will never be suggested that public officers need not observe the same high standard

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which is expected from ordinary citizens with regard to the duty to attend promptly to official or business correspondence."

WIJESEKERA AND CO., LTD. *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS, COLOMBO ... ... XLV. 81

Commencement of proceedings under Chapter 18 of Criminal Procedure Code—Assumption of summary jurisdiction by Magistrate—Pleas of accused recorded—Attorney-General's order to Magistrate to discontinue summary proceedings and to take non-summary proceedings—Validity of.

ATTORNEY-GENERAL *vs.* SRISKANDARAJAH ... ... XLVII. 1

Mandamus—**Irregular election—Person questioning the election taking part and concurring therein.**

THASSIM *vs.* WIJEKULASURIYA AND OTHERS ... ... XLVII. 5

Writ of Mandamus—**Order for security of costs of respondent—Discretionary power—Mere poverty of petitioner not sufficient.**

In an application for a writ of *mandamus* the Court would not exercise its power, which is purely discretionary, of ordering the petitioner to furnish security for the costs of the respondent merely on the grounds of the petitioner's poverty.

JAYASINGHE *vs.* DAYARATNE XLVIII. 80

Mandamus, **writ of—Application by unsuccessful candidate at election—Relief sought against presiding and counting officer—Should the elections officer be made a party.**

Held: *That an Election Officer is not a necessary party to any proceedings in which relief is sought against the Returning Officer or the Counting Officer.*

RAJAH *vs.* RATNADURAI ... XLVIII. 82

MARKET

Market—Keeping unlicensed private market—Market owner's default in obtaining licence due to delay of local authority in arriving at a decision—Propriety of instituting prosecution.

REV. FR. COLLEREE *vs.* BENEDICT XXXI. 27

MARKET VALUE

Of land acquired under Land Acquisition Ordinance.

See under **Land Acquisition Ordinance.**

Land Acquisition Act.

MARRIAGE

Nullity of marriage.

See under **Husband and wife**

Muslim Marriage—*See under* **Muslim Law**

Marriage—Cohabitation, habit and repute—Is such marriage valid in the the absence of evidence of a marriage ceremony according to custom?

Held: *That marriage by cohabitation habit and repute cannot be established in Ceylon in the absence of some evidence of a customary marriage ceremony.*

PUNCHINONA *vs.* CHARLES APPUHAMY I. 3

Marriage—Action for breach of promise—What should the writing relied on contain in order to succeed in an action?

The plaintiff sued the defendant for breach of promise of marriage. He relied on a letter which *inter alia* contained the following passages:—

"If ever I marry anybody, I assure you that it will be none other than yourself. If by any mischance I fail to do so, I will remain single as I am. If I can join an order of nuns I will do so."

"Had my beloved father been alive I would certainly give a definite word at once without any fear or doubt.....I remind you that I who am in fear of knowing that it is very hard to escape from my mother, did not give a definite word. If God likes this matter between we two, I hope, that will be a divine help to change the minds of the opponents. What our duty now is to pray only to God for the success of our matter."

Held: *That the letter does not contain either a promise to marry or any admission of an earlier promise.*

PHILLIP *vs.* REGINA WETTASINGHE ... ... VII. 33

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Marriage of divorcee with co-respondent several months after decree nisi but before decree absolute —Validity of marriage.

SATHIYANATHAN *vs.* SATHIYANATHAM ... ... IX. 135

Breach of promise of marriage—Action for damages—Marriage Registration Ordinance section 19.

Held: *That no action for the recovery of damages for breach of promise of marriage lies, unless the writing which is relied on contains an express promise of marriage.*

KARUNAWATHIE *vs.* WIMALASURIYA XX. 126

Breach of promise of marriage—Damages —Factors to be considered in assessing the extent of damages to be awarded.

Held: *That in awarding damages for a breach of promise of marriage, the duration of the engagement and the resulting publicity, the conduct of the defendant. the feelings between the parties and the financial loss involved are factors to be taken into consideration.*

MASLIN *vs.* DE SILVA ... XXIII. 107

Marriage—Customary marriage—Burden of proof where validity impeached.

PONNAMMAH *vs.* RAJAKULASINGHAM ... ... XXXVII. 67

Marriage according to Hindu rites—Is tying of thali essential to validity.

PONNAMMAH *vs.* RAJAKULASINGHAM ... ... XXXVII. 67

Marriage—Child born during subsistence of valid marriage—Presumption of legitimacy.

PESONA *vs.* BABONCHI BAAS XXXVII. 97

MARRIAGE REGISTRATION ORDINANCE

No action for the recovery of damages for breach of promise of marriage lies unless the promise is in writing and is an express promise of marriage.

KARUNAWATHE *vs.* WIMALASURIYA XX. 126

Registration of marriage as "best evidence" thereof—Its meaning—Effect of non-production of entry in Register—Can evidence of eyewitnesses of marriage in lieu of production of entry in Register be led to prove marriage against a person charged with bigamy.

Where a person was charged with bigamy, the prosecution did not produce the entry in the Register as proof of that person's first marriage, but the first wife and the officiating priest testified to the marriage. It was contended on behalf of the accused person that such proof was inadmissible as the entry in the Register shall be the best evidence of the marriage according to section 38 (1) of the Marriage Registration Ordinance.

Held: (1) *That according to section* 38 (1) *of the Marriage Registration Ordinance, the expression "entry in the Register shall be the 'best evidence' thereof," means that the entry shall prevail over conflicting evidence, and in case of non-production of the entry, other evidence affording strict proof may be adduced.*

(2) *That in the circumstances, the oral evidence of the first wife and the officiating priest were admissible.*

THE KING *vs.* NONIS ... XXXV. 84

MARRIED WOMEN'S PROPERTY ORDINANCE

In the case of persons married before the Married Women's Property Ordinance No. 18 of 1923, the wife's movable property vests in the husband by virtue of § 19 of the Matrimonial Rights and Inheritance Ordinance No. 15 of 1876.

KARUNANAYAKE *vs.* KARUNANAYAKE ... ... IX. 109

In an application under section 26 of the Ordinance the burden of proof is on the husband to establish that through illness or otherwise he is unable to maintain himself.

PERERA *vs.* PERERA ... XXII. 69

Woman married before the Ordinance came into operation—Gift of immovable property acquired before the Ordinance without consent of husband in writing—Is such gift void—Matrimonial Rights and Inheritance Ordinance.

Held: *That a disposition made by a woman married before July 1st,* 1924, *without the written consent of her husband,*

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in respect of immovable property acquired before that date is void,

PERERA *vs.* PERERA ... XXXVIII. 49

Married woman inheriting undivided share of land in 1918 from her first husband—Defined lot allotted to her in partition decree in 1940 in lieu of such undivided interests—Sale of divided lot without second husband's consent in 1942—Is such sale valid.

Where in 1942 a married woman conveyed without her husband's consent a defined lot of land allotted to her in 1940 in a final decree for partition in lieu of an undivided share in a larger land which she inherited in 1918 from her first husband.

Held: *That the conveyance was valid as her rights under the partition decree in* 1940 *amounted to an accrual of title under section* 10 (1) *of the Married Women's Property Ordinance* (*Chap.* 46).

SEEDIN *vs.* THEDIYAS ... XLVI. 1

MASTER AND SERVANT

Assistant employee paid a monthly salary —Dismissal of employee—Payment by employer of a month's salary in lieu of notice.

Held: *That where the engagement of an employee is from month to month, salary being payable monthly, the employee is entitled to only a month's notice of termination of services, or a month's salary in lieu of notice.*

LA BROOY *vs.* THE WHARF LIGHTERAGE CO, LTD. ... ... I. 364

Liability of master under Police Ordinance for act of servant.

See under **Police Ordinance.**

Communication by Master to Trade Union Official of cause of servant's dismissal—Master's liability for defamatory statements in such communication.

VAITILINGAM *vs.* VOLKART BROTHERS ... ... XIV. 73

Criminal liability of master for acts of his servant.

AKBAR *vs.* LEORIS APPUHAMY XIV. 95

Employer providing free housing accommodation for estate labourer—Relationship of landlord and tenant does not arise.

FORBES *vs.* RENGASAMY ... XVII. 45

Criminal liability of master for act of servant—When may a person be said to "permit" an offence.

Held: *That before a person can be convicted of "permitting" an offence, it must be shown that, either the accused himself or someone to whom he had delegated control, either knew, or ought to have known, or had reasonable ground for suspecting that an offence was being or would be committed.*

PACKIR SAIBU (CHAIRMAN, U. D. C. BADULLA) *vs.* NAYAR ... XIX. 25

Master and servant—Relationship of between two persons—No bar to their being charged for conspiracy.

REX *vs.* ANDREE AND TWO OTHERS ... ... XXI. 51

Damages arising from motor collision—Offending vehicle at the time driven by a person not in owner's employ—Liability of owner—Cross-objection to appeal—Scope of section 772 of the Civil Procedure Code.

Held: (1) *That under section* 772 *of the Civil Procedure Code, an objection may be taken by a respondent to anything appealable in the decree out of which the appeal arises.*

(2) *That where a person sustained injuries as a result of a motor collision while the offending vehicle was being driven by a driver not employed by its owner, the latter was not liable in damages in the absence of proof of ratification on his part.*

WIJERATNE *vs.* PILLAI ... XXII. 20

The plaintiff, an uncertificated teacher in a vernacular school, sued the manager for wrongful dismissal as his services had been discontinued. It was proved that the plaintiff's services were terminated on instructions from the Director of Education as the teacher in whose place the plaintiff had been employed had returned after undergoing a course of training.

(1) *The plea of carrying out the instructions of the Director of Education cannot prevail against the plaintiff's claim for damages for breach of contract.*

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(2) *The plaintiff is not entitled to more than two months' salary by way of damages.*

THURAISAMY *vs.* THAIALPAGAR XXV. 41

Food Control Regulations—Rice found in a hotel is in the control of the manager or proprietor of the hotel, not in that of a waiter who serves a customer.

WIJESINGHE *vs.* DAVOOD AND ANOTHER ... ... XXVI. 87

Liability of master for acts of servant under Regulation 5 of the Defence (Control of Prices) (Supplementary Provisions) Regulations.

ROCHE AND ANOTHER *vs.* IYER XXVII. 38

Mandamus—**to compel performance of obligations arising out of contract.**

PERERA *vs.* COLOMBO MUNICIPAL COUNCIL AND ANOTHER XXXIV. 7

Dismissal of servant—Does certiorari **lie.**

SURIYAWANSA *vs.* LOCAL GOVERNMENT SERVICE COMMISSION ... XXXV. 36

Master's liability for act of servant.

MUTHUSAMY *vs.* DAVID ... XXXVIII. 81

Possession of adulterated milk by authorised servant of registered Dairyman—Does it amount to possession by master—Liability of master—Rules 5 and 8 of Chapter XIV of By-Laws of Municipal Council.

Held: (1) *That milk found in the possession of a registered dairyman's authorised servant while engaged on his master's business should be regarded as having been in the possession of his master for the purposes of Rule 5 of Chapter XIV of the By-Laws of the Municipal Council.*

(2) *That Rule 5 does not require proof of sale, exposure of sale or of hawking in cases where adulterated milk is found in the possession of a registered Dairyman or his servant. It only arises in the case of milk found in the legal possession of some person other than a registered Dairyman.*

JAYASENA *vs.* DABRERA (SANITARY INSPECTOR) ... ... XXXIX. 111

Watcher given free room by employer—Watcher's employment terminated and action for ejectment filed—Value of action.

PONNIAH *vs.* SELLAN ... XLIX. 92

Plaintiff generally engaged by defendant company on a fee for medical examinations of clients—Plaintiff engaged by an employee of the company to examine prospective proponents for insurance—Injury to plaintiff while travelling with employee in company's car-Car driven at the time of accident by person not in the employ of the company- Liability of company—Damages.

The plaintiff, a medical practitioner, had been engaged from time to time to examine persons proposing to take out policies of life insurance with the defendant company, and was paid a fee of Rs. 15/- by the company in each case. An employee of the company, who was a canvasser, engaged the services of the plaintiff to examine prospective clients, and while travelling together with the employee for this purpose in a car loaned to the employee by the company for the purpose of canvassing, the plaintiff was injured as a result of negligent driving by another person, who was not a servant of the company. The car at the time of the accident was driven with the approval of the employee.

In an action for damages by the plaintiff, the company denied liability alleging that the car belonged not to the company but to the employee who was in control and possession of it at the relevant time, and that the driver who caused the accident was under the employ of the employee, and that the car had in fact been lent by the employee to the plaintiff for his use.

Held: *That the Company was liable in damages as:*

(*a*) *the employee was in the circumstances of this case a "servant" of the company.*

(*b*) *the plaintiff was brought into a contractual relationship with the company when he was engaged by the employee to examine prospective clients for the company.*

(*c*) *that the accident occurred while the employee was engaged on the company's business.*

DR. T. H. I. DE SILVA *vs.* TRUST CO. LTD. ... ... L. 28

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MATRIMONIAL RIGHTS AND INHERITANCE JAFFNA.

See under **Jaffna Matrimonial Rights and Inheritance Ordinance.**

MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE

Meaning of expression "uncles and aunts" —Does it include "uncles and aunts" of the half blood.

Held: *That the expression "uncles and aunts" includes "uncles and aunts" of the half blood.*

VANDERSTRAATEN *vs.* EATON V. 11

Persons married before Married Women's Property Ordinance, No. 18 of 1923—Vesting of wife's movable property in the husband.

KARUNANAYAKE *vs.* KARUNANAYAKE ... ... IX. 109

Inheritance—Death of person of illegitimate birth intestate—Who may inherit such person's property in case such person leaves no surviving mother.

Held: *That in the circumstances, the husband of the deceased was entitled to succeed to the exclusion of all others.*

APPUHAMY *vs.* PERERA AND OTHERS ... ... XII. 73

Hotch-pot or collation—Scope of expression "occasion of their marriage" and "to advance or establish them in life."

Held: (1) *That for a gift to fall into the class of gifts intended to advance a child in life it must be reasonably clear from all the circumstances that when the parent made the gift he had in contemplation the fact that the child would inherit a certain share of his estate on his death, and that in anticipation of that event decided to draw on the ultimate share in order, presently, to advance or establish the child in life.*

(2) *That the phrase "on the occasion of marriage" is co-extensive with the connotation of the Latin phrase employed by the Roman-Dutch Text writers—*"propter nuptias"—*which would include a gift in contemplation of marriage.*

(3) *That the liability to collation of a gift in contemplation of marriage remains whether the marriage takes place or not.*

(4) *That a gift made on the occasion of marriage is liable to collation unless it can be proved that the deceased parent, expressly or impliedly, released the property from collation.*

(5) *That once it is shown that the impending marriage was the occasion for the gift it is for the donee to show that the donor expressly or impliedly released the gift from collation.*

(6) *Failure to sue for a recovery of the gift is by itself not a sufficient indication of a wish to exempt.*

KALIAMMA AND ANOTHER *vs.* SELLASAMY ... ... XXI. 6

Meaning of the phrase"on the occasion of their marriage"—Evidence of circumstances not mentioned in deed—On whom lies burden of proving release from collation.

Held: (1) *That the phrase "on the occasion of their marriage" in section* 35 *of the Matrimonial Rights and Inheritance Ordinance does not mean on the happening of the marriage. If the marriage or, contemplated marriage, was a factor inducing the gift, then the gift is a gift made on the occasion of the marriage, and it is irrelevant whether the marriage takes place or not.*

(2) *Once it is accepted that a gift was made on the occasion of the marriage the burden of proving that the property was released from collation is on the person who asserts it.*

(3) *Although a deed of gift does not mention the fact that the gift is made in contemplation of the marriage of the donee, evidence can be led as to the circumstances in which the deed was executed and the state of the donor's knowledge at that date.*

SELLASAMY *vs.* KALIAMMA AND OTHERS ... ... XXIX. 65

Disposition by woman married before July 1, 1924 without husband's consent—Validity.

PERERA *vs.* PERERA ... XXXVIII. 49

Collation—Gift by father to son on the occasion of son's marriage—Mortgage by son —Sale in execution of mortgage—Purchase

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by plaintiff—Death of father—Administration of his estate—Order in administration proceedings that the value of gifted property was Rs. 6,000 and it must be brought into collation—Does this order amount to a declaration of title in favour of estate—Has S the option to bring the property or paying its value—Matrimonial Rights and Inheritance Ordinance (Cap. 47) section 36—Was Roman Dutch Law superseded by this enactment.

P gifted a property in 1927 to his son S who mortgaged it in 1944. In execution of the mortgage decree the property was sold and purchased by the plaintiff who obtained Fiscal's conveyance in 1950 and sued the defendant for declaration of title and ejectment.

P died in 1936 and in proceedings relating to the administration of his estate it was decided by the District Court, Kandy, in 1941 (later upheld by the Supreme Court and the Privy Council) that this property had been gifted to S on the occasion of his marriage and that its value was Rs. 6,000 and that it must be brought into collation.

The defendant, the administrator of P's estate, claims that the order of Court was in effect a declaration of title in favour of the estate and that S was divested of his title thereby and the defendant as administrator was in lawful possession.

The District Judge accepted this view and dismissed plaintiff's action.

Held: (1) *That the decision that the property must be brought into collation did not have the effect either of declaring that P's estate was entitled to it or of divesting S of his title under the deed of gift.*

(2) *That section 36 of the Matrimonial Rights and Inheritance Ordinance (Cap. 47) did not supersede the Roman-Dutch Law which permits an heir to discharge a liability to collation by surrendering the property gifted or paying its true value at his option.*

JAINUDEEN *vs.* MURUGIAH XLVII. 81

MEDICAL ORDINANCE

No. 26 of 1927—Ordinance No. 9 of 1933—Dentists not qualified to be registered—Use of title after passing of new Ordinance prohibiting its use.

Held: *That dentists not possessing the qualifications prescribed by Ordiance No. 9 of 1933 are not entitled to use the title of "dental surgeon" after the Ordinance became law even though they were entitled to use the title before the passing of the Ordinance.*

SAIBO (SUB-INSPECTOR OF POLICE) *vs.* WAMBEEK ... ... IV. 16

Medical Ordinance No. 26 of 1927 section 41 (b)—Burden of proof.

Held: *That, in a prosecution for a breach of section 41 (b) of the Medical Ordinance, it is for the accused to prove that he falls within the exceptions to the section.*

PERKINS (INSPECTOR OF POLICE) *vs.* DEVADASAN ... ... X. 141

Section 39—Person not being a medical practitioner, practising medicine for gain—Ingredients necessary to be proved.

A pharmacist, employed by a registered medical practitioner on a fixed salary diagnosed a patients' ailments in the doctor's absence and gave the patient medicines selected by him out of prescriptions left in his care by the doctor. The fee levied from the patient was paid to the doctor.

Held: (1) *That habituality need not be established and that proof of one instance of practising medicine was sufficient.*

(2) *That the pharmacist had "practised medicine."*

(3) *That, in the circumstances, he had practised medicine "for gain."*

PETER FERNANDO *vs.* FLAMER CALDERA (INSPECTOR OF POLICE) ... XL. 110

MENS REA

Not an essential element in a limited class of offences.

PERUMAL *vs.* ARUMUGAM ... XV. 55

Mens rea **is not an ingredient in the offence created by Defence Miscellaneous Regulation 20A—Publication of article likely to cause alarm and despondency.**

THE ATTORNEY-GENERAL *vs.* GUNARATNE ANOTHER ... ... XXIV. 89

Mens Rea—**Has doctrine a place in the Criminal Law of Ceylon.**

MUTHUSAMY *vs.* DAVID ... XXXVIII. 81

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Is mens rea necessary to constitute offence under section 59 (1) (c) of the Ceylon (Parliamentary Elections) Order in Council, 1946.

ALUVIHARE *vs.* NANAYAKKARA ... ... XXXVIII. 101

MERCHANDISE MARKS

Ordinance No. 13 of 1888—Test of whether a mark is calculated to deceive.

Held: *That if a trade mark is so like another that normally it, by reason of its resemblance to that other, would be likely to deceive people then the making of it is a forgery quite independently of the knowledge or intent of the person making it.*

SAHIB *vs.* MUTHALIP ... ... II. 17

Ordinance No. 13 of 1888—Section 3 (1) and 3 (2).

Held: *That the practical rule to be applied in considering offences against sub-sections* 1 (*b*) *and* (2) *of section* 3 *of Ordinance No.* 13 *of* 1888 *is to contrast the devices and consider if a purchaser, with his recollection of the devices, on the goods he is seeking to buy, (that is as seen and remembered in actual use) would be likely to be deceived.*

THIAGARAJAH *vs.* MAJEED ... IV. 41

Ordinance No. 13 of 1838—Section 3 (e).

Held: *That for the purposes of a prosecution under section* 3 (*e*) *of the Merchandise Marks Ordinance it is only necessary to prove disposal or possession.*

MUTUKUMARASAMY *vs.* CADER IV. 50

Ordinance No. 13 of 1888—Sections 3 and 4—'Panchauda'—Registration of trade mark for silver medals—Symbols commonly used on a charm—Does such registration exclude the right of any other person to produce medals containing the same symbols—Is a trade mark registered in respect of silver medals capable of application to medals of metals other than silver.

Held: (1) *That where a device is registered as a trade mark in respect of silver medals, the registration cannot be taken as extending to the use of the same device on medals made of other metals.*

(2) *That the mere reproduction of the symbols commonly known as* 'Panchauda' *on any metal disc, does not constitute an infringement of a registered trade mark consisting of the same symbols.*

(3) *That where the public purchased an article merely for the sake of the design on it, and not because it indicated that a certain manufacturer made it, it was not a breach of trade mark to produce articles containing the same design.*

ABDUL AZEEZ *vs.* SEYAD MOHAMED BUHARY ... ... IX. 88

Infringement of Trade Mark—Passing off—Offending mark likely to mislead purchasers—Tests to be applied in deciding whether the mark is calculated to deceive.

Held: (1) *That, in the case of a colourable imitation of a trade mark, the test is whether or not the defendant's mark is calculated to cause his goods to be taken, by ordinary purchasers, for the goods of the plaintiff.*

(2) *That the marks must be compared as they are seen in ordinary use on the goods they are used for, provided the plaintiff's mark does not substantially differ from the mark on the register.*

(3) *The fact that the plaintiff has by injunction prevented the goods containing the infringing mark from reaching the market does not disentitle him from bringing an action for infringement of his trade mark.*

(4) *That where it is shown to the satisfaction of a court that goods, calculated to pass off, or to cause to be passed off as the goods of the proprietor of a trade mark, have been imported and are at the Customs premises, the court is entitled to grant an injuction prohibiting the sale of the goods.*

LEVER BROTHERS LTD. *vs.* RENGANATHAPILLAI ... ... IX. 103

Trade Mark—Use by trader of his own name on paper bags and wrappers in which goods were enclosed—Trader's name the same as the trade name of another trader.

Held: (1) *That the accused had not infringed the registered trade mark of the complainant's firm in respect of paper bags etc.*

(2) *That, to sustain a conviction for falsely applying a trade mark to goods the trade mark must be applied* qua *trade mark.*

(3) *That the word "for any purpose of trade or merchandise" in section*

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3 (2) *of the Merchandise Marks Ordinance No.* 13 *of* 1888 *apply to a case of trade or merchandise in the goods to which the offending mark is applied, and not to trading in goods in which these things are a necessary or useful adjunct.*

ABDUL CADER SAHIB AND CO. *vs.* MOWLANA ... ... X. 29

Trade marks—Colourable imitation—Intent to pass off defendant's goods as plaintiff's.

Held: *That, although the plaintiff may have no monopoly for the use of the individual features of his trade mark, if they are so combined by the defendant as to pass off the defendant's goods as the plaintiff's, then the plaintiff is entitled to an injunction to restrain the defendant from passing off his goods as the plaintiff's.*

LITTLE'S ORIENTAL BALM AND PHARMACEUTICALS LTD. *vs.* USSEN SAIBO ... ... XIV. 152

Trade mark—Application for registration of—Objections—Refusal by Registrar on ground not set out in objections filed—Appeal to District Court—Decision of Registrar upheld—Can the District Court examine grounds of opposition not taken in the original objections—Discretion of Registrar—Section 12 (8) of the Trade Marks Ordinance (Chapter 121).

Held: (1) *That it is within the discretion of the Registrar of Trade Marks to refuse registration of a trade mark on a ground not set out in the notice of objections if on the material placed before him he is of opinion that such ground could properly have been taken by those opposing the application.*

(2) *That in the event of an appeal to the District Court the judge of that court can examine only the grounds of opposition originally taken by the opponents unless prior leave has been obtained to argue the appeal on a fresh ground.*

ABDUL CAFFOOR AND OTHERS *vs.* AHAMED AND ANOTHER ... XXIII. 97

An action arising out of an alleged infringement of rights under a trade mark is movable property, within the meaning of regulation 7 (1) of the Defence (Enemy Property) Regulations, 1939.

BOGTSTRA *vs.* THE CUSTODIAN OF ENEMY PROPERTY ... XXVI. 5

Infringement—Passing off—Anterior user—Honest concurrent user—Trade Marks Ordinance, sections 9, 19, 38 and 40.

The plaintiff, a manufacturer of beedies, was the proprietor of certain trade-marks registered in respect of beedi. He alleged that the defendants had infringed his trade-marks and passed off their goods as his and asked for an injunction to restrain such infringement and passing off. The defendants denied infringement and passing off and pleaded anterior user and honest concurrent user.

As there was no evidence of actual deception, the issue of infringement turned upon a comparison of the plaintiff's trade-marks with those used by the defendants. The points of similarity between these was very marked. Evidence was led by both parties on the issues relating to anterior user and honest concurrent user. On the issue relating to passing off, there was no evidence that any person who asked for beedies by the plaintiffs' trade names had been given the defendants' beedies.

Held: (1) *That the defendant's marks closely resembled the plaintiff's registered trade-marks, were calculated to lead to confusion and deception and that the plaintiff was entitled to an injunction to restrain infringement of his trade-marks.*

(2) *On a review of the whole of the evidence, that the defendants had not discharged the burden resting on them of proving anterior user and honest concurrent user.*

(3) *That the evidence fell far short of showing that the description under which the plaintiff's beedies were asked for and sold had come to be regarded in Ceylon as denoting exclusively the beedies of the plaintiff, and that, therefore, the plaintiff was not entitled to an injunction to restrain passing off.*

V. S. SUBBIAH NADAR *vs.* E. P. KUMARAVAL NADAR ... ... XXXII. 32

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MERGER

Merger does not settle a debt except in the case when a debtor and creditor become united in one person both as regard the debt and its security.

MUTHURAMAN CHETTIAR AND ANOTHER *vs.* KUMARAPPA CHETTIAR AND ANOTHER ... ... XXV. 78

On the purchase by the mortgagee of the mortgaged land the mortgage is merged in the ownership. The question of revival of a mortgage can only arise in a case in which for some reason a valid merger does not take place.

VELUPILLAI *vs.* KANDIAH ... XXVII. 89

Promissory note—Mortgage bond subsequently entered into for payment of money including amount borrowed on note—Is there a merger.

MISSO *vs.* MOHAMEDALLY AND ANOTHER ... ...L. 74

MILK

Adulteration of milk.

See under BYLAW.

By-laws—Municipal Council—Meaning of exposing milk for sale.

Held: *That a person, who conveys milk on behalf of his employer and delivers it to another for sale, does not expose such milk for sale within the meaning of Rule* 7, *Chapter* 14 *of the Municipal Council by-laws.*

PERERA *vs.* JUAN APPU ... XXVII. 80

Milk—Possession of adulterated milk by authorised servant of registered dairyman—Does it amount to possession by master—Liability of master.

JAYASENA *vs.* DABRERA ... XXXIX. 111

MINIMUM WAGES

See under **WAGES BOARDS.**

MINOR

Who should take steps to avoid minor's contract.

Held: *That steps to avoid a minor's deed should be taken by the minor himself and that an action to which the minor is not a party is not* res judicata *as against him.*

PEIRIS *vs.* SINGHO APPUHAMY ... II. 419

A person who obtains an advantage for himself by concealing the fact that a minor is the beneficial owner of any right must be deemed to be constructive trustee for the minor.

ABEYSUNDERA *vs.* THE CEYLON EXPORTS LTD. AND ANOTHER ... ... VI. 69

Can a minor be arrested for debt?—Roman Dutch Law relating to immunity of minors from arrest

Held: *That under the law of Ceylon a minor is not liable to be arrested for debt.*

N. H. L. GIRIGORIS *vs.* R. P. DE ZILVA ... ... VII. 83

Cheque issued by minor—Minor trading in partnership with another with his father's consent—Cheque drawn on partnership account in the bank—Payment of cheque stopped after its issue—Cheque drawn in favour of minor's other partner—Cheque endorsed by payee to plaintiff—Can minor plead minority.

Held: *The first defendant was liable to pay the amount due on the cheque, and that, in the circumstances, he was not entitled to plead minority.*

SATHAPPA CHETTIAR *vs.* THAHA AND ANOTHER ... ... IX. 45

Bond executed by Muslim minor with his father's concurrence—Representation to notary that the minor was of full age—Goods supplied to minor for the purposes of his business—Can minor avoid payment for such goods on the ground of minority—Should the case be decided according to principles of Roman-Dutch Law or Muslim Law.

Held: (1) *That, where a Muslim minor enters into a contract with the consent of his natural guardian, the contract is valid according to Muslim Law.*

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(2) *That, where a minor by falsely representing himself to be of full age deceives a person to contract with him, the minor is bound by his contract.*

SHORTER AND CO. *vs.* MOHAMED IX. 46

Lease of minor's property by curator without sanction of Court—Is such lease null and void—Change of curator—Agreement with lessee for monthly tenancy before expiry of lease—Subsequent notice to quit forthwith by curator—Action by minor for ejectment and damages against lessee—Judgment for plaintiff—Is such tenant entitled to reasonable notice.

Held: (1) *That the relationship created was one of monthly tenancy.*

(2) *That the defendant was entitled to reasonable notice before the tenancy could be terminated.*

MOHAMED ANVAR *vs.* ARUMUGAM CHETTIAR ... ... XII. 163

Minor—Action on covenant to warrant and defend title—How should minor be noticed—Extent of liability of minor heirs of deceased vendor for breach of covenant

RAMALINGAM CHETTIAR *vs.* MOHAMED ADJOOWAD AND ANOTHER ... XV. 124

Assets of a deceased person in a minor's hands can be recovered by an action against him through a guardian-ad-litem.

RAMALINGAMPILLAI *vs.* ADJOOWAD AND ANOTHER ... ... XXIII. 131

Where at the time when the cause of action arose the party entitled to sue is a minor, the existence of an administrator would not affect the right of the minor to take advantage of the provisions of section 13 of the Prescription Ordinance except where prescription had already begun to run.

UDUMANACHY AND OTHERS *vs.* MEERALEVVE ... ... XXIV. 5

Where a minor-plaintiff who attains majority during the pendency of an action is allowed by court to proceed with the action in his own name, any irregularity in the appointment of his next friend must be taken to have been cured.

An irregularity in procedure in the appointment of a next friend is not necessarily fatal to the proceedings in an action by a minor.

WANIGASEKERA *et al vs.* LOUISZ *et al* ... ... XXV. 33

The fact that the party entitled to rights under a fraudulent deed happens to be a minor and does not assert his rights cannot affect the question of time limited for bringing the action.

RAJAH *vs.* NADARAJAH AND ANOTHER ... ... XXV. 97

Minor—unrepresented in action against him—Decree entered against unrepresented minor—Proceedings to have decree set aside after attaining majority.

SOMASUNDARAM *vs.* UKKU AND OTHERS ... ... XXVI. 47

Marriage does not confer majority on a Kandyan minor.

A gift by a Kandyan minor is ipso jure **void.**

A minor who has effected a conveyance which is *ipso jure* void need take no legal action to have it set aside unless he has lost possession of the property conveyed. In such a case the remedy is by *actio rei vindicatio.*

HATURUSINGHE *vs.* UKKU AMMA ... ... XXVIII. 107

Minor—Transfer of land by—Circumstances in which transfer will be set aside.

SIMAN NAIDE *vs.* JANE NONA XXX. 84

Minor—Guardian appointed by father by deed—Should court interfere with such appointment.

IN *Re* LESLIE MARK ANTHONY XXXIV. 71

Muslim minor—Promissory note given by—Is the maker, though married, liable on the note.

KALANDER LEVVE *vs.* PACKERTHAMBY AVVA UMMA ... ... XXXV. 98

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Minority of a partner is no bar to the existence of a partnership.

EBRAHIMJEE *vs.* THE COMMISSIONER OF INCOME TAX ... ... XL. 79

Contract of sale of land by minors jointly with adults—Repudiation of contract by minors—Benefit to minors—Effect of contract on the interests of the adults.

Two minors jointly with their parents sold some property. There is no evidence that the purchase money was utilised for the benefit of the minors. In an action by the purchaser for declaration of title, the minors sought to repudiate the contract of sale.

Held: (1) *That a contract of sale of property by minors may be repudiated by them, but only to the extent of their interests at the time of the contract.*

(2) *That such a contract will not be set aside if the party seeking to enforce it proves that it has been to the benefit of the minors;*

(3) *That the onus of proving that a minor did in fact benefit by a contract of sale is on the person seeking to enforce the contract;*

(4) *That the interests of the adults passed to the purchaser under the contract of sale.*

KANAPATHIPILLAI THANGARETNAM *vs.* ALIARLEVVE UMARLEVVE *et al* XLI. 15

Minor, property of—Sale sanctioned by Court after due inquiry—Conclusion of sale by execution of notarial conveyance—Subsequent offer of higher price by prospective purchaser—Can Court set aside such concluded sale.

Held: *That where the sale of a minor's property was sanctioned by Court after due and proper inquiry, the mere fact, that some prospective purchaser subsequently turns up, who is willing to pay a higher price for the property, cannot justify the Court in repudiating a concluded sale which has taken place on terms expressly sanctioned by the Court.*

MEERA LEBBE *vs.* PIYADASA *et al* XLVII. 82

Donation to minor—Deed accepted by maternal uncle—Validity of acceptance.

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM ... XLVIII. 1

Minor—Who are his natural guardians.

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM ... XLVIII. 1

What is the law applicable in Ceylon to the question who is the natural guardian of the property of a Muslim minor.

NOORUL MUHEETHA *vs.* SITTIE RAFEKA LEYANDEEN AND OTHERS XLVIII. 74

Minors not represented in Partition action—Final decree entered without such representation is invalid. Defendants in Partition action minors—Service of summons on them personally is ineffective.

SETUN BIBEE *et al vs.* ABUSALLY MARIKAR ... ... XLIX. 79

MINUTES ON PENSIONS

See under **PENSIONS**

MISDIRECTION

See under

COURT OF CRIMINAL APPEAL.

CRIMINAL PROCEDURE CODE § 355

MISJOINDER

See also under **CIVIL PROCEDURE CODE.**

Misjoinder of causes of action—There is no provision in the Civil Procedure Code for striking off the action.

MUTHUMENIKA *vs.* SUDU MENIKA AND OTHERS ... ... XXVI. 91

Misjoinder of parties and causes of action—Is court bound to dismiss action.

PODIHAMY AND ANOTHER *vs.* SIMON APPU AND TWO OTHERS ... XXXIII. 29

Misjoinder of defendants and causes of action—Action for declaration of title—Defendants independently in possession of separate defined blocks—Allegation of concerted action by defendants in plaint—Fundamental question of fact—Discretion of Court in permitting amendment in the case of such

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a misjoinder—Civil Procedure Code, Sections 14, 17 and 22.

The plaintiff in one action sued two sets of defendants for a declaration of title to five lots of land possessed by the defendants separately. In his plaint he alleged that the defendants were acting in concert to deprive him of the entire land comprised of the five lots, but was unable to substantiate in his evidence. The issue of misjoinder of defendants and causes of action was raised at the commencement of the trial, but the learned District Judge at the conclusion of the trial on all issues ruled against the defendants on the issue of misjoinder and also failed to discuss this point. The defendants appealed and at the conclusion of the argument in appeal, Counsel for the plaintiff respondent requested that the plaintiff be allowed to amend his pleadings and restrict his claim against one set of defendants.

Held: (1) *That the failure of the plaintiff to establish that the defendants were acting in concert, was fundamental to the recognition of his right to proceed against all the defendants in the same proceedings, and as such, there was a misjoinder of defendants and causes of action.*

(2) *The discretion of the Court must be judicially exercised, after consideration of all relevant circumstances, such as the conduct of the parties, and the belatedness of the application, and, therefore, the application of the plaintiff to amend his pleadings should not be allowed.*

J.M. Wismaloma *et al vs.* E.D. Alapatha ... ... XLV. 67

MISTAKE

Mistake in translation of document produced by parties—Detection of mistake after decision in appeal—Is restitutio in integrum available in such circumstances.

Mapalathan and Another *vs.* Elayavan ... ... XIV. 92

Court's power to give relief—Equitable principles

Girigoris Perera *vs.* Rosalin Perera ... ... XLVII. 65

MONEY

Payment of Money into court.

Velukangany *vs.* Kappen Chetty VII. 78

Money paid under Mistake of law.

N. Ramasamy Chettiar *vs.* Attorney-General ... ... VII. 95

Money—Payment of claim by defendant on order of court—Irregularity in appointment of legal representative of plaintiff—Can defendant be compelled to pay same claim a second time to the proper heirs.

Selonona Hamine *vs.* Perera ... XII. 144

Money paid to public officer in his official capacity—Action to recover—Must be against the Crown and not against the officer.

Fonseka *vs.* Leigh Clare ... XVII. 100

MONEY LENDING ORDINANCE

See also under **BILLS OF EXCHANGE**

PROMISSORY NOTES

The Money Lending Ordinance No. 2 of 1918—Sections 10 and 13—Promissory Note Omission to make an entry in the marginal—Dismissal of action—The money lender should be given an opportunity of showing cause against the omission—Benefit of the proviso to § 10.

Held: *That an action on a promissory note cannot be dismissed on the ground of failure to fill in the marginal correctly, in the absence of a special plea of the benefit of the Ordinance or even of an issue on the point, and without the plaintiff being given an opportunity to show cause why the action should not be dismissed.*

Sockalingam Chetty *vs.* Sithi Rookia Wife of Mohamood ... ... I. 64

The Money Lending Ordinance No. 2 of 1918—Section 10 Failure to state amount deducted as interest at time of loan—Inadvertance—When may appeal court grant relief in such a case.

Held: *That where the objection had not been taken by the defendant to an action on a promissory note that the note was bad in so far as the particulars required by* § 10 (i)

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(*b*) *of the Money Lending Ordinance No.* 2 *of* 1918 *had not been entered and the trial judge* ex mero motu *considered such objection the Court of appeal will consider the question whether the plaintiff should be granted the relief provided for in the proviso to the Section.*

KADIRESEN CHETTY *vs.* RAYEN AND ANOTHER ... ... I. 260

Does ignorance of the provisions of the Money Lender's Ordinance No. 2 of 1918 excuse a Money Lender's failure to keep books.

Held: (1) *That a person who lends money on the security of promissory notes and immovable property to all and sundry was a "money lender" within the meaning and intent of the Ordinance.*

(2) *That ignorance of the provisions of the Ordinance does not excuse a failure to keep books.*

DEWASURENDRA *vs.* DE SILVA ... II. 185

Bond to secure future advances—Advances made on fictitious promissory notes—Can the notes be produced in evidence in support of a claim on the bond.

Held: (1) *That promissory notes which do not comply with the provisions of Section* 10 *of the Money Lender's Ordinance No.* 2 *of* 1918 *cannot be produced in evidence in support of a loan or an action to recover the money lent on such note.*

(2) *That a bond to secure future advances made on the security of promissory notes which do not comply with Section* 10 *of the Money Lender's Ordinance cannot be enforced.*

SOCKALINGAM CHETTIAR *vs.* RAMANAYAKE ... ... II. 291

Fictitious Promissory note—Statement of capital sum borrowed false—

Held: (1) *That a fictitious note is unenforceable even though the fictitious entries are made by common consent.*

(2) *The relief under Section* 10 (2) *of the Money Lender's Ordinance No.*2 *of* 1918 *cannot be extended to a case where the fictitious entries in a note are deliberate.*

DHARMADASA *vs.* GUNEWARDENA ... II. 385

When may a money-lending transaction be reopened.

Held: *That Section* 2 (1) *of the Money Lender's Ordinance No.* 2 *of* 1918 *refers to a stage in the action before a decree has been obtained and that it does not give a court power to reopen a decree which it has made on a mortgage bond suit or on any other claim for moneylent.*

NEIYAPPA CHETTIYAR *vs.* SEYADO LEBBE *et. al.* ... ... II. 398

Section 10 (1)—Is a person accepts an imperfect note in ignorance of the provisions of the Ordinance entitled to relief under the proviso to Section 10.

Held: (1) *That a person who accepted a note that does not comply with the requirements of the Money Lending Ordinance No.* 2 *of* 1918 *in the belief that it was in proper form and in ignorance of the provisions of Section* 10 *of the Ordinance is entitled to relief under the proviso to Section* 10.

(2) *That a failure to fully comply with the provisions of Section* 10 *through ignorance of law and not with any intention to evade its provisions would entitle a person to the relief which the proviso to Section* 10 *permits a Court to grant.*

(3) *That the act which the law intended to penalise was the intentional evasion of the provisions of the section.*

(4) *That the word "inadvertence" in this contest should be given the widest possible meaning and it includes "acts done without deliberate election."*

FERNANDO *vs.* FERNANDO ... II. 433

Professional Money-lender—Test of.

Held: (1) *That even though a plaintiff admits in his evidence that he is a professional money lender it does not necessarily follow that he is one.*

(2) *That whether a person is a professional money lender or not is a matter to be gathered from the facts of each case.*

(3) *That a person who within a period of twenty years lent money on* 10 *or* 15 *bonds was not a professional money lender.*

APPUHAMY *vs.* FERNANDO ... II. 447

Money lending transaction— Promissory note given in satisfaction of money borrowed and money due on goods purchased—Is note

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fictitious—Compound interest—When may it be charged.

The defendant gave the plaintiff a promissory note for Rs. 20,000/- The sum included the capital sum previously lent plus interest thereon and money due on rice purchased by the defendant. To cover the previous loans the defendants had given two cheques, which were returned on the execution of the promissory note for Rs. 20,000/-

At the trial the defendant took the following objections.

(*a*) That the note was unenforceable as the capital sum actually borrowed did not appear on the face of the note as required by the provisions of section 10 of the Money Lending Ordinance No. 2 of 1918.

(*b*) That the note was void as the capital sum of Rs. 20,000/- appearing on the note included compound interest.

(*c*) That the note came within the ambit of section 13 of the Money Lending Ordinance as it was a fictitious note within the meaning of the expression in section 14. . At the trial it was admitted that the sum of Rs. 20,000/- included interest on the money lent previously. The trial Judge did not uphold the defendants objections but held that the plaintiff was not entitled to recover the full amount claimed on the note as compound interest was not in law recoverable. The defendant appealed.

Held: (1) *That compound interest may be lawfully charged in Ceylon where there is a definite contract to pay such interest.*

(2) *That a transaction, in which the promissor, in lieu of cheques already issued by him to the promisee, gives a promissory note for moneys already borrowed plus interest accumulated thereon, and for moneys due on account of goods sold and expenses incurred in connection with the transactions between the promissor and the promisee, does not cease to be a money lending transaction merely because the promisee does not at the time of execution of the note physically lend the money to the promissor.*

(3) *That a promissory note given in consideration of*

(*a*) *money lent to the promissor previously together with interest thereon.*

(*b*) *goods sold to the promissor*

(*c*) *travelling expenses incurred in connection with the transactions between the promissor and the promisee is not a "fictitious note" within the meaning of the expression in section 14 of the Money Lending Ordinance.*

ABEYDEERA *vs.* RAMANATHAN CHETTIAR ... ... VI. 143

Moneylending Ordinance, No. 2 of 1918—Sections 2, 8, 10, 13 and 14—Fictitious promissory notes taken as security for money lent—Can money lent on the security of unenforceable promissory notes be recovered? —Can fictitious promissory notes be admitted in evidence to prove the loans?—Scope of Section 2—When may the Court re-open a moneylending transaction and take an account?

Held: (1) *That the Court has power under Section 2 of Ordinance No. 2 of 1918 to reopen a money lending transaction and to take an account even though the promissory notes given as security for the loan are "fictitious" and therefore unenforceable.*

(2) *That a loan is recoverable though the promissory notes taken as security in respect of it are "fictitious."*

(3) *That promissory notes which are not enforceable by reason of Section 10 and by implication from Section 13 prohibited are not admissible in evidence to prove the the loan.*

M. A. L. M. S. SOCKALINGAM CHETTIAR AND ANOTHER *vs.* D. P. RAMANAYAKE AND ANOTHER ... ... VII 1

Characteristics of moneylender

RUTHIRA REDDIAR *vs.* SUBBA REDDIAR AND ANOTHER ... ... VII. 59

Money-lender—Business of money-lending —Sufficiency of evidence necessary to establish that a person is a money lender—Section 8 of No. 2 of 1918.

Where a plaintiff admitted that during a period of 12 years he had lent money to ten or fifteen persons, to some of them on promissory notes, to others on mortgage bonds, and also that he supplemented his income with the interest gained thereby.

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Held: *That these facts alone were not sufficient to prove that the plaintiff was a money-lender.*

T. B. DISSANAYAKE *vs.* HARAMANIS APPUHAMY ... ... VII. 136

Money Lending Ordinance—Fictitious promissory note—Circumstances in which relief under section 10 may be given.

Held: *That the note was fictitious only in respect of the sum of Rs.* 2/40 *and that the plaintiff was entitled to relief under section* 10 *as there was no evidence of intention to evade the provisons of the Money Lending Ordinance.*

NALLIAH *vs.* FERNANDO AND ANOTHER ... ... VIII. 111

Money Lending Ordinance No. 2 of 1918—Section 8—Person carrying on money lending business—Failure to keep books—Inadvertence—Meaning of—Does section 8 provide for relief against a total failure to keep books.

Held: (1) *That the evidence was sufficient to establish that the plaintiff carried on the business of money lending.*

(2) *That section* 8 *of the Money Lending Ordinance No.* 2 *of* 1918 *does not make provision for granting relief to a money lender who keeps no books of accounts whatever.*

(3) *That the proviso to section* 8 *of the Money Lending Ordinance is intended to give relief to a person who does keep books of accounts but who, on a particular occasion, through an oversight, omits to record therein the details of a particular loan.*

(4) *That the word "inadvertence" in the proviso to section* 8 *of the Money Lending Ordinance cannot be regarded as applying to a case of failure to observe the requirements of the Ordinance through ignorance.*

SINNAPILLAI *vs.* VEERAGATHTHY AND ANOTHER ... ...X. 5

Money Lending Ordinance (Chapter 67) section 8—Is the administrator of a deceased money lender who has not kept a regular account of each loan as required by section 8 of the Money Lending Ordinance barred by that section from enforcing a claim in respect of money lent by the deceased in an action commenced by the deceased money lender in his lifetime.

A deceased money lender had, in his lifetime commenced, an action against the defendant-respondent, and after his death his administrator had himself substituted as plaintiff. The deceased had not kept a regular account of each loan as required by section 8 (1) of the Money Lending Ordinance, and the District Judge dismissed the action.

Held: *That the objection applied only to the money lender himself and did not affect his administrator and that, therefore, the appellant was entitled to enforce his claim.*

DE SILVA *vs.* EDIRISURIYA ... XVIII. 11

Money-lending Ordinance § 10—A promissory note given on an account stated is enforceable.

MARIKAR *vs.* SUPRAMANIAM CHETTIAR ... ... XXVI. 17

Money Lending Ordinance sections 13 and 14—Taking of a fictitious note—Abetment—Penal Code section 102.

Held: (1) *Where a sum of Rs.* 650/- *was lent on the understanding that a promissory note for Rs.* 2,000/- *was to be given by the borrower and a note for Rs.* 2,000/- *was given in pursuance of the understanding, the promissory note was fictitious within the meaning of that expression in section* 13 *of the Money Lending Ordinance. The fact that the promissory note was actually given a few hours after the loan and at a different place does not affect the question.*

(2) *A proctor who arranges a loan for another on the understanding that a promissory note for a much larger sum than the amount actually lent would be given by the borrower, actually writes out the fictitious note, and takes an active and essential part in the transaction is guilty of abetting the offence of taking a fictitious note.*

SYLVA (I.P.) *vs.* AMARASINGHE XXVIII. 25

Money Lending Ordinance—"Harsh, unconscionable or substantially unfair" transaction—Finding of trial Judge.

Held: *That the question whether a money-lending transaction is "harsh, unconscionable or substantially unfair" is one of fact and*

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a finding by a trial court of such a fact will not be disturbed unless it is clearly wrong.

MAYAPPA CHETTIAR *vs.* SENEVIRATNE ... ... XXX. 80

Written promise to pay money—Enforceability—Consideration—Undue influence—Money Lending Ordinance, sections 2 and 6.

The plaintiff sued the defendant on a written promise to pay Rs. 2,800 in certain circumstances. The promise was made deliberately and was not "irrational or motiveless." Although an issue was raised no evidence of undue influence on the part of the plaintiff was led by the defendant.

Held: (1) *That there was* justa causa *for the promise and that it was, therefore, enforceable;*

(2) *That the agreement sued upon was within the provision of section 2 of the Money Lending Ordinance.*

(3) *That the transaction fell within section 6 of that Ordinance and that the burden was on the plaintiff to prove that the promise was not induced by undue influence.*

The Supreme Court accordingly re-opened the transaction and granted the defendant relief.

EDWARD *vs.* DE SILVA ... XXXI. 49

Money lender—Accepting promissory notes where amount due is left blank—Defence that notes were accepted by servant without knowledge of master—Mens rea**—Money Lending Ordinance (Cap. 67) Section 13—Liability of master for act of servant.**

Magistrate not pronouncing reasons in open Court—Is this a fatal irregularity—Criminal Procedure Code sections 190, 304, 306 and 425.

The accused, a money lender was charged under section 13 of the Money Lending Ordinance with having taken as security for loans, promissory notes in which the amount due was left blank. He pleaded that the notes were taken by his Kanakapulle that he himself did not take them, and that he was not present when they were taken. The Magistrate held that no *mens rea* was necessary and that the act of the Kanakapulle bound the accused. He convicted the accused and recorded the verdict and sentence and signed and pronounced them in open Court. The reasons were not pronounced, not dated nor signed in open Court, but merely filed of record.

Held: (1) *That the doctrine of* mens rea *as understood in English Criminal Law has no place in the Criminal Law of Ceylon.*

(2) *That under section 13 of the Money Lending Ordinance, the prohibition against taking promissory notes in blank is absolute, and that the accused must be held liable for a breach of the section committed by the servant who was entrusted with the carrying on of his master's business.*

(3) *That the failure to pronounce the reasons in open Court and to date and sign them did not, in the circumstances, vitiate the conviction.*

MUTHUSAMY *vs.* DAVID (S. I. POLICE, MATALE) ... ... XXXVIII. 81

Money Lending Ordinance, section 2 (1) and (2)—Can a borrower re-open a transaction already closed—Statute—Words reproduced from English Statute—Construction—How far English decisions of Court of Appeal should be followed by our Courts.

Held: (1) *That a borrower has the right to re-open a transaction under section 2, sub-sections* (1) *and* (2) *of the Money Lending Ordinance although the transaction had already been closed and no money is due.*

(2) *That it is the duty of Courts in Ceylon to follow the decisions of the English Court of appeal on the construction of words identical with those used in a Ceylon Ordinance.*

NADARAJAH CHETTIAR *vs.* T. W. MAHATMEE AND ANOTHER ... XLIII. 11

Promissory note—Moneys lent on various occasions—Aggregate amount stipulated in the note as amount borrowed—Note not enforceable—Section 10, Money Lending Ordinance (Chap. 67)—What is an account stated.

A promissory note which stipulates the aggregate of the moneys advanced from time to time as the capital sum borrowed is not enforceable, as it does not comply with section 10 of the Money Lending Ordinance. It is not an account stated.

JOHN RODGER *vs.* L. C. DE SILVA XLIX. 18

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MORTGAGE

Sale in execution of a Mortgage decree—Conditions of Sale—Extent to which a Court can grant relief in the event of a breach of a condition by the purchaser at the sale.

Held (1) *That a Court has power to grant relief in the case of a breach of a condition of sale prescribed in a Mortgage decree, in a case in which it would be manifestly inequitable to penalise the purchaser for a breach of a condition.*

(2) *The fact that the directions for the conduct and sale of a land in execution of a Mortgage decree are included in the decree itself does not make the provisions of* § 289 *of the Civil Procedure Code applicable to such directions as if they were a decree.*

ZAHAN *vs.* STEPHEN FERNANDO ... I. 170

Mortgage bond—Principal sum to be paid on demand—Payment of interest in advance—Does it prevent the Mortgagee suing on the bond within the period for which interest has been paid?

Held: *That a mortgagee to whom according to the bond the principal sum is payable on demand is not prevented from putting the bond in suit, till the effluxion of the period for which interest has been paid in advance.*

ROMEL FERNANDO *vs.* OLIVER FERNANDO ... ... I. 202

Payment of money due on the mortgage of a land by one of several co-debtors—Land released from burden of mortgage—Remedy of co-debtor who has satisfied the entire debt.

Held: *That the remedy of a co-debtor who pays off a mortgage debt over common property is against the other co-debtors. The land does not become burdened with a real charge in favour of him who has satisfied the entire debt.*

HARRIET DIAS AND ANOTHER *vs.* SILVA ... ... I. 214

Discharge of mortgage—Is it utilis impensa.

HARRIET DIAS AND ANOTHER *vs.* SILVA I. 214

A hypothecary action does not lie against a mortgagor who has parted with all his interest in the mortgaged property previous to the action.

ABRAHAM SINGHO *vs.* HARMANIS APPU AND ANOTHER ... ... I. 242

Mortgage decree ordering payment forthwith of the mortgage debt and all interest—Successful application to stay execution of decree—Civil Procedure Code §§ 194, 201, 343, and 344—Variation of mortgage decree—

Held: (1) *That* §§ 343 *and* 201 *of the Civil Procedure Code do not permit the variation of a decree once entered.*

(2) *That an instalment decree must be entered in the first instance and it cannot be entered as a variation of a decree once entered.*

(3) *That* § 194 *of the Civil Procedure Code specifically excludes all money due on mortgages of movable or immovable property from power given to the Court to enter instalment decrees.*

THE BANK OF CHETTINAD LTD. *vs.* PULMADAN CHETTY ... ... I. 255

Ordinance No. 8 of 1927—Mortgage of unsettled land—Prohibition of Mortgage in Ordinance—Liability of mortgagor to repay the money.

Held: *That where land coming within the scope of Ordinance No.* 8 *of* 1927 *was mortgaged the personal liability of the mortgagor to pay the money upon the contract was not affected although the mortgage is invalid inasmuch as such mortgage is prohibited by Ordinance No.* 8 *of* 1927.

RATRANHAMY AND ANOTHER *vs.* APPUHAMY ... ... I. 320

Mortgage—§ 194 of Civil Procedure Code does not apply to a decree for money due on a mortgage of immovable property.

PILLAI *vs.* THAMBY ... ... I. 379

Policy of Roman Dutch Law is against allowing mortgaged property to become the property of the creditor if the mortgage debt is not paid off within the specified time.

SAMINATHAN CHETTY *vs.* VANDER POORTEN ... ... II. 123

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Mortgagor's right to redeem mortgaged property—Same in Ceylon as in South Africa.

SAMINATHAN CHETTY *vs.* VANDER POORTEN ... ... II. 123

Rights of mortgagee of an undivided share to a land after partition.

MUDALIHAMY *vs.* APPUHAMY ... II. 400

Mortgage Action—Particulars regarding mode of sale not given in decree—Is sale invalid.

A mortgagee instituted an action on a mortgage bond and prayed for judgment against the mortgagor for the sum sued for with interest and costs; for an order that the property mortgaged is bound and executable and for an order that the defendants do pay to the plaintiff the said sum of Rs. 5,000/- interest and costs on some day to be named by the Court and in default of such payment "that the said property and premises declared specially bound and executable as aforesaid be sold by Francis F. Krishnapillai, Licensed Auctioneer or some other licensed Auctioneer named by the Court by Public Auction after such advertisement in the Government Gazette and at least in one of the local newspapers as the said auctioneer may consider sufficient upon the condition of sale annexed hereto and marked "B" and pleaded as part and parcel of this plaint or such other conditions of sale as may be prescribed by the Court the said auctioneer being directed and authorised to allow the plaintiff or anyone else on his behalf to bid for and purchase the said premises at such sale and to do so upon such special terms as the Court may impose and in the event of the plaintiff becoming the purchaser thereof to allow the plaintiff credit to the extent of his claim and costs." The plaintiff further prayed that the Secretary of the Court do execute the necessary conveyance in favour of the purchaser. The decree entered by court on August 12, 1927 stopped at the declaration that in default of payment the property mortgaged was bound and executable. After the decree the court allowed an application for the execution of the mortgage decree by the issue of a commission to Mr. F. Krishnapillai. Thereafter the 2nd defendant was substituted plaintiff in the mortgage action. He obtained leave to bid for and purchase the property to be sold under the commission to Mr. Krishnapillai. The sale took place and the Commissioner was authorized to execute a conveyance in favour of the purchaser.

It was contended that the Court has no authority in an action to realise a mortgage under section 201 of the Civil Procedure Code to give special directions for the execution of the decree, except in the decree, itself and that the terms under which the mortgagee is allowed to bid for and purchase the property must be embodied in the decree.

Held: *That the sale under the decree as entered in the mortgage action is not invalid.*

THE ASSISTANT GOVERNMENT AGENT *vs.* WIJEWARDENE AND ANOTHER V. 15

Mortgage of a share of land which is the subject of a Partition action—Is the mortgage bond void?—Can the debt be recovered?—If so within what time?—Prescription.

The defendant mortgaged on February 21, 1929 a certain share of a land which was, at the time the mortgage bond was executed, the subject of a partition action. Action was filed on the bond on March 5, 1935. The action was resisted on the following grounds:

(*a*) That the hypothecation while partition proceedings were pending was void.

(*b*) That the action was prescribed by section 7 of the Prescription Ordinance No. 22 of 1871.

Held: (1) *That in the case of a mortgage of a share of land which is the subject of a partition action only the hypothecation is void and not the instrument containing it.*

(2) *That although the hypothecation is void there still remains to the mortgagee an action on the promise to pay.*

(3) *That the action on the promise to pay can be brought within the period prescribed in section 6 of the Prescription Ordinance provided the instrument of mortgage is according to its substance and real characteristics "a bond conditioned for the payment of money."*

JOHN APPUHAMY *vs.* WILLIAM APPUHAMY ... ... VII. 56

Mortgage of immovables—Purchase of lands by mortgagee at execution sale for appraised value—Interest—Is mortgagee

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entitled to interest for the period between the sale and the confirmation of the sale.

Held: *That the plaintiff was entitled to interest up to date of confirmation of the sale.*

COOMARASAMY *vs.* FERNANDO ... VIII. 125

Mortgage bond executed in 1924—Bond undertaking to pay the money loaned to the mortgagee and after his life-time to his son—Death of mortgagee in 1930—Action by son in 1931.

TILLAINATHAN AND ANOTHER *vs.* NAGALINGAM ... ... VIII. 8

Mortgage of Thediatetam property—Mortgage action—Children of deceased mortgagor not made parties to the action—Is decree binding on them.

THAMBIAH *vs.* SANGARAJAH ... VIII. 145

Property devolving on heir of deceased—Transfer of such property by heir—Transfer not for purposes of administration—When may a mortgage creditor of the deceased seize such property in the hands of the transferee.

Held: *That, as the sale of the three properties to the plaintiff was not for the purposes of administration, the asignee-judgment-creditor was entitled to proceed against the other two properties in order to realize the balance due on the mortgage bond after the sale of the mortgaged property.*

RAMUPILLAI *vs.* SOMASUNDARAM IX. 1

Mortgage action against executor of last will of deceased mortgagor—Sale of mortgaged property in execution—Balance of mortgage debt remaining unsatisfied—Death of executor—Ex parte order appointing a person administrator of the deceased mortgagor's estate for the purpose of realizing the balance due on the mortgage—Motion for writ—Can District Court set aside order of substitution.

Held: (1) *That the order substituting the defendant as administrator in place of the deceased executrix of the mortgagor operated as* res judicata *and the District Court had no power to set it aside.*

(2) *That an application under section 87 of the Civil Procedure Code to set aside a decree absolute must be made within reasonable time after the decree, and must show that there were "reasonable grounds for the default upon which the decree was passed."*

MEEDENIYA *vs.* VANDER POORTEN IX. 10

Mortgage action—Decree—Sale of property mortgaged—Writ for delivery of possession—Resistance by wife of judgment-debtor claiming title on a deed of gift executed pending mortgage action—Complaint to court under section 325 of the Civil Procedure Code but out of time—Second application for writ of delivery of possession on the ground that party resisting was bound by the decree under section 6 (3) of the Mortgage Ordinance (Chapter 74)—Allowed—Refusal to vacate premises—Applicability of sections 287, 325 and 326 of the Civil Procedure Code (Chapter 86) and sections 6 (3) and 12 (1) of the Mortgage Ordinance (Chapter 74)—Is the transferee bound by the mortgage decree.

Held: (1) *That sections* 325 *and* 326 *of the Civil Procedure Code* (*Chapter* 86) *did not apply to the order made by the learned District Judge inasmuch as the decree entered did not order the delivery of possession or the removal of a party bound by the decree.*

(2) *That the orders to Fiscal directing him to deliver possession of the premises must be regarded as having been made under section* 12 (1) *of the Mortgage Ordinance* (*Chapter* 74) *and not under section* 287 *of the Civil Procedure Code* (*Chapter* 86).

(3) *The appellant was bound by the decree in the mortgage action because she had failed to register her address.*

ZEINADEEN *vs.* SAMSUDEEN AND ANOTHER ... ... XIV. 133

Effect of a sale under the Partition Ordinance on existing mortgages.

DE SILVA *vs.* NONA BABA AND OTHERS ... ... XV. 25

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

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

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

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

DEONIS APPU *vs.* GUNAWARDENE XVI. 29

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

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

HARAMANIS PERERA *vs.* CAROLIS PERERA AND ANOTHER ... ... XVII. 108

Mortgage—Right to possess hypothecated property and to receive rubber coupons allotted to land in lieu of interest—Does this constitute pactum antichresis—**Stipulation that the mortgage should not be paid off before a certain period of time—Is such stipulation valid.**

A mortgage bond contained the following clauses:

(*a*) that the mortgagee was "to possess the same (land hypothecated) in lieu of interest and also to take and receive the rubber coupons allotted to the said land in lieu of interest."

(*b*) "We the said obligors do hereby undertake not to redeem the said mortgage as long as the control last."

the words "the control" referred to the Rubber Control.

Held: *That the bond constituted a* pactum antichresis.

(2) *That the stipulation that the mortgage should not be paid off for a certain length of time is void.*

GABRIAL *vs.* CICILIA ADIKARAN XIX. 66

Payment by mortgagee of rates and taxes due in respect of mortgaged premises—When may mortgagee recover such rates and taxes along with the money due on the mortgage.

MOTHA *vs.* FERNANDO ... XXII. 108

Lis pendens—**Mortgage decree unregistered—Subsequent sale of mortgaged property in execution of a partition decree—Does registration of plaint in mortgage action protect mortgagee's rights as against the purchaser at the partition sale—Section 8 (proviso 1) and section 11 (proviso) Registration of Documents Ordinance (Chapter 101) —Section 12 Partition Ordinance (Chapter 56).**

Held: (1) *That where the plaint in a mortgage action has been registered the registration of the decree is unnecessary, and the purchaser at a subsequent partition sale can claim no priority by virtue of the registration of his certificate of sale.*

(2) *That section* 12 *of the Partition Ordinance continues to protect the rights of a mortgagee even after decree is entered.*

GUNARATNE *vs.* PERERA AND ANOTHER ... ... XXIV. 11

Mortgage action—Plaintiff and 2nd and 3rd defendants co-obligees, contributing to the sum lent—Agreement to sue jointly or separately—Also if proceeds of sale of security insufficient to share, proceeds pro rata—**Mortgagor's interests in mortgaged property sold in execution of money decree and purchased by 2nd and 3rd defendants—Action on bond by plaintiff alone—Are 2nd and 3rd defendants entitled to concurrence —Merger.**

Held: (1) *That each of the co-obligees is a creditor as to part only of the debt, but the mortgage is* in solidum.

(2) *That the rights of* 2*nd and* 3*rd defendants were not extinguished by merger inasmuch as the debtor and creditor did not become united in one person both as regards the debt and its security.*

(3) *That the* 2*nd and* 3*rd defendants were entitled to concurrence.*

MUTTURAMAN CHETTIAR AND ANOTHER *vs.* KUMARAPPA CHETTIAR AND ANOTHER ... ... XXV. 7

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MORTGAGE DECREE

(1) *In a case involving a hypothecary decree, directing that the mortgaged property be sold by a named auctioneer, no order for sale with notice to the judgment-debtor under section* 347 *of the Civil Procedure Code is necessary.*

(2) *Even if it is assumed that the order of the judge was intended to direct notice on the judgment-debtor, the failure to issue it was only a non-compliance with a direction of court and as such not an irregularity that had the effect of vitiating the sales.*

(3) *Once the hypothecary decree giving directions for the sale of mortgaged property by a named auctioneer is signed by the judge, the communication of the order to sell to the auctioneer may be made through an officer of court.*

DE FONSEKA *vs.* THE CHARTERED BANK ... ... XXVI. 73

Mortgage—Purchase of mortgaged land by mortgagee—Merger—Revival of mortgage on failure of merger.

Held: (1) *That on the purchase by the mortgagee of the mortgaged land the mortgage is merged in the ownership.*

(2) *That the question of revival of a mortgage can only arise in a case in which for some reason a valid merger does not take place.*

VELUPILLAI *vs.* KANDIAH ... XXVII. 89

Mortgage bond action—Prayer for hypothecary decree against transferee from mortgagor—Matters to be proved by plaintiff.

Held: *That in an action on a mortgage bond in which a hypothecary decree is prayed for against a person who has acquired interests in the mortgaged property subsequent to the mortgage, plaintiff has to prove:*

(1) *That the land belonged to the mortgagor at the time of the mortgage,*

(2) *That it was duly mortgaged to him (plaintiff) for a sufficient consideration,*

(3) *That the mortgage debt had not been paid and that a definite sum of money was still due,*

(4) *That the plaintiff is entitled to levy this sum out of the mortgaged property.*

BARONCHI *vs.* ARIYADASA ... XXIX. 30

Usufructuray mortgage—Property mortgaged first to one person and subsequently to another—Right of subsequent mortgagee to compel prior mortgagee to accept payment of the amount due to him and give a discharge of his bond.

A person granted to the defendant a usufructuary mortgage bond in 1940, and subsequently granted another usufructuary mortgage bond to the plaintiff in 1942. The plaintiff brought the amount of the earlier mortgage bond into court and asked for an order that the defendant should accept the said sum and give a discharge of the bond. The plaintiff maintained the action in his capacity as mortgagee and not as an agent of the mortgagor.

Held: *That the plaintiff has no right, as mortgagee, to compel the defendant to accept payment of the amount due to him and give a discharge of his bond.*

SARAM *vs.* THIRUCHELVAM ... XXIX. 81

Mortage Bond—Hypothecation of shares in a company—Delivery of share certificates to mortgagee—Absence of provision for registration—Subsequent sale in execution and purchase of shares by party with knowledge of existence of mortgage—Rights of such purchaser—Law governing such hypothecation—English or Roman-Dutch law.

The plaintiff sued the 1st and 2nd defendants as executors of the last will and testament of H. Bastian Fernando, deceased, for the recovery of a sum of Rs. 144,541.25 and interest due on a mortgage bond dated 28th September, 1922, whereby 900 shares in the Chilaw Coconut Co., Ltd. (now H. Bastian Fernando Estates, Ltd.) has been hypothecated to the plaintiff. The 3rd defendant was added as a party on the footing that she, with knowledge of the aforesaid mortgage had caused to be seized and sold and herself purchased the said shares.

The 1st and 2nd defendants consented to judgment and the action against the 3rd defendant was contested.

It was established:

(*a*) That the share certificates mortgaged to the plaintiff were deposited with him along with the bond and had always been in his possession.

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(*b*) That the plaintiff notified his claim as mortgagee to the company.

(*c*) That two conditions were necessary for the transfer of the shares in question, *viz.*:

(i) Approval of the transfer by the Board of Directors.

(ii) A transfer duly executed and registered in the books of the company, and that neither of them had been satisfied in the case of the plaintiff.

(*d*) That the 3rd defendant prior to her purchase at the Fiscal's sale actually had notice of the existence of the mortgage in favour of the plaintiff and that she got the shares she purchased registered in the company's books in her name.

It was clear that under our law there is no provision which requires that such a mortgage or pledge should be registered.

The learned District Judge dismissed the plaintiff action as against the 3rd defendant and the plaintiff appealed.

Held: (1) *That the mortgage or pledge of shares in a Company is not a matter with respect to Joint Stock Companies and the law applicable is the Roman-Dutch law and not the English law.*

(2) *That physical delivery of share certificates (which are only the documentary evidence of title) cannot be said to constitute delivery of the right mortgaged.*

(3) *That as regards delivery of possession the mortgagee of an incorporeal right stands on the same footing as that of a corporeal right.*

(4) *That the 3rd defendant inasmuch as she had actual notice of the existence of the mortgage did not stand in any other better position in respect of the shares in question than the mortgagor himself and that in consequence the plaintiff is entitled to resort to the shares in the hands of the 3rd defendant and is not merely restricted to claim in the amount realized at the execution sale.*

MITCHELL *vs.* FERNANDO ... XXX. 57

Mortgage—Bond put in suit—Mortgagor and his transferee parties—Transferee dead at time of action—Compromise with alleged legal heir of transferee and mortgagor—Transfer of hypothecated property to mortgagees—Decree dismissing suit—Finding by Court that alleged legal heir of transferee not entitled to convey rights under Mortgage Bond—Do they revive—Rights of mortgagees—When can Court declare such rights revived.

The defendants, who were mortgagees under a mortgage bond put the bond in suit making the mortgagor and his transferee (as puisne encumbrancer) parties. The transferee was dead at the date of the action and on the footing that one K was his lawful heir, the mortgagees compromised the mortgage suit with the said K and the mortgagor by obtaining a transfer of their rights in the hypothecated property and decree was entered accordingly dismissing the suit.

In the present action the plaintiffs sued the defendants for a declaration of title and the Court held that as K was not the lawful heir of the said mortgagor's transferee the defendants were not entitled to the property in question. It was then contended for them that their rights under the mortgage bond revived.

Held: (1) *That before the claim to have the rights under the mortgage bond revived, the decree dismissing the mortgage action must first be got out of the way.*

(2) *That a declaration that such rights revived cannot be made in proceedings to which the mortgagor is not a party.*

GUNAWATHIE *vs.* KUMARAPPAN CHETTIYAR ... ... XXXIV. 19

Action—Mortgagor in Malaya leaving mortgaged property in charge of his wife—Action on mortgage bond—Service of summons on wife under section 66 of Civil Procedure Code—Decree entered—Property sold in execution—Return of mortgagor after sale—Proceedings to set aside sale—Validity of service of summons—Wife's agency—Is it terminated by Malaya being overrun by Enemy—Defence (Trading with Enemy) Regulations.

In 1935 the 1st respondent hypothecated with the appellants to secure a loan, a property he acquired after his marriage with the 2nd respondent. In 1938 the 1st respondent left Ceylon for Malaya leaving the 2nd respondent in charge of the property. In 1942 the appellants instituted action for recovery of the loan against the respondents and as Malaya was overrun by the

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Japanese at the time, service of summons was effected on the 2nd respondent under section 66 of the Civil Procedure Code and *exparte* decree was entered in September, 1942. The land was sold in 1944. 1st respondent having returned in 1947 commenced proceedings to set aside the decree and succeeded.

Held: (1) *That the summons had been rightly served on the 2nd respondent as agent of the mortgagor.*

(2) *That the agency of the 2nd respondent for the purpose of section 66 of the Civil Procedure Code was not determined by the enemy occupation of Malaya.*

(3) *That the Defence (Trading with the Enemy) Regulations had no application to the facts of this case, and therefore the decree entered was good in law.*

MURUGESU AND ANOTHER *vs.* CHETTIAR AND ANOTHER ... ... XLI. 108

Gift subject to fidei commissum—**Donor reserving right to mortgage property gifted—Mortgage by donor—Transfer of property by donee after donor's death in satisfaction of amount due on bond—Claim to property by donee's children—Effect—Revival of mortgage.**

CHETTIAPPEN KANGANY *vs.* YOOSOOF *et al.* ... ... XLII. 60

Mortgage Bond—Rate of interest agreed on in bond—What is recoverable—Money-Lending Ordinance—Civil Law Ordinance.

Where on a mortgage bond the rate of interest agreed on was 30% there is no justification for the trial Judge's view that only 20% is recoverable.

The rates prescribed in section 4 of the Money-Lending Ordinance are not maximum rates of interest. In a mortgage bond action which is not a proceeding under the Money Lending Ordinance the plaintiff can recover interest at the agreed rate, provided of course the interest recovered does not exceed the principal.

GUNATILAKA AND OTHERS *vs.* DE ZOYSA ... ... XLV. 48

Mortgage—Mortgagor subsequently adjudicated insolvent—Mortgage disclosed among liabilities—Certificate of conformity granted—Action on mortgage bond—Assignee, only defendant, consent to judgment—Hypothecary decree—Sale—Purchaser's title contested by mortgagor's heirs—Validity of title.

S. who was entitled to certain interests in a land mortgaged them in August, 1938. He was adjudicated an insolvent on a petition dated 24th May, 1930 and was allowed a certificate of conformity on 28-1-1940. In the meantime, the mortgagee filed action on the bond making only the assignee a defendant and on 19-2-1940 the latter consented to judgment and a hypothecary decree was entered accordingly. In execution of the decree the mortgaged interests were sold and purchased by a 3rd party. S's heirs claimed that the said interests devolved on them as the sale was invalid for the reason that the mortgagee failed to make S. a defendant.

Held: *That S's heirs are not entitled to any interests in the property in question as upon the adjudication of S. as an insolvent and the appointment of the assignee the mortgaged interests became absolutely vested in the assignee.*

HAFEELU PALITHUMMA AND OTHERS *vs.* UMMA SALAHI AND OTHERS ... XLVI. 58

Sale of land subject to usufructuary mortgage—Subsequent sale to another—Prior registration of later deed—Possession by vendee on earlier deed after discharging of mortgage—Possession of usufructuary mortgagee—To whose benefit does it enure—Prescription.

ALITAMBY *vs.* BANDA ... XLVII. 97

Promissory Note—Mortgage bond subsequently entered into for payment of money including amount borrowed on note—Is there a merger.

MISSO *vs.* MOHAMEDALLY AND ANOTHER ... ... L. 74

Co-owner's right of pre-emption under the Thesawalamai—When exercised, do they extinguish hypothecary rights acquired by a third party during the interval between the date of the impugned sale and the date of pre-emption.

SIVAPIRAGASAM *vs.* VELLAIYAN AND ANOTHER ... ... L. 81

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MORTGAGE ORDINANCE No. 21 of 1927.

Mortgage decree—Sale of property by Fiscal—Section 12 of Ordinance No. 21 of 1927—Plaintiff permitted to purchase at an appraised value—Purchase by plaintiff's nominee for a nominal sum—Application to set aside sale after confirmation by Court § 282 of the Civil Procedure Code—Applicability of § 344 of the Civil Procedure Code to sales by Fiscal.

Effect of § 12 of Ordinance No. 21 of 1927—Application to set aside sale on ground of fraud may be made under § 344.

Held: (1) *That the effect of section* 12 *of the new Mortgage Ordinance No.* 21 *of* 1927 *where the Court acting under its provisions direct that the sale in execution of a hypothecary decree should be carried out by the Fiscal, is to bring into operation all the provisions of the sections* 255 *to* 288 *and sections* 290 *to* 297 *of the Civil Procedure Code, and it is competent therefore for any person having the right to do so to proceed if so advised under the provisions of section* 282.

(2) *That there is nothing in the provisions of Ordinance No.* 21 *of* 1927 *to prevent a person proceeding under the provisions of* § 344 *of the Civil Procedure Code to have a sale set aside in any case in which it would otherwise be competent for him to do so.*

(3) *That an application for relief based on fraud as apart from a mere irregularity, if the fraud is such as would entitle a plaintiff to relief in an action, may be made under the provisions of* § 344. *A purchase by the decree holder in the name of a nominee is an irregularity within the contemplation of* § 282.

(4) *That fraud should be specifically and clearly set out in an application of this nature and a general allegation of fraud does not suffice .*

SIDAMBARAM CHETTIAR *vs.* ANNAMALAY CHETTIAR *et al* ... ... I. 138

Directions for the sale of land in execution of mortgage decree—Directions included in decree—Does not makes § 289 of Civil Procedure Code applicable.

ZAHAN *vs.* STEPHEN FERNANDO ... I. 170

Civil Procedure Code §§ 241, 246 and 247 —Action brought under section 247 by a mortgagee—Ordinance No. 21 of 1927.

Held: *That Ordinance No.* 21 *of* 1927 *does not affect the law* (i) *That a hypothecary action does not lie against a mortgagor who has parted with all his interest in the mortgaged property previous to the action on the mortgage, and that only a personal action lies against him for the money due.*

(1) *That an action under* § 247 *cannot be brought by a mortgagee.*

ABRAHAM SINGHO *vs.* HARMANIS APPU AND ANOTHER ... ... I. 242

Hypothecary decree—Sale of land by auctioneer—Application to set aside sale—Some of the defendants not made parties to application—Confirmation of sale before application to set aside—Confirmation made without notice to parties—Mortgage Ordinance No. 21 of 1927 § 12 (i)—Civil Procedure Code § § 282 and 344.

Held: (1) *That there is nothing in the provisions of the law applicable to sales by an auctioneer appointed by Court under a hypothecary decree which requires the Court to give notice of an application for confirmation of a sale.*

(2) *That the order confirming sale is one which the Court was entitled to make without notice to the appellants.*

(3) *That the provisions of* § 344 *would justify an application to set aside a sale where relief is claimed on the ground of fraud;—but that fraud should be specifically and clearly set out and pleaded in the application.*

RAMANATHAN CHETTIAR *et al vs.* KURERA *et al.* I. 396

Effect of Section 6 (3) or Ordinance No. 21 of 1927.

Held: *That the effect of section* 6 (3) *of Ordinance No.* 21 *of* 1927 *is to shut out the rights of any person, in respect of the mortgaged property, who does not intervene thereunder before the distribution of the proceeds of sale.*

SUBASINGHE *et al vs.* PERERA ... II. 337

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Where the court did not in a mortgage decree direct that a plan should be attached to the conveyance and where the occupier of the land, a person other than the judgment debtor, objected to the Fiscals' entry on the land for the purposes of surveying it.

Held: (1) *That the Fiscal had no right to enter the land without an order of court in terms of* § 12 (3) *of Ordinance No.* 21 *of* 1927.

(2) *That it was not necessary to attach a plan to the conveyance as no order to that effect had been made by court.*

(3) *That* § 286 *of the Civil Procedure Code does not apply to conveyances under a mortgage decree.*

SELLAPPA CHETTY *et al vs.* SENANAYAKE *et al* ... ... II. 171

Notice of seizure issued by fiscal on a mandate **of sequestration does not create an interest in land within the meaning of § 6 (1) of Ordinance 21 of 1927. A person who has obtained a** mandate **of sequestration is not a necessary party to a mortgage action under § 6 (2) (b).**

IBRAHIM *vs.* THE HONKONG AND SHANGHAI BANKING CORPORATION ... II. 501

Section 12—Decree in favour of plaintiff —Failure to state time within which money is to be paid—Contents of decree.

Held: *That a decree under the Mortgage Ordinance should contain the conditions under which the sale is to be carried out including the period within which the money is to be paid.*

RAMANATHAN CHETTIAR *vs.* IBRAHIM AND OTHERS ... ... IV. 14

Mortgage—Failure to join secondary mortgagee and transferee of the mortgagor in the mortgage action—Can primary mortgagee bring a second action against the mortgagor, the secondary mortgagee, and the transferee of the mortgagor.

The plaintiff the primary mortgagee, put his bond in suit. At the time of action there was a secondary mortgage over the property and the mortgagor had sold it. The plaintiff failed to join the secondary mortgagee and the transferee in the first action. Decree was entered but the plaintiff did not have it executed. He later brought the present action against the mortgagor, the secondary mortgagee and the transferee so as to obtain a decree binding on all.

Held: *That the action was maintainable.*

KADAPPA CHETTIAR *vs.* RAMANAYAKE AND OTHERS ... ... VI. 17

Mortgage Decree—Can court stay execution of decree—Civil Procedure Code, section 343.

In a mortgage action, of consent a decree was entered directing that order to sell the mortgaged property was not to issue either until the defendant made default in the payment of certain sums which he agreed to pay on certain dates, or till a period of two years from the date of the decree had expired. The consent motion provided that in the event of the full claim not being paid within the period of two years, commission to sell was to issue forthwith without notice to the defendant, but this condition was not included in the decree. After the expiry of that period the plaintiff applied for an order to sell, and the defendant applied for a further period within which he might pay the money. The trial judge held that it was not open to him to enlarge the time fixed in the decree. The defendant appealed from this decision.

Held: *That in a mortgage action the Court has power under* 343 *of the Civil Procedure Code to stay execution of the decree for good reason.*

ARUNACHALAM CHETTIAR *vs.* A. D. PAULIS APPUHAMY ... ... VI. 151

Mortgage—Joinder of Parties—Civil Procedure Code section 18—Seizure of mortgaged premises in execution of a decree of court—Mortgage action in respect of the same premises—Can the execution creditor become a party to the mortgage action—Mortgage Ordinance No. 21 of 1927 section 6 (1).

Held: (1) *That the petitioner had no right to intervene in the mortgage action as he is not a necessary party for the effectual and complete adjudication of the action between the mortgagor and the mortgagee.*

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(2) *That section* 6 (1) *of the Mortgage Ordinance No.* 20 *of* 1927 *does not give a person such as the petitioner-respondent a right to intervene in the mortgage action.*

(3) *That a seizure of a land in execution of a decree of court does not create an interest in the land seized within the meaning of section* 6 (1) *of Ordinance No.* 21 *of* 1927.

THANGAMMAH *vs.* NAGALINGAM VIII. 91

Action on a Mortgage Bond—Mortgagee subject to Thesawalamai—Action against administrator of deceased mortgagee—Widow not made a party to the action—Separate action brought against the widow after ten years from the date of the bond—Prescription—Section 6 of Ordinance No. 22 of 1871—Section 16 of the Mortgage Ordinance No. 21 of 1927.

Held: (1) *That the action was statute-barred.*

(2) *That all the actions possible under the provisions of section* 16 (1) *of the Mortgage Ordinance must be commenced, against the different parties sought to be bound, within the period mentioned in section* 6 *of the Prescription Ordinance No.* 22 *of* 1871.

SAVERIMUTTU *vs.* ANNAMAH ... VIII. 112

Action against mortgagor—Mortgagor subject to Thesawalamai—Death of mortgagor's wife after mortgage and before mortgage action—Children of mortgagor not made parties to the mortgage action—Held children not bound by decree and that the mortgage sale conferred on the purchaser only the title of the mortgagor to his half of the property—Second action brought by purchaser under section 11 of the Mortgage Ordinance against the children.

Held: *That the purchaser was entitled to bring the action.*

KANAGASOORIAM AND ANOTHER *vs.* ARULAPPU ... ... XI. 42

Mortgage—Civil Procedure Code section 289—Courts Ordinance section 60—Fiscal's sale—Mortgage action filed after Fiscal's sale of property—Mortgage Ordinance No. 21 of 1927, sections 6 and 10—Purchaser not a party—Fiscal's conveyance not registered at the time of mortgage action—Is purchaser bound by mortgage decree—Necessary party—Meaning of—Is deed executed by Acting Secretary of District Court valid—Section 144 (e) of Evidence Ordinance—Power of District Judge to make an acting appointment—General Orders of Government No. 228.

Held: (1) *That a purchaser of a mortgaged property, whose deed is not registered at the time of the institution of the mortgage action, is not a necessary party within the meaning of section* 6 *of Ordinance No.* 21 *of* 1927.

(2) *That, although under the provisions of section* 289 *of the Civil Procedure Code, upon the execution of a Fiscal's conveyance the grantee is deemed to have been vested with the legal estate from the time of the sale, it is not incumbent on a person filing a mortgage action in respect of the land to join the purchaser, unless the Fiscal's conveyance had been registered at the date of the mortgage action.*

(3) *That a purchaser at a Fiscal's sale is bound by a mortgage decree even though he is not a party to the mortgage action, unless his conveyance had been duly registered at the date of the institution of the mortgage action.*

(4) *That the burden of proving that a deed was executed by an officer who had no authority to do so is on the person who challenges the validity of the deed.*

WIJEWARDENE *vs.* PERERA ... XI. 57

Mortgage Ordinance No. 21 of 1927—Section 10—The effect of § 10 (2) is to give a transferee a title to the property mortgaged superior to that of every party to the action, and not inclusive of it.

EMILY WIJESEKERA *vs.* VAITHIANATHAN ... ... XII. 25

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

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Held: (1) *That section* 347 *of the Civil Procedure Code (Chapter* 86) *does not apply in a case in which a hypothecary decree has been entered and direction given that an auctioneer shall carry out the sale, when the judgment-creditors are moving for a commission for the sale of the mortgaged property by an auctioneer.*

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

PERERA *vs.* JONES AND ANOTHER XVI. 119

Action on mortgage bond—Mortgaged property transferred by mortgagor before institution of action—Sale of mortgaged property in execution of decree—Surplus proceeds of sale after satisfying decree—Rights of transferee and holder of a money decree against the mortgagor to surplus—Mortgage Ordinance section 9.

In an action on a mortgage bond, the property mortgaged was sold in execution and a sum in excess of the amount necessary to satisfy the decree was realized. Before the institution of the action, the mortgagor had transferred the mortgaged property to a third party, but the deed of transfer had not been registered. The transferee and the holder of a money decree against the mortgagor, both claimed the surplus proceeds of sale.

Held: *That the transferee was entitled to the surplus.*

ETHAL *Alias* SILVA *vs.* VELUPILLAI
... ... XXIX. 78

Mortgage Ordinance (Chapter 74) section 7—Deceased mortgagor—Representation to estate not granted—Appointment by court of person to represent estate of deceased for purposes of hypothecary action—No evidence before court that value of mortgaged property did not exceed Rs. 2,500—Jurisdiction of court to make appointment—Validity of subsequent orders of court.

After the death of a mortgagor and before representation to his estate was granted, the mortgagee put the bond in suit and moved, under section 7 of the Mortgage Ordinance, for the appointment of a person to represent the estate of the deceased for the purpose of the action. No evidence was led as to the value of the mortgaged property. The court appointed a representative under section 7 and subsequently ordered a sale of the mortgaged property which was then bought by the mortgagee. In an action of the administrator of the estate of the deceased mortgagor against the purchaser-mortgagee for a declaration of title to the mortgaged property.

Held: (1) *That it was a condition precedent to the appointment of a representative under section* 7 *of the Mortgage Ordinance that evidence should be tendered that the value of the mortgaged property did not exceed Rs.* 2,500.

(2) *That in the absence of such evidence, the court had no jurisdiction to make the appointment and that the subsequent sale of the mortgaged property and other proceedings were a nullity as against the estate of the deceased mortgagor.*

AHAMADU MUHEYADIN *vs.* THAMBIAPPAH
... ... XXX. 106

MOTOR CAR INSURANCE

See under **INSURANCE**

MOTOR CAR

A person who, though not the registered owner, has a limited interest in a motor car of which he is in lawful possession, is entitled to maintain an action for damages caused to it consequent on the negligent act of another party.

PARAMASOTHY *vs.* VENAYAGAMOORTHI
... ... XXVI. 68

MOTOR CAR ORDINANCE NO. 20 OF 1927

Charge of not paying motor car tax—Section 30 (i) of the Ordinance—Admission of non payment of tax—Not plea of guilty.

Held: *That where in answer to a charge under* § 31 (i) *of Ordinance No.* 20 *of* 1927 *the accused made the statement. "I have not paid," such statement is not a "plea of guilty" to the charge.*

HUNTER *vs.* ALADIN PERIS ... I. 191

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Possession of motor car without a licence —Section 30 (i) and (2).

Held: *That once a person has been registered as owner of a car on his declaration that he is entitled to the possession of it, he must be regarded as the person in possession of it, unless there has been a transfer of possession in the manner provided by the Ordinance, or unless by the cancellation of the registration it ceases to be a car which can be the subject of possession for the purposes of the Ordinance.*

GOVERNMENT AGENT, CENTRAL PROVINCE *vs.* BEEMAN ... ... I. 223

Regulation 4 of Regulations published in Gazette of 22nd November 1929—Meaning of the word "route"—Proof necessary for a conviction for breach of the regulation.

Held: (1) *That the word "route" in regulation* 4 (2) *means the route prescribed in the licence.*

(2) *That for a conviction for breach of this regulation there must be clear proof that the vehicle was driven long a route other than that prescribed in the licence.*

VANDER STRAATEN *vs.* VELAITHAN I. 252

Car licensed for wholly or mainly carrying passengers—Not a hiring car—Car used for carrying fish—Evidence that accused owner carried fish in car—Offence under § 31.

Where the evidence disclosed that the owner of a car licensed for wholly or mainly carrying passengers conveyed persons in it whenever he had no fish to carry in it, and where he was charged under § 31 of Ordinance No. 20 of 1927 with using a car for a purpose other than that authorised by the licence in that he did convey fish in it.

Held: *That an offence under* § 31 *of Ordinance No.* 20 *of* 1927 *had been committed.*

AZIZ *vs.* FONSEKA ... ... I. 392

Sections 30 and 31—Motor Cab licensed to carry passengers—Carriage of Mail bags.

Held: *That is an offence for a Motor cab licensed to carry passengers to convey mail bags such mail bags not being the luggage of the passengers.*

VANDERSTRAATEN SUB-INSPECTER *vs.* NARAYANSAMY ... ... I. 424

Use of motor car for a purpose other than that for which it is licensed.

Held: *That the conveyance of goods in a motor car licensed for carrying passengers is an offence even though the goods are conveyed for the owner's own use and not for hire.*

SUB-INSPECTOR OF POLICE *vs.* FERNANDO ... ... II. 265

Section 30—Liability of a registered owner of a motor car to pay licence duty.

Held: *That a registered owner is liable to pay licence duty until such time as he gets rid of the possession, in law, of his car in compliance with the provisions of the Motor Car Ordinance.*

DE SILVA *vs.* ROSEN ... ... II. 98

By what evidence may the state of the brakes of a car be proved.

Held: *That evidence as to the state of the brakes of a motor car need not necessarily be given by a qualified motor car examiner appointed under the Ordinance.*

MAC PHERSON (S. I. POLICE) *vs.* NAPO SINGHO ... ... II. 408

Can the driver of a car be convicted for using the car for a purpose other than that for which it was licensed without proof that he was aware of the illegal purpose.

Held: (1) *That the driver of a private car which was hired by its owner cannot be convicted under section* 30 (1) *of Ordinance No.* 20 *of* 1927 *in the absence of evidence to show that he knew that the car had been hired.*

(2) *That batta paid to the driver of a car is not a "fee or reward" within the meaning of the words in the definition of "hiring car" in Ordinance No.* 20 *of* 1927 *unless it can be shown that the owner who hired the car received any part of such batta as hire.*

HOOPER *vs.* JOHN ... ... II. 442

Road prohibited for lorries exceeding 4 1/2 tons when fully loaded—Can a lorry weighing more than 4 1/2 tons when fully loaded use the road when carrying less than its full load.

Held: *That a lorry weighing more than* 4 1/2 *tons when fully loaded cannot use a road prohibited for vehicles weighing more*

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than 4 1/2 tons when fully loaded even when it is carrying less than its full load.

FERNANDO *vs.* NAGALINGAM ... II. 445

Section 62 (3)

Held: (1) *That section 62 (3) of Ordinance No. 20 of 1927 does not apply to the case of servants travelling in a lorry on their own business and not in the capacity of servants of the owner.*

(2) *That the business of the owner in which the servants are employed and the purpose for which they are travelling in the lorry need not necessarily be business connected with the lorry. It may be for the purpose of any other business in which their employer is engaged.*

GODAGAMA *vs.* HINNI APPU *et al* II. 461

Charge of Dangerous driving—Nature of evidence that should be led in support of.

Held: (1) *That to sustain a conviction for driving a motor car at a dangerous speed or in a dangerous manner proof of the speed of the car alone is insufficient.*

(2) *That speed in excess of a prescribed speed limit is not by itself proof of dangerous driving in the absence of other circumstances which render it otherwise dangerous.*

(3) *That where a road is crowded driving up to the speed limit or even less may be dangerous.*

LIVERA *vs.* BOTEJU ... ... II. 473

Motor Car Ordinance section 30 (1)—Need prosecution prove that the car was used on a highway.

Held: *That in a charge under section 30 (1) the prosecution need not prove that the car was actually used on a high way during the period there was a licence in force.*

THE GOVERNMENT AGENT SABARAGAMUWA *vs.* PEIRIS ... II. 510

Failure of omnibus to proceed to destination shown in the destination indicator.

Held: *That it is not a breach of regulation 32 (b) of the regulations in the fourth Schedule to the Motor Car Ordinance No. 20 of 1927 for an omnibus to stop short of the destination shown in the destination indicator when there are in such omnibus no passengers who have hired the omnibus to proceed to such destination.*

PODISINGHO *vs.* EDWIN ... III. 111

Section 64 (1)—Touting for passengers.

Held: *That in a charge under section 64 (1) of the Motor Car Ordinance No. 20 of 1927 it is not necessary to prove that the accused did solicit passengers for a particular car in waiting.*

INSPECTOR OF POLICE FORT *vs.* LINTON ... ... III. 124

Fourth Schedule Regulation 26—Circumstances in which it is not irregular to frame charge after recording evidence partly.

Held: (1) *That the driver of an omnibus is a person travelling in an omnibus for the purpose of regulation 26 of the fourth Schedule of the Motor Car Ordinance No. 20 of 1927.*

(2) *That it is not irregular to convict an accused on the evidence of witnesses examined and cross-examined before a charge is framed, where the accused is afforded an opportunity of cross-examining the witnesses over again after the charge is framed, even though he does not make use of the opportunity.*

MARRIOT (SUB-INSPECTOR OF POLICE) *vs.* RATNAPALA ... ... III. 139

Can the registered owner of an omnibus be convicted for failing to take reasonable precautions to prevent the offence of overloading.

Held: *That the owner of an omnibus cannot be convicted of an offence under section 80 (3) (b) of the Motor Car Ordinance on the mere fact that the omnibus of which he is owner is found to be overloaded.*

WITTENSLEGER *vs.* WILLIAM SINGHO IV. 28

Section 55—Failure to obey order of Police Constable to drive a motor car to the Police Station—Is it an offence.

Held: *That section 55 of the Motor Car Ordinance No. 20 of 1927 refers primarily to traffic directions by a Police Officer.*

ABEYSINGHE *vs.* ANA OSSEN ... IV. 51

Section 6 (1) of the Regulations in the Fourth Schedule—Meaning of word "on" in regulation 6 (1).

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Held: *That carrying goods inside an omnibus does not amount to a contravention of regulation* 6 (1) *of the regulations in the Fourth Schedule to the Ordinance.*

BANDARANAYAKE *vs.* PERERA ... IV. 77

Jurisdiction of Municipal Magistrate to try offences under the Ordinance—Section 30 (1)—Onus or proof of lawful possession of registered car—On whom it lies.

Held: (1) *That by virtue of the notification at page* 295 *of the Gazette of the* 8*th February* 1929 *the Municipal Magistrate has jurisdiction to try offences under the Motor Car Ordinance.*

(2) *That once a person has been been registered owner of a car he must be regarded as the person in possession of it until he divests himself of his right to possess it in the manner provided in the Ordinance.*

MISSO *vs.* DE ZOYSA ... ... IV. 81

Section 16.

Held: *That mere emitting of oil from a motor car on to a road is insufficient to constitute an offence under section* 16 *of Ordinance No.* 20 *of* 1927. *It must be proved that the quantity of oil was such as to be a nuisance or cause damage to the road or annoyances or damage to any person.*

SAPADEEN *vs.* LOKUBANDA ... IV. 93

Possession of a motor car without a licence.

Held: *That actual possession or user of a motor car must be proved before the registered owner can be convicted for a breach of section* 30 *of the Motor Car Ordinance.*

HUDSON *vs.* MADUGALLE ... V. 22

Using a motor car with unserviceable tyres.

Held: *There is no provision in the Motor Car Ordinance which makes the use of a motor car with unserviceable tyres an offence.*

WICKREMESINGHE (INSPECTOR OF POLICE) *vs.* NOMIS SINGHO ... ... V. 28

Refusal to permit a lorry to be weighed on a loadmeter.

Held: *That mere refusal to permit a lorry to be weighed on a loadmeter for fear lest the wheel of the vehicle might get damaged is not an offence under section* 82 *of the Motor Car Ordinance.*

RANAWANA *vs.* BRAMPY ... V. 29

Prosecution for exceeding the speed limit—Stop watch, only evidence of speed—Can a conviction be sustained in the absence of evidence that the stop-watch was accurate at the time it was used?

When the only evidence in a prosecution for exceeding the speed limit was the readings taken from a stop-watch the accuracy of which has not been proved.

Held: *That a conviction cannot be sustained in the absence of evidence to prove the accuracy of the stop-watch at the time it was used.*

MISKIN *vs.* SIMON ... ... V. 139

Charge against owner of a motor car under section 80 (3) (b)—What must the prosecution prove in such a charge.

Held: *That in a charge against the owner of a motor car under section* 80 (3) (*b*) *of Ordinance No.* 20 *of* 1927 *the onus of proof, that none of the excusatory circumstances specified in paragraph* (*b*) *existed, is upon the prosecution.*

NAIR *vs.* SAUNDIASAPPU ... VI. 1

Setting down a passenger at a place other than a public stand or stopping place.

Held: *That, if the driver of an omnibus slows down his vehicle when taking a bend and a passenger taking advantage of the slowing down of the vehicle chooses to alight from it, the driver of the omnibus cannot be said to have set-down such passenger in breach of regulation* 4 *of the regulations in the Fourth Schedule to Ordinance No.* 20 *of* 1927.

KULATUNGE *vs.* SIMON ... ...VI. 111

Same act constituting two different offences—Two separate charges—Is it proper to treat the charges as cumulative.

Held: *That, where for the same act two different charges under sub-sections* (2) *and* (3) *of section* 57 *of the Motor Car Ordinance are made, they should be treated as alternative charges.*

ANGAMMANA *vs.* LEWIS DE SILVA VIII. 49

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Obstruction by car when halted—Section 52 (1).

Held: (1) *That a person is entitled to halt his car on a road in any one of the following positions without being guilty of the offence of obstruction under section* 52 (1) *of the Motor Car Ordinance No.* 20 *of* 1927.

(*a*) *As close to the side of the road as possible.*

(*b*) *In such position as may be indicated by a police-officer regulating traffic.*

(*c*) *In such position as indicated by a properly exhibited notice.*

(2) *That it is no offence under section* 52 (1) *of the Motor Car Ordinance to halt a car close to the left edge of a road, and that it makes no difference that the road is a busy one and narrow at the point at which the car is halted.*

PERERA (POLICE SERGEANT) *vs.* FERNANDO ... ... VIII. 63

Endorsement by local authority on licence relaxing in certain circumstances the effect of regulations made under Ordinance.

Held: (1) *That it is a breach of regulation* 4 *of the regulations made under sections* 6 *and* 58 *of the Motor Ordinance No.* 20 *of* 1927 *for an omnibus weighing more than* 3 *tons when fully loaded to proceed along a highway prohibited for ominibuses over* 3 *tons even though at the time it is proceeding its actual total weight is less than* 3 *tons.*

(2) *That a local authority cannot by endorsement on a licence relax a prohibition made by regulation under sections* 6 *and* 58 *of the Motor Car Ordinance.*

NAIR *vs.* ALEXANDER AND ANOTHER VIII. 93

Omnibus contravening terms of licence—Authority to carry a certain number of passengers and a prescribed quantity of goods on the roof or in the alternative a prescribed quantity of goods and a fixed number of passengers.

Held: (1) *That once the six passengers limit is exceeded,* ipso facto *the condition that the bus may carry goods to the extent of* 336 *pounds on the roof becomes operative and then if any goods are carried inside the bus it would amount to a contravention of the license no matter what their weight is.*

(2) *Regulation* 6 (3) *of the regulation in the* 4*th schedule to the Motor Car Ordinance applies to a case of overloading and does not apply to a case where goods are carried in a part of an omnibus not authorised by the license.*

MUNASINGHE (S. I. MOTOR PATROL) *vs.* ELIATHAMVY ... ... VIII. 96

Written notice of non-user sent by post—Must the sender of such notice prove that the licensing authority to whom it was intended received it—With what amount of precision must the period of non-user be stated.

Held: (1) *That there was no obligation on the part of the accused to prove that the notice of non-user was in fact received by the local authority.*

(2) *That the accused was only bound to prove that he posted the notice.*

(3) *That the accused had in the circumstances of this case complied with the requirements of section* 30 (2) *of the Motor Car Ordinance.*

JAFFNA U. D. C. *vs.* RAJERATNAM VIII. 116

Obstruction—Rule of road.

Held: *That, however unnecessary or negligent the act of a driver of a car may be, his conduct would not amount to obstruction within the meaning of section* 44 (4) *of the Motor Car Ordinance, unless such conduct causes risk of accident to other traffic.*

COOPER (SUB-INSPECTOR OF POLICE) *vs.* DE SARAM ... ... IX. 43

Hiring car carrying passengers in excess of the number authorised by the licence—Burden of proof.

Held: *That the onus of proof that all the passengers were adults was on the prosecution and that, even if the accused had not given the evidence he did, the prosecution was not entitled to succeed in the absence of proof that one or more of the passengers in excess of the authorised number were persons the accused was not entitled to carry.*

DIAS (POLICE CONSTABLE) *vs.* MARCIAN X. 57

Charge of placing a motor van in such a position as to obstruct traffic—Meaning of the words "in such a position."

Held: *That the halting of a motor car drawn up parallel to and by the edge of a street, however crowded the street may be*

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at the time, is not an offence under section 52 (1) of the Motor Car Ordinance.

MARSHALL (POLICE CONSTABLE) *vs.* HASSEN ... ... XI. 147

Road or street—Meaning of—Is a bus-stand a road or street—Ordinances 10 of 1861, 6 of 1910 and 20 of 1927—Highway —Meaning of—Can a person claim access to and a right to pass over a public stand for hiring cars constructed on land which is not a highway, road or street.

Held: (1) *That a public road, in its ordinary sense, is a road which has existed from time immemorial or which has been constructed on land belonging to the Crown or acquired for the purpose and thereafter used by the public as a means of communication.*

(2) *That the public have no right of way over a public stand for hiring cars constructed on land which is not a highway, street or road.*

(3) *That regulation 2 of Part 1 of the Fourth Schedule to the Motor Car Ordinance No. 20 of 1927 does not have the effect of making a place (not being a highway street or road,) which is declared a public stand for omnibuses, a part of a road or street.*

WIJEGUNAWARDENE AND ANOTHER *vs.* DE SILVA ... ... XI. 51

Driver of lorry carrying passengers and goods contrary to the terms of his licence—Exception in favour of the servants or agents of the owner of hirer of the lorry or of the goods carried therein—On whom lies the burden of proof of this exception.

Held: (1) *That the words "other than the owner or hirer of the lorry or of the goods carried therein or the servants or agents of the owner or hirer" in section 62 (3) of the Motor Car Ordinance amount to a specific exception.*

(2) *That the onus of proving the exception was on the accused and not on the prosecution.*

WIJESINGHE (S. I. MOTOR PATROL) *vs.* DHANAPALA ... ... XII. 1

Driver of lorry carrying passengers contrary to terms of his licence—Exception in favour of owner or hirer of the goods carried therein, or servant or agent of the owner or hirer—Burden of proof of this exception—Offence against more than one section.

Held: (1) *That it is for the accused to prove that the passengers in the lorry were persons to whom the exception applied.*

(2) *That, even if the accused had been charged with carrying persons in his lorry in contravention of the terms of his licence, the burden of proving that they were persons he was entitled to carry would be on the accused.*

(3) *That the prosecution is entitled to select the section under which to prosecute if the accused appears to have committed a breach of more than one section.*

JOSEPH (S. I. POLICE) *vs.* SUGATADASA XII. 16

Offence of possessing a car without a licence—Nature of the evidence necessary to the offence.

Held: (1) *That the accused was guilty of the offence of possessing a car without a licence.*

(2) *That the accused can rebut the presumption of possession in any way he wishes, and not necessarily by establishing compliance with sections 22 or 24 of the Motor Car Ordinance.*

HUDSON (GOVERNMENT AGENT) *vs.* CASSIM ... ... XII. 37

Person charged with certain offences—Not the holder of a driving licence—Licensed driver seated by his side. Liability for offences.

DHANAPALA *vs.* MOHAMED IBRAHIM XIV. 139

When is a registered owner of a motor car liable to be convicted of a breach of section 31 (1) of the Ordinance.

Held: *That in a prosecution for a breach of section 31 (1) of the Motor Car Ordinance the prosecution must prove not only that the registered owner possessed the motor car at some time during the material period, but also, that at some time during that period, it was used on a highway.*

MISSO (REVENUE INSPECTOR) *vs.* PERERA ... ... XIV. 145

Duty of driver of car involved in accident on highway to report to police.

Held: *That where the driver of a motor car involved in an accident on a highway resulting in injury to person, animal or or property fails to furnish the particulars required by section 51 (b) of Chapter 156 of*

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the Revised Edition, whether he was requested to do so or not, he is under a duty to report the accident to the officer in charge of the nearest police station or to the first police constable or officer whom he meets on his way thereto.

ATTORNEY-GENERAL *vs.* KUNJIPALU XV. 58

Regulations governing the parking of cars—Meaning of expression "park" in the context ".....shall not park his hiring car....."

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

HARRIS DOOLE (INSPECTOR OF POLICE) *vs.* SIMON APPU ... ... XV. 66

MOTOR CAR ORDINANCE NO. 45 OF 1938

Regulation 3 of First Schedule—Meaning of the expression "rear of the body" in the definition of the word "overhang" in regulation 30 of the First Schedule—Should the length of the rear flap door of a motor lorry when opened be taken into account in measuring its "overhang."

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

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

PERERA *vs.* RAJAKARIYA ... XVI. 23

Section 29 (1)—Possessing a car without a licence—Notice of non-user given before but received after Ordinance No. 45 of 1938 came into operation.

Held: (1) *That a notice of non-user given before but received after the Motor Car Ordinance No.* 45 *of* 1938 *came into operation is not a valid notice and cannot be acted on.*

(2) *That any person possessing a motor car, for which a licence is not in force contravenes the provisions of section* 29 (1) *of the Motor Car Ordinance No.* 45 *of* 1938 *even though the car has not been used on a highway during the material period.*

DYSON (GOVERNMENT AGENT, C. P.) *vs.* KARUNARATNE ... ... XVIII. 24

Sections 111 (2) and (6)—May a police constable who has stopped an omnibus in order to ascertain whether it was licensed give evidence of the fact that it was carrying passengers in excess of the authorised number.

Held: (1) *That section* 111 (6) *of the Motor Car Ordinance No.* 45 *of* 1938 *is no bar to a police constable, who has stopped an omnibus for the purpose of ascertaining whether it has been duly licensed stating in evidence the fact that the omnibus was carrying at the time he stopped it more than the authorized number of passengers.*

(2) *That a conviction for an offence under section* 111 (2) *of the Motor Car Ordinance No.* 45 *of* 1938 *can be based on such evidence.*

EKANAYAKE (POLICE SERGEANT) *vs.* DEEN ... ... XVIII. 60

Sections 122 and 158—Carriage of goods in motor lorry in excess of permitted maximum load—Testing of weight with loadometer—When may accuracy of loadometer be inferred.

GUNATILAKE *vs.* SILVA ... XVIII. 71

Section 75 (3)—Plea of guilty—Accused warned and discharged under section 325 of the Criminal Procedure Code—Can court endorse the particulars of the offence upon the certificate of competence.

Held: *That where an accused driver charged under the Motor Car Ordinance is dealt with under section* 325 *of the Criminal Procedure Code, no endorsement should be made on his certificate of competence.*

BEMUNAWALA *vs.* NOTTLEY ... XIX. 10

Sections 29 (1) and (2)—Scope of expression "unless the contrary is proved" in section 29 (2).

Held: *That the word "possess" in section* 29 (2) *of the Motor Car Ordinance No.* 45 *of* 1938 *indicates* de facto *possession as understood in the common law, and that*

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it is open to the registered owner to prove that he did not possess the car in that sense during the material period.

DE ALMEIDA (REVENUE INSPECTOR) *vs.* PERERA ... ... XIX. 111

Section 29 (1)—Meaning and scope of words "for which a licence is not in force" in that section.

Appellant purchased on December 10th 1940, a lorry which was licensed for 1940. The vendor and vendee gave the prescribed notices of change of possession. Certificate of registration was issued on January 6th, 1941. The appellant was charged with possessing on December, 10th, 1940 a lorry for which a licence was not in force.

Held: *That as the vendor's license for* 1940 *was in force on December* 10*th*, 1940, *the appellant was not guilty of an offence under section* 20 (1) *of the Motor Car Ordinance No.* 45 *of* 1938.

THE CHAIRMAN, URBAN COUNCIL, JAFFNA *vs.* RASENDRAM ... ... XXI. 141

Section 182—Regulation made under the Ordinance—Meaning of "passenger."

Held: *That the word "passenger" includes an employee of a bus company if he is in the bus for the* bona fide *purpose of travelling from one place to another.*

SILVA (SUB-INSPECTOR OF POLICE) *vs.* ANTHONI APPU ... ... XXII. 31

Section 83—Where the accused drove a bus whith a number of persons besides the driver and conductor in it on an unauthorized road which afforded the bus the only means of access to its garage, the accused was held to have contravened section 83 (2) of the Motor Car Ordinance No. 45 of 1938.

Per CANNON, J.: "In my view the words in the definition of hiring car 'used for the conveyance of passengers for fee or reward' are not limited to the period of time during which the bus is actually carrying passengers for reward, and therefore the words 'for fee or reward' cannot be added to the definition of 'passengers.'"

ABEYGUNAWARDENE (INSPECTOR OF POLICE) *vs.* JACOB RODRIGO XXV. 95

Case stated under sections 4 (6) (a) and (c) of the Motor Car Ordinance No. 45 of 1938—Failure to give the notice required by section 4 (6) (c) at or before the time when the case is transmitted to the Supreme Court.

Held: *That failure to give the notice required by section* 4 (6) (*c*) *of the Motor Car Ordinance No.* 45 *of* 1938 *within the time prescribed in that section is fatal, and a case stated will be rejected for such failure.*

THE N. W. BLUE LINE BUS CO., LTD. *vs.* PERERA ... ... XXVI. 38

Section 151—Conductor of omnibus convicted for overloading—Driver charged and convicted for aiding and abetting—Circumstances in which the latter may become liable.

Held: *That a conviction based on the mere fact that a driver of an omnibus was aware of the overload and that he failed to get the extra passengers set down is not justified.*

SIMON DE SILVA *vs.* HOOPER (I.P) XXIX. 10

Sections 111 (2), 112, 151, 158, and 42—Overloading of omnibus—Conviction of conductor—Omnibus driven by driver with knowledge that it was overloaded—Liability of driver for aiding and abetting the conductor.

Held: (1) *That the driver of an omnibus can be charged with abetting an offence by the conductor under section* 111 (2) *of the Motor Car Ordinance No.* 45 *of* 1938.

(2) *That by the mere act of driving the omnibus the driver cannot be said to facilitate the commission of the offence of overloading the omnibus.*

(3) *That mere knowledge on the part of the driver that the omnibus is overcrowded cannot make him liable for the offence of abetting the overloading of such omnibus.*

DE ALWIS *vs.* AGOSINGHO ... XXX. 1

Lorry licensed for the carriage of goods—Is it an offence under section 42 (1) to carry pigs.

Held: *That where a lorry had been duly licensed to carry goods it was no offence under section* 42 (1) *of the Motor Car Ordinance No.* 45 *of* 1938 *to carry pigs as the word "goods" include pigs.*

ATTANAYAKE *vs.* MARTINU ... XXX. 54

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Licences to be reckoned for grant of exclusive road service licence.

THE KELANI VALLEY MOTOR TRANSIT CO., LTD., *vs.* THE COLOMBO RATNAPURA OMNIBUS CO., LTD. ... XXXII. 79

Section 85 (7)—Obstruction to traffic—When can a person be said to be obstructing traffic.

Held: (1) *That where it is shown that the driver of a motor car drove his vehicle along a highway keeping well to his left and after taking stock of the traffic on the road and satisfying himself that there was no other traffic which would be impeded by his taking a turn across the highway, crosses the highway at a moderate or even slow speed, he cannot be said to be obstructing traffic.*

(2) *That where a motorist crosses causing some slight obstruction to the traffic, he could not be said to be guilty of obstructing traffic within the meaning of section* 85 (7) *of the Motor Car Ordinance.*

JAYA RAJAH *vs.* ABEYGUNAWARDENE, INSPECTOR OF POLICE ... XXXIV. 36

Tribunal of Appeal constituted under section 4—What constitutes decision of the Tribunal—Observations made by the Tribunal not necessarily part of its decision—Omnibus Service Licensing Ordinance, No. 47 of 1942.

Held: *That the decision of the Tribunal of Appeal constituted under section* 4 *of the Motor Car Ordinance, No.* 45 *of* 1938 *is the decision which is reduced to writing under Regulation* 13 *of the Regulations made under section* 4 (5) *of the said Ordinance and transmitted to each of the parties.*

Observations made by the Tribunal, in the course of the proceedings before it, will not form part of its decision unless they are incorporated in the decision which is reduced to writing and transmitted to the parties.

Such observations which do not form part of its decision are not final and are liable to revision as the proceedings progress.

FERNANDO *vs.* PAUL E. PIERIS AND FOUR OTHERS ... ... XXXVII. 32

Sections 154 and 127—Driving a bus without certificate of insurance—Suspension of Certificate of Competence—What is meant by "special reason" in Section 75 (2) (c).

Petitioner was convicted of the offence of driving a bus on the highway when there was not in force in relation to the said bus a policy of insurance or security in respect of 3rd party risk. In addition to a fine the learned Magistrate suspended his certificate of competence for 12 months.

The accused applied to the Supreme Court by way of revision to set aside the order suspending the certificate on the ground that on the day he drove the bus, *viz.* 16th January, 1948, the bus had been licensed for the new year and he assumed that a certificate of insurance was in force as required by section 33 (2) of the Motor Car Ordinance.

Held: *That the petitioner was entitled to act on the assumption that a license would not be issued in contravention of an express provision of the statute and his case fell within the exception to section* 75 (2) (*c*) *of the Motor Car Ordinance.*

Meaning of the expression "special reasons" in section 75 (2) (*c*) *of the Motor Car Ordinance explained.*

TISSERA *vs.* KATHIBIPILLAI ... XXXIX. 105

Using vehicle for purpose not authorised by licence—Evidence necessary to establish charge.

The charge related to the use of a motor vehicle for a purpose not authorised by the licence.

Held: *That the licence, being a document required by law to be in writing and in a prescribed form must be proved by the document itself or by secondary evidence of its contents in cases where secondary evidence is admissible.*

MUDIYANSE *vs.* DISSANAYAKE (S. I. POLICE, KEGALLE) ... ... XL. 37

§ 124—"Police officer of a rank not below that of sergeant in charge of a station"—Meaning of

JAYASEKERA *vs.* DALADAWATTAGE ALEXANDER ... ... XL. 94

Section 75 (2)—Certificate of competence—Order for Suspension—Need to afford opportunity to place evidence of special circumstances before such order.

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Held: *That before an order suspending a certificate of competence under section* 75 (2) *of the Motor Car Ordinance is made, an accused person should be given an opportunity to place before the Court evidence of any special circumstances that govern his case.*

HARMANIS SILVA *vs.* POLICE SERGEANT WIJESINGHE ... ... XLIII. 48

§ 4 (6) Case stated—Proper mode of application by Commissioner of Motor Transport—Form of case stated—

COMMISSIONER OF MOTOR TRANSPORT *vs.* THE SOUTH WESTERN BUS CO., LTD. AND OTHERS ... ... XLIII. 106

Motor Tribunal—Case stated by way of Appeal—Application for licence for lorry—Form and validity of—Motor Car Ordinance No. 45 of 1938—Sections 4 (6) (a), 31, 43, 45 (3) (d).

An application for a licence for a lorry stated that the lorry was to be used for the purpose of carrying sundry goods, tiles, bricks, etc. of applicant's business and for hire, and that it was to provide a service for the Kandy District and on the routes Kandy to Kurunegala and Kandy to Colombo.

Objections were taken on the grounds that the application did not comply with the requirements of sections 43, 31, 45 (3) (*d*) of the Motor Car Ordinance No. 45 of 1938 in that the application was not in the form prescribed in the 2nd Schedule to the Ordinance and the applicant failed to specify the place or places outside the proposed area of operation and the purposes for which such service was necessary. On a case stated by the Motor Tribunal.

Held: (1) *That as the application had substantially complied with the requirements of the Motor Car Ordinance the Commissioner had properly entertained it.*

(2) *That where an appeal by way of case stated lies only on a question of law, the Tribunal should base the question of law, on which the opinion is desired, on the facts as found by them.*

DE SILVA *vs.* KUMARASINGHE AND ANOTHER ... ... XLV. 79

Sections 69, 130, 133, 137 and 138—Motor Car Accident—Driver authorised in certificate of competence to drive car not exceeding specified weight — Action claiming damages by injured party—Comprehensive policy of Insurance—Condition of policy that insurer not liable for damage caused while car being driven by person not holding certificate of competence—Action by Insurer for declaration pending action by injured party for damages that insurer not liable to indemnify owner of car or to pay damages that may be decreed in favour of injured party—Injured party added defendant—Rights and duties of insurer.

The defendant was at all material times the owner of a motor car which was 23 cwts. 3 qrs. in weight. On 11-4-46 the plaintiff company—"an authorised insurer", within the meaning of the Motor Car Ordinance No. 45 of 1938—issued to the defendant in respect of his motor car a comprehensive policy of insurance covering 3rd party risks for a period of one year. It was a condition of the policy that the company would not be liable in respect of any claim arising while the vehicle was being driven by an "excluded driver" which expression as defined in the Schedule to the policy included "any person who is not the holder of a certificate of competence unless he has held and is not disqualified from obtaining such certificate."

On 17-5-46 the said car, while being driven by the defendant's driver, who held a certificate of competence only to drive a motor car not exceeding 19 cwts. in weight, met with an accident resulting in injuries to the added-defendant, who instituted action No. 18669 of the District Court of Colombo, claiming damages in Rs. 15,000.

The plaintiff company thereafter instituted the present action under section 137 of the Motor Car Ordinance for a declaration against the defendant that it was not liable to indemnify him in respect of the accident because the motor car was at the relevant time being driven by an excluded driver within the meaning of the policy. The company further prayed for a declaration that as the condition in respect of which the breach was committed was a condition referred to in section 130 (4) of the Ordinance, it was not liable under section 133 to pay any damages that may be decreed in favour of the added-defendant in the pending action 18669.

The added-defendant intervened on notice of action being served on him.

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The learned District Judge dismissed the company's action on the ground that it could not rely on a breach of the condition of the policy which excludes liability when the car is being driven by an "excluded driver."

The plaintiff appealed and the added-defendant cross-appealed.

Held: (1) *That in view of section* 69 *of of the Motor Car Ordinance, the defendant's driver's certificate of competence was not valid for any motor car which exceeded* 19 *cwts in weight, and therefore in permitting the driver to drive the motor car in question the defendant committed a breach of a condition of the policy.*

(2) *That the breach of the condition relied on by the company was a breach of a condition contemplated by section* 130 (4) (*c*) (ii) *of the Ordinance, because the driver was not the holder of a certificate of competence within the meaning of that section.*

(3) *That the company was under no contractual liability to indemnify the defendant in respect of the said accident.*

(4) *That as the company in its notice to the added defendant failed to specify the breach of the condition relied on by it as required by the proviso to section* 137 *of the Ordinance the added defendant's statutory right to obtain satisfaction of the decree under section* 133 *direct from the company would be unaffected by the declaration of nonliability against the defendant.*

(5) *That in the circumstances, the company could discharge its obligation under section* 133 *and seek its remedies against the defendant under section* 138 *of the Ordinance.*

THE CEYLON INSURANCE CO., LTD. *vs.* RICHARD AND ANOTHER ... XLV. 97

Section 75 (2) (c)—Scope of—Certificate of competence—Order for suspension—Need to afford opportunity to accused to place evidence of special reasons for extenuation before making such order—"Special reasons" —Meaning of, and examples of what they are.

Held: *That before an order suspending a certificate of competence under section* 75 (2) *of the Motor Car Ordinance is made, the accused person should be given an opportunity of placing before the Court any special reasons in extenuation of his offence so that it may be the better able to exercise its discretion to mitigate the operation of the imperative terms of section* 75 (2) (*c*).

RAMSON *vs.* AHAMATH (S. I. POLICE, PUTTALAM) ... ... XLVI. 6

Section 42 (1), Forms 16—18—Motor car used for a purpose not authorised by the licence in force for that car—Difference between "convey persons" and "carry passengers.

Where the accused was convicted of using what is known as a "private number car" for a purpose not authorised by the licence in force for that car, *viz.*, for carrying a passenger for hire and it was argued on appeal that a licence to "convey persons" without qualification is a sufficient authority to "carry passengers," and therefore no offence was committed.

Held: *That section* 42 (1) *was intended to and does in terms prohibit the carrying of passengers for hire in a motor car for which the only licence in force is a licence issued in Form* 16 *appearing in the Second Schedule to the Ordinance.*

KANDAR KADIRGAMER *alias* ELAYAVER *vs.* ROSAIRO, INSPECTOR OF POLICE, CHANKANAI ... ... XLVI. 13

Injuries caused to respondent by car insured with appellant Company—Decree for damages against insured obtained by respondent—Letter requesting appellant to settle claim before action against insured—Is such letter sufficient notice of action under section 134 of Motor Car Ordinance No. 45 of 1938—Sections 128, 134-137—Liability of appellant—English Law compared with—Interpretation of a set of words.

The respondent sought to recover from the appellant a sum of money under a decree which he had obtained against one K.S.P. The decree was in respect of damages for injuries caused to the respondent by a car belonging to K. S. P., who had insured with the appellant against third party risks under the Motor Car Ordinance No. 45 of 1938.

Before the action was filed against K. S. P. the respondent's proctors wrote a letter to the appellant stating that unless the claim was settled, action would be filed against the owner of the car. The letter contained

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the name and address of the proposed plaintiff, the name of the owner and number of the car, the date of the accident and the amount claimed as damages from the owner of the car.

The appellant denied liability by pleading that the letter did not amount to a sufficient notice under section 134 of the Motor Car Ordinance inasmuch as it failed to mention the name of the Court and the number of the action.

Held: *That the appellant were liable as the particulars contained in the letter constituted a sufficient notice of action under section* 134 *of the Motor Car Ordinance.*

Obiter.—"Their Lordships would observe about them (the words 'notice of action') generally that the interpretation of such a set of words in a particular statute does not always greatly assist the interpretation of the same words in another."

CEYLON MOTOR INSURANCE ASSOCIATION LTD. *vs.* THAMBUGALA ... XLIX. 53

MOTOR TRAFFIC ACT No. 14 OF 1951

Section 45 (1)—Use of motor car for purpose not authorised by revenue licence—Charge that offence was committed between two dates without specifying occasions—Validity—Burden of proof.

Where a charge states that an accused person plied his motor car for hire between certain dates without specifying the occasions on which the offences were committed.

Held: (1) *That the charge is bad in law.*

(2) *That a number of offences committed during the period cannot be included in one charge.*

(3) *That as the prosecution had not called evidence to prove that hire was paid to the accused the charge had not been established.*

HERATHHAMY *vs.* ARSARATNAM XLIX. 112

Section 158—Motor vehicle—"running board"—Meaning of.

Held: *That a platform which was within the body of a bus, and was not a projection outside the bus, was not a "running board" within the meaning of section* 158 *of the Motor Traffic Act. No.* 14 *of* 1951.

MADAWALA, INSPECTOR OF POLICE *vs* TITUS PERERA ... ... L 48

Omnibus driven with defective speedometer and with uncushioned seats—Contravention of Regulations 15 and 45 made under sections 19 and 239 of the Act and published in Gazette 10360 of February, 1937—Can the driver be convicted under section 216 (2) of the Act?

Held: *That the driver of a motor vehicle driven with a defective speedometer or with seats not fitted with cushions cannot be said to be using the motor vehicle in contravention of regulations* 15 *and* 45 *within the meaning of section* 216 (2) *of the Motor Traffic Act No* 14 *of* 1951. *A conviction under these regulations cannot be sustained in the absence of a prohibition against the user of a motor vehicle which does not conform to the regulations.*

SUB-INSPECTOR OF POLICE, GAMPAHA *vs.* DON THOMAS SINGHO ... L. 92

MUNICIPAL COUNCILS

Application to have name inserted in list of persons qualified to be elected—Erroneous decision of fact by Government Agent—Mandamus does not lie to correct. Ordinance No. 6 of 1910.

GUNASEKERA *vs.* AMARASURIYA ... II. 14

Circumstances in which the Chairman may exercise his power under Section 31 of the Ordinance to erase the name of a Councillor from the list.

Held: (1) *That the condition which must exist to entitle the Chairman to exercise the power to erase the name of a councillor from the list of persons entitled to be elected is that at the date of the election he was not possessed of all the qualifications required by the Ordinance in respect of persons entitled to have their names placed upon the list of persons qualified to be elected or at such date was under any of the disqualifications specified in the Ordinance.*

(2) *That the exercise of the powers conferred on the Chairman by section* 31 *of the Ordinance is not limited to such dis-*

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qualifications as arise subsequent to the preparation of the lists,

JAYAWICKREME *vs.* CASSIM ... II. 141

Section 10 (4) (c). The term "uncertified bankrupt" as used in Section 10 (4) (c) of the Municipal Councils Ordinance No. 6 of 1910 refers to an insolvent who has not obtained a certificate because the insolvency proceedings have not reached the stage of the certificate meeting.

JAYAWICKREME *vs.* CASSIM ... II. 141

Rates. Liability of Art Gallery to be assessed for rates—Basis of assessment.

Held: (1) *That the building known as the Art Gallery of the Ceylon Society of Arts is not a "school building" within the meaning of the expression in section* 115 (i) *of "The Municipal Councils Ordinance No.* 6 *of* 1910".

(2) *That the Art Gallery is liable to be assessed for rates.*

(3) *That where a building liable to be assessed for rates is not tenanted and there are no similar buildings available for comparison and there is nothing to ascertain what rent tenants do actually pay for such a building it is open to the rating authority to see what the building cost is and take a percentage on that cost as representing the rent which a tenant would give.*

MALALASEKERA *vs.* MUNICIPAL COUNCIL, COLOMBO ... ... II. 456

Erection of a sunshade over a Street—Does Section 156 apply to lateral projections—Period of limitation in the case of a continuing offence.

Held: (1) *That section* 156 *of the Municipal Councils Ordinance applies to lateral projections.*

(2) *That an offence under section* 156 *is a continuing offence and limitation does not begin to run so long as the projection remains.*

(3) *That sections* 156 *and* 157 *of Ordinance No.* 6 *of* 1910 *contemplate totally different proceedings.*

BARTHOLOMEUSZ *vs.* ISMAIL ... IV. 96

Erasure of a Councillor's name from the list of those qualified to be elected.

Held: (1) *That the Chairman has the right to erase the name of a Councillor from the list of those qualified to be elected if it at any time it is proved to his satisfaction that the Councillor, though his name was on the list, was at the date of his election not possessed of the qualifications required by the Ordinance.*

(2) *That before taking action under section* 31 *the Chairman should give the person against whom he proposes taking action an opportunity of being heard and of placing his evidence before him.*

(3) *That section* 31 *vests in the Chairman powers which may be called judicial powers and that he must base his finding on evidence.*

SARAVANAMUTTU *vs.* THE CHAIRMAN, MUNICIPAL COUNCIL, COLOMBO V. 31

Annual value of house—Appeal from determination of Chairman under section 31—Circumstances in which the Supreme Court will not interfere.

Held: (1) *That the Supreme Court, sitting in appeal, should not draw any distinction between a finding of fact by the Chairman in an inquiry under section* 31 *of Ordinance* 6 *of* 1910 *and a finding of fact by a judge in a civil action.*

(2) *That although on the evidence placed before the Chairman another Chairman may have come to a different conclusion as there was evidence to support the Chairman's finding there was no reason for interference by the Supreme Court.*

DR. R. SARAWANAMUTTU *vs.* CHAIRMAN M. C. COLOMBO ... ... VII. 124

Municipal Councils Ordinance, sections 190, 197 and 236—Is the offence under section 190 a continuing offence.

Held: *That the failure to comply with a requisition under section* 190 *of the Municipal Councils Ordinance is not a continuing offence.*

RODRIGO (SANITARY INSPECTOR) *vs.* SYLVESTER ... ... XII. 53

Objection to assessment—Action under section 124—Onus of proof that assessment is excessive on whom—How onus may be discharged.

WEERASEKERA *vs.* THE COLOMBO MUNICIPALITY ... ... XIII. 56

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Is non-compliance with a notice given under section 208 an offence.

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

NESADURAI (MUNICIPAL INSPECTOR) *vs.* PERERA ... ... XVI. 99

Appeal from decision of Commissioner of Requests under section 124 (3) of the Municipal Councils Ordinance—Is such appeal governed by the provisions of section 833 (A) of the Civil Procedure Code—When may the actual rent paid for a building be taken as a criterion for determining the annual value.

Held: (1) *That section* 833 (*A*) *of the Civil Procedure Code does not apply to appeals to the Supreme Court under section* 124 (3) *of the Municipal Councils Ordinance.*

(2) *That the rent recently agreed to be paid by a perfectly free occupier would be a criterion of value difficult to set aside in the absence of* mala fides *or special circumstances relating to fixing the rent.*

SOYSA *vs.* COLOMBO MUNICIPAL COUNCIL ... ... XVIII. 113

Rates and rating—Annual value of house occupied by its owner how determined—Section 4 Municipal Councils Ordinance—On whom lies the burden of proving that the assessment is wrong in proceedings under section 124 of the Municipal Councils Ordinance.

Held: (1) *That where the owner and occupier are one, the annual value of the property must be ascertained by determining the rent a hypothetical tenant would pay for the property.*

(2) *That in determining the rent all possible occupiers including the owner must be taken in to account as possible tenants.*

(3) *That the burden of proving that the assessment is wrong is on the plaintiff in proceedings under section* 124 *of the Municipal Councils Ordinance.*

ABEYESEKERA *vs.* COLOMBO MUNICIPALITY ... ... XIX. 121

Municipal Election—Writ of *quo warranto* **lies to question a municipal election on the ground either of general undue influence or general bribery.**

PIYADASA *vs.* GOONESINGHE ... XX. 67

Municipal Election void—Where right of voter to go to the poll without molestation or fear of molestation is violated.

PIYADASA *vs.* GOONESINGHE ... XXI. 85

The power to make by-laws for the regulation of "traffic in streets" given to Municipal Councils by section 110 (6) (c) of the Municipal Councils Ordinance does not include the power to make by-laws for regulating motor traffic.

COOPER *vs.* SIRISENA ... XXII. 38

Rates and Taxes—Payment by mortgagee—How may such mortgagee recover amount so paid.

MOTHA *vs.* FERNANDO ... XXII. 108

Municipal Councils Ordinance—§§ 82 and 85—Notice of meeting and of business to be served on members—Mandamus **will not be granted where another remedy is available.**

GOONESINGHE *vs.* DE MEL ... XXIX. 54

Municipals Councils Ordinance—Section 156—Power of Council to suspend operation of—Appeal on matter of law—Certification of point of law—Criminal Procedure Code, sections 340 (2) and 442.

With the permission of the Colombo Municipal Council, the accused placed a number of packing cases containing apples and grapes on the pavement. He was charged with having contravened section 156 of the Municipal Councils Ordinance, convicted and fined Rs. 20. He appealed on a matter of law. The petition which dealt with several matters contained the following certificate:—"I certify that the point of law raised in this petition of appeal is a fit and proper question for adjudication by the Supreme Court." There was also an application in revision.

Held: (1) *That there was no proper certificate of the matter of law and that the appeal must be rejected.*

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Acting in revision: (2) *That the accused had committed an offence under section* 156 *of the Municipal Councils Ordinance.*

(3) *That the Council had no power to suspend or modify the operation of the section, and that the permission given to the accused was of no avail.*

SEBASTIAN *vs.* GIRIHAGAMA, POLICE SERGEANT ... ... XXXVI. 86

Election of Mayor of Colombo Municipal Council—Name proposed by a member not qualified to sit or vote—Validity of Election.

GIVENDRASINGHE *vs* DE MEL XXXVIII. 1

A Council and those entrusted with administration of its business are under a statutory obligation to recognize and implement appointments made by the Local Government Service Commission.

WIJESINGHE *vs.* THE MAYOR AND ANOTHER COLOMBO MUNICIPAL COUNCIL ... ... XXXVIII. 40

Resolution by Municipal Council suppressing post temporarily—Effect of.

WIJESINGHE *vs.* THE MAYOR AND ANOTHER COLOMBO MUNICIPAL COUNCIL XXXVIII. 40

Action against Municipal Council—Council not acting under the Ordinance—Time limit within which action must be instituted—Municipal Councils Ordinance, section 263.

Held: *That section* 263 *of the Municipal Councils Ordinance, which prescribes the time limit in regard to actions instituted against the Council for anything done or intended to be done under the provisions of the Ordinance, does not apply to a case where the act complained of does not fall within the express ambit of any provision of the Ordinance.*

FERDINANDUS *vs.* THE MUNICIPAL COUNCIL, COLOMBO ... XXXVIII. 72

Municipal Council—By laws—Auctioneer displaying customer's furniture—Business of storing furniture—Offensive and dangerous trade—Delegated Legislation—Doctrine of ultra-vires**—Municipal Council's Ordinance No. 29 of 1947. Section 148 (1) and (3).**

Where an auctioneer displays in his premises, his customer's furniture, which he sells by auction two days in the week and charges commission for the sale but not for the display or storage.

Held: *That he was not guilty of the offence of carrying on the business of storing furniture without a licence under the Municipal Councils Ordinance No.* 29 *of* 1947, *section* 148 (3).

Obiter: If a Council purports to pass a by-law under section 148 (1) by exceeding the terms of the delegation conferred by Parliament the doctrine of *ultra-vires* is immediately brought into operation even though such law has been approved by the Minister and confirmed by Parliament.

GUNASEKARA *vs.* MUNICIPAL REVENUE INSPECTOR ... ... XLVI. 59

MUNICIPAL COUNCILS ORDINANCE No. 29 of 1947

Quo warranto **and** mandamus**—Application for—Election of Mayor, Galle Municipal Council—Three candidates—Withdrawal of one candidate after voting commences—Voting resulting in seven votes for petitioner, and six for first respondent—Second voting held thereafter resulting in eight votes for first respondent and seven for petitioner—First respondent declared Mayor—Was second voting, and election of first respondent valid?—Meaning of the term "candidate" in section 14 (4), Municipal Council's Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act, No. 39 of 1951—Irregularity in mode of election—Effect of petitioner's innocent participation—Plea of ignorance of the Law—Is petitioner estopped from impeaching election?—Section 14, Municipal Council's Ordinance, No. 29 of 1947, as amended by the Local Authorities Act No. 39 of 1951.**

The petitioner and the first respondent were candidates for election as Mayor of the Galle Municipal Council at a meeting of the Council held for that purpose. The second respondent was the Chairman of that meeting.

At the meeting in question, the names of three Councillors—The petitioner the first respondent and N. were duly proposed and seconded for election. After three councillors had exercised their rights of voting N. withdrew from the contest, and the second respondent continued with the taking of the votes. In the result seven

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councillors voted for the petitioner, six for the first respondent and two declined to vote. The second respondent thereafter purported to hold a second voting which resulted in eight councillors voting for the first respondent, and seven for the petitioner. The second respondent thereupon declared the first respondent elected Mayor.

The petitioner contended that the second voting and the purported election of the first respondent were a nullity, and that having received more votes than the aggregate of the votes received by the first respondent and N. at the first voting, he was duly elected Mayor in accordance with the provisions of section 14 of the Municipal Council's Ordinance, No. 29 of 1947, as amended by the Local Authorities (Election of Officials) Act No. 39 of 1951.

Held: (1) *That despite the fact that the provisions of section* 14 (4) *of the Municipal Council's Ordinance* 29 *of* 1947, *as amended by the Local Authorities (Election of Officials) Act No.* 39 *of* 1952 *were infringed, the inadvertent participation of the petitioner in the irregularity, and his concurrence thereto, disqualified him from impeaching the first respondent's title to the office.*

(2) *That the petitioner's plea that he was "not aware that the said further proceedings were void" was only a plea of ignorance of the law, which is not an excuse.*

Per GUNASEKARA, J.—I agree with this view. The word "candidate" in the context in which it appears means no more, I think, than a Councillor who has consented to his name being proposed and seconded for election.

THASSIM *vs.* WIJEKULASURIYA AND OTHERS ... ... XLVII. 5

Municipal Councils Ordinance No. 29 of 1947.

Section 325—Rateable premises—Proper test in estimating the annual value.

Section 236 (1)—Meaning of "aggrieved." Definition of "annual value" in Ordinance —Note affected by provisions of Rent Restriction Act, 1948—Owner of premises who is dissatisfied with Council's assessment may institute action to have annual value increased so as to exempt the premises from operation of the Rent Restriction Act.

BANK OF CHETTINAD LTD. *vs.* THE MUNICIPAL COUNCIL OF COLOMBO L. 107

Colombo Municipal Council, (Constitution) Ordinance No. 60 of 1935 section 21, 23 (4) and 23 (6)—Application to have name placed in the lists.

The appellant, on a notice from the Commissioner acting under section 21 of Ordinance No. 60 of 1935 in the preparation and revision of lists of persons qualified to vote and to be elected applied to have his name placed in both lists. The Commissioner omitted his name on the ground that the application was improperly filled in inasmuch as the number of the appellant's residing house was not correctly given. On inquiry, presumably at the instance of the Commissioner, his rates' clerk had ascertained the correct number which was 66/10 and annual rate Rs. 40/- whereas the application form gave 10/66 and annual rate as Rs. 80/-.

Held: (1) *That a mistake such as the one made by the applicant in his application form does not entitle the Commissioner to reject it under section* 21 (1) (*h*) *on the ground that it is improperly filled in.*

(2) *That the error was not of such a character as to deprive the appellant of his right to vote inasmuch as he had the requisite qualifications.*

SILVA *vs.* MURPHY ... ... VI. 126

Colombo Municipal Council Constitution Ordinance No. 60 of 1935—Section 23 (1) and (2)—Objection to name of voter—Who may object?

Held (1) *That the person who can object that a voter is disqualified, is a voter in the same ward.*

(2) *That the words 'in any such new or revised lists' in section* 23 (2) *should be read as meaning 'in any one of such new or revised lists.'*

NAHA-KANNU MEERANPILLAI *vs.* ASBY LEBBE MARIKAR ... ... VII. 71

Colombo Municipal Council (Constitution) Ordinance, sections 2 (2) (a) and 14—Residence as a qualification to have a person's name placed on the list of voters—More residences than one.

Held: (1) *That the appellant had a residence in the Modera Ward which entitled him to have his name included in the list of voters of that Ward.*

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(2) *That a person can have more than one residence at the same time.*

(3) *That there was no legal objection to a person having a residence within a particular ward with the object of acquiring the residential qualification requisite for having his name on the voters' list of that ward.*

FERNANDO *vs.* GRERO ... XII. 97

Colombo Municipal Council (Constitution) Ordinance—Section 22—Application of member to have his place of residence transferred from list of voters for one ward to another ward—Effect of Amending Ordinance No. 14 of 1938.

GOONESINGHE *vs.* THE MUNICIPAL COMMISSIONER ... ... XII. 99

Colombo Municipal Council (Constitution) Ordinance, sections 2 (2) (a) and 14 (3) (c) —Meaning of dwelling-house—Can a joint tenant of qualifying property be registered as a voter.

Held: (1) *That to constitute a building a dwelling-house, it is sufficient if some person dwells in the building, and it is not necessary that the house should be used exclusively for residential purposes.*

(2) *That the Ordinance contemplated, subject to the provisions of section* 14 (5), *that all tenants of any qualifying property should be qualified to be registered as voters.*

REYAL *vs.* ASSAN ... ... XII. 109

Colombo Municipal Council (Constitution) Ordinance—Qualifications of a voter to have his name in register—Is residence in the ward in the voters' list, of which a voter seeks to have his name included, a necessary qualification—Interpretation Ordinance, section 5 (3).

Held: (1) *That a person, who is entitled to be registered as a voter by virtue of his income qualification, must be entered in the list prepared for the ward in which he is resident.*

(2) *That a person claiming to be registered as a voter under the provisions of section* 14 *of the Municipal Council (Constitution) Ordinance (except the owners of qualifying property who are not resident in the Municipality) must be registered as a voter for the ward in which he resides.*

(3) *That the words "action, proceeding or thing pending" in section* 5 (3) (c) *of the Interpretation Ordinance must mean something in the nature of proceedings which are of a judicial or quasi-judicial nature.*

(4) *That a notification, under section* 21 (1) (e) *of the Colombo Municipal Council (Constitution) Ordinance, that the revision of the lists of persons qualified to vote and to be elected would commence on a stated date, is not an "action, proceeding or thing" within the meaning of section* 5 (3) (c) *of the Interpretation Ordinance.*

PELPOLA *vs.* GOONESINGHE ... XII. 114

Stamping of appeal—Objection taken to 285 voters' names on the register of Municipal voters—Dismissal of objection—Appeal against order of dismissal—One appeal petition in respect of all the voters—Appeal petition stamped with a stamp to the value of Rs. 5/- —Section 24 (2) of the Colombo Municipal Council (Constitution) Ordinance —What should be the proper duty on the petition.

Held: (1) *That the petition of appeal had not been correctly stamped.*

(2) *That there should have been paid a stamp duty of Rs.* 5/- *in respect of each respondent to whom objection had been taken.*

SIRIWARDENE *vs.* MEERA SAIBO PANA NAGOOR AND OTHERS ... XIII. 116

Colombo Municipal Council (Constitution) Ordinance—Section 23—Can a voter registered in one ward object to a name in the list of voters of another ward.

Held: *That a voter registered in one ward is not qualified to object to a name in the list of voters of another ward.*

POROLIS DE SILVA *vs.* ISMAIL CASSIM XIII. 144

Stamping of petition of appeal—Appeal by nineteen unsuccessful claimants to be registered as voters—One appeal petition—One five-rupee stamp affixed—Section 24 (2) of the Colombo Municipal Council (Constitution) Ordinance—Is the petition of appeal correctly stamped—Does the withdrawal of all bad appeals make the remaining appeal good.

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Held: (1) *That the petition of appeal was not correctly stamped inasmuch as in fact there were nineteen petitions of appeal and therefore as many five-rupee stamps were required.*

(2) *That the withdrawal of eighteen bad appeals could not and did not make the remaining petition a good petition of appeal.*

CHAIRMAN, MUNICIPAL COUNCIL, KANDY *vs.* MUTTUSAMY AND OTHERS XIV. 33

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

PELPOLA *vs.* GOONESINGHE ... XV. 23

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

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

DE SILVA *vs.* SCHOKMAN ... XVI. 35

Colombo Municipal Council (Constitution) Ordinance section 15 (2) (c)—Meaning of expression "hold any public office under the Crown in this Island"—Does the manager of the Ceylon State Mortgage Bank hold office under the Crown.

Held: *That the respondent as manager of the State Mortgage Bank did not hold public office under the Crown, and was therefore, not disqualified under section* 15 (2) (*c*) *of the Colombo Municipal Council (Constitution) Ordinance.*

DE ALWIS *vs.* TYAGARAJAH ... XVIII. 38

Municipal Council (Constitution) Ordinance—Sections 14 (2) (f) and 108 (2)—Scope of the expression "is resident within the limits of any ward of the Municipality" in section 14 (2) (f).

Held: (1) *That the claimant cannot be regarded for the purposes of section* 108 (2) (*a*) *as having or using a sleeping apartment in the building in which he slept.*

(2) *That a person who opposes an application to have a person's name inserted in the voters' list need not be made the respondent to an appeal under section* 24 *of the Colombo Municipal Council (Constitution) Ordinance.*

THE MUNICIPAL COMMISSIONER *vs* PERERA ... ... XVIII. 91

Omission to insert double qualification mark of voter—Omission discovered after certification under section 26—Failure to apply under section 23—No Mandamus.

RANASINGHE *vs.* MACK ... XXVI. 44

Colombo Municipal Council (Constitution) Ordinance section 14 (6)—Meaning of the words "resident on the date of the preparation or revision, as the case may be, of such list."

Held: *That section* 14 (6) *of the Colombo Municipal Council (Constitution) Ordinance provides that in the course of the preparation and revision of lists the date on which a resident's name comes up to be entered on the separate list for a ward shall be the date of preparation or revision* vis-a-vis *that resident.*

WIJERATNE *vs.* PIUS SILVA ... XXVI. 57

A candidate, to whose nomination paper no objection is taken within the time prescribed in section 32 (2) must be regarded as duly nominated, even though the nomination paper does not satisfy the requirements of section 31 (2).

The Returning Officer is not required to announce his decision under section 32 (4) to the assembled public.

JOSEPH *vs.* THE RETURNING OFFICER, MUNICIPALITY ... ... XXVI. 79

Payment of the deposit required by section 30 to the Municipal Treasurer does not satisfy the requirements of that section.

Failure to make the deposit required by section 30 with the returning officer vitiates a candidates's nomination.

LIVERSZ *vs.* THE RETURNING OFFICER, MUNICIPALITY ... ... XXVI. 83

MUNICIPAL MAGISTRATE

Jurisdiction to try offences under Quarantine and Prevention of Diseases Ordinance.

SALY *vs.* LIYANAGE ... ... XXXII. 71

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MUSLIM INTESTATE SUCCESSION AND WAKFS ORDINANCE.

Ordinance No. 10 of 1931—Sections 7, 9 and 14.

Who may institute prosecution under section 14.

Held: *That any person connected with a particular mosque has a right to institute a prosecution under section* 14 *of Ordinance No.* 10 *of* 1931 *in respect of that mosque.*

RAZIK *vs.* MOHAMED ... ... II. 494

Ordinance No. 10 of 1931 is not retrospective in effect and does not govern a case arising before the Ordinance.

WEERASEKARA *vs.* PEIRIS ... II. 99

Proceedings under section 16 (1) of the Muslim Intestate Succession and Wakfs Ordinance No. 10 of 1931—Should documents produced in such proceedings be stamped.

Held: *That documents produced in proceedings under section* 16 (1) *of the Muslim Intestate Succession and Wakfs Ordinance No.* 10 *of* 1931 *should be stamped as documents in Civil proceedings in the District Court under Schedule B Part* II *of the Stamp Ordinance.*

MAHROOF AND OTHERS *vs.* SAILE V. 46

Donation of immovable property by deed—Revocability—Effect of proviso to § 3.

SARA UMMA *vs.* MAIMOOR AND OTHERS ... ... XXXIX. 5

Applications under sections 15 and 16—Governed by Civil Procedure Code.

MARJAN AND OTHERS *vs.* MOWLANA AND ANOTHER ... ... XL. 81

Application under section 15—Failure to make all trustees respondents—Can Court proceed with such application—Has Court power to add remaining parties under section 18 of the Civil Procedure Code.

Held: (1) *That the Court has no jurisdiction to proceed with an application under section* 15 *of the Muslim Intestate Succession and Wakfs Ordinance, when it has found that the petitioners have failed to comply with the requirements of that section.*

(2) *That where the petitioners failed to make all trustees interested in the charitable or religious trust parties to the application, the Court has no power to add them under section* 18 *of the Civil Procedure Code.*

SINNALEBBE AND ANOTHER *vs.* MUSTAPHA AND OTHERS ... ... XLI. 85

MUSLIM LAW

Deed of gift by Muslim—Recital in the deed that the gift is absolute and irrevocable—Gift by grandmother to minor grandchildren—Rents of gifted property collected by mother for benefit of minor donees—Execution of subsequent gift of the same property by donor in favour of another—Is such subsequent gift valid? Ordinance 10 of 1931—

Held: *That where a deed of donation given by a Muslim recites that the donation is "absolute and irrevocable" such donation cannot be revoked by the donor.*

The gift of something to a minor by a person other than the father or guardian, which something is at the time of the gift in the possession of the guardian, the guardian's seisin becomes the seisin of the minor donee and no formal acceptance by the guardian is necessary.

RAFEEKA *et al vs.* MOHAMED SATHUCK ... ... I. 103

Deed of gift—Absolute and irrevocable—What amounts to delivery.

Held: *That payment of rent by the donor as tenant of the subject matter of a gift to the guardian of the minor donees is sufficient delivery of the property according to Muslim Law.*

RAFEEKA *et al vs.* MOHAMED SATHUCK ... ... I. 192

Deed of gift in favour of minor children—by parent—Reservation of life interest—How far deed of gift revocable—Fidei Commissum **created by Muslim—Law applicable to such** fidei commissum

Held: (1) *That a deed of gift to her children made by a Muslim parent in the following terms was a valid deed of gift.*

"Know all men.....that I.....wife of.....of.....(hereinafter called and

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referred to as the donor) with the consent and concurrence of my husband the said .....as is testified by his becoming a party hereto and signing these presents, in consideration of the natural love and affection which I have and bear unto my sons .....hereinafter called and referred to as the donees.....do hereby grant, convey, assign, transfer, set over and assure unto the said donees as a gift inter vivos *absolute and irrevocable that piece of land called .....together with all easements, rights and advantages whatsoever appertaining .....and all the estate right, title, interest, claim and demand whatsoever of me into upon or out of the said premises..... subject to the terms and conditions hereinafter mentioned.*

To have and to hold the said premises hereby granted or intended so to be unto the said donees in equal shares, provided however that I the said donor shall have the right of living in the said premises and enjoying the rents and produce thereof during my lifetime; provided further the donees shall not seek partition of the said premises either amicably or in a court of law and they the said donees shall not alienate or encumber or lease the said premises except among themselves.

In the event of any of the donees dying without issue the said premises shall devolve on the surviving donees; and in case the said donees should die possessed of the said premises leaving issue the said premises shall devolve on the respective children.

And I the said.....the first named donee do hereby for myself and on behalf of my minor brothers.....thankfully accept this gift subject to the conditions hereinafter mentioned."

(2) *That Ordinance No.* 10 *of* 1931 *in regard to the declaration under* § 3 *is declaratory of the law applicable to donations not involving* fidei commissa.

SAHUL HAMID *vs.* MOHIDEEN NACHCHIYA ... ... I. 268

Marriage—Thali given to wife by husband—Divorce of wife—Does the Thali remain the wife's property even after divorce ?

Held: *That a Muslim wife is the owner of the Thali even after divorce*

JAMALDEEN *vs.* HAJIRAUMMA ... I. 347

Deed of gift executed by a person subject to Muslim Law and creating a valid fidei-commissum **should be construed according to the Roman Dutch Law.**

WEERASEKERA *vs.* PEIRIS ... ... II. 99

Gift subject to restrictions and reservations—Is it valid in the absence of delivery of possession.

Held: (1) *That a gift subject to restrictions and reservations is not valid in the absence of delivery of possession.*

(2) *That the mere delivery of a deed is not constructive delivery when the donor has clearly manifested his intention that it was he who was to take all the rents and profits.*

PEIRIS *vs.* SULTAN ... ... II. 211

Application for Habeas Corpus—Custody of children—When may Muslim mother to whom custody of children has been entrusted, be deprived of that custody?

Held: (1) *That there is no inflexible rule in Muslim Law as to whom the custody of minor children may be entrusted.*

(2) *That a mother, even if entrusted with the custody of her children by a court, can be deprived of that custody if her moral conduct is such that it will have a bad influence on the children.*

FERNANDA *vs.* FERNANDO ... I. 405

Custody of Child—Who is entitled to.

Held: *That under Muslim Law the mother and the maternal relatives of a Muslim child are entitled to its custody in preference to the father.*

JUNAID *vs.* MOHIDEEN AND OTHERS II. 83

Person subject to Muslim law may create a valid fidei commissum.

WEERASEKERA *vs.* PEIRIS ... II. 99

Promise of gift to future husband of daughter of promissor—Is such a gift in futuro **valid—Difference in Muslim law between gifts in** futuro **by bride's parents.**

Held: *That a deed of dower by way of gift in* futuro *by the parents of a Muslim bride is valid in Muslim law.*

MUSHEEN AND ANOTHER *vs.* HABEEB AND ANOTHER ... ... III. 47

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What is kaikuli—Is land given in lieu of kaikuli to the husband alienable by him without the wife's consent.

Held: (1) *That the deeds in question do not constitute a trust.*

(2) *That* kaikuli *means a payment of money and not anything else.*

(3) *That where land is given in lieu of* kaikuli *it cannot be followed into the hands of a third party to whom the husband may have alienated it.*

(4) *That a husband holding* kaikuli *is trustee for his wife or her heirs.*

ZAINAMBU NATCHIA *vs.* USUF MOHAMMADO AND ANOTHER ... VI. 23

Where a muslim minor enters into a contract with the consent of his natural guardian, the contract is valid according to Muslim Law.

SHORTER AND CO., *vs.* MOHAMED IX. 46

Deed of Gift—Gift inter vivos **reserving life interest and creating a** fidei commissum.

Held: *That the deed was valid according to Roman Dutch law and effect should be given to the* fidei commissum.

KUDHOOS *vs.* JOONOOS ... XV. 133

Deed of gift—Immediate transfer of dominium **without transfer of possession—Is such deed valid.**

Held: *That a deed of gift of immovable property by a person subject to Muslim law, whereby immediate transfer of* dominium *over the property is effected without a transfer of possession, is invalid.*

CASIE CHETTY *vs.* MOHAMED SALEEN AND OTHERS ... ... XVIII. 93

Application for maintenance of illegitimate child before its birth—Bad at initio **and cannot be continued after the child's brith.**

UMMA HAMI *vs.* ABDUL HAMID XIX. 36

Muslim will—construction of—Practice of the Courts is to have recourse to the principles of Roman Dutch Law.

NOORDEEN *et al vs.* BADOORDEEN *et al* ... ... XX. 51

Donation—Gift by Muslim lady to her adopted son—Reservation of donor's life interest and covenant not to revoke gift—Muslim law or Roman-Dutch law applicable—Does donee's failure to obtain possession render such gift inoperative—What passes in the case of a gift inter vivos when possession is postponed.

A deed of gift by a Muslim lady in favour of her adopted son contained clauses to the following effect: (*a*) that a life interest over the property gifted was reserved in favour of donor (*b*) that the donee was entitled to possession only after the death of the donor (*c*) that the donor bound herself not to revoke the deed of gift.

It was common ground that the donee never entered into possession.

Held: (1) *That the deed of gift was governed by Muslim law.*

(2) *That the failure on the part of the donee to obtain possession rendered the deed inoperative.*

(3) *That where a donation* inter vivos *has not been completed by transfer or delivery, what passes to the donee is only a right to enforce the contract.*

ABDUL CAFFOOR *vs.* PACKIR SAIBU AND OTHERS ... ... XX. 81

Muslim will—Fidei commissum—**Property bequeathed to children subject to a** fidei-commissum—**Expressions used in will how interpreted—Meaning of expression "heirs from generation to generation."**

A Muslim lady by her last will devised certain lands to her two sons subject to the condition that the lands should not be alienated but should be enjoyed by the devisees "and by their heirs from generation to generation in perpetuity under the bond of *fidei commissum*."

Held: *That the expression "heirs from generation to generation" meant heirs according to Muslim law and not according to Roman Dutch law.*

JAMEEL *vs.* HANIFFA AND OTHERS XX. 104

Gift by a Muslim creating a fidei commissum **reserving life-interest—When is Roman-Dutch Law applicable to Muslim gifts.**

Held: *That* Sultan *vs.* Pieris (35 *N. L. R.* 81) *contained an erroneous interpretation of the opinion delivered by the Privy Council in* Weerasekere *vs.* Pieris (34 *N. L. R.* 281), *and that the correct view is that*

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where Muslims make a deed of gift inter vivos, *whether in* praesenti *or* in futuro, *all the terms of the deed must be examined, and if, upon such examination it is found that the deed is not in accordance with Mohammedan Law, but is in accordance with the general law of the land, effect will be given to it under that law, for in such a case the reasonable inference is that the donor did not intend to create a Muslim gift, but did intend to and did create a gift known to the general law.*

ABU THAHIR *vs.* MOHAMED SALLY XXII. 113

Custody of Muslim child—Application for Writ of Habeas Corpus—Father's right to custody of son.

Held: *That under the Hanafi law a Muslim father is entitled to the custody of his son, who has completed his seventh year, unless there are strong grounds for interfering with his right.*

FAIZ MOHAMED *vs.* ELSIE FATHUMMA *alias* MURIEL DE VOS ... XXVI. 40

Muslim will—Creating fidei commissum—Fidei commissum **simplex—Construction of—Meaning of expressions "Sokkaran" and "Thakappanai Serntha Sokkaranakku"**

NOORDEEN *vs.* BADURDEEN AND OTHERS ... ... XXVII. 49

Father's donation of property to minor—Possession by father—Can it be regarded as possession by minor.

Held: *That in Muslim Law, where a father donated property to a minor, possession by the father must be deemed to be possession of the minor, who is entitled to reckon such possession in establishing prescriptive title.*

UTHUMALEBBE AND ANOTHER *vs.* MUHAIYATHEEN BAWA ... XXXIII. 106

Muslim Marriage and Divorce Ordinance (Chap. 99), sections 15, 50 and 51 (1)—Effect on general law applicable to Muslims—Divorce by wife without husband's consent—Grounds other than those specified in the Ordinance—Right of Muslim wife to resort to civil Courts.

A Muslim wife, without her husband's consent, brought an action for divorce in the District Court of Kalutara, on the ground of the leprosy of the husband. At the trial, the preliminary point was taken up to decide whether the wife's only remedy was to resort to the Kathi or whether she could seek redress in the Civil Courts. The Judge held that she could not have recourse to the Civil Courts.

Held: (1) *That the right conferred on a Muslim wife by the Muslim Marriage and Divorce Ordinance (Chap. 99) to seek a divorce without her husband's consent is limited to the grant of a divorce by a Kathi, on the grounds specified in the Ordinance.*

(2) *That a Muslim wife can have recourse to the Civil Courts in cases where she seeks a divorce on grounds permitted by the general law applicable to Muslims, but not specified in the Ordinance.*

(3) *That the principles of Mohammedan Law relating to leprosy as a ground for repudiating the contract of marriage is still part of the Law of Ceylon.*

(4) *That the Courts will lean against the presumption that the Muslim Marriage and Divorce Ordinance (Chap. 99), being an Ordinance to Amend and Consolidate the law relating to the Marriage and Divorce of those professing the Muslim faith, was intended to alter the common or general law.*

NOORUL NALEEFA *vs.* MARIKAR HADJIAR ... ... XXXV. 62

Muslim Law—Liability of married Muslim minor on promissory note.

KALANDER LEVVE *vs.* PACKERTHAMBY AVVA UMMA ... ... XXXV. 98

Contract made by married Muslim aged 18—Capacity—Majority—Age of Majority Ordinance, sections 2 and 3—Effect on Muslim Law relating to attainment of majority.

The plaintiff, a married Muslim male aged 18, sold and transferred some property. After reaching 21 years, he brought an action to have the sale set aside on the ground that he was a minor at the time of the sale. There was no proof that he lacked the "discretion or understanding," required by Muslim law, for the management of his affairs.

Held: (1) *That in the circumstances the plaintiff is bound by the contract.*

(2) *That under Muslim Law, a person acquires personal emancipation on*

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proof of reaching puberty, or on reaching the age of 15, *whichever is earlier.*

(3) *A minor on attainment of puberty acquires the capacity to make a contract, or manage or dispose of his property unless it is shown that he lacks the "discretion or understanding" to manage his affairs.*

(4) *That, if contractual capacity and power to manage and dispose of his property are not acquired on the attainment of puberty owing to the proved absence of the necessary "discretion" their acquisition is postponed until the necessary discretion is developed or until the age of* 18 *is reached, whichever is earlier.*

(5) *That the Muslim Law relating to the attainment of majority before* 21 *is not inconsistent with the provisions of sections* 2 *and* 3 *of the Age of Majority Ordinance.*

ASANAR *vs.* ABDUL HAMEED XXXVIII. 97

Donation of immovable property by deed —Revocability—Muslim Intestate Succession and Wakfs Ordinance, section 3—Proviso— Effect of.

By a deed a father gifted to his daughter (the plaintiff-appellant) certain shares of a land. Later he revoked the gift and conveyed the said shares to the defendants-respondents.

It was contended for the appellant that the deed of gift was irrevocable except by a decree of Court.

Held: (1) *That the gift was revocable without the intervention of Court.*

(2) *That under the proviso to section* 3 *of the Muslim Intestate Succession and Wakfs Ordinance a deed of donation could be revoked unless it is stated to be irrevocable in the deed.*

SARA UMMA *vs.* MAIMOOR AND OTHERS ... ... XXXIX. 5

Preferential right of Muslim widow to custody and guardianship of minor children.

NOORUL MUHEETHE *vs.* LEYANDUN XLII. 86

How much of the Mohamedan Law is applicable to Muslims in Ceylon.

NOORUL MUHEETHE *vs.* LEYANDUN XLII. 86

Marriage of a female under twentyone years following Hanafi Sect—Wali not necessary if female had attained "bulugh" or puberty—Effect of Civil Procedure Code, Section 502 and Majority Ordinance No. 7 of 1865 (cap. 53)—A Muslim in Ceylon attains "majority" on reaching bulugh or puberty—Mohamedan Code of 1806, repealed by the Muslim Intestate Succession and Wakfs Ordinance (Cap. 50) and Muslim Marriage and Divorce Registration Ordinance (Cap. 99)—Meaning of "Muslim Law" in Section 50 of Cap. 99—A Muslim in Ceylon is to be governed by the law of the Sect to which he belongs—Section 8 (1) of Cap. 99 does not supersede Muslim Law of Marriage and Divorce.

A Muslim female who had been brought up from her infancy as a Hanafi married according to Muslim rites when she was of fifteen years and two months, in age, which she alleged was past the age of 'bulugh' (discretion). For the purpose of the marriage she appointed by notice to the Registrar her uncle as wali, and the marriage was duly registered in accordance with the provisions of the Marriage and Divorce (Muslim) Ordinance (Cap. 99).

The father challenged the validity of the marriage incidentally, in an application by him to be appointed as curator and guardian of his daughter.

Held: (1) *That the marriage was valid. A Muslim female in Ceylon following the Hanafi sect and had attained the age of bulugh (discretion) could marry without the assistance of a wali or marriage guardian.*

(2) *That for the purpose of marriage a Muslim attains "majority" on reaching the age of bulugh or puberty.*

(3) *That in a matter of marriage or divorce a Muslim is governed by the law of the Sect to which he or she belongs. "The words "Muslim Law" in that section (Section* 50 *of Cap.* 99 *)cannot mean anything more or less than the Muslim Law governing the Sect to which the particular person belongs."*

(4) *That Section* 8 (1) *of Cap.* 99 *read in conjunction with Section* 50 *must be understood to mean that where Muslim Law requires a bride to be represented by the wali, he shall sign the marriage register on her behalf; where it does not, the signature of a wali to the marriage register is un-*

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necessary. The section does not supersede the Muslim Law of Marriage and divorce.

A. H. M. ABDUL CADER *vs.* A. R. A. RAZIK *et al* ... ... XLIII. 60

Deed of gift—Provision that donee should render all necessary assistance and succour to donor—Also after donor's death property should remain in donee and his heirs, executors administrators and assigns—Validity of gift in Muslim Law —Roman Dutch Law.

A Muslim lady gifted by deed a property to her grandson subject to the conditions

(*a*) that the donee shall render all necessary succour and assistance to the donor during her life.

(*b*) that after her death the property should continue to remain in the donee and his heirs, executors, administrators and assigns.

It was contended that the gift was invalid according to Muslim Law but valid according to Roman-Dutch Law.

Held: *That the deed contained a conditional gift valid according to Muslim Law.*

MOHAMED CASSIM *vs.* ABDUL JABBER AND ANOTHER ... ... XLVI. 3

Donation by a Muslim subject to fidei commissum**—Acceptance by mother on behalf of infant donees—Validity of—Relevancy of intention of donor in determining law applicable—Muslim Law or Roman-Dutch Law?—To what extent Muslim Law applicable in Ceylon.**

By a deed of gift a Muslim (the paternal grand-mother) conveyed immovable property to minors, subject to a *fidei commissum* in favour of the donee's children, and the mother of the donees purported to accept the gift on their behalf.

It was contended that inasmuch as the deed of gift created a *fidei commissum* it was governed by Roman-Dutch Law, but the parties to the deed being Muslims there has been no valid acceptance as under the Muslim Law a mother was not recognized as a natural guardian of her children in matters concerning property.

The Supreme Court held that the validity of the gift had to be determined solely within the framework of the Roman-Dutch Law, and under that law the mother of the donees had authority to accept the gift, and that even if this conclusion was wrong it has not been shown that according to Muslim Law as administered in Ceylon a Muslim widow could not be deemed to be the guardian of her minor children.

Held: (1) *That although under the deed the donor intended that the Roman-Dutch Law should apply in determining who could accept the benefaction, the authority of the mother to accept the gift is determined not by the intention of the donor or some other party to the deed but on the proper law applicable in determining the capacity of the infants and the authority of the guardians to enter into binding agreements on their behalf.*

(2) *That the proper law applicable to the acceptance of the gift in this case is the Muslim law and not the Roman-Dutch Law as the Muslims in Ceylon are governed by their own personal law.*

(3) *That under the Muslim Law as received in Ceylon and in the circumstances of the particular case the mother had the necessary authority to accept the gift.*

NOORUL MUHEETHA *vs.* SITTIE RAFEEKA LEYANDEEN AND OTHERS XLVIII. 74

MUSLIM MARRIAGE AND DIVORCE REGISTRATION ORDINANCE

Does an application to a Kathi for a dissolution of marriage oust the jurisdiction of the Police Court to make an order for maintenance under the Maintenance Ordinance.

SOORIYAUMMA *vs.* SATHUKEEN VIII. 149

Order for maintenance by competent Kathi at the instance of deserted wife. Later, notice of husband's intention to divorce wife given to another Kathi—Order fixing maintenance during iddat on husband's application—Distress warrant to enforce earlier order—Does the order of the latter Kathi supersede that of the former.

Held: (1) *That the second* Kathi *had no right to fix the amount of maintenance during* iddat *on the application of the husband.*

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(2) *That the question of the iddat maintenance arises only after an irrevocable divorce has taken place.*

RAJUMATH UMMA *vs.* GHOUSE ... XI. 39

Application for leave to appeal under section 13 (1) of Part 2 of the Third Schedule to the Muslim Marriage and Divorce Registration Ordinance—Has respondent right to be heard at such application.

Held: *That the opposite party, to whom notice of an intended application for leave to appeal to the Supreme Court has been given under section* 13 (1) *of Part* 2 *of the Third Schedule to the Muslim Marriage and Divorce Registration Ordinance, is entitled to be heard in opposition to the application.*

MOHAMED MUSTAPHA *vs.* IBRAHIM ALIM ... ... XIII. 7

Rule 10 Part I of the Third Schedule—Does it apply to maintenance proceedings—Section 21 (3) of the Ordinance.

Held: *That Rule* 10 *of Part* I *of the Third Schedule to the Muslim Marriage and Divorce Registration Ordinance does not apply to maintenance proceedings.*

UMMA SAIDU *vs.* HASIM MARIKAR XXII. 55

Is a kathi **appointed under the Muslim Marriage and Divorce Registration Ordinance a public officer or servant for the purposes of section 218 (h) of the Civil Procedure Code.**

WALKER AND GREIG LTD., *vs.* MOHAMED ... ... XXV. 50

Payment of Mahr—Application of rule 8 of the Third Schedule and proceedings before the Kathi.

Held: *In a claim for the payment of Mahr, where the facts are admitted by the parties, the* kathi *is absolved from complying with the requirements of rule* 8 *of the Third Schedule relating to the recording of the sworn statements of at least two witnesses.*

ALY-AYAD *vs.* AYAD ... XXIX. 63

Procedure for enforcing Kathi's **award.**

Held: *That the machinery laid down by section* 21 (4) *of the Muslim Marriage and Divorce Registration Ordinance is exhaustive of the remedies available for the enforcement of awards made by a Kathi's Court in respect of claims for the payment of* mahr.

MARIKAR *vs.* HABIBU ... XXXIX. 78

Muslim Law—Maintenance—Allegation of cruelty on the part of husband—Wife's right to maintenance—Order to maintain operative only from the date of order—Muslim Marriage and Divorce Registration Ordinance (chapter 99)—Section 21 (3).

Where a wife left her husband's home and lived apart, alleging cruelty on the part of her husband and asked for maintenance for herself under section 21 (3) of the Muslim Marriage and Divorce Registration Ordinance (Chapter 99).

Held: (1) *That the wife was not entitled to maintenance as she had failed to prove that she had a valid reason for leaving the conjugal domicile and living apart from the husband.*

(2) *That an order for maintenance under section* 21 (3) *of the Ordinance takes effect only from the date of the order and not from the date of application.*

SEYED MOHAMED *vs.* MOHAMED ALI LEBEE ... ... XLVIII. 77

Muslim Law—Marriage—Money paid by wife's father to husband on the day of registration of marriage—Amount entered in column "Stridanum" of marriage certificate—Can wife recover money from husband?—"Stridanum"—Meaning of—Muslim Marriage and Divorce Registration Ordinance (Chapter 99)—Section 7 (2), First Schedule, Form No. IV.

Where a sum of money was paid by the wife's father to the husband on the date of the registration of the marriage, and the amount was entered in the column "Stridanum" in the marriage certificate and there was evidence to show that the money so paid was intended by the partner to be a gift by the father for the benefit of the daughter, the wife.

Held. *That the District Judge had arrived at the correct interpretation of what the parties intended and the wife was entitled to recover the money paid as "Stridanum."*

MEEVI MOHAMED AFLEEN *vs.* NONA JULAIYA ... ... XLVIII. 79

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NAME

Change of name—Is a person who has been known by a name different from the name in the register of births entitled to have the entry relating to his name rectified.

IN *re* LUCY DE SILVA ... XVII. 109

NATURAL JUSTICE

Natural justice—Principles of

THE MAYOR OF COLOMBO *vs.* COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER ... ... XLI. 33

Principles of natural justice violated—Power of Supreme Court to intervene.

WIJESINGHE *vs.* MIGEL AND OTHERS ... ... XLIII. 86

NEGLIGENCE

See also under **DAMAGES**

Civil Action in damages for injuries caused by motor car.

Held: *That a civil action for damages for injuries caused by a motor car lies even though the negligence is not such as to justify a criminal prosecution.*

SAPENAUMMA *vs.* SIDDICK AND ANOTHER ... ... II. 477

Negligence—What is criminal negligence.

SCHARENGUIVEL *vs.* CHARLIE ... X. 85

Negligence of notary—Circumstances in which notary is liable in damages for loss caused to client.

DANIEL *vs.* COORAY ... ... XX. 59

Negligent act resulting in death of person—Can mother of deceased claim damages for maternal loss sustained—Measure of damages.

AGIDAHAMY *vs.* FONSEKA ... XXIII. 65

A public servant who acts negligently in exercising the powers conferred on him by statute cannot escape liability, the bona fides **of his action notwithstanding.**

PARAMASOTHY *vs.* VENAYAGAMOORTHI ... ... XXVI. 68

The owners of a private nursing home are liable for the negligence of their servant even though the work which the servant is employed to do is of a skilful or technical character as to the method of performing which the employer is himself ignorant.

TRUSTEES OF THE FRAZER MEMORIAL NURSING HOME *vs.* OLNEY ... XXVII. 7

Bus swerved to avoid car at junction—Excessive speed of bus—Wet road—Much traffic—Skid—Accident—Injury to passenger—Claim for damages.

A bus approaching a junction at an excessive speed, in avoiding a car that crossed its path without warning, skidded and overturned causing injury to a passenger. The road was wet at the time and there was considerable traffic.

Held: *That, in the circumstances, the driver was negligent in driving at an excessive speed without due care, which would have prevented the accident.*

THE HIGH LEVEL ROAD BUS CO., LTD. *vs.* MISSO ... ... XXXVI. 44

Negligence of carrier.

BAGSOOBOY *vs.* THE CEYLON WHARFAGE CO. LTD. ... ... XXXVII. 8

Negligence—Damages for injury resulting from—Passenger just alighted at halting place run over by rear wheels of the vehicle—Driving off from halting place without due care and caution—Res ipsa loquitur.

Held: (1) *That the driver of an omnibus, who, without taking due care and precautions for the safety of persons, who were known to be in very close proximity to the vehicle, merely depends on the signal given by his conductor to drive off a 'bus from a halting place, is guilty of gross negligence.*

(2) *That the doctrine of* "res ipsa loquitur" *applies to a case where the rear wheels of an omnibus ran over a person who had just alighted from the vehicle at a prescribed halting place.*

GAMAGE LUISA PERERA *vs.* GAMINI BUS CO., LTD. ... ... XL. 49

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NEGOTIORUM GESTIO

Negotiorum gestio—**Plaintiff's claim for recovery of proportionate share of expenses incurred in litigation—Benefit to defendants—Principles governing a claim on the basis of** negotiorum gestio—**Roman-Dutch Law.**

The plaintiffs brought this action to recover from the defendants a half share of the expenses incurred in successfully contesting a claim to property by one K. which resulted in benefit to the defendants. Defendants *inter alia* denied that plaintiffs could maintain the action in law.

Held: (1) *That the plaintiffs were not entitled in law to maintain the action.*

(2) *That our law does not recognize the management by one person of the litigation of another except to the extent allowed by the Civil Procedure Code.*

THANGAMMA AND ANOTHER *vs.* MUTTAMAL AND OTHERS ... XXV. 103

Negotiorum Gestor—**Joint debt paid by third party. Rights of third party against co-debtors.**

DINGIRI APPU *vs.* PUNCHI APPUHAMY AND 3 OTHERS ... ... XXXV. 41

NINDAGAMA LANDS

See under **SERVICE TENURES**

NON-DIRECTION

See under **COURT OF CRIMINAL APPEAL**

NOTARY

"The Notaries Ordinance 1907"—Failure of Notary to renew certificate as required by section 25—Certificate obtained under the proviso to § 25 (2)—No retrospective effect—

Held: (1) *That section* 25 *of "The Notaries Ordinance* 1907" *allows two months' grace in obtaining a yearly certificate, but proceedings could be taken in respect of any act done by the notary as notary within those two months, if the certificate for the year be not applied for and granted by March* 1*st.*

(2) *That a certificate obtained under the proviso to* § 25 (2) *of "The Notaries Ordinance* 1907" *has no retrospective effect.*

WICKRAMANAYAKE *vs.* PERERA ... I. 363

Notaries Ordinance—Breach of section 29 rule 35 (a).

Held: *That a breach of section* 29 *rule* 35 (*a*) *was committed by a notary who not being also a proctor attested about* 51 *deeds in one year at an office at a place not approved by the Governor where he had a board with the legend "Notary's Office" in Sinhala.*

DE SILVA *vs.* DE ZOYSA ... II 320

Notaries Ordinance No. 1 of 1907—Application under the proviso to section 25 (2)—Refusal of District Judge to make an order for the issue of a certificate—Is there an appeal.

Held: *That there is no appeal to the Supreme Court from an order, made by the District Judge under the proviso to section* 25 (2) *of the Notaries Ordinance No.* 1 *of* 1907, *refusing to make order for the issue of a certificate.*

IN THE MATTER OF AN APPLICATION OF ALBERT GODAMUNE ... V. 54

Deed notarially executed—Effect and force of statement in attestation clause.

Held: (1) *That it can be presumed that the statements in the attestation clause of a deed were written down by the notary as agent for and on the instructions of the executant and are recorded in writing in consequence of those instructions.*

(2) *That the instructions to a notary need not be in writing. Oral instructions are sufficient to constitute him a mandatory.*

(3) *That the averments in an attestation are binding on the executant.*

AUSADAHAMY *vs.* KIRIBANDA ... V. 57

Can evidence be led to contradict the statement made by a notary in his attestation clause to a deed attested by him.

PERERA *vs.* ALICE ... ... VIII. 109

Notaries Ordinance No. 1 of 1907—section 29 rules 24 and 33—Omission to transmit duplicates of deeds to the Registrar General—Failure to give an explanation of the omission—Effect of proviso to section 29.

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Held: (1) *That the proviso to section 29 of the Notaries Ordinance does not impose an obligation on the Registrar-General to give a notary, who has disregarded or neglected to observe the provisions of Rule No. 24, further time to comply with the requirements of the rule.*

(2) *That the word "may" in the proviso to section 29 of the Notaries Ordinance does not have the force of "must."*

(3) *That a notary is bound under rule 33 of section 29 to give an explanation of his omission to comply with rule 24, and that failure to give an explanation is punishable.*

WIJESURIYA (REGISTRAR OF LANDS) *vs.* DALPATADU (NOTARY PUBLIC) IX. 73

Notaries Ordinance No. 1 of 1907—Section 29 rule 16—Failure to obtain written dispensation for search.

Held: *That a Notary who, without authority in writing authorising him to dispense with the search of the registers in the land registry, fails to examine the registers is guilty of an offence under section 29 of the Notaries Ordinance.*

PERERA *vs.* JAYAWARDENA ... X. 99

Notaries Ordinance No. 1 of 1907—Section 29 rule 24—Does rule 24 apply to a deed which has not been executed by all the parties thereto.

Held: *That section 29 rule 24 does not apply to a deed which has not been executed by all the parties necessary thereto.*

PERERA (CLERK—LAND REGISTRY—COLOMBO) *vs.* CASSIM (NOTARY PUBLIC) ... ... X. 132

Notaries Ordinance section 30 rule 25 and proviso (a)—Can a notary be prosecuted both for a breach of rule 25 and a failure to comply with a notice under proviso (a)—Interpretation Ordinance section 9—Section 330 of the Criminal Procedure Code.

Held: (1) *That section 30 proviso (a) of the Notaries Ordinance enables the Registrar-General to give a notice under that proviso to a notary though he has been convicted for a breach of rule 25 of section 30 and then to prosecute the notary again if he fails to comply with the terms of the notice.*

(2) *That section 9 of the Interpretation Ordinance and section 330 of the Criminal Procedure Code are no bar to the prosecution of a notary both for a breach of section 30 rule 25 of the Notaries Ordinance and for failure to comply with a written notice under proviso (a) to section 30 of the same Ordinance.*

SAMARASINGHE (REGISTRAR OF LANDS) *vs.* DALPATADU ... ... XVIII. 26

Circumstances in which notary may be liable in damages for loss suffered by his client owing to the notary's mistake.

DANIEL *vs.* COORAY ... XX. 59

Notaries Ordinance section 25 rule 30 and section 30—Can magistrate try breach of rule in the exercise of his powers under section 152 (3) of the Criminal Procedure Code merely because the offence is punishable with a fine of Rs. 200/- —Criminal Procedure Code section 11 (b).

Held: *That a Magistrate is not justified in trying summarily under section 152 (3) of the Criminal Procedure Code a breach of rule 30 of section 25 of thr Notaries Ordinance merely because the maximum punishment is only a fine of Rs. 200/-*

DE SILVA (REGISTRAR OF LANDS) *vs.* DALPATADU ... ... XXII. 65

Notary—Declaration by—Of due execution of deed—Is proof of notary's signature necessary.

SREENIVASARAGHAVA IYENGAR *vs.* JAINAMBEEBEE AMMAL AND OTHERS XXXIV. 1

NOVATION

Debt of deceased person—Oral Promise by defendant to pay debt—Is such promise enforceable without a writing—Ordinance No. 7 of 1840—Guarantee—Novation—Novation need not be in writing.

Held: *That a novation to be valid need not be in writing. It can be by parol merely and still be perfectly valid.*

FERNANDO AND ANOTHER *vs.* ABEYEGOONESEKERA ... ... I. 419

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Novation—Undertaking to pay debt due from another—Acceptance by creditor—Prevention of Frauds Ordinance, section 78—(Chapter 57).

Held: *That the undertaking given by the appellants amounted not to a guarantee, but to a novation and hence no writing was required.*

RODRIGO AND ANOTHER *vs.* EBRAHIM ... ... XXVI. 62

NUISANCE

Nuisances Ordinance—(Chapter 180) section 2 (12)—Nuisance—When is an employer criminally responsible for the acts of his servants.

Held: (1) *That the master was liable although the servants acted contrary to his instructions and in his absence, because in law, the master must be held to have permitted them to do what they did, for the master ought at his peril, to have seen his prohibition obeyed.*

(2) *That the word "whosoever" in the context of section* 2 (12) *of the Nuisances Ordinance (Chapter* 180) *means, whosoever being the occupier of premises.*

AKBAR (INSPECTOR, MUNICIPALITY) *vs.* LEORIS APPUHAMY ... XIV. 95

Nuisances Ordinance section 2, sub-section (1) and (2)—Proof necessary in a charge under.

Held: *That in a charge under section* 2, *sub-section* (1) *or sub-section* (2) *of the Nuisances Ordinance, a finding that the person charged was "the owner or occupier" or "person in occupation" respectively, is a necessary foundation—apart from the existence of a nuisance—of his liability to be convicted.*

WICKRAMASINGHE (SANITARY INSPECTOR) *vs.* SECRETARY, S. P. C. A. XIX. 38

Nuisance—Repairer of radio sets turning in wireless sets in the course of repairs till late at night.

THAMOTHERAMPILLAI *vs.* GOVINDASAMY ... ... XXXII. 39

NULLITY OF MARRIAGE

See under **HUSBAND AND WIFE**

NURSING HOME

The owners of a private nursing home are liable for the negligence of their servant even though the work which the servant is employed to do is of a skilful or technical character as to the method of performing which the employer is himself ignorant.

TRUSTEES OF THE FRAZER MEMORIAL NURSING HOME *vs.* OLNEY XXVII. 7

OATHS

Oaths Ordinance 1895—Evidence of child—Manner of taking.

Held: *That when a Court decides to take the statement of a person as evidence it has no option but to administer either the oath or affirmation to such person as the case may require.*

SUB-INSPECTOR OF POLICE, CHILAW *vs.* MARIA UMMA ... ... I. 1

Decisory Oath—Oaths Ordinance, section 8.

Held: *That, in the absence of evidence of the terms of the oath and of its binding nature, a decisory oath cannot be regarded as one coming within section* 8 *of the Oaths Ordinance.*

JAYASINGHE *vs.* FERNANDO AND OTHERS ... ... XII. 150

Decisory oath to decide action—Plaintiff's sgreement to take out commission—Action to be dismissed if plaintiff fails to take out commission—Is agreement valid and enforceable.

SUPPIAH *vs.* BRAMPY AND ANOTHER ... ... XXI. 49

Sections 4 and 9. The deliberate non-administration of an oath or affirmation amounts to a case of commission and does not therefore come within the ambit of section 9 of the Oaths Ordinance which provides that no omission to take any oath or make any affirmation shall render inadmissible any evidence.

REX *vs.* RAMASAMY ... ... XXI. 83

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A magistrate specially gazetted to hear a criminal case on a particular day has the power to administer an oath in support of an affidavit.

SARAM *vs.* SRI SKANDA RAJAH XXVI. 108

Oaths and Affirmations Ordinance—Challenge by Muslim plaintiff to Buddhist defendant to take oath at Mosque—Challenge accepted—Terms of settlement recorded by court—Is agreement obnoxious to § 7 of Ordinance.

NAGOOR ADUMAI *vs.* WILLIAM XXX. 108

Oath—Agreement of parties to decide case by—Date fixed by Judge without appointing Commisioner to administer oath—Failure to take oath owing to illness of defendant's proctor on the date fixed—Should judgment be entered for plaintiff as agreed.

The plaintiff agreed to his action being dismissed if the defendant took an oath at the "Maligawa" on a date to be fixed by the court. The defendant agreed that, on his failure to take the oath, judgment should be entered for the plaintiff. The court fixed a certain date for the oath, but the name of the Commissioner before whom the oath was to be administered was not named. The defendant did not take the oath on the date fixed owing to the illness of his Proctor, and thereupon judgment was entered for plaintiff.

Held: *That judgment should not have been entered for the plaintiff as the court had failed to appoint a commissioner to administer the oath.*

MUDIYANSE AND ANOTHER *vs.* AUCHAPILLAI ... ... XXXII. 14

Maintenance—Action for—Agreement that respondent should take Oath at Minneriya Temple on the steps near temple door—Oath taken when temple door not open—Can applicant withdraw from undertaking.

The parties to a maintenance case agreed, that the case should be decided by taking an oath at the Minnneriya Temple on the steps of the Temple near the entrance door. Whether the door should be kept open or not was no part of the agreement. Respondent took the oath, but the applicant sought to get behind the undertaking on the ground that the door was shut at the time.

Held: *That the applicant was not entitled to withdraw from the undertaking after the opponent had taken the oath.*

JAYEWARDENE *vs.* KUMARIHAMY XXXV. 53

Refusal of party to take oath without sufficient reason when required by opponent—Should it be taken into consideration by judge.

SINNAPODY AND ANOTHER *vs.* MANNIKAN AND ANOTHER ... ... XLI. 76

Before a witness is dealt with summarily under § 11 of the Oaths Ordinance, it is necessary that a proper charge should be framed against him.

JOHN PERERA *vs.* JOHNSON ... XLII. 97

OFFENSIVE AND DANGEROUS TRADE

See under **BYLAW**

DANGEROUS AND OFFENSIVE TRADE

OMNIA PRAESUMUNTUR RITE ESSE ACTA

Maxim applies to acts of a legislature as to any other acts.

KODAKKAN PILLAI *vs.* MUDANAYAKE AND OTHERS ... ... XLIX. 33

OMNIBUS SERVICE LICENSING ORDINANCE No. 47 of 1942

Sections 4, 7, 6 (1) (e)

The Kelani Valley Motor Transit Company and the Colombo-Ratnapura Omnibus Company applied to the Commissioner of Motor Transport under section 3 of the Omnibus Service Licencing Ordinance for road service licences between Colombo and Ratnapura. The deciding factor of preference between the two applicants as required by rule 1 (ii) in the 1st schedule was, who held the majority of licences. Between Colombo and Ratnapura the latter company had eleven licences and the former six. To points beyond Ratnapura, within the Ratnapura district each held seven licences. The former company, however,

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held six licences from Panadura to Badulla *via* Colombo and Ratnapura and four other licences from Panadura to points beyond Ratnapura in the Ratnapura district. The question, therefore, at issue was whether the said six licences from Panadura to Badulla should be reckoned as licences in respect of the same route or of routes which are substantially the same in order to determine the holders of a majority of licences The Commissioner and the Tribunal of Appeal held that they should be taken into account, thereupon a case was stated for the opinion of the Supreme Court.

(1) *A licence in respect of Colombo to Badulla is not an authority to use the omnibus on the Colombo-Ratnapura route, though it may use the highway between these points. The two licences are not identical. The word "route" does not mean "highway."*

(2) *That on a case stated by the Tribunal of Appeal for the opinion of the Supreme Court under the Motor Car Ordinance No.* 45 *of* 1938 *the party successful in the Tribunal of Appeal should be heard by the Supreme Court.*

THE KELANI VALLEY MOTOR TRANSIT CO. *vs.* THE COLOMBO-RATNAPURA OMNIBUS CO. ... ... XXV. 107

An appeal does not lie as of right to the Privy Council from the decision of the Supreme Court on a case stated under the Ordinance.

THE K. V. MOTOR TRANSIT CO. *vs.* THE C. R. OMNIBUS CO. ... XXVI. 112

Construction of section 7.

The licence of the Commissioner of Motor Transport was sought for providing an omnibus service on a section of a highway which formed part of the routes over which two companies operated services.

Held: *That under section 7 of the Omnibus Service Licensing Ordinance, the Commissioner had no power to issue a licence for the proposed route either to the existing companies or to any other applicant.*

THE COMMISSIONER OF MOTOR TRANSPORT *vs.* THE HIGH LEVEL ROAD BUS CO. ... ... XXXI. 51

Exclusive road service licence—Meaning of "route" and "highway"—Motor Car Ordinance, No. 45 of 1938.

Both parties to this case applied for a road service licence for the route Colombo-Ratnapura. The respondent had the greater number of omnibus licences covering that route. The appellant had more licences if his omnibuses, licensed for the route Panadure to Badulla *via* Colombo-Ratnapura, were taken into consideration.

Held: *That the two routes were not the same and that the only omnibus licences to be reckoned for the purposes of the road service licence were those confined to the Colombo-Ratnapura route.*

THE KELANI VALLEY MOTOR TRANSIT COMPANY, LIMITED *vs.* THE COLOMBO-RATNAPURA OMNIBUS COMPANY, LTD. ... ... XXXII. 79

Road license issued under—How may its terms be proved.

Held: *That no evidence can be given in proof of the terms of a road license issued under Ordinance No.* 37 *of* 1942 *except the document itself or secondary evidence of its contents when secondary evidence is admissible.*

JAYASEKERA *vs.* COOPER (S. I. POLICE, SPECIAL TRAFFIC, COLOMBO) XXXIX. 104

Application for route licence—Route common to whole of route for which Licence already issued to another person—Order made by Officer on behalf of Commissioner of Motor Transport—Reasons for decisions of Commissioner and of Tribunal of Appeal not given.

A and B, who were holders of road service licences under the Omnibus Service Licensing Ordinance, applied for additional road service licences. A part of A's proposed route was common to a route for which there was already a licence in favour of B. A part of B's proposed route was common to the whole of a route for which A held a licence. An officer signing for the Commissioner of Motor Transport refused A's application, and allowed B's. The Tribunal of Appeal upheld the Commissioner's decision. On a case stated.

Held: (1) *That the grant of a licence to B was contrary to section 7 of the Omnibus Service Licensing Ordinance.*

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(2) *That A's application ought to be granted.*

(3) *That applications for road service licences must be considered and decided by the Commissioner himself.*

THE KANDY TOWN BUS CO., LTD. *vs.* (1) THE COMMISSIONER OF MOTOR TRANSPORT (2) THE UNITED BUS CO., LTD. ... ... XL. 18

Certiorari—**Writ of—Omnibus Service Licensing Ordinance, No. 47 of 1942, section 10—Renewal of licence—Application made after expiry of licence—Commissioner's discretion to treat it as application for fresh licence.**

Where the Commissioner of Motor Transport treated an application for renewal of a licence for an Omnibus Service received after the licence had already expired as an application for a fresh licence to be considered in competition with other claimants,

Held: *That the Commissioner did not act in excess of jurisdiction.*

Per GRATIAEN, J.—"Indeed, if it were necessary to give a ruling on the point, I would be inclined to hold that although the Commissioner had a discretion under the Regulation to treat as valid an application for a "renewal" received less than eight weeks before a licence had expired, he had no such power if the licence had already expired before he received the application."

W. H. BUS CO., LTD. *vs.* THE COMMISSIONER OF MOTOR TRANSPORT XLI. 45

Case stated—Motor Car Ordinance No. 45 of 1938 and Omnibus Service Licensing Ordinance No. 47 of 1942—Proper mode of application by Commissioner of Motor Transport.

In stating a case for the opinion of the Supreme Court, the Commission should set forth the facts tabulated in paragraphs. Opinions or arguments should not be stated and there should be a definite finding of the facts, not a verbatim statement of the evidence, nor an approval of the contentions of either party. The questions submitted for the opinion of this (Supreme) Court should be clearly set out. Any material documents which were in evidence at the hearing before the Tribunal should be annexed as exhibits.

COMMISSIONER OF MOTOR TRANSPORT *vs.* THE SOUTH-WESTERN BUS CO., LTD. AND OTHERS ... ... XLIII. 106

Section 4 proviso—Application for route licence to ply buses—Representations by local authority against the grant of licence—Refusal of application by Commissioner without giving opportunity to applicant to urge reasons in support—Legality of order of refusal—Case stated for opinion of Court under section 4 (6) of Motor Car Ordinance No. 45 of 1938.

Held: (1) *That where an application is made to the Commissioner of Motor Transport for a licence to ply buses on a particular route, proviso to section* 4 *of the Omnibus Service Licensing Ordinance makes it imperative, that the Commissioner should not make any decision refusing the application on the ground of any representations made to him* inter alia *by a local authority, without an* ad hoc *inquiry.*

(2) *That the language of that proviso requires the Commissioner* (*a*) *to give notice to the applicant,* (*b*) *to consider any matters, that may be urged by the applicant in support of his application.*

(3) *That failure to give such notice renders the decision or refusal of the Commissioner illegal.*

EBERT SILVA OMNIBUS CO., LTD. *vs.* HIGH LEVEL ROAD BUS CO., LTD. *et al* ... ... XLVI. 26

Omnibus—Levying a fare in excess of the authorised fare—Liability of conductor of omnibus—Omnibus Service Licensing Ordinance No. 47 of 1942, sections 6 (1) (a), 15.

Held: *A conductor employed in an omnibus to collect fares, cannot be said to use, or cause or permit an omnibus to be used, within the meaning of section* 15 *of the Omnibus Service Licensing Ordinance No.* 47 *of* 1942, *and is, accordingly, not guilty of contravening the provisions of section* 6 (1) (*a*) *of the said Ordinance.*

SOMADASA *vs.* JAYASEKERE (S. I. POLICE,) WELLAMPITIYA ... XLVI. 54

OPIUM

See also under **POISONS OPIUM AND DANGEROUS DRUGS ORDINANCE.**

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Opium Ordinance 1910—Possession of opium—Seized opium sealed at the Police Station in the presence of the accused—Failure to seal immediately after seizure.

Held: (1) *That there is no imperative or inflexible rule that the articles or things seized should be sealed immediately after seizure in the presence of the accused and before they are moved to the Police Station.*

(2) *That the delay in sealing like informalities in the manner in which a search is conducted, are circumstances to be weighed in the consideration of the case.*

(3) *That the principles that apply to the Excise Ordinance regarding sealing of seized articles apply to the Opium Ordinance.*

PRINS *vs.* SABARATNAM ... I. 373

Opium Ordinance 1910 section 7 (2)—Meaning of offer for sale.

Held: *That preparation to sell opium to a decoy who had asked for opium did not amount to an "offer for sale" within the meaning of section 7 (a) Ordinance*

TOUSSAINT (SUB-INSPECTOR OF POLICE) *vs.* SADIRIS APPU ... ... II. 492

Opium Ordinance 1910 sections 5 and 8 (1)—Keeping opium—Criminal Procedure Code section 347—Alteration of charge in appeal.

The accused who was a watcher living all by himself in a hut on seeing an excise party who were raiding his hut took a parcel of opium from inside a room in the hut and ran away with it and was pursued and arrested while still in possession of the parcel. He was charged with committing an offence under section 8 (1) of Ordinance No. 5 of 1910.

Held: (1) *That the accused was guilty of the offence of keeping opium within the meaning of section 8(1) of Ordinance 5 of 1910.*

(2) *That the Supreme Court has power under section 347 of the Criminal Procedure Code in appeal to alter a charge so as to meet an offence that has been disclosed by the evidence already recorded especially when the accused is not prejudiced thereby.*

ELIYATHAMBY (SUB- INSPECTOR OF POLICE) *vs.* SUNDARAMPULLE ... III. 61

Opium Ordinance 1910. Can an order be made under section 27 directing the payment of a portion of a fine recovered under the Ordinance to the Police Reward Fund?

Held: (1) *That an order under section 27 directing the payment of a part of a fine recovered under Ordinance No. 5 of 1910 should be made at the time of the conviction and as a part of the judgement.*

(2) *That the Police Reward Fund is not an "informant" within the meaning of section 27 of Ordinance No. 5 of 1910 and that an order directing the payment of a part of a fine to the Fund cannot be made under the section.*

THE SOLICITOR GENERAL *vs.* MANIKKAM AND ANOTHER ... ... VI. 79

ORPHAN

Is a person in possession of an orphan's property legally liable to maintain him

CASSIPILLAI *vs.* RAJARETNAM VIII. 144

OUSTER

When does long continued and undisturbed possession constitute ouster among co-owners.

SIYADORIS AND OTHERS *vs.* SIMON AND ANOTHER ... ... XXX. 50

Burden of proving ouster in action for declaration of title.

KATHIRAMATHAMBY *vs.* ARUMUGAM ... ... XXXVIII. 27

OVERHANGING TREES

Overhanging branches of an adjacent neighbour's trees—Action for removal of overhanging branches—Law applicable in Jaffna is the Thesawalamai and not the Roman Dutch law.

SUNTHERAM AND ANOTHER *vs.* SINNATHAMBY AND OTHERS ... IV. 136

PACTUM ANTICHRESIS

Right to possess hypothecated property and to receive rubber coupons allotted to land in lieu of interest.

GABRIAL *vs.* CICILIA ADIKARAN XIX. 66

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PANGUWA

Panguwa—Co-owner of—Possessing exclusive lot in lieu of shares for over twenty years—Does such possession confer prescriptive title.

BANDARA *vs.* SINAPPU AND ANOTHER ... ... XXXII. 54

PARATE EXECUTIE

How far is an agreement for parate executie **recognized in Ceylon.**

HONGKONG AND SHANGHAI BANKING CORPORATION *et al vs.* KRISHNAPILLAI I. 149

PARAVENI NILAKARAYA

See under **SERVICE TENURES ORDINANCE.**

PARENT AND CHILD

Claim by father for custody of minor female child under sixteen—What considerations should guide the court in deciding such an application.

SAMARASINGHE *vs.* DE SIMON *et al* XXIII. 21

PARLIAMENT

Legislative power of Parliament.

KODAKAN PILLAI *vs.* MUDANAYAKE AND OTHERS ... ... XLIX. 33

PARLIAMENTARY ELECTIONS

See also under **Ceylon (Parliamentary Elections) Order in Council.**

AMENDMENT ACT No. 19 of 1948.

Validity of—

THAMBIAYAH *vs.* KULASINGHAM XXXVIII. 53

PARLIAMENTARY ELECTION RULES 1946.

Rule 15—Effect of not serving notice on respondent's agent as required by rule.

RAMALINGAM *vs.* KUMARASAMY L. 17

PARTITION

Public right of way is not extinguished by a partition decree to which the Crown is not a party.

FERNANDO *vs.* SENARATNE ... I. 199

Partition of land—Unequal division of the corpus—adjustment—by the apportionment of compensation among the shareholders—Decree for costs—Sale of certain lot in execution of decree—Deposit of amount realised in Court—Should the compensation or the costs be a first charge on this fund?

A land was partitioned and certain lots were decreed by the final decree to the Plaintiff, third, tenth, eleventh, twelfth and thirteenth defendants amongst others, and it was further ordered and decreed that "equalising and apportioning the valuation of the foregoing lots" *inter alia* the tenth, eleventh and twelfth defendants pay Rs. 12/91 each to the thirteenth defendant, and the third defendant do pay Rs. 436.11 to the thirteenth defendant. Lots C and D had been allotted to the third defendant, and Lot A to the tenth, eleventh, and twelfth defendants. Writ was issued by the thirteenth defendant for the recovery of *pro rata costs*, and lots C and A2 were seized and sold. Lot C realised Rs. 505/- and lot A 2 Rs. 27/- The total realised less certain fees and expenses, amounting to Rs. 519/86, was deposited in court.

. Plaintiff's Bill of costs was taxed at Rs. 435/63 and he sought to recover this against the second, third, eighth, and thirteenth defendants by seizure of the same property. The thirteenth defendant, however, subsequently paid the *pro rata* cost due from him to the plaintiff.

Plaintiff sought to have the *pro rata* costs still due to him satisfied out of the proceeds of the sale of the Lots C. and A2 claiming concurrence with the thirteenth defendant. The thirteenth defendant claimed that the amount awarded him as compensation was a first charge on that sum.

Held: *That in the above circumstances the thirteenth defendant was entitled to have his compensation paid out as a first charge on the lots, and that thereafter the plaintiff was entitled to concurrence for his* pro rata *costs if any amount remained after payment of compensation.*

RAPIEL *vs.* PEIRIS ... ... I. 351

Partition Ordinance—Final Decree—Motion to set aside final decree—Settlement of consent affecting minors—Consent given by guardian ad litem**—Consent affecting**

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interests of minors adversely—Can such consent operate against minors—Transfer of property without leave of Court.

Held: (1) *That the Court has no power to set aside a final decree in a partition action.*

(2) *That the consent given by a guardian* ad litem *of a minor to convey the minor's interests under a partition decree is not binding unless the attention of the court has been expressly directed to the fact of minority and the court has specially approved it.*

SINNAMAH *et al vs.* SELLAMMA *et al* I. 369

Partition of Land—Sale of land in three blocks—Two blocks sold below appraised value—Fresh scheme of distribution filed whereby the deficiencies resulting from the sale of the two blocks were to be made good from the proceeds of the sale of the other block—Amounts due to co-owners reduced proportionately thereby—Reduction of amount of credit given to co-owners who purchased the lot sold for more than the appraised value—Can such fresh scheme be made in the circumstances.

Held: (1) *That the value of improvements in a sale under the Partition Ordinance cannot be enhanced or decreased by the accident of any particular price realised at the sale.*

(2) *That the scheme of distribution approved by Court in Partition action in which a sale has been decreed cannot be altered on the ground that some of the blocks of the land fetched less than the appraised value while others fetched more.*

DE SILVA *vs.* ODIRIS ... ... I. 385

A partition action may be brought in any District Court within the jurisdiction of which any party defendant resides.

HUSSEN *vs.* PEIRIS *et al* ... ... II. 53

A District Court has no power to re-open an order of dismissal in a partition case even with the consent of parties.

PAULAUSZ *vs.* PERERA ... II. 252

When may party be permitted to intervene even after final decree in a partition action.

Held: (1) *That where the procedure in a partition action has been irregular a party may be allowed to intervene even after final decree.*

(2) *That a District Judge has no power to set aside a final decree even though the procedure has been irregular.*

(3) *That in such a case the remedy is by way of an application for revision to the Supreme Court.*

KANNANGARA *vs.* DE SILVA *et al* II. 267

Rights of mortgagee of an undivided share to a land after partition.

Held: (1) *That a mortgagee is entitled to seize and sell the share allotted to his mortgagor.*

(2) *That a mortgagee who inspite of his being aware that the mortgagor had been allotted a specific lot seized and sold only the share mortgaged and not the specific allotment was not entitled to sell the whole lot allotted in the partition but only the share he purported to sell.*

MUDALIHAMY *vs.* APPUHAMY ... II. 400

Obligations of a party to a partition action once brought before court.

Held: *That once a party to a partition action has been brought before the Court it is his duty to keep himself informed of the proceedings in the action and that he is bound by the decree though he has not taken part in the proceedings and has had no notice of the trial.*

DAVID *vs.* SIMON ... ... II. 413

Rights of improving co-owner.

Held: *That an improving co-owner is entitled to the fruits of the improvement effected by him unless it can be shewn that he acted against the express wishes of his fellow owners.*

ABDUL AZEEZ *vs.* MOHAMED ... II. 444

Civil Procedure Code—Proceeds of sale under partition decree lying in court to the credit of a defendant whose rights are subject to a mortgage bond in favour of another defendant—Seizure of the fund by another judgment creditor of the defendant—Payment of money by court to mortgagee without

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notice to seizing judgment creditor—Application to set aside order of payment.

Held: *That proceeds of a partition sale lying in court to the credit of a defendant is the property of that defendant though it is declared that his rights are subject to a mortgage bond in favour of another defendant.*

FERNANDO *vs.* JAYASOORIYA ... III. 54

Affixing of summons on land in occupation of defendant without personal service on him.

Held: *That where a defendant is in possession of a land sought to be partitioned it is irregular to affix a notice on the land without serving summons on the defendant.*

ABEYESINGHE *vs.* DHANAYAKE AND OTHERS ... ... III. 67

Partition Action—Purchaser of interest of a defendant—Extent of liability to pay pro rata **costs.**

A person purchased the interest of the first defendant to a partition action at a judicial sale and came into the proceedings after the interlocutory decree. By final decree he was declared entitled to and allotted the interests which, under the interlocutory decree, fell to the first defendant. The final decree went on to decree that the costs of partition be borne *pro rata*. When the 2nd and 3rd defendants took out writ against the added defendant, he disclaimed liability to pay costs incurred prior to the date on which he came into the action.

Held: *That the purchaser of the 1st defendant's interest was liable to pay the* pro rata *costs incurred prior to the date on which he came into the action.*

FERNANDO AND OTHERS *vs.* AMARASURIYA ... ... VI. 84

Mortgage of a share of land which is the subject of a partition action—Is the mortgage bond void—Can the debt be recovered—

JOHN APPUHAMY *vs.* WILLIAM APPUHAMY ... ... VII. 56

Partition action—Interlocutory decree—Appeal by 2nd to 7th defendants—8th to 11th defendants who were substituted in place of the 1st defendant, not made parties to the appeal—Section 770 of the Civil Procedure Code.

Held: *That this was a case in which the appellants should as a matter of indulgence be given an opportunity to add the parties omitted from the appeal.*

FRANCINA FERNANDO *vs.* KAIYA FERNANDO AND OTHERS ... ... VII. 113

Partition—Transfer of interests pending final decree—Interests transferred described as "the shares to be awarded by the decision arranged in partition case 5303 now pending"—Is such transfer obnoxious to section 17 of the Partition Ordinance No. 10 of 1863.

Held: *That the transfer was valid and that it was not obnoxious to section* 17 *of the Partition Ordinance No.* 10 *of* 1863.

SALEE AND OTHERS *vs.* NATCHIA AND OTHERS ... ... VIII. 70

Partition—Transfer executed after confirmation of scheme of partition, but before final decree was actually entered—Is the transfer valid—Section 17 of the Partition Ordinance.

Held: (1) *That the plaintiff's deeds of 25th July,* 1935, *and 1st August,* 1935, *were void by operation of section* 17 *of the Partition Ordinance.*

(2) *That the District Judge had power to vacate the order of 24th July,* 1935, *in the circumstances of this case.*

(3) *That for the application of the* exceptio rei venditae et traditae *there must be a deed good in law.*

GUNAWARDENA *vs.* SENEVIRATNE VIII. 129

Partition action—Registration of lis pendens **in wrong folio—Issue of summons—Rectification of error by registration in proper folio—Issue of fresh summons—Effect of non-compliance with § 12 (1) of Registration of Documents Ordinance.**

Held: *There is no provision in law which declares that a partition action should be dismissed if the provisions of* § 12 (1) *of the Registration of Documents Ordinance are not complied with.*

THOCHINA *vs.* DANIEL ... IX. 9

Partition action—Costs—Cursus curiae **as to.**

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Held: *That costs in partition actions should, apart from incidental contentions, ordinarily be borne by the co-owners* pro rata.

DE SILVA AND OTHERS *vs.* DE SILVA AND OTHERS ... ... XII. 124

Partition Ordinance No. 10 of 1863—Final decree in partition action—Can any alteration of the decree be made by consent of parties—Does the fact that, though the order that decree be entered has been made by the judge, the actual decree has not been signed by him, make any difference—Civil Procedure Code section 189.

Held: (1) *That the District Judge had no power to amend the decree in the partition action after April* 7, 1932 *except to the extent prescribed in section* 189 *of the Civil Procedure Code.*

(2) *That the fact that the* 5*th defendant had no objection to the amendment made no difference.*

(3) *That, although the final decree was not actually entered by the District Judge on April* 7, 1932, *his order "Enter Final Decree" should be regarded as the act of entering up of the final judgment required by section* 6 *of the Partition Ordinance.*

APPUHAMY AND ANOTHER *vs.* ALPERIS AND ANOTHER ... ... IX. 33

Partition action—Admission by parties of the existence of a document which is not produced—Cannot be regarded as amounting to proof of the document.

DE LIVERA AND OTHERS *vs.* AMARASEKERA AND OTHERS ... ... XIII. 157

Partition of land subject to a fidei commisum**—When will partition of such land be permitted.**

FERGUSON (NEE) HAWKE *vs.* SABAPATHY AND OTHERS ... ... XIV. 61

Partition—Final decree—Section 5 of the Partition Ordinance—No proof of affixing of notice on land—Report by Commissioner that he acted with notice to the parties—Presumption under section 114 (e) of the Evidence Ordinance—Validity of final decree.

Held: (1) *That inasmuch as the Commissioner's report stated that he acted with notice to parties and after publication by beat of tom-tom the requirements of the proviso to section* 5 *of the Partition Ordinance had been complied with.*

(2) *That a Commissioner under the Partition Ordinance is an Officer of Court and under section* 114 *(e) of the Evidence Ordinance his official acts should be presumed to have been regularly performed.*

FRANCISCU *vs.* PERERA ... ... XIV. 71

Partition Ordinance section 17—Deed executed during the period intervening between an order of abatement of a partition action and the setting aside of such an order—Not obnoxious to § 17

ARANAPPU DE SILVA *vs.* WILLIAM AND THREE OTHERS ... ... XIV. 81

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

Held: (1) *That the effect of sections* 8 *and* 12 *of the Partition Ordinance (Chapter* 56*) is to conserve a mortgage over the land whether it has been set up in the partition action or not.*

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

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

DE SILVA *vs.* NONA BABA AND OTHERS XV. 25

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

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Held: (1) *That where it is sought to partition land bought in the names of the members of a partnership, and the partition is opposed on the ground that the land is partnership property, the onus is on the plaintiffs to show that each party's share in the land was for his personal use and that the land was not partnership property.*

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

SEYYADO IBRAHIM SAIBO AND OTHERS *vs.* JAINAMBEEBEE AMMAL AND OTHERS XVI. 45

Transfer of land—Subsequent discovery that deed of transfer was pending partition action—Purchaser's right to bring action for recovery of purchase price.

THAMOTHERAM PILLAI *vs.* KANAPATHIPILLAI ... ... XVI. 95

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

Held: (1) *That section* 84 *of the Civil Procedure Code (Chapter* 86) *applies to actions under the Partition Ordinance (Chapter* 56).

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

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

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

DE SARAM *vs.* DE SILVA AND ANOTHER ... ... XVI. 102

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

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

JUSTINA AND ANOTHER *vs.* ANDIYA AND OTHERS ... ... XVI. 112

A judge has no power to dismiss a partition action on the ground that the plaintiff failed to take steps to have summons served on a defendant who was absent from the Island.

RAJAPAKSE *vs.* RAJAPAKSE ... XVIII. 39

If a deed is admitted in evidence in a partition action without objection, the objection that the deed had not been duly proved will not be entertained in appeal.

SIYADORIS *vs.* DAINIS AND OTHERS XX. 33

Fidei commissum **property—Partition action by one of the** fiduciarii. **A** fidei commissum **in respect of a land cannot be enforced against a purchaser without notice of the** fidei commissum **from a** fiduciarius **who has acquired title under the Partition Ordinance.**

ANEES *vs.* BANK OF CHETTINAD XX. 88

Partition action—Judgment of consent in—operates as res-judicata.

MENIK ETANA *vs.* PUNCHI APPUHAMY AND ANOTHER ... ... XXI. 14

Partition—Agreement affecting only the rights of parties inter se **subject to investigation by court of their interests to land—Is such agreement obnoxious to Partition Ordinance.**

Held: (Keuneman, J. dissentiente) *That once the title of the parties to a partition action has been investigated by the court the parties are not precluded by the provisions of the Partition Ordinance from adjusting their differences* inter se.

KUMARIHAMY *vs.* WERAGAMA AND ANOTHER ... ... XXIII. 9

Section 12 of the Partition Ordinance continues to protect the rights of a mortgagee even after decree is entered.

GUNARATNE *vs.* PERERA AND ANOTHER ... ... XXIV. 11

A purchaser of an undivided share of a land in execution of a mortgage decree is upon partition of the land subsequent to his purchase entitled to have his conveyance rectified by the inclusion of the lots allotted to his mortgagor in the partition decree.

AIYADURAI *vs.* THURAISINGHAM AND ANOTHER ... ... XXIV. 27

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In partition cases courts should not deny to parties the right to intervene until the final decree is entered.

While granting such an application the court is empowered under section 18 of the Civil Procedure Code to impose such terms as may appear fair and equitable.

WIJESEKERA AND THREE OTHERS *vs.* WIJESURIYA ... ... XXV. 96

Partition action—A claim for compensation for improvements only can be asserted in.

JASOHAMY AND ANOTHER *vs.* PODIHAMY AND TWO OTHERS ... XXV. 100

Partition action—Panguwa **in a** nindagama**—Failure to perform services or pay commuted dues for over ten years—Acquisition of full dominium by tenants—Maintainability of partition action—Nature of the obligations of the tenants—Service Tenures Ordinance (Chapter 323) section 24.**

Held: (1) *That the obligations of tenants of a* panguwa *of a* nindagama *to render services is in the nature of an indivisible obligation and therefore, the liability to pay commuted dues is also indivisible.*

(2) *That where over ten years had lapsed since the proformance of any services or the payment of any dues to the overlord in respect of such a land the* dominum *in such land became vested in the* nilakarayas *under section* 24 *of the Service Tenures Ordinance* (*chapter* 233)*and a partition action could be maintained in respect thereof.*

DINGIRI MENIKE AND TWO OTHERS *vs.* KIRI BANDARA AND ANOTHER XXVI. 1

Partition Ordinance section 17—Effect of—Prescription Ordinance section 3—Possessory action—Effect of on the possession of the person dispossessed.

Held: (1) *That section* 17 *of the Partition Ordinance renders void only the alienation of shares of a land which is properly the subject of a partition action.*

(2) *That a person who is dispossessed of a land cannot by instituting a possessory action claim that his possession has not been interrupted.*

(3) *That possession once interrupted cannot be regarded as uninterrupted unless regained in fact in a few days.*

PERERA *vs.* WILLIAM ATTALE XXVII. 45

Partition of land—Partition Ordinance section 3—Service of summons on defendants resident in enemy occupied territory—Can a partition action be maintained against defendants resident in British territory occupied by the enemy.

Held: (1) *That a partition action can be maintained against a defendant resident in enemy occupied British territory.*

(2) *That service of summons on a person in possession of the land on behalf of defendants who are in enemy occupied territory is sufficient service under section* 3 *of the Partition Ordinance.*

YOKKOMUTTU *vs.* SAMINATHER AND ANOTHER ... ... XXVII. 111

Action for partition of land—Decree ordering sale of land in lots and declaring one party to be entitled to a house and the soil covered thereby—What share of the proceeds of sale is such party entitled to.

A decree entered in an action for the partition of a land ordered the sale of the land in lots and declared one of the parties to the action to be entitled to a house and the soil covered thereby.

Held: *That such party is entitled to the entirety of the amount realized by the sale of the house and the soil on which it was standing.*

WICKREMASURIYA *vs.* DAVITHAPPU AND OTHERS ... ... XXIX. 86

Partition Ordinance (cap. 56) § 9—Fidei commissum **property—Partition decree allotting defined lot—Subsequent sale—Effect of decree on rights of** fidei commissarii.

SOYSA *vs.* MISKIN ... XXX. 100

Partition action—Defendants' answers disclosing fact that owners of certain shares not made parties—Plaintiffs proving claim as against certain defendants—Procedure.

In this case the plaintiffs and 1st to 9th defendants claimed a half share of a certain field and stated that 10th to 13th defendants were entitled to the other half. The 10th to 13th defendants claimed the entire field but their answer disclosed that the owners of certain shares in the field were not parties to the action. At the trial, plaintiffs and 1st to 9th defendants proved their claim as against 10th to 13th defendants.

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Held: (1) *That further proceedings should be taken after all the persons who had not parted with their interests in the field had been made parties to the action.*

(2) *That at those proceedings* 10*th to* 13*th defendants should not be permitted to dispute the rights of the plaintiffs and* 1*st to* 9*th defendants to the shares claimed by them in the plaint.*

ISMAIL AND ANOTHER *vs.* MOHAMMADU AND OTHERS ... ... XXXI. 47

Partition—Lease of undivided share by co-owner—Can such co-owner bring partition action pending lease—Partition Ordinance, section 2.

Held: *That a co-owner who leases his undivided share can institute an action to partition the land pending such lease.*

GUNAWARDENE *vs* BABY NONA AND ANOTHER ... ... XXXI. 81

Partition—Conveyance pending partition action of interests to which vendor may be declared entitled to in the final decree—Is it obnoxious to section 17 of the Partition Ordinance—Nature of the right so conveyed.

A conveyance executed after the institution of a partition action and before the entering of the final decree purported to "sell, assign, transfer and set over" to the vendee the interest to which the said vendor may be declared entitled to in the final decree to be entered in the said case from and out of all that land (*i.e.*, the subject-matter of the partition suit).

Held: (1) *That the conveyance was not obnoxious to section* 17 *of the Partition Ordinance.*

(2) *That the right of title conveyed thereunder comes into existence only upon the entering of the final decree in virtue of the* jam tunc *principle of the Roman-Dutch Law or the equitable principle of the English Law that "when the property comes into existence the assignment fastens to it."*

MANCHANAYAKE *vs.* PERERA AND OTHERS ... ... XXXI. 104

Partition—Adoption of commissioner's report as regards allocation of allotments and valuation—Not proper subjects for appeal to Privy Council.

NARAYANAN CHETTIAR AND OTHERS *vs.* KALIAPPA CHETTIAR AND OTHERS ... ... XXXI. 109

Rival schemes by the Commissioner appointed by Court and another surveyor—Acceptance of scheme by the surveyor appointed by court—How it should be adopted.

Held: *That where a court accepts a scheme of partition prepared by a Surveyor other than the Commissioner appointed by court, the proper course is to remit the case to the Commissioner with directions for him to modify his scheme on the lines, more or less of the scheme so accepted.*

DON HENDRICK AND ANOTHER *vs.* GIMARAHAMINE AND OTHERS ... XXXII. 45

Partition case—Death of party—Administrator party to interlocutory decree—Rights of the heirs of the deceased to intervene after such decree—Civil Procedure Code, Section 472—Is it applicable to partition proceedings.

Held: (1) *That section* 472 *of the Civil Procedure Code is applicable to partition proceedings.*

(2) *That under section* 472 *of the Civil Procedure Code the administrator is the proper party to such proceedings, although the Judge has discretion to bring the heirs also as parties to the action.*

(3) *That where an administrator had not fully administered the estate, he should continue to represent the heirs of the deceased and any decree entered against him would bind the heirs too.*

MACKEEN AND ANOTHER *vs.* PULLE AND TWO OTHERS ... XXXIII. 28

Partition action—Party to interlocutory decree in representative capacity—Can he intervene thereafter to claim rights personally.

Held: *That a party to proceedings and to the interlocutory decree in a partition action in a representative capacity is entitled to intervene up to the date of final decree as regards his personal rights.*

GUNASEKERA *vs.* ARTHUR DE ZOYSA ... ... XXXIV. 57

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Partition—Co-owner erecting new house on common land—Possession for over ten years—Does mere possession mature into prescriptive title to building and soil covered thereby—Co-owners, members of one family—Necessity to lead strong evidence of exclusive possession to establish prescription—Can undivided portion of larger corpus be partitioned.

Held: (1) *That, where a co-owner erects a new building on the common land and remains in possession thereof for over ten years, he does not acquire a prescriptive right to the building and the soil on which it stands as against the other co-owners merely by such possession.*

(2) *That where the co-owners are members of one family very strong evidence of exclusive possession is necessary to establish prescription.*

(3) *That the partition of an undivided portion of a larger* corpus *cannot be allowed.*

DIAS ABEYSINGHE *vs.* DIAS ABEYSINGHE AND TWO OTHERS ... XXXIV. 69

Partition Action—Fidei commissum **referred to in preliminary decree—Omission in final decree—Is** fidei commissum **wiped out by such omission.**

TILAKARATNE AND OTHERS *vs.* DE SILVA AND OTHERS ... XXXVI. 1

Partition Ordinance, sections 2, 3 and 9—Action for partition—Decree for sale—Intervention by person not named in plaint—Is he entitled to process under section 3 of Partition Ordinance—Right to intervene.

Held: *That in a partition action, a person who is not named in the plaintiff's libel, is not entitled to be served with the process contemplated in Section* 3 *of the Partition Ordinance and has no right to intervene after the Court orders a decree for sale. The proviso to section* 9 *contains the remedies available to party prejudiced by a decree for partition or sale.*

RAMASAMY CHETTIAR *vs.* FERNANDO ... ... XXXVI. 62

Partition Ordinance section 21—Costs—Partition action—Decree for sale—Order for pro rata **costs—Property valued in plaint for Rs.3,000—Commisioner's appraised value Rs. 1,790—Sale proceeds Rs. 1,810—Absence of evidence regarding value of property at date of institution of action—Taxation of costs—Value that should be adopted for.**

In his plaint for the partition of a land the plaintiff valued the subject-matter at Rs. 3,000. A decree for sale was ordered and the Commissioner's appraised value was Rs. 1,790. At the sale the property fetched Rs. 1,810. Plaintiff sought to tax the bill of costs as for an action of the value of Rs. 3,000. Plaintiff led no evidence that the value of the property at the time of the institution of the action was Rs. 3,000.

Held: (1) *That under Section* 21 *of the Partition Ordinance* (*Chap.* 56), *where the value of the property is under Rupees three thousand, the costs shall be taxed according to the rates specified in Class* I *of Part* I *of the Second Schedule to the Civil Procedure Code.*

(2) *That the words "value of the property" in Section* 21 *of the Partition Ordinance means the actual value the property would fetch, if sold in the open market.*

(3) *That the material date for the purpose of determining the value is the date of the institution of the action and not the date of taxation.*

SOMASUNDERAM *vs.* MANICKAM XXXVI. 71

Partition action—Court of Requests—Objection to monetary jurisdiction of Court raised in answer—Failure of defendant to raise issue at trial or press this objection—Adjudication on other disputes raised—Duty of Court—Partition Ordinance, section 4.

In his answer to a plaint in a partition action instituted in the Court of Requests, the defendant averred that as the land, the subject-matter of the action was worth more than Rs. 2,000, the Court had no jurisdiction to hear the case. At the trial the defendants did not raise an issue on this point and the Court proceeded to hear and adjudicate on other disputes.

Held: (1) *That it was the duty of the Court to determine the question of jurisdiction expressly raised in the answer in pursuance of the requirements of section* 4 *of the Partition Ordinance.*

(2) *The failure of the defendants to press their objection at the trial cannot confer jurisdiction if, in fact, the averment in the answer is true.*

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(3) *That except in the case of survey plans which are deemed by statute to be accurate until the contrary is proved and to be* prima facie *proof of the facts exhibited therein, all other survey plans must be proved according to the rules of evidence.*

DON LEWIS AND OTHERS *vs.* JAYAWICKREMA AND ANOTHER XXXVII. 6

Partition action — Interlocutory decree declaring parties entitled to shares—Agreement to sell to plaintiff divided lots in lieu of such shares within three months after final decree—Registration of agreement—Transfer of divided lots after final decree to 3rd party—Is plaintiff entitled to specific performance.

PERERA *vs.* ELIZA NONA ... XXXVII. 109

Partition action—Defendants obtaining final decree—Plaintiffs not made parties to action and losing title to land—Action for damages—Partition Ordinance, section 9.

Held: *That an action for damages under section* 9 *of the Partition Ordinance must be based on a wilful act or omission arising from a breach of a legal duty or some fault or unfairness or lack of care or inquiry on the part of the defendant.*

Per BASNAYAKE,J.—"My own view is that any party prejudiced by a decree under the Partition Ordinance is entitled to receive damages upon mere proof that he has suffered damages by the act of the party against whom he brings the action."

ALMEIDA *et al vs.* DISSANAYAKA *et al* ... ... XXXVIII. 60

Agreement to partition land within three years—Failure to partition as agreed upon—Transfer of land to third party—Action for liquidated damages—Prescription Ordinance, sections 5 and 6.

On June 23, 1931, the plaintiff conveyed certain lands to the defendant by deed whereby it was agreed that the defendant would partition the same within three years from that date and re-convey a portion thereof to plaintiff. It was further provided that on failure to partition or reconvey as agreed the defendant should pay the plaintiff liquidated damages assessed at Rs. 10,000. The defendant took no steps to partition the land and on August 28, 1939, conveyed the lands to a third party. On May 29, 1944, the plaintiff filed action for the recovery of Rs. 10,000.

Held: (1) *That the plaintiff's cause of action arose when the defendant failed to take any steps to have the lands partitioned within three years from June* 23, 1931.

(2) *That the acton was barred by prescription.*

DON VELUN APPUHAMY *vs.* WILLIAM FERNANDO ... ... XXXVIII. 62

Interlocutory decree—Intervention after—Interlocutory decree vacated by consent of parties—Order for trial de novo**—Court's power to make such order—What intervenient can claim—Should plaintiff prove his case all over again—Meaning of "**per incuriam."

Held: (1) *That the Court cannot vacate an interlocutory decree for partition on the ground that parties consented to it.*

(2) *That it is not open to an intervenient to ask for a partition of a land different to that decribed in the plaintiff's libel.*

(3) *That where an intervention is entertained by the Court after interlocutory decree, the plaintiff should not be ordered to prove his case all over again.*

ALASUPPILLAI *vs.* YAVETPILLAI AND ANOTHER ... ... XXXIX. 107

Intervenient claiming by reason of prescriptive right—Period of prescription—Prescription Ordinance, section 3.

Held: *That an intervenient in a partition action, claiming under a prescriptive right, is entitled to count the period up to the date of his intervention in the action for the purpose of computing the period of ten years prescribed in section* 3 *of the Prescription Ordinance.*

NERIS PERERA AND ANOTHER *vs.* DON HENDRICK AND OTHERS ... XL. 112

Partition action—When should a Court order a sale under section 4 of the Ordinance.

Held: *That except in a case where parties ask for a sale, a judge should not order a sale under section* 4 *of the Partition Ordinance, unless it is proved to his satisfaction that a partition would be impossible or expedient.*

DONA MARY AND ANOTHER *vs.* DISSANAYAKE ... ... XLI. 111

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Sale of 'undivided' shares or 'whatever rights, interests, lot or lots that may be allotted' to grantor in partition action—Is such sale obnoxious to section 17 of the Partition Ordinance—Is it sale or agreement to sell—How determined—Does section 9 invalidate such transaction.

Held: (1) *That a deed alienating or hypothecating, pending partition proceedings an interest, to which a co-owner may ultimately become entitled under the final decree, is not obnoxious to Section* 17 *of the Partition Ordinance.*

(2) *That whether such a deed should be construed as an actual alienation or hypothecation of such contingent interest* or *merely as an agreement to alienate or hypothecate such interest* (*if and when acquired*) *must be decided in accordance with the ordinary rules governing the interpretation of written instruments.*

(3) *That if such an instrument is in effect only an agreement, no rights pass under it to the grantee until and unless the agreement had been duly implemented.*

(4) *That if , without implementing the agreement the grantor conveys to a* 3*rd party the rights acquired under the decree, the competing claims of the* 3*rd party and the original grantee must be determined with reference to other legal principles such as the application of section* 93 *of the Trusts Ordinance.*

(5) *That if, the instrument is in effect a present alienation or hypothecation of a contingent interest, rights of ownership or hypothecating rights vest in the grantor automatically upon the acquisition of that interest by the grantor.*

(6) *That neither any principle of the Common Law nor the provisions of section* 9 *of the Partition Ordinance invalidate a sale by anticipation of a contingent interest during the pendency of a Partition Action.*

SIRISOMA AND OTHERS *vs.* SARNALIS APPUHAMY AND OTHERS ... XLII. 70

Consideration of Original scheme of partition with notice to parties—Alternative scheme of partition ordered—Consideration by Court without notice to parties—Adoption of alternative scheme—Is it valid?

After considering the original scheme of partition submitted by the Commissioner with due notice to the parties, the court directed an alternative scheme to be submitted afresh. This scheme was considered by the Court and adopted without notice to all the parties.

Held: (1) *That the order adopting the alternative scheme was bad in law as notice required by section* 6 *of the Partition Ordinance had not been given.*

(2) *That the notice required to be given under Section* 6 *of the Ordinance cannot be restricted to the day fixed for the consideration of the original scheme of partition proposed by the Commissioner.*

(3) *That the Policy of the Law has been to allot to a co-owner the portion which contains his improvements whenever it is possible to do so.*

THEDCHANAMOORTHY AND OTHERS *vs.* APPAKUDDY AND OTHERS XLII. 107

Partition—Action for—Defendants's denial of plaintiff's title and claim that land forms part of Nindagame—Grant of whole village by Sannas—Failure of defendant to prove that land falls within village mentioned in grant.

Held: *That where a person claims a land on a Sannas conveying a whole village, he must establish that the land he claims falls within the limits of the village at the time of the grant, for there is no presumption that the limits of a village do not undergo change in course of time.*

MOLAGODA KUMARIHAMY *vs.* WIJETUNGA AND OTHERS ... ... XLIII. 40

Partition action—Interlocutory decree obtained without making heirs of certain deceased parties parties to the action—Decree affirmed in appeal—Power of Supreme Court to vary its decree.

WIJESINGHE *vs.* MIGAL AND OTHERS ... ... XLIII. 86

Partition—Co-owner acquiring prescriptive title to divided block in lieu of undivided share in land—Heirs of such co-owner transferring their rights describing as undivided shares of whole land—Partition sought of divided block—Transferees not entitled to larger fractions of the corpus than set out in the deeds in respect of the larger corpus

A co-owner acquired a prescriptive title to a divided block in lieu of his undivided

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1/12 share of a land. His heirs transferred their rights in the divided portion describing as fractions of the larger land. In an action for partitioning the divided block.

Held: *That the transferees are not entitled to get any larger fraction of the* corpus *to be partitioned than set out in the deeds in respect of the larger corpus.*

APPUHAMY *vs.* ELISAHAMY ...XLIII. 111

Partition action—Sale ordered—Case withdrawn—Sale of undivided share in land by co-owner—Sale void—Section 17, Partition Ordinance—Section 10, 406 Civil Procedure Code.

Where a sale was ordered by the Court in a partition action, and the case was allowed to be withdrawn on plaintiff's motion before sale, and one of the co-owners sold by deed his undivided share in the land.

Held: (1) *That the sale was void as it infringed the provisions of section* 17 *of the Partition Ordinance in that the withdrawal of the action cannot be said to be a refusal by the Court to grant the application for a partition or sale within the meaning of the section.*

(2) *That the Court had no power to allow the withdrawal of the action.*

MARY NONA *et al vs.* JAYAWARDENA ... ... XLIV. 31

Amicable partition—Co-owners acquiring prescription title to divided portions—Transfer of Co-owner's interests by reference to undivided shares—Action to partition divided corpus **by transferee—Is transferee entitled only to fractional share of divided** corpus.

JAYARATNE *vs.* RANAPURA ... XLIV. 97

Transfer pending partition—Final decree—Suit for cancellation of deed of transfer—Failure of consideration.

Sale—Undivided land—Contingent interest in transfer pending partition suit, together with another land—Allocation of a smaller interest by final decree—Action by vendee to cancel sale—Failure of consideration— Conventio rei speratae**—Impossibility of performance—Roman-Dutch Law**

By deed, the plaintiff bought from the defendant for Rs.5,000 two lands:—(*a*) an undivided one hundred acres of a land called "Shand's Land", in extent 4,000 acres, together with the share which may be alloted to him under the final decree in the partition case then pending: (*b*) an undivided paddy field in "Shand's Land."

There were no express covenants in the deed, by which the defendant undertook to indemnify the plaintiff against loss.

In the final decree, the plaintiff was allotted only 13 acres 1R. 20P. and he instituted an action to cancel the deed of sale, and for the return of Rs. 5,000, on the ground that there was a total failure of consideration of the contract of sale.

Held: (1) *That the express terms of the deed and the facts of the case, show that the sale of the contingent interests in the land under partition, was a contract under which the plaintiff purchased "a chance or expectation that a thing would come into existence", and was binding on the parties.*

(2) *That there was no total failure of consideration, as some benefits, even though smaller than the parties had hoped, had accrued to the plaintiff under the partition decree, together with an interest in the paddy land.*

(3) *That the principles of Roman-Dutch Law dealing with "impossibility of performance" in relation to contracts, apply only to "executory contracts", and did not apply to the contract of this case, which from the moment of its execution, operated as a present sale of a contingent interest in one land, as well as of an existing interest in another.*

E. A. WIJESINGHE *vs.* D. H. SONNADARA ... ... XLV. 64

Partition decree allotting defined lot to married woman—Sale of divided lot without husband's consent—Validity of sale.

SEEDIN *vs.* THEDIYAS ... XLVI. 1

Partition action—Ownership of houses and soil rights—Contests settled—Terms lacking in precision—Want of mutuality—Sections 91 and 408 Civil Procedure Code—Interlocutory decree entered conforming to the terms—Restitutio in integrum.

Where the points in dispute in a partition action were settled among the parties before evidence was led and interlocutory decree entered so as to give effect to the

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said settlement, but where the said compromise was lacking in precision and did not strictly conform to sections 91 and 408 of the Civil Procedure Code and was in fact calculated to lead to confusion and uncertainty and where any decree entered in conformity with the said compromise would be open to attack on the ground of want of mutuality.

Held: (1) *That the Supreme Court will not go into the question whether there was consensus* ad idem *between the parties to their original settlement and if so, as to what was in their minds.*

(2) *That, in the interests of justice, the purported settlement and the judgment entered upon the basis of that settlement should be set aside and the trial should proceed* de novo *upon the issues framed on the assumption that no admissions were made and no compromises effected by or on behalf of the parties.*

BABYHAMINE *et al vs.* JAMIS *et al* XLVI. 5

Partition action—Damages under section 9—Fraud and collusion—Two competing deeds—Failure to disclose subsequent deed —Title acquired by earlier deed superior—No fraud.

S was the executor named in the Last Will made by his father P. Pending a protracted litigation regarding this Will on 4-3-1938, S sold an undivided share of property belonging to the deceased's estate to C, reciting title as by inheritance from P. Subsequent to this sale, D in execution of a money decree obtained against S as *executor de son tort* caused the said interests to be sold by the Fiscal on 8-3-1938 and this was purchased by the plaintiff. C conveyed his rights to the appellant.

First defendant, who was a co-owner of the property, instituted proceedings under the Partition Ordinance making the appellant a party, who later purchased the entire property under a decree for sale under the Ordinance.

Plaintiff brought this action against the 1st defendant (as plaintiff in the partition action) and the appellant for the recovery of damages on the ground that they, acting in fraud and collusion, wrongfully failed and neglected to disclose his interests and wilfully suppressed or omitted to produce the deeds which would have disclosed plaintiff's interests.

The learned District Judge gave judgment for plaintiff and the 2nd defendant appealed.

Held: (1) *That the title which C acquired on* 4-3-1938 *and later sold to the plaintiff in* 1941 *was and continued to be superior to that which the plaintiff purported to acquire on* 8-3-1938.

(2) *That plaintiff had no vested rights in the property sought to be partitioned and therefore not being a necessary party to the partition action was not entitled to the damages claimed.*

APPUHAMY *vs.* EDWIN ... XLVI. 83

Partition, action for—Portion of land unbuildable and valueless—Is it sufficient ground for ordering sale.

Held: *That in proceedings under the Partition Ordinance the mere fact that one section of the land is unbuildable and valueless is not a sufficient ground for ordering a sale.*

Per NAGALINGAM, A.C.J—"In fact it is not uncommon in partition cases to find that the land sought to be partitioned consists of a fertile portion and of an unfertile rocky and barren portion. The existence of the barren portion has not been regarded as a ground by itself for ordering a sale but on the other hand a partition is directed and the Commissioner is instructed to allot portions out of both the fertile and unfertile parts."

SAPARAMADU *et al vs.* SANDERATNE *et al* ... ... XLVI. 95

Partition action—Lis pendens **registered in wrong folio—Final decree entered—Effect of—Section 9 of Partition Ordinance —Registration of Documents Ordinance (Cap. 101), section 12, Sub-section (1).**

Held: *That the failure to effect the due registration of the "* lis pendens" *in a partition action as required by section* 12 (1) *of the Registration of Documents Ordinance (Cap.* 101) *deprives the final decree entered in the action of the "conclusive effect" which it would otherwise have under section* 9, *by reason of the fact that it is not a decree entered as "hereinbefore provided" within the meaning of that section.*

KANAGASABAI AND ANOTHER *vs.* VELUPILLAI ... ... XLVIII. 45

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Partition action—Interlocutory decree—Special direction to Commissioner to give soil rights so as to include building put up by a party—Is such order justifiable—Partition Ordinance, section 5.

Where in a partition action the Court having held that the 7th defendant had constructed a building before the action commenced, gave in the interlocutory decree a special direction to the Commissioner that in his scheme of partition he should give the 7th defendant his rights in the soil so as to include this building.

Held: (1) *That the "special direction" was given prematurely as the Court would have been in a better position to adjudicate on this matter after hearing the parties on their objections to the scheme submitted by the Commissioner.*

(2) *That a Court should be slow to make such a direction unconditionally, unless the Court has perfectly satisfied itself upon an examination of all the relevant considerations that such a scheme of partition is practicable and just.*

DON NIKULAS *vs.* H. ANDIRISHAMY ... ... XLVIII. 96

Appellants minors at the date of action—Final decree entered without representation of minors—Is decree valid?—Section 480 Civil Procedure Code—Applicability to partition action.

A final decree in a partition action is invalid where the defendants were minors at the date of the institution of the action and the final decree was entered without the minors having been represented.

Where defendants are minors, service of summons on them personally is ineffective.

Section 480 of the Civil Procedure Code applies to actions under the Partition Ordinance, and the code governs the service of summons on, and the appearance of minors, under the Partition Ordinance.

SETUN BIBEE *et al vs.* ABUSALLY MARIKAR ... ... XLIX. 79

Section 18 of Partition Ordinance—Does it affect devolution of joint Hindu family property.

ATTORNEY-GENERAL *vs.* RAMASWAMI IYENGAR AND ANOTHER ... XLIX. 98

Partition action—Dismissal of action for failure to prepay costs—No adjudication on merits—Is the decree binding on the parties— Res judicata.

SEDERAHAMY *vs.* ALICE NONA ... L. 6

Thesawalamai—Co-owner—Pre-emption—Hypothecary rights acquired by third party after the date of the impugned sale—Effect of a final decree for partition on a co-owner's right to pre-empt.

SIVAPIRAGASAM *vs.* VELLAIYAN AND ANOTHER ... ... L. 81

Partition—Definite share allotted to appellant by plaintiff in the plaint—No statement of claim filed by appellant—Judge's order after inquiry not to allot share of appellant—Subsequent claim to the share by intervenients—Refusal of Judge to allow appellant to contest intervenients.

The plaintiff in a partition case allotted to the appellant a certain share of the land which was not disputed by the other defendants. The appellant did not file a statement of claim. After inquiry, the Judge made order that the share of the appellant should remain unallotted. Subsequently others intervened claiming the share on certain deeds, and the Judge refused the appellant the right to contest the claim of the intervenients on the ground that the appellant was bound by the proceedings on the date of the inquiry.

Held: *That at the trial there was no adjudication against the appellant, and it was left open to any party to establish a claim to the share, and that the failure by the appellant to file a statement by itself did not preclude her from contesting the claim of the intervenients as it was the duty of the Court to satisfy itself that each party had proved his title against the world.*

DON ESALIS *alias* EMALIS JAYASEKERE HAMINE *vs.* DONA GIMARA ALWIS SAMARANAYAKE *et al* ... L. 103

PARTNERSHIP

Nature and scope of action by members of partnership.

Held: *That under our procedure legal proceedings instituted by partners are actions by them individually. They must sue in*

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their own names and judgment must be entered in favour of them individually.

VEERAVAGOPILLAI *vs.* RAWTHER II. 139

Ordinance No. 7 of 1840 section 21—Action based on partnership—No written partnership agreement—On whom lies the burden of proof that the capital of the partnership is over Rs. 1,000/-

Held: *That where an action is based on an unwritten partnership agreement and the point is taken that the action cannot be maintained, it is for the defence to prove that the partnership capital is over Rs.* 1,000/-

DE SILVA *vs.* SILVA ... ... IV. 43

Partnership—Termination of—Absence of provision in deed of partnership that it can be terminated by notice—Donation of plaintiff's shares subject to a fidei commissum **and reserving his life-interest—Action for dissolution of partnership—Can summons in the action be regarded as notice of termination—Is partnership terminated by service of summons—What is a partnership terminable at will.**

Held: (1) *That the partnership created by the instrument in question is a partnership for an indefinite period and, therefore, terminable at will.*

(2) *That summons in an action for the dissolution of a partnership can be regarded as notice of termination of the partnership.*

(3) *That the termination of the partnership comes into effect on the date of service of the summons.*

WICKRAMASURIYA AND OTHERS *vs.* DE SILVA AND OTHERS ... IX. 25

No written agreement of partnership—Is oral evidence admissible.

RAJARATNAM *vs.* COMMISSIONER OF STAMPS ... ... XI. 15

Evidence of the existence of a partnership—Circumstances in which parol evidence may be led—Stamp Ordinance—Failure to supply stamps "together with" petition of appeal—Does interlocutory appeal lie from an order admitting or rejecting evidence—Rejection of appeal—Does it operate as an adjudication of the points raised in the appeal.

Held: (1) *That defendant was, in the circumstances, entitled to lead parol evidence of the existence of a partnership with a capital of over Rs.* 1,000, *in order to exclude the plaintiff's claim under section* 21 *of Ordinance No.* 7 *of* 1840.

(2) *That interlocutory appeal could not be entertained as the defendant had not complied with the requirements of the Stamp Ordinance.*

(3) *That tendering the deficiency in the value of the stamps five days after the filing of the petition of appeal does not regularise the failure to tender the stamps "together with" the petition of appeal even though the deficiency is made good within the appealable period.*

(4) *That the rejection of an interlocutory appeal for failure of the appellant to comply with the provisions of the Stamp Ordinance does not amount to an adjudication on any points raised in the appeal.*

(5) *That the Supreme Court is free to consider the points raised in an interlocutory appeal rejected for non-compliance with the requirements of the Stamp Ordinance in the final appeal.*

(6) *That an interlocutory appeal does not lie against the admission or rejection of evidence only.*

BALA SUBRAMANIAM *vs.* VALLIAPPA CHETTIAR ... ... XI. 87

Partnership—Purchase of property by partners—Death and retirement of some partners—Settlement of claims due—New partnership by remaining partners and another—Property purchased treated as assets of partnership—Death of two partners of second partnership—Third partnership formed treating such property as partnership property—Rights of heirs of original partner who was also a partner of second and third partnerships—Is such property held in trust for the partnership—Can such heirs maintain an action for partition of such property—Is a conveyance necessary for acquisition of beneficial interests—Ordinances No. 22 of 1866 and 7 of 1840.

Held: (1) *That the land in question formed part of the assets of the partnership created by P*27.

(2) *That the seven person who formed the first partnership held the property in trust for such partnership.*

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(3) *That a further deed was not necessary to pass such beneficial interests to the second or to the third partnership.*

(4) *That the beneficial interests of partners in partnership property may be said to be joint.*

(5) *That, in the circumstances, plaintiffs were not entitled to maintain an action for partition.*

JAINAM BEEBEE AMMAL AND TWO OTHERS *vs.* IBRAHIM AND OTHERS ... XII. 61

Partnership—Action for dissolution on the ground that it cannot be carried on with any reasonable prospect of profit—Partnership Act, sections 32 and 35.

Held: *That if a partnership cannot be carried on with any reasonable prospect of profit it is a ground for dissolution of the partnership.*

BROWNE *vs.* DAVIES AND ANOTHER XIV. 128

Partnership formed with express power to purchase and sell land—Partition of land.

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

SEYYADO IBRAHIM SAIBO AND OTHERS *vs.* JAINAM BEEBEE AMMAL AND OTHERS ... ... XVI. 45

Partnership—Assignment of his share by one of the partners to another partner in a partnership of more than two—Does the assignment terminate the partnership.

Held: *That an assignment of the share of one partner to another where there are more than two partners does not terminate the partnership.*

KELEYN *vs.* DEONIS ... XXVII. 27

Partnership—Action to oust manager entitled to a share of the profits—Prevention of Frauds Ordinance section 18 (c)—Evidentiary value of certificate of registration of a business name issued under the Registration of Business Names Ordinance.

Held: *That a person may produce in evidence certificates of registration of a business name issued under the Business Names Registration Ordinance in order to rebut a claim made against him on the basis of the existence of a partnership which is not evidenced by a writing as required by section 18 (c) of the Prevention of Frauds Ordinance.*

MOHAMED HASSEN *vs.* MOHAMED YOOSOOF ... ... XXVII. 29

Dissolution of Partnership—Person appointed to determine matters in dispute—Agreement by parties that such person's decision should be final and conclusive—Can decision be canvassed.

Held: *That where a person is appointed to determine matters in dispute and his decision is, by agreement of parties, made final and conclusive, the decision cannot be questioned so long as the person acts fairly within the terms of the authority granted to him.*

SAMARAKONE AND ANOTHER *vs.* DIAS ABEYSINGHE ... ... XXXIX. 31

Premises let to firm by one partner—Can such partner maintain an action for rent and ejectment against other partner.

NEINA MOHAMED *et al vs.* SAHUL HAMEED ... ... XL. 61

Minority of partner—No bar to formation of partnership.

EBRAHIMJEE *vs.* THE COMMISSIONER OF INCOME TAX ... ... XL. 79

Partnership—Capital alleged to be over one thousand rupees—No agreement in writing—Prevention of Frauds Ordinance section 18—Onus of proof—Meaning of "capital."

Held: *That where a partnership, not evidenced in writing is established, the party who pleads the benefit of section 18 of the Prevention of Frauds Ordinance, must establish the existence of facts which bring the case within the section.*

Per GUNASEKERA, J.— "The capital contemplated by section 18 of the Prevention of Frauds Ordinance is the original capital contributed by the partners (*de Silva vs. de Silva*, 1935, 37 N. L. R. 276), and the term does not extend to the amount that may stand as capital after additions

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or withdrawals, at any time during the course of the business.

ARALIS *vs.* FRANCIS ... XLII. 95

Circumstances establishing de facto partnership.

COMMISSIONER OF INCOME TAX *vs.* ALLAUDIN ... ... XLVIII. 91

PART PAYMENT

Contracts for sale of goods—Amounts due on some of the contracts statute barred—Part payment—When such payment revives statute barred debts.

BASTIAN SILVA *vs.* WILLIAM SILVA L. 110

Part payment by one of the heirs—Does it interrupt prescription as regards the rest.

PERERA *vs.* PERERA AND FIVE OTHERS XX. 35

PATENTS

Patents Ordinance—Sections 28 and 36—Petition under section 28 for extension of patent—When will such extension be granted—Does appeal lie from decision of District Court.

Held: (1) *That an appeal lies to the Supreme Court from the decision of a District Court under section* 28 *of the Patents Ordinance:*

(2) *That an extension of a patent will not be granted unless there is proof that the invention is one of more than ordinary utility;*

(3) *That an extension will not be granted unless the patentee's accounts show clearly and precisely how he has been remunerated in respect of his patent;*

(4) *That the absence of proof that the corresponding patents outside Ceylon are in force is a circumstance unfavourable to the grant of an extension.*

JOHN ROBERT FARBRIDGE *vs.* THE REGISTRAR OF PATENTS ... XXXII. 7

PAULIAN ACTION

Where a claim is for unliquidated damages, the person who has such a claim cannot maintain a Paulian action until his claim has been reduced into the form of a decree.

ROSA MARIA FERNANDO *vs.* JAMES FERNANDO AND ANOTHER XVII. 121

Fraudulent Alienation—Paulian Action—Combined with action under section 247 of the Civil Procedure Code—Onus of Proving Fraud—What should be proved.

Held: (1) *That in an action to set aside a sale in fraud of creditors it must be proved that the alienee with full knowledge that the alienation was being made to defraud creditors has participated in the transaction.*

(2) *That the mere fact that the alienee simply knows that the debtor also had other creditors is no ground for holding that he is a participant in the fraud.*

(3) *That the burden of proving fraud rests upon the plaintiff when the alienation is for valuable consideration.*

TOBIAS FERNANDO *vs.* DON ANDRIS APPUHAMY ... ... XLIII. 44

Deed of transfer pending a claim for unliquidated damages against transferor—Action to set aside such deed after obtaining decree for damages—Fraud and collusion—Can such action be maintained.

Held: *That a Paulian action is available to a person, who having obtained a decree on a claim for unliquidated damages against another, impugns a deed of transfer by the latter on the ground that it was executed fraudulently and collusively, although at the time of its execution such claim for unliquidated damages was pending.*

PUNCHI APPUHAMY *vs.* SEDERA AND ANOTHER ... ... XXXIV. 73

PAWN BROKERS ORDINANCE

Sections 22 and 23 Ord: No. 8 of 1893—Goods repawned--Nature of possession spoken of in § 22.

Held: *That the possession spoken of in* § 22 *of the Ordinance is an unlawful possession.*

ELAIMAN *vs.* PALANIAPPA CHETTIAR I. 395

Pawnbrokers Ordinance No. 8 of 1893—Prosecution for making a declaration required under § 19 (1) falsely.

ELIATAMBY *vs.* KATHIRAVEL ... III. 28

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Pawnbrokers Ordinance—Loss of articles pawned—Action by pawner for value of articles pawned—Worth of articles pawned entered in foil and counterfoil of pawn ticket—Can pawner lead other evidence to establish their actual value—Sections 91 and 92 of the Evidence Ordinance.

Held: *That the provision in the Pawnbrokers Ordinance that the worth of the article pawned shall be entered in the foil and the counterfoil of the pawn ticket does not preclude the pawner from establishing the value of the articles by evidence other than that contained in the pawn ticket.*

MOHAMED ISMAIL *vs.* MUTTIAH CHETTIAR ... ... XXIII. 81

Sections 3 and 4.

Held: (1) *In the absence of any special agreement, for a pawnee or pledgee to sue to recover the amount lent by him on the security of a pawn or pledge, it is not a necessary condition that he should tender the pawn or the pledge.*

(2) *The pawnee or pledgee may sue on the principal contract of loan disregarding the security he holds, for there is nothing in law to prevent a person waiving a benefit that he has.*

(3) *The pawner's or pledgor's course of action must be to discharge his obligation on the principal contract, and then seek to recover what is due to him on the accessory contract or damages in default. He may do this* uno ictu *tendering the money due by him and asking for the return of the thing pledged or pawned or its value or damages.*

PALANIAPPA CHETTIAR *vs.* AMARASENA ... ... XXV. 61

PAYMENT

Payment of money into Court—Rules regulating payment—Effect of failure to comply with rules.

Held: *That payment, of money into court, not in accordance with the Rules regulating payment is not a valid payment.*

VELU KANGANY *vs.* KUPPEN CHETTY VII. 78

Payment on account merely extends period of prescription and cannot be regarded as creating a new cause of action.

UDUMANACHY AND OTHERS *vs.* MEERALEVVE ... ... XXIV. 5

PAYMENTS OF FINES (COURTS OF SUMMARY JURISDICTION) ORDINANCE, NO. 49 OF 1938.

Matters to be considered in fixing fine.

WIJE *vs.* ABEYSUNDERA ... XL. 96

Section 3 and 4—Sentence of fine without sentence of imprisonment in addition—Magistrate ordering imprisonment in default of fine on same day—Failure to comply with provisions of sections 3 of Payment of Fines Ordinance—Practice of ordering "double security" as condition of granting time to pay fine unwarranted—Criminal Procedure Code, section 312.

Held: (1) *That where a person is convicted by a Court of Summary Jurisdiction and sentenced to a fine, without a sentence of imprisonment in addition, it is obligatory on the Court to comply with the provisions of sections* 3 *and* 4 *of the Payment of Fines Ordinance No.* 49 *of* 1938 *before such person is committed to prison for default.*

(2) *That the provisions of section* 312 *of the Criminal Procedure Code must be construed as having been repealed to the extent to which they are inconsistent with the explicit provisions of the Payment of Fines Ordinance of* 1938.

(3) *That the practice of ordering "double security" as a condition of the granting of time to pay a fine is unwarranted and should be forthwith discontinued.*

REX *vs.* VELIN.

REX *vs.* SETTU, SON OF ALAGEN.

REX *vs.* M. HEMASIRI.

REX *vs.* W. A. D. MARKU.

REX *vs.* L. WILSON PERERA *et al*

REX *vs.* M. WILLIAM.

REX *vs.* MARIMUTTU, SON OF RAMIAH ... ... XLIV. 49

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PENAL CODE

GENERAL EXCEPTIONS

Burden of proving hat prisoner comes within lies on him.

REX *vs.* HARAMANISA *alias* THIMISA ... ... XXIV. 25

REX *vs.* JAMES CHANDRASEKERA XXV. 1

§ 19

Peon in the employ of the Society for the Prevention of Cruelty to Animals—Is he a public servant within the meaning of sections 19, 183, and 323 of the Penal Code?

Held: *That a peon employed by the Ceylon Society for the Prevention of Cruelty to Animals is not a public servant within the meaning of the expression in* 19 *of the Penal Code.*

THE POLICE (WALASMULLA) *vs.* RAJAPAKSE ... ... I. 282

Is a Sanitary Inspector a Public Officer.

Held: *That a Sanitary Inspector of a Local Board is not a public officer within the meaning of section* 19 *and* 323 *of the Penal Code.*

JAMAL *vs.* HANIFFA ... ... II. 163

Is fiscal's process server a public servant—Criminal Procedure Code sections 50, 51 (1) and 62 (1).

Held: (1) *That a fiscal's process server is a public servant within the meaning of section* 19 *of the Penal Code.*

(2) *That section* 51 *of the Criminal Procedure Code applies to a warrant issued under section* 62 (1) (*a*) *of the same Code.*

(3) *That the direction in section* 51 *of the Criminal Procedure Code that in the case of a bailable offence a magistrate's court should direct by endorsement on the warrant that if the person against whom it is issued execute a bond with sufficient sureties for his attendance before the court, is mandatory, and the omission of such endorsement from the warrant makes it* ex facie *defective.*

(4) *That a process server executing a warrant which is* ex facie *defective cannot be said to be acting in the discharge of his public functions.*

(5) *That a person taken into custody under a warrant which is* ex facie *defective cannot be said to be in lawful custody.*

SITTAMPARAMPILLAI *vs.* MURUGAN XIX. 118

§ 21

"Wrongful loss" and "wrongful gain"

RAMALINGAM *vs.* NAIR ... XXIX. 25

CASPERSZ *vs.* THE KING ... XXXVIII. 13

§ 22

"wrongful loss"

KING *vs.* FERNANDO ... ... II. 406

"Dishonestly"

RAMALINGAM *vs.* NAIR ... XXIX. 25

KING *vs.* FERNANDO ... XXX. 79

CASPERSZ *vs.* THE KING XXXVIII. 13

§ 23

"Fraudulently"

KING *vs.* FERNANDO ... XXX. 79

§ 32

Joint conviction of four persons for murder—Sufficient evidence against one—Unsatisfactory evidence against the rest—Common intention—Absence of evidence of a pre-arranged plan.

REX *vs.* SUMATHIPALA AND OTHERS ... ... XXXV. 75

Scope of § 32

REX *vs.* HEEN BANDA AND DAVID SINGHO ... ... XLII. 26

§ 67

Applicability of § to Defence Regulations.

PERERA *vs.* INSPECTOR GORDON. XXXIII. 73

Prolix indictment—Some offences charged constituting part of other offences separately charged—Sentence.

REX *vs.* HOTHA AND ANOTHER XXXIV. 11

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Charges under Excise Ordinance of possessing fermented toddy and transporting same toddy—Conviction on both charges—Regularity.

LAZARUS *vs.* DE ZYLVA ... XXXIX. 64

Act contravening more than one provision of criminal law—Punishment.

JAYASURIYA *vs.* RATNAYAKE ... XL. 47

§ 71

The protection afforded to a process server by § 71 does not extend to a case where he is mistaken in what the process of law allows him to do.

BADOORDEEN *vs.* DINGIRI BANDA *et al* I. 74

§ 72

The protection afforded to a process server by § 72 does not extend to a case where he is mistaken in what the process of law allows him to do.

BADOORDEEN *vs.* DINGIRI BANDA *et al* I. 74

§ 72 affords a good defence to a person who refuses to accept currency notes because he considers them not good money.

MIRIHANA POLICE *vs.* MARIKAR XXIV. 59

§ 73

Burden of proof where accident is pleaded.

REX *vs.* THURAISAMY ... XLVII. 105

§ 78

Plea of drunkenness and provocation.

THE KING *vs.* MARSHALL APPUHAMY XLI. 49

§ 79

§ 79 provides an exception to the general rule that a man is presumed to intend the natural and inevitable consequences of his act.

REX *vs.* VELAIDEN ... XXXV. 49

Plea of drunkenness and provocation.

THE KING *vs.* MARSHALL APPUHAMY XLI. 49

§ 92

Exercise of right of private defence—Person charged with assaulting public officer. Can he take plea under § 92.

DISSANAYAKE *vs.* MARIMUTTU XV. 121

Arrest of accused by Fiscal's officers—Resistance by accused—Rescue of arrested person by others—Causing hurt to Fiscal's officers—Charges under § § 220A and 323 of Penal Code—Legality of arrest—Applicability of § 92 (1)—Self defence.

PONNIAH KUMARESU *et al vs.* D. R. O. VAVUNIYA ... ... XLI. 38

§ 100

What amounts to abetment.

REX *vs.* KADIRGAMAN *et al* XVIII. 41

Abetment of conspiracy—Agreement an essential prerequisite.

REX *vs.* COORAY ... ... XLIII. 49

§ 102

A proctor who arranges a loan for another on the understanding that a promissory note for a much larger sum than the amount actually lent would be given by the borrower, actually writes out the fictitious note,and takes an active and essential part in the transaction is guilty of abetting the offence of taking a fictitious note.

SYLVA *vs.* AMARASINGHE ... XXVIII. 25

When can offence under § 102 be joined with offence of conspiracy under § 113B.

REX *vs.* KANAGARATNAM *et al* XLVII. 42

§ 109

Abetting the acceptance of an illegal gratification by a public servant—Ingredients of the offence—Burden of proof.

Held: (1) *That in a charge of abetting the acceptance of an illegal gratification by a public officer under sections* 158 *and* 109 *of the Penal Code* (*Chapter* 15), *the relevant state of mind is not that of the person to whom the offer is made, but of the person making the offer.*

(2) *That in a prosecution under section* 158 *and* 109 *of the Penal Code it is sufficient if the prosecution proves that the money offered could not have been offered by way of legal remuneration.*

PERERA (POLICE INSPECTOR) *vs.* KANNANGARA (POLICE VIDANE) XIV. 106

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Abetment of forgery—Is sanction of Attorney-General necessary to enable a private party to prosecute.

VANDER POORTEN *vs.* VANDER POORTEN AND ANOTHER ... XXXI. 77

§ 113

Offence of conspiracy—Three persons charged on the same indictment—No charge of conspiracy with other persons unknown to prosecution—Acquittal of two of the three indicted—Conviction of third—Can it be sustained.

The appellant and two others were charged on the same indictment (1) with having conspired to cheat and (2) having cheated the Imperial Bank of India, Ltd. The learned District Judge acquitted the two others on both counts and convicted the appellant on the charge of conspiracy only on the ground that the appellant with several others joined together to perpetrate the fraud. The indictment contained no charge of conspiring with others.

Held: *That the conviction could not stand as the accused had been convicted of an offence of which he was not committed for trial and with which he was not charged in the indictment.*

M. ABRAHAM COORAY *vs.* THE QUEEN L. 23

§§ 113A and B

Conspiracy to accept illegal bets—Master and servant—Is the existence of the relationship of master and servant between two persons a bar to their being charged for conspiracy.

Held: (1) *That the definition of "conspiracy" in section 113A of the Penal Code is wider than the meaning given to that expression in the Indian Penal Code and in English law.*

(2) *That once it is established, that two or more persons acted together with a common purpose for or in committing an offence, the fact that they were acting, one as the master and others as servants or employees, can make no difference.*

REX *vs.* ANDREE AND TWO OTHERS XXI. 51

Conviction of appellant and another for conspiracy to murder and the appellant for murder—Appeal to Court of Criminal Appeal—Convictions of appellant affirmed—Conviction of other conspiracy quashed and retrial ordered—Acquittal of other in second trial—Can conviction of appellant on conspiracy stand.

DHARMASENA *vs.* THE KING XLIII. 1

Conspiracy—Abetment of—Agreement an essential pre-requisite.

REX *vs.* COORAY ... XLIII. 49

§ 113B.

Offence of conspiracy—When can it be joined with offence of abetment under § 102.

REX *vs.* KANAGARATNAM *et al* XLVII. 42

§ 120

Meaning of "classes"

REGINA *vs.* ABU-BAKR ... XLVIII. 107

§ 138

What amounts to unlawful assembly.

REX *vs.* SILVA AND OTHERS XVIII. 51

Failure to specify accurately the common object in a charge of unlawful assembly is a material omission and one which cannot be cured by section 425 of the Criminal Procedure Code in a case in which the accused have been prejudiced by the way in which the common object is stated in the charge.

VAN CUYLENBERG *vs.* AMARASEKERA AND FOURTEEN OTHERS ... XX. 41

§ 146

Charge of unlawful assembly with robbery as the common object. Second count of committing murder in prosecution of common object—Omission of second part of § 146 in the indictment—Charge to jury based on second part of § 146—Can conviction be sustained.

REX *vs.* PANNILAGE GABO SINGHO AND OTHERS ... ... XXXVII. 43

Scope of § 146

REX *vs.* HEEN BANDA AND DAVID SINGHO ... ... XLII. 26

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§ 158

Abetting the acceptance of an illegal gratification by a public servant—Ingredients of the offence.

PERERA *vs.* KANNANGARA ... XIV. 106

Abetment—Offer of bribe to public officer as motive or reward for doing an act not within his official power to perform—Does such offer amount to an offence under our law.

Held: *That a person, who offers a bribe to a public officer for doing something, which it is not within the power of the latter officially to achieve, cannot be found guilty of abetting an offence under section* 158 *of the Penal Code.*

T. B. TENNEKOON *vs.* DISSANAYAKA, A. S. P. ... ... XXXIX. 49

§ 169 F.

Offence falling within both Article 51 of the Ceylon State Council (Elections) Order in Council 1931 and section 169 F of the Penal Code. Offender can be prosecuted under the Penal Code.

THIEDEMAN *vs.* GEORGE ... XXII. 9

§ 172

Failure to attend Court on Summons—Section 147 (i) (a) of the Criminal Procedure Code—Want of sanction of the Attorney-General—Conviction bad.

Held: *That a Magistrate cannot take cognizance of an offence under* § 172 *of the Penal Code except with the previous sanction of the Attorney-General, or on the complaint of the public servant concerned or some public servant to whom he is subordinate.*

SILVA *vs.* RAZAK ... ... I. 213

§ 180.

Circumstances under which §§ 180 and 208 should be used against offenders.

KANDIAH (POLICE SERGEANT) *vs.* THAMBIPILLAI ... ... I. 334

False information of burglary given to Police—Accused convicted under § 180—Proper section to charge informant is § 208

TILLEKERATNE *vs.* APPADURAI ... I. 381

Can a charge under this section be made in respect of a statement made in answer to questions asked by a Police Officer in an investigation under section 122 of the Criminal Procedure Code.

Held: *That a charge under section* 180 *of the Penal Code can be made in respect of a statement made in answer to questions put by a Police Officer in the course of an investigation under section* 122 *of the Criminal Procedure Code.*

PEIRIS (SUB-INSPECTOR) *vs.* FERNANDO X. 108

When should an accused be convicted under that section—Misdirection.

Held: (1) *That to constitute the offence punishable under section* 180 *of the Penal Code it is necessary that the information given should be information which the accused person knows or believes to be false. It is not sufficient that he had reason to believe it to be false or that he did not believe it to be true.*

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

ASSISTANT GOVERNMENT AGENT (MULLAITIVU) *vs.* SELVADURAI ... XVII. 130

Pointing out wrong persons as defendants in a case pending to process server for service of summons.

The appellant was charged with having given false information to a fiscal's process server, a public servant, by pointing out to the latter three persons as being the defendants in C.R. Jaffna 1308. It was established at the trial that the three persons so pointed out were not the defendants in the said case and the accused was convicted.

In appeal it was contended for the appellant that as the only "lawful power" the process server could exercise was to make a report to the fiscal and as such a report could not tend to any direct or immediate prejudice of the person against whom the information is levelled, the information supplied could not be brought within the ambit of section 180 of the Penal Code.

Held: *That the false information supplied by the appellant brought him within the ambit of section* 180 *of the Penal Code.*

THURAIAPPAH *vs.* ELIYAVAN ... XX. 8

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Charge of giving false information to Police—When should such proceedings be instituted.

Held: *That a prosecution under section* 180 *of the Penal Code should not be instituted in respect of information given under section* 121 *or* 122 *of the Criminal Procedure Code—*

(a) except after the informant has been afforded an opportunity of establishing his charge; and

(b) unless there is unmistakable evidence that the information was false and that it was given with the intention or knowledge requisite for such offence.

JUAN APPU AND ANOTHER *vs.* FERNANDO (INSPECTOR OF POLICE, MARADANA) ... ... XXXVII. 41

Complaint to police against three persons—Intention to cause officer to use his lawful power to the injury of the three persons.

Where a complaint was made to the police against three persons, but the complaint did not disclose that any offence had been committed, and the facts showed that the complainant had no intention of causing a police officer to use his lawful power to the injury or annoyance of the three persons.

Held: *That the act of the complainant did not fall within the scope of section* 180 *of the Penal Code.*

SILVA *vs.* NANAYAKKARA (P. C. 3146 AMBALANGODA POLICE) XXXIX. 28

Ingredients of offence.

Held: (1) *That a charge under section* 180 *of the Penal Code must (a) state precisely the information the accused gave knowing or believing it to be false, (b) specify the person to whose injury or annoyance the accused intended or knew that he would by his information cause the public servant to use his lawful power.*

(2) *That where the person to whom the information is given has himself no power to act on that information without the orders of a superior officer, the offence does not fall within the ambit of section* 180.

DISSANAYAKE (INSPECTOR OF POLICE, PT. PEDRO) *vs.* KRISHNAPILLAI XLIV. 90

§ 181

Resistance to a process server acting outside his jurisdiction is no offence under

DE ZOYSA *vs.* WIMALASURIYA AND ANOTHER ... ... I. 40

§ 183

Order made under § 114 Criminal Procedure Code. Obstruction of carrying out of order—Section 183 of the Penal Code—Meaning of the expression "voluntarily obstruct."—Mere words unaccompanied by some overt act do not constitute obstruction.

Held: *That where an accused by words incited others to commit an act of obstruction to Police Officers empowered to execute an order made under* § 114 *of the Criminal Procedure Code, he was guilty of causing voluntary obstruction within the meaning of* § 183 *of the Penal Code.*

FERNANDO (SUB-INSPECTOR OF POLICE) *vs.* WICKRAMASINGHE ... I. 62

Obstruction of S.P.C.A Peon—Validity of conviction.

THE POLICE (WALASMULLA) *vs.* RAJAPAKSE ... ... I. 282

Attempt at eviction of accused from land in his possession—Obstruction to public officer not legally entitled to carry out such eviction not unlawful.

Held: *That obstruction to a Deputy Fiscal who had no authority to evict the accused was not an offence under Section* 183 *of the Penal Code.*

GOONESEKERA (ADDL: DEPUTY FISCAL, KURUNEGALA) *vs.* APPU SINGHO APPUHAMY ... ... III. 84

Act of Public Servant outside his funtions—Is obstruction an offence?

Held: *That where a public servant was obstructed in the discharge of a function which did not fall within his duties an offence under Section* 183 *of the Penal Code was not committed.*

SALGADO *vs.* HANIFFA ... IV. 7

Obstruction to a public servant in the discharge of his duty—Is failure to set out

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the manner in which the obstruction is caused fatal to a conviction.

Held: *That in a charge under section* 183 *of the Penal Code the failure to set out the manner in which the obstruction was caused is fatal to a conviction.*

KING *vs.* PARAMANPALAM ... IV. 20

Refusal to obey an order a police officer had no right to give—Does it amount to voluntary obstruction.

Held: (1) *That a Police constable has no right to order a motor bus suspected of carrying goods in excess of the quantity it is licensed to carry to proceed to a stated destination for the purpose of being weighed.*

(2) *That refusal to obey an order a police officer has no right to give is not an offence under section* 183 *of the Penal Code.*

BANDARANAYAKE (SUB-INSPECTOR OF POLICE) *vs.* APPUSINGHO AND OTHERS ... ... IV. 22

Obstruction to an Excise Officer executing a search-warrant obtained on an affidavit—Defence that the search-warrant was illegal as it had been issued on insufficient evidence—Ordinance No. 17 of 1929 section 73 (1).

Held: *That the affidavit contained sufficient material for the issue of a search-warrant under section* 73 (1) *of Ordinance No.* 17 *of* 1929.

THURAIRATNAM (EXCISE INSPECTOR) *vs.* MOHIDEEN PICHCHAI ... XI. 83

Obstruction to a public servant in the execution on his duty—Duty performed in execution of an illegal order—Is it an offence to obstruct the execution of such order.

Held: (1) *That the Commissioner of Requests had no power, in the circumstances, to order the plaintiffs to be placed in possession of the* 4*th defendant's land.*

(2) *That obstruction to an act which, in the circumstances of the case and in law, is without justification, is not an illegal obstruction punishable under section* 183 *of the Penal Code.*

KATHIRGAMER (UDAIYAR) *vs.* WALLIAMMAH *alias* AMMAH ... XII. 121

Obstruction to public servant in the discharge of his functions—Instigating a person not to make a statement or to sign any document—Does this amount to obstruction.

Held: *That the appellant was rightly convicted.*

Per DE KRETSER,J.—"Each case must be decided on its own facts. Mere words may, in certain circumstances, not amount to obstruction, and in other cases words may be as potent as physical acts and may amount to very real obstruction."

PETER (POLICE SERGEANT) *vs.* RAZAK ... ... XIII. 39

Obstructing Public Servant—What constitutes "voluntary obstruction"—Is interference by physical force or threats necessary.

Held: (1) *That the question, whether the conduct of an accused person amounts to "voluntary obstruction" within the meaning of section* 183 *of the Penal Code, is one that should be decided according to the circumstances of each case.*

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

POLICE SERGEANT (HAMBANTOTA) *vs.* SIMON SILVA ... ... XV. 13

Accused charged with obstructing excise officer during search—Search unlawful—Conviction under § 183 invalid.

DISSANAYAKE *vs.* MARIMUTTU XV. 121

A conviction under § 183 cannot be sustained against an accused who obstructed the execution of a warrant in respect of a bailable offence and not containing an endorsement as required by § 51 of the Criminal Procedure Code.

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS ... ... XX. 77

A surveyor employed by the Fiscal to prepare a plan for the purpose of executing a Fiscal's conveyance as required by section 286 of the Civil Procedure Code is a public servant for the purpose of section 183. For a conviction under section 183 the motive of the persons obstructing is immaterial.

VEERASINGHAM *vs.* MEENACHY XXII. 37

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The refusal to unlock a gate to permit a public officer who has a right to enter the premises for the execution of his duty amounts to obstruction.

INSPECTOR OF POLICE *vs.* KALUARATCHI ... ... XXIV. 74

Order of District Court to secretary to proceed to the house where the movable property of a deceased person may be found and to prepare an inventory pending grant of letters of administration—Is it a lawful order within the meaning of § 183.

GNANAPRAKASAM *vs.* SUBRAMANIAM ... ... XXIV. 117

Voluntarily Obstructing Food Control Guards—Absence of evidence showing that they were duly entrusted or vested with duty, power or authority to act as such—Can judicial notice be taken that Food Control Guards are Public Servants.

Held: (1) *That mere assertions by persons that they are Food Control Guards and that they were on patrol duty when they detected an alleged offence of transporting rice without a permit without evidence that they were duly entrusted or vested with power or authority to act as such, are not sufficient to establish that they were public servants within the meaning of section* 183 *of the Penal Code.*

(2) *That a Food Control Guard is a "Public Servant" cannot be judicially taken notice of.*

SEENITHAMBY AND OTHERS *vs.* JANSZ, A. G. A. KALMUNAI ... XXXIII. 22

Obstruction to public servant in the discharge of his public functions.

DARLIS *vs.* RAJENDRA ... XXXIII. 94

Offence under Purchase of Foodstuffs Regulations—Transporting rice without permit—Arrest without warrant of persons so transporting—Escape from custody—Can such escape be basis of a criminal charge.

Held: *That in the absence of a provision of law declaring that offences under Defence (Purchase of Foodstuffs) Regulations are cognizable offences, the arrest of persons accused of offences under such regulations without a warrant is illegal, and the escape by such persons or their rescue from custody cannot be made the subject of criminal charge under section* 220*A or section* 183 *of the Penal Code.*

JAINUDEEN MOHAMED SHERIFF AND OTHERS *vs.* T. S. BONGSO, S.I. POLICE XXXIV. 63

Voluntarily obstructing public servant——Police officer searching without warrant—What the prosecution has to prove—Section 220A—Charge of intentionally offering resistance of Police officer in the lawful apprehension of accused on charge of theft—Arrest without warrant—When is such arrest legal—What should be proved.

Criminal Procedure Code, section 32—Arrest without warrant—Necessity to comply with provisions of sections 37, 126 and 126A—Search of premises for stolen property without warrant—Police Ordinance, section 69—Police powers to carry out search.

Arrest without warrant on suspicion—Need to inform suspect of nature of charge—Duty of Court to scrutinise jealously actions of police officers arresting private citizens without warrant.

Held: (1) *That to establish a charge under section* 183 *of the Penal Code it is incumbent on the prosecution to prove affirmatively (a) that the public officers concerned were in fact engaged in the lawful exercise of their public functions; (b) that the conduct of the accused as specified in the charge constituted obstruction within the meaning of that section.*

(2) *That where the charge was that the accused voluntarily obstructed police officers, who, without search warrant, attempted search of premises for stolen property, the prosecution must prove the material upon which the police officers concerned entertained "reasonable suspicion" that the premises in question contained stolen property.*

(3) *That a suspicion is proved to be reasonable if the facts disclose that it was founded on matters within the police officers own knowledge or on statements by other persons in a way which justify him in giving them credit.*

(4) *That a mere verbal refusal to allow a public servant to perform his duty is not obstruction within the meaning of section* 183 *of the Penal Code.*

(5) *That to establish a charge of intentionally offering resistance to a police officer in the lawful apprehension of the*

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accused on a charge of theft, (an offence under section 220A of the Penal Code) the prosecution must affirmatively prove (a) that resistence to arrest was offered,and (b) that the arrest without warrant on a charge of theft was lawful.

(6) *That to prove such an arrest was lawful the prosecution must show that the accused were persons "against whom a reasonable complaint had been made or credible information had been received or a reasonable suspicion existed" of their having been concerned in the commission of the offence of theft.*

(7) *That in such a charge it is the Magistrate's function to inquire into the state of mind of the officer at the time he ordered the arrest.*

(8) *That whenever a police officer arrests a person on suspicion without a warrant "common justice and commonsense" require that he should inform the suspect of the nature of the charge upon which he is arrested.*

(9) *That the procedure laid down by section 126A of the Criminal Procedure Code is intended to be applied only in those rare cases in which the investigation of allegations against a person in police custody suspected of crime cannot be completed in 24 hours.*

(10) *That when private citizens are arrested without a warrant it is imperative that the provisions of sections 37, 126 and 126A of the Criminal Procedure Code should be scrupulously applied. If this is not done, police powers which are designed to protect the community "become a danger instead of protection."*

K. MUTTUSAMY *et al vs.* INSPECTOR OF POLICE, KAHAWATTA XLIV. 33

Obstruction—Fiscal Officer entrusted with writ for delivery of possession of property to person other than purchaser at sale in execution.

J became the purchaser of a property sold in execution of a mortgage decree against the appellant. He filed a motion stating that he purchased the property on behalf of his daughter M and her husband S and moved that conveyance be made out in their favour. The plaintiff having shown no cause and M and S having consented the Secretary executed a conveyance in their favour. Writ of delivery of possession under section 12 of the Mortgage Ordinance was issued and entrusted to the Fiscal's officer who was obstructed by the appellant.

The appellant was thereupon charged for obstruction and was convicted under section 183 of the Penal Code.

Held: *That the writ was not invalid merely because it ordered delivery of possession to persons other than the purchaser at the sale.*

DIAS *vs.* DE SILVA (FISCAL'S OFFICER) ... ... XLIII. 24

§ 186

Threat to deter a public servant from doing his duty—Insult—Criminal Intimidation.

Held: (1) *That on a charge of threat of injury to a public servant in order to deter him from doing his duty it is necessary to prove that the threats were really calculated to cause the person to whom they were held out to act otherwise than he would have done of his own free will. Section 186 of the Penal Code deals with menaces which would have a tendency to induce the public servant to alter his action because of some possible injury to himself.*

(2) *That a Sub-Inspector of Police is a firm and prudent man within the meaning of the following dictum of Lord Ellenborough in Rex vs. Southerton (6 East R 126.) "To make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man."*

HERATH *vs.* RAJAPAKSE ... I. 326

§ 190

Perjury—Uncorroborated evidence of prosecutor—Accused should not be convicted on—Character of the prosecution witnesses should be considered—Unsafe to convict on uncorroborated evidence of persons of doubtful character and standing.

Held: (1) *That for the purposes of a charge under § 190 of the Penal Code two or more witnesses who speak to the self same incident may be regarded as one witness and an accused should not be convicted on the evidence of such witnesses unless such evidence is corroborated.*

(2) *That it is unsafe to convict on a charge of perjury where the prosecution evidence consists of witnesses whose character and standing are questionable, in the absence of other corroborative material.*

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(3) *That a conviction for perjury cannot stand where the onus has been wrongly placed and explanation have been demanded from the accused when no occasion for them existed.*

(4) *That there must be something in the case to make the oath of the prosecution witnesses preferable to the oath of the accused.*

THE KING *vs.* DHARMASIRIWARDENE I. 101

Pawn of attiyal by accused on behalf of another—Pawn ticket handed to rightful owner of article pawned—Pawn reclaimed by accused on a false declaration under Section 19 (1) of the Pawnbrokers Ordinance No. 8 of 1893 that the Pawn ticket was lost —Article subsequently claimed by owner on Production of Pawn ticket—What offences has accused committed.

Held: *That a person who makes a declaration required by Section* 19 (2) *of the Pawnbrokers Ordinance No.* 8 *of* 1893 *falsely commits an offence which can be brought under sections* 190 *and* 197 *of the Penal Code and* 19 (3) *of the Pawnbrokers Ordinance.*

ELIATAMBI *vs.* KATHIRAVEL III. 28

For a charge under § 190 the previous sanction of the Attorney-General is not necessary in a case where the offence has been committed in the course of an investigation directed by law preliminary to a proceeding in any court.

DHARMALINGAM CHETTY *vs.* VADEVIEL CHETTY AND ANOTHER ... IX. 3

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

Held: (1) *That the taking down of evidence in a civil proceeding by a shorthand writer under the direction of the judge does not constitute sufficient compliance with section* 169 *of the Civil Procedure Code.*

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

REX *vs.* WIJESEKERE ... XVII. 81

§ 197

Person making declaration required by § 19 (2) of Pawnbrokers Ordinance No. 8 of 1893 falsely can be brought under § 197.

ELIATAMBY *vs.* KATHIRAVEL ... III. 28

§ 198

Causing evidence to disappear with the intention of screening the offender—What constitutes the offence.

Held: *That the offence contemplated by section* 198 *of the Penal Code (Chapter* 15) *is causing evidence already in existence to disappear, and that the act of the accused does not amount to an offence under the section.*

SUB-INSPECTOR OF POLICE (EHELIYAGODA) *vs.* POSATHHAMY ... XIV. 85

Charge of murder not proven—Can accused be convicted under § 198.

REX *vs.* KARUPPIAH SERVAI XLIV. 44

§ 202

Criminal Procedure Code section 64—Summons issued by a Magistrate's Court in maintenance proceedings—Summons served outside jurisdiction of issuing court without the endorsement required by section 64—Validity of such summons—Effect of acceptance of such summons by impersonation.

Held: (1) *That a summons served outside the jurisdiction of the court issuing the summons, without the endorsement required by section* 64 *of the Criminal Procedure Code, is of no effect.*

(2) *That a person, who falsely personates another for the purpose of accepting summons, does not commit an offence under section* 202 *of the Penal Code where the summons is invalid and of no effect.*

KING *vs.* SENEVIRATNE ... XVIII. 103

§ 208

§§ 208 and 180—Circumstances under which the respective sections should be used against offenders.

Held: *That where a false charge is carefully prepared, elaborated, and then placed before a court, the proper course would be to charge the offender under §* 208 *of the Penal Code, but where the charge*

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is made without preparation, without witnesses to support it in a reckless manner it is sufficient if the offender is charged under § 180 *of the Penal Code.*

KANDIAH (POLICE SERGEANT) *vs.* THAMBIPILLAI ... ... I. 334

False Information of burglary given to Sub-Inspector of Police—Penal Code §§ 180 and 208—Accused convicted under § 180 in Summary Proceeding.

Held: *That where a false charge is made to a Police Officer of the commission of a crime, specially of a crime such as burglary which itself is a non-summary offence the proper section to charge the false informant is Section* 208 *of the Penal Code.*

TILLEKERATNE (SUB-INSPECTOR OF POLICE) *vs.* APPUDURAI ... ... I. 381

§ 211

Offering an illegal gratification.

Where the Magistrate found that the accused offered a gratification of one rupee to a Police Constable "in order to get home to rest and to prevent himself being delayed or locked up in the Police Station."

Held: *That an offence under section* 211 *of the Penal Code had not been committed.*

BENEDICT *vs.* MARIKAR ... VIII. 127

§ 213

(1) *In a prosecution under section* 216 *of the Indian Penal Code it is necessary for the prosecution to establish—*

(*a*) *that before the date of the harbourage there existed an order for the apprehension of the offender who was harboured,*

(*b*) *that the order was known to the accused person, and*

(*c*) *that acts amounting to harbourage were done by the accused with that knowledge.*

(2) *There can be no proof that the accused knew of the orders or warrants of arrest, unless or until the issue of the warrants has been proved.*

GOUNDAN *vs.* EMPEROR ... XXIX. 33

The word "knowing" in section 216 of the Indian Penal Code means something more than and different from the words "had reason (or sufficient cause) to believe."

GOUNDAN *vs.* EMPEROR ... XXIX. 33

§ 219

The expression "charged" in section 219 is not restricted to a judicial charge formulated after recording evidence in court. The arrest of a person by a duly authorised officer is "charging" within the meaning of the section.

KARUNARATNE *vs.* SIYATU ... I. 31

When may a Magistrate try an accused charged with escaping from lawful custody.

Held: *That a Magistrate has no jurisdiction to try an accused on a charge of escaping from lawful custody while being detained on charges of abduction and robbery as these charges are beyond his jurisdiction.*

NARANAPILLAI *vs.* SINNATHAMBY II. 315

Meaning of the word "charged" in section 219—Arrest of a person on suspicion by a police constable—Is resistance to such arrest or escape from custody an offence.

Held: (1) *That the arrest of a person on suspicion by a police constable amounts to charging him with an offence within the meaning of section* 219 *of the Penal Code.*

(2) *That resistance by such person to his apprehension or his escape from custody would constitute an offence punishable under the section.*

RAJENDRAM (INSPECTOR OF POLICE) *vs.* PERERA ... ... XX. 124

§ 220

A conviction under § 220 cannot be sustained against an accused who obstructed the execution of a warrant in respect of a bailable offence and not containing an endorsement as required by § 51 of the Criminal Procedure Code.

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS. ... ... XX 77

§ 220A

Excise Ordinance No. 8 of 1912 sections 34, 43, 44, and 50—Meaning of the words "any person found committing.....any offence punishable under section 43 and

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section 44"—Powers of arrest of Excise Officers.

Held: (1) *That on the facts, the Excise Guards were not entitled to arrest the 3rd accused as there was nothing to show that the cup of toddy given to the unknown man was for a money consideration.*

(2) *That the authority conferred by section 34 of the Excise Ordinance No. 8 of 1912 cannot be exercised except in a case where a person is found actually committing an offence.*

(3) *That a person cannot be lawfully arrested by virtue of the power conferred by section 34 of the Excise Ordinance No. 8 of 1912 merely because he is found doing something which the officers carrying out the arrest have reason to believe is an offence, and which is later proved to be an offence.*

(4) *That the escaping of the 3rd accused from the custody of the Excise Guards was not an offence, as they were not in law entitled to arrest him.*

(5) *That a person causing hurt to a public officer in an attempt to rescue another person, who has been arrested without lawful authority, does not commit an offence under section 323 of the Penal Code.*

THE KING *vs.* GUNESEKERA AND TWO OTHERS ... ... IX. 40

Offence under Defence (Purchase of Foodstuffs) Regulations—Transporting rice without a permit—Arrest without warrant of persons so transporting—Escape from custody—Can such escape be basis of charge under § 220A.

JAINUDEEN MOHAMED SHERIFF AND OTHERS *vs.* BONGSO ... ... XXXIV. 63

Charge of intentionally offering resistance to police officer in the lawful apprehension of accused on charge of theft—Arrest without warrant—When is such arrest legal—What should prosecution prove.

MUTHUSAMY *et al vs.* INSPECTOR OF POLICE KAHAWATTA ... XLIV. 33

§ 223

Criminal Procedure Code section 381—Interrupting a public servant while such public servant is sitting in a stage of a judicial proceeding—Unqualified plea of guilt—Conviction set aside.

A witn ss who was being examined came to court after the luncheon interval 8 minutes late. The trial judge charged him under section 233 of the Penal Code. On being faced with the charge the witness said: "I went to get my book. I am guilty." The learned judge refused to accept this plea as it was qualified. Thereupon the witness pleaded guilty.

Held: *That the witness had not committed an offence under section 233 of the Penal Code as he had no intention of interrupting the judge.*

EBRAHIM *vs.* MUNISAMY ... XX. 98

§ 272

Meaning of public way.

Held: *That the Galle Face Green is not a "public way" within the meaning of* § 272 *of the Ceylon Penal Code.*

MC PHERSON *vs.* PEIRIS ... I. 382

Criminal negligence—What must be proved to establish.

LOURENSZ *vs.* VYRAMUTTU ... XX. 101

§ 276

Excise Inspector lying in wait for illicit trafficers of arrack—Stopping suspected car by damaging tyres with spiked boards—Officer carrying out instructions of superior—Criminal liability of.

Held: (1) *That where an Excise Inspector had no reasonable cause to suspect that a person was an illicit trafficer in an excisable article, he was not justified in stopping a car by damaging its tyres with a spiked board thrown in its way.*

(2) *That where the Attorney-General has refused sanction to an appeal the Supreme Court will hear the case in revision if a strong case amounting to a positive miscarriage of justice in regard either to the Law or the Judges' appreciation of the facts is made out.*

OSSEN *vs.* PONNIAH (EXCISE INSPECTOR) *et al* ... ... I. 246

§ 285

Test of obscenity within the meaning of Section 295 of the Penal Code.

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Held: *That if a publication tends to deprave or corrupt the reader the publisher commits an offence against section 285 of the Penal Code regardless of any good intentions he may plead.*

BANDARANAYAKE *vs.* ABUBUCKER AND ANOTHER ... ... II. 120

Scope of the expression "representation" in that section.

Held: *That the word "representation" in section 285 of the Penal Code does not include obscene writings made on the wall or other parts of a building.*

SIRIWARDENE (INSPECTOR OF POLICE) *vs.* SINNATAMBY AND OTHERS XXII. 40

Obscene publication—Test of Obscenity—

The 2nd appellant, an Ayurvedic Physician, who is the owner of various kinds of drugs published a book for the purpose of advertising his drugs. The book was printed at the press of the 1st appellant. The author claimed that his drugs possessed remedial qualities for a very extensive number of complaints. The reader of the book was exhorted to pass it on to a friend. There were passages in the book which went beyond recommending remedies to the diseased. They suggested artificial stimuli for the increase of sexual energy and the enhancement of sexual satisfaction. The book not only prescribed a remedy for the diseased but also an aphrodisiac for the sound.

Held: *That such a book has a tendency to deprave and corrupt those whose minds are open to such influence.*

PERERA (S. I. POLICE) *vs.* AGALAWATTE AND ANOTHER ... ... VI. 91

§ 287

Using obscene words—Annoyance to some person essential.

Held: *That to establish a charge under* § 287 *of the Penal Code there must be definite evidence that someone was actually annoyed by the obscene words used by the accused.*

APPUHAMY *vs.* RATNAYAKE ... III. 70

Obscene words—Failure to set out the obscene words in the charge—Offending words stated in the evidence of the witness who complained he was annoyed by them—Does the mere failure to set out the obscene words vitiate a conviction.

Held: (1) *That the words were obscene within the meaning of the expression in section 287 of the Penal Code.*

(2) *That the failure to set out the words in the charge did not vitiate the conviction, as the obscene words appeared in the evidence and the accused was not prejudiced by the omission.*

JAYAWARDENE *vs.* DIONIS SILVA IX. 102

§ 288

Keeping place for the purposes of a lottery—what constitutes "Keeping".

PERERA *vs.* PERERA XXXI. 16

§ 294

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

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

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

KING *vs.* KUMARASAMY XVII. 41

Charge of murder—Sections 294 exception 1 and 2 and 296—In a charge of murder where there is evidence of provocation the entirety of the evidence bearing on the question of provocation should be put to the jury even though the accused says that he was not provoked.

REX *vs.* MOHIDEEN MEERA SAIBO XIX. 129

Exception 2—Benefit of exception—Onus of proof on person claiming.

Held: *That a person claiming to come within the ambit of exception 2 to section 294 of the Penal Code must prove that he comes within it.*

REX *vs.* BANDA ... . XX. 129

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§ 294 Fourthly—Judge should direct the jury as to the nature of the circumstances which might come within the words "without any excuse" in this provision.

REX *vs.* IYASAMY WIJEYERATNAM XXII. 1

§ 294—Exception 4—Meaning of "without premeditation"

REX *vs.* FERNANDO ... ... XXX. 39

§ 294—Exception 2—Meaning of "intention"

REX *vs.* KIRINELIS ... XXXIV. 13

Conviction for murder—Defence of grave and sudden provocation—Mere abuse unaccompanied by physical acts—Omission in directions to jury—Validity of Conviction.

REX *vs.* PATHIRANAGE KIRIGORIS ... ... XXXV. 77

Meaning of "sufficient in the ordinary course of nature to cause death".

REX *vs.* (1) MENDIS (2) ZOYSA *alias* GILMON ... ... XLVI 78

§ 294 Exception 1

Meaning of "grave" and "sudden"

ATTORNEY GENERAL OF CEYLON *vs.* K. D. J. PERERA ... XLVIII. 42

§ 311

Section 311 (seventhly)—When does cutting into bone constitute grievous hurt.

Held: *That in the absence of evidence that the bone was either broken or cracked, so as to constitute a fracture within the meaning of section 311, the accused could not be convicted of grievous hurt.*

INSPECTOR OF POLICE *vs.* PEDRICK AND ANOTHER ... XXVI. 96

Meaning of "fracture."

An injury was described as follows:—"Linear lacerated wound 1 inch long and scalp deep over right side of back of head with linear fracture of bone underneath". The witness was unable to state whether the fracture extended to the inner table. It was accordingly argued that there had been no fracture of a bone within the meaning of that expression in Seventhly of section 311 of the Penal Code.

Held: *That the injury may correctly be called a fracture of the skull bone.*

ARNOLIS APPUHAMY *et al vs.* MAHIL (S. I. POLICE KOSGAMA) XXXIX. 29

§ 314

Offence against § 314 is sufficiently cognate with offence of riot to make § 182 of Criminal Procedure Code applicable.

FONSEKA (INSPECTOR OF POLICE) *vs.* FRANCIS KARUNE ... ... I. 190

Charges under §§ 314 and 332—Offence under § 314 within exclusive jurisdiction of village tribunal—Charge referred to village tribunal but added again after evidence completed—Acquittal on charge under § 332—Conviction under § 314.

Held: *The conviction cannot be sustained.*

ROGUS *vs.* TISSERA ... ... XII. 39

Voluntarily causing hurt—Considerations which do not affect the sentence to be passed thereunder.

Held: *In passing sentence, on a conviction for voluntarily causing hurt under section 314 of the Criminal Procedure Code, it is irrelevant to take into consideration any evidence led of cruelty or ill-treatment.*

DINGIHAMY *vs.* JANSZ (CHIEF INSPECTOR OF POLICE, ANURADHAPURA) XLVI. 16

§ 315

Hurt caused with the handle of a closed clasp knife. Is the handle of a closed clasp knife an instrument for cutting within the meaning of the section?

Held: *That the handle of a closed clasp knife is not an instrument for cutting within the meaning of section 315 of the Penal Code.*

VEERO (S. I. POLICE) *vs.* MARCHALL VI. 89

§ 317

Accused charged under § 317 cannot be convicted under § 327.

KING *vs.* SABAPATHY ... ... II. 449

§ 323

Hurt caused to an excise guard acting under the orders of an excise Inspector acting in the discharge of his duty under the Excise

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Ordinance is "hurt" within the meaning of § 323.

KARUNARATNE *vs.* SIYATU ... I. 31

Obstruction of S.P.C.A. Peon—Validity of conviction.

THE POLICE (WALASMULLA) *vs.* RAJAPAKSE ... ... I. 282

Hurt caused to Sanitary Inspector—Is he a public officer.

JAMAL *vs.* HANIFFA ... ... II. 163

A person causing hurt to a public officer in an attempt to rescue another person who has been arrested without lawful authority does not commit an offence under § 323.

THE KING *vs.* GUNASEKERA AND TWO OTHERS ... ... IX. 40

§ 325

Exceeding right of self defence.

PONNIAH KUMARESU *et al vs.* D. R. O. VAVUNIYA ... ... XLI. 38

§ 328

Criminal Negligence — What must be proved to establish.

LOURENSZ *vs.* VYRAMUTTU XX. 101

Charge of rash and negligent driving alleged in same charge—Irregular

NAGAIAH *vs.* D. R. O., M. S. AND E. P. ... ... XLI. 42

Charges under—Rash and negligent driving —What is necessary to prove—Presumption of negligence—Res ipsa loquitur**—Applicability to criminal cases—Evidence Ordinance, section 114.**

Held: (1) *That to establish a charge under section* 328 *or* 329 *of the Penal Code it must be proved that the act done by the offender was not only rash or negligent, but also that it was so rash as to endanger human life or the personal safety of others.*

(2) *That where a motor vehicle went across the road to its wrong side and collided with another which was going at a moderate speed along the extreme edge of its own side, such evidence creates a presumption of negligence which is expressed by the phrase* res ipsa loquitur.

(3) *That such a presumption may be rebutted by establishing that the accident happened without fault on the part of the driver of the offending vehicle.*

Per BASNAYAKE, J.—"Section 114 of our Evidence Ordinance is wide enough to include the presumption embodied in the phrase *res ipsa loquitur*, which, in my view, is applicable equally to civil and criminal cases. In the latter class of cases the burden that rests on the prosecution of proving every ingredient of the charge may be discharged by proving those ingredients by presumptive evidence."

PERERA *vs.* AMARASINGHE (SUB-INSPECTOR OF POLICE) RATNAPURA ... XLI. 92

§ 329

Causing grievous hurt by driving a motor vehicle negligently—Degree of negligence necessary to make a negligent act criminal.

Held: *That to constitute criminal negligence, a negligent act must go beyond a mere matter of compensation between subjects and show such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.*

SCHARENGUIVEL (INSPECTOR OF POLICE) *vs.* CHARLIE ... ... X. 85

Criminal negligence—What must be proved to establish.

LOURENSZ *vs.* VYRAMUTTU ... XX. 101

Charges of rash and negligent driving—What is necessary to prove—

PERERA *vs.* AMARASINGHE ... XLI. 92

§ 331

Wrongful confinement—Charge of—Conviction changed in appeal to one of wrongful restraint.

The appellant was charged with wrongfully confining a police constable by locking him up in a room. It was admitted that there was another exit out of the room through which he could have escaped. The Magistrate convicted the appellant.

Held: *That the appellant was guilty of wrongful restraint and that the conviction should be altered.*

LOURENSZ *vs.* SIMON ... XIII. 24

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§ 332

Excise Inspector lying in wait for illicit traffickers of arrack—Stopping suspected car by damaging tyres with spiked boards—Officers carrying out instructions of superior—Criminal liability of—

OSSEN *vs.* PONNIAH (EXCISE INSPECTOR) *et al* ... ... I. 246

Voluntarily obstructing users of a road by cutting a drain across—Finding by magistrate that cart way was obstructed—Can conviction be sustained.

Held: *That obstruction of a vehicle alone, in the absence of evidence that any person had been obstructed, cannot amount to wrongful restraint.*

JAYASEKERE *vs.* APPU ... XXII. 71

§ 344

Deputy Fiscal acting without authority—Obstructed by accused—Conviction of accused for assault irregular.

GOONESEKERA *vs.* APPUSINGHO APPUHAMY ... ... III. 84

Search for excisable article—Obstructing Public Officer in the discharge of his functions—When may such search be unlawful. Assault on Public Servant—Right of private defence.

Held: (1) *That in the absence of any evidence to suggest that the Inspector had cause to suspect that there was an excisable article on the person of the accused the search of the accused by the Inspector was unlawful and therefore the accused could not be convicted for voluntarily obstructing a public servant in the discharge of his public functions.*

(2) *That in the circumstances, the plea of private defence was not available to the accused.*

DISSANAYAKE (SUPERINTENDENT OF EXCISE) *vs.* MARIMUTTU ... XV. 121

A conviction under § 344 cannot be sustained against an accused who obstructed the execution of a warrant in respect of a bailable offence and not containing an endorsement as required by § 51 of the Criminal Procedure Code.

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS ... ... XX. 77

§ 345

Kidnapping and use of criminal force with intent to outrage modesty—Accused acquitted of latter offence—Evidence relating to latter charge relevant to guilt of accused on charge of kidnapping—Effect of acquittal—

K. NALLIAH *vs.* P. B. HERAT XLIV. 81

§ 354

Kidnapping and use of Criminal force with intent to outrage modesty—Accused acquitted of the latter offence—Evidence relating to latter charge relevant to guilt of accused on charge of kidnapping—Effect of acquittal—Evidence relating to the acquitted charge, is it relevant to the other charge?—What constitutes "kidnapping"—Consent of child immaterial—Criminal Procedure Code 152 (3).

The accused was charged with the offences of kidnapping a girl of 13 1/2 years and of using criminal force with intent to outrage her modesty, and the Magistrate convicted him of kidnapping but acquitted him of the other offence.

Held: (1) *That the evidence relating to the charge of using criminal force with intent to outrage modesty was relevant to the guilt of the accused on the charge of kidnapping and the effect of the accused's acquittal was to shut out that evidence for the purpose of establishing the offence of kidnapping.*

(2) *That the accused was entitled to rely in his acquittal in so far as it was relevant to his defence in the other charge.*

(3) *That the effect of a verdict of acquittal is binding and conclusive in the same or subsequent proceedings between the parties to the adjudication.*

(4) *That where a person is charged on more than one count in the same proceeding a verdict on one count cannot be based on evidence which has by implication been rejected in disposing of another count at the trial.*

(5) *That a person is not guilty of "kidnapping" unless he is proved to have taken or enticed the child out of the keeping of the lawful guardian without the consent of such guardian.*

(6) *That where a minor leaves the immediate custody of his lawful guardian for a temporary purpose the relationship of*

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guardian and child suffers no break in its continuity so long as there is no interference with the child's opportunity of returning to the guardian.

(7) *That the offence of kidnapping would have been complete if the complainant had been forced or enticed away for an improper purpose.*

(8) *That the charge of kidnapping failed in this case because the person of the minor has not been proved to have been transferred from the custody of her guardian into the custody of some person not entitled to her custody.*

(9) *That a child cannot validly consent to the substitution of some other person's control which is exercised over her by her lawful guardian, and therefore, the girl's consent to the alleged kidnapping is immaterial.*

K. NALLIAH *vs.* P. B. HERAT, INSPECTOR OF POLICE, KOTAHENA ... XLIV. 81

§ 362B.

Bigamy—Can evidence of eye-witnesses of marriage in lieu of production of entry in register be led to prove marriage against a person charged with bigamy.

THE KING *vs.* NONIS ... XXXV. 84

§ 367.

Theft—Stolen property—Evidence Ordinance section 114 Illustration (a)—Presumption of theft—Carcases of stolen goods found in a car in which seven persons, including the owner and driver of the car, were travelling—What evidence is necessary to create the presumption of theft.

Held: *That the accused could not be convicted of theft in the absence of evidence that any one or more of them had conscious and exclusive possession of the stolen property.*

KHAN (INSPECTOR OF POLICE) *vs.* KANAPATHY AND FOUR OTHERS ... IX. 21

Removal of cash in owner's presence on refusal to pay on illegal demand—Dishonest intention—Theft—Penal Code sections 21 and 22.

Accused and one Vinasitamby were residents of the same village and members of the same caste. A Maha Jana Sabha was formed in their village, one of the objects of which was to prevent the members of that caste from working for Vellalas. The accused was a member of the Sabha. Vinasitamby who was not a member of the Sabha worked for a Vellala. Shortly afterwards the accused and four others went to Vinasitamby's house and questioned him as to why he worked the field for a Vellala man and "dragged him" to go to the Sabha. Vinasitamby declined, whereupon the accused ordered Vinasitamby to pay a "fine" of Rs. 25/- to the Sabha. Vinasitamby refused and the accused took Rs. 25/- out of a box and went away remarking, "I am taking Rs. 25/- and you can do what you like."

Held: *That in the circumstances the accused could be convicted of theft of the said Rs. 25/-.*

RAMALINGAM *vs.* NAIR (S.I.P.) XXIX. 25

§ § 367 and 368

Charge of theft—Defects in the charge—Cross-examination by accused showing that they were not misled by the defective charge—Accused making statements denying charge—Admission of evidence of bad character of accused—Sufficiency of independent evidence to justify conviction—Evidence Ordinance, Section 167.

Held: (1) *That a defect in the charge does not vitiate a conviction where the accused is not misled by such defect.*

(2) *That where certain evidence has been improperly admitted in the Court of trial, the Appellate Court, in view of section 167 of the Evidence Ordinance, will not set aside the conviction where it is satisfied that there is sufficient admissible evidence to justify such conviction.*

KALLADI PITCHE AND ANOTHER *vs.* INSPECTOR OF POLICE, PUTTALAM XXXVI. 5

§ 369

Seizure of dog by dog seizer on steps of private house—Theft—Is the plea that the steps are an encroachment on the public road a good defence.

Held: (1) *That a dog seizer seizing a dog on the steps of a private house is guilty of the offence of theft even though the steps encroach on the public road.*

(2) *That the steps of a private house which encroach on a public road do not*

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form part of the road within the meaning of Ordinance No. 10 of 1861.

SAMIVEIL *vs.* EDWIN ... ... II. 326

Charge of theft and retaining stolen property—When liability of accused person to give explanation arises—Doubt as to whether such property can be said to be recently stolen—Effect—Evidence of police witness that explanation given to them by accused unsatisfactory in their opinion—Effect of such evidence.

SOLOMON PETER DE SILVA *vs.* PERERA ... ... XXXIV. 105

Seven accused charged with theft—Three convicted of theft and four of dishonestly receiving stolen property—Validity of conviction—Criminal Procedure Code, sections 181, 182 and 184.

Seven accused were charged under section 369 of the Penal Code, with having committed the theft of 18 bags of chillies from a depot. There was evidence that the 2nd, 6th and 7th accused were seen removing the bags from the store to a lorry. The 1st, 3rd, 4th and 5th accused were found soon afterwards in the lorry which contained the bags. The 2nd, 6th and 7th accused were convicted of theft, and the rest of dishonest receipt.

Held: (1) *That the conviction was in order.*

(2) *That the joinder of the accused was justified under the provisions of sections 181, 182 and 184 of the Criminal Procedure Code.*

THE KING *vs.* JAYASENA AND OTHERS ... ... XXXV. 25

Can charge of housebreaking and theft be tried summarily by a Magistrate assuming jurisdiction as a District Judge.

VADIVELU *vs.* INSPECTOR OF POLICE BADULLA ... ... XL. 22

§ 388

Criminal breach of trust—Canvasser absconding with money advanced to him for purchasing rubber.

Held: *That a canvasser who is employed to purchase rubber for a principal commits criminal breach of trust if he absconds with the money given to him for the purchase of rubber.*

SILVA *vs.* COOREY ... ... III. 109

Criminal Breach of Trust—Promissory note in favour of servant in respect of money lent by master—Judgment entered in favour of servant on promissory note—Can servant legally appropriate to his own use money paid to him by judgment-debtor in part satisfaction of judgment-debt.

KALYANARATNA *vs.* GUNADASA *alias* JAMES SILVA ... ... IX. 139

Breach of trust of key—President of Co-operative Society—Election of new President at Annual General Meeting—Refusal of outgoing President to hand over to new President key of premises where business of Society conducted—Evidence necessary to establish such charge.

The appellant was convicted of criminal breach of trust of the key of premises where the business of a Co-operative Society was conducted. The evidence for the prosecution was to the effect that the appellant was till 25th May, 1947, the President of the Co-operative Society in question, and on his failure to be re-elected, refused to hand over the key of the Society's business premises to the new President.

Held: *That in the absence of definite evidence—*

(*a*) *as to how the appellant came into possession of the key;*

(*b*) *to indicate that the appellant was under a legal obligation to hand over the key to the incoming President;*

(*c*) *that the President of the Society is the person entitled to hold the keys of the Society's business premises, the conviction could not be sustained.*

CHELLAPPAH *vs.* CHELLIAH XXXVII. 40

Criminal breach of trust—Meaning of the word "dishonestly" in the Penal Code—Person entrusted with money for payment of labourers making payments for work which to his knowledge was not carried out—Intention to cause wrongful gain or wrongful loss—Irrelevancy of motive in the constitution of the offence.

The accused, an executive engineer, who was entrusted with money for payment of

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labourers for constructing a road within a limited time, finding that labour could not be obtained at the Government rates and consequent on complaints by overseers, who supplied the labour, that they were incurring losses, procured the overseers to insert items on their bills for rubble-bottom, which to his knowledge was not carried out. Bills were accordingly sub-, mitted including the item of rubble-bottom and payments were made out of the public funds entrusted to the accused.

Held: (1) *That the accused was guilty of the offence of criminal breach of trust of the amounts paid in respect rubble-bottoming.*

(2) *That when the evidence established an intention to cause wrongful gain to the overseers or wrongful loss to the Government, the fact that the accused was impelled by a good motive in incurring the expenditure will not avail.*

CASPERSZ *vs.* THE KING ... XXXVIII. 13

§ 392

An administrator, though subject to stringent liabilites under the Civil Procedure Code, may also be charged under section 392 of the Penal Code with criminal breach of trust of moneys received by him.

EMMANUEL *vs.* FERNANDO ... II. 33

Necessity to prove dishonest misappropriation—Accused's explanation.

The accused, a railway guard, was convicted for criminal breach of trust of goods entrusted to him to be delivered to the officer at a railway station without direct evidence of dishonest misappropriation or of wilfully suffering others to do something contrary to the terms of the trust. The accused did not give evidence at the trial, but an explanation given by him at a departmental inquiry earlier was produced from which his guilt could not be reasonably presumed.

Held: *That the conviction cannot be upheld.*

REX *vs.* FOENANDER ... XXXV. 57

Criminal Breach of trust—Person entrusted with money for payment of labourers making payments for work which to his knowledge was not carried out—Intention to cause wrongful gain or wrongful loss—Irrelevancy of motive in the constitution of the offence—Meaning of "dishonestly" in the Penal Code.

CASPERSZ *vs.* THE KING ... XXXVIII. 13

Conviction for criminal breach of trust as an agent—Is offence limited to the case of one who carries on an agency business?—Penal Code, sections 388,389, 390, 391, 392, 392A, 392B: Criminal Procedure Code, section 183; Court of Criminal Appeal Ordinance, section 2.

The appellant, who was the President of the Salpiti Korale Union, was charged with having committed criminal breach of trust in respect of a sum of money entrusted to him by the managers of certain Co-operative Wholesale Depots of the Union, in the way of his business as an agent.

One R, the manager of the Moratuwa Depot, acting on instructions from the appellant, transferred the cash which he had collected from the retail stores to the appellant for deposit with the Co-operative Central Bank. The appellant, instead of paying it over, appropriated the cash, substituted for it is own cheques for the amount due. The appellant, however, as Vice-President of the Bank ensured that in many instances, his cheques were not presented for collection. On conviction of the appellant for criminal breach of trust as an agent.

Held: (1) *That the offence contemplated in section* 392 *of the Penal Code is limited to the case of one who carries on an agency business, and does not comprehend a man who is casually entrusted with money, either on one individual occasion, or indeed, on a number of occasions, provided the evidence does not establish that he carries on an agency business.*

(2) *That in the circumstances of the case, the appellant was clearly guilty of a criminal breach of trust under section* 389 *of the Penal Code.*

M. E. A. COORAY *vs.* THE QUEEN XLIX. 13

§ 392 A

Misjoinder of charges—Public Officer entrusted with money—Shortage of money so entrusted—Charges of criminal breach of trust under section 392A of Penal Code—Can a charge of falsification of accounts under section 467 of Penal Code be joined

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—Legality of such joinder—Criminal Procedure Code, section 168—Burden of proving charge under section 392A.

Held: (1) *That upon a charge under section 392A of the Penal Code, the burden rests on the prosecution to prove the ingredients of the offence of criminal breach of trust as defined in section 388 of the Penal Code, and that burden so far as the element of dishonesty is concerned, is* prima facie *discharged by the failure on the part of the public officer to produce the money shown in the accounts kept by him or to account therefor.*

(2) *That a finding of dishonesty on the evidence taken as a whole being a pre-requisite to a conviction under the section, the joinder of a count in the same indictment for making false entries with intent to defraud by concealing misappropriaton is not illegal, as the falsification is so intimately connected with the misappropriation, as to form a single transaction.*

THE KING *vs.* DON CHARLES GUNATUNGA ... ... XLVII. 49

§ 394

Receiving stolen property—What evidence is necessary to create presumption of theft.

KHAN *vs.* KANAPATHY AND FOUR OTHERS ... ... IX. 21

Dishonest retention of stolen property—Onus of proof.

Held: *That a person, charged with dishonestly retaining stolen property, is entitled to be acquitted if, having regard to all the circumstances of the case, the explanation given by him might reasonably be true, even though the Court is not convinced of its truth.*

FERNANDO AND ANOTHER *vs.* HEILLER ... ... XXX. 105

Charge of theft and retaining stolen property—When liability of accused person to give explanation arises—Doubt as to whether such property can be said to be recently stolen —Effect—Evidence of Police witnesses that explanation given to them by accused unsatisfactory in their opinion—Effect of such evidence

Held: (1) *That the liability of a person accused of dishonestly retaining stolen property to give an explanation only rises when the prosecution has led admissible and relevant evidence, which if believed would establish the necessary ingredients of the offence.*

(2) *That where there is room for doubt whether the property can be said to be "recently" stolen property, the presumption of theft arising from the possession of recently stolen property cannot be drawn.*

(3) *That the court should not act on the evidence of police witnesses who merely state that the explanation given by the accused was in their opinion unsatisfactory, without confronting the accused with the statement recorded by them, if inconsistent with the evidence given by him in court.*

SOLOMON PETER DE SILVA *vs.* PERERA, S. I. POLICE ... ... XXXIV. 105

Seven accused charged with theft—Three convicted of theft and four of dishonestly receiving stolen property—Validity of conviction.

THE KING *vs.* JAYASENA AND OTHERS ... ... XXXV. 25

Charge under—Accused acquitted and order made for return of stolen goods to lawful owner—Is order appealable.

RANASINGHE *vs.* JUSTIN ... XL. 43

Retaining stolen property—Explanation by accused—Sufficiency of explanation.

The accused, who was a dealer in used motor spare parts and accessories, was convicted under section 394 of the Penal Code, although he gave an explanation as to the possession of the stolen property. The stolen property consisted of a motor bicycle gear box worth Rs. 250 which he had bought for Rs. 6.

Held: *That the following were sufficient to establish guilty knowledge:—*

(*a*) *The appellant as a dealer in second-hand motor spare parts should ordinary be taken to know the market value of the gear box.*

(*b*) *The unusual character of the seller, a bullock cart driver, coupled with the exceedingly low price demanded by him.*

(*c*) *The exceedingly low price paid by the appellant.*

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(*d*) *The fact that he had never before purchased any motor accessories from the seller.*

(*e*) *The fact that the gear box was kept in a gunny bag for over a week while the other motor accessories were exhibited in open shelves.*

NADAR *vs.* PERERA (S. I. POLICE, TRINCOMALEE) ... ... XL. 44

§ 398

Cheating by personation.

CHRISTINAHAMY AND ANOTHER *vs.* CONDERLAG ... ... XXXII. 69

Cheating—Cheque issued without sufficient funds in bank—Reasonable grounds for believing that cheque would be met—Intention to defraud.

Held: *That where a person, being aware that he has not sufficient funds in his bank to meet the full amount of a cheque, nevertheless issues such cheque in the honest belief that it would be met on presentation, he cannot be held guilty of cheating as he had no intention to defraud.*

Per GRATIAEN, J.—The position would be different, of course, if at the time when the cheque is given the accused has nothing but a hope (as opposed to a genuine and reasonable belief) that sufficient money would be paid into his bank to meet the cheque.

SALIH BIN AHMED *vs.* N. M. HOWTH ... ... XLV. 62

§ 399

Cheating by personation.

CHRISTINAHAMY AND ANOTHER *vs.* CONDERLAG ... ... XXXII. 69

§ 400

Cheating—Evidence of system—

Held: *That in a charge of cheating, evidence of one similar transaction is not sufficient to prove system.*

DIAS *vs.* WIJETUNGE ... XXXII. 86

Cheating—Damage or harm to person deceived—Nature of proof required to constitute offence.

The accused was convicted under section 400 of the Penal Code for having deceived R. Muttusamy, Proctor and Notary, by falsely representing to him that certain premises, which the accused hypothecated under a bond attested by the said R. Muttusamy as Notary, were free from all encumbrances, when in fact the accused had by a prior mortgage bond hypothecated the same premises with another.

It was in evidence that the said Muttusamy had taken every step that a careful Notary would take to protect his clients' interests in spite of the representations of the accused. As the earlier bond had not been registered its existence could not be discovered.

There was no evidence of any damage or harm to the Notary.

Held: (1) *That the conviction could not be sustained as the possibilities of damage or harm to the Notary in mind or reputation in consequence of the representation by the accused were too remote.*

(2) *That to constitute the offence of cheating under section* 400 *of the Ceylon Penal Code, the damage or harm contemplated therein is damage or harm which must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.*

DE ALWIS *vs.* SELVARATNAM XXXIV. 33

§ 402

Cheating by personation.

The accused, pretending to be the mother of a girl of seventeen, induced a Magistrate to make order for the delivery of the girl to her. The accused was charged and convicted with having cheated the Magistrate by personation and thereby induced him to deliver the girl to her. She was not charged with having induced the Magistrate to make the order of delivery.

Held: *That the conviction was bad and must be set aside.*

CHRISTINAHAMY AND ANOTHER *vs.* CONDERLAG (INSPECTOR OF POLICE) XXXII. 69

§ 403

Price-controlled goods—Dealer bound to sell on tender of controlled price—Attempt to obtain price controlled goods by means of a forged document—Meaning of "fraudulently" and "dishonestly"—Control of Prices Ordinance, No. 39 of 1939—Penal Code sections 22, 23, 403, 459, and 490.

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The price of Sanatogen was controlled under the Control of Prices Ordinance, No. 39 of 1939. A dealer is bound by law to sell a price-controlled article on tender of the price. As Messrs. Cargills, Ltd., sold Sanatogen only on production of a doctor's prescription, the accused attempted to obtain a bottle from them on production of a forged prescription. He was charged and convicted under sections 403, 459 and 490 of the Penal Code. It was argued in appeal that the conviction was bad as, if the attempt had succeeded there would have been no wrongful gain or wrongful loss to either party.

Held: (1) *That the accused acted both dishonestly and fraudulently and was therefore rightly convicted.*

(2) *That "fraudulently" is wider than "dishonestly" and is not confined to the acquisition of wrongful gain or to the infliction of wrongful loss measurable in money's worth.*

KING *vs.* FERNANDO ... XXX. 79

§ 403

Charge under—Dishonestly inducing Controller of Exchange to issue permit for foreign exchange for travel—Is such permit 'property' within the meaning of the section.

Held: *That a permit for foreign exchange for travel outside Ceylon is 'property' within the meaning of section* 403 *of the Penal Code.*

P. KANAGARATNAM *vs.* W. A. BARTHOLOMEUSZ, INSPECTOR OF POLICE, FORT ... ... L. 112

§ 407

Removal by tenant of his property from house after judgment for rent against him but before attachment or seizure. No offence.

KING *vs.* FERNANDO ... ... II. 406

§ 408

Destruction of trees planted on common land—Mischief—Section 408 of the Penal Code.

Held: *That a co-owner who causes wanton destruction of fences and trees on the common property is guilty of mischief.*

HAPUWA *vs.* PEIYA AND ANOTHER I. 212

Mischief—Trespassing cow—Fatal Injury caused in attempting to drive it away.

Held: *That, if in the course of driving away a trespassing animal from his land, a landowner with no intention of causing wrongful loss to anyone, causes it injury, he cannot be said to have committed mischief even though the injury proved fatal.*

RANHOTIYA *vs.* LIYANNA AND ANOTHER ... ... IX. 85

Throwing human excreta into the examination room of a surgeon—Is it an offence under section 408 of the Penal Code.

Held: (1) *That a person who throws human excreta into the examination room of a surgeon does not commit an offence under section* 408 *of the Penal Code.*

(2) *That a confession made to a person by an accused is not inadmissible merely because the accused had retracted it.*

ROCKWOOD (A. S. P.) *vs.* DE SILVA XIX. 19

Criminal trespass and mischief—Harvesting of paddy crop on land lawfully in the possession of another.

Held: (1) *That a person who enters on a paddy field in the lawful possession of another and harvests the crop commits the offence of "mischief" within the scope of that expression as defined in section* 408 *of the Penal Code.*

(2) *That the failure to read over to the accused the evidence of a witness who was examined before the issue of process or to tender him for cross-examination is an irregularity whih does not vitiate a conviction.*

KANAPATHIPILLAI *vs.* NAGARAJAH AND SIX OTHERS ... ... XXVIII. 46

Mischief—Demolition of wall obstructing a right of way—Act done in vindication of a right—No evidence of spite or malice.

A wall constructed by the complainant, obstructing a path was demolished by the accused and some others in the exercise of a "*bona fide*" right of path which the public had been in the habit of using for a number of years—The accused was charged and convicted of the offence of mischief.

Held: *That in the absence of evidence that the accused was actuated by spite, malice or wantoness, the conviction of the accused*

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on a charge of mischief by demolition of the wall, could not be sustained.

FONSEKA *vs.* CHANDRASEKERE XLIX. 97

§ § 408 and 409.

Mischief—Does the blocking of a roadway amount to mischief.

Held: (1) *That it is the essence of the offence of mischief that the perpetrator must cause the destruction of property or such change in it as destroys or diminishes its value or utility.*

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

AGIE NONA AND ANOTHER *vs.* PEREIRA ... ... XVI. 71

§ 409

Destruction of a wall erected across land over which the accused had a right of way—Ownership admitted—Bona fide **act—Is it criminal.**

Held: *That the act of the accused did not amount to an offence under section* 409 *of the Penal Code.*

MOHIDEEN *vs.* SUPPRAMANIAM CHETTIAR AND OTHERS ... ... VIII. 123

Mischief—Cutting down a boundary fence —State of mind of accused how far material— —Compounding—When does a settlement in court amount to a compositon—Section 290—Criminal Procedure Code.

Held: (1) *That a settlement in court between the parties does not amount to a compounding of the offences unless there is an order by the Magistrate to that effect or anything to show that the parties intended it to be a composition.*

(2) *That in a prosecution under section* 409 *of the Penal Code (Chapter* 15) *the state of mind of the accused is an element for consideration.*

SIRIWARDENE *vs.* PUNCHI HAMY AND ANOTHER ... ... XV. 152

§ § 409 and 410.

Mischief by cutting down trees growing on a land—Complainant not the owner of the land—Can the charge be maintained?

Held: *That there is no provision of law which requires that the complainant in a charge of mischief shall be the owner of the property in respect of which the offence is alleged to have been committed, nor is it necessary that the complainant shall be aggrieved by the offence.*

J. JAYASINGHE *vs.* MIGUEL APPU AND ANOTHER ... ... VII. 63

§ 427

House trespass—Action by appellant for rent and ejectment against tenant—Plea by tenant that accused was owner—Accused's evidence and deeds rejected—Judgment for appellant—Writ for delivery of possession—Premises vacated by tenant but in occupation of accused—Has accused committed house trespass.

Held: *That the accused had not committed the offence of house trespass inasmuch as the house cannot be said to be in the occupation of the appellant at the time the accused entered it.*

KIRIBANDA *vs.* KUMARASINGHE XII. 160

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

Held: (1) *That in a charge of criminal trespass the mere omission to use the words "with intent to cause annoyance" cannot be said to prejudice an accused person if all the facts from which such an intention could be inferred are set out in the charge.*

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

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

(4) *That a superintendent of an estate is by virtue of his office in occupation*

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of the whole estate which is under his control and may therefore prosecute for criminal trespass a person who remains in possession of a room after whose right of occupation has been lawfully determined.

PERIANEN KANGANY *vs.* EBBELS XVI. 15

Criminal Trespass—Charge should specify intent.

Held: (1) *That in a charge of criminal trespass the intent with which the alleged trespass was committed should be specified.*

(2) *That the fact, that the alleged trespasser is also charged with theft and mischief in the same transaction as the criminal trespass, is no legal justification for not specifying in the charge for trespass the intent with which the alleged trespass was committed.*

E. P. T. HANIFFA *vs.* A. S. HAMEEDO MARIKAR ... ... XII. 81

A person who enters on a paddy field in the lawful possession of another and harvests the crop commits the offence of mischief within the scope of that expression as defined in § 408 of the Penal Code.

KANAPATHIPILLAI *vs.* NAGARAJAH *vs.* SIX OTHERS ... ... XXVIII. 46

Criminal trespass—Labourer in occupation of line rooms in tea and rubber estate—Acquisition of estate by Crown for village expansion—Possession taken on behalf His Majesty—Superintendent placed in control of estate—Notice that services of labourer not required and that line rooms should be vacated—Refusal to vacate—Does it amount to criminal trespass—Nature of such occupation—Superintendent's right to prosecute—Meaning of occupation.

The accused is a labourer who worked in the factory of a tea and rubber estate in which he occupied two line rooms with his wife and children. The estate was subsequently acquired by the Crown under the Land Acquisition Ordinance for purposes of village expansion and having been taken possession on behalf of His Majesty it was placed under the control of a Superintendent, who—

(*a*) took up residence on the estate;

(*b*) was in actual possession of the entire estate including all buildings thereon,

(*c*) allowed the labourers to continue their work without discussing with them any terms or conditions of service,

(*d*) paid all labourers including the accused without making any deduction for the rooms they occupied;

(*e*) had the right to allot any rooms in the lines to the labourers and to change the rooms occupied by the labourers as he wished.

The Superintendent served on the accused a notice that his services would not be required and that he should vacate the rooms occupied by him before a certain date. He was paid all wages due and his certificate of discharge was tendered to him. The latter, he refused to accept and failed to vacate the rooms.

The Superintendent charged him with having committed criminal trespass by unlawfully remaining in the two line rooms with intent to annoy him. The accused gave evidence and stated that he was born and bred in the estate, and that the estate was his home, and that he intended to remain in the estate till he was able to build a house to move into.

The Magistrate convicted him and he appealed.

Held: (1) *That in the circumstances the conviction was right.*

(2) *That the accused's occupation was not as tenant but was ancillary to the performance of his duties as a labourer.*

(3) *That the line rooms were in the occupation of the Superintendent within the meaning of section 427 of the Penal Code, inasmuch as the accused's occupation was that of a servant and is in law the occupation of the master.*

(4) *That the accused's object in remaining in the line rooms was to annoy the Superintendent.*

SELVANAYAGAM *vs.* HENDERSON, A. G. A. (KEGALLE) ... ... XXXII. 94

Is offence triable by Rural Court.

MURUTHAPPEN *vs.* ASHTON XXXVI. 31

Criminal trespass—Appellant occupying rooms in estate acquired by Government—Notice to quit by Superintendent of estate after acquisition—No evidence of occupation

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by Superintendent or of annoyance to him by accused—Accused not the servant of Superintendent—Relevant intention must be proved and not assumed—What constitutes criminal trespass.

The appellant, who was in occupation of two rooms on an estate, wherein his family had lived for nearly seventy years,was noticed to quit by the Superintendent, R, who was under the direction of the Assistant Government Agent of Kegalla, H. On his refusal to leave, he was charged and convicted of the offence of criminal trespass by unlawfully remaining in the two rooms with intent to annoy R. The conviction was affirmed on appeal by the Supreme Court.

The Magistrate found that R was in occupation of the entire estate and the buildings thereon; that the apellant had occupied the rooms not as a tenant but as a servant and that, when his employment was terminated by notice to quit, his continued occupation of the rooms was unlawful and warranted the conclusion that the intention of the appellant was to annoy R, since that would be the natural consequence of his action.

Evidence led in the case showed that the appellant's intention was not to annoy R but to remain on the estate where his family had lived for generations and not to find himself homeless. Further, there was no satisfactory evidence as to the character of the appellant's occupation, but the facts relating to R's employment, and duties established that the appellant was a servant of H and not of R.

Held: (1) *That in the circumstances the Crown had failed to prove that R was in occupation of the estate, including the two rooms.*

(2) *That on the evidence there was no intention on the part of the appellant to annoy R by remaining on the estate and the lower Courts were wrong in assuming an intention to annoy R merely because such annoyance would be the natural consequence of appellant's refusal to leave.*

(3) *That entry upon land, made under a* bona fide *claim of right, however ill-founded in law the claim may be, does not become criminal merely because a foreseen consequence of the entry is annoyance to the occupant.*

(4) *That to establish criminal trespass the prosecution must prove that the real or dominant intent of the entry was to commit an offence or to insult, intimidate or annoy the occupant, and that any claim or right was a mere cloak to cover the real intent, or at any rate constituted no more than a subsidiary intent.*

THE KING *vs.* SELVANAYAGAM XLIII. 101

§ 429

Does a bona fide **claim to land justify a criminal trespass.**

Held. *That a* bona fide *claim to a land does not entitle a claimant to forcibly enter property in the possession of another and remove or destroy fences thereon.*

NANAYAKKARA *vs.* APPUHAMY *et al* II. 324

§ 433

Estate Labourer remaining on lines after termination of his contract of service. Is he guilty of criminal trespass.

FORBES *vs.* RENGASAMY ... XVII. 45

Criminal Procedure Code section 425.

Held: (1) *That in a charge under section* 433 *of the Penal Code the offence intended to be committed must be specified.*

(2) *That omission to specify in a charge under section* 433 *of the Penal Code the offence intended to be committed is an omission that cannot be cured under section* 425 *of the Criminal Procedure Code unless the offence intended to be committed is obvious from the evidence.*

MEDIWAKE (INSPECTOR OF POLICE) *vs.* DE SILVA AND TWO OTHERS XIX. 64

Criminal trespass and criminal intimidation—Is entry on a path over a land on which the accused has a right of way with intent to insult, intimidate or annoy an offence —To constitute the offence of criminal intimidation need the threats be made directly to the person intimidated.

Held: (1) *That entry on a land in the occupation of a person with intent to intimidate, insult or annoy is an offence even though the place entered be a path on the land over which the accused has a right of way.*

(2) *That the utterance of threats designed to intimidate a person who is not present is an offence under section* 486 *of*

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the Penal Code if the intention is that the threats should be conveyed to him.

BALAWANDARAM *vs.* HEENKENDE XXIII. 17

Is offence triable by Rural Court.

MURUTHAPPEN *vs.* ASHTON XXXVI. 31

§ 434

Criminal trespass—Nature of intention necessary to support charge.

Held: *That a subsidiary intention to annoy or mere knowledge that annoyance might result is not sufficient to prove a charge of criminal trespass.*

JIRASINGHE *vs.* SETUNGA ... XXIX. 96

§ 443.

Discretion of Magistrate to try summarily Criminal Procedure Code, section 152 (3).

Held: *A Magistrate may, under section* 152 (3) *of the Criminal Procedure Code, try summarily in his capacity as District Judge, a charge under section* 443 *of the Penal Code.*

KIRIMUDIYANSE AND TWO OTHERS *vs.* POTHUHERA POLICE ... XXXVI. 88

Can a magistrate try summarily.

Held: *That a magistrate, even though he assumes jurisdiction as Additional District Judge, cannot try a charge under section* 443 *of the Penal Code summarily.*

SMITH (INSPECTOR OF POLICE) *vs.* PELECK SINGHO AND ANOTHER XXIII. 76

Charge under—Should conviction be set aside merely because Magistrate tried the case summarily.

PINCHA *vs.* VELOO ... XXXIII. 78

Criminal Procedure Code, section 152 (3)—Can a charge of housebreaking and theft be tried summarily by a Magistrate assuming jurisdiction as a District Judge.

Held: (1) *That a Magistrate who is also a District Judge can try summarily a charge of housebreaking and theft by assuming jurisdiction under section* 152 (3) *of the Criminal Procedure Code.*

(2) *That the question whether it is "proper" for him to exercise the jurisdiction in a particular case is one for the Magistrate to decide on the facts of that case.*

VADIVELU *vs.* THE INSPECTOR OF POLICE BADULLA ... ... XL. 22

§ 445.

Scope of section.

REX *vs.* SILVA KAVIRATNE XXIII. 128

§ 449

Possession of bunch of keys—Article that can be used both for the purpose of house-breaking and for an innocent purpose—No proof of intent to commit an unlawful act—Conviction cannot be sustained without such proof.

Held: *That it is unnecessary in a charge under* § 449 *of the Penal Code to prove that a person found in possession of an instrument commonly used for house-breaking such as a jemmy intended to commit an act of house-breaking but where an article, such as a bunch of keys—which can be used for an innocent purpose—is found in the possession of a person the onus is upon the prosecution to prove the intent on the part of the possessor to use it for house-breaking. The intent may be proved by circumstantial evidence.*

It is not correct to draw an inference of an intent to commit house-breaking from an unsatisfactory explanation of the possession of a bunch of keys, alone.

BURAH *vs.* SUBAYA ... I. 136

Possessing without lawful excuse instruments of house-breaking, a chisel, a clasp knife and torch—What the prosecution should prove before accused is called upon to prove lawful excuse—Explanations consistent with the innocence of the accused—What inference should be drawn.

Held: (1) *That in a prosecution for possessing without lawful excuse instruments of house-breaking, before the accused can be called upon to prove a lawful excuse for their possession, the prosecution must establish that the accused intended to use them for the purposes of house-breaking.*

(2) *That where there are explanations which are consistent with the innocence of the accused, the selection of those*

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which tend to incriminate him is not justifiable.

SANGARAM *vs.* RAJASURIYA (INSPECTOR OF POLICE) ... ... XXXII. 100

§ 450

Offence of being found upon a building for an unlawful purpose—What are the ingredients of such an offence?—Criminal Procedure Code Section 178.

The accused was found standing on the window sill of a house looking into a room in the house. This room was occupied by an ayah employed there. The accused was charged with being found in a building for an unlawful purpose.

Held: (1) *That where a person is charged with being found in a building for an unlawful purpose the prosecution must not only prove his presence there but also that he was there for some unlawful purpose.*

(2) *That section* 450 *of the Penal Code refers to two offences, one offence consisting in being found in or upon a building for an unlawful purpose, and the other offence consisting in being found in a building or enclosure and failing to give a satisfactory account.*

(3) *That an accused cannot, upon a charge of being found in or upon a building for an unlawful purpose, be convicted of being found in a building and failing to give a satisfactory account with a separate charge in respect of the latter offence.*

M. W. B. THIEDEMAN (S. I. POLICE) *vs.* P. CHARLES ... ... VII. 40

Ingredients necessary to contribute offence under.

MASILAMANY *vs.* RODRIGO XXXIV. 66

§ 451.

Onus of proof.

Held: *That under Section* 451 *of the Penal Code the onus lies on the prosecution to prove that the accused "loitered" in or about any "public place" with intent to commit "theft" or "other unlawful act." It is not incumbent on the accused to explain his presence at the "public place."*

NAIR *vs.* VELUPILLAI ... IV. 67

Evidence necessary to establish that accused is a reputed thief.

Held: *That in a charge under section* 451 *of the Penal Code evidence of previous convictions of accused cannot be led to establish the fact that he is a reputed thief.*

PERERA *vs.* POLICE ... ... XXXII. 108

§ 454

Forgery—Abetment of—Cattle Voucher.

Held: *That the failure of the prosecution to prove that the signature on the cattle voucher, which was alleged to be forged, was not genuine, by an Express repudiation from the person whose signature it purported to be, was fatal to a conviction.*

THE KING *vs.* KONAR ... IX. 152

Abetment of forgery—Abetment of fabrication of evidence for the purpose of being used in or in relation to a judicial proceeding—Is sanction of Attorney-General necessary to enable a private party to prosecute.

VANDER POORTEN *vs.* VANDER POORTEN AND ANOTHER ... XXXI. 77

§ 455

Forgery—Alteration of date in birth certificate using it as genuine document by employee of Municipality to obtain longer period of service than otherwise entitled to.

On the accused entering permanent service under the Municipality he was required to submit a birth certificate. Accused whose birth was registered to have taken place on 24-12-1906 sent a copy of a birth certificate (P3) with the figures of the year altered from 1906 to 1912. He was charged on two counts, *viz.*: (i) of forgery, (ii) of using as genuine a forged document. After trial he was acquitted on the grounds (*a*) that the prosecution had not proved that the alteration was made by the accused, and (*b*) that the ultimate gain or loss to the Municipality by the circumstance that accused may remain in its service for longer period (viz, six years) than he would otherwise be, and may obtain a larger pension than he would otherwise receive was too remote.

The Attorney-General appealed.

Held: *That in the circumstances, the accused was guilty of the 2nd count, viz. of using as genuine a forged document.*

THE KING *vs.* PEIRIS ... XXXII. 64

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§ 456

Forgery of rent receipt—Meaning of "fraud"

THE KING *vs.* PERERA ... ... II. 160

§ 459

Using as genuine a forged document—Meaning of fraud—

THE KING *vs.* PERERA ... II. 160

Is deprivation of property actual or intended an essential element in the offence of fraudulently or dishonestly using as genuine a document which the accused knew or had reason to believe to be false.

Held: *That for an offence under section* 459 *of the Penal Code it is sufficient to prove an intention to deceive and by means of the deceit to obtain an advantage.*

KING *vs.* SILVA ... ... III. 74

Attempt to obtain price—controlled goods by means of a forged document.

KING *vs.* FERNANDO ... XXX. 79

Forgery—Alteration of date in birth certificate using it as genuine document by employee of Municipality to obtain longer period of service than otherwise entitled to.

THE KING *vs.* PEIRIS ... XXXII. 64

§ 467

Particulars of offence under—Does each particular constitute a separate offence.

KING *vs.* GOONEWARDENA XXIV. 127

Can charge of falsification of accounts under § 467 be joined with charge of criminal breach of trust under § 392A.

THE KING *vs.* DON CHARLES GUNATUNGA ... ... XLVII. 49

§ 483.

Criminal intimidation—Conditional threat to cause injury—Is it an offence within the ambit of section 483.

Held: (1) *That a conditional threat of injury or a threat of future injury is not excluded from the description of the offence of criminal intimidation.*

(2) *That for a threat to constitute the offence of criminal intimidation, it is not necessary that the threatened injury should be capable of execution in all its details.*

SAMARANAYAKE *vs.* JAYASINGHE (POLICE SERGEANT, AMBALANGODA) XXXVII. 65

§ 484

Insult—Ingredients of offence.

HERATH *vs.* RAJAPAKSE ... I. 326

Abuse and Insult.

Held: *That mere verbal abuse is not punishable under* § 484 *of the Penal Code, unless it appears from the circumstances, from the terms of the abuse itself, and having regard to the person to whom it is addressed, that the accused intended or knew that it would be likely to cause him to break the peace, or commit some other offence.*

BALASURIYA *vs.* DHARMASIRI ... I. 343

Threat to lower a person in the estimation of others.

The accused on being asked to shut up for rude behaviour towards him, by a Medical Officer who went to inspect certain buildings in connection with an application to build retorted "I will lower you in the estimation of others."

Held: *That this action of the accused did not amount to an offence under either sections* 486 *or* 484 *of the Penal Code.*

SUB-INSPECTOR OF POLICE, BELIATTE *vs.* WIJESURIYA ... ... III. 78

Intentionally insulting a Police Officer.

Held: (1) *That mere use of abusive language does not constitute an offence under Section* 484 *of the Penal Code.*

(2) *That a person cannot be convicted under section* 484 *of the Penal Code unless it appear, from the circumstances, having regard to the person to whom the abusive words are addressed, that the person who used the words complained of intended or knew that it was likely to cause the person to whom they were addressed to break the peace or commit some offence.*

SUB-INSPECTOR OF POLICE *vs.* WIJESEKERA ... ... IV. 103

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Accused must know or intend that abuse is likely to provoke the other to commit a breach of the peace. The insulting words used should be set out in the charge.

DISSANAYAKE *vs.* MARIMUTTU XV. 121

What are the ingredients of the offence under section 484.

Held: *That to constitute an offence under section* 484 *of the Penal Code the following ingredients must exist:*

(*a*) *The insult must be intentional.*

(*b*) *The insult must be of a provocative character likely to produce a breach of the peace.*

(*c*) *The accused must have the knowledge that his words would produce that result.*

SUBASINGHE *vs.* MUTTIAH ... XXIX. 95

Offence under § 484 cannot be included in same charge with offence under § 486.

MOHAMED LEVVE *vs.* CAREEM XXXVI. 96

What should be proved in a charge under.

Held: *That a conviction under section* 484 *of the Penal Code cannot stand where the prosecution has failed to prove that the accused person intended or knew the provocation offered to be of such a character as to be likely to cause the person insulted to commit some other offence.*

JAYASURIYA *vs.* RATNAYAKE, (S. I. POLICE) ... ... XL. 47

Charge under—Actual words complained of must be proved.

ISMAIL *vs.* THANGIAH ... XL. 63

Complaint declared vexatious—When is complaint vexatious within the meaning of § 253B of the Criminal Procedure Code.

RANASINGHE *vs.* JAYASEKERA XLVI. 52

§ 486

Threat to assault—"I will lower you in the estimation of others" is not a threat to assault.

SUB-INSPECTOR OF POLICE, BELIATTA *vs.* WIJESURIYA ... ... III. 78

To constitute offence of criminal intimidation need the threats be made directly to the person intimidated.

BALAWANDARAM *vs.* HEENKENDE XXIII. 17

Offence under § 486 cannot be included in same charge with offence under § 484

MOHAMED LEVVE *vs.* CAREEM XXXVI. 96

Complaint declared vexatious—When is complaint vexatious within the meaning of § 253B of the Criminal Procedure Code.

RANASINGHE *vs.* JAYASEKERA XLVI. 52

Competency of wife as witness against husband.

SEETHEVI *vs.* ARUMUGAM AND OTHERS ... ... L. 21

§ 488

Is a Post Office a public place within the meaning of section 488.

Held: *That a Post Office is public place within the meaning of section* 488 *of the Penal Code.*

INSPECTOR OF POLICE, BATTICALOA, *vs.* PONNIAH ... ... XI. 129

Is a police station a public place.

Held: *That a police station is not a public place within he meaning of section* 488 *of the Penal Code.*

VAN CUYLENBURG (A. S. P. UVA) *vs.* WEERASEKERA ... XXXIX. 26

§ 490

Attempt to obtain price-controlled goods by means of a forged document.

KING *vs.* FERNANDO ... XXX. 79

PENSIONS

Pension of a servant of the Crown—Does it vest in the assignee on the insolvency of the pensioner—Can an order impounding a pension of a servant of the Crown be made—Do payments made to a creditor out of pension after the insolvency of the pensioner vest in the assignee—Government Minutes on Pensions.

Held: (1) *That a prospective order cannot be made impounding the pension of a*

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person who had retired from the service of the Crown in Ceylon.

(2) *That payments made by or at the instance of the pensioner to a creditor after the insolvency of the pensioner vest in the assignee who is entitled to compel the creditor to pay the money so received by him to the credit of the assignee in the insolvency proceedings.*

PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION *vs.* ABRAHAMS (ASSIGNEE) ... ... XXIV. 101

PER INCURIAM

A judge who imposes an illegal sentence per incuriam **has the power to set aside the illegal sentence and impose a legal sentence.**

REX *vs.* PEDRICK APPUHAMY KADIRESU AND TWO OTHERS ... XXVIII. 78

PERMIT

Permit to Preach in Streets—Can permit be arbitrarily revoked.

PERKINS *vs.* SRI RAJAH ... XVII. 56

PETROL CONTROL

(1) *A court is bound to take judicial notice of the date on which an Ordinance has been brought into operation.*

(2) *The expression "vendor" in section* 11 *(b) of the Petrol (Control of Supplies) Ordinance No.* 52 *of* 1939 *includes not only the actual vendor who is in charge of the retail depot but also the person who owns it even though the offence is committed in his absence and without his knowledge.*

JAYAKODY *vs.* PAUL SILVA AND ANOTHER ... ... XXV. 45

PLAINT

See under **PLEADINGS**

CIVIL PROCEDURE CODE

PLAN

Description in decree by reference to plan—When essential part of description.

MURUTHAPPAH *vs.* ZOWHAR XXIV. 38

PLANTERS SHARE

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

ABEYWEERA *vs.* ENSOHAMY AND ANOTHER ... ... XVI. 142

PLEADINGS

Amendment of plaint after filing of answer—Amendment relates back to the date of original institution of action.

Held: *That where after the institution of an action the plaint is amended by the addition of an alternative count for goods sold and delivered the new cause of action relates back to the date of original institution.*

ISMAIL GIGE AND ANOTHER *vs.* NOORDEEN ... ... I. 207

Right of judge to reject a plaint.

Held: (1) *That a judge cannot reject a plaint once accepted.*

(2) *That the plea that the writing sought to be enforced was bad in law is one that should be left to the defendant to take and is not a ground for rejecting a plaint.*

PIERIS *vs.* SILVA ... ... II. 380

Action to decide whether certain lands were burdened with a fidei commissum**—Compulsory acquisition of lands under Ordinance No. 3 of 1876—Money paid into Court—Amendment of plaint to the effect that the money deposited be declared impressed with the** fidei commissum**—Is amendment in order.**

Held: *That the amendment was in order as it did not set up a new cause of action.*

NOOR UMMA *vs.* ABDUL HAMEED III. 114

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

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

PERERA *vs.* ASSEN ... ... XVII. 8

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Amendment of pleadings—Bona fide amendment should be allowed even though parties have been negligent or careless in stating their cases.

Belatedness of a proposed amendment is a matter that affects the question of terms in regard to costs and postponement.

PUNCHIMAHATMAYA MENIKE AND OTHERS *vs.* RATNAYAKE AND OTHERS XVIII. 18

An application for amendment of the plaint may be made even in the appeal court.

MUTHUMENIKA *vs.* SUDU MENIKA XXVI. 91

Amendment of plaint—Amended plaint adding new charge and out of time—Original plaint filed within time—Amendment is out of order.

REV. FR. COLLERE *vs.* BENEDICT XXXI. 27

Plaint rejected by judge in his discretion for being prolix—Mandamus does not lie.

ORR *vs.* SANSONI ... ... XXXVI. 22

Amendment of Plaint—When should it be allowed.

Held: *That where a pleading to amend a plaint serves only to bring out prominently and clearly some of the real issues between the parties, without introducing a new cause of action, it should be allowed to be filed.*

DE MEL *vs.* THENUWARA ... XXXIX. 84

Application to amend pleadings—When should it be refused.

WISMALOMA *et al vs.* ALAPATHA XLV. 67

Cause of action—Amendment of pleadings—Hire of elephant—Contract—Death of elephant due to negligence of defendant—Is it a tort?—Scope of action—Civil Procedure Code, Sections 40 (d) and 45.

The plaintiff, who sued the defendant for damages in connection with the hire of an elephant stated in his plaint that the contract was entered into within the jurisdiction of the Court, and after referring to the date and nature of the contract claimed damages on the ground that the elephant died owing to the negligence of the defendant. He sought to amend the plaint in order to make it clear that his claim was based on contract. The learned District Judge disallowed the amendment on the ground that the plaintiff was seeking to alter the scope of his original action which was based on a tort to one based on a contract. The plaintiff appealed.

Held: *That the original plaint was based on contract and the mere mention of negligence in the plaint did not convert it into one of tort and as such the amendment should have been allowed.*

MUNASINGHA *vs.* L. C. DE SILVA XLVII. 63

PLEDGE

See also under **PAWNBROKERS.**

Right of pledgee to sell security without recourse to a court.

HONGKONG AND SHANGHAI BANKING CORPORATION *et al vs.* KRISHNAPILLAI ... ... I. 149

Pledger and pledgee—Registration of Documents Ordinance § 18 (a)—Meaning of the words "ostensibly and bona fide in such custody" in that §. Scope of § § 17 and 18.

INDIAN BANK LTD. *vs.* CHARTERED BANK AND THE EXECUTORS OF THE ESTATE OF KAPADIA ... ... XXII. 43

Pledge of bicycle purchased on hire-purchase agreement to guarantor to the agreement for debt due to him by purchaser—Sale of same bicycle without delivery of possession on conclusion of the hire purchase to a person other than the guarantor—Action to recover possession—Is pledgee deprived of his rights by the sale.

Held: *That a pledgee of movable property pledged to him by a person who is not the absolute owner will not be deprived of his rights by a sale of the property to another by the pledgor on his becoming absolute owner.*

JAYAMANNE *vs.* PERERA ... XXVII. 70

POISONS, OPIUM AND DANGEROUS DRUGS ORDINANCE

Unlawful Possession of dangerous drug—Sealing of production—Is it an essential requirement of law.

Held: *That there is no requirement in law that the production, in any case in which a person is charged with being in unlawful*

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possession of an excisable article or a dangerous drug, should be sealed at the spot or at any given time.

DE SILVA (EXCISE INSPECTOR) *vs.* SARPIN SINGHO ... ... VIII. 150

Possession of opium by several persons—Person running away from a house raided by an Excise raiding party—To what extent does such conduct alone raise a presumption strong enough to demand an explanation in a charge against him for possession of opium along with the other occupants found in the house at the time of the raid.

Held: *That the conduct of the accused in running away from the house by itself does not create a presumption strong enough to demand an explanation.*

DE NEISE (INSPECTOR OF EXCISE) *vs.* SABUNATHAN *Alias* SAMPEN AND OTHERS ... ... IX. 116

Illicit possession of opium—How should charge in regard to possession of opium be framed—Criminal Procedure Code section 425.

Held: *That failure to describe, in a charge for illicit possession of opium, the kind of opium in respect of which the offence has been committed is a defect to which the provisions of section* 425 *of the Criminal Procedure Code would be applicable.*

EXCISE INSPECTOR OF NATTANDIYA *vs.* SOMASUNDARAM ... ... IX. 130

Illicit possession of Opium—Opium found under pillow of accused—How far is it evidence of illicit possession.

Held: *That the mere existence of two packets of opium under the pillow of the accused in the circumstances above stated does not constitute sufficient proof of an offence under section* 32 *of the Poisons, Opium and Dangerous Drugs Ordinance No.* 17 *of* 1929.

WIJEMANNE (INSPECTOR OF POLICE) *vs.* SINNATHAMBY ... ... IX. 165

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

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

PERUMAL (EXCISE INSPECTOR) *vs.* ARUMUGAM ... ... XV. 55

Charges under Ordinance—§ § 26 and 28—No evidence to prove charges as framed—Exercise of discretion by appeal court under § 425 of Criminal Procedure Code.

DIAS *vs.* INSPECTOR OF POLICE MATALE ... ... XXXI. 63

Possession of seeds, leaves and stems of the hemp plant (ganja)—Does ganja come within the definition of hemp plant.

Where the accused was charged with possessing seeds, leaves and stems of a hemp plant (ganja) in contravention of section 26 of the Poisons, Opium and Dangerous Drugs Ordinance, and it was contended that there were two varieties of the hemp plant, namely, Canabis Sativa and Canabis Indica and that the Ordinance penalised only the possession of Canabis Sativa.

Held: *That canabis Indica is a species of Canabis Sativa and that ganja comes within the definition of hemp plant in the Ordinance.*

WILSON *vs.* KOTHALAWALA, (EXCISE INSPECTOR) ... ... XXXI. 81

Cultivation of the hemp plant without a licence from the Governor—Meaning of "cultivation"—Onus of proof of licence.

Held: (1) *That the act of placing a shade or screen over newly planted ganja plants amounted to the cultivation of such plants.*

(2) *That ganja plants came within the definition of "hemp plants" and that the offence of the accused did not require proof of* mens rea.

(3) *That once the prosecution established that the accused had cultivated the hemp or ganja plants, the onus shifts on to the accused to show that he did so with a licence from the Governor.*

MARAMBE EXCISE INSPECTOR *vs.* JOAN ... ... XXXIII. 47

Unlawful possession of ganja found in house—Conviction of husband and wife—When is wife guilty.

Where ganja was found in a house in the occupation of a husband and his wife, but at the time of the search, the house was in

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charge of the wife, who denied at the trial (*a*) that the house was searched, (*b*) that the excise officers visited the house or that anything was found therein.

Held: (1) *That the wife was guilty of unlawful possession of ganja.*

(2) *That the mere fact that the husband is the chief occupant of the house without any other evidence against him cannot support a conviction of the husband for possession of ganja found in such house.*

SUDU BANDA AND ANOTHER *vs.* INSPECTOR OF EXCISE PASSARA .... XXXV. 6

Charge of selling ganja—Arrest without warrant—Legality of arrest—Excise Ordinance, section 34.

An Excise Inspector was resisted in attempting to arrest a person for selling ganja. He had not obtained a search warrant nor made the record prescribed by section 75 (2) of the Poisons, Opium and Dangerous Drugs Ordinance.

Held: (1) *That such a record is a condition precedent to a search or arrest without a warrant and a search or warrant made without that record is illegal.*

(2) *That section 34 of the Excise Ordinance has no application to offences under the Poisons, Opium and Dangerous Drugs Ordinance.*

APPUSINGHO AND THREE OTHERS *vs.* VAN BUREN (EXCISE INSPECTOR) XXXVI. 91

Poisons, Opium and Dangerous Drugs Ordinance (Chap.172)—Charge under section 26—What must be proved—Meaning of "ganja."

Where a person is charged under section 26 of chapter 172 with cultivating and having in his possession hemp plants, the charge must refer to the plant by the name by which it is known to the law and the prosecution must establish by evidence of a qualified person that the plant possessed by the accused is a plant of the variety prohibited by section 26.

SAMARASEKERA *vs.* SOYSA (EXCISE INSPECTOR, WADDUWA) ... XLIV. 80

Possession of a quantity of ganja—Section under which a charge should be framed.

Where an accused person alleged to have been in possession of a quantity of ganja was charged and convicted under section 26 of The Poisons, Opium and Dangerous Drugs Ordinance (Chap. 172) read with section 76 of the same Ordinance.

Held: *That the conviction could not be sustained as the proper section under which he should have been charged in section 28.*

A re-trial was ordered on a proper charge

P. S. FERNANDO GAMPAHA POLICE *vs.* W. CAITHAN ... ... XLIX. 62

POLICE

Police Reward Fund

Is it an informant within the meaning of the expression in section 27 of Ordinance No. 5 of 1910.

SOLICITOR GENERAL *vs.* MANIKKAM AND ANOTHER ... ... VI. 79

Police Ordinance No. 16 of 1865 section 53 (4)—Is a master liable for an act committed in breach of section 53 (4) by his servant.

Held: (1) *That the accused had not committed a breach of section 53 (4) of the Police Ordinance.*

(2) *That, in the circumstances, the accused cannot be convicted of abetting the offence of his servant.*

DEVASAGAYAM (POLICE SERGEANT) *vs.* MOHAMED BUHARY ... XIII. 18

Police Officer who is a witness should not himself conduct the prosecution.

KULATUNGA *vs.* MUDALIHAMY *vs.* OTHERS 86 XVIII.

Police Ordinance—Charge under section 76 (2)—Charge laid before magistrate—Absence of certificate required by section 97—Can magistrate properly exercise jurisdiction—Does section 425 of the Criminal Procedure Code cure the defect—Is the fact that the prosecution was conducted by Crown Counsel sufficient to regularise the omission.

Held: (1) *That a magistrate cannot take summary proceedings in regard to a charge under section 76 (2) of the Police Ordinance without the certificate required by section 79 of the same Ordinance.*

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(2) *That the absence of such certificate is not cured by section 425 of the Criminal Procedure Code even though Crown Counsel conducted the prosecution before the magistrate.*

VANDERSTRAATEN (INSPECTOR OF POLICE) *vs.* MRS. N. M. PERERA AND OTHERS ... ... XIX. 131

Police Ordinance section 64 (f)—Meaning of "passengers."

Held: *That the word "passengers" in section 64 (f) of the Police Ordinance does not include "pedestrians."*

PABILIS SINGHO *vs.* GNANAPARAGASAM ... ... XXIX. 64

Complaint made to police officer—Right of police officer to demand from person against whom the complaint was made his name and address—Magistrate reading to accused the particulars of the offence from the plaint and not from the summons—Criminal Procedure Code sections 33 and 187—Police Ordinance section 57—Penal Code section 323.

Held: (1) *That a police officer to whom a complaint is made against a person has the right to demand from that person his name and address.*

(2) *That the reading of the particulars of the offence from the plaint did not vitiate the conviction.*

SILVA *vs.* ABEYSEKERA ... XXXI. 14

Police Ordinance

Section 72—General fund for the reward of Police Officers—Informers Rewards Ordinance—Section 2—Person convicted and fined on plaint filed by Police Officer—Application on later date to order half-fine be awarded to Police Reward Fund allowed—Validity of order—Effect of proviso to Section 72 of Police Ordinance.

Held: (1) *That an order under Section 2 of the Informers Reward Ordinance should be made at the same time as the order imposing the fine and not later.*

(2) *That the effect of the proviso to Section 72 of the Police Ordinance is that when a police officer acts the part of an 'informer" properly so called the share of the fine should be paid to the Reward Fund contemplated therein and not to the "Informer" personally as prescribed by the Informers Reward Ordinance.*

ATTORNEY-GENERAL *vs.* LETCHIMAN NADAR ... ... XLII. 64

Police officer initiating proceedngs in Magistrates' court under Section 148 (1) (b) of Criminal Procedure Code—Is he entitled to appear and conduct prosecution at trial.

THE ATTORNEY-GENERAL *vs.* KANDE NAIDE ... ... XLII. 74

Power of Police officers to search premises or to arrest persons without prior judicial authority.

MUTHUSAMY *et al vs.* INSPECTOR OF POLICE KAHAWATTA ... XLIV. 33

Police Ordinance

Section 69—Power of Police to search premises without warrant—No reasonable suspicion that premises contained stolen property—Obstruction to police officers—Legality of conviction.

MUTHUSAMY *et al vs.* INSPECTOR OF POLICE KAHAWATTA ... XLIV. 33

Police Ordinance

Section 69—Applicability of—To offence under the Betting on Horse Racing Ordinance.

PONNUDURAI *vs.* JALALDEEN XLV. 28

POSSESSORY ACTION

Exclusive possession of a land by one co-owner by agreement with the other co-owner—Is possession ut dominus**—Nature of possession necessary to bring a possessory action.**

SADIRISA AND ANOTHER *vs.* ATTADASSI THERO ... ... VI. 13

Possessory action—Possession for a year and a day—In calculating this period can period of possession of predecessor in title be counted.

RAYMOND *vs.* WIJEWARDENA AND OTHERS ... ... X. 1

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Possessory action—Effect of—On the possession of the person dispossessed.

PERERA *vs.* WILLIAM ATTALE XXVII. 45

Possessory action by lessee—Value of action—Test of jurisdiction.

Held: (1) (*by Divisional Bench*)—*That the test of jurisdiction in a possessory action is the value of the land.*

(2) *That it is immaterial whether such an action is brought by a plaintiff* suo nomine *or as lessee.*

Per SOERTSZ, A.C.J.: "In order, therefore, to ascertain whether an action is within or beyond the pecuniary jurisdiction of a court, the nature and extent of the subject-matter in dispute has to be ascertained, and for that purpose, it would be necessary, to examine not only the plaintiff's claim but also the defendant's answer to it."

APPUHAMY AND ANOTHER *vs.* APPUHAMY AND ANOTHER ... ... XXXI. 33

Possessory action for plantation—Can it be maintained by one co-owner against another.

Held: *That a possessory action for a plantation can be maintained by one co-owner against another.*

COORAY AND ANOTHER *vs.* SAMARANAYAKE ... ... XXXII. 43

Possessory action—Disturbance of possession of field—Action for declaration of title and ejectment by Buddhist monk who is not the controlling viharadhipathi—Disclaimer of title by Viharadhipathi—Possession of Buddhist monk ut dominus**—Sanghika property.**

MENIKA AND OTHERS *vs.* DHAMMANANDA ... ... XXXIX. 12

Possessory action—What is possessio civilis **or** possessio ut dominus**—Should the fact that dispossession by defendant was in assertion of a** bona fide **right of co-ownership be taken into consideration in determining nature of possession.**

Held: (1) *That the fact that dispossession by the defendant in a possessory action was in the assertion of his right of co-ownership is not a factor to be taken into consideration in determining whether the plaintiff had* possessio civilis *or* possessio ut dominus.

(2) *That* possessio civilis *or* possessio ut dominus *is proved when a person is in possession of property with the intention of holding and dealing with it as his own.*

PERERA *vs.* PERERA ... XXXIX. 100

POST OFFICE

Post Office Ordinance sections 50, 55 and 83—Rule 22 and 27 of the Post Office Savings Bank rules—Scope of the words "all matters relating to the general management of the savings bank"—Are they wide enough to permit the making of a rule excluding the jurisdiction of the courts—Is the Attorney-General the proper person to sue for the recovery of money deposited in the Ceylon Savings Bank—Civil Procedure Code section 456.

Held: (1) *That rule 22 of the rules relating to the Post Office Savings Bank is* ultra vires.

(2) *That the words "general management of the savings bank" in section* 83 *of the Post Office Ordinance are not wide enough to permit the making of a rule which ousts the jurisdiction of the courts.*

(3) *That an action for the recovery of money deposited in the Ceylon Savings Bank should be brought against the trustees of the Bank and not against the Attorney-General.*

ARNOLIS HAMY *vs.* THE ATTORNEY-GENERAL ... ... XIX. 58

POWER OF ATTORNEY

See under **ATTORNEY**

PRESCRIPTION

Prescription Ordinance No. 22 of 1871 § 13. Shop Debt.

Held: *That a special promise is one which will not bind unless accepted by the plaintiff to whom it is preferred, and that where a proposal is rejected it cannot be relied on as an acknowledgement to bar the statute.*

HOARE AND CO. *vs.* RAJARATNAM ' I. 284

Prescription Ordinance No. 22 of 1871, §§ 7, 8, and 9—Promise to pay account stated—Shop debt.

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Where a document of sale of Jewellery was entered in the following terms dated the very day of the sale.

One pair Bangles 46
One pendant 15

Received cost 9/-

(Sgd.) D. J. WEERASINGHE
30th March 1929.

Held: (1) *That it constituted a written promise within the meaning of* § 7 *of the Prescription Ordinance No.* 22 *of* 1871.

(2) *That to constitute an account stated there must be some antecedent liability or some previous transaction with reference to which an account is stated.*

SONNADARA *vs.* WEERASINGHE ... I. 328

Shop Debt—Account stated—Accounts examined and agreed on orally.

Held: *That an oral statement of accounts does not take a case out of* § 9 *and bring it within* § 8 *of Ord: No.* 22 *of* 1871.

DIAS AND CO., *vs.* KACHINONA II. 118

Can the lessee of a land plead prescription against a person obtaining title from the lessor.

Held: (1) *That the Lessee of a Crown land cannot plead prescription against a prior transferee of the Crown.*

(2) *That the lessee was bound by the terms of the lease and was not entitled to obtain compensation from the Crown's title holder.*

JAMES APPU *vs.* KIRI BANDA ... II. 426

Promise "by words only" within the meaning of § 13.

SILVA *vs.* SILVA ... ... III. 4

Implicit promise—Can it be excluded from § 8 on the ground that in the absence of a writing the admission of parol evidence of an account stated would render § 13 nugatory.

SILVA *vs.* SILVA ... ... III. 4

Prescription Ordinance—Account stated—Settlement of accounts without a settlement in writing—No cross dealings—Civil Procedure Code section 192—When is interest payable under Ceylon Law in the absence of a special agreement.

Held: (1) *That where accounts are looked into and an account is struck between creditor and debtor there is an account stated although there are no cross dealings or a settlement in writing.*

(2) *That in Ceylon interest is not recoverable in respect of the period prior to the date of action in the absence of an agreement or of any provision of law.*

ANNAMALAY CHETTY *vs.* THORNHILL III. 56

Proctor and client—Right to fees—Within what time must proctor enforce his right.

KARUNARATNE *vs.* VELAIDEN ... IV. 73

Action on book debt due from deceased debtor—Does the filing of a petition for the appointment of a legal representative in order to take proceedings for the recovery of the debt arrest prescription.

Held: (1) *That the filing of a petition for the appointment of a legal representative before the debt due from deceased debtor becomes prescribed is not sufficient to arrest prescription.*

(2) *That to arrest prescription the action for the recovery of the debt should itself be instituted within time.*

PEIRIS *vs.* THE PUBLIC TRUSTEE IV. 83

Book debt—Money due on account of board and lodging at a hotel.

Held: (1) *That money due to the proprietor of a hotel for board and lodging is a book debt within the meaning of section* 9 *of the Prescription Ordinance.*

(2) *That where an action was first brought by a party not entitled to bring the action and later the proper party was added after the right of action had become prescribed the action was not maintainable.*

(3) *That the authority given by a person to another to make payments on his account ceases directly the principal is adjudicated a lunatic and payment made after such adjudication does not arrest prescription.*

PERERA AND ANOTHER *vs.* TOUSSAINT IV. 99

Part payment of a promissory note by one co-debtor operates as payment to take the

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debt out of the Prescription Ordinance as against the other co-debtor.

SOOSAIPILLAI *vs.* VAITHIYALINGAM AND ANOTHER ... ... IV. 139

Mortgage bond void—Action on promise to pay—Period within which action must be brought.

JOHN APPUHAMY *vs.* WILLIAM APPUHAMY ... ... VII. 56

Mortgage bond executed on January 12, 1924—Promise to pay the mortgagee and after his life-time to his son—Death of mortgagee in September 1930 while his son was yet a minor—Action by son in February, 1934—Is action barred.

Held: *That the action was statute barred.*

TILLAINATHAN AND ANOTHER *vs.* NAGALINGAM ... ... VIII. 8

Claim to incumbency of a Buddhist Temple —Within what time does a claim to an incumbency become statute-barred.

SUMANATISSA *vs.* GOONERATNE VIII. 67

Action on mortgage bond—Action against administrator of deceased mortagagor—Deceased mortgagor subject to Thesawalamai—Widow of mortgagor not a party to the mortgage action—Separate action against widow after ten years from date of bond—Prescription.

SAVERIMUTTU *vs.* ANNAMAH ... VIII. 112

Action against unincorporated association —Action first brought on the footing that the association was a corporate body—Action under § 16 of Civil Procedure Code taken later at the instance of court—Claim within time at date of filing of plaint—Claim prescribed at the time action taken under § 16—Is the action maintainable.

BANIEL SILVA *vs.* LAW COUNTRY PRODUCTS ASSOCIATION ... IX. 13

Possessory action—Prescription Ordinance No. 22 of 1871 section 4—Point not taken in petition of appeal—Can it be raised at the hearing of the appeal—Civil Procedure Code section 758—Scope of expression "predecessor in title" of a person bringing a possessory action.

RAYMOND *vs.* WIJEWARDENA AND OTHERS ... ... X. 1

Claim to incumbency—Becomes prescribed in three years from the date when the cause of action first arose.

PEMARATNA *vs.* INDRASARA ... XI. 116

An executor who is not an express trustee is entitled to claim the benefit of the Prescription Ordinance.

DE SILVA AND OTHERS *vs.* DE SILVA XI. 131

Prescription—Possession for over ten years by lessee of strip of land adjoining land leased in the belief that it formed part of such land—Agreement to purchase the leased premises by lessee—Purchase of leased premises ten years after agreement—Continued possession of strip of land adjoining thereafter—Action claiming title to the strip of land eight years after purchase and ten years after agreement—When should prescription be regarded as commencing.

Held: *That, in the circumstances, the defendant was not entitled to count any period prior to the conveyance, inasmuch as the possession of A was* qua *lessee and not* ut dominus.

DE SILVA *vs.* SUMATHIPALA ... XII, 146

Prescription Ordinance—Section 3.

Held: (1) *That section* 3 *of the Prescription Ordinance cannot be regarded as introducing the Roman Law requirement known as* justus titulus *or* justa causa.

(2) *That a person can acquire title by prescription by virtue of section* 3 *of the Prescription Ordinance even though his possession be wholly without right.*

(3) *That the purpose of the parenthetical clause in section* 3 *of the Prescription Ordinance is to explain the character of the possession which, if held without disturbance or interruption for ten years, will result in prescription.*

(4) *That a man's possession by his agent or co-owner cannot be regarded as dispossession by his agent or co-owner for the purposes of section* 3 *of the Prescription Ordinance.*

CADIJA UMMA AND ANOTHER *vs.* MANIS APPU AND OTHERS ... XIII. 44

An application under the Insolvency Ordinance to sell property transferred by the insolvent is prescribed within three years of the adjudication of insolvency.

CASSIM *vs.* SUPPIAH PILLAI ... XV. 158

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Transfer of land—Subsequent discovery that deed of transfer was pending partition action—Purchaser put in possession—Right of purchaser to bring action for recovery of purchase price—When does cause of action arise.

THAMOTHERAM PILLAI *vs.* KANAPATHI-PILLAI ... ... XVI. 95

Planter's share—

Held: (1) *That a right to a planter's share can be acquired by prescription.*

(2) *That a planter's share is an interest in land within the meaning of section 2 of the Prescription Ordinance.*

ABEYWEERA *vs.* ENSOHAMY AND ANOTHER ... ... XVI. 142

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

Held: (1) *That the plaintiff's cause of action arose on the death of the testator and was not interrupted by the fact of minority of the children of the deceased devisee.*

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

DE SILVA AND OTHERS *vs.* DE SILVA XVII. 39

Servitude—Right of cattle track acquired by prescription—Deviation of track—Does prescriptive right attach to new track.

HENDRICK AND OTHERS *vs.* SARANELIS AND OTHERS ... ... XVII. 87

Prescription among co-owners—Division of inheritance among heirs—Different entities of land assigned to heir for his exclusive use in lieu of undivided shares—Does possessor by virtue of such division acquire a prescriptive title by user to such land.

RAMANATHAN *vs.* SALEEM AND OTHERS ... ... XVIII. 73

Debt due from estate of deceased—Admission of debt by administrator in administration proceedings—Does it amount to acknowledgment—Does a part payment by one of the heirs interrupt prescription as regards the rest.

Held: (1) *That an admission by an administrator of a deceased estate in administration proceedings, that a debt is due to a party from the estate, does not amount to such an acknowledgment as would serve to take the case out of the operation of the Prescription Ordinance.*

(2) *That on the death of a debtor, each of the adiating heirs becomes liable for the debt* pro rata, *and an acknowledgment or payment of the debt by one such heir does not interrupt prescription as regards the rest.*

PERERA *vs.* PERERA AND FIVE OTHERS XX. 35

Prescription Ordinance section 12—Acknowledgment or promise—What is for the purposes of that section.

Held: (1) *That the words in a written statement by the defendant to the plaintiff "I wish to settle your account" constitute an acknowledgment of the defendant's debt to the plaintiff from which a promise to pay the debt can reasonably be inferred.*

(2) *That where there is an acknowledgment of a debt without any words to prevent the possibility of an implication of a promise to pay it, a promise to pay is inferred.*

PERERA *vs.* WICKREMERATNE XXI. 111

Prescription—Institution of action by lessee of a land for possession—Does the institution of the action arrest prescription running in favour of those in adverse possession.

Held: *That the mere institution of an action for possession by the lessee of a land against those in possession for the purpose of obtaining possession thereof does not prevent those who were in possession at the date of the action from acquiring title by prescriptive possession.*

JERAMIAS AND ANOTHER *vs.* PODISAN AND TWO OTHERS ... XXII. 92

Prescription Ordinance (Chapter 55) section 13—Appointment of administrator over estate of deceased creditor after prescription has begun to run—Does it arrest progress of prescription against minor heirs—Does a payment on account create a fresh cause of action.

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Held: (1) *That where prescription has begun to run, its progress cannot be arrested merely by the subsequent incapacity e.g. minority of the person entitled to sue.*

(2) *That a payment on account merely extends the period of prescription and cannot be regarded as creating a new cause of action.*

(3) *That in a case where at the time when the cause of action arose the party entitled to sue is a minor, the existence of an administrator would not affect the right of the minor to take advantage of the provisions of section* 13 *of the Prescription Ordinance except where prescription had already begun to run.*

UDUMANACHY AND OTHERS *vs.* MEERALEVVE ... .. XXIV. 5

Prescription Ordinance (Chapter 55) section 3 proviso—Gift of property subject to life interest in donor's favour—When does prescription begin to run against the donee.

The owner of a certain property gifted it, in 1928 to the plaintiffs' predecessor in title, reserving to himself a life interest. He died in 1932. The defendants claimed prescriptive title to a house on this property and the soil on which it stands on the ground that they built it in 1923 with the permission of the owner and continued to possess up to date.

Held: *That prescription did not begin to run against the donee until the donor's death in* 1932.

PODIMAHATHMAYA AND OTHERS *vs.* HENDRICK APPUHAMY AND OTHERS XXIV. 51

Prescription — Fraudulent alienation—When cause of action arises—Can minority of alienee and his failure to assert rights affect the question of prescription—Can the court examine the true nature of a transaction notwithstanding the form given to it.

Held: (1) *That where a deed of transfer is sought to be set aside on the ground of fraudulent alienation the cause of action arises on the execution of such transfer, if the party impugning such deed was aware of the fraud.*

(2) *That the fact that the party entitled to rights under the fraudulent deed happened to be a minor and did not assert his rights cannot affect the question of time limited for bringing the action.*

(3) *That the court is entitled to examine the true nature of a transaction notwithstanding the form in which the transaction is described.*

RAJAH *vs.* NADARAJAH AND ANOTHER ... ... XXV. 97

Prescription Ordinance—Section 7—Acknowledgment in writing of money borrowed on interest—Absence of promise to pay sum borrowed—Can an undertaking to pay be implied—Is the action prescribed in three years.

Held: *That the document contained an acknowledgment of the borrowing of Rs.* 275/- *and from that acknowledgment an implied promise to pay that sum can be inferred as a matter of law. The action was, therefore, prescribed in six years.*

NADAR *vs.* FONSEKA ... XXVI. 88

No prescriptive title to a land belonging to a pangu **can be acquired so long as some part of the dues has been recovered by the overlord in respect of a land belonging to that** pangu **within the last ten years.**

GUNARATANA THERO *vs.* JAYARATNE ... ... XXVI. 97

Prescription Ordinance § 3—Possession once interrupted cannot be regarded as uninterrupted unless regained in fact in a few days.

PERERA *vs.* WILLIAM ATTALE XXVII. 45

Partition—Land owned in common possessed by two of the co-owners—Lease of entirety of land by two of the co-owners—Can purchaser of rights of the co-owners who were in actual possession claim a right to exclude the co-owner who was not in actual possession without adverse possession by him for ten years after his purchase—Absence of proof of knowledge that the co-owner who was not actually in possession knew that the other co-owners were dealing with the land as if they owned the entirety.

Held: (1) *That a person who purchases the shares of some only of the co-owners of a land cannot succeed in a claim to its entirety merely on the ground that his transferors have been in actual possession of the entire land and have given leases of the entirety.*

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(2) *That co-owners of a property, who seek to establish prescriptive title by leading evidence that they dealt with the entirety for over thirty years cannot succeed without proving further that the co-owners who were not in possession had knowledge of such dealings.*

FERNANDO *vs.* FERNANDO AND OTHERS ... ... XXVII. 71

Title by prescription—Possession through agent—Acknowledgement in writing of opponents' title by agent—Absence of authority to grant such acknowledgement--Does it affect acquisition of prescriptive title by principal.

HASSAIN *vs.* OPALAGALLA TEA AND RUBBER ESTATES LTD. ... XXVII. 77

Prescription—Action filed within period of limitation—Summons served after the period—Is action barred.

RATNAYAKE *vs.* GUNATILEKE *alias* JAMES SINGHO ... ... XXX. 17

Prescription—When does long, continued and undisturbed possession constitute ouster among co-owners.

SIYADORIS AND OTHERS *vs.* SIMON AND ANOTHER ... ... XXX. 50

Prescription Ordinance—§ 15—The term "divorce" applies to cases where a decree for nullity of marriage is prayed for.

NAVARATNAM *vs.* NAVARATNAM XXX. 90

Prescription Ordinance § 10—Application of to actions under Article 11 of the Ceylon (State Council Elections) Order in Council.

DE ZOYSA *vs.* WIJESINGHE ... XXXI. 5

Co-owner of Panguwa—Exclusive possession of lot in lieu of shares without interference by others for over twenty years—Is such possession sufficient to confer prescriptive title to such lot.

Where, in lieu of his interests, a co-owner of a "panguwa", possessed a separate portion of land out of the panguwa, exclusively for a period of over twenty years without any interference by the other co-owners, who similarly possessed other lots of the "panguwa."

Held: *That such co-owner acquired a prescriptive title to such lot possessed exclusively by him.*

BANDARA *vs.* SINAPPU AND OTHERS ... ... XXXII. 54

Prescription—When can vendee avail himself of vendor's prescriptive possession.

COSTA AND ANOTHER *vs.* REITH XXXIII. 17

Prescription—Can road reservation be acquired by prescription.

WIJESINGHE *vs.* ATTORNEY-GENERAL ... ... XXXIII. 26

Prescription against the Crown—Proof of possession for over 30 years—Burden of proof—Land Surveys Ordinance (Cap. 316) section 6—Crown Lands Encroachment Ordinance (Cap. 321) section 7—Evidence Ordinance section 114.

The defendants and their predecessors in title possessed and cultivated for over 30 years paddy fields, which according to plans from the Surveyor-General's Office, were parts of an abandoned tank. There was no evidence of the date the tank was abandoned or whether it was a public tank.

Held: (1) *That the provisions of the Encroachments upon Crown Lands Ordinance (Cap.* 321) *are not operative before* 1840.

(2) *That the defendants have acquired title against the Crown by proof of over* 30 *years possession.*

(3) *That in the absence of evidence that the tank was a public one and that the tank existed after* 1840, *section* 7 *of the Encroachments upon Crown Lands Ordinance is inapplicable.*

THE ATTORNEY-GENERAL *vs.* KIRIMUDIYANSE AND ANOTHER ... XXXV. 43

Repairs effected and materials supplied to motor car—Claim due on—Does such claim fall within section 8 of the Ordinance.

Held: *That money due for repairs effected and materials supplied to a motor car becomes prescribed in one year under section* 8 *of the Prescription Ordinance.*

AMARASINGHE *vs.* DE ALWIS XXXV. 70

Plaintiff claiming title through defendants' vendee—Defendant remaining in possession

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after sale for over ten years—Plea that conveyance to plaintiffs' predecessor was in fact a mortgage—Evidence of repayment of substantial part of mortgage debt by defendant—Does this amount to an acknowledgement of vendee's rights within the meaning of section 3 of the Prescription Ordinance.

DON SIMON *alias* SINGHO APPU *vs.* FERNANDO ... ... XXXVIII. 37

Agreement to partition land within three years—Failure to partition as agreed upon —Transfer of land to third party—Action for liquidated damages—When does cause of action arise.

DON VELUN APPUHAMY *vs.* WILLIAM FERNANDO ... ... XXXVIII. 62

When may trustee plead prescription

LAKSHMAN CHETTIAR *vs.* MUTTHIAH CHETTIAR ... ... XL. 65

Intervenient in partition action claiming by reason of prescriptive right—Period of prescription.

NERIS PERERA AND ANOTHER *vs.* DON HENDRICK AND OTHERS ... XL. 112

Acquisition of prescriptive title—Can adverse possession by intestate and his heirs be added together in computing the ten years.

Held: *That the possession of an intestate and of her heirs can be added together for the purpose of computing the period of ten years' adverse possession.*

CAROLISAPPU *vs.* ANAGIHAMY *et al* XLII. 105

Action for balance purchase money—Absence of any agreement or undertaking in the transfer deed to pay balance—Is the claim prescribed in 3 years or 6 years.

Where in a deed of transfer there is a declaration in the body of the deed that the vendor has received the consideration and a further statement to the effect that the vendor does admit and acknowledge the receipt of the consideration and contains no statement in the attestation from which any promise or undertaking on the part of the vendor can be gathered.

Held: *That any claim for the balance purchase money is prescribed in three years.*

PERERA *vs.* JOHN APPUHAMY ... XLIII. 58

Rei vindicatio **action — Defendant in possession—Claim on prescriptive title—Possession as agent—Time does not begin to run until agent has made it manifest that he is holding adversely to his principal.**

KUDA MADANAGE SIYANERIS *vs.* JAYASINGHE ARACHCHIGE UDENIS DE SILVA ... ... XLIV. 66

Prescription—Nilakarayas failing to pay commuted dues or to render services—Action for damages by Nindagama proprietor —Is such action barred in one year—Service Tenures Ordinance, sections 24 and 25.

The plaintiff, as Basnayake Nilame of the Pattini Dewale, sued the defendants who are paraveni nilakarayas, for damages for non-performance of services due in respect of the period commencing from the first day of the Perahera in 1947 (15th August), to the day prior to the first day of the Perahera in 1948 (5th August).

The action was filed on 25-8-49.

The defendants contended that the action was prescribed in terms of section 24 of the Service Tenures Ordinance which provides that "arrears of personal services in cases where the paraveni nilakaraya shall not have commuted shall not be recoverable for any period beyond a year: arrears of commuted dues, where the paraveni nilakarayas shall have commuted, shall not be recoverable for any period beyond two years."

It was argued for the plaintiff, that the Ordinance, Cap. 323, contemplates three possible claims by the overlord against the nilakaraya, *viz.*, (1) arrears of personal services, where services have have not been commuted under sections 14 and 15 of the Ordinance (2) commuted dues where the services have been commuted (3) damages for nonperformance of the services which have not been commuted, under section 25 of the Ordinance and that plaintiff's claim being one under (3) was not prescribed in one year as contended for by the defendants.

Held: *That the right to recover damages under section 25 of the Ordinance (Cap. 323) is not prescribed in one year as section 24 has no application to such a right.*

PANANWALA (BASNAYAKE NILAME) *vs.* GABRIEL APPUHAMY AND OTHERS ... ... XLVI. 14

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Prescription Ordinance, Sections 3 and 13 —Owner of immovable property in Ceylon dying leaving intestate heirs in India— All heirs except one absent beyond seas since death of deceased—Appointment of administrator after thirteen years—Third party and successors in title possessing for over ten years—Action rei vindicatio **by administrator—Defence of prescriptive title—No proper proof of visit of any heir to Ceylon— Can defence succeed—Burden of proving starting point for prescriptive possession.**

Civil Procedure Code, section 472 Meaning of "vested in.....an administrator."

Held: (1) *That where a person died leaving immovable property in Ceylon and all his intestate heirs were absent beyond the sea (within the meaning of section* 13 *of the Prescription Ordinance) during the period material to the issue of prescriptive title, a third party and his successors in title, possessing such property for over ten years prior to the appointment of an administrator by Court, cannot acquire prescriptive title there to as against the heirs.*

(2) *That in an action by an administrator as provided by section* 472 *of the Civil Procedure Code for the recovery of immovable property belonging to the estate of the deceased, the disability contemplated by section* 13 *of the Prescription Ordinance is the disability of the true claimant and not that of the person who represents him in the proceedings.*

(3) *That where a party invokes the provisions of section* 3 *of the Prescription Ordinance in order to defeat the claims of an adverse claimant to immovable property, the burden of proof rests on him to establish a starting point for his or her acquisition of prescriptive rights.*

(4) *That where that onus has* prima facie *been discharged, the burden shifts to the opposite party to establish that, by reason of some disability recognised by section* 13, *prescription did not in fact run from the date on which the adverse possession first commenced. Once that has been established the onus shifts once again to the other side to show that the disability had ceased on some subsequent date and that the adverse possession relied on had uninterruptedly continued thereafter for a period of ten years.*

S. K. CHELLIAH *vs.* M. WIJENATHAN *et al* ... ... XLVI. 27

Right to have a gift revoked on the ground of the subsequent birth of a child comes within the ambit of section 10 of the Ordinance and becomes prescribed within three years from the time when the cause of action has accrued.

APPUHAMY *vs.* MARY NONA AND ANOTHER ... ... XLVII. 46

Plaintiff, officiating priest of Hindu Temple —Plaintiff's claim for declaration to office on prescriptive right and hereditary right— Roman Dutch Law—What rights can be acquired by prescription.

Plaintiff claimed that he was entitled to be declared the hereditary officiating priest of Nagapooshani Amman Temple on the ground (1) that he had acquired prescriptive title by reason of undisturbed and uninterrupted possession of a 2/9 share of the priestly office for over ten years, and (2) that he had a hereditary right.

Held: (1) *That under our law acquisition by prescription is confined to rights in immovable property and there is no acquisitive prescription either to movables or choses in action or even to a right to an office.*

(2) *That the history and practice of the temple establish that the right to officiate as priests in the temple was hereditary and the plaintiff was therefore entitled to officiate as priest and receive "the traditional perquisites" of the office.*

MUTTUKUMARU KASIPILLAI *et al vs.* SAMINATHA KURUKKAL ... XLVII. 61

Prescription—Acquisition of rights by— Administrator and heir in possession for over ten years of property of deceased qua **administrator—Refusal to acknowledge rights of some co-heirs—Administrator's failure to divest himself of his representative character—Can he acquire prescriptive rights to such interests—Administrator's right to acquire prescriptive right as against some co-heirs—Fiduciary character of Administrator's office—Is he an express trustee?—Section III of the Trusts Ordinance.**

D. B. a married Muslim lady died intestate in 1926 leaving her husband (the 1st defendant) and two infant children (2nd and 3rd defendants). It is not contested that according to Muslim law the deceased's parents also became her intestate heirs in addition to her husband and children. D. B.'s father himself died intestate shortly

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afterwards leaving his widow (4th defendant) and his three sons (the plaintiff and the 5th and 6th defendants) who succeeded to his interests in D. B.'s estate, which was duly admitted to administration and letters of administration were issued to her husband the 1st defendant, and the property, the subject matter of the action was correctly inventorised and the 1st defendant entered into possession thereof as administrator.

The plaintiff instituted this action to partition the property and 1st defendant disputed the rights of the plaintiff and the 4th, 5th and 6th, defendants. The learned District Judge after hearing evidence dismissed the plaintiff's action on the ground that he and 4th, 5th and 6th defendants had lost their rights by virtue of the provisions of section 3 of the Prescription Ordinance. The District Judge also held that the 1st defendant as administrator and as an heir of D. B.'s estate had consistently and unequivocally refused to acknowledge her parent's claims to heirship and had since about the year 1930 possessed the property on behalf of himself and his minor children on the footing that the property belonged exclusively to them.

The plaintiff appealed—

Held: (1) *That in the absence of evidence to establish that the 1st defendant had divested himself of the representative character in which he first entered upon the land in such a manner as the law would consider sufficient to relieve him of the fiduciary obligations attaching to his office, he cannot be held to have converted his possession* qua *administrator into possession* ut dominus *to enable him to acquire a prescriptive right against the other co-heirs to whom he stood in a position of fiduciary relationship.*

(2) *That the duration of the status of an administrator in relation to property which he has taken over in the exercise of his powers of administration and which he still retains in his hands is indicated in the provisions of sections* 540 *of the Civil Procedure Code. His office endures until the death of the administrator or the completion of the administration whichever first occurs.*

(3) *That whenever an administrator enters in that capacity upon property belonging to a deceased's estate, the law requires him to act in a fiduciary relation in regard to it, and a Court of Equity imposes upon him all the liabilities of an express trustee and will call him an express trustee of an express trust and section* III *of the Trusts Ordinance becomes applicable.*

(4) *An administrator in possession of property belonging to the estate owes an equal duty by virtue of his office to all the intestate heirs without discrimination and so long as that fiduciary relationship subsists, the law will not permit him to say that he held the property for the benefit of only those to whom he was bound by special ties of kinship or affection.*

BAHAR *vs.* BURAH AND TWENTY-FIVE OTHERS ... ... XLVII. 75

Prescription—Sale of land subject to usufructuary mortgage—Subsequent sale to another—Prior registration of later deed—Possession by vendee on earlier deed after discharging of mortgage—Possession of usufructuary mortgagee—To whom does it ensure.

ALITAMBY *vs.* BANDA ... XLVII. 97

Informal agreement to sell land for fixed amount—Money advanced in instalments by buyer as part of purchase price—Refusal of seller to convey land on buyer's tender of balance purchase price—Claim to recover amounts paid—When cause of action arises.

A claim for the recovery of sums of money advanced from time to time as part of the purchase price of land agreed to be sold under an informal agreement is a deposit and not a loan, and the cause of action would be the refusal to return the deposit and prescription would run from that time.

KALAHE CHANDRATANA THERO *vs.* SANGHADASA GUNASEKERA AND ANOTHER ... ... XLIX. 28

Claim to incumbency of Buddhist temple.

KIRIKITTA SARANANKARA *vs.* MEDEGAMA DHAMMANANDA AND OTHERS L. 43

Contracts for sale of goods—Amounts due on some of the contracts statute-barred—Part payment—When such payment revives statute-barred debts—Prescription Ordinance, sections 8, 12.

Where there are several debts due on goods sold and delivered, and some of the debts are statute-barred, a debtor who pays sums of money as part payment of the debts is not deprived of the defence of prescription, unless there is evidence to show

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that the debtor intended the payments to be appropriated on account of all the debts collectively or that there was an "account stated" between the parties. Even if the creditor appropriates such payments to any debts selected by him, such appropriation does not by itself operate as a part-payment so as to take the balance of the prescribed debts out of the statute.

BASTIAN SILVA *vs.* WILLIAM SILVA L. 110

PREVENTION OF CRIMES ORDINANCE

Preventive Detention—Facts that may be proved to establish the charge of persistently leading a dishonest or criminal life.

Held: (1) *That in order to establish a charge of "persistently leading a dishonest or criminal life" there must be evidence to show either that the person charged is getting his living by dishonest or criminal means or that he is an habitual associate of criminals.*

(2) *That evidence as to the character and repute of the accused is admissible upon an indictment for being a habitual criminal, and the accused may tender similar evidence.*

ATTORNEY-GENERAL *vs.* ABDUL RAHIMAN ... ... I. 368

Prevention of Crimes Ordinance No. 2 of 1926.

Charge under sections 373 and 490 of the Penal Code—Trial by Police Magistrate, who is also District Judge, under section 152 (3) of the Criminal Procedure Code—Registered criminal—Sentence of two years' rigorous imprisonment and two years police supervision—Should judge, on finding that an accused is a registered criminal within the meaning of the expression in Ordinance No. 2 of 1926, discontinue summary proceedings and commence non-summary proceedings.

Held: (1) *That section 6 of the Prevention of Crimes Ordinance No. 2 of 1926 applies only where a person is accused of a crime triable summarily.*

(2) *That a Police Magistrate, who is also a District Judge, when trying an accused under section 152 (3) of the Criminal Procedure Code in respect of a charge not triable summarily by a Police Magistrate, need not, on it being brought to his notice that the accused is a registered criminal, discontinue the trial and commence non-summary proceedings.*

GUNATILLEKE (SUB INSPECTOR OF POLICE) *vs.* NEPOSINGHO AND ANOTHER IX. 52

Prevention of Crimes Ordinance No. 2 of 1926—Rules made under section 4 (1)—Meaning of the word 'move' in Rule No. 38.

Held: *That the word 'move' in rule No. 38 of the rules made on January 8th, 1929 under section 4 (i) of the Prevention of Crimes Ordinance of 1926, means change of one's position whether for a permanent or an indefinite period and does not mean change of one's residence.*

SIVASAMPU *vs.* CAROLIS APPU ... XIII. 114

Charge under section 394 of the Penal Code—Conviction of accused—Sentence of two years' rigorous imprisonment and two years' police supervision passed by magistrate—Validity of sentence—Prevention of Crimes Ordinance sections 5 and 6.

Held: (1) *That it is a condition precedent to the imposition of the enhanced punishment provided by section 6 of the Prevention of Crimes Ordinance that the Magistrate should pass a sentence other than imprisonment in respect of the offence charged.*

(2) *That the punitive powers given by sections 5 and 6 of the Prevention of Crimes Ordinance can be combined.*

PIKAI *alias* PERIYAM *vs.* SIRISENA (P. S. 1744) ... ... XXXI. 32

Prevention of Crimes Ordinance (Chap. 18) Sections 5, 6 and 7—Conviction of accused—Five previous convictions—Sentence of two years' rigorous imprisonment and two years' Police supervision—Is the sentence regular.

Held: (1) *That section 6 of the Prevention of Crimes Ordinance makes it a condition precedent to the imposition of the enhanced punishment provided for by that section that the Magistrate should pass a sentence other than imprisonment in respect of the offence charged.*

(2) *That there is nothing to prevent a Magistrate from combining the punitive powers given to him by sections 5 and 6 of the said Ordinance.*

P. S. 1744 SIRISENA *vs.* PILIAI *alias* PERIYAM ... ... XXXIII. 7

Prevention of Crimes Ordinance Section 6—Punishment cannot be imposed

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in respect of each charge of which accused is convicted.

GUNASEKERA *vs.* PERERA XXXVIII. 94

Section 152 (3) of Criminal Procedure Code—Magistrate assuming jurisdiction under—Sentence of two years rigorous imprisonment and further term of two years rigorous imprisonment under section 6 of Prevention of Crimes Ordinance—Legality of additional sentence.

MOHAMED CASSIM *vs.* HEADQUARTERS INSPECTOR POLICE BADULLA XLVI. 15

Prevention of Crimes Ordinance (Cap. 18) section 6—Accused—With previous convictions—Sentence—Principles governing.

Section 6 of the Prevention of Crimes Ordinance does not make it a condition precedent to the imposition of the enhanced punishment provided for by that section, that the Magistrate should pass a sentence other than imprisonment in respect of the offence charged.

Per PULLE, J.—(*a*) "I am unable to read section 6 as a mandate provision requiring Magistrates to impose the maximum term of two years on a registered criminal or to impose a fine as a condition precedent to punishing him with imprisonment for two years or a lesser term. Cases can be visualized in which a registered criminal may be adequately punished without invoking the special punitive powers conferred by section 6."

(*b*) "The antecedents of an offender are undoubtedly relevant in assessing the sentence, but however numerous the previous convictions may be, regard must first be had to the intrinsic nature of the offence."

AMARASEKERA (SUB INSPECTOR OF POLICE, KOTAHENA) *vs.* CADER ... XLVI. 86

PREVENTION OF FRAUDS ORDINANCE

Where the respondent tendered for and obtained the lease of a land and the appellant paid a half-share of the annual rent and obtained by a non-notarial agreement a half share of the rights secured by the respondent from Government.

Held: *That in an action for the half share of the rights, the respondent was not entitled to say that the action was not maintainable on the ground that the assignment did not conform with the requirement of Ord: 7 of* 1840 *in as much as the case was one that directly fell under* § 84 *of the Trusts Ordinance No.* 9 *of* 1917.

WIJETILAKA *vs.* RANASINGHE ... I. 5

Agreement to cut and remove trees—Enforceable thought it is not notarially executed.

BALAPPU *vs.* SILAWATHIE *et al* II. 111

Action based on partnership—No written partnership agreement—On whom lies the burden of proof that the capital of the partnership is over Rs. 1000/-

Held: *That where an action is based on an unwritten partnership agreement and the point is taken that the action cannot be maintained, it is for the defence to prove that the partnership capital is over Rs.* 1000/-

DE SILVA *vs.* DE SILVA ... IV. 43

Agreement to make a gift of land by way of dowry—Lands not specified by reference to a corpus—Agreement not notarially attested—Is such agreement enforceable.

Held: (1) *That an agreement made upon consideration of marriage to settle upon the plaintiffs landed property is not 'a bargain, promise or agreement for 'effecting'" a sale, purchase, transfer, assignment or mortgage of land or other immovable property within the meaning of section* 2 *of Ordinance No.* 7 *of* 1840.

(2) *That a promise given in writing by the defendant undertaking to give "Cash Rs.* 1,000/- *and house and paddy field and estate worth Rs.* 20,000/- *at Nawalapitiya and Rambukpitiya" in consideration of the marriage of plaintiff with his daughter was enforceable, although it was not notarially attested.*

THAMBY LEBBE AND ANOTHER *vs.* JAMALDEEN ... ... VIII. 99

Agreement of lease of paddy field—Land situated in Eastern Province—Agreement not notarially attested—Is such agreement enforceable.

SUBRAMANIAM *vs.* VISWANATHAN VIII. 137

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Authority to agent to execute instrument required by law to be notarially executed—Need such authority be in writing notarially attested.

PALANIAPPA CHETTY *vs.* RAMANATHAN CHETTY ... ... X. 151

The presumption created by § 109 of the Evidence Ordinance operates only when the existence of a partnership has been duly proved, i.e. when it has been proved according to law.

RAJARATNAM *vs.* COMMISSIONER OF STAMPS ... ... XI. 15

A non-notarial writing which merely reduces the rent due on a lease is not a document referred to in § 2 of Ord: No. 7 of 1840.

KUMARAHAMY AND ANOTHER *vs.* GNANAPANDITHAN ... ... XIV. 30

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

Held: (1) *That an agreement to transfer certain lands when embodied in the terms of settlement in an action when filed of record and accepted by the court is binding on the parties to the settlement though the agreement is neither embodied in a formal decree nor executed in the presence of a notary and two witnesses as required by section 2 of the Prevention of Frauds Ordinance.*

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

FERNANDO *vs.* COOMARASWAMY XVII. 1

Section 3 (1)—An agreement to give paddy in lieu of interest in consideration for transfer of land whose possession could not be given owing to the existence of a prior lease need not be notarially executed.

MOHAMMED CASSIM *vs.* S. NATCHIA XXV. 49

A novation need not be in writing.

RODRIGO AND ANOTHER *vs.* EBRAHIM ... ... XXVI. 62

Section 2—Contract of sale of land—Transfer deed—Agreement to repurchase within eight years—Absence of vendee's signature on the deed—Is the vendee bound to retransfer—Constructive trust.

The 1st plaintiff transferred a land to the defendants by a notarially executed deed reserving to himself "the right to pay to the vendees or their heirs within eight years.....the sum of.....to redeem this transfer." Under this deed the defendants entered into possession of the said land. The defendants did not sign the deed.

The 2nd plaintiff, to whom the 1st plaintiff's right to repurchase has been transferred, claimed the retransfer on tendering the sum agreed upon in the deed. The defendants refused on the ground that they were not bound by the agreement to retransfer inasmuch as they did not sign the said deed.

Held: *That an obligation in the nature of a trust had been established by the facts proved and that the defendants cannot evade such an obligation by pleading section 2 of the Prevention of Frauds Ordinance.*

NANDUWA AND ANOTHER *vs.* JUNGA AND TWO OTHERS ... ... XXVII. 1

Prevention of Frauds Ordinance § 18 (c)—Evidentiary value of certificate of registration of a business name issued under the Registration of Business Names Ordinance.

MOHAMED HASSEN *vs.* MOHAMED YOOSOOF ... ... XXVII. 29

Section 11 of the Prevention of Frauds Ordinance has not repealed by implication the Roman-Dutch law rule that the person who writes out a will for the testator cannot insert therein any benefit for himself, and should he do so, cannot take such benefit unless the testator either adds a clause in his own handwriting to the effect that he dictated the will and acknowledges its correctness, or in some other manner clearly confirms the disposition.

THAMBU *vs.* ARULAMPIKAI AND ANOTHER ... ... XXVIII 40

Trust—Transfer of property by debtor to creditor on the agreement that the latter is to retransfer the property after the debts

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have been liquidated out of the income there from--Can parole evidence of agreement be led.

VALLIAMMAI ATCHI *vs.* ABDUL MAJEED ... ... XXVIII. 81

Transfer of land by notarial deed—Contemporaneous non-notarial agreement by vendee to retransfer land to vendor—Enforceability of non-notarial document.

SAIYA NONA *vs.* KARTHELIS APPUHAMY ... ... XXX. 72

Grant of equitable relief to prevent fraud.

FERNANDO *vs.* THAMEL AND ANOTHER ... ... XXXII. 66

Prevention of Frauds Ordinance—§ 2—Does it apply to trusts.

VALLIYAMMAI ATCHI *vs.* ABDUL MAJEED ... ... XXXV. 1

Agreement to transfer immovable property in consideration of marriage—Must be notarially attested.

NOORUL HATCHIKA *vs.* NOON HAMEEN *et al* ... ... XLI. 65

Will—Revocation—Must be by adopting one or other of the modes of revocation set out in § 6 of the Prevention of Frauds Ordinance.

VELMURUGU *vs.* ARUMUGAM ... XLII. 23

Construction of §§ 2 and 17—Validity of oral agreement.

WIJESURIYA *vs.* THE ATTORNEY-GENERAL ... ... XLII. 77

Partnership—Capital alleged to be over one thousand rupees—No agreement in writing—Onus of proof.

ARALIS *vs.* FRANCIS ... ... XLII. 95

Scope of §§ 2 and 3.

W. UKKU BANDA *vs.* M. TIKIRI BANDA ... ... XLIV. 9

Informal agreement to reconvey land—Is obnoxious to the provisions of section 2.

THANGAVELAUTHAM *vs.* SAVERIMUTTU *et al* ... ... XLV. 41

Notarial agreement to purchase land—Provision that agreement be void after expiration of three months—Can the period be extended by oral agreement—Earnest money—Default in completing transaction—Liability to refund.

Where a notarially attested agreement to purchase land, provided that the agreement should be null and void at the expiration of three months from the date of its execution.

Held: (1) *That after the expiry of the said period such an agreement could in law be revived only by another writing attested by a notary as required by section 2 of the Prevention of Frauds Ordinance.*

(2) *That the earnest money paid under such an agreement must be refunded if the transaction could not be completed owing to the default of the party who received it.*

SUPPIAH AND ANOTHER *vs.* SITUNAYAKE ... ... XLIII. 28

Agreement or compromise—Affecting immovable property—Must it be embodied in a formal order of Court?—Formalities necessary—Prevention of Frauds Ordinance, section 2—Civil Procedure Code, sections 408, 741.

In the course of testamentary proceedings, the applicant for probate of a last Will and testament, and the respondent to these proceedings, having settled their differences, filed in Court the terms of their compromise whereby the applicant (i.e., the defendant-appellant) undertook "to convey the immovable properties described in the schedule to the plaint to the respondent in that proceeding or to his son, the plaintiff-respondent, subject to a life interest, and the then respondent, the present plaintiff-respondent's father, in return consented to the *order nisi* in the testamentary proceedings being made absolute."

In an action filed by the plaintiff-respondent on the refusal of the defendant-appellant to implement the compromise and agreement, on the ground that it had no force or effect in law.

Held: *That though the agreement was not embodied in a formal order of Court, it was binding on the parties thereto as no particular form was necessary under section 408 of the Civil Procedure Code, and the absence of notarial execution did not affect*

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the validity of the agreement or compromise entered into.

VALLIPERAM *vs.* KANADIPILLAI XLVI. 92

Last Will—Testator signing at end of first sheet—Four out of five witnesses signing at top of second sheet—Validity.

MAUD BEATRICE DAVID *vs.* GRACE ROBERTS ... ... XLVIII. 4

Syndicate formed to purchase business and to promote a private limited liability company—Agreement not in writing—Purchase of business—Business carried on by first defendant, a member of the syndicate—Action against defendant for an account of the business—Defendants plea of non-enforceability of agreement under section 18 (c) of Prevention of Frauds Ordinance.

GODAMUNE AND OTHERS *vs.* CHARLES APPUHAMY AND OTHERS ... L. 12

PRICE CONTROL

See under **CONTROL OF PRICES ORDINANCE.**

PRINCIPAL AND AGENT

Liability of agents for money obtained by false representation.

Held: *That an agent is liable personally to pay back money obtained by false representation even though he has paid it to the principal.*

KATHIRANA HAMY *vs.* WIJESINGHE II. 205

Broker engaged to raise a loan on the mortgage of premises—Loan arranged—Failure of transaction owing to defect in title—Is broker entitled to commission.

A person was engaged to arrange a loan on the mortgage of certain premises for an agreed remuneration of 2 1/2% of the amount of loan. The loan was arranged but the mortgage was not accepted owing to a defect in the title of the premises to be mortgaged which the mortgagor refused to perfect though it was in his power to do so.

Held: *That although the loan was not actually given the agent was entitled to his commission.*

PEIRIS *vs.* JAYASINGHE ... IV. 75

Storekeeper and customer—Payment to salesman for goods purchased—Money misappropriated by salesman—In what circumstances would the payment operate as a discharge of the customer's obligation.

Held: *That in the circumstances of this case, the payment to the salesman would operate as a discharge of the customer's liability to the firm on the goods purchased.*

K. T. E. DE SILVA *vs.* H. DON CAROLIS AND SONS LTD. ... ... VII. 116

Need authority to Agent to execute instrument required by law to be notarially executed be in writing notarially attested—Agent acting for both parties to a contract—When is such a contract voidable—Business Names Registration Ordinance No. 6 of 1918—Should a party be allowed to lead evidence of non-compliance with the provisions of the Business Names Registration Ordinance at the end of the case.

Held: (1) *That it is not necessary that the authority to an agent to execute an instrument requiring notorial attestation should be by a writing notarially attested.*

(2) *That the ratification by the principal of the execution by the agent of an instrument requiring notorial attestation need not be by a notarial instrument.*

(3) *That there is no objection to the same agent acting for both parties to a contract, unless the fact that he was agent for one party was kept away from other party to the contract, in which event the contract might be avoided at the instance of the later party.*

(4) *That a party should not be allowed to lead evidence of non-compliance with the provisions of the Business Names Registration Ordinance at—*

(*a*) *the closing stages of a case, or*

(*b*) *in appeal.*

PALANIAPPA CHETTY *vs.* RAMANATHAN CHETTIAR ... ... X. 151

Sale of land effected by principal after vendor and vendee had been brought together by agent—Broker and land agent—Is a broker residing in an area to which Ordinance No. 15 of 1889 does not apply bound to take out a licence—At what point of time does a broker become entitled to his commission.

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Held: (1) *That the plaintiff was entitled to recover his commission as he was responsible for bringing Marikar into relations with the defendant company and doing the most effective part of the work.*

(2) *That a broker residing within an area to which Ordinance No.* 15 *of* 1889. *does not apply need not take out a broker's licence.*

(3) *That a land agent requires no licence under Ordinance No.* 15 *of* 1889.

GUNATILAKE *vs.* LIPTON, LTD. XI. 27

Purchase and sale of rubber coupons by broker—Rights and liabilities of broker acting for undisclosed principal—When may local usage be regarded as affecting the general law.

Held: (1) *That where by reason of a custom the brokers are liable to be sued by the sellers, they are not relieved of their liability because it is inconsistent with their position as mere agents under the general law.*

(2) *That a right of action which lies according to local usage will not be lost because it is inconsistent with the plaintiff's position under the general law.*

(3) *That the right of indemnity covers not merely the losses actually sustained by the agent but also the full amount of the liabilities incurred by him even though they may in fact never be enforced.*

MARIKAR *vs.* DE MEL LTD. ... XXIV. 103

In the absence of an express stipulation in that behalf a broker who is authorized to find a purchaser for any property is not entitled to remuneration unless the transaction is completed by the vendor.

BOTEJU *vs.* PERERA ... XXV. 47

An admission made by an agent of a landowner regarding the latter's title does not bind him in the absence of evidence that the agent had special or general authority to make such admission.

HASSAIN *vs.* THE OPALAGALLA TEA AND RUBBER ESTATES LTD. ... XXVII. 77

Promise by purchaser of property to pay commission to agent—Receipt of secret commission from seller—Is agent entitled to payment from purchaser.

Held: (1) *That an agent employed to purchase property, who received a secret profit from the seller, is not entitled to insist on fulfilling any promise by the purchaser to pay commission to him.*

SAUNDRANAYAGAM *vs.* SUPPRAMANIAM CHETTIAR ... ... XXXIV. 87

Contract—Brokerage—Sale and purchase of rubber coupons through intermediary of brokers-Real capacity in which brokers acted.

PEIRIS *vs.* AUSTIN DE MEL LTD. XXXVII. 26

Person going into possession of land as agent for another—Time does not begin to run until he has made it manifest that he is holding adversely to his principal.

SIYANERIS *vs.* UDANIS DE SILVA XLIV. 66

Government official contracting with plaintiff's agent in Ceylon to indent goods from foreign country on commission—Order executed and goods accepted though not consigned to the official as agreed—Action by plaintiff as undisclosed principal against Crown for balance due—Privity of contract—Plaintiff's right to sue—Mixed question of fact and law—Can it be raised for first time in appeal.

The Government of Ceylon through the Commissioner of Co-operative Development placed an order with a local firm of indenting agents for certain goods to be imported from a foreign country. It was agreed *inter alia* (*a*) that the shipment be consigned to the Commissioner, (*b*) that commission as usual at 4 per cent. was payable to the indenting firm by the Commissioner. The order was executed and the goods were accepted by the Commissioner though the shipment was not consigned to the Commissioner as agreed. The Commissioner was aware and it was clear from the terms of the contract that the goods were indented from certain undisclosed principal. Plaintiff as undisclosed principal sued the Attorney-General for a balance sum due on the contract.

Held: (1) *That the plaintiff is entitled to maintain this action for the recovery of his claim.*

(2) *That an undisclosed principal can sue upon a contract made by an agent on his behalf.*

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(3) *That a mixed question of law and fact could not be raised in appeal for the first time.*

JAFFERJEE *vs.* THE ATTORNEY-GENERAL ... ... XLVII. 17

PRIVY COUNCIL

See also under **Appeals (Privy Council) Ordinance.**

Appeal to—From order of an election judge—Does not lie.

WIJESEKERA *vs.* COREA ... I. 159

Appeal to—From decree of Supreme Court—Inherent power of Supreme Court to control action taken on decree while appeal is pending.

MOHAMED *vs.* ANNAMALY CHETTIAR *et al* ... ... II. 195

Does an appeal from a decision of the Supreme Court under section 74 of the Income Tax Ordinance No. 2 of 1932 lie as of right.

Held: *That an appeal as of right does not lie to the Privy Council from a decision of the Supreme Court under section 74 of the Income Tax Ordinance No. 2 of 1932.*

R. M. A. R. A. R. R. M. *vs.* THE COMMISSIONER OF INCOME TAX ... V. 2

When will Privy Council interfere where injustice is alleged on the ground that the jurors in a case tried by jury were open to objection.

ALEXANDER KENNEDY *vs.* THE KING ... ... VII. 107

Appeal to Privy Council from decision of Supreme Court—Meaning of expression "final judgment"—Computation of time within which application for leave to appeal should be made.

PALANIAPPA CHETTIAR AND TWO OTHERS *vs.* MERCANTILE BANK OF INDIA AND OTHERS ... ... XXIII. 13

Privy Council—Costs in—Where Crown should be ordered to pay.

P. D. SHAMDASANI *vs.* EMPEROR XXX. 97

Appeal to Privy Council on questions of valuation and allocation of allotments under Partition Ordinance—Not proper subjects for appeal.

NARAYAN CHETTIAR AND OTHERS *vs.* KALIAPPA CHETTIAR AND OTHERS ... ... XXXI. 109

Binding effect on Ceylon courts of decisions of the Privy Council on Appeals from foreign countries.

PESONA *vs.* BABONCHI BAAS ... XXXVII. 97

Privy Council—Principles on which the Council acts in criminal appeals.

DHARMASENA *vs.* THE KING ... XLIII. 1

Objection cannot be taken in Privy Council to evidence admitted at the trial and in the court of appeal.

SATHAR *vs.* BOGSTRA *et al* ... XLVII. 53

Privy Council—Conviction for murder—Appeal to Court of Criminal Appeal—Retrial ordered on ground of misdirection in that trial Judge stated to jury that to reduce murder to culpable homicide, act taken in consequence of provocation must be reasonably commensurate with degree of provocation offered—Penal Code, section 294, Exception I—Corrections of trial Judge's direction—Appeal to Privy Council—Attorney-General's right to appeal in criminal cases.

The respondent appealed to the Court of Criminal Appeal from a conviction for murder before Justice Gratiaen and a jury. It was in evidence that ill-feeling had long existed between the respondent and the family of the deceased and on the day in question he shot and killed the deceased woman and three of her sons. The defence was one of provocation resulting from some stone-throwing by the woman's family and threats uttered by them. The respondent said (*a*) that he was suddenly provoked by this incident, (*b*) that at the same time he felt serious danger to his life and did not know what happened as he had lost control over himself.

The Court of Criminal Appeal quashed the conviction and ordered a re-trial on the ground that the learned trial Judge had wrongly directed the jury when he told them that a defence of provocation could not succeed and the charge of murder could

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not therefore, be reduced to culpable homicide not amounting to murder unless the action of the respondent taken by him in consequence of the provocation was reasonably commensurate with the degree of provocation offered to him.

From this order the Attorney-General appealed to the Privy Council by special leave. At the hearing of the appeal counsel for the respondent raised a preliminary objection that the Board had no jurisdiction to entertain an appeal by the Crown in a criminal case.

Held: (1) (*On the preliminary point*) *That as Her Majesty in Council has power to entertain an appeal from any Dominion or Dependency of the Crown in any matter, whether civil or criminal, by whichever party to the proceedings the appeal is brought, unless that right has been expressly renounced, the Board had the right to entertain the appeal.*

(2) *That the question whether the provocation was grave and sudden enough to reduce the offence of murder to culpable homicide depends entirely on the true construction of section* 294 *of the Penal Code.*

(3) *That the words "grave" and "sudden" in Exception I to section* 294 *of the Penal Code are relative terms and must at least to a great extent be decided by comparing the nature of the provocation with that of the retaliatory act and the whole of the summing-up by the learned trial Judge was impeccable and was in accordance with the law of Ceylon.*

ATTORNEY-GENERAL OF CEYLON *vs.* K. D. J. PERERA ... ... XLVIII. 42

Privy Council—Not bound, on a question of law, by an admission which in their opinion would involve an erroneous construction of an Ordinance.

ATTORNEY-GENERAL OF CEYLON *vs.* A. D. SILVA ... ... XLIX. 7

PRIZE

Prize Proceedings—Amendment of writ—Absence of provision in the Prize Court Rules for the amendment of writ—Power of court to order amendment of writ in the absence of express provision in the rules in that behalf.

Held: *That the Prize Court has power to order the amendment of a writ issued by it even though the Prize Court Rules do not confer express power in that behalf.*

IN *Re* PART CARGO EX M. V. "MARO Y" ... ... XX. 38

PROBATE

Power of Supreme Court to make order conferring sole testamentary jurisdiction on District Court in cases falling within the ambit of the British Courts Probates (Re-sealing) Ordinance.

IN *Re* CHARLES WILLIAM NOBLE ... ... XXXVIII. 44

PROCTOR

Proctor's lien for costs—Money deposited as security for costs of appeal—Payment of costs direct to winning party—Action by depositor for security deposited by him. Proctor's fees not paid—Is Proctor entitled to retain deposit?

The facts of the case which are fully set out in Judgment shortly stated are as follows.

The plaintiff Amba'avanar deposited with the defendant a Proctor a sum of Rs. 200, as security for the costs of the respondent in a case in which Amba'avanar was appellant.

The appeal was dismissed and Amba'avanar alleging that he had paid and settled the costs due to the respondent brought this action demanding the return of the deposit. The defendant resisted the claim mainly on the ground that it was fraudulent, and collusive in as much as it was an attempt to deprive him of his costs.

Held: *That a Proctor can claim a lien only in so for as his client is entitled to the money in his hands. He has no higher right than his client. The lien can be exercised against the client only, and it attaches to the property only to the extent of the clients interest therein.*

AMBALAVANAR *vs.* WANDURAGALA I. 22

Misconduct of Proctor—Criminal Breach of Trust of money entrusted by client.

Held: *That where a proctor committed breach of trust of a sum of Rupees* 175/05 *entrusted to him by his client for the purpose of settling a Judgment debt he was not fit to*

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be on the roll of proctors and should be disenrolled.

IN *Re* ISAAC ROMEY ABEYDEERA A PROCTOR OF THE SUPREME COURT ... I. 359

This matter came up for hearing on the application of the Solicitor-General under § 19 of the Courts Ordinance No. 1 of 1889. The respondent a proctor of about six years standing had been convicted in December 1930 on two counts of culpable homicide not amounting to murder and sentenced to ten years rigorous imprisonment on each count, the sentences to run concurrently. The charge against him at the trial at which he was sentenced to imprisonment were in respect of the murder of his wife and child. For some time before the murder there had been unpleasantness between the respondent and his wife. The deceased wife alleged infidelity on the party of the respondent, while the respondent said he suspected his wife of infidelity. On the night of the crime the respondent stated in his statutory statement that he saw his wife talking to a man and kissing him. When she retired to sleep, the respondent took his gun and fired at her and his child and attempted suicide. The respondent was in hospital some time as a result of his injuries. His wife and child were instantly killed.

At the hearing of the application, attempt was made by the respondent's counsel to show cause on the ground that the offences committed by the respondent were offences in which no moral turpitude was involved and that suspension or removal from the Roll of Proctors would amount to a punishment once more for the offences for which the respondent was already serving his sentence. He also maintained that the offence was not one that rendered him unfit to hold the office of Proctor and that in any event by the end of his terms of imprisonment he would fully have expiated his crime.

After hearing the Solicitor-General, the rule was made absolute.

Held: *That these proceedings were not for again punishing a man and that the question was whether the respondent ought to remain on the roll of an honourable profession, and that in the circumstances of this case his name must be removed from the roll of proctors.*

Per MACDONELL, C.J. "This is not a question of again punishing a man who has been punished already but quite a different one *viz.* Ought a person against whom such offences are proved to remain on the roll of an honourale profession and really the question answers itself. His crimes at the very least were as Mr. Illangakoon puts it an outrages violation of the Law which it was his duty as a proctor to uphold. One of the cases cited to us in argument is absolutely in point that of In *Re* Cooper (67 L. J. A. B. p 276) where the Solicitor had been convicted and sentenced to penal servitude for the attempted murder of his wife, a crime committed while he was in a state of mental depression consequent on money losses.

THE SOLICITOR-GENERAL *vs.* ARIYARATNE ... ... I. 400

Proctor convicted of offences of Criminal Breach of Trust. Removal from the Roll of Proctors.

This matter came up for hearing on an application made by the Solicitor-General under § 19 of the Courts Ordinance No. 1 of 1889. The respondent was a proctor of several years standing and had been convicted by the Supreme Court on three charges of Criminal Breach of Trust of a large sum of money entrusted to him in his capacity as a Proctor. The Supreme Court sentenced him to a term of five years rigorous imprisonment on his own plea of guilty. There were several other charges against him for similar offences; but they were not presented at the hearing, the respondent showed no cause. The Solicitor-General pointed out that the offences which the respondent had committed were grave ones and that his embezzelment had totalled up to several lakhs and had brought grave hardship and ruin to a number of his clients and pressed for his removal from the Roll of Proctors. The Court granted his application, and delivered the following judgment.

MACDONELL, C. J. "One naturally does not wish to say anything hard against a man who is already being pretty severely punished for his misdeeds but as Mr. Illangakoon quite rightly said the acts proved against him struck at the foundation of all relations between proctors and their clients. Under the circumstances the only decision possible is that the respondent's name should be struck off the roll of Proctors of this

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Court, and I am of opinion that such should be the order on this application."

THE SOLICITOR-GENERAL *vs.* DE VOS I. 402

Proctor on record present in Court but without instructions—When is trial deemed to be inter partes.

ANDIAPPA CHETTY *vs.* SANMUGAM CHETTY ... ... I. 178

Proctor and client—Right to fees—Within what time must proctor enforce his right to his fees.

Held: *That a proctor's right to sue for his fees is prescribed in three years from the date of the completion of the work for which he is engaged.*

KARUNARATNE *vs.* VELAIDEN ... IV. 73

Proctor—Accosting of by a person without lawful excuse.

SWAMINATHAN *vs.* SUPPIAH ... XI. 167

Two proctors cannot be recognized as appearing for the same party in the same case.

SILVA *vs.* CUMARANATUNGA ... XII. 112

Proctor convicted of breach of trust of property—Trust not qua proctor—Application to strike proctor's name off roll.

Held: (1) *That there is no absolute rule that a proctor convicted of felony should be struck off the rolls.*

(2) *That, in the circumstances of this case, suspension of the respondent from practice for twelve months was sufficient.*

THE SOLICITOR-GENERAL *vs.* CHELVATHAMBY ... ... XIII. 80

Re-admission of proctor who has been struck off the rolls on conviction of offences of cheating and forgery—Principles which guide the court in considering applications for re-enrolment.

Held: *That, in considering an application for re-admission to the profession of a lawyer who had, upon conviction of offences of cheating and forgery, been struck off the rolls, the court has not only to be satisfied that the applicant has re-established his character but also that it is safe to re-admit him to the profession having regard to the nature of the crime he has committed.*

IN *Re* WIJESINGHE ... ... XIV. 45

Proctor—Can he withdraw from trial on refusal of postponement.

DE MEL AND OTHERS *vs.* SUGUNASEKERA AND OTHERS ... ... XIV. 164

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

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

THE SOLICITOR-GENERAL *vs.* COOKE XV. 1

Removal from office of proctor found guilty of any deceit, malpractice, crime or offence.

IN *Re* WICKREMASINGHE ... XV. 97

Conviction of proctor—Criminal breach of trust—Removal from office.

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

THE SOLICITOR-GENERAL *vs.* CALDERA ... ... XVII. 106

Proctor and Client—A party must suffer for the failure of his proctor to comply with the provisions of the Civil Procedure Code and of the orders made by the court from time to time.

GUNASEKERA *vs.* KARUNARATNE XVIII. 30

Notary employed to draft mortgage deed—Mistake by notary—Loss to client—Circumstances in which notary is liable in damages.

The appellant, a notary public, was employed by the respondent to invest Rs. 1,000/- on a mortgage of the northern block of a certain land called Ambagahawatte belonging to one Peter Perera. By an error

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in the appellant's office the southern block of Ambagahawatte which was not in the ownership of Peter Perera was mortgaged instead of the northern block. Later the bond was put in suit and at the execution sale the respondent purchased the land. For these proceedings the respondent employed another proctor. After his purchase the respondent discovered the mistake and claimed a sum of Rs. 1,935/- as damages from the appellant.

Held: *That the appellant was not liable in damages as the damages were too remote and there was contributory negligence on the part of the respondent.*

DANIEL *vs.* COORAY ... ... XX. 59

Proctor—Admission by—Must be clear as to terms and made with consent of parties.

PUNCHIBANDA *vs.* PUNCHIBANDA AND OTHERS ... ... XXI. 16

Proctor convicted of offences against sections 19 and 71 (1) of the Post Office Ordinance — Disenrolment of — Considerations that guide the Supreme Court in determining whether a proctor convicted of an offence should be disenrolled.

Held: (1) *That a proctor convicted of the offence of sending by post indecent and grossly offensive postcards was unfit to remain on the roll of proctors.*

(2) *That it is the duty of the court to regard the fitness of a person to continue in the profession from the same angle as it should regard it if he was a candidate for enrolment.*

(3) *That for any gross misconduct whether in the course of his professional practice or otherwise the court will expunge the name of a proctor from the roll.*

IN *Re* A. T. G. BRITO, PROCTOR XXIV. 7

Proctor—Application for re-enrolment—What formalities should a proctor seeking re-enrolment observe—Inherent jurisdiction of Supreme Court to readmit to the profession a proctor who has been disenrolled.

Held: (1) *The restoration of a proctor to the Roll, after his name has been removed, cannot be regarded as an admission and enrolment of the proctor under section* 16 *of the Courts Ordinance, and the Second Schedule to that Ordinance has no application to such restoration to the Roll.*

(2) *Unless the court is satisfied that the effort of the applicant to live a decent and respectable life has been continued over a period sufficient for it to say with confidence that he can safely be entrusted with the affairs of clients, an application for re-enrolment will not be granted.*

IN *Re* WICKREMESINGHE ... XXIX. 87

Proctor—Conviction for misappropriation of money entrusted by clients—Removal from Roll.

The respondent, a Proctor, was convicted for misappropriating a sum of Rs. 330.33 entrusted to him by his clients for the purpose of redeeming a mortgage bond. An application was made by the Solicitor-General for an order removing the respondent from the Roll of Proctors.

The application was granted.

IN *Re* WIJESINGHE ... ... XXX. 54

Proctor—Pleading guilty to a charge of criminal breach of trust—Application to strike proctor off the Roll.

A proctor pleaded guilty to a charge of criminal breach of trust of a postal order of the value of ten rupees. An application was them made to the Supreme Court to strike his name off the roll of proctors. In view of the special circumstances of the case the Supreme Court suspended him from practice for one month.

IN *Re* MOHAMED ... XXXIII. 75

Proctor and client—Gift—Donee, wife of donor's proctor—Deed of gift drafted on proctor's instruction by another notary who attested same—No opportunity to donor of independent advice—Undue influence—Presumption of.

The plaintiff apprehensive of death entrusted to one W, his proctor and a close relative, the duty of drafting and attesting a number of conveyances. W, obtained the services of another notary to draft and attest one of the deeds by which the plaintiff conveyed irrevocably and with immediate effect a house to his niece, who was the proctor's wife. The terms of the deed were communicated by W, himself and were in complete accord with the plaintiff's wishes.

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At the time of the execution the plaintiff's faculties were normal and unimpaired.

The plaintiff sought to set aside the deed of gift on the ground that it was obtained by undue influence and duress on the part of W, that the transaction was vitiated because W, being plaintiff's legal adviser stood in a position of active confidence, and that the gift was bad because no delivery of the property had taken place.

Held: (1) *That the deed of gift belongs to a class of case where the special relationship between the proctor and his client at the time of execution of the gift raises a presumption that the former had influence over the latter.*

(2) *That in such a case the gift should be set aside unless the presumption is rebutted by the donee by proof of circumstances which satisfy the Court that the gift was the result of the free exercise of the donor's independent will.*

(3) *That in the circumstances of this case the presumption of undue influence has not been rebutted.*

Per GRATIAEN, J.—"The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee (*i. e.* the solicitor or the relative in whom the solicitor has a special interest) and with the full appreciation of what he was doing."

ABDUL CADER *vs.* SITTINISA *et al* XLV. 107

Proctor and client—Appellant induced to lend money on inadequate security—Material circumstances relating to inducement not fully disclosed by respondent, appellant's proctor—Action by appellant against respondent for loss on the ground of breach of duty—Duty of proctor to client—Nature of—Principles governing fiduciary relationship.

The appellant sought to invest a sum of money on a mortgage through the respondent, his proctor, who had negotiated such investments previously for him. He was induced to loan the money to one Samaratunga on a primary mortgage of his "Panwila" property and a secondary mortgage of his "Fincham's Land", on statements made by the respondent's brother Samsudeen, an "unlicensed broker" as to the nature of the security and the integrity of the borrower, which were false, but which Samsudeen represented to the appellant as having been endorsed by the respondent.

At the time of the loan there was a hypothecary decree for Rs. 4,900 in respect of the Panwila property in favour of the respondent's cousin Naina Marikar and Fincham's Land was subject to a primary bond in favour of Moolchand for nearly Rs. 44,500 and to a secondary bond for Rs. 6,000 in favour of respondent's brother Samsudeen and respondent's wife. Out of the sum of Rs. 15,000 lent by appellant to Samaratunga Rs. 4,500 was paid to respondent's cousin Naina Marikar and Rs. 6,000 to respondent's brother and wife. In an action to recover the loan, the appellant ultimately was able to realize only a sum of Rs. 2,250 from Samaratunga.

The appellant alleged in his plaint that the respondent, acting as his legal adviser, had recommended an unprofitable investment introduced by Samsudeen and that his conduct constituted a breach of his professional duty arising under the contract of employment; in particular that the respondent had acted fraudulently and with dishonest intention of furthering the interests of his own relatives—information regarding which interest he had improperly withheld from the appellant at the time of the transaction.

The respondent denied the allegation and pleaded that he had at all times expressly told the appellant that he should satisfy himself about the value and adequacy of the security and with which the appellant in fact was satisfied.

The learned District Judge dismissed the appellant's action on the ground that the respondent had not fraudulently concealed material facts within his knowledge with a view to inducing the appellant to make the investment, and that the respondent had sufficiently complied with his duty by informing the appellant of the existence only of the subsisting mortgages on Fincham's Land and the Panwila property respectively (without disclosing the identity of the mortgagees), and that it made no difference to the appellant whether secondary mortgage was in favour of Samsudeen and the respondent's wife or in favour of some other parties.

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The evidence in the case established that the respondent did not disclose to the appellant the extent to which his relatives stood to gain if the transaction went through; that he did not sufficiently advise the appellant as to the safe margin which should be insisted on if the main security for the loan was to be a secondary mortgage of Fincham's Land, having regard to the proved unreliability and financial weakness of the borrower and to appellant's known inability to purchase the property himself at a forced sale; that he did not sufficiently refute the recommendation of the borrower with which Samsudeen had deliberately associated him.

Held: (1) *That the respondent's conduct in the transaction fell far short of the duty imposed on him by contract and also of "the duty of particualr obligation imposed on him" by his special fiduciary relationship because he refrained from communicating to his client mary circumstances within his knowledge which were material to his client's decision and consequently the appellant must succeed in his claim.*

(2) *That in a transaction arising from a fiduciary relationship of a special nature, such as where a proctor is invited to act professionally for a client which would benefit materially either the proctor or his close relatives, it is not necessary for the plaintiff to establish that the alleged breach of duty was due to intentional and deliberate fraud. It is sufficient for him to prove such facts that would show that there has been a dereliction of duty, however innocently, arising from his position of fiduciary relationship.*

Per GRATIAEN,J.—When a proctor is engaged to advise a client in regard to a proposed investment, "his contract of employment imposes on him a duty to act skilfully and carefully.....and, superimposed on this contractual duty, is the duty imposed by his fiduciary position to make a full and not a misleading disclosure of facts known to him when advising his client."

WEERASURIYA *vs.* FUARD ... XLVII. 33

PROHIBITION

A writ of prohibition does not lie to stay criminal proceedings for breach of trust against an administrator on the ground that he was not liable to a criminal prosecution for his conduct regarding the moneys of the estate but only to the liabilities provided in the Civil Procedure Code.

EMANUEL *vs.* FERNANDO (INSPECTOR OF POLICE) ... ... II. 33

Prohibition does not lie where an appeal is available.

EMANUEL *vs.* FERNANDO (INSPECTOR OF POLICE) ... ... II. 33

Prohibition—Courts Ordinance § 42—Order issued by District Judge on a Proctor to appear in court—Circumstances in which a mandate in the nature of a writ of prohibition will be issued.

WICKRAMANAYAKE *vs.* NAGALINGAM, D. J. KANDY ... ... XXVIII. 111

Application for writ of prohibition on Tribunal of Appeal constituted under regulation 8 (2) of the Defence (Compensation) Regulations—Requisitioning of land—Jurisdiction of Tribunal to determine compensation—Validity of Defence (Compensation) Regulations.

VERNON RAJAPAKSE *vs.* TRIBUNAL OF OF APPEAL *et al* ... XXXIV. 52

Jurisdiction of Supreme Court to issue Writ of Prohibition on Commissioner appointed under Commissions of Inquiry Act. No. 17 of 1948, to inquire into allegations that Municipal Councillor acted corruptly as specified by section 5 (1) of the Colombo Municipal Council Bribery Commission (Special Provisions Act No. 32 of 1949).

Held: *That it is competent for the Supreme Court to issue a* mandate *in the nature of a Writ of Prohibition to prohibit a Commissioner appointed by the Governor-General under the Commissions of Inquiry Act. No.* 17 *of* 1948, *from inquiring into an allegation that a Municipal Councillor has acted corruptly in a manner specified by section* 5 (1) *of the Colombo Municipal Council Bribery Commission (Special Provisions) Act, No.* 32 *of* 1949, *as such Commissioner is under a duty to act judicially.*

THE MAYOR OF COLOMBO *vs.* THE COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER ... ... XLI. 28

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Writ of Prohibition—Commission appointed under Commissions of Inquiry Act, 1948, to inquire and report on prevalence of bribery and corruption among members of Colombo Municipal Council—Preliminary investigation by Commissioner—Allegations that petitioner, who was a Councillor had on several occasions corruptly given money or other gifts to other Councillors to vote for him at Mayoral elections—Inquiry into allegations against some Councillors who received bribes from petitioner already taken place in his absence—No formal notice of allegations implicating petitioner given—No opportunity given to petitioner for legal representation at such inquiries—Procedure adopted by Commissioner—Principles of natural justice—The Colombo Municipal Council Bribery Commission (Special Provisions) Act, No. 32 of 1949.

THE MAYOR OF COLOMBO *vs.* COLOMBO MUNICIPAL COUNCIL BRIBERY COMMISSIONER ... ... XLI. 33

Application for Writ—Party who would be affected by the grant of application not made a party—Application is not properly constituted.

MURUGESU *vs.* AMERASINGHE *et al* XLIV. 25

PROHIBITION AGAINST ALIENATION

In Crown Grant—*See under* **LEASE**

In Deed—*See under* **FIDEI COMMISSUM**

PROMISSORY NOTE

See also under **MONEY LENDING, BILLS OF EXCHANGE**

Not complying with provisions of Money Lending Ordinance—Enforceability.

SOCKALINGAM CHETTIAR *vs.* RAMANAYAKE ... ... II. 291

Payee's right to insert the rate of interest in a promissory note.

Held: (1) *That where a definite rate of interest is neither agreed on nor inserted in a promissory note the payee has no right without the authority of the maker to insert any reasonable rate of interest in the note.*

(2) *That an alteration of a note in the circumstances is a material alteration.*

KANNIAH *vs.* MARIKAR ... II. 344

Promissory Note—Does non-compliance with the provisions of the Money Lending Ordinance bar an action on the money count where the note is not fictitious.

Held: *That where a promissory note is not fictitious an action on the money count lies even though the note itself is unenforceable for want of compliance with the provisions of the Money Lending Ordinance.*

WICKREMESURIYA *vs.* SILVA ... IV. 89

Promissory note given in lieu of interest due on a loan bond—Action to recover money due on note—Can the principal amount stated in the note and the interest thereon be recovered.

A borrowed a sum of Rs. 1000/- from the plaintiff on a bond. It was agreed that out of this amount a sum of Rs. 55/- being four months' interest and the expenses of executing the bond were to be deducted. But as the defendant wanted the full amount it was arranged that he should give a promissory note for Rs. 75/- Rs. 70/- being the amount due and Rs. 5/- the amount of interest due on the promissory note for four months. The promissory note did not set out the fact that Rs. 5/- had been deducted as interest.

Held: (1) *That the action on the note was maintainable,*

(2) *That interest on the sum of Rs. 55/- which was interest due on the bond was not recoverable.*

SOKKALINGAM CHETTIAR *vs.* VIDAMBENEY AND ANOTHER ... ... IV. 125

Promissory note—Part payment by co-debtor—Does it operate as payment so as to bar a claim of prescription by the other debtor.

Held: *That part payment of a promissory note by one co-debtor operates as payment to take the debt out of the prescription Ordinance, as against the other co-debtor.*

SOOSAIPILLI *vs.* VAITHILINGAM AND ANOTHER ... ... IV. 139

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Promissory Note not duly stamped—Money lent by a person who is not engaged in the business of money lending—Can it be recovered.

Held: *That a person, not engaged in the business of money lending, who lent a sum of money on two promissory notes insufficiently stamped, was entitled to maintain an action for money lent, although the promissory notes themselves were inadmissible in evidence under section 36 of the Stamp Ordinance No. 22 of 1909.*

Sockalingam Chettiar vs. Ramanayake, 35 N. L. R. 33 interpreted.

ABEYSEKERA *vs.* JAYATILLEKE ... V. 87

Promissory Note—Undertaking to marry—Illegal consideration.

The plaintiff-appellant sued the defendants on a promissory note made out in Tamil of which the following is a translation.

Rs. 1000/-

This 10th day of Sept: 1933.

I, the undersigned, R. M. Vasthiampillai have granted a promissory note and borrowed and received from Pethurupillai Thegopillai of Karampan, who was and is an officer in the G. P. O. Colombo and now at Karampan on leave, Rs. 1000/-. I do hereby promise to pay on demand to him or his order the said sum of Rupees one thousand together with interest thereon at the rate of 12 per cent. per annum. I have received the amount in full.

Sgd. R. M. VASTHIAMPILLAI.

Witnesses.

1. (Sgd.) B. Saverimuttu.
2. (Sgd.) Sana Vastiampillai.

This note was endorsed by the 2nd defendant respondent to the plaintiff in satisfaction of a debt of Rs. 1000/- due to the latter from the former. When he sued on it, objection was taken that as a matter of law the action was not maintainable, in view of the circumstances in which the note was made. Shortly they are as follows:—A proposal of marriage was made between the 1st defendant and one Saveriachchy, daughter of the 2nd defendant. On the day before the day fixed for the exchange of rings it was agreed between the parties that the 1st defendants should make a promissory note in favour of the 2nd defendant and that the latter and his wife Anapillai should make a promissory note in favour of the 1st defendant. The condition being that both promissory notes should be left in the hands of a common friend, one Vastiampillai, who if any party backed out of the agreement of marriage, was to hand over to the other the note made by the defaulting party. An agreement regarding dowry was also drawn up and signed on the day the rings were formally exchanged. The 1st defendant backed out of the arrangement after the exchange of rings on the ground the girl was not what she was represented to be to him and thereupon the promissory note made by him was handed by Thambipillai to the 2nd defendant, who, as stated above, endorsed it to the plaintiff.

Held: *That the note was for illegal consideration and was not, therefore, enforceable.*

RASALINGAM *vs.* BASTIANPILLAI AND ANOTHER ... ... VI. 35

Action on a joint promissory note against two persons—Joint answer filed by defendants through the same proctor authorised by one proxy—First proxy subsequently revoked by the second of the defendants—Separate proxy and separate answer filed—Absence of first defendant on day of trial—Judgment entered against him in default—Can action proceed against the other defendant thereafter.

Held: *That a judgment against one of two joint debtors is a bar to an action against the other joint debtor unless it is otherwise provided by some statute or rule of court.*

SUPPRAYAR REDDIAR *vs.* MOHAMED AND ANOTHER ... ... X. 44

Promissory note—Presentment for payment—Meaning of.

RAMASAMY CHETTIAR *vs.* RAMANATHAN CHETTIAR AND ANOTHER ... XI. 32

Promissory Note—Payee denoted by his vilasam—Admission of extrinsic evidence to prove the owner of the vilasam—Requisites of a note—Endorsement.

Held: (1) *That, where a person is referred to and described by his initials, extrinsic evidence can be led to shew who the individual described was intended to be.*

(2) *That the note contains all the necessary essentials of a promissory note.*

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(3) *That the endorsement is valid as a restrictive endorsement.*

ADIKAPPA CHETTIAR *vs.* LETCHUMANAN CHETTIAR ... ... XII. 6

Promissory note given for money due as survey fees—Absence of marginal particulars—Note endorsed to third party as security for loan—Action by endorsee—Applicability of section 10 of the Money Lending Ordinance, 1918.

Held: *That section* 10 *of the Money Lending Ordinance did not apply to the transaction inasmuch as the note was not given originally as security for a loan.*

PALANIAPPA CHETTIAR *vs.* WEERASINGHE AND ANOTHER ... ... XII. 42

The plaintiff, as endorsee, sued the defendants on an instrument which, he alleged, was a promissory note. This instrument, in addition to the particulars required to be stated on a promissory note, contained the following words:—

"Whereas this amount has been taken out on account of *cheetu*, and whereas deposit has been made for 37 months at the rate of Rs. 25/- once in a month, the amount will be paid off. This *cheetu* is in the name of the first named, and the second and third named are the sureties."

Held: *That the writing cannot be regarded as a promissory note, and that the plaintiff was not entitled to sue on it.*

KANDIAH *vs.* SOLOMON AND TWO OTHERS ... ... XII. 149

Promissory note—Debt due on—Judgment entered—Roman Dutch Law governs judgment debt.

RAMALINGAM *vs.* JONES ... XIV. 89

Promissory note—Maker and indorsers defendants—Claim against maker waived before trial—Can trial proceed against indorsers.

Plaintiffs sued on a promissory note made by the 1st defendant and endorsed by the appellants. Plaintiffs having waived their claim against the 1st defendant without the knowledge or consent of the appellants, trial proceeded against them and the Commissioner gave judgment for plaintiffs.

Held: *That the appellants being indorsers are in the position of sureties and as such they were discharged from liability on the note when the plaintiffs waived their claim against the maker of the note without their knowledge or consent.*

JAYARAM AND CO. *vs.* EBRAMAJEE AND TWO OTHERS ... ... XX. 6

Promissory note—Valuable consideration—Does the compromise of a claim for wages constitute valuable consideration for the execution of a promissory note.

Held: (1) *That there was valuable consideration for the execution of the promissory note.*

(2) *That the compromise of a claim may be a good consideration for a promissory note if the party making it is acting in good faith.*

AIYAMPILLAI *vs.* SORNAMMAH AND ANOTHER ... ... XXIII. 108

Once a promissory note is discharged by payment the English law ceases to apply to the rights of parties thereafter.

The Roman-Dutch law governs the rights of parties.

GUNASEKERA *vs.* GUNASEKERA XXIV. 35

The payee cannot endorse a promissory note paid by the maker so as to give the endorsee a right to sue the maker.

MARIKAR *vs.* KAMALLA ... XXV. 66

Action by endorsee—Defence of payment to payee—Unstamped receipt given by payee—Section 35, proviso (b) of the Stamp Ordinance—Is such receipt admissible in evidence against the endorsee.

Held: *That an unstamped receipt given by the payee of a promissory note to its maker is not admissible in evidence against the endorsee in an action by the latter against the maker.*

KURUKKAL *vs.* SARMA ... XXXII. 85

Promissory note given by married Muslim lady under 21 years—Is the maker liable on the note.

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Held: *That a Muslim minor, though married at the time of the making of a promissory note, is not liable on it.*

KALANDAR LEVVE *vs.* PACKERTHAMBY AVVAUMMA ... ... XXXV. 98

Mortgage bond subsequently entered into for payment of money including amount borrowed on promissory note—Was there a merger?—Principles governing merger? —Bills of Exchange Ordinance, section 36 (1).

The first defendant granted to the second defendant a promissory note for valuable consideration and subsequently hypothecated by a mortgage bond certain properties as security for the repayment of a sum which included the amount due on the promissory note, and stated specifically as such in the bond. The second defendant retained the promissory note which contained an indorsement by both the defendants that the amount due has been secured by mortgage bond. The second defendant endorsed and delivered the promissory note to the plaintiff for valuable consideration.

In an action by the plaintiff to recover the amount on the note from the first and second defendants.

Held: (1) *That both the first and second defendants were liable and the plea of the first defendant that the note had been discharged by the second defendant's acceptance of a higher security of the mortgage bond cannot avail as the language of indorsement made on the note indicated that the bond was an additional security and that the note appeared to be undischarged at the time it was indorsed to the plaintiff.*

Per GRATIAEN, J.: "If the maker of a promissory note subsequently creates a mortgage to secure the repayment of his debt, the Court would not be justified in holding that the note was thereby discharged unless an intention to provide a substituted (as opposed to an additional) security was established."

MISSO *vs.* BADURDIN MOHAMEDALLY AND ANOTHER ... ... L. 74

PROSTITUTE

See under **VAGRANTS**

PROVOCATION

Provocation—Sufficient to reduce murder to manslaughter.

HOLMES *vs.* DIRECTOR OF PUBLIC PROSECUTIONS ... ... XXXIII. 12

PUBLIC BODIES (PREVENTION OF CORRUPTION) ORDINANCE No. 49 of 1943.

Application to set aside election of Village Committee Chairman—Remedy under Ordinance available—Writ of Quo Warranto **not granted.**

SAMARAKOON *vs.* TIKIRI BANDA XLI. 53

Act of electing the chairman of a village committee falls within the definition of the expression "official act" in § 6.

SAMARAKOON *vs.* TIKIRI BANDA XLI. 53

PUBLIC DUTY

Refusal to perform—What constitutes refusal.

WIJESEKERA AND CO., LTD. *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS ... ... XLV. 81

PUBLIC OFFICER

Public Officer—Purchase of land by unregistered overseer in the name of his brothers and sisters—Contravention of General Orders—Force of General Orders —Is it against public policy to enforce anything done contrary to General Orders?

Held: (1) *That an unregistered overseer is not a public officer for the purposes of the General Orders of Government.*

(2) *That purchase of land by a public officer in contravention of General Orders does not render the transaction invalid.*

(3) *That a Court will not refuse to enforce any contract agreement or undertaking merely on the ground that the person who seeks the assistance of Court is a public officer, who in entering into the transaction in which he seeks the Courts' interference, did so contrary to General Orders.*

LUCY THIRUNAYAKAR *vs.* LEONARD THIRUNAYAKAR ... ... VII. 127

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Public Officer—Offering bribe to—Person offering bribe is an accomplice.

REX *vs.* NUGAWELA ... XVII. 71

Action to recover money paid to a public officer in his official capacity—Action lies against the Crown and not against the public officer.

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

FONSEKA *vs.* LEIGH CLARE ... XVII. 100

Public Servant—Voluntary obstruction—Surveyor employed by the Fiscal to prepare a plan for the purpose of executing a Fiscal's conveyance as required by section 286 of the Civil Procedure Code—Is such surveyor a public servant within the meaning of section 183 of the Ceylon Penal Code—Is motive for obstructing material for a conviction under section 183 of the Penal Code.

Held: (1) *That a surveyor employed by the Fiscal to prepare a plan for the purpose of executing a Fiscal's conveyance as required by section* 286 *of the Civil Procedure Code is a public servant within the meaning of section* 183 *of the Ceylon Penal Code.*

(2) *That for a conviction under section* 183 *of the Penal Code, motive of the person obstructing is immaterial.*

VEERASINGHAM *vs.* MEENACHY XXII. 37

Public servants' pension—Does it vest in assignee on the insolvency of the pensioner.

PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION *vs.* ABRAHAMS (ASSIGNEE) ... ... XXIV. 101

Public servant — Negligent exercise of powers conferred by statute—Customs Ordinance—Bona fides **of act—Liability of public servant.**

Maintainability of action for damages to car by person other than registered owner.

Held: (1) *That a person who, though not the registered owner, has a limited interest in a motor car of which he is in lawful possession, is entitled to maintain an action for damages caused to it consequent on the negligent act of another party.*

(2) *That where a public servant acts negligently in exercising the powers conferred on him by statute, he cannot escape liability, notwithstanding the* bona fides *of his actions.*

PARAMASOTHY *vs.* VENAYAGAMOORTHI AND ANOTHER ... ... XXVI. 68

Public officer—When does his acts bind the Crown.

ATTORNEY-GENERAL *vs.* WIJESURITYA ... ... XXXII. 89

Public Servant—That Food Control Guard is, cannot be judicially noticed.

SEENITHAMBY AND OTHERS *vs.* JANSZ ... ... XXXIII. 22

Public Servant—Obstruction to—Search of accused's house to ascertain whether rice or paddy hoarded—Authority to search granted by Deputy Food Controller under Regulation 2A of Food Control Regulations 1938 and 1943—Resistance by accused—Legality of such authority.

Held: (1) *That Regulation* 2*A of the Food Control Regulations* 1938 *and* 1943 *does not empower the issue of an authority to inspect and search premises for the purpose of ascertaining whether there is any hoarding of a controlled article.*

(2) *That the Regulation authorises the search of such places or premises as those to which the controlled article has been transported or removed, not any or all places generally.*

(3) *That an attempt to search premises for controlled articles hoarded under such an authority is illegal and could be lawfully resisted.*

DARLIS *vs.* RAJENDRA, A.G.A., MATARA ... ... XXXIII. 94

Writ of Mandamus**—Public Servants—Dismissal of officer in the Post and Telegraph Department—Officer's right to office—Is it enforceable by action—Instructions given under Royal Sign Manual and Signet, (Ceylon State Council) Order in Council 1931 Article 86 (2).**

An officer of the Post and Telegraph Department, who was dismissed from the Public Service in 1945 by an order of the Governor applied for a writ of *mandamus*

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on the Postmaster-General ordering him to hold an inquiry into the charges against him, complaining that he did not have the fullest opportunity of exculpating himself according to the Instructions in the Royal Sign Manual and Signet.

Held: (1) *That a public servant holds office at the pleasure of the Crown.*

(2) *That he has no remedy at law for enforcing any alleged contract of service.*

(3) *That the Instructions do not entitle a public officer to insist on a particular form of procedure in investigating charges against him, but the duty of giving him a full opportunity of exculpating himself must be honestly discharged.*

VALLIPURAM *vs.* POSTMASTER-GENERAL ... ... XXXIX. 1

Does action lie against public servant personally for alleged breach of contract entered into by him in his official capacity and not for his personal benefit.

SILVA *vs.* THE ATTORNEY GENERAL XLV 17

Refusal to perform public duty—What constitutes refusal.

WIJESEKERA & CO LTD. *vs.* THE PRINCIPAL COLLECTOR OF CUSTOMS ... XLV. 81

Dismissal of public officer by Public Service Commission — Certiorari **does not lie.**

WIJESUNDARA *vs.* PUBLIC SERVICE COMMISSION ... ... XLIX. 44

PUBLIC PERFORMANCES ORDINANCE No. 7 of 1912.

The Public Performance Ordinance No. 7 of 1912—Rule A 2 of rules made under section 3 (1) Meaning of "Public dramatic representation" in § 2 (a). Admission without pay—Does it matter.

ABEYERATNE *vs.* MIGEL PERERA ... I. 422

PUBLIC RIGHT OF WAY

See under **RIGHT OF WAY**

PUBLIC ROAD

See under **RIGHT OF WAY**

PUBLIC SERVANT

See under **PUBLIC OFFICER**

PUBLIC SERVANTS LIABILITIES ORDINANCE

Unregistered Overseers employed in the Government Public Works Department—Can they plead the benefit of the Ordinance.

Held: *That an unregistered overseer, employed in the Government Public Works Department, who is not entitled to the privileges of a registered overseer and who is paid monthly at a daily rate of wages payable only for the days on which he works is a public servant who is entitled to the protection of the Public Servant's (Liabilities) Ordinance No. 2 of 1899.*

WEERASINGHE *vs.* WANIGASINGHE I. 316

Is a Registrar of Births, Deaths and Marriages a Public Servant within the meaning of the Ordinance.

Held: *That a Registrar of Birth, Deaths and Marriages is not a public servant within the meaning of section 2 of the Public Servants (Liabilities) Ordinance No. 2 of 1899.*

JAYASINGHE *vs.* JAYATILLEKE ... II. 322

Meaning of the word "salary" in section 3 (2) of the Ordinance.

Held: (1) *That the word "salary" in section 3 (2) of the Ordinance means the regular remuneration received by a man in respect of his fixed appointment in the public service under the head "salary" as distinct from "allowance."*

(2) *That "overtime" is not "salary" within the meaning of the word in section 3 (2) of the Ordinace.*

GOUL *et al vs.* CONCECION ... II. 378

Does a public servant cease to enjoy the privileges conferred by the Ordinance if he is permitted to carry on business outside his normal functions.

Held: *That a person who was also employed on a monthly salary by the Government Medical Department to distribute the pay of certain minor employees in a district and who was entitled to the normal privileges of a public servant was a "public*

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servant" within the meaning of the expression in the Ordinance despite the fact that Government had permitted him to carry on the business of auctioneer, broker, general merchant and petrol dealer.

SARAVANAMUTTU *vs.* SITTAMPALAM II. 384

What constitutes a person a "Public Servant"—Can a public servant plead the Ordinance, even after he has left the service to which he belonged, in answer to an action begun while he was in the service?

Held: (1) *That a person employed in the service of the Colombo Municipal Council on a daily rate of pay paid once a month, and who was entitled to a gratuity and certain privileges as regards sick leave, was a "public servant" within the meaning of the expression in section 2 of Ordinance No. 2 of 1899.*

(2) *That a public servant can, after he has left the service to which he belonged, plead the Ordinance in answer to an action begun, while he was in the service.*

PARANGODUN *vs.* RAMAN AND ANOTHER ... ... VI. 39

Action against public servant—Death before trial—Legal representative and another substituted—Can they for the first time plead the benefit of the Ordinance.

A public servant was sued on an alleged guarantee in respect of a promissory note. He did not claim the benefit of the Public Servant's (Liabilities) Ordinance and died while the action was pending. The administrator and another were substituted as defendants. The substituted defendants for the first time claimed the benefit of the Public Servants' (Liabilities) Ordinance. The District Judge held that it was not open to the substituted defendants to take the plea inasmuch as the deceased public servant had not taken it.

Held: *That the legal representatives of a deceased public servant can plead the Public Servants' (Liabilities) Ordinance in an action pending at the date of his death even though the public servant had not in his lifetime taken the plea.*

MADAWELA AND ANOTHER *vs.* MADAWELA AND ANOTHER ... ... VI. 94

Joint promissory note by husband and wife—Husband a public servant—Is an action on the note maintainable against the wife.

Held: *That the proceedings were not void as against the wife (2nd defendant) inasmuch as she was not a public servant.*

ALLANOOR BAI *vs.* MARY MAGARET EDWIN ... ... XII. 23

Unregistered sub-overseer of the Public Works Department—Is he entitled to the benefit of the Ordinance—Does a break in the continuity of service prevent the benefit of the Ordinance being claimed while in service.

Held: (*Keuneman, J. dissentiente*) (1) *That an unregistered sub-overseer of the Public Works Department, employed on the terms on which the defendant served, was entitled to claim the benefits of the Public Servants' (Liabilities) Ordinance.*

(2) *That the defendant was, in spite of the break in the continuity of his service, entitled to claim the benefit of the Ordinance in an action brought while in service in respect of a debt contracted when he was serving in the Public Works Department.*

MUTTUCARUPPEN CHETTIAR AND ANOTHER *vs.* VELUPILLAI ... ... XII. 85

Joint and several promissory note executed by public servant and his mistress—Action against both—Plea that action does not lie against the public servant—Can the action proceed against the public servant's mistress alone.

Held: *That the plaintiff was entitled to proceed with his action against the other defendant who is not entitled to the benefit of the Public Servants' (Liabilities) Ordinance.*

ALAGAPPA CHETTIAR *vs.* JAYALATH AND ANOTHER ... ... XII. 155

Can a public servant who was sued at the time when he was a public servant claim the benefit of the Ordinance after he has ceased to be a public servant.

Held: (1) *That a public servant who was sued at the time when he was a public servant can even after he has ceased to be a public servant claim the benefit of the Public Servants (Liabilities) Ordinance.*

(2) *That if, at any point during the pendency of an action to which the Public Servants (Liabilities) Ordinance applies, the defendant is or becomes a public servant the proceedings are automatically rendered void.*

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(3) *That the fact that, pending an action to which the Public Servants (Liabilities) Ordinance applies, the defendant ceases to be a public servant, is immaterial.*

PAYAN BHAI *vs.* GUNATILLEKE XVIII. 34

Clerk employed under Sanitary Board—Is he entitled to the benefits of the Ordinance.

Held: *That a person employed in the service of a Sanitary Board cannot claim the benefits of the Public Servants (Liabilities) Ordinance, unless he can at the same time bring himself within any of the classes of employees enumerated in the definition of "public servants" in that Ordinance.*

DISSANAYAKE *vs.* YATAWARA XXXVI. 95

Plea of protection under, raised unsuccessfully at trial—Can such plea be raised at later stage in execution proceedings. Res judicata—**Exceptions to the principle.**

Held: *That a public servant, who had unsuccessfully claimed protection under the provisions of the Public Servants Liabilities Ordinance at the trial, is not precluded by the principle of* "res judicata" *from raising the same plea at a later stage in execution proceedings.*

MADAN *vs.* NANA ANDY ... XL. 73

PUBLIC SERVICE COMMISSION

Not liable to Certiorari **for dismissing public servant from office.**

WIJESUNDARA *vs.* PUBLIC SERVICE COMMISSION ... ... XLIX. 44

PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION ORDINANCE

Held: *That the word "orphans" in section 3 of the Public Service Mutual Provident Association Ordinance must be construed not in its ordinary sense but in a wider sense and includes even grandchildren of a deceased member.*

PUBLIC SERVICE MUTUAL PROVIDENT ASSOCIATION *vs.* DE SILVA AND THREE OTHERS ... ... XXV. 82

PUBLIC TRUSTEE

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

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

DAISY LAW *vs.* FERNANDO AND OTHERS ... ... XVI. 137

PURCHASER AND VENDOR

See under **Vendor and Purchaser**

QUANTUM MERUIT

Where the auditors of a company who were requested by the directors to prepare a balance sheet failed to complete it owing to the default of the company the auditors are not entitled to any remuneration. They cannot base their claim on quantum meruit **as the company did not get the benefit of any work done.**

CHARLES AND ANOTHER *vs.* LIQUIDATOR TURRET MOTORS ... XXV. 84

QUARANTINE AND PREVENTION OF DISEASES ORDINANCE

Quarantine and Prevention of Diseases Ordinance, Chapter 173—Offences under—Jurisdiction of Municipal Magistrate to try.

Held: *That the Municipal Magistrate has no jurisdiction to try an offence committed under the Quarantine and Prevention of Diseases Ordinance, chap.* 173.

SALY *vs.* LIYANAGE (MUNICIPAL SANITARY INSPECTOR) ... XXXII. 71

Regulation 46 of the Regulations framed under the Ordinance—Failure to report case of small-pox—Charge under regulation—Burden of Proof.

SANITARY INSPECTOR MIRIGAMA *vs.* THANGAMANI NADAR ... XLIX. 81

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QUIA TIMET

Quia timet action—Rights previously transferred to plaintiff purchased by defendant at Fiscal's Sale—Plaintiff in possession—Fiscal's conveyance not obtained when action instituted—Action for declaration of title by plaintiff—Is it maintainable.

On 5th January, 1937 plaintiff became entitled to an undivided one-fourth acre of a certain land from one Siriwardene and entered into possession thereof. On 3rd July, 1937 defendant became the purchaser of the said interests at a Fiscal's sale. Plaintiff instituted this action for declaration of title to the interests he acquired as against the defendant who had not at the time obtained the Fiscal's transfer nor asserted title to the land. The learned District Judge entered judgment for plaintiff.

Held: *That a* quia timet *action was not maintainable under the circumstances.*

GUNASEKERE *vs.* KANNANGARA XXIV. 84

Quia timet action—Ingredients of cause of action.

HEWAVITHARANA *vs.* CHANDRAWATHIE *et al* ... ... XLV. 73

Nature of proceedings—Power of court to grant declaratory decree.

NAGANATHAR *vs.* VELAUTHAM & WIFE SARASWATHY ... ... L. 13

QUO WARRANTO

Village Communities Ordinance No. 9 of 1924—Sections 18 (a) and 25 (2)—Objection taken, at time of election, to a candidate on the ground that he is not 25 years of age—Objection overruled—Can validity of election be questioned by Qua Warranto **in a case where it can be proved that the candidate was under twenty-five years at the time of election.**

Held: *That the words "final and conclusive" in section* 25 (2) *of the Village Communities Ordinance No.* 9 *of* 1924 *preclude the validity of an election being questioned on any ground that was raised and decided at the election.*

IN *Re* WATTE WALAUWA HEEN BANDA *alias* ABEYRATNE ... IX. 49

Buddhist Temporalities Ordinance No. 19 of 1931—Election of Diyawadana Nilame—Person holding more than one office—Has he a vote in respect of each office.

APPLICATION BY NUGAWELA FOR WRIT OF QUO WARRANTO ON RATWATTE AND THE PUBLIC TRUSTEE ... IX. 66

Village Committee—Election of Chairman—Equality of votes—Decision by lot—Meaning of "lot"—Village Committee election rules.

Held: *That decision by the toss of a coin is decision by lot within the meaning of the election rule.*

APPLICATION BY MUTTUKUMARU TO SET ASIDE ELECTION OF S. B. AMUNUGAMA AS CHAIRMAN V. C. ... X. 49

Election of Chairman of Urban District Council—Want of quorum—Is election valid.

MARIKAR *vs.* PUNCHIHEWA ... X. 101

Application in respect of appointment of Revenue and Works Inspector of Urban District Council—Local Government Ordinance No. 11 of 1920—Sections 23 and 47—Does the writ lie to question the validity of such appointment.

Held: (1) *That the validity of the appointment of Revenue and Works Inspector of an Urban District Council cannot be questioned by an application for the Writ of* Quo Warranto.

(2) *That any appointment made under section* 47 *of the Local Government Ordinance is not an appointment of a permanent nature.*

DEEN *vs.* RAJAKULENDRAM AND OTHERS ... ... XII. 102

Does the writ lie in respect of the office of Secretary of Urban District Council—Are members of the Council necessary parties.

Held: (1) *That the Writ of* Quo Warranto *does not lie in respect of the office of Secretary of an Urban District Council.*

(2) *That the members of the Urban District Council are not necessary parties to an application for a Writ of* Quo Warranto *questioning the validity of an appointment made by the Council.*

SUMANASURIYA *vs.* FERNANDO AND OTHERS ... ... XII. 111

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Election of Village Committee Chairman—Equality of votes—Election by lot—Three of the voters found later to be disqualified to be elected or to be members of the Committee—Is election of Chairman valid—No evidence that they voted for the Chairman.

Held: (1) *That the election was valid.*

(2) *That the burden of proving that the votes of the disqualified persons were cast for the successful candidate lay on the applicant for the writ of* quo warranto.

WIJESINGHE *vs.* RAJAPAKSE ... XIV. 49

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

Held: *That the court will not ordinarily grant a writ of* Quo Warranto *to a relator*

(*a*) *who has acquiesced in the proceedings he seeks to question, or*

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

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

JAYASOORIYA *vs.* DE SILVA ... XVII. 111

Does writ lie to question a Municipal election on the ground of general undue influence or general bribery.

Held: *That a writ of* quo warranto *lies to question a Municipal election on the ground either of general undue influence or general bribery.*

PIYADASA *vs.* GOONESINGHE ... XX. 67

Urban Councils Ordinance No. 61 of 1939, sections 39, 248 and 255 (1) (d)—Resignation by Chairman—Can resignation be withdrawn once it is tendered.

Held: (1) *That the Chairman's letter was a resignation and that he was not entitled to withdraw it even with the consent of the Council.*

(2) *That the fixing of a term, at which an act such as a resignation is to take effect, does not make it any the less absolute though it defers the operaton of the act.*

(3) *That the quorum required for a meeting for the election of a Chairman under section* 33 (5) *of the Urban Councils Ordinance is the quorum fixed by by-law for the meeting of Council.*

DE SILVA *vs.* DE SILVA ... XXI. 41

Municipal Election—Election of candidate impugned on the ground that there was no real electing by the constituency at all owing to intimidation of voters.

Held: *That where the right of a voter to go to the poll without molestation or fear of molestation is violated the election is void on the ground that there has been no real electing by the constituency at all, as the constituency has not been allowed "a free and fair opportunity of electing the candidate which the majority might have preferred."*

PIYADASA *vs.* GOONESINGHE ... XXI. 85

Village Committee Election—Mistake regarding colour allotted to the candidate—Election held despite mistake—Is mistake sufficient to invalidate the election—Acquiescence—Is candidate taking part in election under protest disqualified from questioning its validity by quo warranto.

The petitioner was one of two candidates who sought election to Ward No. 2 of the Village Committee of Uda Pattu. On nomination day the petitioner was allotted the colour green and the respondent the colour yellow, but the presiding officer in error recorded that the petitioner had been allotted yellow and the respondent green. On the date of the poll the petitioner pointed out the mistake but the presiding officer preferred to go by his record. The petitioner took part in the election and was beaten as the change of colour upset his arrangements and his voters. He, thereupon, sought to have the election set aside. Objection was taken to the petitioner's application that he was disqualified by reason of acquiescence.

Held: (1) *That the election was void.*

(2) *That the petitioner was not disqualified from questioning the validity of the election.*

Per WIJEYEWARDENE, J.: "Now it is laid down in the Encyclopaedia of the Laws of England vol. 1 page 130 that:—

> "Acquiescence during the progress of the infringing act, or of steps necessarily leading to it, will bar a legal right only where it amounts to an encouragement to do the act or take the steps, in the belief or expectation that the right does not exist or has been abandoned ("standing by") or is such as to raise an inference that the parties have acted

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upon an agreement inconsistent with the right asserted."

KARUNARATNE BANDARA *vs.* ALADIN ... ... XXVII. 103

Disqualified person elected to village Committee—No objection raised on nomination day—When will writ be granted.

MENDIS APPU *vs.* HENDRICK SINGHO ... ... XXX. 7

Election as member of Municipal Council —Does writ lie when member not in office de facto.

Held: *That an application for a writ of* quo warranto *to set aside an election to a Municipal Council will not be granted when, at the time the rule* nisi *was issued, the person elected had not attended any meeting of the Council or done any other act showing that he had acted in or accepted the office of Municipal Councillor.*

DE ZOYSA *vs.* KULATILEKE ... XXX. 20

Village Committee election—Allegations of under influence and violation of secrecy of ballot at election—Validity of election.

DE SILVA *vs.* MARINGOMUWA XXXI. 52

Election of Village Committee Chairman —Disqualified member voting at election.

A person disqualified for election to a Village Committee was duly nominated and elected, without objection, as a member of the committee and took part in the election of the Chairman. The respondent was elected Chairman by a majority of one vote. It was submitted, but not proved, that the disqualified member voted for the respondent, that his vote should have been rejected, and that the presiding officer should have drawn lots as on an equality of votes.

Held: (1) *That the disqualified member was entitled to vote at all deliberations of the Committee and that the election of the respondent as Chairman was valid.*

(2) *That the petitioner had not discharged the burden of proving that the disqualified member voted for the respondent.*

FERNANDO *vs.* GOONESEKERE XXXIII. 41

Person elected as member of Village Committee while interested in contract with Committee—Village Communities Ordinance (Cap. 198) sections 13, 15 (3), 19 (a) and 36.

The respondent, who was the only candidate nominated for election to a certain ward of a Village Committee, was duly declared elected on nomination day. On this day he was interested in a contract with the Village Committee. Before the respondent's term of office commenced, he had executed the contract.

Held: (1) *That as the Village Committee is a corporation the respondent was interested in a contract with the Committee on nomination day and was disqualified for election:*

(2) *That the fact that the disqualification was not raised on nomination day does not preclude the making of an application in the Supreme Court.*

JAMES *vs.* FERNANDO ... XXXIV. 27

Election of Mayor of the Colombo Municipal Council—Name proposed by a member not qualified to sit or vote—Validity of Election—Municipal Councils Ordinance, No. 29 of 1947, sections 14 (3) and (52)—Local Authorities Elections Ordinance, No. 53 of 1946, section 69.

At the election of the Mayor of the Colombo Municipal Council, held under section 14 (3) of the Municipal Councils Ordinance, the name of the respondent, who won, was proposed by a person who was at that date not qualified to sit or vote, as he held a public office under the Crown. The validity of the election was challenged.

Held: (1) *The fact that the proposer was disqualified to sit and vote as councillor at the time of the election did not invalidate the respondent's election.*

(2) *That section* 14 (3) *of the Municipal Councils Ordinance is directory and a substantial compliance with its provisions is sufficient.*

(3) *That to avoid an election, the departure from the prescribed method of election must be so great that the tribunal must be satisfied as a matter of fact, that the election was not an election under the existing law.*

(4) *That words "public office" in section* 10 (1) (*d*) *of the Local Authorities Elections Ordinance, No.* 53 *of* 1946 *have a wide connotation and include the office of Parliamentary Secretary appointed under*

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the Ceylon (Constitution and Independence) Orders in Council, 1946 and 1947.

GIVENDRASINGHE *vs.* DE MEL XXXVIII. 1

Teacher employed in assisted school elected as member of Municipal Council—Salary payable by manager of school paid direct by Government—Is such teacher holder of public office within the meaning of section 10 (1) (d) of the Local Authorities Elections Ordinance, No. 53 of 1946.

Held: *That a teacher, employed in an assisted school and whose salary, payable by its Manager, is paid direct by the Government out of its annual grant to such school, does not, "hold a public office under the Crown in Ceylon" within the meaning of section 10 (1) (d) of the Local Authorities Elections Ordinance, No. 53 of 1946, and is accordingly not disqualified from sitting or voting as a member of any local authority.*

JAYASINGHE *vs.* SOYSA ... XLI. 26

Not granted if other remedy is available

SAMARAKOON *vs.* TIKIRI BANDA XLI. 53

Irregular election—Person questioning the election taking part and concurring therein

THASSIM *vs.* WIJEKULASURIYA AND OTHERS ... ... XLVII. 5

RAILWAYS ORDINANCE

A person cannot acquire a right of way across a railway line.

DE SILVA *vs.* THE ATTORNEY-GENERAL ... ... IV. 74

Liability for damage to goods—Limitation of liability by statute—Further limitation by contract—Meaning of "misconduct" by a servant of the railway.

SANGARALINGAM *vs.* THE ATTORNEY-GENERAL ... ... XLI. 100

Charge under section 12—Assault in train—Interfering with comfort of other passengers—Ingredients of the offence to be proved. No. 9 of 1902, section 72.

In order to convict a person under section 12 of the Railways Ordinance No. 9 of 1902 for wilfully interfering with the comfort of the other passengers it is necessary to prove that passengers other than the person assaulted were disturbed by the incident and also that the person assaulted was a "passenger".

PREMADASA *vs.* JANSEN ... XLVIII. 66

RATES AND RATING

Liability of Art Gallery to pay rates—Basis on which such a building can be assessed for rates.

MALALASEKERA *vs.* MUNICIPAL COUNCIL COLOMBO ... ... II. 456

How should house occupied by its owner be rated.

ABEYESEKERA *vs.* COLOMBO MUNICIPALITY ... ... XIX 121

Procedure to be followed in seizing and selling property for default of rates must be strictly observed.

HARAMANIS APPUHAMY *vs.* ASHIYA UMMA ... ... XXI. 130

Rates and taxes—Payment by mortgagee—How may such mortgagee recover amount so paid—Section 147 if the Municipal Councils Ordinance Chapter 193.

Held: (1) *That where a mortgagee pays rates due to a local authority in respect of premises mortgaged to him on behalf of the mortgagor an implied promise by the latter to pay the former cannot be inferred equitably in the absence of evidence that such payment was made under compulsion.*

(2) *That when a mortgagee pays rates due to a local authority after a warrant has been issued, he is entitled to add the amount so paid to his claim on the mortgage bond.*

(3) *That where such mortgagee omits to add the amount so paid when suing on the bond he is prevented by section 34 of the Civil Procedure Code from suing subsequently.*

MOTHA *vs.* FERNANDO ... XXII. 108

Rating—Residential premises—"Annual value"—Basis of assessment—Market value—Municipal Councils Ordinance No. 29 of 1947, section 325—Not affected by Rent Restriction Act 1948—Meaning of "aggrieved" in section 236 (1) of the Ordinance—Right to institute action.

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Held: (1) *That the proper test in estimating the annual value of rateable premises under section 325 of the Municipal Councils Ordinance (No. 29 of 1947) is what a man of ordinary prudence and foresight who had advised himself as to the state of the market existing at the relevant time would offer to pay as rental for the premises rather than fail to obtain the tenancy. The question whether such offer is reasonable or equitable is irrelevant.*

(2) *That the definition of "annual value" in the Ordinance is unaffected by the provisions of the Rent Restriction Act* 1948.

(3) *That a person is said to be "aggrieved" within the meaning of section* 236 (1) *of the Ordinance, if a person considers that he is aggrieved by the decision of the Municipal Council in assessing the premises.*

(4) *That where the owner of the premises is dissatisfied with the assessment made by the Municipal Council he may institute an action under section* 236 *of the Ordinance to have the annual value of the premises increased so as to exempt the premises from the operation of the Rent Restriction Act* 1948.

BANK OF CHETTINAD, LTD. *vs.* THE MUNICIPAL COUNCIL OF COLOMBO L. 107

RECIPROCAL ENFORCEMENT OF JUDGMENTS ORDINANCE

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

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

ALAGAPPA CHETTIAR AND ANOTHER *vs.* PALANIAPPA CHETTIAR ... XVII. 9

RECTIFICATION

See also under **DEED**

Rectification—Undivided shares—Sale in execution of mortgage decree—Conveyance by commissioner—Application by purchaser for rectification of conveyance by substituting divided lots allotted to mortgagor under final decree (subsequent to date of sale; in lieu of undivided shares—Endorsement on conveyance—Writ of delivery of possession—Should application be allowed.

At a sale in execution of a mortgage decree the appellant purchased on 14th October, 1939 an undivided 2/5th share of a certain land mortgaged by the respondents and obtained a Commissioner's conveyance dated 25th November, 1940. A decree partitioning the land in question was entered on the 29th August, 1940, whereby in lieu of the undivided 2/5 share lots 4 and 5 were allotted (subject to the mortgage) to the respondent. On 4th September, 1914 the appellant moved the District Court to endorse the Commissioner's conveyance by substituting the words "lots 4 and 5 according to final plan in case No. 11072 of the District Court of Jaffna" in place of "an undivided 2/5 share of the land" and for a writ to the Fiscal to deliver possession of the said lots 4 and 5.

This application was opposed by the respondents and was refused.

Held: *That the appellant is entitled to the relief he claims inasmuch as he purchased the undivided shares prior to the partition decree and the parties who oppose are the execution-debtors themselves.*

AIYADURAI *vs.* THURASINGHAM AND ANOTHER ... ... XXIV. 27

REGISTRATION OF DOCUMENTS

Civil Procedure Code § 238 and Ordinance No. 23 of 1927—Registration of seizure—Does it obtain priority over anterior deed.

Held: *That the registration under section* 9 *of Ordinance No.* 23 *of* 1927 *of a notice of Seizure does not give priority over a deed which is anterior in date and which has not been duly registered.*

NAGALINGAM *vs.* PULLE *et al* ... II. 333

A notice of seizure issued by the fiscal on a mandate of sequestration is an instrument affecting land within the meaning of § § 6, 7 and 8 of Ord: 23 of 1927

IBRAHIM *vs.* THE HONGKONG AND SHANGHAI BANKING CORPORATION II. 501

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Registration of deeds—Competing deeds —One registered in old folio, the other in a new folio having a cross-reference to the old folio—Section 15 of Ordinance No. 23 of 1927.

Held: *That a deed registered in a new folio containing a cross-reference to the folio in which instruments relating to the same land were previously registered can in law be regarded as duly registered.*

CHELLIAH PILLAI *vs.* DEVADASAN AND OTHERS ... ... VII. 104

Registration of Documents Ordinance No. 23 of 1927—Section 12 (1)—Partition action —Registration of lis pendens **in wrong folio —Issue of summons—Rectification of error by registration in proper folio—Issue of fresh summons thereafter—Effect of non-compliance with the terms of section 12 (1).**

Held: (1) *That the objection is unsustainable.*

(2) *That there is no provision in law which declares that a partition action should be dismissed if the provisions of section* 12 (1) *of the Registration of Documents Ordinance are not complied with.*

(3) *That where the* lis pendens *in a partition action is by mistake registered in the wrong folio and summons have been issued the plaintiff can, on discovering the error, rectify it by registering in the proper folio and obtaining fresh summons.*

THOCHINA *vs.* DANIEL ... IX. 9

Registration of Documents Ordinance sections 14 and 15—Regulations 13 and 14 of the regulations made under section 49—Registration of an instrument affecting a divided lot of a land when there is an earlier registration affecting the entire land.

Held: (1) *That the joint effect of regulation* 14 *and section* 15 *of the Registration of Documents Ordinance is to require the registrar to register an instrument affecting a divided lot of a land in a separate folio and to connect by means of cross references the new folio and the folio in which instruments affecting the entire land have been registered.*

(2) *That the description required by section* 14 (2) *of the Registration of Documents Ordinance should be given in the deed.*

(3) *That the sanction of the Registrar-General under section* 14 (5) *of the Registration of Documents Ordinance has the effect of making registrable an instrument which would otherwise have been non-registrable; but it does not have the effect of giving an instrument which is registered in the wrong folio, though with such sanction, the benefits of prior registration.*

RANMENIKA *vs.* APPUHAMY ... XX. 28

Registration of Documents Ordinance section 7—Adverse interest—Has a transferee of a land an interest adverse to a lessee whose deed is unregistered though prior in date to the transfer—Prescription—Can a lessee acquire a prescriptive right to the remaining term of his lease.

Held: (1) *That a transferee of a land has an "adverse interest" to a lessee who claims a right to retain his lease against the transferee under a prior deed of lease although the lessee's deed is unregistered.*

(2) *That a lessee who has been in possession of a land for the prescriptive period can prove that he is entitled to the remainder of the lease on the ground of prescription.*

RANHAMY *vs.* KIRA ... ... XXI. 71

Pledger and pledgee—Registration of Documents Ordinance section 18 (a)—Meaning of the words "ostensibly and bona fide **in such custody" in that section—Scope of sections 17 and 18.**

Held: (1) *That the words "ostensibly and* bona fide *in such custody" in section* 18 (*a*) *of the Registration of Documents Ordinance means that the possession of the person possessing should be not only* bona fide *but should be of such a nature as to make it apparent to others that such person was in possession.*

(2) *That section* 18 *of the Registration of Documents Ordinance refers to documents and transactions.*

(3) *That the words "bill of sale" in section* 17 *of the Registration of Documents Ordinance is not confined to written instruments.*

INDIAN BANK LTD. *vs.* CHARTERED BANK AND THE EXECUTORS OF THE ESTATE OF KAPADIA (DECEASED) ... XXII. 43

Where the plaint in a mortgage action has been registered the registration of the decree

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is unnecessary and the purchaser at a subsequent partition sale can claim no priority by virtue of the registration of his certificate of sale.

GUNARATNE *vs.* PERERA AND ANOTHER ... ... XXIV. 11

Roman-Dutch Law—Exceptio doli—Land transferred a second time in fraud of prior transferee—Action by subsequent transferee claiming property—Can prior transferee who is in possession raise defence of fraud without making transferor a party to the action—Is priority of deed in favour of subsequent transferee defeated by fraud—Section 7 (2) Registration of Documents Ordinance (Cap. 101).

Where X sold a land to the defendant (who entered into possession) prior to the publication of a settlement order declaring her (X) entitled to the land, and later, after the settlement order, re-sold the same land to the plaintiff, who was aware of the earlier conveyance:—

Held: (1) *That the defendant could successfully raise the plea of* exceptio doli *(fraud) against the plaintiff.*

(2) *That it was not necessary to make X a party to the action if it could be shown that the plaintiff had acted fraudulently.*

(3) *That as the transaction between X and the plaintiff was a sham the priority obtained by the registration of the deed in the plaintiff's favour was defeated.*

AMARASEKERA APPUHAMY *vs.* MARY NONA ... ... XXXI. 106

Registration—Kandyan gift for securing succour and assistance—Revocation of gift as no succour and assistance received—Subsequent gift subject to condition that property should devolve on certain named persons if donee had no legitmate children—Rights of purchaser of title under 1st gift contested by legitimate children of 2nd donee—Rights of competing claimants—

HOLLOWAY AND ANOTHER *vs.* KIRIHAMY AND OTHERS ... ... XXV. 52

Registration of Documents Ordinance sections 6, 7 and 8—Prior registration of later deed—Decree in action under section 247 Civil Procedure Code—Is it an "instrument affecting land."

The plaintiff claimed a land on a chain of deeds dating from 1931. After the death of the original owner, his heirs, in 1942, transferred the land to the 2nd defendant. In an action under section 247 of the Civil Procedure Code, the plaintiff was declared entitled to the land. The plaintiff's deeds and the decree in the 247 action were not registered in the correct folio, whereas the 2nd defendant's deed was correctly registered.

Held: (1) *That the deeds in favour of the plaintiff and the 2nd defendant proceeded from the same source;*

(2) *That the deeds in favour of the plaintiff were void against the subsequent deed in favour of the 2nd defendant by reason of prior registration;*

(3) *That the 2nd defendant by his deed claimed an adverse interest on valuable consideration to the decree in the 247 action.*

(4) *That such decree was a registrable document under the Registration of Documents Ordinance and lost priority by non-registration.*

EBERT SILVA *vs.* WIJESEKERA XXXII. 1

Two consecutive transfers of same land—Registration of deeds by purchasers in different folios—Misdescription of situation of land by earlier purchaser, but registered in folio dealing with previous transactions—Priority.

A person made two conveyances of the same land. The earlier purchaser registered the deed in the folio dealing with previous transactions in this land, and describing its situation as Inguruwatte. The subsequent purchaser registered the deed in a different folio as being situated at Uda Inguruwatte, which is the correct situation, but without reference to the folio indicating the previous transactions.

Held: *That the later purchaser does not gain priority as his deed was not duly registered.*

STEPHEN DE SILVA *vs.* DEWAYALAGE SILVA AND ANOTHER ... ... XXXV. 58

Registration of Documents Ordinance

Sections 17 and 18—Donation inter vivos **—Acceptance by donee—Death of donor—**

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Donee's action to recover gift from donor's estate—Is donee's right a "bill of sale."

PUBLIC TRUSTEE *vs.* UDURUWANA XLII. 17

Registration of Documents Ordinance No. 23 of 1927

Fraud and collusion as contemplated in section 7 (2).

NAGANATHER ARUMUGAM *et al vs.* E. ARUMUGAM ... ... XLV. 70

Registration—Document purporting to be a record of a sale of movable property—Document stamped as a receipt—Title to goods passing on payment—Delivery—"Bill of Sale"—Does it include verbal transactions?—Is registration necessary?—Registration of Documents Ordinance (Cap. 101) sections 17 18, as amended by Ordinance No. 13 of 1947.

Held: (1) *That a document purporting to be a record of a sale and delivery of movable property and stamped as a receipt, whereby it was not intended that title to the property should pass by virtue of the document itself, is not a "Bill of Sale" within the meaning of the Registration of Documents Ordinance (Cap.* 101) *as amended by Ordinance No.* 13 *of* 1947.

(2) *That the document was not a void or voidable "Bill of Sale" by reason of non-compliance with the provisions of the Registration of Documents Ordinance (Cap.* 101) *as amended by Ordinance No.* 13 *of* 1947.

(3) *That the term "Bill of Sale" cannot be extended to include a verbal transaction of sale which took place contemporaneously with the execution of a document which did not, and was not intended to affect the legal rights of parties.*

Per GRATIAEN, J.—"As Lord Esher has pointed out in *Johnson vs. Diprose* (1893) 1. Q. B. 512, a "Bill of Sale", in the sense in which that term is commonly understood, is "a document given in respect of a sale of chattels, which is necessary in cases where possession of the chattels intended to be sold is not given, and the object is to pass the property in the goods without possession of them being given.

DAVID *vs.* MENDIS *et al* ... XLVI. 88

Registration of Documents—Sale of land subject to usufructuary mortgage—Subsequent sale to another—Prior registration of later deed—Possession by vendee on earlier deed after discharging of mortgage—Possession of usufructuary mortgagee—To whose benefit it enures—Prescription—Registration of Documents Ordinance No. 23 of 1927. Section 7 (1) and (4).

A property subject to a usufructuary mortgage was sold to the defendant on the 9th of August, 1927, and again to the plaintiff on the 10th of August, 1927. The plaintiff's deed P1 was registered prior to the defendant's deed 1D1, but the plaintiff never had any possession of the land. The usufructuary mortgagee, remained in possession until 1939 when the defendant redeemed the mortgage and went into possession. In 1947, the plaintiff asked for a declaration of title to the land against the defendant who contended that he had title by long prescriptive possession which had commenced on a valid title derived by purchase.

Held: (1) *That the defendant was entitled to the property by prescription as the possession of the usufructuary mortgagee must be presumed to enure to the benefit of the original mortgagor and thereafter to the person to whom the contractual rights of such mortgagor have at any relevant point of time been transmitted or ceded.*

(2) *The combined effect of section* 7 (1) *and* (4) *makes it clear that registration by itself confers no validity on an instrument unless and until a claim is based upon it.*

ALITAMBY *vs.* BANDA ... XLVII. 97

Lis Pendens **registered in wrong folio—Effect of final decree entered in partition case.**

KANAGASABAI AND ANOTHER *vs.* VELUPILLAI ... ... XLVIII. 45

REGISTRATION ORDINANCE No. 14 of 1891

Section 17 of the Registration Ordinance No. 14 of 1891—Prior Registration—Fraud and collusion—Guardian and Ward—Advantage obtained by guardian of minor without disclosing his fiduciary relationship—To whose benefit does it enure—Trust—Extent to which the English-Law of Trusts apply—Section 118 of Ordinance No. 9 of 1917.

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Held: (1) *That mere notice of a prior unregistered instrument is not itself sufficient evidence of fraud so as to deprive a person registering of the priority conferred by law.*

(2) *That the words "fraud or collusion" in section* 17 *of Ordinance No.* 14 *of* 1891 *import serious moral blame and that mere construcitve fraud resulting from notice would not justify a finding of "fraud or collusion."*

(3) *That a person who conceals the fact that a minor is the beneficial owner of any right and obtains an advantage for himself must be deemed to be constructive trustee for the minor.*

(4) *That it is the duty of a person in fiduciary position to protect the interests of the beneficiary and take such steps as are necessary to prevent the destruction of the interests of the beneficiary.*

ABEYSUNDERA *vs.* THE CEYLON EXPORTS LTD. AND ANOTHER ... VI. 69

REI VINDICATIO

Action for Declaration of Title—Prayer for damages, costs, and such other and further relief as to this court may seem meet—No prayer for ejectment—Decree entered in terms of prayer—Application made later for notice on defendants to show cause why they should not be ejected and why the decree should not be amended by entering an order for ejectment—Civil Procedure Code Section 189.

Held: (1) *That where a person obtains a declaration of title to land without an order for ejectment, he is not entitled to a writ for delivery of possession.*

(2) *That a decree cannot be altered except in accordance with section* 189 *of the Civil Procedure Code.*

(3) *That where a person suing for declaration of title omits to ask for and obtain a decree for ejectment he cannot obtain a decree for ejectment by amendment of the original decree.*

WANIGASEKERA AND OTHERS *vs.* KIRIHAMY AND ANOTHER ... VII. 134

Rei vindicatio **action—And for** restitutio in integrum**—Transfer of land by married Kandyan woman under 21 years of age at date of transfer—Circumstances in which transfer will be set aside.**

SIMAN NAIDE *vs.* JANE NONA XXX. 84

Action rei vindicatio**—Burden of proving plaintiff's title—Misdirection.**

Held: (1) *That in an action for declaration of title it is for the plaintiff to establish his title to the land he claims and not for the defendant to show that the plaintiff has no title to it.*

(2) *That it is a serious misdirection on the part of a Judge to overlook this rule.*

MUTHUSAMY *vs.* SENEVIRATNE XXXI. 91

Plaintiff claiming title on deed executed through attorney—Power of attorney not registered—Need to prove due execution for establishing that attorney was lawfully authorised agent for executing valid conveyance —Proving signature by person acquainted with the handwritng of a person—Evidence Ordinance, section 47—Powers of Attorney Ordinance, section 8.

The plaintiffs sued the defendants for a declaration of title to a land claiming title on P3 from K. who is alleged to have purchased it from R. V. on P1. The defendants (of whom the 1st was a son of R.V.) put the plaintiffs to the proof of execution of deeds P1 and P3.

Plaintiff in her evidence stated that P1 was executed by R. V., living in Benares, through his attorney S. S. and produced the power of attorney P6 in favour of S. S. which had not been duly registered. Plaintiff failed to adduce satisfactory proof of the due execution of P6.

Held: (1) *That in the circumstances the plaintiff could not be said to have proved the due execution of P6.*

(2) *That a power of attorney not registered under the Powers of Attorney Ordinance is not entitled to the presumption under section* 8 *of that Ordinance.*

NADARAJAH *et. al. vs.* THILLAIRAJESWARI *et al.* ... ... XXXVII. 60

Action—Prayer for restoration to possession—Allegation of ouster—Denial by defendant—Failure to frame issue or to lead evidence of ouster—Evidence Ordinance, section 110—Presumption—Burden of proof.

Held: (1) *That in an action for declaration of title and for restoration to possession of land from which a plaintiff alleges he has been forcibly ousted, the burden of proving ouster is on the plaintiff.*

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(2) *That where the plaintiff fails to prove ouster, the defendant's possession must be assumed to be lawful and the defendant is entitled to rely on the presumption created by section* 110 *of the Evidence Ordinance.*

(3) *That possession for the purpose of section* 110 *of the Evidence Ordinance must be possession obtained neither by force nor by fraud.*

KATHIRAMATHAMBY *vs.* ARUMUGAM ... ... XXXVIII. 27

Plaintiff claiming title through defendant's vendee—Defendant remaining in possession of land after sale for over ten years—Plea that conveyance to plaintiff's predecessor was in fact a mortgage—Evidence of repayment of substantial part of mortgage debt by defendant—Does this amount to an acknowledgment of vendees' rights within the meaning of section 3 of the Prescription Ordinance.

By Deed P1 of 1919 the defendant transferred a land to C whose title devolved on the plaintiff on P2 of 1931. Despite P1, the defendant remained in possession of the land and the plaintiff sued him for a declaration of title alleging that defendant's possession "was in the capacity of watcher or caretaker" under C.

The defendant pleaded (*a*) that P1 was intended to be a security for a loan of a sum of money advanced to him by C; (*b*) that he liquidated a substantial part of it before the death of C in 1920; and (*c*) that he had acquired a prescriptive title to the land.

There was no evidence led by plaintiff to prove that defendant's possession was permissive. However, the learned District Judge held that it was permissive, basing his finding on the evidence of the defendant that he paid back to C a large portion of his loan, which he considered as a fact from which an "acknowledgment" by the defendant of C's right to possession of the land could fairly and naturally be inferred, in terms of section 3 of the Prescription Ordinance.

Held: *That, if P1 was nothing more than a mortgage, possession was rightly in the defendant in spite of P1 and the repayment of a part of the loan could not be regarded as an acknowledgment of a non-existent right in C to possess the land.*

DON SIMON *alias* SINGHA APPU *vs.* FERNANDO ... ... XXXVIII. 37

Rei Vindicatio **Action—Answer alleging** inter alia **that plaintiff's predecessor held land in trust for defendant—Defendant in possession—Claim on prescriptive title—Possession as agent—When prescription begins to run—Burden of proof.**

Where in an action for declaration of title to a land the defendant who was in possession alleged

(*a*) that the plaintiff's predecessor in title held the property for his (defendant's) benefit.

(*b*) that the (defendant) had acquired a prescriptive title.

(*c*) that the plaintiff was not a *bona fide* purchaser for value.

(*d*) that in any event he (defendant) was entitled to compensation and to a *jus retentionis.*

Held: *That the learned District Judge was right in calling upon the defendant to begin as legal title was in plaintiff.*

That if a person goes into possession of land as an agent for another, time does not begin to run until he has made it manifest that he is holding adversely to his principal.

K. M. SIYANERIS *vs.* J. A. UDENIS DE SILVA ... ... XLIV. 66

Owner of immovable property in Ceylon dying leaving intestate heirs in India—All heirs except one absent beyond the seas since death of deceased—Appointment of administrator after thirteen years—Third party and successors in title possessing for over ten years—Action rei vindicatio **by administrator—Defence of prescription title—Can defence succeed.**

CHELLIAH *vs.* WIJENATHAN AND OTHERS ... ... XLVI. 27

Declaration of title—Plea of jus tertii **by defendant—Third party's claim dismissed in previous action—Does it operate as a bar to defendants' plea.**

DADALLE DHARMALANKARA THERO *vs.* MARIKKAR ... ... XLVII. 12

Landlord and tenant—Defendants sub-tenants—Consent decree between plaintiff landlord and tenant to surrender possession

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of premises occupied by sub-tenants—Acceptance of rents by plaintiff from tenant subsequent to consent decree—Rei vindicatio action by plaintiff against defendants—Can it succeed.

JUSTIN FERNANDO AND ANOTHER *vs.* ABDUL RAHIMAN ... XLIX. 94

Cause of action, falsely asserting title and disturbing possession—Admission by plaintiff at trial that he is in exclusive possession of property in dispute—Dismissal of action on ground plaintiff has no cause of action—Plaintiff's right to maintain action—Civil Procedure Code, section 5.

The plaintiff prayed for a declaration of title to a property against the defendants who, he alleged, were falsely asserting title to it and were disturbing his possession to his damage of Rs. 100/- per annum. In his evidence at the trial the plaintiff admitted that notwithstanding the dispute as to title he continued to possess the property and enjoy it exclusively. In view of this admission the defendants raised an additional issue to the effect that plaintiff had no cause of action against them and the learned District Judge dismissed the plaintiff's action.

Held: *That the dismissal of the action was premature. The plaintiff's evidence destroys his claim to damages or to an order for ejectment, but he is entitled to proceed with his claim for a declaration of his rights of ownership to the property in dispute.*

Per GRATIAEN, J.—The Civil Procedure Code, even in its present form, does not deny to litigants the benefit of declaratory decrees in certain circumstances for the purpose of settling concrete disputes which have arisen between them—*Hewavitarane vs. Chandrawathie* (1951) 53 N.L.R. 169 and *Naganathan vs. Velauthan et al.* (1953) 50 C.L.W. 13. Where an owner of property complains only of a "bare verbal denial of his rights", a Court may very properly refuse to entertain a declaratory action if no concrete dispute relating to the conflicting interests of the parties can be said to have actually arisen. In the present case, however, the plaintiffs' evidence does disclose a cause of action within the strict meaning of section 5 of the Code. The law does not compel an owner to postpone his claim to relief until the dispute as to title has led to physical dispossession (perhaps by violence).

A GASPAR SELVAM *vs.* NAGENDIRAR KUDDIPILLAI et al. ... L. 24

RENT RESTRICTION

Rent Restriction Ordinance No. 60 of 1942 section 8—Meaning of words "reasonably required" in section 8.

Held: (1) *That a landlord cannot seek to have a tenant ejected under proviso (c) to section 8 of the Rent Restriction Ordinance No. 60 of 1942 by merely establishing a good reason, so far as he himself is concerned, for requiring the premises.*

(2) *That under proviso (c) of section 8 of the Rent Restriction Ordinance No. 60 of 1942, the court has to be satisfied, after taking into consideration other matters such as alternative accommodation at the disposal of the landlord and the position of the tenant, that the requirement is a reasonable one.*

RAHEEM *vs.* JAYAWARDENE ... XXVII. 73

Rent Restriction Ordinance No. 60 of 1942—Section 8—Scope of expression "reasonably required."

Held: (1) *That even though a landlord may in good faith or with the best of motives require a house let by him for occupation, it does not necessarily follow that the landlord will come within proviso (c) to section 8 of the Rent Restriction Ordinance No. 60 of 1942.*

(2) *That the difficulty of obtaining suitable alternative accommodation is a circumstance that the court may take into account in considering the question of reasonableness.*

ABEYWARDENE *vs.* NICHOLEE XXVII. 101

Rent Restriction Ordinance No. 60 of 1942 section 8—Is there a right of appeal from the decision of the Court of Requests under section 8 proviso (a) to (d).

Held: *That there is no right of appeal to the Supreme Court from the decision of the Court of Requests under section 8 proviso (a) to (d) of the Rent Restriction Ordinance No. 60 of 1942.*

MOHIDEEN *vs.* GUNAPALA ... XXVIII. 1

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Rent Restriction Ordinance No. 60 of 1942—Trial of preliminary issues arising under section 8 proviso (a) to (d) along with the main issues in the action for ejectment—Is there a right of appeal from the decision of the court—Procedure to be followed in actions for rent and ejectment.

Held: (1) *That before an action for rent and ejectment can be tried the court must form the opinion that there exists one at least of the conditions specified in section 8 proviso (a) to (d) of the Rent Restriction Ordinance No. 60 of 1942.*

(2) *That the issues arising under the proviso to section 8 of the Rent Restriction Ordinance should be tried as preliminary issues and till those issues are decided the court is not entitled to proceed to try the case on the main issues.*

(3) *That the absence of a right of appeal from the decision of the court under the proviso to section 8 of the Rent Restriction Ordinance No. 60 of 1942 does not affect the right of a party aggrieved by the decision in an action in ejectment to appeal from the final judgment of the court on questions other than those specified in the proviso abovementioned.*

JAN SINGHO *vs.* ROSELINE NONA XXVIII. 48

Rent Restriction Ordinance No. 60 of 1942—Action for ejectment—To what extent should the court take into consideration the position of the tenant.

Held: (1) *That in deciding whether a house is reasonably required for the occupation of the landlord within the meaning of the Rent Restriction Ordinance the court should take into consideration not only the position of the landlord but also that of the tenant.*

(2) *That where the hardship to either party appears to overbalance that of the other, the landlord should succeed by virtue of his ownership.*

RAMEN *vs.* PERERA ... XXVIII. 110

Rent Restriction Ordinance No. 60 of 1942 section 8—Decision on matter relating to proviso (a) to (d)—Is there a right of appeal from such decision.

Held: *That an appeal lies from a decision on any of the matters (a) to (d) contained in the proviso to section 8 of the Rent Restriction Ordinance.*

Per KEUNEMAN, J.: "On the footing of these cases it is argued that, even if a new jurisdiction was created by section 8 of the Rent Restriction Ordinance, that jurisdiction was conferred upon the ordinary courts, *viz.* the Courts of Requests and District Courts—and that the rights of appeal from judgments of those courts were not taken away. This is a forcible argument and, I think, it is correct."

UMMUL MAROOFA *vs.* LEAFF ... XXIX. 1

Rent Restriction Ordinance No. 60 of 1942—Action for ejectment instituted without consent of Assessment Board—No plea bringing action within any of the provisos to section 8—Jurisdiction of Court.

A decree for ejectment was entered by the Court in the absence of the defendant who later appeared and consented to the decree. She then challenged the jurisdiction of the Court to entertain the action as the plaintiff had neither obtained the consent of the Assessment Board nor brought himself within any of the provisos to section 8 of the Ordinance.

Held: *That as the Court had jurisdiction over the subject-matter of the action, the defect of not complying with the procedure prescribed as essential for the exercise of the jurisdiction was one which could be waived.*

BAVA *vs.* THOMAS ... ... XXX. 15

Rent Restriction Ordinance No. 60 of 1942—Application of section 8 proviso (c).

Held: *That the word "his" in proviso (c) to section 8 of the Rent Restriction Ordinance refers to the landlord only and not to both the landlord and a member of the family.*

ABEYWARDENE *vs.* AMARADASA XXX. 55

Writ of Certiorari—Courts Ordinance section 42—Rent Restriction Ordinance No. 60 of 1942, section 6 (b)—Powers and jurisdiction of Assessment Board—Interpretation of Statutes—Can reference be made to speeches made in the State Council.

Held: (1) *That section 6 (b) of the Rent Restriction Ordinance state in the clearest possible language that a landlord is entitled to raise the rents according to a certain*

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formula whenever there is an increase in the amount paid by the landlord as rates, and there is nothing in that section or even in the whole Ordinance to indicate that the Legislature contemplated only an increase of the rates occasioned by an enhancement of the annual value and not by raising of the rate percentage.

(2) *That the Assessment Board has no jurisdiction to interfere with an enhancement of rent under section* 6 (*b*) *of the Rent Restriction Ordinance No.* 60 *of* 1942.

(3) *That the plain meaning of section* 6 (*b*) *should be given to it and it should not be interpreted in a different way in view of certain speeches made in the State Council.*

DE PINTO *vs.* THE RENT ASSESSMENT BOARD ... ... XXXI. 12

Landlord and Tenant—Action for ejectment—Premises reasonably required for plaintiff's occupation—Hardship to defendant—Rent Restriction Ordinance No. 60 of 1942.

Plaintiff, a widow with three boys and two girls living with her at Ganewatte, sued the defendant, a tenant under her lessee to whom she had leased the premises in question for eight years. The plaintiff wanted the premises, to reside in Colombo for the purpose of educating her children, and she obtained a surrender of the remaining period of the lease from her lessee on payment to him of a sum of Rs. 255.

The defendant contested the case on the ground that he has a large family and has not been able to secure other accommodation for himself.

Held: *That in the circumstances the premises were reasonably required for the plaintiff's use and occupation.*

EGGIE NONA *vs.* DAVID ... XXXI. 110

Nuisance—Basis of action for ejectment—Tenant a repairer of radio sets tuning in wireless sets in the course of repairs till late at night—Interference with comfort and convenience of persons occupying adjoining premises—Rent Restriction Ordinance, section 8 proviso (c).

The plaintiff sued the defendant for ejectment from a room which the former had let to the latter. The basis of the action was that the defendant caused damage to the premises and annoyance to plaintiff. The room adjoined the premises in which the plaintiff was living. It was in evidence that the defendant was a radio mechanic, who brought home radio sets for repair at night when he was off-duty; and that in the course of effecting such repairs the defendant created noise practically every night by tuning-in wireless sets till late in the night.

Held: *That the noise complained of did cause substantial interference with the plaintiff's comfort and convenience and that it amounted to a nuisance within the meaning of section* 8 *proviso* (*c*) *of Ordinance No.* 60 *of* 1942.

THAMOTHERAMPILLAI *vs.* GOVINDASAMY ... ... XXXII. 39

Premises required for landlord's occupation—Written agreement by tenant to pay rental above standard rent—Can landlord accept such rent under section 17 of the Ordinance—Calculation of standard rent where landlord paid rates—Rent overpaid in landlord's hand's—Does it reduce tenant's liability.

Held: (1) *That section* 17 *of the Rent Restriction Ordinance does not permit a landlord to accept a rental above the standard rent, on the ground that such rental was in accordance with a written agreement between him and the tenant.*

(2) *That where the landlord paid the rates, the standard rent has to be determined in the manner provided by section* 5 (1) (*b*) *that is to say, by adding the annual value and the amount of rates leviable for the year and dividing the result by twelve.*

(3) *That the overpaid amounts in the hands of a landlord overpaid as rent, and not for any other purpose, extinguished* pro tanto *by operation of law the rent as it fell due.*

WIJEMANNE *vs.* FERNANDO XXXII. 28

Lessor and lessee—Is the lessee protected by the provisions of the Rent Restriction Ordinance after expiry of lease.

Held: *That where a person enters into a lease for a definite term, the relationship of landlord and tenant expires at the end of the term and, therefore, he is not entitled to*

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protection under the Rent Restriction Ordinance.

ASIA UMMA AND FOUR OTHERS *vs.* CADER LEBBE ... ... XXXII. 56

Notarial lease—Expiry of term of lease—Right of lessee to plead Rent Restriction Ordinance.

Held: *That the Rent Restriction Ordinance applies to premises leased as well as to premises held on a tenancy from month to month and that a "tenant" can plead the benefit of section 8 where the premises in question were occupied under a lease which has terminated by effluxion of time.*

GUNARATNE *vs.* THELENIS *et al* XXXIII. 19

Standard rent—Payment of rent in excess of standard rent—Judicial notice of Proclamation bringing Ordinance into operation.

The plaintiff sued the defenant for rent, ejectment and damages for overholding after the tenancy had been determined after notice. It was found that the defendant had tendered the rent to the plaintiff's proctor who had refused to accept the same. The defendant counter-claimed that the rent payable, which had been agreed upon between the parties before the enactment of the Ordinance, was in excess of the standard rent chargeable under the Ordinance. He, therefore, asked for a refund of the excess. No evidence was led as to the amount payable as rates on the premises in question or as to the date on which the Ordinance came into operation within the area.

Held: (1) *That judicial notice will be taken of a Proclamation bringing the Ordinance into operation.*

(2) *That, in view of the tender by the defendant, the plaintiff's case must fail.*

(3) *That the rates payable must be considered in assessing the "standard rent."*

(4) *That, after the Ordinance came into operation within the area, the plaintiff was prohibited from receiving rent in excess of the standard rent and that any such excess received by him must be refunded to the defendant.*

DE SILVA *vs.* SIRIWARDANE XXXIII. 35

Section 8, proviso (c)—Action by sub-lessee to eject tenant—Tenancy commenced under owner—Payment of rent to lessee—Is lessee entitled to eject on the ground of premises reasonably required for lessees' occupation—Rights of a lessee.

The plaintiff, a sub-lessee, sued the defendant, who had been a tenant under the owner prior to the lease for ejectment on the ground that the premises were reasonably required for his personal occupation and to commence and carry on a trade. The defendant had paid rent to the plaintiff prior to the action.

Held: (1) *That the plaintiff is not entitled to eject the defendant inasmuch as the plaintiff took the lease with notice of the occupation of the prior lessee.*

(2) *That for the purpose of section 8 proviso (c) of the Rent Restriction Ordinance "landlord" must be defined as one who is entitled not only to receive rent, but as one who has a* jus in re *in regard to the premises.*

(3) *That where the ordinary meaning and grammatical construction of the language of a statute leads to a manifest contradiction of the purpose of the enactment, construction may be put upon it which modifies the meaning of the words.*

SAHUL HAMEED *vs.* ANNAMALAY XXXIV. 29

Writ—Certiorari or Prohibition—Application to Rent Assessment Board for authority to institute proceedings for eviction of tenant—Denial that applicant was landlord—Has the Board authority to grant application—Rent Restriction Ordinance (Cap. 60) of 1942, Sections 8 and 16 (1)—Meaning of the term "Landlord"—Order of Rent Assessment Board authorising institution of proceedings.

The Rent Assessment Board made an order under section 8 of the Rent Restriction Ordinance authorising the institution of eviction proceedings against a tenant on the application of a person, who the tenant alleged is not his landlord. The tenant applied for a writ of *Certiorari* to quash the order of the Board.

Held: (1) *That in section 8 of the Ordinance the words "on the application of a landlord" means "on the application of the person claiming to be landlord."*

(2) *That in granting an order to such person, the Board has acted within its powers.*

(3) *That such a decision by the Board did not preclude the trial Court from*

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determining whether a person instituting such proceedings is a landlord or not.

ZACKERIYA AND ANOTHER *vs.* CROOS RAJ CHANDRA AND OTHERS ... XXXV. 71

Rent Restriction Ordinance No. 60 of 1942, section 8 (c) Premises required by landlord for his occupation—Ejectment of tenant—If Court satisfied that premises required for his use should Court take into account the tenant's difficulties of finding accommodation.

Held: *That in an action for the ejectment of a tenant, once the Court is satisfied that the premises are reasonably required by the landlord for any of the purposes mentioned in section 8 (c) of the Rent Restriction Ordinance, the Court is not entitled to take into account the tenant's difficulties of finding accommodation.*

DAVID *vs.* FERNANDO ... XXXVI. 93

Rent Restriction Ordinance, section 8 (1) (c)—Interpretation of—Premises reasonably required for the occupation of the landlord as his residence—What the landlord has to prove—Question of alternative accommodation to tenant—Does our law require a Court to take such question into consideration—Landlord, owner of several houses occupied by tenants—His right to elect the house he likes.

Plaintiff, who is the owner of several houses in Dehiwala, brought this action against one of his tenants for ejectment on the ground that the house occupied by this tenant was reasonably required for the plaintiff's residence.

It was in evidence:

(*a*) that the plaintiff was a Government employee at the Colombo Customs;

(*b*) that he was married and had six children some of whom were attending a school in the vicinity of the house in question;

(*c*) that he had sued another of his tenants for ejectment unsucessfully;

(*d*) that he had been served with notice to quit the house he was occupying at the time;

(*e*) that his wife's ill-health made it necessary to live in a house close to the sea;

(*f*) that he had to sell his car as he had no garage in the house he was living;

(*g*) that the house which the defendant was in occupation was roomy and had ceiling,lights,garage and answered to all his needs;

(*h*) that the defendant, a bachelor, was employed in the Food Control Department and lived in the house in question with his mother, his elder brother, a nephew and niece.

The learned Commissioner dismissed the plaintiff's action on the ground that the premises were not reasonably required by the plaintiff for his occupation as a residence, and the plaintiff appealed.

Held: (1) *That on the evidence, the plaintiff had made out a case for an order of ejectment in his favour.*

(2) *That section 8 (c) of the Rent Restriction Ordinance requires the Court to form an opinion whether the premises are reasonably required for the occupation as a residence for the landlord. The tenant's difficulties do not come into the matter at all.*

ATUKORALE *vs.* NAVARATNAM XXXVII. 73

Rent Restriction Ordinance, No. 60 of 1942 Section 8 (c)—Premises "reasonably required" for the landlord's occupation or business purposes—Should a Court take into consideration the tenants' position in considering the reasonableness of the requirement.

Held: (1) *That in deciding whether premises occupied by a tenant are "reasonably required" for the occupation or business purposes of the landlord within the meaning of section 8 (c) of the Rent Restriction Ordinance, a Court should take into account the tenant's position and any other relevant factor.*

(2) *That alternative accommodation is a relevant factor, in determining whether the requirement of the premises for the landlord's purpose is reasonable.*

GUNASENA *vs.* SANGARALINGAM PILLAI AND CO. ... ... XXXVII. 91

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Landlord and Tenant—Contract of tenancy in writing—Clause to the effect that tenant gave notice that he would quit and "deliver quiet and vacant possession" on specified date—Does such notice amount to a notice to quit by the tenant under Section 8 (b) of the Rent Restriction Ordinance, No. 60 of 1942.

A tenancy agreement in writing given at the request of the landlord contained *inter alia* the following clause.

'And I do hereby give notice that I will quit on the 31-10-47 and deliver or cause to be delivered quiet and vacant possession as aforesaid and the notice hereby given is deemed to be a notice under section 8 (*b*) of the Rent Restriction Ordinance No. 60 of 1942 now in force.'

Held: *That the notice to quit contained in the agreement cannot be regarded as a notice to quit by the tenant within the meaning of section* 8 (*b*) *of the Rent Restriction Ordinance No.* 60 *of* 1942.

ALIKANU *vs.* MARIKAR ... XXXVIII. 90

No. 60 of 1942—Section 8 (c)—Premises reasonably required by landlord for the purposes of his business—Landlord not engaged in any trade or business—Is he entitled to the premises.

Held: *That a person, who has no trade or business in* esse *at the time of the institution of his action, is not entitled to claim any premises of which he is landlord, on the ground that they are reasonably required for the purposes of his trade or business.*

MAMUHEWA *vs.* RUWANPATHIRANA ... ... XXXIX. 32

No. 60 of 1942—Application of to contracts of tenancy made before the Ordinance came into operation.

Held: *That after the Rent Restriction Ordinance is applied to any area, the rent for any premises in that area is the rent payable under the Ordinance, even though a higher rent may have been agreed upon between the parties before the Ordinance came into operation in that area.*

PEIRIS *vs.* RATNABARTHI ARATCHY ... ... XXXIX. 36

Premises owned by joint landlords—Notice to quit given by one of them—Premises required for partnership business of which landlords as well as other were partners.

The premises in question belonged to four persons jointly. Notice on the tenant to quit was given by one of the landlords. The premises were required for the purposes of a business carried on in partnership by the landlords and some others.

Held: (1) *That the notice to quit was bad, as, in the case of joint landlords, notice must be given by each of them.*

(2) *That the trade or business contemplated in section* 8 (*c*) *of the Ordinance is the trade or business carried on by the landlords alone, and not a business of which they are partners along with others.*

HASSENALLY *vs.* JAYARATNE XXXIX. 37

Tenant in arrears of rent for more than one month—Tender of arrears of rent by tenant after notice to quit—Refusal to accept—Institution of action for rent and ejectment—Can landlord maintain action—Rent Restriction Ordinance, section 8, proviso (a).

Held: *That a landlord, who refuses to accept arrears of rent due for more than a month tendered to him by his tenant after notice to quit has been served on him, is not entitled to maintain an action for ejectment under proviso* (*a*) *to section* 8 *of the Rent Restriction Ordinance.*

GEORGE *vs.* RICHARD ... XXXIX. 55

No 60 of 1942, section 8 (c)—Reasonably required for landlord's occupation—Competing claims of landlord and tenant equally genuine.

Held: *That a landlord should be entitled to be restored to his property if his need to occupy it is at least as great as that of his tenant.*

A. J. DE MEL *vs.* PIYATISSA XXXIX. 63

Landlord and tenant—Rent Restriction Ordinance, No. 60 of 1942, section 8 (c)—Order of ejectment—Death of plaintiff before issue of writ of ejectment—Effect on issue of writ of ejectment.

An order of ejectment was made against a tenant on the ground that the premises were reasonably required for the use of

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the plaintiff and his family, in a case where the scales were evenly balanced. Before the date fixed for the issue of the writ of ejectment, the plaintiff died.

Held: (1) *That as the premises are no longer required for the use of the landlord, a writ of ejectment cannot be issued.*

(2) *That the right of the landlord to occupy his premises is a personal right, which does not enure to his executor until the landlord had entered into possession.*

ISMAIL *vs.* HERFT ... ... XL. 50

Rent Restriction Ordinance—House reasonably required for landlord's occupation--When should tenant's claim be preferred.

Held: *That the claims of a tenant, who has failed in spite of diligent search, to find alternative accommodation should be preferred to those of a landlord, whose family does at least possess a house in which they can continue to live.*

ABEYSEKERE *vs.* KOCH ... XLI. 31

Rent Restriction Ordinance—Action for ejectment of tenant—Compromise without proceeding to trial—Tenant granted time to vacate of consent—Court relieved of duty to call for proof—Decree entered in terms of compromise—Jurisdiction of Court to enter such decree.

Held: *That the limitations placed on the Jurisdiction of a Court by the provision of the Rent Restriction Ordinance in actions for ejectment of tenants by landlords do not in any way fetter the right or duty of the Court to give effect to lawful compromises willingly entered into in a pending action between the parties.*

NUGARA *vs.* RICHARDSON ... XLI. 41

Rent Restriction Ordinance, No. 60 of 1942, section 8—Action for ejectment of tenant—Reasonably required for landlord's daughter—Dependance of daughter on landlord—Reasonableness of claims of parties.

The defendant, a dental surgeon, was plaintiff's tenant since 1931 and he carried, on his profession on the ground floor of the premises in question. The floor above, which is a self-contained residential flat, was originally occupied by the defendant, but later sublet by him. In January, 1948, the defendant handed over the floor above and the garage to plaintiff's son-in-law and daughter. As a child was born to the plaintiff's daughter, the plaintiff sought to eject the defendant in order to provide the daughter with additional accommodation.

The defendant alleged that he was unable to obtain any other place suitable for his surgery.

Held: (1) *That plaintiff had to satisfy the Court that, taking into account,* inter alia, *the hardship and inconvenience which would be caused to the defendant by the enforcement of a writ of ejectment, the premises were 'reasonably required' for occupation as a residence for a member of her family (as defined in the proviso to section* 8).

(2) *That the words 'dependent on him' qualify 'son or daughter over eighteen years of age' as well as "parent, brother or sister."*

(3) *That as the language of the section is ambiguous, it should be construed in favour of the tenant.*

(4) *That, even on the assumption that the premises could, in law, have been claimed for the daughter's use, the hardships, which the defendant would suffer, outweighed the owner's needs in this case.*

HEWAVITHARANE *vs.* BRITO-MUTTU-NAYAGAM ... ... XLI. 105

Rent Restriction Ordinance, No. 60 of 1942, section 8 (c)—Landlord's need of premises for purposes of his own business—Reasonableness of demand—When should it be proved to exist—What landlord has to prove—Should the landlord have a business in existence.

Held: (1) *That the reasonableness of a landlord's demand to be restored to possession for the purposes of his business under section* 8 (*c*) *of the Rent Restriction Ordinance, No.* 60 *of* 1942, *must be proved to exist at the date of the institution of the action and to continue to exist at the time of the trial.*

(2) *That the landlord must place before the Court the necessary material to assist it in deciding whether his demand to eject the tenant is a reasonable one having due regard to the tenant's position.*

(3) *That to succeed in a claim to eject a tenant under section* 8 (*c*) *of the Ordinance, there must exist at the relevant date a present requirement to use the premises for the purposes of a business which is in*

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existence or which will be established by him as soon as the premises are made available to him.

ANDREE *vs.* DE FONSEKA AND ANOTHER ... ... XLI. 109

Landlord, a shareholder of a company—Action to eject tenant on the ground that premises reasonably required for the purpose of the business carried on by the company—Can landlord maintain action—Rent Restriction Act No. 29 of 1948.

Held: (1) *That a shareholder of a Company who owns houses, is not entitled to make use of the Rent Restriction Act for the purpose of providing his company with a place of business.*

(2) *The Rent Restriction Act provides for a case where the premises are reasonably required for the immediate use and occupation of the landlord or his family.*

(3) *That a plaintiff who succeeds in an action for ejectment is entitled to execute his decree immediately and time can only be given by consent of parties, or in the event of an appeal, where execution of the writ would cause irreparable loss to the unsuccessful party.*

YOOSUF AND OTHERS *vs.* SUWARIS XLII. 55

Rent Restriction—Premises reasonably required for the occupation of widow and children of deceased—Action for ejectment of tenant by administrator qua **administrator of estate of deceased—Is action maintainable—Civil Procedure Code, section 472.**

Held: *That an administrator of the estate of a deceased person is entitled to maintain an action* qua *administrator for the ejectment of a tenant under section* 13 (*c*) *of the Rent Restriction Ordinance on the ground that the premises are reasonably required for the occupation of the widow and the children of the deceased.*

RODRIGO *vs.* PARANGU ... XLII. 66

Rent Restriction Act, No. 29 of 1948—Section 13 (1) (c)—Landlord requires premises for occupation of his sister—Meaning of "sister dependent on him"—Must plaintiff, need be immediate—Reasonableness.

A landlord for the purpose of renting his present residence and of moving into a smaller house sought to eject his tenant on the ground that the premises were required for his sister living with him. The sister herself owned a house and had an income of her own.

Held: (1) *That the Court should consider all the factors relevant to the hardship caused to the parties, and decide in favour of the party whose need was greater. One of the factors is that the plaintiff's need of the premises should be "immediate" and not prospective.*

(2) *That a person owning property and having an income cannot be a "dependant" on the landlord, within the meaning of the Rent Restriction Act.*

MENDIS *vs.* FERDINANDS ... XLIII. 41

Rent Restriction Ordinance No. 60 of 1942—Sale of lease of boutique prior to area brought under operation of Ordinance—Purchaser entering into lease bond providing for advance deposit and payment of annual rent by monthly instalments—Failure to pay monthly instalments which exceed authorised rent—Action to recover rent and for ejectment—Rent Restriction Act of 1948 coming into operation pending action—Its applicability—Plaintiff's right to recover rent originally agreed upon.

The plaintiff sold by public auction the lease of a boutique for a period of four years from 1-7-1947 and the defendant became purchaser thereof at Rs. 2,150 a year. Accordingly a lease-bond dated 7-4-1947 was executed paying the plaintiff a sum of Rs. 1,433.33 as an advance and further providing that the annual rental should be paid in monthly instalments of Rs. 179.16, the 1st becoming payable on 30-6-1947 and the others on the last day of each month.

The defendant paid the 1st instalment and defaulted thereafter. On 2-6-1948 the plaintiff instituted this action for (i) the recovery of the rent due after giving credit for the advance, and (ii) for ejectment.

The defendant resisted the plaintiff's claim on the grounds:—

(*a*) that the plaintiff was not entitled to receive Rs. 179.16 per month in view of the provisions of the Rent Restriction Ordinance No. 60 of 1942.

(*b*) that under the Rent Restriction Act of 1948 (which came into operation on 1-1-1949) he was not entitled to retain in his hands more than 3 months' rent as advance.

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It is common ground that the Rent Restriction Ordinance came into operation in the area on 10-7-1947 and that the authorised rent of the premises was Rs. 50 per month.

Held: (1) *That the advance payment must be treated as a deposit made to secure the repayment of the rent.*

(2) *That the provisions of the Rent Restriction Act of* 1948 *did not apply to his case as it came into operation after the institution of this case.*

(3) *That the plaintiff was not entitled to recover any rent in excess of the authorised rent from* 10-7-1947, *the date on which the Ordinance came into operation in the area.*

SANTHIA DIAS *vs.* LAWRENCE PEIRIS ... ... XLIII. 56

Rent Restriction Ordinance, section 9—Tenant sub-letting the leased premises without prior consent of landlord in writing—Can landlord sue such tenant for ejectment without terminating tenancy by notice.

Held: *That a landlord is entitled to institute an action in ejectment under section* 9 *of the Rent Restriction Ordinance No.* 29 *of* 1948 *without terminating the tenancy by notice.*

WIMALASURIYA *vs.* PONNIAH XLIII. 107

Landlord and tenant—Plaintiff's residential house compulsorily acquired by Crown—Defendant's premises purchased by plaintiff on defendant's promise to vacate premises—Defendant's refusal to vacate—No suitable accommodation—Ejectment—Rent Restriction Act 8 (c)—Premises reasonably required for occupation as a residence—Hardship caused to the tenant should be the basis in assessing reasonableness—Purchase of disputed premises a factor to be considered—Court's power to suspend ejectment order to mitigate hardship to tenant.

The plaintiff, who had to leave her residential house owing to compulsory acquisition by the Crown was induced to purchase from R the premises, where the defendant was living as a tenant of R, on a promise by both R and the defendant that the premises would be vacated on the completion of the purchase.

The defendant later refused to vacate the premises and the plaintiff, who was then expecting, her husband and three children were temporarily accommodated in a small room in the house of plaintiff's father, who was himself under notice to quit.

The plaintiff sought to eject the defendant on the ground that the premises were "reasonably required for occupation as a residence" for the plaintiff and her family within the meaning of the Rent Restriction Act. The learned Commissioner dismissed the action because he was of the view that a person who becomes a landlord by purchase as in the circumstances of this case could not be said to require the premises reasonably within the meaning of the Ordinance and that the plaintiff would have succeeded if she had been the landlord from the commencement of the tenancy.

Held: (1) *That the learned Commissioner had misdirected himself. The claim of a landlord, who is a purchaser of premises, to eject a tenant therefrom should be determined solely by reference to the reasonableness of his requirement for occupation, as in the case of any other landlord.*

(2) *That in considering whether premises are reasonably required for the occupation of a landlord, a Court should take into account,* inter alia, *the degree of hardship caused to the tenant by eviction.*

(3) *That where the hardship of the landlord either outweighs or is evenly balanced with that of the tenant, the landlord's claim must prevail.*

(4) *That where a landlord has obtained an order for possession the Courts have power to suspend the order for such a period so as to mitigate the hardship caused to the tenant by eviction.*

B. G. WEERASINGHE *vs.* R. S. R. CANDAPPA ... ... XLIV. 4

Lease of grass and vegetable enclosure only—Are they 'premises' within the meaning of the Rent Restriction Act.

Held: *That the word "premises" in the Rent Restriction Act is used in the sense of a building with the land appurtenant thereto devoted to residential or business purposes and does not apply to a grass land or vegetable enclosure where there is no building.*

PAKIADASAN *vs.* MARSHALL APPU ... ... XLIV. 12

Landlord and tenant—Notice terminating tenancy—Cheques subsequently sent by tenant

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for payment of rent—Landlord returning them uncashed after institution of action for ejectment—Is a new tenancy created—Rights and obligations of statutory tenant and landlord—Legal effect of payment of rent by cheques—Deposits—Right of landlord to appropriate for rent—"Waiver" of right—Presumption of—Rent Restriction Act.

The defendant tenant, who was noticed to quit by the plaintiff landlord, refused to vacate the premises and continued to pay the rates as before and sent by post cheques each month to the plaintiff for nearly eight months as payment of rent. The plaintiff, after appropriating the defendant's advance deposit of six months' rent, which he had with him, instituted an action for ejectment and returned all the cheques uncashed.

The learned Commissioner dismissed the action on the ground that the plaintiff's conduct in accepting the cheques as payment or rent month after month after the notice amounted to waiver of the notice and such conduct created a new tenancy between the plaintiff and the defendant.

Held: (1) *That in a statutory tenancy under the Rent Restriction Act the mere acceptance of rents by the landlord after notice to quit does not create a new tenancy except where the tenant proves that the landlord had abandoned his rights to eject expressly or by unambiguous conduct.*

(2) *That where a tenant commits a breach of any of the statutory obligations under the Act, he cannot revive his right to occupation of the premises by remedying the breach later.*

(3) *That an intention to waive a right or benefit to which a person is entitled is never presumed, but must be proved by the person who asserts it.*

(4) *That in a contractual tenancy the appropriation of the deposit towards rent falling due after the termination of tenancy under the name of damages or any other may give rise to the inference that by so doing the landlord intended to creat a new tenancy.*

(5) *That a tenant who pays rent by cheque does so at his risk.*

FERNANDO *vs.* SAMARAWEERA XLIV. 19

Landlord and tenant—Premises owned by wife—Husband entering into contract of tenancy—Tenant exclusively dealing with husband—Action for ejectment of tenant by husband—Is he entitled to maintain action?——Is jus in re **necessary to maintain such action—Rent Restriction Ordinance No. 29 of 1948—Meaning of the term "landlord." Interpretation of "Means" and "Includes"—Estoppel—Evidence Ordinance, section 116.**

Some years prior to the institution of this action for ejectment the plaintiff and defendant entered into a contract of tenancy whereby the plaintiff let to the defendant certain premises belonging to his wife. There was no dispute that it was the plaintiff that the defendant exclusively dealt with.

The action was contested in the Court below on the issue as to whether the premises were reasonably required by the plaintiff for the purposes of his business and the Court answered it in plaintiff's favour. Nevertheless, the plaintiff's action was dismissed on the ground that the plaintiff, although entitled to receive rent, did not have a "*jus in re*" in the premises, following the decision in *Hameed vs. Annamalay* reported in (1946) 47 N.L.R. 558.

Held: (1) (*By the Divisional Bench*) *That the plaintiff was entitled to a decree ejecting the defendant.*

(2) *That the plaintiff was the defendant's landlord within the meaning of the Rent Restriction Act No.* 29 *of* 1948.

(3) (NAGALINGAM, J. dissentiente) *That a plaintiff, who is a landlord within the meaning of the Rent Restriction Act, can maintain an action under section* 13 (1) (*c*) *of the Act for ejectment of a tenant although he does not have the* jus in re *in regard to the premises.*

DE ALWIS *vs.* PERERA ... XLIV. 100

Landlord and Tenant—Premises required for a member of landlord's family for trade or business—Landlord's right to eject—Section 13 (1) (c), Rent Restriction Act No. 29 of 1948.

Held: *That section* 13 (1) (*c*) *of the Rent Restriction Act No.* 29 *of* 1948 *does not give the landlord the right to bring a suit in ejectment in a case where he requires the premises for the purpose of trade or business for a member of his family.*

RAJAPAKSE *vs.* PERERA ... XLV. 20

Landlord and Tenant—Co-owners—Premises reasonably required for residence for

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one co-owner—Rent Restriction Act No. 20 of 1948—Section 13 (1) (c).

Held: *That section* 13 (1) (*c*) *of the Rent Restriction Act No.* 29 *of* 1948 *does not enable one of several co-landlords to sue a tenant in ejectment on the ground that he requires the premises for his occupation as a residence.*

HANRY *vs.* HAMIDOON HADJIAR XLV. 44

Rent Restriction Act, section 13 (1) (d)—Action for ejectment—Landlord and tenant occupying parts of same premises—Single bath and lavatory for both—Tenant permitting twenty-nine persons without permanent abode to use bath and lavatory—Inconvenience to landlord and members of his household—Does it constitute nuisance within the meaning of section 13 (1) (d)—Should execution of decree for ejectment be delayed on the ground that business would suffer loss and damage.

Held: (1) *That where a landlord and his tenant are in occupation of parts of the same premises served by one bath and lavatory and the tenant permits a large number of persons, who have no permanent abode, to use the bath and lavatory so as to impede and interfere with the commodious use thereof by the landlord and the members of his household, the tenant is guilty of conduct amounting to a nuisance within the meaning of section* 13 (1) (*d*) *of the Rent Restriction Act.*

(2) *That the execution of a decree for ejectment entered against a tenant will not be delayed merely because the tenant, who has other premises, is carrying on a business at the premises let, and great loss and damage would be caused to him if he were ejected at a time when his business activities were at their peak.*

MALLIKAPILLAI *vs.* AHAMADU MARIKAR ... ... XLVI. 36

Rent Restriction Act 1948—Lawful rent agreed upon—Subsequent dispute between landlord and tenant regarding rent payable—Reference to Rent Control Board—Appeal to Board of Review—Matter remitted to Rent Control Board—Tenant tendering amount fixed by Board—Refusal by landlord to accept it as it was less than the sum originally agreed upon—Action for ejectment on the ground that tenant was in arrears of rent.

Where in a contract of tenancy, the monthly rental not above the authorised amount was agreed upon by the parties and subsequently a dispute resulting from a demand for a higher rental by the landlord arose between them and the matter was not finally decided by either the Rent Control Board or the Board of Review to which it was referred.

Held: *That, in the circumstances, the tender by the tenant of the amount fixed by the Rent Control Board, which was less than the agreed rental, was not sufficient and the landlord was justified in refusing to accept it and that the tenant was in arrears of rent.*

RANASINGHE *vs.* ARTHUR S. FERNANDO ... ... XLVI. 65

Landlord and tenant—Tenant in arrears of rent—Notice to quit—Arrears tendered before plaint filed—Is landlord entitled to decree for ejectment—Rent Restriction Act No. 29 of 1948, section 13 (1) (*a*).

Held: *That a landlord, who sues a tenant for ejectment on the ground that he has been in arrears of rent, is entitled to the decree prayed for notwithstanding the fact that before the action was filed the tenant tendered all arrears of rent due up to the date of action.*

SUYAMBULINGAM CHETTIAR *et al vs.* PECHI MUTTU CHETTIAR XLVII. 15

Landlord and Tenant—Premises rented out for running a boarding—Is it "business premises" within Rent Restriction Act 29 of 1948?

Where the respondent took premises on rent for the purpose of running a boarding and in fact used the premises for that purpose, whilst living on the premises.

Held: *That the premises were "business premises" within the meaning of the Rent Restriction Act* 29 *of* 1948.

Per L. M. D. DE SILVA, J—"Consequently it is the duty of a Court first to decide whether the premises come within the definition "residential premises." If they do not then they are "business premises." In our opinion in order to do this the character of the physical occupation of the premises judged by the use of which they are put by the tenant must be examined. If the character of the occupation so judged is "wholly or

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mainly for residential purposes" then the premises are "residential premises."

HEPPONSTALL *vs.* PEARL COREA XLVIII. 9

Landlord and Tenant—Denial of landlord's right by tenant—Payment of rent to wrong party—Arrears—Action for ejectment—Payment to landlord after action filed—Rent Restriction Act No. 29 of 1948, Section 3 (1) (a).

A tenant, who denied his landlord's right to recover rent, paid the rents to a wrong party, but later paid the arrears to the landlord after he had instituted an action for ejectment of the tenant on the ground of arrears of rent.

Held: *That the tenant was in arrears of rent and that the landlord was entitled to an order for ejectment.*

Per NAGALINGAM, S.P.J—"I think it is well settled law since the Rent Restriction Ordinance came into operation that where after the tenancy has been terminated arrears of rent is tendered or paid after the institution of the action such tender or payment has no effect at all on the rights of the plaintiff who had instituted the action prior to the tender to him or receipt by him of the arrears."

JAINUDEEN *vs.* MOHIDEEN THAMBY ... ... XLVIII. 11

Nature of protection afforded by the Act to a sub-tenant.

MOHAMED IBRAHIM SAIBO *vs.* MANSOOR *et al* ... ... XLVIII. 35

Landlord and tenant—Premises reasonably required for a "member of the family" of the landlord—Meaning of the expression "member of the family" of any person—Does it include a son or daughter of the landlord over eighteen years of age, and not dependent on him?—Premises needed for landlord's son who is engaged to be married—Does this constitute an immediate and present need?—Question of relative hardship—Duty of tenant to find alternative accommodation—Rent Restriction Act No. 29 of 1948, Section 13.

Held: (1) *That a son of the landlord who is not dependent on him is a "member of the family" of the landlord, within the meaning of that expression as defined in the enactment.*

(2) *That the fact that the premises were required in order to provide the plaintiff's son (who was engaged to be married) with a house after marriage, constituted a present and immediate need of the premises.*

(3) *That the want of corroborative evidence made it manifest that the tenant had made no serious effort to find alternative accommodation, and that, accordingly the finding on the question of relative hardship was clearly erroneous.*

GUNASEKERA *vs.* MATHEW XLVIII. 71

Landlord and tenant—Premises leased to tenant indiscriminately shared by tenant and two other persons—No identifiable portion carved out—Does it amount to sub-letting?—Rent Restriction Act No. 29 of 1948—Section 9 (1)—Roman-Dutch Law and English Law—Compared.

The plaintiff-landlord sought to eject the first defendant-tenant on the ground amongst others that he had sublet the premises to the 2nd and the 3rd defendants in breach of section 9 (1) of the Rent Restriction Act.

The evidence established that (*a*) each of the defendants was carrying on in the same premises a separate but similar business of which he was the sole proprietor.

(*b*) The 2nd and 3rd defendants paid to the first defendant as consideration for this arrangement a sum of money representing a portion of the amount of rental paid by the 1st defendant to the plaintiff.

(*c*) The defendants shared indiscriminately the premises and did not occupy either jointly or severally any identifiable portion carved out of the leased premises.

Held: (1) *That there was no sub-letting by the first defendant in breach of section 9 (1) of the Rent Restriction Act.*

(2) *That the concept of sub-letting prohibited by the Rent Restriction Act is the same as that under Roman-Dutch Law.*

(3) *That under Roman-Dutch Law it is essential to the formation of a contract of tenancy or subtenancy that the "thing hired" is capable of ascertainment as an identifiable entity occupied by the tenant (or sub-tenant as the case may be) to the exclusion not only of trespassers but of the landlord (or tenant) himself.*

(4) *That no breach of section 9 (1) of the Act is committed if a tenant, while himself in occupation of the leased premises*

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merely permits someone else to share their use and enjoyment with him without placing him in exclusive occupation of a part of the premises.

SUPPIAH PILLAI *et al vs.* MUTTU KARUPPA PILLAI *et al* ... ... XLIX. 56

Rent Restriction Act, No. 29 of 1948—Section 13 (1) and 13 (3)—Premises required for landlord's business as selling agent of Petroleum Company—Company to erect petrol station on premises as lessee—Tenant carrying on timber business—Decree ordering landlord to be restored to possession of substantial portion of premises for erection of petrol station—Tenant to continue his business on remaining portion after structural alterations on a reduced monthly rental—Is such decree bad?

The plaintiff, a petroleum agent, sued his tenant, who was carrying on a timber business in the premises, for ejectment on the ground that the premises were reasonably required for the purposes of his business. This claim was based on a proposed lease of the premises to the Shell Company to erect a modern petrol station where the plaintiff could continue his employment as selling agent on far more favourable terms.

The Court after satisfying itself on the evidence that the plaintiff would gain material pecuniary advantage from the proposed arrangement passed a decree in his favour whereby (*a*) the plaintiff was to be restored to possession of a substantial portion of the premises for the erection of a modern petrol installation; (*b*) the tenant was to be allowed to remain in possession of the rest of the premises on a reduced montly rental to be determined by Court subsequently after certain structural alterations were made to suit the requirements of the tenant's business.

Held: (1) *That the form of the decree was inappropriate in the circumstances as* (i) *it would be impossible to provide the tenant with the suggested alternative accommodation until certain substantial alterations have first been completed;* (ii) *it was impracticable to afford the necessary protection to the tenant's business interests during the interval of time.*

(2) *That the possession of the premises by the Shell Company* qua *lessee would amount to a breach of section* 13 (3) *as the alterations contemplated render the premises unsuitable for the tenant's timber business, should he wish to avail himself of the protection afforded by that section.*

DEERASOORIYA *vs.* MASILAMANY XLIX. 58

Landlord and Tenant—Ejectment—Death of tenant—Notice sent by widow under section 18 of Rent Restriction Act No. 29 of 1948—Determination of contractual tenancy before tenant's death—Widow not entitled to statutory protection—Personal right.

Where a landlord of premises governed by the Rent Act terminates contractual tenancy by due notice and files action for ejectment against the tenant on the ground *inter alia* that the premises were reasonably required as a residence for himself and his family within the meaning of section 13 (1) (*c*) of the Rent Act, and the tenant dies pending the action and his widow purported to serve a notice on the landlord under section 18 (2) (*c*) of the Rent Act to the effect that she proposed as "the surviving spouse of the deceased tenant" to continue in occupation of the premises as tenant.

Held: (1) *That the contractual monthly tenancy having been duly determined by due notice at a date long prior to the tenant's death, he enjoyed thereafter only a* purely personal right *to remain in occupation of the premises against the wish of his landlord until an order for ejectment was made by a court of law.*

(2) *That this statutory protection being of a purely personal nature cannot be passed on to another person and must cease the moment he parts with possession* or dies.

(3) *That the word "tenant" in section* 18 *is used in the sense of a contractual tenant and section* 18 *only permits the widow or relation of a deceased tenant to claim a fresh tenancy if the latter was a "tenant" in the strict sense of the term, i.e. if there was still subsisting at the time of death a contractual tenancy between him and the landlord.*

HENSMAN *vs.* MARY STEPHEN AND ANOTHER ... ... XLIX. 85

Landlord and tenant—Reasonable requirement—Tenant disposing of suitable alternative accommodation after notice to quit—A factor in determining relative hardship

In determining the relative hardships incurred by the landlord and the tenant, it is proper for a Court to take into considera- the conduct of a tenant, who between the service of notice to quit and the hearing of

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the action, deliberately divests himself of suitable alternative accommodation for the purpose of defeating the landlord's claim for possession.

SIVAGNANAM *vs.* JINNAJEE ··· L. 5

Landlord and tenant—Grounds for ejectment—Non-occupying tenant—Section 9 (1) Rent Restriction Act No. 29 of 1948.

Where a tenant had sub-let the premises before the Rent Restriction Act came into force and the landlord sought to eject her on the grounds (1) that she had committed a breach of section 9 (1) of the Act, and (2) that she was a non-occupying tenant and had therefore forfeited her protection as a statutory tenant.

Held: (1) *As the premises were sub-let prior to the Rent Restriction Act became law it was not a breach of section* 9 (1) *of the Act.*

(2) *As the sub-letting was lawful, the tenant could not be regarded as a non-occupying tenant in the sense that term was used in* Brown vs. Brash (1948) 2 *K.B.* 247. *The landlord could only obtain an order for ejectment by one or the other conditions specified in the Act.*

K. C. M. SURIYA *vs.* THE BOARD OF TRUSTEES ··· ··· L. 45

Right of person to institute action to have annual value of premises increased so as to exempt the premises from the operation of the Rent Restriction Act.

BANK OF CHETTINAD LTD. *vs.* COLOMBO MUNICIPAL COUNCIL ··· L. 107

REPEAL

Can Notification under one section be repealed by rule made under a different section.

BARTHOLOMEUSZ *vs.* SINNATHAMBY I. 116

REPLY

REPLY—RIGHT OF

The production in evidence on behalf of the accused of the deposition of a witness gives the counsel for the prosecution the right of reply.

REX *vs.* KADIRGAMEN *et al* ··· XVIII. 41

REQUISITIONING OF LAND

See under **Defence (Miscellaneous) Regulations.**

RESIGNATION

Resignation from an office, once properly tendered, cannot be withdrawn.

RATWATTE *vs.* PUBLIC TRUSTEE AND ANOTHER ··· ··· II. 134

When may a resignation not be withdrawn. The fixing of a term at which an act such as a resignation is to take effect, does not make it any the less absolute though it defers the operation of the act.

DE SILVA *vs.* DE SILVA ··· XXI. 41

RES IPSA LOQUITUR

Doctrine applies to a case when rear wheels of omnibus ran over a person who had first alighted from the vehicle at a prescribed halting place.

GAMAGE LUISA PERERA *vs.* GAMINI BUS CO. LTD. ··· ··· XL. 49

Res ipsa loquitur—**Applicability to criminal cases**

PERERA *vs.* AMARASINGHE ··· XLI. 92

RES JUDICATA

See also under **CIVIL PROCEDURE CODE**

Facts not existing at time of judgment—Matter which could not have been brought before Court—Does res judicata **apply in such a case?**

Held: *That the doctrine of* res judicata *applies to all matters which existed at the time of the giving of the judgment and which any party to the suit had an opportunity of bringing before the Court. If there be matter subsequent which could not have been brought before the Court at the time, the party is not estopped from raising it.*

JANE NONA *vs.* MOHAMADU AND ANOTHER ··· ··· ··· ··· I. 158

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Doctrine of res judicata **applies only to matters which the parties had an opportunity of bringing before the court.**

RANA RIDI *vs.* LAPAYA ··· I. 239

Res Judicata—**Decree of consent—Sections 207, 236 and 406 of the Civil Procedure Code——Estoppel.**

Held: *That a Judgment by consent has the full effect of* res judicata *between the parties and is as effective by way of estoppel as a Judgment whereby the Court exercised its mind in a contested case.*

SINNIAH *vs.* ELIAKUTTY ··· I. 253

Rule of res judicata **does not apply where on the first summons the party taking the exception had not been in jeopardy or peril.**

GOVERNMENT AGENT (ASST.) PUTTALAM *vs.* CHETTY ··· ··· II. 113

Does an order which does not conclude upon the rights of the parties operate as res judicata.

Held: *That an order of a Court which is vague and does not conclude upon the rights of the parties and is merely an expression of opinion by the judge does not operate as* res judicata.

SINNIAH *vs.* MURUGESU ··· III. 134

Res Judicata—**Is judgment against a defendant who is not properly before court binding.**

Held: *That where no lawful citation is obtained against a defendant a judgment given in his absence does not operate as* res judicata.

AMUPITIYA *vs.* ALWIS AND ANOTHER IV. 78

Res judicata—**Can interest and principal be claimed in separate actions:—Section 34 of the Civil Procedure Code.**

It was stipulated in a bond given in consideration of a loan of Rs. 1500/- that the principle shall be payable on demand and that the interest shall be payable in the first four years once in six months and thereafter monthly. Three separate actions were brought in respect of the failure to pay interest as stipulated for and on the present action being brought for failure to pay the principal on demand the plea of *res judicata* was taken.

Held: *That as the obligation to pay the interest and the principal were separate and independent obligations action in respect of one obligation only did not operate as a bar in respect of the other.*

SAIBO AND ANOTHER *vs.* ABUTHAHIR AND OTHERS ··· ··· IV. 110

Claim to land seized in execution—Section 247 of Civil Procedure Code—When does a claim under section 247 act as a bar to an action for a declaration of title to the same land.

JULIUS PERERA *vs.* PEDRICK PERERA AND ANOTHER ··· ··· VIII. 119

Decision in maintenance case how far binding.

Held: *That the decision in proceedings for maintenance, that the respondent is not the husband of the applicant for maintenance, is binding on the parties and cannot be litigated a second time in other proceedings.*

JAINAMBO *vs.* IZZADEEN ··· X. 138

Where the appeal court disposes of an appeal on issues other than those on which the original court made its decision, can the decision of the original court be regarded as res judicata.

Res Judicata—Claim to property seized in execution of decree—Absence of judgment creditor at inquiry though noticed—Order upholding claim without investigation—Failure to bring action under section 247 of the Civil Procedure Code—Is such order *res judicata* between the parties in an action under section 247 of the Civil Procedure Code consequent on a second order upholding claim at a subsequent seizure.

Does section 243 of the Civil Procedure Code place an imperative duty on the claimant to adduce evidence in support of his claim whether the judgment-creditor is present or not—Is a claim inquiry governed by the sections of the Civil Procedure Code relating to summary procedure—Scope of presumption under section 114 illustration (*e*) of the Evidence Ordinance.

Held: (1) *That the terms of section 243 of the Civil Procedure Code places an imperative duty on the claimant to adduce evidence whether the judgment-creditor is present or not at the inquiry.*

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(2) *That where the requirements of section* 243 *of the Civil Procedure Code have not been observed, any allowance of a claim cannot be regarded as an order under section* 244 *or as having conclusive effect within the terms of section* 247 *of the Civil Procedure Code. Nor does such an order operate as* res judicata *between the parties.*

(3) *That the words "in a summary manner" in section* 241 *of the Civil Procedure Code do not authorise the use of the sections relating to summary procedure in the investigation of claims to property seized.*

DHARMATILAKE *vs.* BRAMPHY SINGHO AND ANOTHER ... ... XIII. 145

When may the court examine material outside the decree to determine whether a matter is res judicata**—Validity of deed executed during the period intervening between an order of abatement and the setting aside of such an order—Partition Ordinance (Chapter 56) section 17.**

Held: (1) *That, where the decree is unintelligible, the Court may examine the judgment in order to ascertain the meaning of the decree.*

(2) *That a deed executed during the period intervening between an order of abatement and the setting aside of such an order is not obnoxious to the provisions of section* 17 *of the Partition Ordinance (Chapter* 56).

ARANAPPU DE SILVA *vs.* WILLIAM AND THREE OTHERS ... XIV. 81

Res judicata**—Criterion where it is sought to apply the rule as between co-defendants.**

Held: *That the correct criterion in cases where it is sought to apply the rule of* res judicata *as between co-defendants is as follows:*

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

(2) *It must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and*

(3) *The question between the defendants must have been finally decided.*

ANA FERNANDO *vs.* FERNANDO ... XV. 130

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

Held: (1) *That the plea of* res judicata *was entitled to prevail.*

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

ARULAMPALAM AND TWO OTHERS *vs.* KANDAVANAM ... ... XVI. 5

Partition action—Two issues—One decided in plaintiff's favour but plaintiff's case dismissed on the other—Can the issue decided in plaintiff's favour operate as res judicata **as against the defendant in a subsequent suit.**

Held: (1) *That any issue decided by a court in favour of the plaintiff whose action is dismissed on another ground cannot operate as* res judicata *as against the defendant in a subsequent suit.*

(2) *That a finding cannot support a plea of* res judicata *if the decree was not based upon it and consequently there was no scope of appeal therefrom.*

ROWEENA UMMA *vs.* RAHUMA UMMA ... ... XVIII. 7

Res Judicata**—Judgment of consent in partition action.**

Held: (1) *That a judgment of consent in a partition action operates as* res judicata.

(2) *Where there is a decision with regard to the heirship to property it is* res judicata *though the property claimed in the subsequent action may be different and it is immaterial whether the decision was recorded on an admission of parties or after hearing the parties.*

MENIK ETANA *vs.* PUNCHI APPUHAMY AND ANOTHER ... ... XXI. 14

Res judicata **as between co-defendants to an action—Principles governing.**

Held: (1) *That the mere circumstance of any persons having been formally arrayed on the same side is immaterial, and they will only be estopped by a decision on a matter, which was actively in issue between them and as to which they had an active controversy against each other.*

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(2) *That the following three conditions should be adopted as the correct criterion in cases where it is sought to apply the rule or* res judicata *as between co-defendants:*

(*a*) *There must be a conflict of interest between the defendants concerned.*

(*b*) *It must be necessary to decide this conflict in order to give the plaintiff the relief he claims, and*

(*c*) *The question between the defendants must have been finally decided.*

MADDUMA BANDA *vs.* BANDA AND ANOTHER ... ... XXI. 72

The decree of a divorce court for alimony and maintenance does not oust the jurisdiction of the magistrate to make an order under the Maintenance Ordinance.

TULIN FERNANDO *vs.* AMARASENA XXVI. 81

A decision of the Board of Review under the Income Tax Ordinance does not operate as res judicata.

THE ATTORNEY-GENERAL *vs.* ATCHI ... ... XXVII. 40

Co-defendants—Action under section 247 of the Civil Procedure Code by judgment-creditor unsuccessful at claim inquiry—Judgment-debtor made defendant but no relief claimed against him—Failure to file answer or raise issue at trial by judgment-debtor; but evidence given for plaintiff—Issue, whether judgment-debtor or claimant entitled to land—Judgment dismissing action—Does such judgment operate as res judicata **between judgment-debtor and claimant in a subsequent action.**

An unsuccessful judgment creditor at a claim inquiry instituted an action No. 22031 C. R., Galle under section 247 of the Civil Procedure Code in respect of a certain property against the claimant (3rd defendant) to which the judgment-debtors (1st and 2nd defendants) were made parties. In his plaint the judgment-creditor claimed no relief from the 1st and 2nd defendants but stated that they were made parties to prove their title. 1st and 2nd defendants filed no answer and no proctor represented them at the trial. The 3rd defendant filed answer and the following issues were raised by the plaintiff at the trial:—

(1) Are the 1st and 2nd defendants entitled to the land described in the plaint?

(2) Is the said land liable to be seized under the plaintiff's writ?

After trial, at which the 2nd defendant gave evidence and produced deeds in support of his title, the learned Commissioner answered both issues in the negative and dismissed the judgment-creditor's action on 31-3-41.

In March, 1943, the said 3rd defendant became the plaintiff in the present action for declaration of title to the same property against the said 1st and 2nd defendants alleging that they disturbed his possession thereof. These defendants filed answer claiming title on the same deeds as produced in the earlier action 22031.

At the trial an issue was raised as to whether the judgment in C. R., Galle, 22031 operated as *res judicata* between the parties.

The learned Commissioner answered this issue in the affirmative and judgment was entered for plaintiff. The defendants appealed.

Held: *That the judgment in C. R., Galle* 22031 *did not operate as* res judicata *between the plaintiff and the defendants as—*

(*a*) *the defendants were not necessary parties to that action;*

(*b*) *they were without legal advice;*

(*c*) *they did not take an active part in the litigation besides giving evidence as a witness for the plaintiff in that case.*

HINNIAPPU *vs.* GUNARATNE XXXII. 102

Thesawalamai—Action for pre-emption—Prior 247 action in respect of same land against plaintiff and another—Failure of plaintiff to claim in re-convention right to pre-empt—Is the claim res-judicata.

MURUGESU OF PUTTUR *vs.* THAMBIPILLAI AND ANOTHER ... XXXIV. 57

Can party to divorce action, between decree nisi **and decree absolute, raise matters not in issue at the trial.**

FERNANDO *vs.* FERNANDO XXXVI. 33

Decree passed by Court without jurisdiction—Is plea of res judicata **available.**

BANDARANAYAKE *vs.* PERERA XXXVII. 37

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Plea of protection under Public Servants Liabilities Ordinance unsuccessfully raised at trial—Same plea raised at execution proceedings—Res judicata**—Exceptions to the principle.**

MADAN *vs.* NANA ANDY ... XL. 73

Action for declaration of title—Fraud and trust pleaded in answer—Compromise reached without reference to trust—Consent decree—Absence of any indication for or against existence of trust in decree—Does such decree operate as res judicata **on issue of trust.**

Where a decree was entered embodying an agreement reached independently of the allegations in the pleadings relating to a trust and where the decree could not be interpreted as indicating anything for or against the existence of such trust.

Held: *That the consent decree did not operate as* res judicata *against the issue of trust in a subsequent action between the parties.*

MENIKARALA VIDANE *vs.* PUNCHI MENIKA *et al* ... ... XLI. 47

Action for declaration of title—Plea of jus-tertii **by defendant—Third party's claim dismissed in previous action—Does it operate as a bar to defendant's plea.**

Held: *Where a defendant sets up a* jus-tertii *though he himself may not be claiming under that title, it will be sufficient and competent for the plaintiff to repel that plea by showing that a judgment secured by him against the third party operates as* res judicata *as between himself and the third party.*

Per NAGALINGAM, A.C.J.—If a person who is privy in estate to Pandula cannot be permitted to dispute the findings in the case instituted against Pandula and to shew that Pandula was a son of Granville as against the brothers of Granville or their successors-in-title, it seems to me that *a fortiori* the principle must more strongly apply in the case of a third party, who is not a privy in estate and he, the third party is debarred from reagitating the questions finally disposed of by that case and shewing the contrary of what was decided in it—though the label of *res judicata* cannot properly be applied.

DADALLE DHARMALANKARA THERO *vs.* AHAMEDU LEBBE MARIKKAR XLVII. 12

Partition action—Dismissal of action for failure to pre-pay costs—No adjudication on merits—Is the decree binding on the parties.

In a partition case the plaintiff and the defendant were the only parties, and they filed pleadings setting out their respective claims to the land, and after the trial date was fixed, the plaintiff agreed that in the event of costs not being paid before a given date, the action should be dismissed. The plaintiff defaulted and order was accordingly made dismissing the action.

Held: *That the dismissal of the action upon the plaintiff's failure to pre-pay costs determined once for all the parties, title to the land and the order operated as* Res Judicata *between the parties.*

SEDARAHAMY *vs.* ALICE NONA L. 6

RESTITUTIO IN INTEGRUM

Nature of remedy—What must person asking for relief prove.

Held: *In an application for* restitutio in integrum *on the ground that evidence has come to light tending to invalidate a judgment that has been given it is for the petitioner to show, firstly that he was unable with reasonable diligence to obtain the evidence sooner, and secondly that the evidence produced would, if believed be decisive in his favour.*

WILLIAM SINGHO *vs.* THEGIS APPUHAMY ... ... I. 148

Application to set aside judgment entered in pursuance of warrant of attorney to confess judgment.

See under **Warrant of Attorney to confess judgment.**

Restitutio in Integrum—**Direction by the Supreme Court to the judge who pronounced decree to review his own decision—Judge who pronounced decree transferred to another Court—Decision reviewed by his successor after obtaining directions from the Supreme Court as to the course he should take—Effect of order made after such review.**

Held: *That, in the circumstances, the direction given by the Supreme Court has been complied with.*

RAHIM BHAI *vs.* WEERASINGHE XI. 152

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Where there is another remedy does remedy by way of restitutio in integrum **lie.**

Held: *That the remedy of* restitutio in integrum *does not lie in a case for which a remedy is provided by section* 480 *of the Civil Procedure Code* (*Chapter* 86.)

THIAGARAJAH *vs.* BALASOORIYA AND OTHERS ... ... XIV. 91

Error in translation of deed produced in evidence—What must parties to application for restitution prove to have decree based on such erroneous translation set aside.

MAPALATHAN AND ANOTHER *vs.* ELAYAVAN ... ... XIV. 92

Restitutio in integrum—**and action** rei vindicatio—**Transfer of land by married Kandyan woman under 21 years of age at date of transfer—Circumstances in which transfer will be set aside.**

SIMAN NAIDE *vs.* JANE NONA XXX. 84

Restitutio in integrum—**Minute of consent entered in erroneous terms.**

The terms of settlement arrived at between the parties to a case were minuted in erroneous terms in the journal. One of the parties, on discovering the error moved the Supreme Court for *restitutio in integum.* The Court having been satisfied on the affidavits, that there was a *prima facie* case, the application was allowed.

KANDIAH AND ANOTHER *vs.* PONNIAH ... ... XXX. 88

Restitutio in integrum—**Failure to serve summons on Defendant who was in jail.**

MEERALEVVAI *vs.* SEENITHAMBY XXXIV. 9

Compromise of action by Counsel without consent of client—General authority given in proxy to compromise—Its scope.

Held: (1) *That general authority given to Counsel by proxy to compromise or settle a suit is confined to matters that arise within the action.*

(2) *That where the terms of settlement arrived at by counsel in the absence of the client and without his consent dealt with matters which arose within the action and those which did not, it is desirable that the whole of the settlement should be set aside and parties placed in* statu quo ante.

P. ARUNASALAM *vs.* ARUMUGAM MUTHATHAMBY AND SEVEN OTHERS XXXV. 8

Petitioner, an internee at Internment Camp during pendency of action—Judgment entered against petitioner—Release long after—Application to Supreme Court—Inability to give proper instructions to lawyers or to provide necessary funds—Is the remedy available.

Petitioner was sued for damages for breach of contract in 1940. Pending trial he was interned at an Internment Camp, later removed to a camp in India and was released only in 1946. During his internment, the action had been decided against him. After his release, he made this application for *restitutio in integrum* on the ground that by reason of his internment (*a*) he was not in a position to instruct his lawyers in regard to the steps to be taken and witnesses to be summoned on his behalf at the trial. (*b*) he was not able to place his proctors in funds for the proper conduct of the case to enable them to summon the necessary witnesses.

Held: *That in the circumstances the remedy of* restitutio in integrum *is not available to the petitioner.*

ABDUL HAFEEL *vs.* DEMBER ... XXXV. 89

Restitutio in integrum—**Partition action—Heirs of party deceased substituted—Substituted heir dead—Interlocutory decree obtained without making heirs of substituted heir and other heirs parties—Decree affirmed in appeal—Power of Supreme Court to vary its decree not binding and can be set aside where principles of natural justice violated—Sections 36 and 37 Courts Ordinance, Section 776, Civil Procedure Code.**

In a partition action the District Court directed that the heirs of one Nangi, who was dead, should be substituted as parties for proceeding with the action. Saineris, one of the heirs of Nangi, was made a party, but after his death the respondents without substituting Saineris' widow and children as parties obtained an interlocutory decree, which was affirmed in appeal by the Supreme Court. The widow sought to set aside the decree by way of *restitutio in integrum* alleging in her petition that various parties had died and that no steps had been taken

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to substitute their heirs, including herself and her children, in the course of the action.

It was contended on behalf of the respondents that the order of the District Court did not purport to substitute the heirs of Nangi as defendants in the partition action and therefore the petitioners had no status to make this application, and further that the Supreme Court in granting the relief would in effect be varying its decree, which it had not the power to do.

Held: (1) *That the order of the District Court was to substitute Saineris and his heirs as defendants to this action and therefore the petitioners had status to move for relief to the Supreme Court, and that there was no other remedy available to them.*

(2) *That the interlocutory decree was not binding on the petitioners as they were not substituted parties on Saineris' death.*

(3) *That the Supreme Court has power to grant relief in this case as the principles of natural justice have been violated.*

WIJESINGHE *vs.* MIGEL AND OTHERS ... ... XLIII. 86

Partition action—Ownership of houses and soil rights—Contests settled—Terms lacking in precision—Want of multuality—Interlocutory decree entered conforming to the terms—Non-Compliance with sections 91 and 408 of Civil Procedure Code.

BABYHAMINE *et al vs.* JAMIS *et al* XLVI. 5

RETROSPECTIVE EFFECT

Ordinance No. 10 of 1931 has no retrospective effect.

WEERASEKERA *vs.* PEIRIS ... II. 99

REVISED EDITION OF LEGISLATIVE ENACTMENTS

Effect of repealed provision appearing in the Revised Edition.

FERNANDO *vs.* REX ... XVI. 13

Revised Edition Ordinance section 11—Interpretation Ordinance section 12—Omission from the Revised Edition of section 56 of Ordinance No. 4 of 1916—Does it repeal the by-laws kept alive by that section.

Held: *That section 11 of the Revised Edition Ordinance continues all by-laws in force on the date on which the Revised Edition is brought into force and the omission of section 56 of Ordinance No. 4 of 1916 from the Revised Edition of the Vehicles Ordinance does not affect the continuity of the by-law kept alive by that section.*

WEERASINGHE *vs.* SAMY CHETTIAR XXII. 51

REVISION

Attorney-General refusing sanction to appeal—When will Supreme Court hear the case in revision.

OSSEN *vs.* PONNIAH (EXCISE INSPECTOR) *et al* ... ... I. 246

Partition action—Application for intervention by person not party to action after final decree—Proper procedure not followed by District Court—Fraud—Supreme Court acting in revision can allow intervention.

KANNANGARA *vs.* DE SILVA AND OTHERS ... ... II. 267

Where a case has been dealt with in revision parties cannot be heard again in appeal to put the same case before the Court.

ABDUL MAJEED *vs.* CASSIM HADJIAR IV. 52

Order of discharge made by a Magistrate on the instructions of the Attorney-General in a non-summary case—Application for revision of order.

Held: *That the Supreme Court has no power to revise the direction given by the Attorney General to a Magistrate ordering him to discharge an accused who has been charged with a non-summary offence.*

SILVA *vs.* FERNANDO ... IV. 64

Powers of the Supreme Court to revise the order of the District Court—When such power will not be exercised in the case of an appealable order of an original court.

AMEEN *vs.* RASHEED ... ... VI. 8

Revisional Powers of Supreme Court exercised where appeal lies. Only in exceptional circumstances.

SOURJAH *vs.* HENDRICK ... VI. 21

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Application to District Court for consent to marry minor—Notice to minor's mother —Mother consents—Later, application by mother to vacate order—Refusal—Does the remedy by way of revision lie.

Held: *That, in the circumstances, the remedy by way of revision does not lie.*

JAYASINGHE *vs.* ALWIS ... XII. 108

Revisionary powers of Supreme Court—Refusal by one judge to exercise revisionary powers—Application for a re-hearing of the same matter by another judge—Circumstances in which an application for a revision refused by one judge, may be reheard by another.

Held: *That it would not be right, except under the most exceptional circumstances, to exercise revisionary powers when another judge has refused to do so.*

RANASINGHE *vs.* PUNCHIHAMY XIII. 16

Revisionary powers of Supreme Court—Circumstances in which they will not be exercised.

Held: *That a mistake of the legal advisers as to the proper procedure or a failure to raise a point of law at the trial are not grounds on which the Supreme Court will exercise its powers of revision in a case in which the aggrieved party had a right of appeal and a full opportunity of presenting that party's case in the trial court.*

PETER FERNANDO AND TWO OTHERS *vs.* AISA UMMA AND ANOTHER ... XIII. 25

Revision—Mistake in translation of a document produced by parties—Detection of mistake in translation after decision in appeal—Application to review decision on the ground that that decision was influenced by such mistake—Is the remedy of restitutio in integrum **available in such circumstances —Conditions necessary for such relief.**

Held: (1) *That the Supreme Court cannot exercise its powers of revision in respect of cases decided by the Supreme Court itself.*

(2) *That relief by way of* restitutio in integrum *will not be granted where parties are themselves to blame for having failed to place before the court the whole of their evidence which they had at their command.*

(3) *That, to succeed in an application of this kind for* restitutio in integrum, *the petitioners must show that the mistake was not merely material but of such vital and essential materiality, that it must have altered the whole aspect of the case.*

MAPALATHAN AND ANOTHER *vs.* ELAYAVAN ... ... XIV. 92

Supreme Court—Power of revision—Courts Ordinance (Chapter 6) sections 19 and 37—Civil Procedure Code (Chapter 86) section 753—When may the Supreme Court revise an order from which an appeal is pending.

Held: (1) *That the powers by way of revision conferred on the Supreme Court by sections* 19 *and* 37 *of the Courts Ordinance (Chapter* 6*) and by section* 753 *of the Civil Procedure Code (Chapter* 86*) are very wide and the Supreme Court had the right to revise any order made by an original court, whether an appeal has been taken against that order or not.*

(2) *That the Supreme Court will exercise its powers of revision in a case in which an appeal is pending only in exceptional circumstances.*

ATUKORALE *vs.* SAMYNATHAN XIV. 109

Revision—Accused pleading guilty to a charge which did not show that an offence had been committed.

FRISKIN AND THREE OTHERS *vs.* VANCUYLENBERG ... ... XIV. 114

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

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

APONSU *vs.* MALALSEKERE ... XV. 106

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

Held: *That the Supreme Court will ordinarily not exercise its powers of revision after a considerable lapse of time in favour of a person who was entitled to become a party to a proceeding but failed to avail him-*

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self of that opportunity to safeguard his interests.

ARUMUGAM PILLAI AND OTHERS *vs.* LEWIS AND ANOTHER ... XVII. 78

When may the Supreme Court exercise its powers of revision—Courts Ordinance sections 19 and 36—Civil Appellate Rules 1938—Order made by District Judge that an appeal has abated by operation of Rule 4—Can the Supreme Court revise the order.

Held: *That the Supreme Court will in the exercise of its powers of revision examine the order of a District Judge declaring that an appeal has abated by operation of Rule 4 of the Civil Appellate rules* 1938.

PALANIAPPA CHETTY *et al vs.* MERCANTILE BANK *et al* ... ... XXIII. 93

Companies Ordinance section 133 (5)—Can the Supreme Court revise an order made by the court under that section—Courts Ordinance sections 36 and 37.

Held: *That the Supreme Court's power to revise an order pronounced by any court does not extend to orders made under section* 133 (5) *of the Companies Ordinance.*

LAWRIE MUTTUKRISHNA *vs.* CEYLON EXPORTS LTD. ... XXIII. 95

Can Supreme Court make an order under section 325 of the Criminal Procedure Code where a magistrate has convicted and sentenced the accused to a term of imprisonment —Criminal Procedure Code—Sections 325, 347 and 357—Courts Ordinance—Section 37.

Held: *That where a magistrate has convicted and sentenced an accused person to a term of imprisonment and where in appeal the Supreme Court is of opinion that the accused should be dealt with under section* 325 *of the Criminal Procedure Code, it could under section* 37 *of the Courts Ordinance direct the magistrate to discharge the accused conditionally under that section of the Criminal Procedure Code.*

FERNANDO *vs.* ALWIS ... XXIV. 135

The Supreme Court will exercise its powers of revision even in a case in which an appeal lies, when the delay occasioned in bringing the matter up in appeal will render the relief granted useless to the parties unless their cause is promptly heard.

DE SILVA *vs.* DE SILVA ... XXVI. 3

Revision—Where an action in the court of Requests was dismissed for want of appearance, the Supreme Court, acting in revision, has no power to direct that the order of dismissal be set aside.

SABAPATHIPILLAI *vs.* ARUMUGASAMY AND ANOTHER ... ... XXVII. 5

The Supreme Court will exercise its powers of revision, even in a case in which an appeal lies, in the following cases:—

(a) where there has been a failure of justice.

(b) where a fundamental rule of judicial procedure has been violated.

(c) where the person affected by the order made against him had no knowledge of it till the time for preferring an appeal had elapsed.

SUB-INSPECTOR MUTHALIFF *vs.* PEDRICK ... ... XXVIII. 22

The Supreme Court will not exercise its powers under section 357 (1) of the Criminal Procedure Code on an application made, to revise an appealable sentence, nearly four months after sentence was passed.

ATTORNEY-GENERAL *vs.* KUNCHINAMBU ... ... XXX. 87

Revision does not lie where order of abatement of appeal made for failure to serve on respondent personally notice of tendering security for costs.

CARLINA *vs.* SILVA ... XXXI. 71

Revision—Does not lie when application for postponement of trial is refused.

RAMUPILLAI *vs.* ZAVIER AND ANOTHER ... ... XXXII. 42

Revision—Court acting in revision where no appeal lies.

LEELAWATHIE *vs.* HENDRICK XXXIII. 40

Revision—Court of Requests—Order refusing amendment of plaint—Can the Supreme Court set it aside by way of revision—Civil Procedure Code, section 753.

Held: (1) *That section* 753 *of the Civil Procedure Code does not prescribe the scope of or put a limitation on the powers of this Court to deal with an application in revision.*

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(2) *That the limitation that is imposed by this section is as regards the order the Court may pass, namely, if it could not have passed a particular order on appeal then, such an order could not be made even if the matter be brought before it by way of revision.*

PERERA *vs.* AGIDA HAMY AND TWO OTHERS ... ... XXXIII. 86

Revision—Application by accused whose appeals were previously dismissed—Same relief asked for—Allegation that judgment was pronounced per incuriam—**Can the Court entertain such application.**

Where applications in revision were made by two accused, whose appeals were previously dismissed, alleging that the opinions expressed by the appeal Court in the judgment were made *per incuriam.*

Held: *That, where the object of an application in revision was in fact to re-argue a case already decided, the Court cannot and should not entertain such application.*

EHAMBARAM AND ANOTHER *vs.* RAJASURIYA ... ... XXXIV. 65

Revision—Application before Bench of two judges—Disagreement—Referred to "another bench"—Can it go before another bench of two judges.

PABILIS APPUHAMY *vs.* DIAS XXXVIII. 24

Revision—Failure of magistrate to analyse evidence and consider case of each of several accused—When Supreme Court will exercise its revisionary powers.

SANGARAKKITA THERO *et al vs.* BUDDHARAKKITA THERO ... XXXIX. 86

Supreme Court—Powers of revision—Should supreme Court entertain application for revision when applicant failed to appeal where right of appeal lay—Courts Ordinance, section 37—Criminal Procedure Code, sections 356 and 357.

Sentence—Conviction for personation under section 78 (1) of the Local Authorities Elections Ordinance—Fine imposed below minimum fixed by Ordinance—Imprisonment till rising of Court—Is it regular—Sections 15A and 15B of the Criminal Procedure Code.

On 28-2-1950 the respondent was convicted of the offence of "personation" punishable under section 78 (1) of the Local Authorities Elections Ordinance No. 53 of 1946, and was sentenced to pay a fine of Rs. 50 and to be imprisoned until the rising of the Court. This sentence was below the minimum required under section 78 (1) of the Ordinane.

On 22-4-1950 the Attorney-General having failed to appeal within time applied in revision for the enhancement of the sentence and on a preliminary objection taken by Counsel for the respondent that the Supreme Court cannot and should not entertain the application, the matter was referred to two Judges as conflicting views had been expressed by the Supreme Court in similar cases.

Held: (1) *that the powers of revision vested in the Supreme Court are wide enough to embrace a case where an appeal lay but, which, for some reason, was not taken, but this power should be exercised in exceptional circumatances.*

(2) *That the fine imposed by the Magistrate was illegal as it was below the minimum fixed by section* 78 (1) *of the Local Authorities Elections Ordinance.*

(3) *That the sentence of imprisonment till the rising of the Court is irregular in view of sections* 15A *and* 15B (*as amended by Ordinance No.* 59 *of* 1939) *of the Criminal Procedure Code as the effect of these sections is to abolish "imprisonment till the rising of the Court" or any imprisonment which is less than seven days.*

(4) *That it would have been regular for the Magistrate to have detained the respondent until the rising of the Court, such rising being not later than* 8 *p. m. as such order would be in accordance with section* 15B.

(5) *That in the circumstances of the case there has been a miscarriage of justice resulting from a violation of a fundamental rule of judicial procedure calling for the interference of Court.*

ATTORNEY-GENERAL *vs.* PODISINGHO ... ... XLII. 110

Revisionary powers of Supreme Court—Magistrates' order under section 80 of the Income Tax Ordinance.

DE SILVA *vs.* THE COMMISSIONER OF INCOME TAX ... ... XLVI. 33

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REVOCATION

Revocation, arbitrarily, of permit authorising preaching in streets.

PERKINS *vs.* SRI RAJAH ... XVII. 56

RIGHT OF WAY

Public right of way—Is it extinguished by a partition decree to which the Crown is not a party?

Held: (1) *That a public right of way is not affected by a final decree for partition to which the Crown is not a party.*

(2) *That the words of Section 9 of the Partition Ordinance which make the final decree "good and conclusive against all persons whomsoever whatever right or title they have or claim to have in the said property" contemplate the rights of persons and not such rights as those of the public in a highway which are not the subject of individual ownership.*

FERNANDO *vs.* SENARATNE ... I. 199

Right of Way—Immemorial user—User by public for over sixty years—Sufficient proof of public right.

Held: *That where the public had used a footpath for over sixty years a public right of way by immemorial user had been acquired.*

SAMARASINGHE *vs.* THE CHAIRMAN VILLAGE COMMITTEE, MATARA, AND ANOTHER I. 302

Prosecution under § 86 of "The Road Ordinance 1861—" Public road.—Existence of how proved—Road within the area of a Village Committee—Is the power of the District Road Committee under § 86 of Ordinance No. 10 of 1861 ousted within such area?

Held: (1) *That a District Road Committee has power to enter a prosecution under § 86 of The Road Ordinance "1861" in respect of road which is under the control of a Village Committee.*

(2) *That in order to establish that a road is a public road there must be proof either that the road was constructed by a public authority or that it has been used as such by people inhabiting the neighbourhood from time immemorial.*

CHAIRMAN, DISTRICT ROAD COMMITTEE, *vs.* DE SILVA ... ... I. 346

Claim of a right of way over a railway line—Can a right of way across railway line be acquired—Section 32 of the Railway Ordinance No. 9 of 1902.

Held: *That in view of Section 32 of the Railway Ordinance No. 9 of 1902 a person cannot acquire a right of way across a railway line.*

DE SILVA *vs.* THE ATTORNEY GENERAL IV. 74

The public have no right of way over a public stand for hiring cars constructed on land which is not a highway, street or road.

WIJEGUNAWARDENE AND ANOTHER *vs.* DE SILVA ... ... XI. 51

ROADS

For Public Rights of way *see under* **Right of way.**

Road Reservation—Can rights be acquired by possession or user.

WIJESINGHE *vs.* ATTORNEY-GENERAL ... ... XXXIII. 26

ROMAN - DUTCH LAW

Applies to deed of gift executed by a person subject to Muslim Law and creating a valid fidei commissum.

WEERASEKERA *vs.* PEIRIS ... II. 99

KUDHOOS *vs.* JOONOOS ... XV. 133

Mortgage debt not paid off within specified time—Roman Dutch Law is against allowing mortgaged property to become the property of the creditor.

SAMINATHAN CHETTY *vs.* VANDER POORTEN ... ... II. 123

Roman-Dutch Law as the common law of the Island.

PEIRIS *vs.* SULTAN ... ... II. 211at 221.

Roman-Dutch Law applies to contracts of accident insurance

HANIFFA *vs.* THE OCEAN ACCIDENT AND GUARANTEE CORPORATION LTD. II. 311

Executor d: son tort—Liability of—Same in Roman Dutch Law as in English Law.

PERERA *vs.* MANUEL HAMINE AND ANOTHER ... ... II. 343

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Roman Dutch Law on the subject of appropriation of payments as between creditor and debtor does not apply once a decree has been passed in favour of the creditor.

SILVA *vs.* LEIRIS APPU ... V. 95

Roman Dutch Law relating to immunity of minors from arrest.

N.H.L. GIRIGORIS *vs.* R. P. DE ZILVA VII. 83

Right of wife to claim restitution of the dowry.

KARUNANAYAKE *vs.* KARUNANAYAKE IX. 109

Principles of Roman-Dutch Law applicable to a case of defamation.

WICKRAMANAYAKE *vs.* THE TIMES OF CEYLON LTD. ... ... IX. 157

The liability of joint tort-feasors in Ceylon should be determined according to the Roman-Dutch Law.

MIGUEL APPUHAMY *vs.* APPUHAMY IX. 135

Roman-Dutch Law—Waiver of claim after judgment—Debt due on promissory note—Although law governing promissory notes is the English Law, once judgment is entered on a note, the law applicable to the judgment debt is the Roman-Dutch law.

RAMALINGAM *vs.* JONES ... XIV. 89

Roman Dutch Law relating to gifts to concubines.

WANIGARATNA AND TWO OTHERS *vs.* SELLOHAMY AND TWO OTHERS XIX. 137

Roman Dutch Law applies to the construction of the last will of a Muslim testator.

NOORDEEN *et al vs.* BADOORDEEN *et al* ... ... XX. 51

Roman Dutch Law—Applicability of—To hire purchese agreement.

DE SILVA *vs.* KURUPPU ... XXI. 28

When is Roman-Dutch Law applicable to Muslim gifts.

ABU THAHIR *vs.* MOHAMED SALLY ... ... XXII. 113

Once a promissory note is discharged by payment the English Law ceases to apply to the rights of parties thereafter which are governed by Roman-Dutch Law.

GUNASEKERA *vs.* GUNASEKERA XXIV. 35

Roman-Dutch Law boundary of the sea shore.

ZAIN *vs.* FERNANDO ... XXVI. 77

Roman-Dutch Law rule that person writing out a will for a testator cannot insert therein a benefit for himself—Not repealed by § 11 of the Prevention of Fraud Ordinance.

THAMBU *vs.* ARULAMPIKAI AND ANOTHER ... ... XXVIII. 40

Roman Dutch Law is applicable to mortgage or pledge of shares in a company.

MITCHELL *vs.* FERNANDO ... XXX. 57

Revocability of deed for gross ingratitute of donee.

NAKANATHAR *vs.* SINNAMMAH XXXI. 78

Roman Dutch Law of defamation.

PERERA *vs.* PEIRIS AND ANOTHER XXXI. 97

Roman Dutch Law—animus injurandi **is an essential element in proceedings for defamation.**

M. G. PERERA *vs.* A. V. PEIRIS AND ANOTHER ... ... XXXIX. 42

Short leases and long leases—No reason for drawing distinction in Ceylon.

UKKU AMMA *et al vs.* JEMA *et al* XLI. 13

Damage caused by fire spreading to adjoining land—Degree of care required of person starting the fire.

SELVADURAI *vs.* JAMIS APPUHAMY XLII. 53

Revocability of donation for ingratitude.

MANUELPILLAI *vs.* NALLAMA XLIV. 6

Applicability of—To conditional gift by one Muslim to another.

MOHAMED CASSIM *vs.* ABDUL JABBAR AND ANOTHER ... ... XLVI. 3

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Validity of contracts entered into subject to "suspensive conditions"

THE ATTORNEY-GENERAL *vs.* HALE XLVI. 37

Donor's right to revoke gift on account of subsequent birth of children.

APPUHAMY *vs.* MARY NONA AND ANOTHER ... ... XLVII. 46

Was Roman-Dutch law superseded by section 36 of the Matrimonial Rights and Inheritance Ordinance.

JAINUDEEN *vs.* MURUGIAH XLVII. 81

Persons competent under Roman-Dutch law —To accept deed of donation on behalf of minor.

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALSINGHAM ... XLVIII. 1

Donation by Muslim subject to fidei commissum**—Acceptance by mother on behalf of infant donees—Does Muslim law or Roman-Dutch Law apply.**

NOORUL MUHEETHA *vs.* SITTIE RAFEEKA LEYANDEEN AND OTHERS ... XLVIII. 74

Essentials for the formation of a contract of sub-tenancy.

SUPPIAH PILLAI *et al vs.* MUTTU KARUPPA PILLAI *et al* ... ... XLIX. 56

Right of natural parent to custody of his child.

ABEYWARDENA *vs.* JAYANAYAKE *et al* ... ... XLIX. 72

Liability under Roman Dutch law—To pay compensation for improvements.

JAFFERJEE AND TWO OTHERS *vs.* CYRIL DE ZOYSA ... ... L. 1

RUBBER CONTROL ORDINANCE

Rubber Control Ordinance No. 6 of 1934—Possession of stock in excess of that authorised —Nil assessment of stock—Refusal by Magistrate to allow accused to call certain witnesses named by him—Failure to record reasons for refusal—Sections 282 and 425 of the Criminal Procedure Code.

Held: (1) *That a registered dealer cannot claim as a matter of right that the amount of stock he is provisionally authorised to possess under section* 37 *of the Rubber Control Ordinance shall be the actual amount of rubber he has in stock.*

(2) *That the failure to record the reasons for refusal to permit an accused to call certain witness, as required by section* 282 *of the Criminal Procedure Code is an omission curable under section* 425.

ADIHETTY *vs.* SENARATNE ... III. 127

Rubber Control Ordinance No. 6 of 1934 Sections 13 and 51 (1) (d)—Return made before the Ordinance came into operation.

Held: *That though the Rubber Controller is authorised to treat for certain purposes a return made before the Ordinance came into operation as a return made under the Ordinance the penal provisions in regard to returns made under the Ordinance do not apply to such a return.*

RATEMAHATMAYA *vs.* JAYANATHAN IV. 12

Rubber Control Ordinance No. 6 of 1934—Section 51 (e).

Held: *That section* 51 (*e*) *of Ordinance No.* 6 *of* 1934 *does not apply to a case where owing to an error in the return, coupons for a greater amount of rubber is issued to a person than he is in fact entitled to.*

ADIHETTY *vs.* WIJESINGHE ... IV. 66

RUBBER THEFTS ORDINANCE

Forward contract to sell rubber by a person who is not a licensed rubber-dealer—Is such contract void.

HULL BLYTH AND CO. *vs.* VALIAPPA CHETTIAR ... ... VIII. 101

RURAL COURTS

See also under **VILLAGE TRIBUNALS**

Offence within exclusive jurisdiction of Village Tribunal—Where several charges are laid against an accused and the only charge proved against him is one triable exclusively by the Village Tribunal the Magistrate acquitting the accused should refer the parties so such Tribunal.

SIDAMPARAPILLAI *vs.* VEERAN AND OTHERS ... ... XX. 77

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Jurisdiction—Offence of criminal trespass with intent to annoy—Penal Code, sections 427, 433—Rural Courts Ordinance, section 10 (b).

The offence of committing criminal trespass with intent to annoy any person is not an offence within the exclusive jurisdiction of the Rural Courts, but is triable by a Magistrate.

MURUTHAPPEN *vs.* ASHTON XXXVI. 31

§ 12 of the Rural Courts Ordinance No. 12 of 1945 has no application where the actual value claimed by the plaintiff can be determined by the Court only after the conclusion of the case.

SOPIHAMY AND OTHERS *vs.* ABEYRATNE ... ... XXXIX. 105

SALE

Sale in execution of mortgate decree—Conditions of sale—Extent to which court can grant relief in the event of a breach of a condition by the purchaser at the sale.

ZAHAN *vs.* STEPHEN FERNANDO I. 170

Sale in execution—Purchase by decree-holder—Bona fide purchase by third party from decree-holder—Subsequent reversal of decree—Is title of bona fide purchaser affected by such reversal.

Held: *That the title of a* bona fide *purchaser from a decree-holder who purchased at a sale held in execution of his decree is not affected by the subsequent reversal of such decree.*

WIJERATNE *vs.* SAPUGODAGE MENDIS APPU *et al* ... ... XXXII. 105

Execution Sale-Decree against defendant adjudged lunatic at time of decree—Purchase by decree-holder at sale in execution—Later transfer to bona fide purchaser—Can such transfer be set aside.

Held: *That a deed in favour of a* bona fide *purchaser of property sold in execution of a decree against a defendant, who had been adjudged a lunatic at the time the decree was entered, cannot be set aside merely on the ground that such decree and subsequent orders thereon were null and void.*

S. APPUHAMY AND ANOTHER *vs.* RAMASAMY PILLAI'S DAUGHTER, THAILAMMAH ... ... XXXIV. 79

Execution of writ—Misdescription of judgment debtor in prohibitory notice—Correctly described in writ, notices of sale, conditions of sale and Fiscals' conveyance. Is sale void.

RAJENDRAM *vs.* THE INDO-LANKA PROVIDENT INSURANCE CO., LTD. XXXVI. 74

Sale—Title of transferor based on fictitious transaction—Sale null and void.

PENDELAIN *vs.* PENDERLAIN XXXVII. 35

Sale under Entail and Settlement Ordinance—Upset price fixed by Court—Property sold above upset price—Should sale be set aside merely because higher price offered by another before confirmation of sale by court.

ELAINE MUTHUMANI *vs.* MUTHUMANI *et al* ... ... XXXVII. 82

Sale by anticipation of a contingent interest in land—Is it obnoxious to the Roman-Dutch Law. Sale by anticipation of a contingent interest during pendency of a Partition action—Can it become a vested right.

SIRISOMA AND OTHERS *vs.* SARNELIS APPUHAMY AND OTHERS XLII. 70

Sale—Undivided land—Contingent interest in transfer pending partition suit, together with another land—Allocation of a smaller interest by final decree—Action by vendee to cancel sale—Failure of consideration.

WIJESINGHE *vs.* SONNADARA XLV. 64

Building—Adjoining premises—Portion of 1st floor of one projecting over the ground floor of other—Sale in blocks as depicted in plan—Omission in plan to show projection—Blocks sold described with reference to plan—Ownership of such projection.

In a decree for sale certain premises depicted in a plan marked D1 and bearing assessment numbers were ordered to be sold in blocks. Two of the premises adjoining each other bore the assessment Nos. 212 and 216. D1 showed that a portion of the 1st floor of No. 212 projected over the ground floor of 216.

For the purpose of the sale a new plan P3 was made. It referred to the assessment numbers but did not show the said projection. At the sale separate blocks were sold as partitioned in P3 and plaintiff became

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purchaser of lot 216 and defendant the purchaser of lot 212.

In the conveyance to the plaintiff the block is described as the allotment of land presently bearing assessment No. 216; western boundary as premises bearing assessment No. 212 and extent as 2.12 perches, according to plan P3. In the conveyance to defendant, the block is described as premises bearing assessment No. 212 eastern boundary as lot 216; area as 3.46 perches according to plan P3.

Held: (1) *That the plan P3 was an essential part of the description of the land purchased.*

(2) *That plaintiff became the owner of everything above the portion of the ground floor depicted as No.* 216 *in plan P3 including the portion of the building projecting on it: and the defendant is restricted to that only which is above the portion depicted as No.* 212 *in the same plan.*

MURUTHAPPAH *vs.* ZOWHAR ··· XXIV. 38

Sale of minor's property sanctioned by Court after due inquiry—Conclusion of sale by execution of notarial conveyance—Subsequent offer of higher price by prospective purchaser—Can Court set aside such concluded sale.

MEERA LEBBE *vs.* PIYADASA *et al* XLVII. 82

Sale of land—No consideration, no delivery of deed or possession—Exceptio rei venditae et traditae—**Is it available to the vendor?**

Held: *That the plea of* exceptio rei venditae et traditae, *which is an equitable plea, cannot be set up by a party who relies on a pretended sale, where there was in reality no consideration and there was no transfer of possession of the property alleged to be sold or delivery of the deed.*

A PETER SINGHO *vs.* SIYADORIS AND ANOTHER ··· ··· XLVIII. 49

Sale of mortgaged shares in land under decree—Pamphlets distributed at sale disputing title of judgment-debtor—Sale price considerably reduced thereby—Is it sufficient to set aside sale?—Discretion of Court—When interfered with.

Where a person other than the purchaser distributes pamphlets amongst prospective buyers at a sale under a decree of Court, stating that the interest to be sold was someting other than that described in the decree and the sale advertisement, and he thereby caused the sale price to be considerably reduced.

Held: *That this fact alone was not a sufficient reason for setting aside the sale.*

Per L. M. D. DE SILVA.—The discretion which a district Court exercises in an application to set aside a sale under a mortgage decree should not be lightly interfered with. But it is a judicial discretion and, if on examination, it is found that the reasons which influenced the learned Judge are entirely insufficient then this Court has to interfere.

B. K. BAPTIST *et al vs.* L. EKANAYAKE ··· ··· ··· XLVIII. 64

SALE OF GOODS

See also under **CONTRACT**

Sale of Goods Ordinance No. 11 of 1896—Scope of § 4. Action by brokers for breach of contract—Note or Memorandum in writing of the contract—Bought or sold note—Can a broker himself rely on the note as a memorandum in writing?

Held: *That in an action for breach of contract brought by a broker who is not an auctioneer, he cannot rely on entry in his books or on a bought or sold note as a note or memorandum in writing of the contract within the meaning of* § 4 *of Ordinance No.* 11 *of* 1896.

MULLER AND ANOTHER *vs.* FERNANDO I. 35

Sale of Goods Ordinance (Cap 70) § 15 (1)—Meaning of the word "description"

JAYASENA *vs.* COLOMBO ELECTRIC TRAMWAYS AND LIGHTING CO. LTD. XXXI. 40

Goods delivered to buyer—Original date for payment extented by seller—Buyer repudiating liability—When can seller sue for price of goods.

ATTANAYAKE *vs.* CHELLIAH ··· XL. 107

Contracts for sale of goods—Amounts due on some of the contracts statute-barred—Part-payment—When such payment revives statute-barred debts.

BASTIAN SILVA *vs.* WILLIAM SILVA L. 110

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SANITARY BOARD

See under **Small Towns Sanitary Ordinance.**

SANNAS

Grant of whole village by Sannas—Claimant of land must prove that the land falls within the limits of the village at the time of the grant.

MOLAGODA KUMARIHAMY *vs.* WIJETUNGE AND OTHERS ··· ··· XLIII. 40

SEARCH WARRANT

When it may be issued—Section 68 Criminal Procedure Code.

Held: *That a Search Warrant may be issued under* § 68 *of the Criminal Procedure Code only when* prima facie *an offence is disclosed by legal evidence on record.*

DARLEY BUTLER AND CO., LTD. *vs.* SUPPRAMANIAM CHETTIAR ··· I. 294

Search without search warrant—Failure to make list of articles seized in course of search—Validity on conviction.

PERERA *vs.* PAULU ··· ··· I. 399

Clerical error in warrant does not affect its legality.

RAJENDRAM *vs.* PERERA ··· II. 474

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

Held: (1) *That the material placed before the Magistrate was insufficient to justify the issue of the search warrant.*

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

FERNANDO (POLICE SERGEANT, NANU OYA) *vs.* LIYANAGE AND SEVENTEEN OTHERS ··· ··· XV. 73

Effect of search warrant issued under § 5 of the Gaming Ordinance.

THORADENIYA *vs.* ISMAIL ··· XVIII. 142

Search without warrant—Admissibility of evidence so obtained.

MURIN PERERA *vs.* WIJESINGHE XLIII. 8

Search without warrant—Evidence obtained by such search—Should a conviction be based on such evidence.

MARIYAI *vs.* SENANAYAKE ··· XLIII. 46

Search without warrant—Admissibility of evidence obtained through.

KARALINA *vs.* EXCISE INSPECTOR MATARA ··· ··· ··· XLIII. 81

Search—Without warrant—Powers of police officers.

MUTTUSAMY *et al vs.* INSPECTOR OF POLICE KAHAWATTA ··· ··· XLIV. 33

Legality of raiding dwelling house without obtaining search warrant.

RAJAPAKSE *vs.* FERNANDO ··· XLV. 6

Legality of searching and arresting accused without warrant—Offence of receiving illegal bets.

PONNUDURAI *vs.* JALALDEEN XLV. 28

Court should not assume regularity of issue of search warrant.

GAMARALAGE WILLIAM *et al vs.* WEERAKOON ··· ··· XLVI. 8

SEA-SHORE

Sea-shore Protection Ordinance, Chapter 310 sections 2 and 5—Removing sand from prohibited area—Meaning of sea-shore—Landward limit—Roman-Dutch law.

Held: *That the term "sea-shore" in section 2 of the Sea-shore Protection Ordinance should be interpreted in accordance with the Roman-Dutch law and includes the furthest line reached by the sea during the south-west monsoon storms, excluding exceptional or abnormal floods.*

ZAIN *vs.* FERNANDO ··· XXVI. 77

SECURITY

For costs of appeal. Notice tendering served on respondents' proctor. Is it suffi-

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cient compliance with section 756 of Civil Procedure Code.

CARLINA *vs.* SILVA ... XXXI. 71

SEDUCTION

Damages for—When corroboration of plaintiff's evidence necessary.

VEDIN SINGHO *vs.* MENCY NONA XLII. 31

SEIZURE

Cause of action—Seizure of immovable property under writ—Seizure not registered —Alienation of the property two days before sale in execution—Plaintiff, purchaser at the sale—Action to recover damages from judgment-debtor—Has plaintiff a cause of action —Effect of sections 237 and 238, of the Civil Procedure Code, on alienation of such property.

Held: (1) *That, in the circumstances, the plaintiff has no cause of action against the judgment-debtor.*

(2) *That either in section* 237 *or in section* 238 *there is no absolute prohibition against alienation on the part of the judgment-debtor.*

(3) *That section* 238 *of the Civil Procedure Code does not affect alienations made after seizure but before the registration of the seizure.*

WIJEGOONESINGHE *vs.* GUNASEKERA XII. 49

To succeed in a action for damages for wrongful seizure the plaintiff must aver and prove mala fides.

KANDASAMY PILLAI *vs.* SELVADURAI ... ... XVIII. 65

Seizure—Of movable property under provisions for immovable property—Is seizure valid.

SUPPIAH *vs.* SIVARAJAH ... XLVIII. 81

SENATUS CONSULTUM VELLEIANUM

Woman subject to Thesawalamai not renouncing—Can be bound as surety.

Is the Senatus Consultum Velleianum in force in Ceylon.

THANGAPONNU *vs.* GEORGE ... XL. 40

SENTENCE

See also under **WHIPPING**

Considerations that should not be taken into account in awarding punishment.

Held: (1) *That where an accused in his defence makes allegations against the honesty of the prosecuting inspector and the Magistrate finds that they are false he should not take into account the fact that false allegations were made in awarding punishment.*

(2) *That unsworn statements about an accused's bad character should not be acted on in awarding punishment.*

INSPECTOR OF POLICE NEGOMBO *vs.* HUSSAIN ... ... II. 347

Facts showing that an offence is deserving of a deterrent punishment—Procedure for bringing them to the notice of the Court.

Held: *That where a prosecution desires to bring before a Court any facts for establishing that an offence is deserving of deterrent punishment those facts should be laid before the Court by a witness duly sworn or affirmed to speak the truth and unless the accused admits the facts he should be given an opportunity of rebutting that evidence.*

ADIHETTY *vs.* HANIFFA ... III. 72

Enhancement of sentence—Power of Supreme Court in appeal to enhance punishment imposed by the trial court.

Held: *That the Supreme Court has power to enhance a sentence passed by a lower court, even where, at the time of the hearing of the case in appeal or revision, the accused has undergone the whole of the sentence imposed by the lower court.*

INSPECTOR PEIRIS *vs.* PUNCHI BANDA AND OTHERS ... ... VIII. 139

Principles of punishment—How should appropriate punishment for an accused with previous convictions be determined.

THE KING *vs.* SEEMAN *alias* SEEMA IX. 76

Circumstances in which the Supreme Court will allow enhancement of sentence.

Held: (1) *That on an application for enhancement of sentence a revisional court will interfere only when the sentence passed is manifestly inadequate and not merely on*

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the ground that it would itself have passed a heavier sentence.

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

THE SOLICITOR-GENERAL *vs.* JOHANNES ALWIS ... ... XVI. 8

Sentence—Principles governing punishment of young first offenders.

DHARAMARATNE *vs.* DAVITH SINGHO ... ... XVI. 81

A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

REX *vs.* PEDRICK APPUHAMY KADIRESU AND TWO OTHERS ... XXVIII. 78

Sentence—When should previous conviction of accused be taken into account.

THANGARASA *vs.* THARRONACHARI XXX. 56

Sentence—Magistrate imposing a sentence less than the minimum prescribed by law—It is an error in law and appealable.

ATTORNEY-GENERAL *vs.* KUNCHINAMBU ... ... XXX. 87

Sentence—Of two years rigorous imprisonment and two years police supervision—Regularity of sentence.

SIRISENA *vs.* PILLAI ... XXXIII. 7

False allegations made by accused—Power of Court to enhance punishment.

Held: *That an enhanced punishment should not be imposed merely because an accused person has made certain allegations which are later proved to be false.*

YOWAN *vs.* HUBERT, PRICE CONTROL INSPECTOR ... ... XXXIII. 32

Sentence—When should sentences be concurrent and not consecutive.

REX *vs.* HOTHA AND ANOTHER XXXIV. 11

Sentence excessive—Reduced in appeal.

REX *vs.* WARNAKULASURIYA ALPHONSO ... ... XXXV. 7

False allegations made by accused—Not to be taken into consideration in fixing sentence.

Held: *That the fact that an accused person has made false allegations against the police should not be taken into consideration in fixing the sentence.*

JOHN *vs.* P. C. 3072 EKANAYAKE XXXV. 56

Magistrate influenced by extraneous considerations.

Held: *That the accused should be given the option of paying a fine as it appeared that the Magistrate, in sentencing the accused to imprisonment, was influenced by considerations which were not in evidence.*

BRAMPY PERERA *vs.* GOONEWARDENA (EXCISE INSPECTOR, WELLAMPITIYA) ... ... XXXVIII. 69

Can Sentence run concurrently with imprisonment in default of payment of fine.

SIEBEL SINGHO AND OTHERS *vs.* THE MIRIGAMA POLICE ... XXXVIII. 89

Magistrate influenced by extraneous circumstances.

Held: *That the sentence should be reduced as the Magistrate, in imposing the sentence, appeared to have been influenced by matters not in evidence.*

GUNASEKERA *vs.* KANAGANAYAGAM (EXCISE INSPECTOR, KALUTARA) ... ... XXXVIII. 91

Should a mere allegation against accused that he committed the same offence previously be taken into account in passing sentence.

Held: *That in assessing the sentence that should be passed on an accused, it is improper for a Magistrate to take into account a mere allegation that he has previously committed the same offence and successfully evaded detection.*

MUSAFER A. S. P. *vs.* CHARLES PEIRIS ... ... XXXIX. 101

Sentence of imprisonment till rising of court—Regularity.

ATTORNEY-GENERAL *vs.* PODISINGHO ... ... XLII. 110

Youthful offender—Sentence—Principles determining it—Section 21 of Children

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and Young Persons Ordinance—Welfare of the young person should be the paramount consideration—Section 325 (2), Criminal Procedure Code.

A boy of ten years and six months was charged with murder. There was no evidence to establish the charge, but he pleaded guilty to the offence of wrongful confinement under section 333 of the Penal Code. The boy was found on medical and other evidence to be intelligent, co-operative and amenable to discipline and capable of being educated to be a good citizen.

The Court in the circumstances was of opinion that in the best interests of the accused and society, which is the underlying principle of section 21 of the unproclaimed Children and Young Persons Ordinance, and because of the absence of adequate machinery to carry out the objects of the Ordinance, the accused should be discharged subject to conditions under section 325 (2) and 326 (2) (*c*) of the Criminal Procedure Code.

REX *vs.* W. A. JAYASENA *alias* JAYASINGHE ... ... XLIII. 71

Sentence—Unsworn statement regarding accused—Magistrate influenced by.

Where in determining the sentence to be passed on an accused person the learned Magistrate appeared to have been influenced by the unsworn statement of a Police officer regarding the accused.

Held: *That the sentence should be set aside.*

Per BASNAYAKE, J.—The sentence of a Court is a part of its judgment and it cannot be based on any material which is not legal evidence.

MAILVAGANAM *vs.* SUB-INSPECTOR OF POLICE ... ... XLIII. 108

Sentence of fine without sentence of imprisonment in addition—Procedure to be followed in default of payment of fine.

REX *vs.* W. A. D. VALIN ... XLIV. 49

Power of Court of Criminal Appeal to review sentence.

REX *vs.* A. G. MARTIN ... XLIV. 94

Offence under § 314 of Penal Code—Considerations which do not affect the sentence to be passed thereunder.

DINGIHAMY *vs.* JANSZ ... XLVI. 16

Sentence—Youthful offender—Importance of placing before Court evidence helpful for selection of appropriate punishment.

It is of fundamental importance that Magistrates should before passing sentence upon convicted persons, who are qualified by age for the benefits of Borstal training, to insist upon the prosecution placing before the Court strict proof of age in addition to other evidence relevant to the selection of the appropriate punishment.

REX *vs.* M. SENERIS SINGHO ... XLVI. 55

Sentence—Accused with previous convictions—Principles governing sentence.

AMARASEKERA *vs.* CADER ... XLVI. 86

Conviction for cheating—Person committing a series of similar offences within a short period of time—Terms of imprisonment already imposed aggregating over ten years—Appropriate punishment to be imposed in the circumstances.

Where a person—(who had been intermittently brought to justice, and sentenced to terms of imprisonment exceeding ten years in the aggregate, for a series of similar offences committed within a short period of time)—was convicted for cheating.

Held: (*a*) *That it would be wrong for a Court to sanction yet another long period of incarceration commencing on a date more than a decade later.*

(*b*) *That, in these circumstances a nominal term of imprisonment would be sufficient.*

REX *vs.* VANNIASINGHAM SIVANATHAN ... ... XLVI. 93

Duty of Police when moving for deterrent punishment—

Held: *That it is wrong for the Police to press for deterrent punishment on grounds which they are not prepared to disclose and to establish by evidence.*

WEERASOORIYA *et al vs.* POLICE SERGEANT M. SABDEEN ... ... XLVIII. 48

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SEPARATIO A MENSA ET THORO

See under **Husband and Wife, Divorce.**

SEQUESTRATION

Sequestration—Order obtained before judgment—No actual seizure of goods—Can claim for damages be maintained—What judge should find before awarding damages.

Held: (1) *That where a person has suffered injury to his reputation in consequence of sequestration proceedings taken by another maliciously and without reasonable and probable cause, the latter's conduct is actionable even though no actual sequestration was effected, partial or otherwise.*

(2) *That before awarding damages for malicious sequestration, there should be a finding by the judge that the order for sequestration was obtained without reasonable and probable cause.*

HADJIAR *vs.* ADAM LEBBE ··· XXII. 99

When may mandate of sequestration issue.

Held: (1) *That a mandate for sequestration of property before judgment should not issue on a mere assertion that the defendant is making arrangements to place his assets beyond the reach of the plaintiff.*

(2) *That a plaintiff who obtains irregularly a writ to seize the defendant's property before Judgment is liable in damages.*

RAJADURAI *vs.* THANAPALASINGAM *et al* ··· ··· ··· ··· II. 147

SERVICE TENURES

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

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

MEDHANKARA ISTAWEERA *vs.* SUPPERAMANIAM CHETTIYAR AND LECHIMAN CHETTIAR ··· ··· XV. 53

The obligations of tenants of a panguwa **of a** nindagama **to render services is in the nature of an indivisible obligation and therefore, the liability to pay commuted dues is also indivisible.**

Where over ten years had elapsed since the performance of any services or the payment of any dues to the overlord in respect of such a land the dominium in such land became vested in the *nilakarayas* under section 24 of the Service Tenures Ordinance and a partition action could be maintained in respect thereof.

DINGIRI MENIKE AND TWO OTHERS *vs.* KIRI BANDARA AND ANOTHER XXVI. 1

Service Tenures Ordinance—Sections 9, 10, 14 and 15—Liability of tenants or nilakarayas**—Nature of—Right of overlord to sue for dues—Joinder of other** nilakarayas**—When may prescriptive title to land belonging to a** pangu **be acquired.**

Held: (1) *That the provisions of the Service Tenures Ordinance make it clear that the liability to perform services or to pay commuted dues in respect of a* pangu *in a* nindagama *is an indivisible obligation owned jointly and severally by the* nilakarayas *and are exigible from any of them subject to his or their right to claim contribution.*

(2) *That where a party has acquired prescriptive title to lands belonging to a* pangu *as against the* nilakarayas *and their successors, the overlord is entitled to sue such party to recover the entire dues, without joining the other* nilakarayas *or their successors.*

(3) *That no prescriptive title to a land belonging to a* pangu *can be acquired so long as some part of the dues has been recovered by the overlord in respect of a land belonging to that* pangu *within the last ten years.*

GUNARATANA THERO *vs.* JAYARATNE XXVI. 97

Paraveni property—And acquired property under Kandyan Law.

SELIWA *vs.* SIRIMALIE AND ANOTHER ··· ··· ··· XXXV. 17

Grant of whole village by Sannas—Failure of defendant to prove that land which he

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claimed as forming part of nindagama, **fell within the village mentioned in the grant.**

MOLAGODA KUMARIHAMY *vs.* WIJETUNGE AND OTHERS ... ... XLIII. 40

Nilakarayas **failing to pay commuted dues or to render services—Action for damages by** Nindagama **proprietor—Is such action barred in one year.**

PANANWALA *vs.* GABRIEL APPUHAMY AND OTHERS ... ... XLVI. 14

SERVITUDE

See also under **RIGHT OF WAY**

Action for declaration of right of way over several servient tenements—Should all servient tenants be joined.

Held: (Dalton J, dissentiente) *That in an action brought to vindicate a right of way over several contiguous lands it is sufficient to proceed against the person denying the dominant owner's right without joining the other servient tenants.*

DE SILVA *vs.* NONNOHAMY *et al* II. 1

Servitude of threshing paddy.

Held: *That a servitude of threshing paddy can be acquired in Ceylon.*

TIKIRIAPPU *vs.* DINGIRALA ... II. 361

Servitude—Can one co-owner create without other co-owner's consent.

Held: (1) *That one co-owner cannot create a servitude by deed without the consent of the other.*

(2) *That where two lands owned by the same person can be reached by a right of way in respect of one only of these lands a servitude cannot be claimed in respect of the other.*

THAMBU *vs.* ANNAMAH ... II. 496

Right of cart way—Alteration of track by mutual agreement—Is a notarial agreement necessary to constitute a valid alteration.

Where the owners of the dominant and servient tenements by mutual agreement altered the track of a right of cartway.

Held: *That the servitude attached to the new track though the alteration was not evidenced by a notarially attested writing.*

DIAS *vs.* FERNANDO ... ... IV. 67

Cartway—Adverse user for over ten years—Dominant and servient tenement not contiguous—Can right of cartway be acquired when there is only a right of footpath over the intervening lands.

Held: *That the plaintiff was not entitled to claim the right of cartway sued for.*

AMARASURIYA *vs.* RAMANATHAN CHETTY ... ... X. 169

Servitude—Roadway by boundary of land—Grant of land without grant of roadway—Access to allotment granted available from a public road—Is the grantee entitled to use the roadway—Mortgage Ordinance No. 21 of 1927, section 10.

Held: (1) *That the defendant was not entitled to the roadway in question.*

(2) *That a right of way granted to the owner of a tenement personally does not necessarily go with the tenement.*

(3) *That the effect of section* 10 (2) *of the Mortgage Ordinance is to give the transferee a title to the property mortgaged superior to that of every party to the action, and not inclusive of it.*

EMILY WIJESEKERA *vs.* VAITHIANATHAN ... ... XII. 25

Right of footpath through several lands to well—Destruction of the well—Use of new well in one of the intervening lands—Same footpath used with slight diversion—Use of the new well for less than ten years—Is the right of way affected by the discontinuance of the old well.

Held: (1) *That with the abandonment of the right of drawing water from the old well the accessory right of footpath to the said well was destroyed.*

(2) *That the original servitude of* aquae haustus *in respect of the old well is not the same as drawing water from the new well.*

(3) *That as ten years had not lapsed from the date of commencement of the use of the new well by plaintiff, there is no servitude of way which subserves or is accessory to any existing sevitude of drawing water at the new well.*

DON SIMON PETER AND ANOTHER *vs.* JAMES FERNANDO AND TWO OTHERS XIII. 109

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

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

HENDRICK AND OTHERS *vs.* SARANELIS AND OTHERS ... ... XVII. 87

(1) The right to thresh paddy on another's land is a servitude which can be acquired by prescriptive user.

(2) What is acquired by prescriptive user is not the ground on which the paddy is threshed, but the incorporeal right of servitude.

WEERASINGHE *vs.* PERERA *et al* XXV. 56

Where a right of cartway of necessity is claimed over contiguous lands belonging to different persons it is open to the plaintiff to join the owners of all the lands over which he claims the cartway in the same action.

ABEYTUNGE *vs.* SIYADORIS AND OTHERS ... ... XXV. 68

Right of drawing water from a well—Access to well along a by-road and across lands other than the servient tenement—User for nearly forty years.

Held: *That a right to draw water from a well is not affected by the fact that the person who enjoys the right has to go along a by-road and then cross lands of persons other than that of the owner of the servient tenement in order to reach the well.*

SILVA *vs.* FERNANDO ... XXVII. 12

Servitude of light and air—Erection of building on neighbouring tenement so as to affect the enjoyment of light and air—In what circumstances will the court by injunction stop the erection of the building.

Held: *That a court will not prohibit a person from building on his land so as to affect the light and air of his neighbour unless the diminution of light and air will be so substantial as to render the building unfit for the purpose for which it is used.*

PERERA *vs.* SIRIWARDENE XXVIII. 12

Right of footpath claimed through another's land—Existence of other means of access to a public road—Nature of evidence necessary to establish such right.

Held: (1) *That the fact that a person who claims a right of way has direct access to a road is a matter that cannot be ignored in considering the evidence of user.*

(2) *That a right to a footpath must be established by cogent evidence, as it affects the right of the owner of a land to the free and unfettered use of his land.*

SUMANGALA ISTHAVIRA *vs.* APPUHAMY ... ... XXX. 3

Servitude of footway—Can right to free use of footway be obstructed—Right to use bicycle or wheelbarrow on footway.

The plaintiff claimed a right of footway, three feet wide, over the defendant's land. The defendant had by placing obstructions at certain points of the footway to prevent cattle trespass, restricted the free use of the footway by the plaintiff.

Held: *That the plaintiff was entitled to the use of the footway, free from any obstruction.*

Per DE KRETSER, J.: "The rights to use a bicycle and a wheelbarrow are not free from difficulty.....I am inclined to think that a right to use a bicycle or to use a wheelbarrow should be conceded to a person entitled to a footpath."

JAYASEKERA HAMINE *vs.* AGIDA HAMINE ... ... XXX. 41

Right to discharge rain water along defined channel—Deviation of channel by agreement—Right to use new channel.

Held: *That when a right to discharge rain water along a defined channel over another's land has been acquired by prescription and a new channel is substituted by agreement, the benefit of possession of the old channel attaches to the new one.*

SINNATHAMBY AND ANOTHER *vs.* KATHIRGAMU ... ... XXXII. 41

Action for right of footway—Misjoinder of parties and causes of action—Is court bound to dismiss action.

Held: (1) *That clear, precise and cogent evidence is necessary to establish a servitude like a right of way.*

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(2) *That where there is a misjoinder of parties and causes of action, a court is not bound to dismiss the action.*

PODIHAMY AND ANOTHER *vs.* SIMAN APPU AND TWO OTHERS ... XXXIII. 29

Grant of Share of Well—Does it include the right to lead water from the well along another's land—Burden of proof—Presumption.

Held: (1) *That the bare grant of a share in a well implies only a right of way to the well and does not imply the right of leading water over the land of another. The right of leading water must be expressly granted.*

(2) *That a heavy onus lies on a person who seeks to establish a servitude by prescription. In case of doubt the presumption is always against a servitude.*

CHELLIAH AND ANOTHER *vs.* NAGARAJAH AND ANOTHER ... XXXIX. 98

Cartway of necessity—Principles which should be considered in granting.

The plaintiff, who lived in an urban area, claimed of a right of cartway of necessity from his land to the public road. He sought a servitude over a narrow strip of the defendant's land and offered the defendant adequate compensation. The strip of land was of no special use of the defendant. On the facts the plaintiff proved that he had no reasonably sufficient access to the public road.

Held: *That the servitude asked for should be granted.*

ARNOLIS APPU *vs.* HEENHAMY XL. 91

Right of way—Claim by plaintiff of a cartway or footpath of necessity—Sketch filed with plaint — A Surveyor's plan subsequently filed—Plaint rejected and ordered to be amended to define strictly cartway—Sufficient if plaint indicates way claimed —Civil Procedure Code, section 41—Amendment of plaint.

In an action claiming either a cartway or a footpath of necessity, the plaintiff filed with the plaint a sketch indicating the tract of the cartway. On a commission issued by the Court a plan showing the cart tract claimed by the plaintiff was filed.

At the trial the District Judge rejected the plaint on the ground that it did not describe the way of necessity as depicted in plan and that it was silent with regard to the actual right of way, and ordered the plaintiffs to amend the plaint accordingly.

Held: (1) *That in such a claim it was sufficient for the claimant to indicate the way not obliged to describe the way of necessity by physical metes or bounds or by reference to a sufficient sketch, map or plan.*

(2) *That in this case the plaintiffs had pleaded everything material to sustain a claim for a way of necessity and the Court had ample material to frame the issues for determining the case.*

ABDULLA AND ANOTHER *vs.* JUNAID AND OTHERS ... ... XLIV. 84

Servitude of habitatio**—Nature of**

SWARIS AND OTHERS *vs.* SAMARAJEEVA L. 89

SET-OFF

Set-off—Principal debtor and sureties sued by liquidators of a cheetu company for money due on agreement—Claim to set off money due to one of the sureties—Is surety entitled in law to claim such benefit.

The plaintiffs, in their capacity as liquidators of a *cheetu* company, sued the 1st defendant principal and 2nd and 3rd defendant as sureties for a sum of Rs. 70/- due under an agreement. The second defendant claimed that he was entitled to set off against the amount claimed a sum of Rs. 105/- which he had contributed to the plaintiff company.

After trial, the learned Commissioner held that the 2nd defendant was entitled to the set-off claimed and gave judgment against the 1st defendant, judgment against the 3rd defendant having gone already by default. He further ordered that, if the 1st defendant failed to satisfy the decree, the 2nd defendant should set off against the decree the sum due to him from the company and the 3rd defendant too should enjoy the benefit of such set-off.

The plaintiffs appealed and it was contended on their behalf (1) that the two demands were not of such a character as would permit one to be set off against the other; (2) that a set-off, in this case, would amount to giving a creditor in a winding up preferential treatment.

Held: *That the Commissioner was wrong in allowing the set-off, inasmuch as it would*

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amount to giving a creditor in a winding up preferential treatment.

CANAGARATNE AND ANOTHER *vs.* CHELLIAH AND TWO OTHERS ··· XII. 13

SHOPS

Shops Regulation Ordinance—Sections 18 and 23 (1).

Held: (1) *That section* 18 *of the Shops Regulation Ordinance does not make it an offence merely to keep a shop open. To be an offence under that section the shop must have been kept open "for the serving of customers."*

(2) *That it is not an offence under section* 18 *to permit a customer to enter a shop before the hour fixed for the opening of a shop.*

RATNAYAKE (INSPECTOR OF LABOUR) *vs.* DE SILVA ··· ··· XXI. 39

Closing Order under the Shops Ordinance—Charge of keeping shop open in contravention of closing order—Proper person to be charged for such contravention—Shops Ordinance, No. 66 of 1938—Sections 18, 23 and 31.

The accused, who was the Secretary of the Co-operative Stores Society, Ltd. was convicted of having kept a shop belonging to the Society open in contravention of a closing order made under the Shops Ordinance. The person liable for the offence was the "occupier" as defined in section 31. There was no evidence to show that the accused was the "occupier."

Held: *That the conviction must be set aside.*

KUMARAVELU *vs.* WIJEYARATNE (INSPECTOR OF LABOUR) ··· ··· XXXI. 48

Shops Ordinance No. 66 of 1938, sections 17 and 18—Evidence necessary to prove charge under—Accused "discharged" after close of prosecution and defence counsel had stated that no evidence would be called—Fresh charge—Plea of autrefois acquit**—Criminal Procedure Code, sections 44, 172 187, 191, 330 and 425.**

Held: (1) *That in a charge under section* 18 *of the Shops Ordinance, there must be evidence that the shop was open for the serving of customers.*

(2) *That a Court is not bound to to take judicial notice of a closing order.*

(3) *That a "discharge" after the close of the prosecution and after the defence has stated that no evidence would be called, is an "acquittal" within the meaning of section* 330 (1) *of the Criminal Procedure Code.*

(4) *That section* 330 *does not make any distinction between an acquittal on the merits and an acquittal on any other ground.*

SOLICITOR-GENERAL *vs.* ARADIAL ··· ··· ··· XXXIX. 17

Shops Ordinance—Meaning of "Shop" —Portion of hotel building used for textile business—Permanent structure and regular business—Does it constitute a 'Shop.'

In a part of a building described as a hotel, the appellant transacted business as a retail dealer in textiles. The portion he occupied was separated by a partition and in front of it was a counter on which his goods were displayed. On either side of the counter were two doors of the entrance left permanently open. There was a canvas over the counter and the place was illuminated by electric lights from current taken from the main building. He was convicted for keeping the shop open in breach of the prescribed hours.

It was contended on his behalf that his place of business did not constitute a "shop" as defined in Ordinance No. 66 of 1938, as it was not a compact building with facilities for means and sanitation and capable of being closed or open by the occupant.

Held: *That the appellant's place of business is a "shop" within the meaning of section* 31 (1) *of the Shops Ordinance No.* 66 *of* 1938.

NADARAJAH, INSPECTOR OF LABOUR *vs.* PIYASENA ··· ··· XLIII. 110

SLANDER

See under **DEFAMATION**

SMALL TENEMENTS ORDINANCE

Application for rule nisi **on tenant to show cause why he should not deliver up possession—Affidavit in support by landlord's attorney—Rule made absolute—Power of attorney not**

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filed—Are proceedings regular—Civil Procedure Code section 25 (b).

Held: (1) *That section* 25 (*b*) *of the Civil Procedure Code, which requires a power of attorney authorising proceedings to be filed in Court, has no application to proceedings under the Small Tenements Ordinance.*

(2) *That proceedings under the Small Tenements Ordinance can be instituted by an agent of the landlord.*

(3) *That it is not necessary that such agent should hold a duly executed power of attorney.*

SINAN CHETTIAR *vs.* SORIMUTTU XIII. 40

Order against tenant—Objection to writ of ejectment by co-occupiers—Claim of title to tenement by co-occupiers—Points of decision by a court in a proceeding under the Small Tenements Ordinance.

Held: (1) *That the co-occupiers were not in the circumstances entitled to succeed in their objection.*

(2) *That once a landlord has established his title to relief under the Small Tenements Ordinance the jurisdiction of the court is not ousted by the tenant alleging title in a third person.*

ARUNACHALAM CHETTIAR *vs.* FERNANDO AND ANOTHER ··· ··· XIV. 58

Does failure of proceedings under ordinance operate as a waiver of notice.

BANDARANAYAKE *vs.* PERERA XXXVI. 73

SMALL TOWNS SANITARY ORDINANCE

Sale of land—Small Towns Sanitary Ordinance 1892—Section 9. Mode of Seizure and Sale—Ordinance No. 6 of 1873.

Held: *That section* 1 (4) *of Ordinance No.* 6 *of* 1873 *permits the sale of any building for the recovery of assessment rates and that it is not necessary to sell a house piece by piece.*

EDIRISURIYA *vs.* USUPH DEEN ··· I. 304

SPECIAL COMMISSION (AUXILIARY PROVISIONS) ORDINANCE No. 25 of 1942

Sections 5, 6 and 9.

PERERA *vs.* PEIRIS AND ANOTHER XXXI. 97

SPECIFIC PERFORMANCE

Property conveyed reserving right to a re-transfer—Assignment of right to third party—Has assignee right to claim retransfer.

MUHANDIRAM *vs.* ABDUL SALAM XXXVI. 8

Interlocutory decree in partition action declaring parties entitled to shares—Agreement to sell to plaintiff divided lots in lieu of such shares within three months after final decree—Registration of agreement—Transfer of divided lots after final decree to 3rd party—Trusts Ordinance (Chap. 72), section 93—Is the plaintiff entitled to specific performance.

The 1st and 2nd defendants, who were declared entitled to certain shares in an interlocutory decree under the Partition Ordinance, agreed by a notarial writing (which was duly registered) to sell to the plaintiff within three months of the entering of the final decree, the divided lots that may be allotted to them in the final decree. The plaintiff performed all her obligations under the agreement and entered into possession of the divided lot allotted to the 1st and 2nd defendants after final decree which was entered in 1940. In 1944 the 1st and 2nd defendants despite the requests of the plaintiff transferred the lot in question to the 3rd defendant, who later mortgaged to the 4th defendant.

In an action by the plaintiff for specific performance, the 3rd and 4th defendants contended that the plaintiff having failed to obtain a transfer within the stipulated time had lost her rights under the contract, and therefore, it was not an existing contract within the meaning of section 93 of the Trusts Ordinance.

Held: *That in the circumstances, the agreement to sell continued to be an existing contract within the meaning of section* 93 *of the Trusts Ordinance, and the plaintiff was entitled to specific performance of it.*

PERERA *vs.* ELZA NONA ··· XXXVII. 109

Specific performance of agreement containing penal stipulations.

HAWADIYA *vs.* UNOOS ··· XXXIX. 76

STAMP ORDINANCE

The Stamp Ordinance 1909—Sections 16, 28, 33, 39, (2) 50, 50B and 58. Application

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under § 50 for deficiency of stamp duty—Unstamped mortgage bond—Evidence that money had been paid by the mortgagors for the stamps—Stamps not affixed by the notary—Are mortgagors bound to pay stamp duty?

Held: *That where a mortgage bond was unstamped the mortgagors were liable to pay duty although there is evidence to show that money had been paid to the notary for stamps at the time of execution of the deed, and the notary had failed to affix the stamps so paid for.*

THE COMMISSIONER OF STAMPS *vs.* FERNANDO AND ANOTHER ... I. 60

The Stamp Ordinance 1909—Appropriate item of schedule B under which recognizance given in an Election inquiry should be stamped.

PERIES *vs.* SARAVANAMUTTU ... I. 81

Recognizance given by petitioner in election inquiry—Whether exempt from stamp duty.

Held: *That a recognizance given by or on behalf of a petitioner in an election petition is liable to stamp duty.*

WIJESEKERA *vs.* COMMISSIONER OF STAMPS ... ... I. 258

Item 22 (b) of Part 1 of Schedule 1 of the Stamp Ordinance—Meaning of consideration.

Held: *That the term "consideration" in item* 22 *of Part* 1 *of Schedule* 1 *of the Stamp Ordinance* 1909 *has the same meaning as it has in the English Law.*

THE WAHARAKA INVESTMENT CO. LTD. *vs.* THE COMMISSIONER OF STAMPS II. 35

Admission of promissory note insufficiently stamped in evidence—Can it be objected to later—

Held: *That the ruling in the case of Hettiaratchy vs. Wilfred* 20 *N. L. R.* 183 *applies even to a case where the action is based on an instrument which is challenged as not duly stamped.*

ENDORIS *vs.* DHARMAWICKREME II. 256

Deed of dissolution of partnership and division of assets—How stampable.

Held: *That where partners engaged in a partnership business, in the same deed, dissolve the partnership, divided the assets and convey to one another by means of cross conveyances each partner's share of the partnership assets, the deed must be stamped under item* 28 *of Schedule* 1 *Part* 1 *of the Stamp Ordinance in respect of the dissolution of the partnership and also in respect of each conveyance by the partner or partners.*

DE SILVA *vs.* COMMISSIONER OF STAMPS II. 489

Conveyance of property by Administratrix to herself as heir of deceased in pursuance of an agreement among the heirs for a division of the estate—Conveyance signed by other heirs as consenting parties—How should deed be stamped—Under item 22 (a) or 22 (c) of Part I of Schedule B of Ordinance.

AKBAR *vs.* COMMISSIONER OF STAMPS III. 9

Stamp Ordinance No. 22 of 1909 item V. of Schedule B. part II item V. Sub-head Miscellaneous.

SILVA *vs.* WIJESEKERA ... III. 11

Stampability of deed—Deed of division of estate of deceased intestate among co-heirs. Should deed be stamped under item 27 or under items 22 (a) and 22 (c) of Part I of Schedule B.

VAN ROOYEN *vs.* COMMISSIONER OF STAMPS ... ... III. 18

Deed conveying property in lieu of and in consideration of money promised as dowry—Under what item of Schedule B. Part I should it be stamped.

Held: *That the deed was liable to duty under item* 30 (*b*) *of Schedule B. Part I of the Stamp Ordinance* 1909.

DE SILVA *vs.* COMMISSIONER OF STAMPS ... ... III. 33

Certificate of appeal—When should stamps for certificate be tendered.

RAMALINGAM PILLAI *vs.* WIMALARATNE AND TWO OTHERS ... ... II. 410

Appeal—Stamp Ordinance Schedule B Part 2 proviso—Should the stamp for the decree or order of the Supreme Court and certificate in appeal be delivered simultaneously with the petition of appeal.

Held: *That unless the stamps for the decree or order of the Supreme Court and certificate in appeal are delivered to the Secretary of the District Court or Clerk of*

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the Court of Requests simultaneously with the petition of appeal an appeal cannot be entertained by the Supreme Court.

THE HONOURABLE THE ATTORNEY-GENERAL *vs.* KARUNARATNE AND ANOTHER ... ... IV. 23

Stamp Ordinance No. 22 of 1909—Section 30—How should deed be stamped—Deed providing for dissolution of partnership business, conveyance of returning partner's interests in favour of other partner for consideration and an agreement to mortgage machinery and stock-in-trade.

ANBUDIAN *vs.* THE COMMISSIONER OF STAMPS ... ... IV. 61

Stamp Ordinance No. 22 of 1909—Section 50—Recovery of duty or penalty imposed under the Ordinance.

Held: *That it is wrong to impose a term of imprisonment in default of payment of any duty or penalty to be recovered under section* 50 *of the Stamp Ordinance No.* 22 *of* 1909.

COMMISSIONER OF STAMPS *vs.* SUBRAMANIAM ... ... VI. 120

Writing requiring a stamp of the value of one rupee stamped with a stamp of the value of fifty cents—Objection taken to the bond in the pleadings on the ground that it was under-stamped—Bond admitted by court—Can objection be taken in appeal to the bond.

Held: *That the admission of a document in evidence cannot be questioned in appeal once it has been admitted in evidence by the trial judge.*

FERNANDO *vs.* PERIS AND ANOTHER VIII. 142

Stamp Ordinance Part II Schedule B—Ascertainment of value of action—Appeal rejected in error—Can it be restored to the list on the error coming to the notice of the Court even after decree has been entered.

Held: (1) *That the value of the claim in S. C.* 77—*D.C. Galle* 35107 *was Rs.* 2,500/-.

(2) *That an appeal rejected in error can, on the error being brought to the notice of the court, be restored to the list.*

(3) *That the Supreme Court will not entertain an appeal in any case in which the appellant has failed to tender the proper amount of Stamp Duty for the decree in appeal in the manner prescribed in Part II of Schedule B of the Stamp Ordinance under head Miscellaneous.*

(4) *That failure to observe the requirements of Part II of Schedule B of the Stamp Ordinance, under head Miscellaneous, regarding the tendering of the stamps for the decree or order of the Supreme Court and the certificate in appeal cannot be rectified by tendering the stamps later, after the appealable time.*

SINNAPOO *vs.* THEIVANAI AND AHOTHER ... ... IX. 80

Method of determining the value of a suit for the purposes of stamping the proceedings—Schedule B of Part II of the Ordinance.

SINNAPOO *vs.* THEIVANAI AND ANOTHER ... ... IX. 82

Stamps for judgment in appeal and certificate in appeal—Should stamps be tendered "simultaneously" with appeal petition.

Where stamps for the judgment in appeal and the certificate in appeal were not tendered simultaneously with the appeal petition.

Held: (1) *That the appeals were not properly before the Supreme Court and should be rejected.*

(2) *That the words "together with" in Schedule B Part II Miscellaneous mean "simultaneously."*

MATHES *vs.* MATHES AND ANOTHER IX. 141

Stamp duty—Proceedings under the Trusts Ordinance—Application under section 42 of the Trusts Ordinance No. 9 of 1917—Section 116, sub-sections (1) and (3).

Held: (1) *That an appeal from the decision of the District Court, on an application under section* 42 *of the Trusts Ordinance No.* 9 *of* 1917, *was subject to the general provisions of the Stamp Ordinance with regard to legal proceedings.*

(3) *That a person appealing from the decision of the District Court in a proceeding under the Trusts Ordinance is bound to deliver the stamp for the decree in appeal and the certificate in appeal together with the petition of appeal.*

SADDANATHAKURUKKAL *vs.* SUBBRAMANIAM ... ... X. 106

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Joint appeal by two appellants in one petition—Petition stamped as if it were two distinct appeals—Stamps for certificate in appeal and judgment in appeal supplied on the footing of one appeal.

Held: *That there is no objection to the stamps for the certificate in appeal and judgment in appeal being supplied on the footing of one appeal.*

CHELLIAH AND OTHERS *vs.* SINNATHAMBY AND OTHERS ... ... X. 116

"Presentment for payment" so far as promissory notes are concerned, must be interpreted by the terms of the Bills of Exchange Ordinance.

RAMASAMY CHETTIAR *vs.* RAMANATHAN CHETTIAR AND ANOTHER ... XI. 32

Stamp duty on Probate—Law existing before 1st July, 1919—Legislation by incorporation—Repeal of incorporated statute —Effect of repeal on statute in which incorporation is made—Estate Duty Ordinance No. 8 of 1919 section 34.

Held: *That Part III of Schedule B of "The Stamp Ordinance,* 1909," *mentioned in section* 34 *of the Estate Duty Ordinance No.* 8 *of* 1919, *must be taken to mean Part II of Schedule B of "The Stamp Ordinance at the commencement of Ordinance No.* 8 *of* 1919."

THE COMMISSIONER OF STAMPS *vs.* CAROLIS ... ... XI. 45

Failure to supply stamps "together with" petition of appeal.

Held: *That tendering the deficiency in the value of the stamps five days after the filing of the petition of appeal does not regularize the failure to tender the stamps "together with" the petition of appeal even though the deficiency is made good within the appealable period.*

BALASUBRAMANIAM *vs.* VALIAPPA CHETTIAR ... ... XI. 87

Stamping of pleadings and documents in civil proceedings—Value of action—Agreement, in the course of proceedings, limiting the value of claim—No formal amendment of pleadings—How should the documents and pleadings be stamped.

Held: (1) *That the value of the action, for purposes of stamping, was rightly regarded Rs.* 7,000/-, *after the agreement.*

(2) *That the agreement, though not followed by a formal amendment of pleadings, can be taken into account for determining the value of the action for purposes of stamping.*

LITTLE'S ORIENTAL BALM AND PHARMACEUTICALS LTD. *vs.* USSEN SAIBO XII. 77

Proceedings under section 112 of the Trusts Ordinance—How should the pleadings and documents be stamped.

Held: *That proceedings under section* 112 *of the Trust Ordinance do not fall under the special item provided under head "Miscellaneous" in Schedule B Part II of the Stamp Ordinance and should be stamped with* ad valorem *duty.*

THAMBIAH *vs.* KASIPILLAI ... XII. 92

Written acknowledgment of debt and interest thereon—Document not stamped—When may such a document be admitted in evidence.

Held: *That the document should have been admitted in evidence subject to the proof of its execution and the payment of a penalty, if any, under section* 36 *of the Stamp Ordinance.*

DON CORNELIS APPUHAMY *vs.* KIRIBANDA AND THREE OTHERS ... XII. 166

Stamp duty in proceedings under the Trust Ordinance—Proceedings under section 112 of the Trust Ordinance—Properties affected by the trust valued at Rs. 100,000/-. How should the petition of appeal to the Supreme Court be stamped.

Held: *That in proceedings under section* 112 *of the Trust Ordinance where the value of the trust properties was Rs.* 100,000/- ad valorem *stamp duty should have been paid on the petition of appeal to the Supreme Court as if the value of the action was Rs.* 100,000/-.

SAVARIMUTTU AND OTHERS *vs.* THE SAIVA PARIPALANA SABHA XIII. 141

Stamping of petition of appeal—Proceedings under § 24 of the Colombo Municipal Council (Constitution) Ordinance.

See under **MUNICIPAL COUNCILS.**

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Joint petition of appeal improperly stamped.

Held: *That the petition of appeal should have been stamped with duty payable on two petitions.*

SUPPER AND ANOTHER *vs.* MUTTIAH AND ANOTHER ... ... XIV. 70

Appeal insufficiently stamped—How should action be valued—Land in dispute valued at Rs. 1000 but mesne profits and damages also asked for.

Held: *That the value of the subject-matter of the action was over Rs.* 1,000/- *and that the appeal had been insufficiently stamped.*

MAITRIPALA *vs.* KOYS ... XIV. 112

Factors to be taken into account in deciding the proper duty to be paid on a conveyance of immovable property

THE COMMISSIONER OF STAMPS *vs.* PARSONS AND OTHERS ... ... XIV. 157

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

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

BARTLEET *vs.* PERERA ... XV. 3

Joint petition of appeal—By two defendants —Stamps affixed as one petition—Appeal rejected though correct amount tendered later within appealable time.

MOHAMED HASSAN *vs.* ABDUL WAHID AND MOHAMED MARIKAR ... XV. 61

Stamp duty—Undervaluing subject-matter of action for the purpose of evading stamp duty—Value cannot later be altered in order to bring the action within the Privy Council Appeal Rules.

SOKKALAL REN SAL *vs.* NADER AND FOUR OTHERS ... ... XV. 80

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

The highest bid at the auction sale was a bid of Rs. 40,500/- from the mortgagee. The amount due to him in the suit was Rs. 99,827/-.

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

THE FISCAL (C.P.) *vs.* NALLIAPPA CHETTIYAR ... ... XVI. 27

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

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

PUNCHIMAHATMAYA *vs.* THE COMMISSIONER OF STAMPS ... XVI. 74

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

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

THE COMMISSIONER OF STAMPS *vs.* THE HIGHLAND TEA CO. LTD. ... XVII. 101

How should the value of a suit be determind for the purposes of stamping.

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

SAMYNATHAN *vs.* ATUKORALE XVII. 114

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

Held: (1) *That the "value of the property" for the purposes of item* 32 (3) *of Part I of Schedule A to the Stamp Ordinance cannot*

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mean the value of the land free from all encumbrances.

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

PUNCHIMAHATMAYA *vs.* THE COMMISSIONER OF STAMPS AND THE ATTORNEY-GENERAL ... ... XVII. 118

Dividend paid in shares of another company—How should share transfer be stamped.

THE ASSOCIATED NEWSPAPERS OF CEYLON, LTD. *vs.* THE COMMISSIONER OF STAMPS ... ... XIX. 107

How should the transfer of a Life Insurance Policy by a man to a woman in consideration of marriage be stamped.

JOSEPH *vs.* COMMISSIONER OF STAMPS ... ... XIX. 115

Proceedings under Chapter XL of the Civil Procedure Code for the appointment of guardians—In an appeal from a decision of the District Court under that Chapter, should the appellant stamp the petition of appeal and deliver the stamps for the decree or order of the Supreme Court and the certificate in appeal as required by Part II of Schedule A of the Stamp Ordinance.

Held: (1) *That in an appeal from the decision of a District Court in proceedings under Chapter XL of the Civil Procedure Code, the petition of appeal need not be stamped and the appellant is not liable to deliver together with the petition of appeal the stamps for the decree or order of the Supreme Court and the certificate in appeal as required by Part II of Schedule A of the Stamp Ordinance.*

(2) *That paragraphs* 9, 10 *and* 11 *of Part I of the* Thesawalamai (*Chapter* 15) *are repealed by section* 40 *of the Jaffna Matrimonial Rights and Inheritance Ordinance.*

(3) *That the father of a child subject to the* Thesawalamai *has, if he is not for any reason unsuitable as a guardian, a paramount right to the custody of his child.*

AMBALAVANNAR *vs.* PONNAMMA AND SECRETARY DISTRICT COURT, COLOMBO ... ... XX. 1

Stamp Ordinance Schedule A—Courts Ordinance section 68—Should applications under section 68 be stamped in accordance with Part III of Schedule A or Part II of Schedule A.

Held: *That an application under section* 68 *of the Courts Ordinance should be stamped in accordance with Part II of Schedule A to the Stamp Ordinance.*

IN *re* THE ESTATE OF HARRY DOUGLAS GRAHAM ... ... XX. 44

The failure to stamp the writing left with the Registrar under rule 9 of the Election (State Council) Petition Rules 1931, at the time it is handed to the Registrar, does not invalidate it and prevent its reception after it is duly stamped.

SARAVANAMUTTU *vs.* JOSEPH DE SILVA ... ... XX. 131

Case decided in appeal—Can decree in appeal be executed unless the parties take a copy of the decree in appeal.

Held: (1) *That a decree entered in appeal cannot be executed by the District Court, unless the party seeking to execute the decree first obtains a copy of the decree in appeal.*

(2) *That there is no provision of law whereby the lower court is empowered, after the determination of an appeal, to pass fresh decree, which, in effect, replaces a decree of the Supreme Court.*

PALANIAPPA CHETTIAR AND TWO OTHERS *vs.* RAMANATHAN CHETTIAR AND OTHERS ... ... XXI. 80

Matrimonial suits—Civil Procedure Code chapter XLII—Scope of a matrimonial suit—Class of action—Have claims wrongly made to be taken into account in determining the class of an action.

Held: (Wijeyewardene, J. dissentiente)

(1) *That there is no provision for asking any other relief in a matrimonial action than that either the marriage be dissolved or that a separation* a mensa et thoro *be granted.*

(2) *That claims which in law cannot be made in a matrimonial action should not be taken into account in ascertaining the class of the action.*

SENADIPATHY *vs.* SENADIPATHY XXIII. 1

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Transfer of land to a company—Land purchased by trustee of partnership—Partners incorporated as a company to purchase land from trustee—Conveyance by trustee to company upon incorporation—Members of the partnership allotted shares according to the value of their interest in the partnership.

Held: *That the deed of conveyance by the trustee to the limited liability company attracted stamp duty under item* 23 (8) *of Schedule A Part I of the Stamp Ordinance.*

WILLE *vs.* THE COMMISSIONER OF STAMPS ... ... XXIX. 13

One Petition of appeal by several defendants who had given separate proxies to same proctor and who acted jointly. Should appeal be regarded as one for purposes of stamping.

K. BILINDI AND OTHERS *vs.* WELLEWA ATTADASSI THERO ... XXXI. 70

Unstamped receipt—Admissibility in evidence.

KURUKKAL *vs.* SARMA ... XXXII. 85

Stamps—On Probate or Letters of Administration.

HASSAN *vs.* MUTTUWAPPA XXXIII. 108

Policy of Insurance—Payment at death of assured or at maturity—Alternative modes of payment after policy matured—Option to receive in monthly instalments during life—Should the policy be stamped as on instrument chargeable with duty under section 23 A of the Stamp Ordinance.

A policy of life insurance provided *inter alia:*—

(*a*) That at the death of the insured (before the date of maturity) *i.e.*, before reaching his 55th year a sum of £2,083-6-8 or the cash value of the policy at the end of the policy year in which death occurs, whichever is greater, would be paid to the insured.

(*b*) That on the assured reaching the age of 55 years, he would be entitled to a sum of £3,656-5*s*.

The instrument further provided for three modes of payment of this sum of £3,656-5*s*. to wit:—

(*a*) Payment of £3,656-5*s*.

(*b*) Payment in one instalment of £1,558-6-8 and 119 monthly instalment of £20-16-8 each, or

(*c*) If the assured so desires it, payment of 119 monthly instalments of £20-16-8 each and in addition a monthly income of £20-16-8 during life.

The Commissioner of stamps held that this policy was "chargeable with duty under section 23A and item 23 (2) being an instrument for the creation of an annuity or other right to a periodical payment not before in existence."

On appeal to the Supreme Court—

Held: *That the instrument in question was not stampable as an instrument within the meaning of section* 23 (*a*) *of the Stamp Ordinance as the principal and leading object of the instrument appears to be to effect a policy for the receipt of a sum of money at death or on attaining the age of* 55 *years.*

THE MANUFACTURERS' LIFE INSURANCE CO., LTD. OF CANADA *vs.* THE COMMISSIONER OF INCOME TAX, ESTATE DUTY AND STAMPS ... ... XL. 71

Agreement in writing to convey business—Insufficiently stamped—Is the grantor liable for the deficiency and penalty?—Interpretation of conflicting provisions in a statute.

By writing date 1-9-45 the Calcutta Metal Syndicate agreed to convey to the Ceylon Navigation and Salvage Co., Ltd., their business for a certain consideration. The document was insufficiently stamped and the Commissioner of Stamps sought to recover the deficiency and the penalty under Section 41 (i) (*b*) of the Ordinance from the petitioner, who signed the writing on behalf of the Syndicate.

It was contended for the petitioner that in view of sections 26 (*a*) and 27 of the Stamp Ordinance the party liable was not the petitioner or the firm whom he represented but the grantee. It was argued for the Commissioner of Stamps that under section 51 of the Ordinance the petitioner was liable.

Held: (1) *That in the absence of an agreement between the two parties to the instrument as to who is to pay the stamp duty, the party liable must be determined by an examination of the relevant sections of the Ordinance, to wit, sections* 26 (*a*), 27 *and* 51.

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(2) *That there being a conflict between sections* 26 (*a*) *and* 27, *which contain specific provisions, on the one hand, and section* 51, *which contains general provisions, on the other, the specific provisions must prevail and hence the petitioner was not liable for the deficiency and the penalty claimed.*

GABELLE *vs.* THE COMMISSIONER OF STAMPS ... ... XLVIII. 6

STATE COUNCIL

See under **Ceylon (State Council) Order in Council**

Ceylon (State Council Elections) Order in Council.

STATE MORTGAGE BANK

Does the manager of the Bank hold a public office under the Crown.

DE ALWIS *vs.* TYAGARAJA XVIII. 38

STATUTE

Courts have power under Roman Dutch law to declare a statute obsolete on the ground of tacit repeal by disuse or contrary usage.

KANDAR *vs.* SINNACHCHIPILLAI II. 436

Legislation by incorporation—Repeal of incorporated statute—Effect of repeal on statute in which incorporation is made.

THE COMMISSIONER OF STAMPS *vs.* CAROLIS ... ... XI. 45

Statute—When does it have retrospective operation.

PARAMASOTHY *vs.* SUPPRAMANIAM AND OTHERS ... ... XI. 99

A statutory duty once duly discharged cannot in the absence of express power be again exercised in respect of the same matter.

RATNAYAKE *vs.* GUNATILAKE AND PUNCHIRALA ... ... XX. 64

Statute—Interpretation of—Words must be construed so as to give a sensible meaning to them.

INSPECTOR OF POLICE *vs.* KALUARATCHI ... ... XXIV. 74

A court is bound to take judicial notice of the date on which a statute has been brought into operaton.

JAYAKODY *vs.* PAUL SILVA AND ANOTHER ... ... XXV. 45

Statute—Interpretation—Power to approve accountant—Includes power to disapprove.

VALUE *vs.* THE COMMISSIONER OF INCOME TAX ... ... XXVI. 65

Where a public servant acts negligently in exercising the powers conferred on him by statute, he cannot escape liability, notwithstanding the bona fides **of his action.**

PARAMASOOTHY *vs.* VENAYAGAMOORTHI ... ... XXVI. 68

Interpretation of statutes—Proviso—Function and effect of.

Held: *That the proper function of a proviso is to except and deal with a case which would otherwise fall within the general language of the main enactment, and its effect is confined to that case. Where the language of the main enactment is clear and unambiguous, a proviso can have no repercussion on the interpretation of the main enactment, so as to exclude from it by implication what clearly falls within its express terms.*

MADRAS AND SOUTHERN MAHRATTA RAILWAY CO., LTD. *vs.* BEZWADA MUNICIPALITY ... XXVIII. 65

Repeal of statute—Effect of upon conviction under repealed statute—When can such conviction stand.

The accused was charged and convicted with having sold on 8th December, 1944, Nettali (driedfish) over and above the controlled price fixed by the order published in "Gazette," No. 9,166 of 3rd September, 1943. This order was revoked by section 1 (*a*) of order No. C 31 of 1944, published in "Gazette" No. 9,274 of 26th May, 1944, which contained a new order in place of the repealed one.

Held: (1) *That the conviction could not stand inasmuch as the offence was not committed while the regulation, under which accused was convicted, was in force.*

(2) *That the conviction could not be altered to one under the new regulation*

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under section 347 (b) of the Criminal Procedure Code.

JOHARAN *vs.* WILBERT PERERA XXX. 69

Statute — Interpretation — Reference to speeches in State Council as aids to interpretation.

DE PINTO *vs.* RENT ASSESSMENT BOARD ... ... XXXI. 12

Statute—Construction of—When the ordinary meaning and grammatical construction of the language lead to a manifest contradiction of the purpose of the enactment.

SAHUL HAMID *vs.* ANNAMALAY XXXIV. 29

Statute—Manifest intention of—Must not be defeated by too literal an adhesion to its precise language.

SELLIAH *vs.* DE SILVA ... XXXVI. 17

Statute—Interpretation—Words must be given their ordinary meaning unless the context otherwise requires.

VAN CUYLENBERG *vs.* WEERASEKERA ... ... XXXIX. 26

Statute—Regulating procedure in courts—Is as a rule imperative and not directory.

ADDITIONAL CONTROLLER OF ESTABLISHMENTS *vs.* LEWIS ... ... XL. 3

Statute—Schedule to—Is part of the statute.

ADDITIONAL CONTROLLER OF ESTABLISHMENTS *vs.* LEWIS ... ... XL. 3

Statute prescribing form of notice in schedule—Notice must be in prescribed form notwithstanding absence of reference to the form in the relevant section.

SIVAGURUNATHAN *vs.* DORESAMY *et al* ... ... XLIV. 38

Construction of—Retrospective effect not to be given so as to impair existing rights—Unless language of statute is quite clear.

LANKA ESTATES AGENCY LTD. *vs.* W. M. P. COREA ... ... XLV. 33

Interpretation of—When is it permissible to go outside enactment to ascertain its scope and purpose.

MUDANAYAKE *vs.* SIVAGNANASUNDRAM ... ... XLV. 49

Statute—Construction of—Words reproduced from English statute—Decision of English court of appeal on construction of words binding on Ceylon courts.

NADARAJAN CHETTIAR *vs.* T. W. MAHATMEE AND ANOTHER ... ... XLIII. 11

Statute—Interpretation of—When will statute be given retrospective effect?

SELLAPPAH *vs.* SINNADURAI AND OTHERS ... ... XLVI. 17

AKILANDANAYAKI *vs.* SOTHINAGARATNAM ... ... XLVI. 67

KANDAVANAM *vs.* NAGAMMAH WIDOW OF VYRAMUTTU *et al* ... XLVI. 104

Interpretation when statute contains conflicting provisions.

GABELE *vs.* THE COMMISSIONER OF STAMPS ... ... XLVIII. 6

Interpretation—Of statute—Ceylon enactment in same terms as an English Statute.

M. E. A. COORAY *vs.* THE QUEEN XLIX. 13

STAY PROCEEDINGS

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

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

RAMAN CHETTIAR *vs.* VYRAVAN CHETTIAR ... ... XVI. 65

STIPULATIONS IN FAVOUR OF THIRD PARTY

Conveyance of land—Stipulation in favour of third party—Can the third party sue?

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Held: *A stipulation in favour of a third party once it has been accepted by such party gives to that party a right to obtain for himself the benefits of the stipulation by action.*

JINADASA *vs.* SILVA ... ... II. 49

STREET LINES

Street lines laid down under Housing and Town Improvement Ordinance—Effect of on market value of land when acquired.

See under **Land Acquisition Ordinance**

SUCCESSION

Devolution of property on death of person leaving a mother and children of paternal uncle.

ANNAM *vs.* KATHIRAVETPILLAI AND OTHERS ... ... XXXIX. 14

Succession to Kandyan mother leaving children of two marriages.

MOHOTIHAMY *vs.* ALBINONA XXXIX. 97

SUICIDE

A nominee of a member of a Benevolent Association who commits suicide cannot claim a contribution payable on the death of the member.

PAGAVATHIAMMA *vs.* THE CEYLON LAWYER'S BEVEVOLENT ASSOCIATION XXIV. 71

SUMMONS

Service of summons on a person in possession of the land on behalf of defendants who are in enemy occupied territory is sufficient service under section 3 of the Partition Ordinance.

YOKKOMUTTU *vs.* SAMINATHER AND ANOTHER ... ... XXVII. 111

Plaintiff taking no steps on order to re-issue summons—Refusal of further process

CHINNIAH *vs.* SINGHOAPPU XXXII. 105

Summons in English—Served on dependant who did not understand the language.

MOHAMADO *vs.* MARIKKER XXXV. 39

SUPREME COURT

Jurisdiction of—*See under* **Jurisdiction.**

Revisionary powers of—*See under* **Revision.**

SUPREME COURT (VACATION) ORDINANCE

No days included in a vacation of the Supreme Court should be reckoned in the computation of the time within which an application for leave to appeal to the Privy Council has to be made.

PALANIAPPA CHETTIAR AND TWO OTHERS *vs.* MERCANTILE BANK OF INDIA AND OTHERS ... ... XXIII. 13

SURETY

Surety given time to produce defaulting accused — Production of accused on extended date—Bond cannot be forfeited.

INSPECTOR OF POLICE *vs.* PUNCHIBANDA ... ... II. 136

Renunciation of benefits of Suretyship by surety to a mortgage bond—Need surety be made a party to the mortage action.

Held: (1) *That where a person bound himself as surety, renouncing the benefits of suretyship, to pay a mortgage debt the mortgagee was not bound to make the surety a party to the mortgage action and that the surety could be sued after the mortgage property had been excussed.*

(2) *That section* 34 *of the Civil Procedure Code was no bar to a separate action against the surety.*

PANDITHAN CHETTIAR *vs.* SINGHAPPUHAMY ... ... IV. 84

Surety bond for appearance of accused—Failure of accused to appear—Surrender of accused to court after forfeiture of bond—Can surety claim remission of part of penalty paid.

GUNAWARDENA *vs.* GUNAWARDENA XI. 163

Principal debtor and sureties sued by liquidators of a cheetu company for money due on agreement—Claim to set-off money

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due to one of the sureties—Is surety entitled in law to claim such benefit.

CANAGARATNE AND ANOTHER *vs.* CHELLIAH AND TWO OTHERS ... XII. 13

Decree of consent—Undertaking by surety to pay amount of decree due if defendant failed to satisfy decree—Failure of defendant—Application under § 348 of Civil Procedure Code for writ against surety.

Held: *That the plaintiff judgment creditor was entitled to proceed against the surety in action and that there was no need for any surety bond.*

CHARLES *vs.* JAYASEKERA ... XII. 118

Relationship in the nature of principal and surety between parties to Bill of exchange —Promissory note—Maker and indorsers defendants—Claim against maker waived before trial—Can trial proceed against indorsers.

JAYARAM AND CO. *vs.* EBRAMJEE AND TWO OTHERS ... ... XX. 6

A surety who has discharged the whole debt may only enforce his own rights against the principal debtors unless he has procured a subrogation to the rights of the creditor.

GUNASEKERA *vs.* GUNASEKERA XXIV. 35

Surety—Bond guaranteeing payment for goods to be supplied to another to a certain amount—Letter to obligee by surety not to give further credit after some goods supplied —Is surety entitled to determine his liability by such notice.

Held: *That a person, who furnishes security by bond guaranteeing payment for goods to be supplied to another up to a certain value, is entitled at any time to notify the obligee determining his liability.*

SAIBO *vs.* MOHIDEEN ... XXV. 89

Woman subject to Thesawalamai—Beneficium senatus consulum velleianum **not renounced—Is surety bound—Married Women's Property Ordinance section 29—Criminal Procedure Code section 357.**

Held: (1) *That a woman subject to the Thesawalamai can be bound as a surety although she has not renounced the* beneficium senatus consultum velleianum.

(2) *That the* senatus consultum velleianum *has no force in this Island after the passing of section 29 of the Married Women's Property Ordinance.*

THANGAPONNU *vs.* GEORGE, S. I. POLICE ... ... XL. 40

SURVEY

By Crown—Recovery of costs.

See under **Definition of Boundaries Ordinance.**

Survey plans—Proof as to.

AMARAWARDENA *vs.* MINODARAHAMY AND ANOTHER ... XXXVII. 5

TATTAMARU POSSESSION

Can party in possession of property under tattamaru possession claim benefits of section 110 of Evidence Ordinance.

DINGIRI MENIKA *et al vs.* HEEN APPU ... ... XLIV. 65

TAXATION OF COSTS

See under **Costs.**

TEA CONTROL

Application for a writ of Mandamus **on the Tea Controller—Sections 7 and 17 of the Tea (Control of Export) Ordinance No. 11 of 1933—Can the Tea Controller be compelled by a writ of** mandamus **to vary an assessment made by him.**

Held: *That section* 17 *of the Tea (Control of Export) Ordinance No.* 11 *of* 1933 *excludes the jurisdiction of the Supreme Court to compel the Tea Controller by a writ of* Mandamus *to vary an assessment made by him.*

PELPOLA *vs.* WHITEHORN (TEA CONTROLLER) ... ... III. 63

Mandamus—**Action of Tea Controller under the Tea (Control of Export) Ordinance No. 11 of 1933—Circumstance in which a** mandamus **will lie.**

Held: (1) *That relief by way of* mandamus *does not lie where the remedy of appeal is provided.*

(2) *That the exercise of the discretion vested in the Tea Controller by Sec-*

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tion 12 (2) *of the Tea (Control of Export) Ordinance No.* 11 *of* 1933 *cannot be questioned by way of* mandamus.

(3) *That a person who has lent money to the owners of a Tea Estate is not a "proprietor" within the meaning of the expression in the Tea (Control of Export) Ordinance.*

BANK OF CHETTINAD *vs.* THE TEA CONTROLLER ... ... IV. 53

Section 20 (1) of the Tea Control Ordinance —Force of word "may" in sub-section—Has it the force of "must"—Can the Board of Appeal exercise, on an appeal, a discretion which the Tea Controller may have exercised.

APPLICATION BY TEA CONTROLLER FOR A WRIT OF CERTIORARI ... X. 39

Tea Control Ordinance—The words "the Board may on any such appeal confirm the order" in § 15 (2) give the Board the power to decide whether the controller has correctly interpreted the provision in § 15 (1).

DANKOTUWA ESTATES CO. LTD. *vs.* THE TEA CONTROLLER ... XVIII. 55

Tea Control Ordinance—Right of appeal to Board of Appeal—Practice of the court in a case in which the Board of appeal has power to grant the relief sought by way of Mandamus.

DANKOTUWA ESTATES CO. LTD. *vs.* THE TEA CONTROLLER ... XVIII. 55

Tea Control Ordinance (1938)—Offence under expired Ordinance (11 of 1933— Prosecution under new Ordinance—Sanction of Attorney-General required by Ordinance No. 11 of 1933—Expired Ordinance kept alive for the prosecution of offences committed thereunder—Prosecution sanctioned by Tea Controller as required by new Ordinance— Conviction under new Ordinance—Offence under both Ordinances identical—Criminal Procedure Code sections 347 (b) (ii) and 425 —Is failure to obtain Attorney-General's sanction fatal to the conviction.

Held: (1) *That an offence committed under the expired Tea Control Ordinance No.* 11 *of* 1933 *cannot, in view of section* 42 *of that Ordinance, be prosecuted under the new Tea Control Ordinance.*

(2) *That where the offence is the same and the accused is not prejudiced thereby the court can under section* 347 (*b*) (*ii*) *of the Criminal Procedure Code alter the conviction under the new Ordinance to a conviction under the old Ordinance; but that the failure to obtain the Attorney-General's sanction as required by the old Ordinance is not cured by section* 425 *of the Criminal Procedure Code, and is fatal to the conviction even though the prosecution had been sanctioned by the Tea Controller as required by the new Ordinance.*

BRERETON (INSPECTOR, TEA CONTROL DEPARTMENT) *vs.* RATRANHAMY XIX. 11

Tea Control Ordinance 1933—Section 15 —The Tea Controller in the discharge of his functions under section 15 is not under a duty to act judicially.

The Board of Appeal in hearing an appeal under section 15 has power to decide whether the Tea Controller has exceeded his powers under that section.

DANKOTUWA ESTATES CO. LTD. *vs.* THE TEA CONTROLLER ... XIX. 41

TELECOMMUNICATION

Telecommunication Ordinance, No. 50 of 1944, Section 43—Construction of— Jurisdiction of Magistrate under section 152 (3) of the Criminal Procedure Code to try offences indictable under the Ordinance.

Held: *That on a proper construction of section* 43 *of the Telecommunication Ordinance the jurisdiction of Magistrates under section* 152 (3) *of the Criminal Prodedure Code remains unaffected in every case where the Attorney-General has not sought to exercise the special power conferred on him by the proviso to section* 43.

GUNAWARDENA, ASSISTANT ENGINEER, C. T. O. *vs.* VYTHILINGAM XLIII. 75

Telegraphs Ordinance—§ 10—Scope of

INSPECTOR OF POLICE *vs.* KALUARATCHI ... ... XXIV. 74

Application for an order on the Postmaster-General to produce a telegram—Inherent powers of the Supreme Court—Principle governing their exercise.

Held: *That, in the absence of any applicable statutory provision, empowering the Supreme Court to order the production of a telegram in the custody of the telegraph*

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authorities, the Court will not order such production in the exercise of its inherent powers.

Per WIJEYEWARDENE, J.: "It is a sound legal principle that a decision given in the exercise of such powers should not be inconsistent with the express intention of the legislature."

NANAYAKKARA *vs.* THE G. A., WESTERN PROVINCE ... ... XXX. 37

TENANCY

See under **Landlord and Tenant.**

Rent Restriction

TENDER

Money available but not actually paid—When can money be said to have been duly tendered.

FERNANDO *vs.* COOMARASWAMY XVII. 1

Tender—Assessment of damage in the case of the breach of a contract for the right to exploit a forest entered into with the highest tenderer after calling for tenders.

ATTORNEY-GENERAL *vs.* VITHILINGAM ... ... XXII. 26

Tender—Deposit of money in Court without previous offer by party to an agreement to purchase—Is this sufficient to prove tender.

Prescription—Action filed within the period of limitation—Summons served after the period—Is the claim barred.

The appellant, by a deed dated 2-11-35 agreed to transfer to one Ukku Banda all that portion of land that would be allotted to him by final decree in a partition case that was pending then. Ukku Banda's rights were sold in execution and were purchased by one Yusoof who in turn sold those interests to plaintiff. The appellant was allotted a defined lot in the final decree dated 8-10-37.

The plaintiff instituted this action on 6-9-43 together with a Kachcheri receipt showing a deposit of Rs. 150 to the credit of the case. This sum the plaintiff alleged was the amount on payment of which he was entitled to a transfer.

The learned Commissioner held that this deposit constituted a sufficient tender and entered judgment for plaintiff.

In appeal it was contended for the appellant—

(*a*) that the plaintiff's action should have been dismissed as the plaintiff had not proved that he had tendered the amount to the appellant before the plaintiff came into Court.

(*b*) that although the plaint was filed and the money deposited on 6-9-43, *i.e.*, within six years of the final decree (entered on 8-10-37) the plaintiff's claim for a transfer is barred because summons was not served till 14-12-43.

Held: (1) *That subject to an appropriate order in regard to interest, costs, etc., in a particular case, a deposit made in Court within the stipulated time without previous offer is sufficient tender.*

(2) *That the claim was not barred as the filling of the plaint constituted the institution of the action and the deposit then made placed the money* in custodia legis *and any delay that occurred thereafter cannot be imputed to plaintiff in the course of the routine of the business of Court.*

(3) *Plaintiff not given costs of the trial Court because he did not prove tender prior to action. If he had so tendered litigation might have been avoided.*

RATNAYAKE *vs.* GUNATILEKE XXX. 17

Tender—Deposit of money with Proctor and notification thereof to party.

Is it a valid tender.

MUHANDIRAM *vs.* ABDUL SALAM XXXVI. 8

TESTAMENTARY ACTION

Two independent applications for letters of administration by rival claimants—Suppression of facts by one applicant—Contempt of court.

RATWATTE *vs.* KATUGAHA ... XLII. 24

THESAWALAMAI

See also under **Jaffna Matrimonial Rights and Inheritance Ordinance.**

Order of Succession—Sections 37 and 38 of Ordinance No. 1 of 1911—Husband of bastard—Does he succeed to her dowry

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property in preference to the children of her mother?

Held: *That section* 37 *of Ordinance No.* 1 *of* 1911 *provides only for the case where there is no surviving spouse or descendants. The case of the succession of the surviving spouse of a bastard is not expressly dealt with either in Ordinance No.* 1 *of* 1911 *or in that of* 1876. *The omission has accordingly to be filled from the Roman Dutch Law and according to it, the mother's children are preferred to the husband.*

CHELLIAH (DECEASED) *vs.* KATHIRAVELU *et al* ... ... I. 69

Tediatetam property—Extent of husband's right to sell or mortgage tediatetam property.

Held: *That the husband of a person married under the Thesawalamai can in the exercise of his power of management, freely sell and mortgage the common property without the consent of the wife.*

MUTTUPILLAI *vs.* VALLIPURAM I. 331

Reacquisition by husband after separation a mensa et thoro **of tediatetam property sold by him without his wife's consent but with her acquiesence during marriage.**

Held: (1) *That the wife cannot claim a share in a land acquired by her husband after a separation* a mensa et thoro *even though the land be tediatetam property sold during their marriage without her consent, but only with her acquiesence.*

(2) *That property acquired by a spouse after separation* a mensa et thoro *does not become tediatetam property.*

KANDAPPA *vs.* AMPALAVANAN, *et al* II. 177

Succession—Law prior to Ordinance No. 1 of 1911.

Held: *That under the Thesawalamai prior to Ordinance No.* 1 *of* 1911 *on the death of a man leaving children and a widow, their mother, his property remains with the mother in whom is vested the right to apply that property or any part thereof in giving a dowry or dowries to their children on marriage. The son or sons take nothing so long as the mother is alive.*

RAJARATNAM *vs.* POOPALASINGHAM II. 370

To what property section 1 Clause 7 of the Thesawalamai Code apply.

Held: (1) *That clause* 7 *of section* 1 *of the Thesawalamai Code is applicable only to property acquired by a son during the time he was under the roof of his parents.*

(2) *That under the Roman Dutch Law the Courts have power to declare a statute obsolete if they are satisfied of its tacit repeal by disuse or contrary usage.*

KANDAR *vs.* SINNACHIPILLAI ... II. 436

Thesawalamai—To whom is it applicable.

Held: *That the Thesawalamai applies to Tamils who have acquired a permanent residence in the nature of a domicile in Jaffna.*

CHETTY *vs.* CHETTY ... ... IV. 39

Mortgage of tediatetam property by husband during wife's life time—Mortgage action after wife's death—Minor children not made parties to action—Is decree binding on them.

Held: *That a decree in a mortgage action to which the minor heirs of the wife of a deceased mortgagee subject to the law of Thesawalamai are not made porties is not binding on them.*

AMBALAVANAR *vs.* SINNACHCHY IV. 29

Does Tediatetam include a gratuity in money paid to a person on his retirement from Government Service.

Held: *That a gratuity in money paid to a person on his retirement from Government Service is not Tediatetam within the meaning of Section* 21 *of Ordinance* 1 *of* 1911.

SEETHANGAINAMMAL *vs.* V. ELIYAPERUMAL ... ... VI. 128

Tediatetem property—Mortgage of—Jaffna Matrimonial Rights and Inheritance Ordinance 1911—Mortgage Ordinance 1937.

The plaintiff is the mortgagee of a land, the mortgagor being one Sinnadurai, the father of the defendant. During the lifetime of his wife Nannipillai, Sinnadurai mortgaged the land. About two and half years later, action was filed on the bond against Sinnadurai alone. While the case was pending Nannipillai died. The plaintiff continued the action against Sinnadurai and obtained a decree against him. At the sale in execution the plaintiff purchased the land. The defendant claims half share of the land on the footing that the decree is

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not binding on him and his minor sister. It was admitted that the defendant was a Jaffna Tamil subject to the Thesawalamai.

Held: *That the decree was not binding on the children of the defendant, because they were not made parties to the mortgage action.*

THAMBIAH *vs.* SANGARAJAH ... VIII. 145

Mortgage bond in favour of husband and wife—Death of wife—Assignment by husband of his interests in the bond after wife's death—Can the administrators of the wife's estate claim the entire amount due on the bond for purposes of administration—Joint appeal by two appellants in one petition—Petition stamped as if it were two distinct appeals—Stamps for certificate in appeal and judgment in appeal supplied on the footing of one appeal.

Held: (1) *That, on the death of one of two spouses subject to Thesawalamai, the whole of the tediatetam property vests in the administrator for the purposes of administration.*

(2) *That, in the case of persons subject to Thesawalamai, an assignee who takes an assignment of the interests of the surviving spouse in a chose-in-action takes the assignment subject to the rights of the administrator to claim the whole property for the purposes of administration.*

(3) *That, where two appellants join in presenting one petition of appeal, and where the grounds of appeal and the relief asked for is the same, and where the petition is stamped as if it were two appeals, there is no objection to the stamps for the certificate in appeal and the judgment in appeal being supplied on the footing of one appeal.*

CHELLIAH AND OTHERS *vs.* SINNATHAMBY AND OTHERS ... ... X. 116

Tediatetam property—Death of wife—Devolution of share of Tediatetam property on heirs—Is such share liable to be sold for debts contracted by husband during the subsistence of the marriage.

The husband and wife were governed by the Matrimonial Rights and Inheritance (Jaffna) Ordinance (Chapter 48). The wife died, leaving as her sole heir her sister, the 2nd defendant-respondent. After the wife's death the husband was sued by the plaintiff-appellant on a promissory note made by him during the subsistence of the marriage and decree was obtained against him. In execution of this decree the plaintiff-appellant seized a land which the husband had bought during the subsistence of the marriage whereupon the 2nd defendant-respondent claimed a half share through her deceased sister.

Held: *That under the provisions of the Thesawalamai the half share in question could be seized and sold in execution of the decree against Sithambarapillai (the husband).*

SEWAKEENPILLAI *vs.* MURUGUPILLAI ... ... XVIII. 49

Paragraphs 9, 10 and 11 of Part I of the Thesawalamai are repealed by section 40 of the Jaffna Matrimonial Rights and Inheritance Ordinance.

The father of a child subject to the Thesawalamai has, if he is not for any reason unsuitable as a guardian, a paramount right to the custody of his child.

AMBALAVANNAR *vs.* PONNAMMA AND THE SECRETARY DISTRICT COURT COLOMBO ... ... XX. 1

Thesawalamai—To whom does it apply.

Held: *That the Thesawalamai applies to Tamils with a Ceylon domicile and a Jaffna inhabitancy.*

SINNIAH CHETTIAR *vs.* NAGALINGAM CHETTY ... ... XXVIII. 54

Is a husband subject to Thesawalamai entitled to donate the whole of the tediatetam property—Wife's remedy in such a case.

Held: (1) *That where a husband donates the whole of the tediatetam property to a son and the donee conveys it to a* bona fide *purchaser, the latter acquires good title and the wife's only remedy is a claim for compensation.*

(2) *That if the donee retains the property conveyed to him and after the death of the husband the wife gives a transfer of her share to another, that conveyance is good against the husband's donee.*

(3) *She or the transferees from her can assert her claim to her half-share against such donee.*

VAITHYLINGAM *vs.* SEENIVASAGAM ... ... XXVIII. 63

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Right of pre-emption—What is the proper price to be paid by person asserting the right.

Held: *That a persor having the right of pre-emption of a land under the Thesawalamai is entitled to assert the right by offering to buy the land at the price actually paid for it by a purchaser.*

Per DE KRETSER, J.: "When a co-owner wishes, to sell, the other co-owner is at liberty, to claim or demand the preference of being the proprietor. That must mean that the person owning a right is not deprived of his natural right to procure the best possible price for his share but that he cannot sell it to an outsider if a co-owner is willing to buy it at that price."

NAVARATNAM AND ANOTHER *vs.* SITHAMPARAPILLAI ... ... XXIX. 74

Action for pre-emption—Jurisdiction—How should subject-matter of action be valued.

Held: *That an action for pre-emption, being merely an action to assert the right to be substituted in the place of the vendee, should be valued on the basis of the sum of money the plaintiff should offer for that substitution, and not on the value of the land at the time of the institution of the action,*

KARTHIGESU AND ANOTHER *vs.* PARUPATHY ... ... XXX. 8

Action for pre-emption—Prior 247 action in respect of same land against plaintiff and another—Failure of plaintiff to claim in reconvention right to pre-empt—Is the claim res judicata.

The plaintiff claimed the right to pre-empt certain lands which he alleged the 1st defendant transferred to the 2nd defendant in derogation of plaintiffs rights.

The plaintiff and another, having obtained judgment against the 1st defendant in an earlier action caused the Fiscal to seize the lands in question. The defendant preferred a claim which was dismissed, resulting in a 247 action against the plaintiff and his co-decree holder, who unsuccessfully contended, that the deed on which the claim was based was executed in fraud of creditors. The plaintiff did not pray by way of reconvention for a declaration of his right to pre-empt in that action.

Held: (1) *That the failure to counterclaim in the* 247 *action the right to pre-empt cannot be deemed to be a bar to the present action.*

(2) *That the cause of action that gives right to an action to pre-empt is entirely independent and totally unconnected with the cause of action giving rise to a* 247 *action.*

MURUGESU OF PUTTUR *vs.* THAMBIPILLAI AND ANOTHER ... XXXIV. 57

Devolution of property of woman married before 1911—Claim of surviving husband to life interest and possession—Sale by son of mother's interests in the property—Matrimonial Rights and Inheritance (Jaffna), (Chap. 84), sections 14 and 37—Thesawalamai Regulations (Chap. 51), sections 9 and 11. Their applicability.

A woman, possessed of property, was married in 1901. A son was born in 1903. In 1938 the woman died. The son sold his mother's interests in the property to the appellant in 1941 and died three years later. The surviving husband claimed possession and a life interest in the property.

Held: (1) *That the Jaffna Matrimonial Rights and Inheritance Ordinance has no application in deciding the devolution of property on the death of a spouse (subject to Thesawalamai) married before* 1911.

(2) *That in such a case, the earlier law, as embodied in Chapter* 51, *Thesawalamai is of application.*

(3) *That according to section* 11 *of Chapter* 51 *(Thesawalamai) the husband acquired a life interest in the property and the right to possession.*

SOOSAIPILLAI *vs.* SWAMIPILLAI XXXVI. 14

Tediatetam—Husband acquiring property during marriage—Death of wife leaving children—Husband sued personally for debt contracted during marriage—Children not made parties to action—Seizure and sale of entire land in execution of decree—Is purchaser entitled to whole land.

The 1st defendant, subject to Thesawalamai, who was married to M, purchased a property in 1920. M died in 1929, leaving children, two of whom are the 2nd and 4th plaintiffs.

The 2nd defendant sued the 1st defendant on a promissory note given by him in 1926 and on a decree obtained in 1932 against the 1st defendant personally the said property was seized and sold and was purchased

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by the 2nd and 3rd defendants. The children of M who were not parties to the said action disputed the 2nd and 3rd defendants' rights to M's half share of the land.

Held: *That the 2nd and 3rd defendants were only entitled to the right title and interest of the 1st defendant, viz., a half share of the land.*

Per CANEKERATNE, J.—"Under the old procedure there appears to have been a decree of divorce *a vinculo matrimonii* and a decree of divorce a *mensa et thoro* (Vanderstraaten 180, 4 S. C. C. 29). The latter would seem to be what would now be known as a decree of separation *a mensa et thoro*. Where a Court passed in those days a decree of divorce *a mensa et thoro* unless the Court made an order interdicting the husband from all interference with the wife's property and ordering a division of the common estate she continued to be a *feme covert*."

SINGARAVELU *alias* PARAMSOTHY *vs.* ANDY PONNAN AND OTHERS ··· XXXIX. 9

Thesawalamai—Woman subject to—Can be bound as surety although she has not renounced beneficium senatus consultum velleianum.

THANGAPONNU *vs.* GEORGE ··· XL. 40

Insurance policy taken by husband—Premiums paid out of his salary—Is such payment "thediatheddam" — Matrimonial Rights and Inheritance (Jaffna) Ordinance (Chapter 48), section 19.

A person subject to the Thesawalamai, took out a policy of insurance during the subsistence of his marriage and paid the premiums out of his salary.

Held: *That such payments do not constitute "thediatheddam" within the meaning of section 19 of the Jaffna Matrimonial Rights and Inheritance Ordinance, and therefore, the money payable under the policy should be according to the terms of the policy.*

SHANMUGALINGAM *vs.* AMIRTHALINGAM AND OTHERS ··· ··· XLI. 59

Pre-emption among co-owners—Right equal and co-existant—Two separate actions by two co-owners against same defendant claiming right of pre-emption—Registration of lis pendens **of action earlier in date—Judgment entered in 2nd action of consent prior to judgment in earlier action—Collusion to defeat rights in earlier action—Failure to register** lis pendens **of 2nd action—Effect on respective decrees.**

Plaintiff, 1st and 2nd defendants (governed by the Thesawalamai) are brothers, who were co-owners of a certain property. Plaintiff who had a decree for costs against the 2nd defendant seized his share in execution. Plaintiff having then found that the 2nd defendant, in violation of the plaintiff's rights of pre-emption had secretly purported to sell his share to N a stranger, instituted action against them in September, 1945 claiming his rights of pre-emption and duly registered the *lis pendens* on the same day. Judgment was eventually entered in favour of the plaintiff in December, 1946 and a conveyance was executed in terms of the decree in March, 1947.

A few days after the institution of the plaintiff's action the 1st defendant instituted action against the same parties claiming the same rights of pre-emption. Judgment was entered of consent in favour of the first defendant and a conveyance was accordingly executed on 26th November, 1945. *Lis pendens* of this action was not registered, but the decree and the conveyance were duly registered.

In the present action the plaintiff claimed that his conveyance of March, 1947 in his favour had priority over the 1st defendant's deed of November, 1945—

(*a*) by reason of prior registration of *lis pendens* of plaintiff's action.

(*b*) because the decree and deed in favour of the 1st defendant had been fraudulently obtained.

Held: (1) *That although the decree of the plaintiff was later in point of time, he is entitled to priority because he had registered his* lis pendens.

(2) *That as the decree in favour of the 1st defendant and the deed in pursuance thereof formed part of a fraudulent and collusive transaction between the 1st and 2nd defendant and N, the conveyance in favour of the plaintiff prevailed over them.*

SARAVANAMUTTU *vs.* MURUGAM AND ANOTHER ··· ··· XLII. 5

Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48), Sections 19 and 20—

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Amending Ordinance No. 58 of 1947—Is it retrospective in effect—Interpretation Ordinance (Cap. 2), Section 5.

The defendant, a Jaffna Tamil purchased a 1/4 share of a land during the subsistence of his marriage with the plaintiffs' sister who died in 1940. After the wife's death the plaintiffs claimed a half-share of the said interests on the ground that it formed *tediatetam* property under sections 19 and 20 of (Jaffna) Matrimonial Rights and Inheritance Ordinance (Chap. 48).

The defendant contended that the plaintiffs were not entitled to any rights in view of sections 19 and 20 of Ordinance No. 50 of 1947 which replaced the said two sections relied on by the plaintiffs.

Held: *That as the amending Ordinance No.* 58 *of* 1947 *was retrospective in its operation the plaintiffs did not become entitled to the rights claimed.*

Per NAGALINGAM, J.—Where a judgment of a lower Court is affirmed without reasons being given by this Court it is incorrect to treat the judgment of the lower Court either as a judgment of this Court or as a judgment which has any binding effect on this Court.

Only when this Court expressly adopts a judgment of the lower Court as its own can the judgment of the lower Court be treated as being invested with that character whereby it is enabled to be regarded as a pronouncement having a binding effect on this Court.

The amending Ordinance has the effect of declaring what was always the law and its operation therefore cannot be confined to any period subsequent to when it became law.

KATHIRITHAMBY *vs.* SUBRAMANIAM ... ... XLIII. 65

Right of pre-emption—Sale without notice in derogation of pre-emptor's right—Time within which right could be exercised.

Under the Thesawalamai, where a person having the right of pre-emption of a land complained that his parents, in derogation of his right, had sold the property to strangers without notice to him, and alleged that he had always been ready and willing to buy the land at its market value, had the purchasers been willing to sell it,

Held: (1) *That such a person is in law entitled to reasonable notice of his parents' intention to sell the property.*

(2) *That it is incumbent on him to establish by positive proof that, had he in fact received the requisite notice, he would and could have purchased the property himself within a reasonable time, rather than permit it to be sold to a stranger.*

(3) *That the burden of such proof lay on the person seeking to exercise the right of pre-emption.*

(4) *That a would-be pre-emptor cannot claim to be in a better position by not receiving notice of the intended sale than he would have been if he had received such notice.*

K. VELUPILLAI *et al vs.* S. R. PULENDRA AND T. M. SABARATNAM *et al* XLV. 45

Dowried daughters—Gift after marriage, not dowry—Married daughters under the Thesawalamai, who have been dowried at the time of their marriage, can prefer a claim to the estate of their parents, only if there are no other children.

Held: *That a gift of lands made after marriage is not a* doty *or* doty ola.

KANDAPPER *vs.* VEERAGATHY AND ANOTHER ... ... XLV. 61

Ordinance 59 of 1947—Action for pre-emption brought one year after registration of transfer deed—Sale before Ordinance came into operation—Vested rights—Retrospective effect.

Held: (1) *That Ordinance* 59 *of* 1947, *which lays down that no action to enforce the right of pre-emption shall be instituted or maintained, if more than one year has elapsed from the date of registration of the purchaser's deed of transfer, does not apply, where the sale took place before the Ordinance came into operation.*

(2) *That under our law, a statute is not to be construed as taking away vested rights unless there is express provision to that effect.*

KUMARASWAMY *vs.* SANMUGAM AND OTHERS ... ... XLV. 112

Tediatetam—Sale by wife of dowry property—Plaintiff husband's action for declaration of title—Jaffna Matrimonial Rights and

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Inheritance Ordinance (Chapter 48)—Sections 19, 20—Amendment Ordinance No. 58 of 1947—Sections 3, 5, 7—Is it retrospective?—Interpretation Ordinance, section 6—Co-owners—Prescription, ouster—Courts Ordinance, sections 38, 48a, 51—Constitution of bench thereunder.

Plaintiff's wife subject to Thesawalamai with the sanction of the Court conveyed by deed to one R a property purchased with her dowry money. The plaintiff husband instituted an action for declaration of title to, and for possession of the property on the ground that it was *tediatetam* property which his wife had no right to alienate.

The questions that arose for determination were (*a*) whether the Jaffna Matrimonial Rights Ordinance, 1911 or the Amendment Ordinance No. 58 of 1947 applied to the plaintiff and his wife at the time of purchase and sale of the property in question, (*b*) whether R and her successors in title had prescribed against the plaintiff, (*c*) whether the Court hearing the appeal was properly constituted.

Held: (Basnayake, J. dissenting): (1) *That the Amendment Ordinance No.* 58 *of* 1947 *applied as the language of the operative section* (3 *and* 5) *indicate that the legislature intended that the sections as amended should apply to all married women after the commencement of the principal Ordinance.*

(2) *That the Amendment Act was enacted for the purpose of declaring what the law always was and of restoring the law as it stood before the decision in* Avitchy Chettiar *vs.* Rasamma (1933) 33 *N.L.R.* 313 *and to remove any doubts that might have been created by the decision.*

(3) *That section* 6 *of the Interpretation Ordinance does not apply to these cases.*

(4) *That the property in question was the separate property of the plaintiff's wife and not* tediatetam *and therefore the sale was valid and gave an indefeasible title to R the purchaser.*

(5) *That R and her successors in title had acquired prescriptive title as they had been in exclusive possession of the property, which was overt and adverse to the plaintiff.*

(6) *That the principle laid down in* Corea *vs.* Iseris Appuhamy (1911) 15 *N.L.R.* 65, Britto *vs.* Muttunayagam (1918) 20 *N.L.R.* 327 *that possession by a co-heir enures to the benefit of his co-heirs did not apply to a stranger who had bought the entirety of the land from one of the co-owners and continued to be in exclusive possession thereof.*

(7) *That section* 38 *of the Courts Ordinance empowers the Chief Justice to direct a Bench of three Judges to hear and decide an appeal reported by a Bench of two Judges as worthy of consideration by a Bench of three or more Judges.*

SELLAPPAH *vs.* SINNADURAI AND OTHERS ... ... XLVI. 17

Dowry gift to daughter—Right of inheritance to parent's property.

The question whether a subsequent gift by a parent to a married daughter operates and is intended to operate as a donation *simpliciter* or as a postponed fulfilment of the earlier obligation to provide her with a dowry is a question of fact dependent on the circumstances of each case.

THESIGAR *vs.* GANESHALINGAM *et al* ... ... XLVI. 64

Tediatetam—Property acquired under Jaffna Matrimonial Rights and Inheritance Ordinance of 1911 (Chapter 48)—Sections 19, 20—Jaffna Matrimonial Rights and Inheritance (Amendment Ordinance No. 58 of 1947—Is it retrospective?—Section 7—Effect of—Interpretation Ordinance, section 6 (Chapter 2)—Scope of.

Held: (1) *That the Jaffna Matrimonial Rights and Inheritance* (*Amendment*) *Ordinance No.* 58 *of* 1947 *does not affect retrospectively vested rights acquired prior to* 3*rd July*, 1947, *under the provisions of the Jaffna Matrimonial Rights and Inheritance Ordinance of* 1911, *as there are no words in the amending Ordinance sufficient to justify the inference* (*far less the "necessary implication"*) *of an intention that the provisions of the principal Ordinance should be repealed retrospectively.*

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(2) *That* Satchithanandan *vs.* Sivaguru (1949) 50 *N.L.R.* 293 Kathirithamby *et al vs.* Subramaniam (1951) 52 *N.L.R.* 62 Sellappah *vs.* Sinnadurai *et al* (1951) 53 *N.L.R.* 121 (46 *C.L.W.* 17) *were wrongly decided and must be considered over-ruled.*

(3) *That section* 6 (3) *of the Interpretation Ordinance applies to these cases and the section protects vested rights acquired under a repealed Act unless there is a clear and unambiguous expression (either directly or at least in so many words) of a legislative intention in the amending or repealing Act to affect vested rights prejudically.*

(4) *That* Avitchi Chettiar's case (35 *N.L.R.* 313) *correctly interpreted the language of section* 19 *of the principal Ordinance.*

Per GRATIAEN, J.—(*a*) "Section 7 of the amending Ordinance contains no words expressing an intention retrospectively to sweep away any rights. It only purports, presumably out of an abundance of caution and in any event quite unnecessarily, to save the rights of parties in a limited group of decided cases dealing with only one particular category of *tediatetam* property which was caught up (perhaps unintentionally but nevertheless unambiguously) by the words of definition in section 19 of the principal Ordinance."

(*b*) "The combined effect of sections 6 (3) (*b*) and 6 (3) (*c*) of the Interpretation Ordinance is that if a party had already instituted proceedings to vindicate a vested right, the subsequent repeal of the enactment under which that right was acquired cannot be regarded retrospectively unless there are express words satisfying both sections."

AKILANDANAYAKI *vs.* K. SOTHINAGARETNAM *et al* ... XLVI. 67

Tediatetam—Devolution of—Matrimonial Rights and Inheritance Ordinance (Cap. 48) —Sections 14, 19, 20—Amending Ordinance No. 58 of 1947—Does it operate retrospectively?—Interpretation Ordinance, section 6.

Held: (By Divisional Bench, Nagalingam, J. dissenting):(1) *That the Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance No.* 58 *of* 1947 *does not operate retrospectively so as to affect any category of vested rights acquired prior to* 3rd *July,* 1947, *under the principal Ordinance.*

(2) *That the devolution of* Tediatetam *property of a Thesawalamai spouse married after* 17*th July,* 1911, *depends solely upon the date of his or her death. If the death occurred before* 3rd *July,* 1947, *section* 20 (2) *as originally enacted by the principal Ordinance applies: but should it occur after that date, the new section substituted by the Amending Ordinance would govern the case.*

Per NAGALINGAM, S. P. J. — "The effect of enacting sections 19 and 20 as two of the sections that follow on section 14 is the same as if the Legislature inserted after the two new sections 19 and 20 a further new section that the provisions of these two sections are to apply to the estates "of such persons only who shall die after the commencement of the principal Ordinance." The repetition of such a provision would have been totally unnecessary in view of the fact that section 14 covers the very same ground which the Legislature would have covered by enacting such a section as that contemplated in regard to the operation of the new sections 19 and 20."

"The effect, therefore, of the new amending sections in the context in which they have been enacted by the Legislature is to make those sections applicable to the estates of all persons who may die or may have died after the commencement of the Ordinance, subject to the limitation that where rights have got merged into decrees, those adjudications are to remain unaffected by the new provisions. The intention, therefore, of the Legislature to be gathered from the language used by it, especially having regard to the context in which the sections appear, is that irrespective of any question of rights having been vested or acquired previously the new provisions were to apply from the date of the commencement of the principal Ordinance and were to affect questions of inheritance in respect of all estates that come into existence

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after the commencement of the Ordinance without any exception whatsoever."

D. V. KANDAVANAM *vs.* NAGAMMAH, WIDOW OF VYRAMUTTU *et al* XLVI. 104

Right of pre-emption—Minor—Means to purchase at time of transaction—Notice of sale.

Under the Thesavalamai a co-owner, who had not the means to purchase a share of the common property at the time the transaction took place, cannot succeed in an action for pre-emption on the ground that no notice of sale was given to her.

MANGALESWARI (MINOR BY HER NEXT FRIEND SINNAMMAH *vs.* VELUPILLAI SELVADURAI AND TWO OTHERS XLVII. 94

Wife's immovable property—Alienation without husband's consent to defendant during subsistence of marriage—Action by husband against defendant for declaration that alienation void—Decision by Court that alienation void but refusal to grant decree on ground that husband (plaintiff) had no proprietary interest in wife's separate property. Quia timet **nature of proceedings —Jaffna Matrimonial Rights and Inheritance Ordinance (Cap. 48) section 6.**

Where in an action brought by the husband against his wife's vendees for a declaration that the alienation was null and void as it was done without the husband's consent during the subsistence of their marriage, and the Court rightly decided that the alienation was void *ab initio* for that reason, but refused to grant a declaratory decree on the ground that the plaintiff had no proprietary interest in the separate property of his wife.

Held: *That the Court had the power to grant the relief prayed for (a) as the plaintiff was vested with marital authority to restrain his wife from alienating* (vide *section 6 of the Jaffna Matrimonial Rights and Inheritance Ordinance*) *(b) as the plaintiff was at least entitled to protect a contingent right to receive income from the property, should his wife predecease him; (c) as a declaratory decree would be of assistance to him against others who dispute his rights to the property.*

CUMARASWAMY NAGANATHER *vs.* SINNATAMBY VELAUTHAM AND WIFE SARASWATHY ... ... L. 13

Co-owner—Pre-emption—Hypothecary rights acquired by a third party after the date of the impugned sale—Effect of a final decree for partition on a co-owner's right to pre-empt—Prior registration.

Two persons, M and S, subject to the law of the Thesawalamai, sold to L certain undivided shares of property owned in common by them and the second respondent. L jointly with her husband mortgaged her interests to the appellant on two bonds and later instituted a partition action of the common property, joining as parties all the co-owners including the 2nd respondent and her husband the 1st respondent and the appellant, and obtained a final decree for partition on the 12th December, 1947, whereby a divided portion (lot 3) was allotted to L subject to the mortgages in favour of the appellant and a separate portion was allotted to the 2nd respondent. There was no appeal from this decree.

Thereafter on the 5th October, 1948, the appellant sued L and her husband for the enforcement of the mortgage bond subject to which she had been declared entitled to lot 3, and obtained a hypothecary decree on 20th January, 1949, and had the property put up for judicial sale and on 19th August, 1949, bought it at the sale and obtained a conveyance of lot 3.

Respondents instituted the present action against the appellant praying *inter alia* for a declaration that their title to lot 3 was superior to his by virtue of a conveyance dated 14th May, 1940, executed in their favour in pursuance of a decree in action No. 2505 of the District Court of Point Pedro filed by the respondents on 24th October, 1945, against L and her husband for the enforcement of their right under the *Tesawalamai* to pre-empt the undivided shares of the larger land (including lot 3) which M and S had previously sold to L.

Held: (1) *L's mortgages in favour of the appellant having been duly registered, no*

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decree for pre-emption in favour of the respondents could operate in derogation of the appellant's previously acquired hypothecary rights except in an action to which the appellant was made a party.

(2) *A co-owner's right of pre-emption cannot defeat the rights of a* bona fide *mortgagee for value whose interests had been created before the right of pre-emption was asserted in a Court of law.*

(3) *The doctrine of* lis pendens *cannot adversely affect the appellant's mortgage, because it was created before the action for pre-emption was instituted.*

(4) *The partition decree effectively extinguished the respondent's right to pre-empt the undivided share in the common property which L had purchased from the two respondents-co-owners.*

(5) *The decree for partition clearly prevails over the decree for pre-emption, because the partition action was duly registered before the pre-emption action had commenced.*

VAIRAMUTTU SIVAPIRAGASAM *vs.* SINNAN VELLAIYAN AND ANOTHER ... L. 81

Husband buying properties—Last Will—Widow executrix—Corpus to be administered—Ordinance No. 58 of 1947—Section 20.

Title to an undivided half share of immovable properties bought, after 1926 and prior to the third day of July, 1947 (when the Jaffna Matrimonial Rights and Inheritance Amendment Ordinance came into operation) by a husband subject to the law of the Thesawalamai vests immediately upon the wife and where the husband does not exercise his right to sell or mortgage the said property and dies leaving a joint last will, the widow as executrix is bound to administer only a half share of the said properties.

KANAMMAH *vs.* THAMBIAPPAH SANMUGALINGAM *et al* ... ... L. 105

THOROUGHFARES

For public rights of way—*See under* **Right of way.**

Ordinance No. 10 of 1861—The steps of a private house which encroach on a public road do not form part of the road within the meaning of the Ordinance.

SAMIVEIL *vs.* EDWIN ... ... II. 326

Is cattle seizer entitled to seize animal controlled by a person even though it be grazing on the road side.

Held: (1) *That the seizure of a calf grazing by the road side under the control of a person holding a rope attached to it is not lawful because the animal cannot be said "to be tied, tethered or straying on to a thoroughfare" within the meaning of section* 94 (*a*) *of Ordinance* 10 *of* 1861.

(2) *That the obstruction offered to a cattle seizer seizing an animal in these circumstances is not an offence under section* 94 (2) *A of the Ordinance.*

JAMES *vs.* PETER *et al* ... II. 341

Land marked off and reserved for construction of road—Can rights to such land be acquired by possession or user—Can compensation for improvements be claimed in respect of such land.

Encroachments upon Crown Lands Ordinance—Can possessor of such road reservation for over ten years claim rights referred to in section 9—Effect of section 10 of the same Ordinance.

Held: (1) *That land marked off and reserved for the construction of a road, comes within the definition of the word "road" in section* 72 *of the Thoroughfares Ordinance* (*cap.* 148).

(2) *That as a claim for compensation for improvements is a right acquired by virtue of possession or user, no such claim can be entertained in respect of a road reservation in view of section* 67 *of the Thoroughfares Ordinance.*

(3) *That a person, who has been in possession for over ten years of land reserved for a road, is precluded by section* 10 *of the Encroachments upon Crown Lands Ordinance from claiming the rights conferred by section* 9 *of the same Ordinance.*

WIJESINGHE *vs.* THE ATTORNEY-GENERAL ... ... XXXIII. 26

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TIME

Privy Council Appeal—Time within which notice is to be given—Computation of—Are Sundays and Public Holidays to be excluded.

PATHMANATHAN *vs.* THE IMPERIAL BANK OF INDIA ... ... VIII. 47

Computation of time—When may Sundays and public holidays be excluded in the computation of a period of time fixed by the Supreme Court for perfecting an appeal.

KANDASAMYTHURAI *vs.* CASSIM XI. 66

Court of Requests—Application to Supreme Court for leave to appeal—Time within which application should be filed.

MOHAMED BAI *vs.* MRS. DIYAWA AND TWO OTHERS ... ... XII. 20

Computation of time within which a criminal appeal should be preferred.

JONES *vs.* AMARAWEERA ... XV. 18

Computation of time within which leave to appeal to Privy Council should be made.

PALANIAPPA CHETTIAR AND TWO OTHERS *vs.* MERCANTILE BANK OF INDIA AND OTHERS ... ... XXIII. 13

Time—Consent order to pay costs on or before next date of trial—Payment during the course of the next trial date is a sufficient compliance with the terms of the order.

BARLIS *vs.* WEERASINGHE ... XXVI. 60

TORT

Malicious sequestration proceedings actionable even though no actual sequestration is effected.

HADJIAR *vs.* ADAM LEBBE ... XXII. 99

Joint tort-feasors—Five persons convicted of housebreaking and theft—Two separate actions for damages against two of them—Is a decree in one of the actions a bar to further proceedings in the other action—Liability of joint tort-feasors—Civil Procedure sections 15 and 34.

Held: (1) *That the liability of joint tort-feasors in Ceylon should be determined according to the Roman-Dutch Law.*

(2) *That the liability of the five persons concerned in the burglary was joint and several and that each was liable* in solidum.

(3) *That the plaintiff had only one cause of action against all the joint tort-feasors.*

(4) *That judgment against one is itself, and without execution, a sufficient bar to an action against another joint tort-feasor.*

MIGUEL APPUHAMY *vs.* APPUHAMY XI. 135

TRADE MARKS

See under **MERCHANDISE MARKS**

TRANSFER OF CASE

From Village Tribunal to Police Court—Offence of "gambling" under the Village Committee Rules—Charge in Police Court under Gambling Ordinance No. 17 of 1889—Police Magistrate's Jurisdiction to try breaches of Village Committee rules.

Held: (1) *That where a Government Agent acting under* § 64 *of Ordinance No.* 9 *of* 1924 *transferred a charge of "gambling" under Village Committee Rules the Police Court had Jurisdiction to try the offence if the facts disclosed an offence under the Gaming Ordinance No.* 17 *of* 1889.

(2) *That a charge under Village Committee Rules may rightly be transferred to a Police Court by a competent person provided the facts establish an offence within the Jurisdiction of a Police Court. A Police Court has no Jurisdiction to try breaches of Village Committee rules.*

IBRAHIAM SAIBO *vs.* ABAREN APPU AND ANOTHER ... ... I. 76

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TRANSFER OF LAND

Transfer of land with condition to retransfer

See under **AGREEMENT.**

Transfer by heirs of estate are subject to the payment of the debts of that estate if, without recourse to the lands transferred, the debts cannot be satisfied.

SURIYAGODA *vs.* WILLIAM APPUHAMY ... ... XXI. 77

Action rei vindicatio **and for** restitutio in integrum—**Transfer of land by a married Kandyan woman—Woman under 21 years of age at date of transfer—Circumstances in which transfer will be set aside—Burden of proof.**

This was an action *rei vindicatio* and for *restitutio in integrum* by a married Kandyan woman who was under 21 years of age at the date on which she transferred the land in question to the defendant. The question for decisions were—

(1) whether the burden of proof was on the minor to show that she suffered damage or detriment or on the defendant to show that the minor derived benefit from the transfer; and

(2) whether the minor should restore the defendant to his original position as a condition precedent to the grant of the relief claimed.

The defendant did not show that the minor derived any substantial benefit from the transfer.

Held: (1) *That the minor must prove that she has suffered loss, damage or prejudice.*

(2) *That in the absence of any proof by the defendant that the minor has been benefited, the minor must be taken to have suffered the kind of loss or damage sufficient to enable her to obtain relief.*

(3) *That the minor must indemnify the defendant and put him back where he stood before he entered into the contract.*

SIMAN NAIDE *vs.* JANE NONA XXX. 84

TRESPASS

Trespass—Cutting down of trees belonging to plaintiff—Measure of damages—Malicious prosecution.

Held: (1) *That in an action for trespass by cutting down trees belonging to the plaintiff, the plaintiff may recover damages without proof that he has suffered particular or special damage.*

(2) *That if the defendant in making a criminal charge honestly believe in the truth of the charge and the facts of the case are such as to lend colour to that belief, even if they do not entirely prove the charge, the Court will infer that he acted with reasonable and probable cause.*

PERERA *vs.* PERERA *et al* ... I. 210

TRUSTS

Trustee of lease for the benefit of another and himself in equal shares as tenants in common—Can he plead that action against him is not maintainable for non-compliance with Prevention of Frauds Ordinance.

WIJETILAKA *vs.* RANASINGHE ... I. 5

Ordinance No. 9 of 1917 has no application to temples and devales for which special provision was made by Ordinance No. 19 of 1931.

RATWATTE *vs.* PUBLIC TRUSTEE AND ANOTHER ... ... II. 134

Ordinance No. 9 of 1917 sections 101, 102 and 106—Settlement of a scheme of management by Court.

Held: (1) *That it is open to the Court under section* 101 *of the Trusts Ordinance to settle a scheme of management in an action by one trustee against another.*

(2) *That section* 106 *of the Ordinance requires local custom or practice with reference to the particular trust to be taken into account by a court in the settlement of a scheme for the management of any trust.*

(3) *That in view of section* 106 *it would be open to the Court to exclude*

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from the management of a temple a female who had been so appointed by deed, it had never been the custom in the temple in question for female heirs to have the right of succession to the management.

PONNAMPALAM *vs.* RATUSWARIAMMA *et al* ... ... II. 202

Extent to which English Law of Trusts apply.

ABEYSUNDERA *vs.* THE CEYLON EXPORTS LTD. AND ANOTHER ... VI. 69

Breach of Agreement to transfer property—Trusts Ordinance—Section 93—When may specific performance of a contract be enforced?

M agreed to transfer property to P and a part payment was made in advance. The agreement provided:

(*a*) that M would on or before 30th June, discharge the present existing mortgage and convey the premises to P free from all encumbrances.

(*b*) that if M fails to get the transfer executed M should pay Rs. 250 as damages.

(*c*) that if the said amount is not paid by M, P can recover it according to law.

On 4th September, 1933 M transferred the property to A. P sued M and A. The District Court held that inasmuch as registration was sufficient notice to A within the meaning of section 93 of the Trusts Ordinance, the transfer to A was subject to the agreement in favour of P and decreed A to transfer the property to P.

Held: *That on failure to perform the agreement, no specific performance can be enforced in view of the provision for payment of damages.*

PAIVA *vs.* MARIKKADAR AND ANOTHER ... ... VI. 97

Application under section 42 of the Trusts Ordinance No. 9 of 1917—Section 116 (1) and (3)—Stamp duty—How far is an appeal from a decision on an application under section 42 subject to the provisions of the Stamp Ordinance.

SADDANATHKURUKKAL *vs.* SUBRAMANIAM ... ... X. 106

Trusts Ordinance No. 9 of 1917, sections 101, 102 and 112—Hindu Temple—Proceedings for vesting order and directions for control and management of trust—Failure to comply with requirements of section 102—Effect of such failure.

Held: *That the plaintiff was not entitled to obtain the relief he claimed without complying with the requirements of section* 102 *of the Trusts Ordinance.*

MUTTUKUMARU AND ANOTHER *vs.* VAITHY AND TWO OTHERS ... XII. 9

Trusts Ordinance—Proceedings under § 112—How should pleadings and documents be stamped.

THAMBIAH *vs.* KASIPILLAI ... XII. 92

Trusts Ordinance—Proceedings under § 112—Stamping of petition of appeal to Supreme Court.

SAVARIMUTTU AND OTHERS *vs.* THE SAIVA PARIPALANA SABHA ... XIII. 141

Power of last surviving trusteee to appoint new trustees—No such power vested in trustees or their successors under trust deed—Does section 75 of the Trusts Ordinance (Chapter 72) give such power.

Held: (1) *That a last surviving trustee may by virtue of section* 75 (1) (*b*) *of the Trusts Ordinance appoint new trustees, in place of those who have died or ceased to hold office even though no such power is vested in him by the instrument of trust.*

(2) *That the words "in the opinion of the court" in section* 75 (1) *of the Trusts Ordinance should be read as applying to the case of—*

(*a*) *a trustee who is absent from Ceylon*

(*b*) *a trustee who is unfit or personally incapable to act in the trust.*

IN *re* DE MEL TRUST ... XVIII. 139

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Trusts Ordinance sections 109 and 111 —Does section 111 apply to religious trusts regulated by the Buddhist Temporalities Ordinance.

Held: *That section* 111 *of the Trusts Ordinance applies to religious trusts regulated by the Buddhist Temporalities Ordinance.*

SOBITHA THERO *vs.* WIMALABUDDI THERO AND ANOTHER ... ... XX. 85

Trusts—Trustee's power to distribute and redistribute.

Held: *That redistribution implies, and is also conditioned by, a power to revoke. If in making a distribution the power to revoke is reserved, a redistribution can take place. But if such power is not reserved, the conveyance is irrevocable and the powers of distribution which could otherwise have been exercised cannot be exercised.*

CHINNIAH *vs.* FERNANDO XXII. 73

Trusts—Constructive—Sale under hypothecary decree—Purchase for judgment-creditor by nominee—Failure to obtain previous sanction as required by section 272 of the Civil Procedure Code—Can such judgment-creditor seek assistance of court to recover such property.

Held: *That a judgment-creditor, who without obtaining previous sanction of court under section* 272 *of the Civil Procedure Code arranges that a nominee should purchase the property seized in execution of a hypothecary decree, is not entitled to seek the assistance of the court to obtain a declaration that such nominee holds the property for him as constructive trustee.*

WARNASURIYA *vs.* WICKREMASINGHE ... ... XXIII. 87

Charitable trust—Hindu temple—Scheme of management framed by court—Provision that meeting to elect trustees be held at the temple premises—Obstruction to holding such meeting at temple premises—Election of trustees at meeting held outside—Is such election void.

When trustees to a Hindu Temple were elected at a meeting held at a place other than the place named in the scheme of management framed by the court as a charitable trust because the congregation was prevented from doing so at the appointed place by the opposing party.

Held: *That the election was good.*

VELUPILLAI AND OTHERS *vs.* SABAPATHIPILLAI ... ... XXIV. 17

Charitable trust—Claim for recovery of property comprised in—Does claim for declaration that a person is trustee convert such action into one for an office or status——Section 111 (1) (c) Trusts Ordinance (Chapter 72)—Prescription—Claim for a vesting order—Procedure "where it is uncertain in whom title to any trust property is vested"—Section 112 (1) — Does procedure laid down in section 102 (1) (b) apply —Is a vesting order necessary.

Held: (1) *That the fact that the plaintiff in an action for the recovery of property comprised in a charitable trust claimed a declaration that he is the trustee does not convert the action into one for an office or status. In substance the claim is* rei vindicatio, *and falls within the provisions of section* 3 (1) (*c*) *of the Trusts Ordinance.*

(2) *That the claim for a vesting order is not a claim to an office or status and, if granted has only the effect of transferring legal title to the person named in the order. No question of prescription or limitation arises in cornection with such a claim, but delay may be an element to be considered in connection with the granting thereof.*

(3) *The procedure laid down in section* 102 *of the Trusts Ordinance does not apply to a claim for a vesting order where it is uncertain in whom the title to any trust property is vested. Such a claim may be asserted by a regular action.*

(4) *A person who can establish that he is the trustee need not clothe himself with a vesting order before suing for the recovery of the trust property from a trespasser.*

THAMBIAH *vs.* SATHASIVAM AND ANOTHER ... ... XXIV. 55

Constructive trust—An obligation in the nature of a trust cannot be evaded by

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pleading § 2 of the Prevention of Frauds Ordinance.

NANDUWA AND ANOTHER *vs.* JUNGA AND TWO OTHERS ... ... XXVII. 1

Trusts Ordinance—Can an action under section 101 be maintained in a case in which the defendants deny the existence of a trust.

Held: (1) *That an action under section* 101 *of the Trusts Ordinance can be maintained even if the defendant denies the existence of the charitable trust alleged by the plaintiff.*

(2) *That in an action under section* 101 *of the Trusts Ordinance for an alleged breach of a charitable trust the plaintiff must prove—*

(*a*) *the existence of a charitable trust;*

(*b*) *the breach of such trust by the defendants.*

(3) *That the word "alleged" in section* 101 *should be read as qualifying all the words "breach of any express or constructive charitable trust."*

DULLEWE *vs.* SUMANAWATHIE UPASIKAWA AND OTHERS ... ... XXVII. 54

Trust—Transfer of property by debtor to creditor on the agreement that the latter is to retransfer the property after the debts have been liquidated out of the income therefrom—Can parole evidence of agreement be led—Prevention of Frauds Ordinance (Chapter 57) section 2—Evidence Ordinance (Chapter 11) section 92.

The plaintiff sued the defendant as executrix of the estate of one Natchiappa Chettiar for a declaration that a transfer deed (P21) executed by him in 1930 in favour of the latter was held in trust for him and for an accounting in the following circumstances:

(*a*) That in March, 1930 the plaintiff owned property of the total value of Rs. 660,115/- and had debts amounting to a sum of Rs. 539,114/- approximately.

(*b*) That of these debts a sum of Rs. 185,031/66 was due to the said Natchiappa Chettiar on a mortgage bond.

(*c*) That as plaintiff was financially embarrassed owing to lack of liquid cash, the said Natchiappa Chettiar, by his agent one Ramanathan, promised to act as trustee of the plaintiff and suggested to the plaintiff to give over the entire management of plaintiff's affairs to the said Natchiappa Chettiar.

(*d*) That the deed P21 was executed in consideration of a sum of Rs. 203,300/- to hold the properties mentioned therein in trust for the plaintiff.

(*e*) That the sums collected as rents and profits were agreed to be devoted by Natchiappa Chettiar to pay the debts due to him together with interest.

(*f*) That Natchiappa Chettiar may sell properties and the proceeds thereof should be paid in liquidation of the said Rs, 203,300/-.

(*g*) That after such liquidation of the said sum of Rs. 203,300/-, Natchiappa Chettiar agreed to reconvey the properties remaining unsold.

(*h*) That the plaintiff should remain as the owner of two of the said properties.

(*i*) That the properties conveyed by P21 was very much in excess of the consideration stated therein.

The learned District Judge accepted the oral evidence in support of the above arrangement and held that a trust was established.

Held: (1) *That the learned District Judge was correct in holding that a trust was established.*

(2) *That oral evidence was admissible to prove the trust.*

VALLIYAMMAI ATCHI *vs.* ABDUL MAJEED ... ... XXVIII. 81

Breach of trust—Sale of trust property by trustee—Bona fide **purchaser for value having no notice of equitable title—Legal**

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title of purchaser — Prescription — Trusts Ordinance (Chapter 72) section 111.

The 1st to 4th defendants purchased a schooner in 1925. The vessel was registered and the documents were executed in the name of the 5th defendant who, in breach of trust, sold the schooner by bill of sale (P5) on 11th August, 1928, to the 6th defendant. By further bills of sale 6th defendant sold the schooner to 7th defendant, who sold it to 8th defendant, who sold it by P 2 on 25th August, 1937, to the plaintiff. The plaintiff claimed the schooner as a *bona fide* purchaser for value. It was established that he had been in possession of the vessel since the date of purchase.

The 1st and 2nd defendants prayed that the bills of sale be set aside. They denied that the plaintiff was the owner of the vessel and maintained—

(*a*) that P 2 was effected secretly, fraudulently and collusively with intent to defraud them of certain moneys due to them in respect of the vessel under another action instituted by them against the 3rd and 4th defendants; and

(*b*) that the 5th defendant was holding the vessel in trust for the 3rd and 4th defendants and that the latter fraudulently and collusively obtained the execution of the various bills of sale and by reason of these bills rendered themselves insolvent.

The transfer to the plaintiff was not secret, being registered. It was not proved that the 3rd and 4th defendants were left without any property when the vessel was transferred by P5.

Held: (1) *That the plaintiff was not bound by the trust in breach of which the schooner was sold by the 5th defendant, as the plaintiff—*

(*a*) *had obtained the legal title:*

(*b*) *was a* bona fide *purchaser for valuable consideration; and*

(*c*) *had received no notice that the transaction was a breach of trust before the transfer was completed.*

(2) *That the 1st and 2nd defendants had failed to establish fraud against the plaintiff.*

(3) *That, even if fraud had been established, the claim of the 1st and 2nd defendants was prescribed as 1st defendant had notice of P 5 on 28th October, 1929 and that the case did not come within the ambit of section 111 (1) of the Trusts Ordinance.*

COOMARASAMY *vs.* CHELLAM AND OTHERS ... ... XXX. 61

Non-notarial agreement by vendee to retransfer land to vendor—Enforceability—

SAIYA NONA *vs.* KARTHELIS APPUHAMY ... ... XXX. 72

Trusts Ordinance, section 102—Religious Trust—Petition to Government Agent by 79 persons claiming to be interested in—Grant of certificate by Government Agent after inquiry—Action instituted by eight of the petitioners and four others—Can action be maintained—Nature of the inquiry by the Government Agent regarding interestedness of plaintiffs—Is the Government Agent's finding final—Matter of semi-public interest —Desirability of remitting case to enable plaintiffs to regularise plaint.

Seventy-nine persons claiming to be interested in the matters relating to a religious trust which are set forth in the plaint, presented a petition to the Government Agent, Northern Province, in compliance with the requirements of section 102 of the Trusts Ordinance (Chap. 72) praying for a certificate in terms of paragraphs (*a*) and (*b*) of sub-section (3) of section 102. Having obtained this certificates 8 of the 79 petitioners and four strangers to the petition instituted this action.

On a preliminary issue raised as to whether the plaintiffs had complied with section 102 of the Trusts Ordinance before filing action the learned District Judge dismissed the action as Counsel for the plaintiff stated that he was not applying to strike out the names of any of the plaintiffs.

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Held: (1) *That the trial Judge was right in dismissing the action as the plaintiffs refused to ask that the names of the non-petitioner-plaintiffs be struck out.*

(2) *That the finding of the Government Agent or the Assistant Government Agent regarding the interestedness of persons within the meaning of section* 102 (2) *is not final, and it would be open to a Court to consider that question independently should it arise before it.*

Per SOERTSZ, A.C.J.: "As I have already observed, the trial Judge had no alternative but to make the order he made. It was not for him, even if he had the power, to strike out those who had not been petitioners. I should have, therefore, dismissed this appeal but that the questions involved are of semi-public interest, and for that reason I would accede to the application of appellant's counsel, make order that the case be remitted to enable the parties to apply to the Court for such of them as had not joined in the petition to withdraw from the action, and for the action to proceed thereafter. The *locus standi* of the eight others was not questioned.

THAMBIPILLAI *vs.* KURUKKAL AND OTHERS ... ... XXXI. 92

Trust Ordinance § 98.

PERIYACARUPPEN CHETTIAR *vs.* PROPRIETORS AGENTS LTD. ... XXXII. 19

Trust and fidei commissum**—difference between.**

ABDUL HAMIL SITTI KADIJA AND ANOTHER *vs.* DE SARAM AND OTHERS ... ... XXXII. 46

Trust—Equitable doctrine of—Plaintiffs transferring property to defendant to pay off mortgage—No consideration paid to plaintiffs—Agreement to retransfer in non-notarial writing—Nature of transaction—Defendant's refusal to retransfer—Conditions necessary to establish trust—Statute of Frauds—Evidence Ordinance, section 92 (2).

The plaintiffs, husband and wife were indebted to one J. F. in a sum of Rs. 650 on a mortgage bond. Being unable to pay this amount they approached the defendant for a loan. The defendant agreed to pay off the mortgage and Deed No. 4447 of 2-9-41 (P 2) was executed in his favour transferring the hypothecated property, which was worth Rs. 1,750 or Rs. 2,000. It was further proved that no money was paid by the defendant on the date of transfer, that he merely undertook to free the property from the mortgage, that the plaintiffs were reluctant to grant the transfer and only did so on an agreement to retransfer. This agreement to retransfer was on a non-notarial writing P 3.

The defendant stated in his evidence that he had no intention of retransferring the land when he gave P 3 but would do so now if he was paid Rs. 2,000 and his expenses.

Held: (1) *That the plaintiffs have established a case of fraud or one in which Equity would grant relief to prevent the defendant from taking advantage of the Statute of Frauds to keep the plaintiffs' property.*

(2) *That in the circumstances the defendant held the property in trust for the plaintiffs.*

(3) *That the agreement to retransfer did not constitute a "condition precedent" to the granting of P* 2 *within the meaning of the Evidence Ordinance.*

FERNANDO *vs.* THAMEL AND ANOTHER ... ... XXXII. 66

Trust created by Last Will for relief to poor relations of testatrix—Liability of income to Income Tax—Is it a trust of a public character established for a charitable purpose.

TRUSTEES OF THE WIJEWARDENA CHARITABLE TRUST *vs.* THE COMMISSIONER OF INCOME TAX ... ... XXXII. 73

Trust—Register of lands belonging to charitable trust—Admissibility of certified copy.

CHELLIAH AND ANOTHER *vs.* SAIVA PARIPALANA SABHAI ... XXXIII. 9

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Trustee—Association to establish Pirivena for teaching Buddhism—Agreement by members that right to appoint principal and teachers to Pirivena to be with the association —Establishment of Pirivena—Appointment of Principal—Dedication by deed of premises on which Pirivena built to Sanga by way of gift to such Principal and to his successors in office as appointed by Sabha—Can such successor in office, maintain action against trespasser without conveyance,vesting order, or other assurance—Trusts Ordinance Section 113, sub-sections 1, 2, and 3—Applicability of sub-sections 2 and 3.

VEN. BADDEGAMA PIYARATANA NAYAKA THERO *vs.* VEN. VAGESWARACHARIYA MORONTUDUWA SIRI DHAMMANANDA NAYAKE THERO AND OTHERS XXXIII. 33

Transfer of land by notarial deed—Contemporaneous non-notarial agreement by vendee to retransfer land to vendor—Refusal by vendee to retransfer—Enforceability of non-notarial agreement—Trusts' Ordinance sections 5 and 83—Jurisdiction.

The plaintiff transferred a certain land worth more than Rs. 300 to the defendant for Rs. 250 by deed. At the time of the execution of the deed, the defendant signed a non-notarial agreement agreeing to retransfer the land to the plaintiff within two years on payment of the said Rs. 250 and the expenses incurred in connection with the deed. The plaintiff tendered the sum as agreed but the defendant refused to retransfer the land. The facts showed that when the deed was executed, it was never intended by either party that the defendant should hold the land as absolute owner but only until such time as his debt was repaid.

Held: (1) *That the informal agreement was enforceable as it would enable the defendant to effectuate a fraud if it were shut out.*

(2) *That though the land was worth more than Rs.* 300, *the court had jurisdiction as plaintiffs' cause of action was for specific performance of an agreement and was below Rs.* 300 *in value.*

ELIYA LEBBE *vs.* ABDUL MAJEED XXXIV. 107

Transfer of immovable property by notarial deed subject to parole arrangement that transferee would hold the property in trust and would later reconvey—Death of transferee—Executor repudiating such trust—Is parole evidence admissible to establish the trust—Enforceability of such agreement to reconvey Trusts Ordinance, section 5—What amounts to fraudulent conduct—Does section 2 of Prevention of Frauds Ordinance apply to trusts—Evidence Ordinance (cap.) sections 91 and 92—Their applicability when whole contract not reduced to form of document.

Held: (1) *That the formalities necessary to constitute a trust relating to immovable property are those laid down in section* 5 *of the Trusts Ordinance* (*Chap.* 72) *and not those in section* 2 *of the Prevention of Frauds Ordinance* (*Chap.* 57).

(2) *That where immovable property had been conveyed to a person by a disposition in writing executed according to law, with no written conditions, but subject to a parole arrangement that he would hold the property in trust for the benefit of the transferor, it would be fraudulent conduct on the part of such person to repudiate such trust, and parole evidence could be led to establish such trust under section* 5 (3) *of the Trust Ordinance.*

(3) *That sections* 91 *and* 92 *of the Evidence Ordinance* (*Chap.* 11) *do not have any application to such a case inasmuch as only a part of the contract was reduced to the form of a document and as the law did not require the parole part to be so reduced.*

VALLIYAMMAI ATCHI *vs.* ABDUL MAJEED ... ... XXXV. 1

Trusts Ordinance § 102—Action under—Reliefs claimed can be decreed from time to time.

CHINNATHAMBY AND OTHERS *vs.* SOMASUNDARA AIYAR AND OTHERS XXXV. 91

Executor's own property hypothecated to secure debt due to estate—Sale under hypothecary decree—Purchase by third party with money provided by executor—Legality of transaction—Is the property held in trust for executor—Prejudice to creditors.

An executor hypothecated his own property together with the deceased's property to secure a debt due to the estate. At the sale in execution of the hypothecary decree, a third party purchased the executor's property with money provided by him. The executor brought an action for a declaration that the property was held in trust for him by the purchaser.

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Held: (1) *That, in the circumstances, it is permissible in law for a debtor to buy his own property in his own name or in the name of a third party at a sale in execution of the hypothecary decree.*

(2) *That the property so purchased by the third party is held in trust for the debtor.*

(3) *That, no prejudice was caused to the creditors by such purchase as the decree extended to other property against which the creditors could proceed.*

MARIKKAR *vs.* MARLIYA XXXVI. 18

Action for declaration as charitable trust —Compromise—Trial of issue relating to claim to be hereditary trustees—Power of Court to accept compromise—Procedure in a settlement by consent—Appeal from such settlement—Trust Ordinance, sections 99, 102, 106—Civil Procedure Code, section 408.

Held: (1) *That in an action for a declaration that a certain temple is a charitable trust, a compromise reached by the parties, to the effect that it should be declared a charitable trust, does not preclude the trial subsequently of an issue whether a party is entitled to exercise rights as hereditary manager of such temple.*

(2) *That the Court has power under section* 408 *of the Civil Procedure Code to accept a compromise with respect to a charitable trust.*

(3) *That a compromise in an action under section* 102 *of the Trusts Ordinance will not be given effect to if it bears a taint of collusion or lack of* bona fides.

(4) *That where parties are agreed that there has been a particular method of devolution appertaining to the office of trustee of a temple, the Court cannot refuse to consider the existence of the accepted method of filling the office of trustee in making an appointment.*

(5) *That a compromise entered into by parties cannot be canvassed in an appeal from an order refusing to set aside such compromise.*

KANDIAHPILLI AND FOUR OTHERS *vs.* VAITHILINGAM AND EIGHT OTHERS ... ... XXXVI. 27

Trust Ordinance § 93—"Existing contract"

PERERA *vs.* ELIZA NONA ... XXXVII. 109

Trusts Ordinance section 93—Executory contract — Specific performance — Agreements to transfer land pending partition action—Conveyances executed after partition decree—Land seized and sold by Fiscal—Is purchaser bound by agreements.

A and B agreed to transfer to C the parcels of land to be allotted to them in a partition action. After the final decree, the land was seized and sold by the Fiscal to D. Before the sale, A and B executed conveyances in favour of C, who maintained that, (under section 93 of the Trusts Ordinance,) D was bound by the agreements respecting the land.

Held: (1) *That section* 93 *of the Trusts Ordinance had no application as the contract affecting the land had been discharged prior to the sale by the Fiscal.*

(2) *That, in any event, the agreements were not capable of specific performance, as they contained penal stipulations.*

HAWADIYA *vs.* UNOOS ... XXXIX. 76

Attorney of plaintiff sued—Debts due to plaintiffs firm—Assignment of decree and endorsement of promissory note to 3rd party by defendant as attorney—Fraudulent breach of trust—When may a trustee plead prescription—Trusts Ordinance section 111.

Plaintiff, who was residing in India, carried on a money-lending business in Ceylon through his attorney, the defendant. Two persons A and S among others owed money to the plaintiff's firm on a promissory note and a decree of court respectively. Three days prior to his leaving the plaintiff's service, *i.e.* on 25-1-33 the defendant assigned the said decree to one Alagappa Chetty, who recovered a sum of Rs. 5,706.81 out of the decreed amount. Prior to 25-1-33 the defendant had also endorsed the note granted by A to the same Alagappa Chettiar who recovered a sum of Rs. 8,500 thereon.

Plaintiff brought this action on the 29th January, 1942 against the defendant alleging that the above transactions were fraudulent and apart from fraud the defendant was liable to account for the said sums of money to plaintiff as trustee for the same.

Held: (1) *That inasmuch as the plaintiff had failed to prove: (a) that the defendant had committed any fraud or fraudulent breach of trust, or (b) that at the time of action brought, the said sums of moneys were still retained by the defendant, or (c)*

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that the said sums of money were converted to the defendant's use, the defendant is entitled to plead that the claim is barred by prescription under section 111 (2) *of the Trusts Ordinance.*

(2) *That fraud, like any other charge of a criminal offence, whether made in civil or criminal proceedings, must be established beyond reasonable doubt.*

LAKSHMANAN CHETTIAR *vs.* MUTTIAH CHETTIAR ... ... XL. 65

Charitable Trust—Application under sections 15 and 16 of the Muslim Intestate Succession and Wakfs Ordinance (cap. 50) —Applicability of Civil Procedure Code— Summary Procedure—Court's Power to vacate decree—Two separate trusts not to be combined in the same action.

The petitioners acting under section 16 of the Muslim Intestate Succession and Wakfs Ordinance made the trustees respondents and applied by petition *only* for leave to make an application under section 15 of the Ordinance for certain reliefs in respect of the Kataragama Mosque and the Quadiriya Takkiya at Hambantota, which was granted. In the petition which alone was filed without affidavits and other relevant documents under section 15 they prayed *inter alia* that the Quadiriya Takkiya and Kataragama Mosque be declared a trust, that the respondents be appointed members of the Board of Trustees, that the properties belonging to the said Trust be vested in the Board of Trustees and that the scheme of management proposed by them be settled by Court. The Court entered a decree in these terms.

The priest and another claiming to be the owner of the Mosque then intervened to have the decree set aside on the ground of irregularities and of fraud and collusion by the parties to the decree. The Court set aside the decree.

The petitioners and the trustees so appointed appealed from this order on the ground that the District Court had no jurisdiction to set aside or vacate the decree.

Held: (1) *That where a decree has been obtained by fraud or collusion, as in this case, the District Court has inherent power to vacate its decree or order in the same proceedings.*

(2) *That the Civil Procedure Code governs the applications under sections* 15 *and* 16 *of the Muslim Intestate Succession and Wakfs Ordinance and should be made by way of Summary Procedure.*

(3) *That before leave to make an application under section* 15 *of the Ordinance is granted, the Court must be satisfied judicially that there are sufficient* prima facie *grounds for the application.*

(4) *That in an application under section* 15 *of the Ordinance, the admitted* de facto *trustees should be made respondents, and failure to give notice to them of the proceedings may vitiate the proceedings. Since an order under section* 15 *is a judgment* in rem, *any person other than the* de facto *trustees cannot set it aside on the mere absence of notice.*

(5) *That each distinct trust must form the subject of a separate application and must not be combined with another trust in the same application*

MARJAN AND OTHERS *vs.* MOWLANA AND ANOTHER ... ... XL. 81

Trust—Colonial Secretary, one of the trustees under last will, functus—Proper successor alleged to be Permanent Secretary to Ministry of Home Affairs—Uncertainty of title to trust property—Application by existing trustee to vest property on trustees by summary procedure under section 112 of Trusts Ordinance (Chapter 72)—Is the procedure proper?—Scope of section 112— Section 595 Civil Procedure Code—Trusts Ordinance—Sections 101, 102.

Under a trust created by a will in 1909 the testator appointed as trustees the Government Agent, Western Province and the Colonial Secretary and empowered his widow and two others to nominate certain other trustees, where the above-named trustees failed. Owing to changes in the constitution of Ceylon, the office of the Colonial Secretary was abolished and was replaced by that of the Chief Secretary which in turn was abolished leaving some of its functions to the Permanent Secretary to the Ministry of Home Affairs and Rural Development.

The widow in acting under the power in the last will purported to appoint a trustee as successor to the Chief Secretary but was opposed by the appellant, the Government Agent of the Western Province, who contended that the proper successor to the Chief Secretary as trustee was the Permanent Secretary, and that the widow had

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accordingly no right to appoint a trustee. The appellant thought that in the circumstances there was uncertainty as in whom the title to the trust property vested and moved the District Court under section 112 of the Trust Ordinance by way of summary procedure for a order vesting the properties in him and the Permanent Secretary.

The learned District Judge dismissed the application on the ground that the appellant should have filed a regular action and not moved the Court by summary procedure.

Held: (1) *That the District Judge was wrong in dismissing the application.*

(2) *That where a person asks for a vesting order under section* 112 *of the Trusts Ordinance without asking for any further remedy, the procedure must be by way of summary procedure and not by way of regular action.*

HUNTER, GOVERNMENT AGENT *vs.* SRI CHANDRASEKERA ... XLIV. 1

Trust—Land purchased with plaintiff's money in first defendant's name—Request by plaintiff to re-convey land—Land furtively sold by first defendant to second defendant— Bona fide **purchaser—Plaintiff in occupation of land for prescriptive period at time of sale—Plaintiff's acquisition of title by prescription—Sale void—Rights of co-ownership as between trustee and beneficiary—Section 98 Trusts Ordinance.**

The plaintiff after purchasing an undivided share in certain lands occupied for convenience a divided allotment of the common land as representing the undivided share. Thereafter the plaintiff advanced money to her father, the first defendant, for the purpose of purchasing another share of the same land in her name. The 1st defendant bought it instead in his name and without conveying it to the plaintiff, inspite of repeated requests, sold it furtively to the second defendant, who purchased it *bona fide* and without knowledge of the above facts. The plaintiff, after the purchase by the first defendant, occupied another divided allotment of the same land in lieu of that share for a period of 19 years on the basis that she was the absolute owner. At the time of the sale to the second defendant, the plaintiff had thus been in occupation of the land for more than the prescriptive period of time.

The District Court dismissed the plaintiff's action to set aside the sale on the ground that although the land was held subject to a constructive trust in favour of the plaintiff the second defendant was protected by section 98 of the Trusts Ordinance, being a *bona fide* purchaser for value without notice of the Trust.

Held: (1) *That the plaintiff possessed the land during the period of occupation as an absolute owner and not as a beneficial owner.*

(2) *That plaintiff's request to the first defendant to convey the share in the land did not constitute an acknowledgment of his rights as trustee and could not be regarded as an interruption of plaintiff's possession* ut dominus.

(3) *That at the time of the sale to the second defendant the plaintiff had acquired prescriptive title as against the first defendant and there was no title which the first defendant could effectively convey.*

(4) *That the plaintiff's occupation of the land could not be regarded as one of co-ownership with that of the first defendant but was an assertion of her claim to rights of co-ownership additional to those rights enjoyed by her under her earlier purchase and the rule in* Corea *vs.* Appuhamy, 15 *N. L. R.* 65 *did not apply.*

K. D. LUCIA PERERA *vs.* K. D. MARTIN PERERA *et al* ... ... XLIV. 60

Trust—Deed conveying land to trustees on trust for a community—Defendants members of the community—Land subsequently transferred absolutely by trustees to plaintiff—Plaintiff's right as absolute owner to eject defendants—Trustee cannot vary the terms of trust.

Where a land purchased with money contributed by the Catholics of the Catholic Karawa community of Kokuvil West was conveyed by deed to trustees for the use of the community and descendants, and the trustees thereafter transferred by deed the land to the plaintiff giving him absolute right of ownership, and the plaintiff as owner sought to eject the defendants who were admittedly members of the Catholic Karawa community because they refused to pay tithes to the Catholic Church.

Held: (1) *That the deed created a trust for the benefit of the defendants and did not deprive them of their right to the use of the land by reason of non-payment of tithes.*

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(2) *That the trustees had no power to alter the terms on which they held the trust property and could not therefore give the plaintiff absolute right over it.*

ANTHONY GASPAR *et al vs.* THE BISHOP OF JAFFNA ... ... XLIV. 71

Trust—Sale of land by defendants—Subsequent lease to them—Purchase of land by plaintiff after expiry of lease—Plaintiff's action to eject defendants—Defence that land held in trust by plaintiff's vendor on informal agreement to reconvey—Prevention of Frauds Ordinance section 2 (Chap. 57).

The defendants sold by deed for valuable consideration a land to one I, who thereafter notarially leased it to them, and after the expiration of the lease sold it to the plaintiff.

In an action for ejectment by the plaintiff, the defendants successfully contended in the District Court that they had conveyed the property to I "in trust" and subject to the terms of an informal agreement where I had undertaken to reconvey the land to them within eight years on payment of Rs. 2,000.

Held: (1) *That the conveyance of land by the defendants to I by deed was clearly a sale and the facts in the case establish that there was no trust in favour of the defendants.*

(2) *That an informal agreement to reconvey land is of no avail as it is obnoxious to the provisions of section 2 of the Prevention of Frauds Ordinance.*

P. THANGARELANTHAM *vs.* SAVERIMUTTU *et al* ... ... XLV. 41

Trusts Ordinance section 111—Applicability of—To administrator entering in that capacity upon property belonging to a deceased's estate.

BAHAR *vs.* BURAH AND TWENTY-FIVE OTHERS ... ... XLVII. 75

Trusts—Person in fiduciary capacity—Wilful suppression of minor's interest—Grant under Waste Lands Ordinance—Defeasible title—Trusts Ordinance, section 92

Where a father wilfully suppressed the fact that his minor children were entitled to certain shares in a land and obtained for himself a grant for the entire land from a Settlement Officer in proceedings under the Waste Lands Ordinance.

Held: *That by section 92 of Trusts Ordinance the father, who stood in a fiduciary position to the children, held the shares of the children in trust for them despite the fact that the Crown grant was made out only in his name.*

V. A. NAIDE *et al vs.* V. D. NAIDE *et al* ... ... XLVIII. 63

Syndicate formed to purchase business and to promote a private limited liability company,—Agreement not in writing—Purchase of business—Business carried on by first defendant, a member of the syndicate—Action against defendant for an account of the business—Defendant's plea of non-enforceability of the agreement under section 18 (c) Prevention of Frauds Ordinance (Chapter 57)—Was defendant a partner, agent of or a trustee for the syndicate? Section 84, Trusts Ordinance.

A "syndicate" was formed by a number of persons, who agreed orally to purchase a business concern and to carry on the business pending the promotion of a private limited company, and the business, consisting of more than a lakh of rupees in capital, was carried on after the purchase by the first defendant.

In an action by the appellants, the members of the syndicate, against the defendant for an account of the profits of the business and the monies received.

Held: (1) *That the defendant could not raise the defence under section 18 (c) of the Prevention of Frauds Ordinance that the agreement was not a partnership in writing, and therefore unenforceable, as the facts of the case establish that he was acting as an agent throughout for and on behalf of the syndicate.*

(2) *That on the facts the defendant was a trustee, and section 84 of the Trusts Ordinance applied, even if the alleged agreement between the parties was unenforceable by reason of the Prevention of Frauds Ordinance.*

T. B. S. GODAMUNE AND OTHERS *vs.* CHARLES APPUHAMY AND OTHERS L. 12

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ULTRA VIRES

See also under **BY-LAW**

Bylaw under Small Towns Sanitary Ordinance—Prohibiting sale of produce within certain limits except at public market—Validity.

BAKELMAN *vs.* SILVA ... XI. 106

Ultra vires—**By-law prohibiting street preaching made under § 168 (8) of the Local Government Ordinance No. 11 of 1920—Validity.**

PERKINS *vs.* SRI RAJAH ... XVII. 56

Power to make rules for the general management of the savings bank—Rule excluding the jurisdiction of the courts is Ultra vires.

ARNOLIS HAMY *vs.* THE ATTORNEY-GENERAL ... ... XIX. 58

Local Board by law continuing in force under Urban Councils Ordinance—By law in conflict with that Ordinance—Validity.

BUULTJENS *vs.* HENDRICK APPU XX. 107

Rule providing cutting of channel across person's land without payment of compensation—Ultra vires.

SIVAGURU *vs.* VAITHILINGAM XXXVI. 56

UNDUE INFLUENCE

In order to place the burden of removing the suspicion of undue influence on the propounder of a last will there must be evidence of the exercise upon the mind of the testator of coercion or mental ascendancy which is equivalent to coercion, not merely the exercise of influence which is unjust and unconscientions.

BRUMPINONA AND ANOTHER *vs.* VITHANAGE ... ... XXIII. 110

Undue Influence—Presumption of—Deed obtained under—Action to set aside deed.

ABDUL CADER *vs.* SITTINISA *et al* XLV. 107

Undue influence as ground for setting aside a deed of gift.

BRIDGET ANTONY *vs.* IMELDA WEERASEKERA AND ANOTHER ... XLIX. 44

URBAN COUNCILS

See also under **LOCAL GOVERNMENT**

Urban Councils Ordinance No. 61 of 1939—Section 165—Scope of—Validity of bylaw made under Local Board Ordinance and in conflict with Urban Councils Ordinance.

BUULTJENS *vs.* HENDRICK APPU XX. 107

Urban Councils Ordinance sections 33, 39, 248 and 255 (1) (d)—Resignation cannot be withdrawn once tendered.

The quorum required for a meeting for the election of a Chairman under section 33 (5) of the Urban Councils Ordinance is the quorum fixed by by-law for the meeting of Council.

DE SILVA *vs.* DE SILVA ... XXI. 41

Urban Councils Ordinance section 183—Municipal Councils Ordinance section 139—Police Ordinance section 44.

Held: *That failure to follow the procedure prescribed by section* 44 *of the Police Ordinance in seizing and selling the property of any person making default in the payment of rates due to an Urban Council results in the sale being bad.*

HARAMANIS APPUHAMY *vs.* ASHIYA UMMA ... ... XXI. 130

Urban Councils Ordinance No. 61 of 1939—Section 25—Unlawful voting—Can a person who genuinely believes he is entitled to vote be convicted.

Held: *That a person who genuinely believes that he is entitled to vote cannot be convicted of section* 25 *of Ordinance No.* 61 *of* 1939.

ARSERATNAM *vs.* KANAGASABAI XXIII. 40

Once the Government Agent informs the public that he proposes to commence the preparation of the list of persons possessing the qualifications specified in sections 7 and 8 on a specified date, he is not free to alter that date.

The Government Agent's functions under section 9 (1) are ministerial and not judicial.

The Government Agent does not exercise judicial functions until the stage prescribed by section 9 (2) is reached.

WIJESEKERE *vs.* A.G.A., MATARA XXVI. 52

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A candidate whose name is not on the lists as certified under section 9 (6) of the Urban Councils Ordinance is entitled under section 11 to claim nomination on nomination day on the ground that he is qualified under section 8 to be a candidate.

DE COSTA *vs.* THE ASSISTANT GOVERNMENT AGENT COLOMBO ... XXVIII. 96

Urban Councils Ordinance No. 61 of 1939—§§ 11 and 19—Withdrawal of candidate from election—Refusal of AGA to postpone election—Mandamus.

CARRON *vs.* THE G. A. WESTERN PROVINCE ... ... XXX. 19

Unlicensed private market—Market owner's default in obtaining licence due to delay of local authority in arriving at a decision—Plaint filed within time—Amended plaint filed out of time—Is prosecution barred—Power to impose continuing fine—Propriety of instituting prosecution—Urban Council's Ordinance, No. 61 of 1939, sections 151, 164 and 230.

The accused was charged with having kept an unlicensed private market during 1944. The default in obtaining a licence was due to the delay on the part of the Chairman of the Urban Council in giving a decision on an application made by the accused. The original plaint charged him with having contravened section 150 of the Ordinance. An "amended plaint" filed after three months of the date of the commission of the offence charged him with having contravened section 151 of the Ordinance. The Magistrate convicted the accused and sentenced him to pay a fine as well as a continuing fine in respect of each of four days.

Held: (1) *That a continuing fine could not have been imposed as the accused had not carried on the market in disregard of a notice suspending his licence.*

(2) *That as the accused's default in obtaining a licence was due to delay on the part of the Chairman, the prosecution should not have been launched until the accused's application for a licence had been disposed of.*

(3) *That the "amended" plaint was a new charge and was out of time.*

REV. FR. COLLEREE *vs.* BENEDICT XXXI. 27

Urban Councils Ordinance, sections 131 and 231—Action against Council for damages caused by lorry driven by employee of Council—Lorry employed for scavenging work—Should requirements of section 231 be satisfied before filing action.

Plaintiff sued the Urban Council of Kurunegala for damages for injury caused by the negligent driving of a lorry driver employed by the Council. It was admitted by the plaintiff that the lorry was employed on scavenging work at the time of the accident. The plaintiff failed to give notice to the Council of his intention to sue them and to bring the action within six months from the date of his cause of action as required by section 231 (1) and (2) of the Urban Councils Ordinance, 1939.

Held: *That the plaintiff could not maintain the action without complying with the requirements of section* 231 (1) *and* (2) *of the Urban Councils Ordinance, inasmuch as the action involved a breach of duty by the Council to supply carefully driven vehicles for the scavenging duties imposed on them by section* 131 *of the same Ordinance.*

THE URBAN COUNCIL OF KURUNEGALA *vs.* BANDA AND ANOTHER XXXII. 3

Writ of Mandamus**—Powers, duties and functions of the Secretary of an Urban Council under Urban Councils Ordinance No. 61 of 1939—Powers and duties of the Chairman of the Council—Interdiction or suspension of the Secretary by the Chairman—Remedy available to Secretary.**

The petitioner, who is the Secretary of the Urban Council, Anuradhapura, applied for a *writ of mandamus* to be issued on the respondent, the Chairman, for his restoration to office, after the latter had ordered him not to receive papers, or have access to documents and further to hand over documents and articles in his charge to the Chief Clerk. The petitioner considered himself interdicted or suspended from the performance of his powers legally vested in him by the Urban Councils Ordinance No. 61 of 1939.

Held: (1) *That the Chairman's orders amounted to a prohibition of the exercise of the powers conferred on the Secretary by statute.*

(2) *That the Chairman was acting outside the scope of his powers in prohibiting the exercise of these powers.*

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(3) *That as no other remedy is open to the petitioner, who is legally entitled to the office and to perform such duties, a* writ of mandamus *will be issued.*

MARCELIN PERERA *vs.* SOCKALINGAM CHETTIAR ... ... XXXIII. 1

Mandamus—**Person duly elected a member of Urban Council—After election, name ordered to be removed from Electoral List—Vacation of seat—Urban Councils Ordinance No. 61 of 1939 section 33—Local Authorities Elections Ordinance, No. 53 of 1946, sections 10, 11, 17, 18, 19, 21, 23 and 29.**

After a person was duly elected as a member of an Urban Council and before the first meeting of the Council the Supreme Court ordered his name to be removed from the Electoral List. The Elections Officer did not, therefore, give him the statutory notice of the first meeting.

Held: (1) *That there was no provision of law which rendered the member's seat vacant:*

(2) *That the member was entitled to exercise the rights of membership as long as his election remained unquashed by a competent authority;*

(3) *That the Elections Officer was under a legal duty to serve on the member the statutory notice convening the first meeting of the Council.*

WIJEANATHAN *vs.* ELECTIONS OFFICER, TRINCOMALEE DISTRICT *el al* XL. 7

Urban Council Election—Impersonation—Validity of Election—Local Authorities Elections Ordinance, No. 53 of 1946 sections 53 and 65.

In an Urban Council Election, the votes of the two candidates being equal, the successful canditate was determined by the drawing of lots. The unsuccessful candidate sought to have the Election set aside on the ground of large scale impersonation. He cited only one case of impersonation which he failed to prove. His application was therefore refused.

MOHAMED NOON *vs.* SINNAPPAH XL. 21

Urban Councils Ordinance No. 61 of 1939, section 238—Charge that the member was directly or indirectly concerned or had financial interest in contract made with Council—Credit sale of soap to Council from member's shop through salesman—Payment for soap authorised by member as Chairman—Is the member guilty?—The test to be applied.

Section 230—Is the period of 3 months referred to in the section to be reckoned from the date of the credit sale or from the date of payment of price?—Continuing offence.

On a complaint made on 7th September, 1948 to Court, the accused was charged under section 238 (2) of the Urban Councils Ordinance of 1939 in that, while being a member of the Urban Council of Ambalangoda, he was on or about the 8th June, 1948, directly or indirectly concerned in a contract made with the said Council, the alleged contract being the contract of sale by which the accused's shop had sold 48 packets of Lux soap to the Council on 6th May, 1948.

The evidence established: (*a*) that the accused was the Chairman of the Ambalangoda Urban Council at the relevant dates; (*b*) that he owned a shop in the town known as the Central Stores; (*c*) that on the 6th May, four dozen packets of Lux soap were sold on credit to the Council by the accused's salesman on a requisition signed by the Secretary of the Council for and on behalf of the Chairman; (*d*) that the bill presented for the price due was paid on the 8th June, 1948, on the express authority of the accused in his capacity as the Chairman; (*e*) that the accused was not aware of the sale on the 6th of May. The learned Magistrate held that the charge was proved but the accused was not liable for any penalty by reason of the provisions of section 230 of the Ordinance, as the complaint of the offence was made three months after its commission.

The complainant appealed.

Held: (1) *That the test to be applied in this case is whether the accused had the knowledge or at least the means of knowledge that the council was the other contracting party to the contract of sale in question.*

(2) *That the evidence established that the accused had at least the means of such knowledge, and, therefore, he was guilty.*

(3) *That the price of the goods which were the subject matter of the contract of sale by itself cannot help the accused, nor the fact that the contract represents a single transaction.*

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(4) *That the provisions of section* 230 *of the Urban Councils Ordinance does not apply as there was a continuing offence punishable under section* 238 (2) *until the contract was discharged by payment on* 8-6-1948.

SIRIMAL *vs.* K. T. S. DE SILVA XL. 27

Local authority—Urban Council—Accused charged with offence of carrying on a dangerous and offensive trade—Breach of bye-laws—Interpretation of bye-laws must be reasonable—Local Government Ordinance (Cap. 195), sections 164, 168 (10k)—Urban Councils Ordinance No. 61 of 1939, section 248.

The accused, who had constructed a cement tile factory with the approval of the Chairman of Dehiwela Urban Council and was manufacturing tiles, was subsequently refused a licence to carry on the trade by the Chairman on the ground that it was a dangerous and offensive trade. The accused was charged and convicted for carrying on a dangerous and offensive trade in breach of a bye-law made under sections 164 and 168 of the Local Government Ordinance.

The bye-law prohibited the carrying on of "any dangerous or offensive trade without an annual licence from the Chairman, which licence the Chairman shall issue to all persons complying with the conditions provided for the issue of such licences." In respect of the trade of manufacturing tiles no conditions in the bye-law had been prescribed for the issue of a licence.

Held: *That the charge could not be sustained as the bye-law cannot be said to apply until and unless the conditions provided for the issue of annual licence have been duly prescribed.*

Per GRATIAEN, J.—"It is necessary to give bye-law 2 a reasonable interpretation which restricts its application to the legitimate objects which a conscientious local authority must assume to have intended to further."

JANSEN *vs.* SANITARY INSPECTOR, DEHIWALA-MT. LAVINIA U.C. ... L. 97

USAGE

See under **CUSTOM**

USE AND OCCUPATION

Action for use and occupation—Agreement to purchase land—Occupation pending completion of sale—Absence of evidence of definite repudiation of the agreement—Can the owner of the land maintain an action for use and occupation.

Held: *That, in the circumstances, the defendant was not liable on an action for use and occupation as the facts did not constitute an implied contract to pay rent.*

DE MEL AND ANOTHER *vs.* AMARASINGHE ... ... XII. 14

Action for use and occupation—Informal agreement relating to land—Defendant placed in possession by plaintiff—Plaintiff not the owner of the land—Can action for use and occupation be maintained.

ELIYATHAMBY *vs.* KANDIAH XXXII. 5

Use and occupation—Action for—Foundation for such action—Can it be maintained against a defendant who claims to be a co-owner.

Held: (1) *That to maintain an action for use and occupation there must be evidence of the existence of the relationship of landlord and tenant between the plaintiff and the defendant, or evidence which gives rise to a presumption of that relationship.*

(2) *That an action for use and occupation cannot be maintained against a defendant who claims to occupy the land as of right.*

KATHIRGAMU AND ANOTHER *vs.* NADARAJAH AND ANOTHER ... XL. 34

USUFRUCTUARY MORTGAGE

See under **MORTGAGE**

VAGRANTS

Vagrants Ordinance—Soliciting a person in a public place for the purpose of an act of illicit intercourse—Meaning of illicit intercourse.

Held: *That the expression "illicit" in* § 7 (1) (*a*) *of Ord: No.* 4 *of* 1841 *means irregular and improper according to the ordinary standard of morals.*

LEEMBRUGGEN *vs.* HENDRICK SILVA I. 262

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Vagrants Ordinance No. 4 of 1841—Charge of living on the earnings of prostitution—Scope of § 9 (1) (a)—

Held: *That* § 9 (1) (*a*) *is intended to meet the case of people who live on the earnings of others obtained by immorality and it does not apply to a prostitute who earns money by prostitution.*

EDWARDS *vs.* SIRIPALI ... I. 380

Invitation by inmate of premises—

Held: (1) *That the onus of proof of presence upon invitation by an inmate of the premises lies on the person charged with an offence under section* 7 (1) *C* (*iii*) *of the Ordinance.*

(2) *That the fact that the accused were present on invitation can be gathered from the real evidence and the facts of the case and it is not necessary to call the persons upon whose invitation the accused had come.*

SAMARAKOON P. C. 1862 *vs.* ENSINA PERERA AND ANOTHER ... II. 430

Vagrants Ordinance sections 7 and 9—Meaning of expression "Soliciting any person," in section 7 (1) (a).

Held: *That the facts did not establish the offence of "soliciting any person for the purpose of the commission of any act of illicit sexual intercourse."*

THIEDMAN (SUB-INSPECTOR OF POLICE) *vs.* GUNASEKERA ... XXI. 110

Person found wandering abroad and not having any visible means of subsistence and not giving a good account of himself—Ingredients of offence—Burden of proof.

Appellant was found by two policemen on a street in the early hours of the morning with a naval man and a boy. When the police came the boy ran away but was arrested. The appellant too was arrested and charged under section 3 (1) (*c*) of the Vagrants' Ordinance and was convicted by the Magistrate on the ground that the accused and her witnesses did not appear to be speaking the truth.

Held: *That it was incumbent upon the prosecution to prove the ingredients of the offence and that the appellant could not be convicted in the absence of evidence from the prosecution to prove that the appellant was a person without any means of subsistence.*

CECILY HAMY *vs.* P. C. 78 ZOYSA XXXI. 85

VEHICLES ORDINANCE

The Vehicles Ordinance No. 4 of 1916—Sections 4 and 48—Riding a push bicycle—Is it driving within the meaning of § 48

Held: *That riding a push bicycle is driving it for the purpose of a charge under the section* 48 *of "The Vehicles Ordinance" No* 4 *of* 1916

WERAGAMA *vs.* DINGIRI BANDA I. 418

VENDOR AND PURCHASER

Sale of land—Misrepresentation by vendor—When is vendee entitled to have sale set aside.

MARTINUS *vs.* PERERA ... II. 287

Auction sale of land—Express undertaking to warrant and defend title—Vendor prepared to put purchaser in possession—Is purchaser entitled to withdraw from contract on the ground that there is a defect in the vendor's title.

Held: (1) *That where there is an express covenant to warrant and defend title no further or other covenant can be implied.*

(2) *That where the vendor and purchaser at an auction sale of land have entered into a valid contract of sale with a condition to warrant and defend title the purchaser is not entitled to withdraw from the contract on the ground that the vendor's title is defective.*

(3) *That the obligation of a vendor who has expressly agreed to warrant and defend title is to give vacant possession, and to warrant against eviction.*

CHELLAPPAH *vs.* MC HEYZER AND ANOTHER ... ... VIII. 14

Right of purchaser to a refund of purchase price and auctioneer's charges on refusal by vendor to confirm sale by auctioneer.

SIRIPALA *vs.* URBAN DISTRICT COUNCIL KALUTARA ... ... XV. 49

Warranty of title—Difference between express warranty of title and a covenant to

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warrant and defend title—Nature of the notice that should be given before an action on a covenant to warrant and defend title—How may minors be noticed—Extent of the liability of minor heirs of a deceased vendor for the breach of a covenant to warrant and defend title.

Held: (1) *That notice to warrant and defend title given to the mother of the minor heirs of a deceased vendor who was also co-executrix of his will and to the other executor was sufficient notice to the minor heirs.*

(2) *That the natural guardian of a minor is entitled to enter into a compromise on his behalf and that the minor would be liable on such a compromise subject to his right to claim* restitutio in integrum *within a certain period if he has been prejudiced by the compromise.*

(3) *That an action for damages for breach of a covenant to warrant and defend title lies against the heirs of a vendor only if administration of the estate has been completed by the executors and property belonging to the estate of the deceased testator has passed into the hands of the heirs and then only to the extent of the property that has so passed.*

RAMALINGAM CHETTIAR *vs.* MOHAMED ADJOOWAD AND ANOTHER ... XV. 124

Transfer of land—Vendor reserving to himself the right of repurchase—Deed not signed by vendee—Vendee bound by agreement.

BABUN SINGHO *vs.* SEMANERIS SINGHO *et al* ... ... XVI. 83

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

Held: (1) *That the purchaser's right of action, if any, became prescribed in three years.*

(2) *That purchaser's cause of action, if any, arose on the date the deed of transfer was executed inasmuch as such deed being void, the purchase money was given without consideration.*

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

THAMOTHERAM PILLAI *vs.* KANAPATHIPILLAI ... ... XVI. 95

Vendor's tenant in occupation of property sold — Possession to purchaser delayed—Failure to give vacant possession—Action for damages.

Held: (1) *That it is the duty of the vendor of a property to free it from occupation by a third party and to give the purchaser free and exclusive possession.*

(2) *That if the purchaser does not elect to take over the property he has purchased with a tenant in occupation, the contract of tenancy between the vendor and the tenant continues and the vendor may take the ordinary steps to eject the tenant and recover damages.*

RODRIGO *vs.* LENONONA AND FERNANDO ... ... XVIII. 90

Warrant and defend title—Notice—Plurality of vendors—Should notice be in writing—Extent of liability of one of several vendors in case of failure to warrant and defend title.

Held: (1) *That where there is a plurality of vendors notice to warrant and defend title should be given to each of them.*

(2) *That such notice need not be in writing, provided that a demand could be implied from the surrounding circumstances, as having been made to each of the vendors to render all help so as to defend vendee's title.*

(3) *That where two vendors transferred a one-fourth share of a land claiming to be entitled to such share by paternal inheritance, the extent of liability of each of the vendors for failure to warrant and defend title would be for only a half share of the amount found to be due.*

SIVAGURU *vs.* SUBRAMANIAM AND ANOTHER ... ... XXII. 53

Sale of land—Five allotments conveyed by the same instrument—Possession of three out of the five allotments given immediately—The purchase price of the other two allotments retained in the hands of the vendee till vacant possession is given—Failure to give vacant possession—Action by vendor for balance purchase price retained by the vendee in respect of the two allotments—

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Can vendee claim rescission of sale of two only of the five lands.

The facts shortly are as follows:

The vendor (1st plaintiff) sold five allotments of land of a total extent of nearly 31 acres to the vendee (defendant) for a sum of Rs. 12,500/-. The vendee retained a sum of Rs. 4,200/- being the value of two of the allotments conveyed till vacant possession was given. The vendor failed to give vacant possession but sued the vendee for the balance purchase price. The vendee claimed a rescission of the contract in respect of the two allotments of which vacant possession was not given.

Held: *That where a vendor sells several allotments of land by the same instrument of sale the vendee is entitled to claim a rescission of the sale in respect of some only of the allotments of land if it can be proved that the sale of some of the allotments was regarded as independant of the sale of the others.*

ASIYATH UMMA *vs.* RATNAYAKE XXIX. 11

Deed of Rectification—Time at which title vests in vendee.

COSTA AND ANOTHER *vs.* REITH XXXIII. 17

Prescriptive possession by vendor—When vendee can avail himself of.

COSTA AND ANOTHER *vs.* REITH XXXIII. 17

Sale of land to two purchasers—Action by third party against one of them—Eviction—Right of other purchaser to sue vendor.

MOHAMMADO CASSIM *vs.* MAHMOOD LEBBE *et al* ... ... XLV. 38

Action for balance purchase money—Absence of agreement to pay balance—When is claim prescribed.

PERERA *vs.* JOHN APPUHAMY XLIII. 58

VILASAM

Admission of extrinsic evidence to prove owner of vilasam.

ADIKAPPA CHETTIAR *vs.* LETCHUMANAN CHETTIAR ... ... XII. 6

VILLAGE COMMITTEES

Mandamus—**Ordinance 9 of 1924 § § 12 and 13—Village Committee elections held by Government Agent under § 20. Counting of votes at election—Votes against candidate not counted—Regularity of procedure—Nature of writ of** Mandamus—**Acquiescence—How far it disqualifies the relator.**

Held: (1) *That in the election of committees it is not customary to record the votes against a candidate whose name has been proposed.*

(2) *That* § 13 (*i*) *of the Village Communities Ordinance No.* 9 *of* 1924 *cannot be construed as affecting or altering the customary mode of electing the members of a committee.*

(3) *That the grant of a writ of* mandamus *is a matter for the discretion of the Court. It is not a writ of right and it is not issued as a matter of course.*

(4) *That a rule will not be granted to a relator who has participated in the alleged irregularities on which he bases his application.*

INNASITAMBY *vs.* GOVERNMENT AGENT (NORTHERN PROVINCE) ... I. 306

Road under control of V. C.—Power of D. R. C. to enter prosecution in respect of—

CHAIRMAN D. R. C. *vs.* DE SILVA I. 346

Ordinance No. 9 of 1924—§ 18 (e)—

Held: *That a conviction of an attempt to cheat is not a conviction of "fraud" within the meaning of Section* 18 *of the Ordinance.*

SUPPRAMANIAM *vs.* KANAPATHIPILLAI II. 23

Village Committee Election—Application to hold a fresh election.

Held: *That where only* 123 *names are proposed for sixty places on a Committee it is in order to declare the remaining sixty elected when sixty-three of those whose names are proposed withdraw and do not stand election.*

KIRIHAMY *et al vs.* ASSISTANT GOVERNMENT AGENT, KEGALLE ... II. 331

Objection taken, at time of election, to a candidate on the ground that he is not 25 years of age—Objection overruled—Can validity of election be questioned by Quo Warranto **in a case where it can be proved**

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that the candidate was under 25 years of age at the time of election.

IN *re* WATTE WALAUWA HEEN BANDA *alias* ABEYRATNE ... IX. 49

Village Committee—Election of Chairman—Equality of votes—Decision by lot—Meaning of "lot"—Village Committee Election Rules.

APPLICATION OF K. MUTTUKUMARU FOR A WRIT OF QUO WARRANTO X. 49

Village Fair—Rule regulating establishment of fair—Permit to conduct fair—Rights of permit holder.

APPUWA *vs.* HEMAPALA ... X. 51

Election of Village Committee Chairman—Equality of votes—Election by lot—Three voters later found to be disqualified—Is election of Chairman valid.

WIJESINGHE *vs.* RAJAPAKSE ... XIV. 49

Village Communities Ordinance section 22—Circumstances in which the Executive Committee may nominate—Can the Government Agent act a second time under section 14 once he has taken the steps prescribed therein.

Held: (1) *That the words "fail.....to elect" in section 22 of the Village Communities Ordinance should be construed as meaning "do not elect."*

(2) *That where for any reason an election does not take place on the day appointed by the Government Agent, the Executive Committee has power to nominate under section 22 of the Village Communities Ordinance.*

(3) *That once the Government Agent has duly taken the action prescribed by section 14 of the Village Communities Ordinance, he is not free to summon a meeting of voters for a second time.*

RATNAYAKE *vs.* GUNATILAKE AND PUNCHIRALA ... ... XX. 64

Village Communities Ordinance section 14 (4)—Election held at a time different from that given under section 14 (4) without notification in the manner prescribed by that section—Mandamus.

Held: *That where a Village Committee election was adjourned from the time fixed under section 14 (4) of the Village Communities Ordinance to another time the election cannot be declared invalid unless it can be proved that the result would have been different if the electon had been held at the time for which it had originally been fixed.*

RANASINGHE *vs.* GOVT. AGENT, SABARAGAMUWA ... ... XXVI. 58

Village Communities Ordinance (Chapter 198), section 90—Meaning of "public officer".

Held: *That the words "public officer" in section 90 of the Village Communities Ordinance cover a member of the police force.*

THAMBY (P.S. 57) *vs.* SIYADORIS AND TWO OTHERS ... ... XXVII. 26

Jurisdiction—Charges by the Police under sections 380 and 314 of the Penal Code—Acquittal of accused on charge under 380 and conviction under 314—Has magistrate jurisdiction—Village Communities Ordinance section 90—Proviso.

The accused were charged by an Inspector of Police under sections 380 and 314 of the Penal Code. The magistrate after trial acquitted them of the charge under section 380 and convicted them of the one under section 314. In appeal objection was taken to the conviction on the ground that the Village Tribunal had exclusive jurisdiction to try the offence.

Held: *That the magistrate had jurisdiction in view of the proviso to section 90 of the Village Communities Ordinance.*

KUMARASAMY (S. I. POLICE) *vs.* RANHAMY AND OTHERS ... ... XXVII. 47

Village Committee Election—Mistake regarding colour allotted to the candidates—Mistake sufficient to invalidate election.

KARUNARATNE BANDARA *vs.* ALADIN ... ... XXVII. 103

Mandamus—**Village Committee Election—Village Communities Ordinance sections 14 (4) 16 (3) and 24—Failure of presiding officer to arrive at the meeting within one hour after the time fixed for its commencement—Arrival of presiding officer more than an hour after time fixed for meeting—Electors present and desire election to be held—Election held with consent of all**

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Mandamus **will not be granted to set aside such election.**

The meeting for the election of a candidate to represent the Horagune Ward of the village area of Kandapolla was fixed for 9-30 a.m. on 13th December, 1943. The presiding officer was held up by an earth slip on the road and was unable to arrive till 11-30 a.m. Immediately the presiding officer realized he would be delayed he sent a telegram to the Government Agent who in turn sent a telegram to the caretaker of the Village Tribunal building which was the venue of the meeting. This telegram was intended to convey the information to those assembled that the presiding officer would arrive late. It reached the addressee at about 11 a.m. As the telegram stated that the presiding officer would come though late the voters did not go away but remained and when the presiding officer arrived, desired that the election should be held.

The presiding officer thereupon informed the voters that he would hold the Horagune election and put off ethe Haldummulla election which had been fixed for 11 a.m. to 1 p.m. The petitioners took part in the election and voted. They raised no objection to the election being held. The defeated candidates themselves raised no objection at any time.

Held: (1) *That the election was not illegal.*

(2) *That the matter was not one in which a* Mandamus *should issue.*

(3) *That a Writ of* Certiorari *does not lie.*

(4) *That in proviso (ii) and (iii) of section* 16 *of the Village Communities Ordinance what is provided for is the manner of notice and not the period of notice prescribed in section* 14.

WEERASEKERA AND ANOTHER *vs.* THE G. A. UVA PROVINCE ... XXIX. 4

Election of disqualified person to Village Committee—No objection raised on nomination day—Application for writ of quo warranto **to set aside election—When will writ be granted—Village Communities Ordinance sections 13 (e), 15 (3) and (4).**

Held: (1) *That a writ of* quo warranto *lies to set aside an election to a Village Committee on the ground that the person elected was not qualified for election as a member.*

(2) *That the fact that no objection was raised to the nomination of the respondent does not operate as a bar to the grant of the writ.*

(3) *That the writ will not be granted where there has been unreasonable delay in presenting the petition or where the petitioner is actuated by malice.*

MENDIAS APPU *vs.* HENDRIK SINGHO ... ... XXX. 7

Village Committee—Election of Chairman—Allegations of undue influence and violation of secrecy of ballot at election—Validity of election. Sections 16 and 27 (1) of the Village Communities Ordinance (Chapter 198). Meaning of "ballot"and "secret ballot."

The Ratemahatmaya of the district was at the place where the members of the Village Committee were voting for the election of their Chairman. There was no evidence that the Ratemahatmaya intimidated the voters or that he saw what the members wrote on their ballot papers or otherwise abused the influence he had over the villagers.

Held: (1) *That the election was valid.*

(2) *That the meaning of the term "ballot" in section* 27 (1) *of the Village Communities Ordinance is hardly different from the meaning of the words "secret ballot" in section* 16 (2) *of the Ordinance.*

DE SILVA *vs.* MANINGOMUWA XXXI. 52

Election of Chairman—Disqualified member voting—Validity of Election.

FERNANDO *vs.* GUNASEKERA XXXIII. 41

Village Committee Election—Person elected while interested in a contract with the Committee—Quo Warranto.

JAMES *vs.* FERNANDO ... XXXIV. 27

Prosecution for criminal offence in Village Tribunal—Direction by the Assistant Government Agent that case should be heard by Magistrate having local jurisdiction—Should proceedings be commenced afresh under section 184 of the Criminal Procedure Code.

Where an Assistant Government Agent acting under section 93 of the Village Communities Ordinance (Chap. 198) directed that a criminal prosecution instituted

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in the Village Tribunal be tried by the Magistrate's Court having local jurisdiction.

Held: *That such a direction is sufficient authority for the Magistrate to issue process and proceed to trial in due course of law without the institution of fresh proceedings as required under section* 148 *of the Criminal Procedure Code.*

ABDUL AZIZ *vs.* PODIAPPU XXXVII. 38

Quo Warranto—**Writ of—Election of Chairman, Village Committee—Allegations of treating, undue influence and bribery against Chairman and supporters—Other remedy available—Is** Quo Warranto **proper remedy.**

Held: (1) *That the supreme Court will not grant an application for* Quo Warranto *to declare the election of a Chairman of the Village Committee on the grounds of treating, under influence and bribery, inasmuch as—*

(*a*) *the petitioner can pursue the remedy provided by the Public Bodies (Prevention of Corruption) Ordinance, No.* 49 *of* 1943, *or Chapter IX* A *of the Penal Code read with section* 10 *of the Local Authorities Elections Ordinance, No.* 52 *of* 1946.

(*b*) *the proper remedy is to ask for a* Mandamus *to proceed to an election* de novo, *the pretended election being a mere nullity.*

(2) *That the act of electing the Chairman of a Village Committee falls within the definition of the expression "official act" in section* 6 *of the Public Bodies (Prevention of Corruption) Ordinance, No.* 49 *of* 1943.

SAMARAKOON *vs.* TIKIRI BANDA XLI. 53

Certiorari **and** Mandamus—**Village Communities Ordinance, sections 14 and 15 (3)—Nominations for election—Objections to nomination of candidate — Inquiry—Decision given after time limit prescribed by section 16 (3)—Effect.**

Held: *That the enactment in section* 15 (3) *of the Village Communities Ordinance that all objections raised against any candidate on the ground that he is not qualified to be elected shall be disposed of by the Government Agent at any convenient time not less than seven days prior to the meeting of the voters summoned under section* 14 *is directory only, and consequently the failure on the part of the Government Agent to give his decision within the time limit prescribed in this section does not by itself render an election void.*

Per JAYATILEKE, S.P.J.—"I think it is reasonable to presume that the object of the legislature in amending the section was to give the candidates who were duly nominated sufficient time to get ready for the election. The neglect of the 1st respondent may have been fatal if the 2nd respondent was not the only candidate who was duly nominated. But as the 2nd respondent was the only candidate it seems to me to be immaterial."

MARK *vs.* A. G. A. MANNAR ... XLI. 94

VILLAGE TRIBUNALS

See also under **RURAL COURTS**

Offence within exclusive jurisdiction of village Tribunal—Magistrate cannot convict.

ROGUS *vs.* TISSERA ... ... XII. 39

VILLAGE TRIBUNALS ORDINANCE

No. 12 of 1945—Sections 12 and 19 (1) —Action involving land—Is the jurisdiction of the Village Tribunals exclusive.

Held: *That in view of section* 19 (1) *of the Village Tribunals Ordinance No.* 12 *of* 1945 *the jurisdiction of the Village Tribunals to try actions involving title to or interest in or right to possession of land is not exclusive.*

WALLIAMMAI *vs.* KANDIAH AND OTHERS ... ... XXXVII. 112

WAGERING CONTRACT

See under **CONTRACT**

WAGES BOARD

Minimum Wages Ordinance § § 8 and 10 —Method of ascertaining minimum wage.

RAMANATHAN *vs,* COL. WRIGHT XXVII. 65

Wages Boards Ordinance—No. 27 of 1941 sections 21, 39 (1) and 54—Prosecution of employer for failure to pay minimum wage—Written sanction of the Commissioner of Labour—Nature of sanction required—Criminal Procedure Code section 425 (b) —Courts Ordinance section 36.

Held: (1) *That a prosecution instituted against an employer for failure to pay the*

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minimum wage in contravention of section 21 of the Wages Boards Ordinance and punishable under section 39 (1) of the Ordinance must have the written sanction of the Commissioner of Labour as required by section 54 of that Ordinance.

(2) *That the sanction of the Commissioner must contain the particulars of the offences alleged to have been committed.*

(3) *That the failure to comply with the provisions of section 54 of the Ordinance is a defect which is not curable under section 425 (b) of the Criminal Procedure Code or under section 36 of the Courts Ordinance.*

M. G. PERERA *vs.* THE INSPECTOR OF LABOUR, MATUGAMA ... XL. 17

Wages Board Ordinance—Charges under sections 21 and 39 (1)—Employer failing to pay wages to worker directly—Worker failing to return to work or call for Wages—Employer's inability to find worker—Is employer liable.

An employer's failure to pay the minimum rate of wages to a worker employed under him was due to the fact that the worker, who, with others, went on strike did not call for the wages and could not be found.

Held: *That in the circumstances, the employer could not be said to have committed an offence under the Wages Board Ordinance.*

SARANADASA *vs.* FERNANDO ... XLIV. 30

Wages Boards Ordinance, section 36—Employer in Engineering trade, workmen in motor transport trade—Is it obligatory on employer to comply with provisions applicable to motor transport trade?

Held: (1) *That where an employer engaged in the engineering trade employs workers to drive lorries, for purposes of transport, it is not obligatory on him to maintain in the premises in which he carried on business one or more registers in the prescribed form applicable to the motor transport trade.*

(2) *That the words "employer in any trade" in section 36 of the Wages Board Ordinance contemplates the employer's trade and not the worker's.*

SINNATHAMBY (INSPECTOR OF LABOUR) *vs.* JINASENA ... ... XLIV. 63

Wages Boards Ordinance—Charge under section 44 (1) (b)—Proceedings instituted against company with sanction of Commissioner of Labour—Summons served on managing director—Is the managing director the lawful representative of the company?—Criminal Procedure Code—Meaning of the words "other like officer" in section 45 (3)—Has the Company been duly summoned and afforded opportunity of being heard?

Where, on the prosecution of a company under the Wages Boards Ordinance, summons was served on the managing director as the legal representative thereof—

Held: (1) *That the summons had not been duly served on the company, and that the conviction was bad, as the trial had taken place in its absence.*

(2) *That the presence of the managing director in Court cannot regularise the failure to serve summons on the company and secure its attendance in the way prescribed by the Criminal Procedure Code.*

(3) *That the persons contemplated by the words "other like officer" in section 45 (3) of the Criminal Procedure Code are* ejusdem generis *of Secretary, and cannot be persons belonging to a category different to that of Secretary.*

Per BASNAYAKE, J.—"An accused person cannot under our law be convicted of an offence unless he has had an opportunity of being heard. Our Criminal Procedure Code contains provisions designed to achieve that end."

EASTERN BUS CO. *vs.* INSPECTOR OF LABOUR, BATTICALOA ... XLV. 85

Wages Board Ordinance, No. 27 of 1941—Prosecution under—Report to Court under section 148 (1) (b) of Criminal Procedure Code—Sanction of Commissioner of Labour endorsed—Difference in dates mentioned in report and endorsement—Should they bear the same date.

In a charge under the Wages Boards Ordinance No. 27 of 1941, the written report to Court under section 149 (1) (b) of the Criminal Procedure Code, the date 11-2-53 preceded the two counts charging the accused and the signature of the complainant. At the end of the first page the letters P. T. O. were typed and on the second page of the report, after the names of four witnesses, the endorsement of the Commissioner of Labour sanctioning the prosecution of the two accused mentioned

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in the report on the charges specified in the report appeared bearing the date 2-2-53.

On an objection taken on behalf of the accused that the sanction was bad inasmuch as there was a difference in the dates mentioned in the report to Court and the endorsement by the Commissioner, the Magistrate acquitted the accused.

Held: *That the charge was a duly sanctioned one as the prosecution had been entered after the sanction was obtained. The learned Magistrate was wrong in acquitting the accused.*

CHRISTOFELSZ INSPECTOR OF LABOUR *vs.* DE KRETSER AND ANOTHER XLIX. 49

WAIVER

A person who has waived a judgment-debt for consideration cannot under our law afterwards recover the debt.

RAMALINGAM *vs.* JONES ... XIV. 89

An intention to waive a right or benefit to which a person is entitled is never presumed but must be proved by the person who asserts it.

FERNANDO *vs.* SAMARAWEERA XLIV. 19

WARRANT OF ARREST

See under **ARREST**

WARRANT OF ATTORNEY TO CONFESS JUDGMENT

Mortgage bond containing certain conditions regarding payment—Such conditions not incorporated in the warrant of attorney—Is the warrant subject to conditions in the bond?

Held: *That a warrant of attorney to confess judgment cannot necessarily be regarded as given subject to all the conditions given in the mortgage bond with respect to which the bond is given.*

By giving a warrant of attorney to confess judgment a debtor loses all control over any defences that may be available to him on the mortgage bond.

MOHIDEEN IBRAHIM *vs.* SEYADU MOHAMADO ... ... I. 84

Construction of powers granted under a warrant—Restitutio in Integrum.

Two persons, Ana Fernando and De Cungho, executed a mortgage bond No. 4177 in favour of one Suppramaniam Chetty, securing for the mortgagee "or his certain attorney or attorneys, heirs, executors, administrators or assigns" all sums of money that may become due on all promissory notes, cheques or I.O.U's made or endorsed by the second obligor in favour of the obligee up to a sum of Rs. 3000/. On the same day, the two obligors executed a warrant of attorney in favour of J. Thambiah Bartlett, a proctor, authorising him to receive summons for them in an action for Rs. 3000/- and interest due to the bond, whether at the suit of Suppramaniam Chetty or his certain attorney or attorneys, heirs, executors, administrators or assigns, and to confess the action.

Suppramaniam died, and letters of administration in respect of his estate were granted to one Ramasamy Chetty, who as administrator and sole heir, assigned to the plaintiff in this action, Vangadasalam Chetty, all the principal and interest due on bond No. 4177 and another bond. The plaintiff sued the defendant for money, which he alleged was due on the bond, and after certain steps had been taken, filed the warrant of attorney granted to J. Thambiah Bartlett, and obtained judgment.

Held: *That the proctor, to whom the warrant of attorney had been granted, has no power under it to confess judgment in an action by Vangadasalam Chetty, who was not the mortgagee's assign but the assign of the administrator and heir.*

VANGADASALAM CHETTY *vs.* FERNANDO ... ... V. 98

Attestation of mortgage bond and warrant of attorney by the same proctor on instructions from plaintiff—Failure to nominate a proctor by defendant's free choice—Civil Procedure Code (Chapter 86)—Section 31.

Held: *That the warrant of attorney to confess judgment was of no force in law inasmuch as there had been a failure to comply with the requirements of section* 31 *of the Civil Procedure Code.* (*Chapter* 86).

VALLIAPPA CHETTIAR *vs.* SUPPIAH PILLAI AND ANOTHER ... ... XIV. 51

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Warrant of Attorney to confess judgment —Form No. 12 of First Schedule to Civil Procedure Code.—Within what limits may the form be altered.

PALANIAPPA CHETTIAR *vs.* HASSEN LEBBE AND ANOTHER ... ... XIV. 67

WARRANT OF TITLE

See under **VENDOR AND PURCHASER**

WASTE LANDS

An appeal does not lie from a decision under section 20 of the Waste Lands Ordinance. Proceedings under section 24 of the Land Settlement Ordinance cannot be taken in respect of land settled under the Waste Lands Ordinance.

The words "investigation and trial" in section 20 of the Waste Lands Ordinance cannot be read as creating a right of appeal from decisions under section 20.

JOSEPH VANDERPOORTEN AND TWO OTHERS *vs.* THE SETTLEMENT OFFICER ... ... XXII. 85

WASTE LANDS ORDINANCE No. 1 OF 1897—

There is no appeal to the Privy Council as of right from a decision under section 20.

VANDERPOORTEN *vs* THE SETTLEMENT OFFICER ... ... XXIV. 14

Waste Lands Ordinance No. 1 of 1897 Section 4—Effect of order under—Claim for compensation by bona fide **improver—Is it wiped out by an order under section 4—Can fruits of the improvements be set off against compensation—Is** bona fide **improver liable to account for fruits he has taken.**

Held: (1) *That the effect of an order under section* 4 *of Ordinance No.* 1 *of* 1897 *is that the title to lands is finally decided and that the lands became vested in the persons mentioned in the order.*

(2) *That a claim for compensation by a* bona fide *improver is not wiped out by the section.*

(3) *That the fruits of improvement received by a possessor cannot be set off against a claim for compensation in respect of the improvements which produced them.*

(4) *The possessor is bound to restore to the owner all fruits actually gathered by him after the* litis contestatio, *as after this date he can no longer be regarded as a* bona fide *possessor and is liable to account for the profits he has taken since.*

WICKRAMASINGHE *vs.* DIAS ... XXX. 74

Waste Lands Ordinance, No. 1 of 1897, sections 2, 3 and 4—Notice under section 1 —Claims by several claimants before special officer—Agreement with claimants admitting claim to part—Remainder declared property of Crown—Orders published in Gazette under section 4 (1) and (2)—Effect of such order—Meaning of the words final and conclusive in section 4 (2).

In pursuance of a notice duly published under section 1 of the Waste Lands Ordinance No. 1 of 1897 in respect of a tract of land 207 acres in extent, seven claimants appeared before the Special Officer, who after due inquiry, entered into an agreement with the claimants admitting their claim to an extent of 133 acres out of the land involved in the notice and the remainder was declared the property of the Crown. This agreement was embodied in orders dated 12th October, 1900, and were published in the "Government Gazette" as required by section 4 (1) and (2) of the Ordinance.

In 1933, the plaintiff brought this action to partition the said extent of 133 acres on the basis that those who claimed under the seven claimants who appeared before the Special Officer only were entitled to rights in the said land. The principal contesting defendants claimed that not only the seven claimants but also others who had been co-owners with them prior to the said agreement were entitled to the land in question, although they did not appear before the Special Officer.

In the District Court the contesting defendants succeeded and the plaintiff appealed.

The appeal came up before their Lordships Soertsz, J. and Jayetileke, J. who in view of the decisions in *Kiri Menika vs. Appuhamy* (19 N.L.R. 298) and *Dingri Banda vs. Podi Bandara* (29 N.L.R. 257) sent the case to his Lordship the Chief Justice for an order under section 51 of the Courts Ordinance. The case was accordingly referred to a Bench of Five Judges.

Held (WIJEYEWARDENE, J., dissentiente):

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(1) *That the rights of co-owners who did not appear before the Special Officer in response to the notice were wiped out by the publication of the orders embodying the agreement with the claimants in the "Government Gazette," as required by section* 4 (1) *and* (2) *of the Waste Lands Ordinance.*

(2) *That proceedings under the Waste Lands Ordinance No.* 1 *of* 1897 *are proceedings* in rem.

(3) *That the Special Officer in acting under section* 4 *of the Ordinance does so in a judicial capacity.*

(4) *The words "final and conclusive" in section* 4 (2) *means binding everyone who is subject to the law, whether parties to the proceedings or not.*

HARAMANIS APPUHAMY *vs.* MARTIN AND OTHERS ... ... XXXI. 17

Waste Lands Ordinance, No. 1 of 1897—Claim under section 20—Is there a right of appeal from an order of the District Judge.

Held: *That an appeal lies to the Supreme Court from an order of the District Judge regarding a claim under section* 20 *of the Waste Lands Ordinance No.* 1 *of* 1897.

Per LORD DU PARCQ.—In their Lordships' opinion the word "trial" in this context must be read as including the decision, which it is not improper to regard as an important part of the trial, and the expression "investigation and trial" is to be understood as descriptive of the whole proceedings. It is true that in some context (*e.g.*, in the Code of Civil Procedure) the word "trial" is at times used in contradistinction to "judgment" or "appeal", but there is nothing in the material sections of the Waste Lands Ordinance which suggests that the word is there being used with this limited meaning. On the contrary, the intention of the legislature, so far as it can be gathered from the terms of the Ordinance, seems to have been to put a person who, though his claim was made out of time, could show "good and sufficient reason" for his delay, in the same position as one who had lodged his petition within the time limited by section 18.

VANDERPOORTEN AND OTHERS *vs.* THE SETTLEMENT OFFICER ... XXXII. 16

WEIGHTS AND MEASURES

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

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

PERERA (P. C. 1541) *vs.* NADAR XVI. 88

Weights and Measures Ordinance section 16—When may a Police Sergeant institute a prosecution.

Held: (1) *That a prosecution under section* 16 *of the Weights and Measures Ordinance could be instituted even if the weights are found by a Police Sergeant.*

(2) *That a prosecution under the Weights and Measures Ordinance can be instituted by a Police Sergeant under section* 148 (1) (*b*) *of the Criminal Procedure Code.*

KULATUNGE (POLICE SERGEANT) *vs.* PERUNAM PULLE ... ... XVIII. 31

WHIPPING

See also under **SENTENCE**

A judge who imposes a sentence of whipping and imprisonment cannot make an order fixing an extended term of imprisonment if the sentence of whipping is not executed.

REX *vs.* PEDRICK APPUHAMY KADIRESU AND TWO OTHERS ... XXVIII. 78

WILLS

Will—On whom lies the onus of proof that the Will was executed by a person over 21 years of age.

Held: *That where the validity of a will is contested on the ground that the testator was a minor, and was therefore not qualified to make a will, the onus of proving that the testator was of full age at the time he made the will lies on the party setting up the will.*

SINNAPODIAN *vs.* MUTTAN AND OTHERS ... ... V. 63

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Proof of will—Onus of proof on whom—Canons of proof of will—Statements made by deceased showing state of mind—Evidence Ordinance sections 14 and 32.

Held: (1) *That the onus of proving a will lies upon the party who propounds it and that the canons of proof vary according as the will is a reasonable and natural one or the reverse.*

(2) *That "where a suspicion attaches to a will, a Court must be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."*

(3) *That the person propounding a will must 'satisfy the conscience' of the Court, not only that a testator was in such a state of mind as to be able to authorise, and to know that he was authorising the execution of a document as his will, but also that he knew and approved of the contents of the document.*

(4) *That statements made by a testatrix, shortly after the execution of her will, to the effect that she had given all her property to her child, were admissible under section* 14 *of the Evidence Ordinance as statements from which it could be inferred that a particular state of mind which gave validity to a particular physical act did or did not accompany the doing of that act.*

RAJASURIAR *vs.* RAJASURIAR AND TWO OTHERS ... ... X. 10

Joint will by husband and wife—Difference between a gift to ascertainable living persons and to an unascertainable class of persons yet unborn—Disposition of contingent interest by will.

DE SILVA *vs.* DE ALWIS AND THREE OTHERS ... ... X. 63

Will—Several devises of specific property—Residue to executor—Specific devise subject to mortgage by testator—Bond put in suit and property sold—Action against executor by devisee's heirs for value of land devised—No words in will to indicate that devise was subject to mortgage—Can an executor, who is not an express trustee, claim the benefit of the Prescription Ordinance.

Held: (1) *That, in the circumstances, the devise must be taken to be free of the mortgage.*

(2) *That the executor was bound to redeem the mortgage.*

(3) *That an action for the value of the land would, in the circumstances, lie against the executor.*

(4) *That an executor, not being an express trustee, is entitled to claim the benefit of the Prescription Ordinance.*

DE SILVA AND OTHERS *vs.* DE SILVA ... ... XI. 131

Will—Construction of—Intention of testator to be given effect to.

VERY REV. FATHER MASSON *vs.* MATHES ... ... XIII. 61

Will—Specific devise subject to mortgage by testator—Executor's failure to redeem mortgage—Devised property sold under hypothecary decree—Action against executor by deceased devisee's heirs for value of land—Liability of executor—When does cause of action arise.

DE SILVA AND OTHERS *vs.* DE SILVA ... ... XVII. 39

Undue influence—What constitutes—Circumstances of suspicion—Burden of proof.

Held: *That in order to place the burden of removing the suspicion of undue influence on the propounder there must be evidence of the exercise upon the mind of the testator of coercion or mental ascendancy which is equivalent to coercion, not merely the exercise of influence which is unjust and unconscientious.*

BRUMPINONA AND ANOTHER *vs.* VITHANAGE ... ... XXIII. 110

Last will—Buddhist monk—Pudgalika **property—Buddhist Temporalities Ordinance (Chapter 222)—Does disposition by last will amount to alienation during lifetime of a deceased monk within the meaning of section 23 of the Ordinance.**

Is the executor in such will entitled to follow such property for purposes of administration.

Held: (1) *That a disposition by last will by a bhikkhu in respect of his* pudgalika *property does not amount to an alienation*

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during his lifetime within the meaning of section 23 of the Buddhist Temporalities Ordinance.

(2) *That an executor appointed in such last will has no right to have recourse to such* pudgalika *property for purposes of administration.*

SUMANA THERO *vs.* RAMBUKWELLA XXV. 86

Will in handwriting of sole beneficiary under it—Will copied at the request of the notary who attested it—Absence of clause in testator's handwriting to the effect that he dictated the will and acknowledged its correctness—Effect of—Is the Roman-Dutch law repealed by section 11 of the Prevention of Frauds Ordinance—Appeal—When may an issue not expressly framed in the trial court be taken in appeal.

Held: (1) *The person who writes out a will for the testator cannot insert therein any benefit for himself, and should he do so, cannot take such benefit unless the testator either adds a clause in his own handwriting to the effect that he dictated the will and acknowledges its correctness, or in some other manner clearly confirms the disposition. The fact that the will was copied at the request of the notary who later attested it makes no difference.*

(2) *That a question which was not expressly raised in the trial court may be taken in appeal when it can be brought under one of the issues framed.*

THAMBU *vs.* ARULAMPIKAI AND ANOTHER ... ... XXVIII. 40

A devisee under a modern will, be he a total stranger to the testator or one who would but for the will be his heir according to intestate succession, is more in the position of a legatee under the Roman-Dutch law.

YUSUF *vs.* SHERIFF ... XXVIII. 73

Will—Prohibition of marriage with those not belonging to the Goigama community of the Sinhalese race or not professing Buddhism under pain of forfeiture of rights under will—Is such a prohibition valid.

Held: *That a clause in a will prohibiting marriage in the following terms was void for uncertainty:*

"It is my will and desire that none of my aforesaid children shall contract a marriage with those not belonging to the Goigama community of the Sinhalese race or not professing Buddhism. Such a marriage should further be sanctioned by all or a majority from and out of the following five persons, to wit, my wife the said Lydia Catherine de Cabraal Wijetunga, my brother Edward de Silva Mohandiram, Charles Batuwantudawe, Don Baron Jayatileke and (torn off) de Silva Abeyratne, all of Colombo. In case any of my children contract a marriage contrary to these instructions herein setforth such child or children shall forfeit whatsoever rights they may have acquired under this will and the property left bequeathed and devised by me to such child or children by this will shall ensure to the benefit of the remaining children of mine in equal shares subject to the terms of the specific legacies already enumerated, provided such children shall not contract any marriages contrary to the directions herein set forth."

DE SILVA AND OTHERS *vs.* WANIGASURIYA AND OTHERS ... XXVIII. 75

Will—Instrument in writing by Buddhist priest appointing pupil priest to be executor and the incumbent of a temple—No specific disposition of property. Is such instrument a last will.

DHAMMANANDA *vs.* PEMANANDA THERO ... ... XXIX. 89

Will—Onus of proving—What should be proved—Suspicious circumstances attaching to execution—Duty of court.

Held: (1) *That it is the duty of the propounders of a will or codicil to prove—*

(*a*) *the fact of execution;*

(*b*) *the mental competency of the testator: and*

(*c*) *his knowledge and approval of the contents of the will.*

(2) *That where there are suspicious circumstances attaching to the execution of a will or codicil the onus of removing such suspicion is on the propounders.*

Per KEUNEMAN, J.:"Now, in *Berry vs. Butlin* there are also laid down certain qualifications which, perhaps, I may quote: 'All that can be truly said is that if a person, whether attorney or not, prepares a will with a legacy to himself it is atmost a suspicious circumstance of more or less weight according to the facts of each particular

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case, in some of no weight at all.....But in no case amounting to more than a circumstance of suspicion demanding the vigilant care and circumspection of the court in investigating the case and calling upon it not to grant probate without full and entire satisfaction that the instrument did express the real intentions of the deceased'."

KANAGARATNAM *vs.* ANANTHATHURAI ... ... XXX. 48

Will—Disputed—Exclusion of blood relatives of testator from specific devices of acquired property—Inherited property to be dealt with as on intestacy—Is will unreasonable or unnatural—When should Appeal Court interfere with findings of lower Court on questions of fact—Misdirection—Failure on the part of trial judge to consider all the evidence, or to appreciate evidence correctly or to give adequate reasons for his conclusions.

Where a testator made specific devises of his acquired property to certain beneficiaries, who were not his relatives, excluding from the operation of his will his property, which would devolve as on intestacy on the "admitted relatives."

Held: (1) *That the will was not unreasonable or unnatural.*

(2) *That the actual feelings of the testator towards his relatives should be considered in deciding whether a will is reasonable and natural or not.*

(3) *That where a trial Judge has come to a conclusion without weighing or deciding the facts on which he could base his inference and where such conclusion has also coloured the attitude of the Judge to the other features of the case, his judgment is vitiated, as it amounts to a serious misdirection.*

Per KEUNEMAN,J.—It has been strongly urged on us that we should not interfere with findings of the trial Judge, and a long series of cases upon this matter decided both in Ceylon and in England have been cited to us. I may say that in this case, as I have shewn earlier, we are not dealing with a finding as to the truth of the oral evidence based upon observation of the manner and demeanour of witnesses, although even in such a case we are not entirely absolved from the obligation of rehearing the case: see *Yuill vs. Yuill* (29 C.L.W. 97). In this case the Judge has decided upon the "probabilities" of the case, and a Court of Appeal is in as good a position to weigh the probabilities as the trial Judge.

KARTHELIS APPUHAMY *vs.* SIRIMARDENA ... ... XXXI. 86

Will—Construction of—General rules applicable

ABDUL HAMID SITHI KADIJA AND ANOTHER *vs.* DE SARAM AND OTHERS XXXII. 46

Joint Last Will—Interpretation—Husband and wife disposing of property in favour of husband's daughter by a previous marriage —Further provision that (*a*) if husband be the survivor, he shall be absolutely entitled to all the residue and remaining property; (*b*) if wife the survivor, she shall be entitled to enjoy rents and profits thereof, but shall not be at liberty to sell, mortgage or otherwise dispose of same — Death of husband before wife—Acquisition of property by wife after husband's death—Who is entitled to property so acquired on wife's death without children.

"Massing" of estates—Does the Will effect a—Effect of 2nd marriage by the surviving spouse.

A Last Will (P1) executed by C and E (husband and wife married after 1877) contained the following clauses:—

Clause A:—"We give and devise all our property both movable and immovable wherever found or situate to our daughter, Panditaratnagamage Dona Margaret de Silva."

Clause B:—"We hereby declare that in case I the said Panditaratnagamage Don Charles de Silva shall be the survivor I shall be absolutely entitled to all the residue and remaining property, movable as well as immovable, belonging to our joint estate, and that in case, I, the said Kirinde Liyana Aratchige Dona Elizabeth de Silva shall be the survivor, I shall be entitled to keep all the said residue and remaining property under my control and to enjoy the rents and profits thereof, but I shall not be at liberty to sell, mortgage or ortherwise dispose of the same."

It also contained two other cash bequests for Buddhist charities.

Margaret referred to in Clause A was a daughter of C by a previous marriage. C

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died before E, who married a second time, and acquired property after C's death. E, died and her intestate heirs claimed her property so acquired as against the heirs of the said Margaret, who also had died at the time.

Held: (1) *That the words "joint estate" in Clause B were used for convenience or reference to denote the property mentioned in Clause A and does not restrict the operation of the Last Will to the properties that C and E had at the time of the execution of P1 or to the properties of C and E at the death of C.*

(2) *That the Last Will P1 does not disclose an intention on the part of the two spouses to make a joint disposition of their joint estate "after the death of the survivor and therefore no massing" of the estate is effected thereby.*

(3) *That there is a strong presumption against "massing" and where possible an interpretation favourable to the view that the Will is regarded as that of the first dying alone, and as containing the separate Wills of each of the spouses in respect of their individual shares.*

(4) *That E would have had the right to revoke the Last Will and in fact the second marriage resulted in revoking the Last Will contained in P1.*

(5) *That, in the circumstances, the property acquired by E, after C's death, devolved on the intestate heirs of E.*

MARY NONA *et al vs.* EDWARD DE SILVA ... ... XXXVII. 94

Bequest to third party by testator of property owned jointly with his wife—Wife ignorant of legal rights of parties—Enjoyment of benefits under will — Does doctrine of election arise.

A husband and wife received, on their marriage, a joint gift of property, the whole of which the husband bequeathed by Last Will to X, subject to the wife's life interest. The wife held the erroneous impression that they were married in community of property and also that her husband had the right to dispose of the whole property. She was unaware that the property had been devised by her husband. After the husband's death, she accepted the position set out in the Last Will and enjoyed the life interest in the whole property.

Held: (1) *That the husband's bequest to X passed only his share in the joint property.*

(2) *That the wife's heirs were not estopped from denying that the Last Will affected her property.*

(3) *That the doctrine of election did not arise as the wife was not aware of her rights, and did not know that she was under a legal obligation to make a choice.*

KIRTHISINGHE *vs.* ARCHBISHOP OF COLOMBO ... ... XXXVIII. 19

Interpretation of will made in Sinhalese —Bequest of property—Description—Reference to Schedule—Is clause in will subordinate to statement in schedule.

A testatrix, who acquired a property by two deeds (an undivided half share by each) devised it by a clause, under which the defendant claimed the whole property, while the plaintiff claimed title to an undivided half share through the residuary legatees.

The relevant clause is literally translated as follows:—

"It is my will (desire) and pleasure (expectation) that out of the immovable properties owned by me at present the allotment of land bearing assessment No. 50 situated at Silversmith Street within the town of Colombo and the house standing thereon fifthly mentioned in the aforesaid schedule, shall devolve after my death on St. Joseph's Church, Grandpass, Colombo, and that the income thereof shall be utilised by the Parish Priest of the said Church for the charities of St. Vincent de Paul Society".

The Schedule referred to as the fifthly mentioned Schedule read as follows:—

"The undivided half share of the land bearing assessment No. 50 situated at Silversmith Street in the town of Colombo bounded on the North by Silversmith Street, East by the land belonging to Ana Sampayo and South and West by the land belonging to J. L. Perera containing in extent twenty-seven decimal sixty-four perches (OA. OR. 27·64.) together with the trees, plantations and the buildings belonging thereto."

It was contended for the plaintiff that the words "fifthly mentioned Schedule" in the clause made it clear that the devise was only of an undivided half share of the property. It appeared that the description

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given in the Schedule was copied from one of the deeds which dealt with a half share of the property.

Held: *That the description in the clause giving the assessment number and situation of the property clearly showed that the testatrix devised the entire property. The reference to the Schedule was for the elucidation of the clause by giving the boundaries and the extent of the property, and not for the purpose of subordinating the clause to the Schedule by reducing the extent of the devise.*

THE ARCHBISHOP OF COLOMBO *vs.* VEERAPATHIRAPILLAI ... XXXVIII. 22

Interpretation—Direction to executor to pay legacy on the occasion of marriage of legatee—Absence of words "give and bequeath" —Vested or contingent legacy—Investment of the amount—Interest—Is such legatee entitled to receive interest before marriage.

A Last Will contained the following clause:—

> "I further direct the executor of this my Last Will and Testament to pay a sum of Rupees Five thousand to the two daughters of Mary at home on the occasion of their marriage as dowry provided by me and of Rupees One thousand to each of her two sons."

The testator died leaving his widow and two daughters by a previous marriage, Mary and Martha. In compliance with an Order of Court the executor deposited in Court the sum of Rs. 5,000 referred to in the above clause. The Court "minuted of record" that the sum of Rs. 5,000 be not paid without the consent of the execuor in compliance with an application for the purpose.

The appellants, who are "the two daughters of Mary at home," referred to in the said clause and who are still unmarried, applied for an order of payment in respect of a dividend of Rs. 75 that had accrued on the investment of the said Rs. 5, 000 in the Loan Board. The Court refused the application and the order was appealed from.

Held: (1) *That in the absence of the words "give and bequeath" the words used in the clause do not indicate a direct gift to the grand-daughters, but a mere direction to the executor to pay on a future event.*

(2) *That the appellants were not entitled to the order of payment asked for.*

MARY CATHERINE PERERA *et al vs.* THE MISSIONARY APOSTOLIC OF HALPATOTA *et al* ... ... XXXIX. 3

Rovocation of Will—How it may be effected—Prevention of Frauds Ordinance section 6.

Held: *That under our law a will cannot be revoked except by adopting one or other of the modes of revocation set out in section 6 of the Prevention of Frauds Ordinance.*

VELMURUGU *vs.* ARUMUGAM XLII., 23

Last Will—Death of executor before grant of probate—Grandchildren entitled to largest interest under the Will—Ninth appellant appointed guardian-ad-litem **of grandchildren—Application by widow for graut of lettters of administration with the Will annexed—Widows interest in estate comparatively small —Claim for letters by ninth appellant as nominee of grandchildren—Competing claims —Nominee of the largest interest entitled—No preferential right to widow—Civil Procedure Code sections 519, 523.**

A. H. M. M. Faluloon Marikar died leaving by a last will properties to the widow of approximately Rs. 15,000, to the daughter to the value of Rs. 5,900, and to the son subject to *fidei commissa* in favour of the son's children the bulk of the estate valued at Rs. 200, 000. On the son's death his widow and minor children were made parties and the ninth appellant was appointed the guardian *ad litem* of the minors in the testamentry proceedings commenced on the application by the executor of the last will.

The executor died before grant of probate and both the widow of the testator and the ninth appellant as nominee of the son's widow and children asked for a grant of letters of administration with the will annexed.

Held: (1) *That other considerations being equal, a Court should, in granting letters of administration with the will annexed, exercise its discretion with due regard to the claims and wishes of those legatees or devisees who have the greatest interest in the estate to be administered.*

(2) *That in the absence of good grounds for rejecting the appointment of the ninth appellant as a fit and proper person to protect the minors' interest in the*

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administration proceedings, his claim as the person nominated by those who have the largest interests in the estate should prevail over that of the testator's widow, whose interests are by comparison of small extent.

(3) *That when the persons with the largest interests in the estate are minors, there is precedent for making a grant of letters with the will annexed to someone for their benefit.*

(4) *That in an application for letters of administration with the will annexed, the principles of English Law would be applicable under the Charter of* 1833 *except to the extent, if any, to which they are found to be inconsistent with the provisions of the local statutes.*

MARIAM BEEBI *et al vs.* M. M. M. H. RAQQIAH UMMA ... ... XLIV. 92

Wills Ordinance § 7—Accrual of property

IBRAHIM *vs.* ALAGAMMAH AND OTHERS ... ...XLV. 35

Principles of construction of a will creating a fidei commissum

THE ARCHBISHOP OF COLOMBO *vs.* DON ALEXANDER ... ... XLVII 26

Last Will—Signature at foot or end thereof —Five witnesses—Two sheets of paper—One document—Section 4 of Prevention of Frauds Ordinance.

The deceased testator wrote out his Last Will and signed the same at the end of the first sheet. There being no room for all the witnesses to sign in that sheet, four of the five witnesses signed at the top of the second sheet.

The executrix applied for probate of the said Last Will and respondent objected thereto on the ground that there was no compliance with Section 4 of the Prevention of Frauds Ordinance. The learned District Judge held that there was the necessary compliance.

Held: *That in the light of the evidence led in the case the papers which the petitioner endeavoured to propound as a Will were capable of being held to form a single instrument.*

Per ROSE, C.J.—"The question as to whether a particular Will which is contained in more than one paper in fact forms one instrument and therefore complies with the requirements of this statute is frequently one of difficulty but it seems to me that the principle applicable can be derived from certain English authorities which relate to statutes in substantially similar terms and which in my opinion are not inconsistent with the decisions of our own Courts in Ceylon."

MAUD BEATRICE DAVID *vs.* GRACE ROBERTS ... ... XLVIII. 4

Wills Ordinance section 7—Does it affect devolution of joint Hindu family property.

ATTORNEY-GENERAL *vs.* RAMASWAMI IYENGAR AND ANOTHER ... XLIX. 98

Last Will—In testator's possession—Will not forthcoming—Presumption of destruction animo revocandi **section 114, Evidence—Joint Will—Is a protocol copy an original document?**

The testator made a joint will with his wife and the original document was with the testator. On the testator's death the widow produced the protocol copy of the will and asked for probate. It was contended that the will had been destroyed by the testator and that the protocol copy was not an original.

Held: (1) *That as the will was shown to have been in the possession of the deceased testator and was not forthcoming on his death, it should be presumed to have been destroyed by him* animo revocandi. *The same principle would be applicable even though it was a joint will.*

(2) *Under our law a protocol copy of a will is not an original document.*

ABDUL HAMID RALIYA UMMA *vs.* ABDUL LATIFF MOHAMED AND ANOTHER L. 101

Thesawalamai—Husband buying properties—Last Will—Widow executrix—Corpus to be administered—Jaffna Matrimonial Rights and Inheritance (Amendment) Ordinance.

KANAMMAH *vs.* THAMBIAPPAH SANMUGALINGAM *et al* ... ... L. 105

WINDING - UP

See under **COMPANIES**

JOINT STOCK COMPANIES

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WITNESS

Not precluded from giving evidence merely because he has been within hearing of the court.

VAN ROOYEN (SUB-INSPECTOR OF POLICE) *vs.* PERERA ... ... II. 282

Witness' expenses in court of requests—Taxation of costs.

HARAMANIS APPUHAMY *vs.* WICKREMASINGHE AND ANOTHER ... XVI. 18

The prosecution is under no obligation to tender witnesses whose names are in the indictment and are not called for the prosecution. The prosecutor has a discretion as to what witnesses should be called for the prosecution, and the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive.

ADEL MUHAMMED *el* DABBAH *vs.* ATTORNEY-GENERAL OF PALESTINE ... ... XXVIII. 49

Witness—Demeanour of—Judge's duty to test.

YUILL *vs.* YUILL ... ... XXIX. 97

Witness—Trial judge taking large part in examination of.—

YUILL *vs.* YUILL ... ... XXIX. 97

Application for a commission to examine witnesses—Reasons for refusal—When should objection be taken.

Held: *That before an application for a commission to examine witnesses is refused, on the ground that the applicant has shown a want of due diligence in pursuing the matter, it must be shown that the granting of such application involves an appreciable postponement of the trial date. An objection to such application does not lie after the case has been taken off the trial roll with the consent of the objector.*

ABNER AND CO. *vs.* CEYLON OVERSEAS TEA TRADING CO. ... XXXI. 59

Witness unduly long examination by Judge—Contradictions so elicited—Judge's views on credibility of witnesses—Weight to be attached to such views.

Where the question for determination in a case depended on testimony of witnesses only and where the Judge indulged in an unduly long cross-examination of the defence witnesses and gave judgment for the plaintiff.

Held: *That in the circumstances, it is not possible to attach weight to the view of the judge as regards the credibility of the witnesses.*

GAUDION *vs.* ROMPI SINGO AND ANOTHER ... ... XXXV. 87

Witness of tender years—Affirmation—Trial judge satisfied regarding competency—Value of such evidence.

REX *vs.* DINGO *et al* ... XXXIX. 52

Material witness acting as prosecutor—Regularity.

NANDASENA *vs.* WICKRAMARATNE ... ...XXXIX. 66

Witness for defence—Contradiction of—By previous Statement to Police—Calling of witness to prove previous Statement after close of defence—Is it Evidence in rebuttal.

RASIAH *vs.* SUPPIAH ... XL. 10

Circumstances in which prosecution could be permitted to treat its own witness as adverse.

KANAPATHIPILLAI *vs.* FERNANDO L. 9

Competency of wife as witness against husband.

SEETHEVI *vs.* ARUMUGAM AND OTHERS ... ...L. 21

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SOLOMON APPU *vs.* R. C. PERERA XXXIII. 58

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SIRAPAKIAM *vs.* SIVAPAKIAM II. 462

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Summons—Service of—When defendant in jail.

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"Terms"—'On such terms as it thinks fit' include costs.

SABAPATHY *vs.* THARMALINGAM AND OTHERS ... ... XII. 127

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THE KING *vs.* APPUHAMY *alias* GOLUWA ... ... XII. 79

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"Warn off" the turf

O'REILLY *vs.* GITTONS ... XL. 100

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"Wilfully"

CHELLAPPAH *vs.* COMMISSIONER OF INCOME TAX ... ... XLIV. 54

"Wrongful loss"—§ 22 of Penal Code.

KING *vs.* FERNANDO ... ... II. 406

WORKMEN'S COMPENSATION ORDINANCE No. 19 OF 1934

Scope of the expression "Workman"—Is a person engaged in arranging goods in a lorry, when it is being loaded, and also in washing it, a "workman."

Held: *That the words "employed, otherwise than in a clerical capacity, in connexion with the operation or maintenance of any mechanically propelled vehicle," in item 1 of Schedule II, are wide enough to include*

(*a*) *a person engaged in washing a lorry*

(*b*) *a person engaged in arranging goods in a lorry when it is being loaded.*

MANICCAM *vs.* SULTAN ABDUL CADER AND BROS. ... ... V. 61

Accident arising out of and in the course of employment—Computation of wages—Can "batta" paid at intervals be included.

Held: (1) *That the injuries sustained by the workman were caused by "accident arising out of and in the course of his employment."*

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(2) *That the "batta" paid to the workman, being part of the wages and not a travelling allowance, can be taken into account in the computation of his wages for the purpose of calculating the compensation payable by the employer.*

ALICE NONA AND ANOTHER *vs.* WICKREMESINGHE ... ... VI. 47

Person injured while loading into a cart machinery which had been installed in an old building in the demolition of which he had been engaged the day previous to the accident—Is the injured person entitled to compensation under the Ordinance?

Held: *That a labourer, who is injured when engaged in loading into a cart machinery from an old building in the demolition of which he had been engaged the previous day, does not fall within the definition of "workman" in Ordinance No.* 19 *of* 1934, *and is therefore not entitled to compensation.*

K. ELONONA *vs.* W. WILLIAM FERNANDO ... ... VII. 102

Question whether incapacity is total or partial—Is it a question of fact or law.

Held: (1) *That the question whether incapacity is total or partial is a question of fact.*

(2) *That in a case of permanent partial disablement, it is the duty of the Commissioner to decide on the evidence before him, whether there has been a complete loss of earning capacity or not.*

ARNOLIS HAMY *vs.* THE CONTROLLER OF ESTABLISHMENTS ... IX. 128

Injury to one eye—Total incapacity—Inability to obtain work.

WILLIAM PERERA *vs.* BROWN AND CO. LTD. ... ... IX. 161

Death resulting from injury—On whom lies onus of proof that death resulted from the injury.

Held: *That the applicant was entitled to compensation.*

MAGGIE SIRIMANNE *vs.* PETER ... X. 100

Workmen's compensation—Claim by defendant—Test of dependency.

The deceased contributed to the maintenance of his sister, the applicant, till two years before his death when he obtained employment in Anuradhapura. After this he ceased to support her. The deceased had shortly before his death written to his sister and aunt saying that he was coming for the New Year with money.

Held: *That this evidence was insufficient to establish that the claimant was a dependent of the deceased.*

ROSA MARIA *vs.* JAYAWARDENE XIII. 19

Workmen's Compensation Ordinance—Section 9—Commutation of half-monthly payments—Effect of such commutation.

Held: (1) *That a workman in arranging for commutation under section* 9 *of the Ordinance does not accept a lump sum in exchange for all claims.*

(2) *That a workman by commutating the half-monthly payments under section* 9 *merely redeems his right to receive half-monthly payments and he does not thereby surrender or prejudice any rights which may later accrue to him.*

FERNANDO *vs.* THE COMMISSIONER FOR WORKMEN'S COMPENSATION XIII. 165

Fatal attack on a workman by a fellow workman—Attack made outside the work place and outside working hours—Was the injury caused by an accident arising out of and in the course of the injured workman's employment.

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

VIOLET CATHERINE PERERA *vs.* MESSRS. BROWN AND CO. LTD. ... XVI. 135

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

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

SUPERINTENDENT, ETANA ESTATE *vs.* MUTTUWEERAN ... XVII. 30

Workmen's Compensation Ordinance—Meaning of dependant.

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The claimant was a regular wage-earner and maintained the family, including the deceased. Such earnings as came from the deceased were occasional and were due to the claimant taking him to assist him.

Held: *That the claimant was not a dependent of his deceased son.*

FERNANDO *vs.* APONSU ... XVIII. 128

Accident to workman while acting contrary to employer's orders for his own purposes—Death—Is the employer liable to pay compensation.

A person, who was employed as a labourer on the ground and had no business on the scaffolding which was prohibited to him, got up to the scaffolding to ask for a chew of betel from a fellow-workman. He lost his balance and fell to the ground which caused his death.

On a claim made under the Workmen's Compensation Ordinance on behalf of a minor son of the deceased,

Held: *That when the deceased got on the scaffolding to get a chew of betel he was not engaged in performing an act for the purpose of and in connection with his employer's trade or business, and the employer, therefore, was not liable to pay compensation.*

PIYADASA *vs.* KELAART ... XXIII. 35

Is determining factor for assessment of compensation the wages actually paid or payable.

Held: *That for the purpose of assessing compensation under section* 6 *and Schedule* IV *of the Workmen's Compensation Ordinance the determining factor is the wages actually paid.*

SANSONI *vs.* THE COMMISSIONER FOR WORKMEN'S COMPENSATON XXVII. 75

Death of workman—Disobedience by workman of orders—Accidents arising out of and in the course of employment—Liability of employer.

The deceased workman was employed as a labourer to load bags of tea leaves from lighters into ships in the Colombo Harbour. The bags were carried from the lighters to the ship by means of a sling worked by a crane. When all the bags had been loaded the workmen were required to go on board the ship to have their names registered by a clerk. The deceased workman, acting against orders, used the sling to go on board the ship, and fell, and was killed.

Held: *That the accident arose out of his employment within the meaning of section* 3 *and that the employer was liable to pay compensation.*

THEVAR *vs.* FERNANDO ... XXIX. 91

Person employed in loading and unloading goods from lorry—Is he a person employed in connection with the "operation" of the lorry.

Held: *That the word "operation" in Schedule II., section* 1 *of the Workmen's Compensation Ordinance includes such activities as the loading and unloading of good in the case of lorries "used for the carriage of.....goods for hire, or for industrial or commercial purposes," and that a person so employed is a "workman" within the meaning of the Ordinance.*

PERERA *vs.* NONAHAMY ... XXX. 36

Assault on one workman by another—Loss of index finger—Accident arising out of his employment.

The appellant, an engine turner and lighter under the Ceylon Government, was assaulted by a fellow workman as a result of which his right index-finger had to be amputated. At the argument in appeal it was agreed that the claim was in respect of an injury caused to a workman by an accident arising in the course of his employment.

Held: *That that accident did not arise out of his employment.*

CHARLES APPU *vs.* ADDITIONAL CONTROLLER OF ESTABLISHMENTS XXXIII. 24

Appeal under Ordinance—Application of Section 340 (2) of the Criminal Procedure Code to petition of appeal.

Held: (1) *That a petition of appeal under the Workmen's Compensation Ordinance must comply with the requirements of section* 340 (2) *of the Criminal Procedure Code.*

(2) *That where there is no such compliance there is a fatal irregularity and the petition must be rejected.*

THE ADDITIONAL CONTROLLER OF ESTABLISHMENTS *vs.* LEWIS ... XL. 3

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Claim for compensation by woman in respect of her husband's death—Failure to institute claim in due time—What is "sufficient cause" within the meaning of the section.

Held: *That the failure to institute the claim for compensation within the specified period of six months due to relief being sought through a source not contemplated by section* 16 *of the Ordinance did not amount to "sufficient cause" within the meaning of the section.*

CHRISTOFFELSZ *vs.* DHANARATH MENIKA ... ... XL. 62

Night-Watcher returning home every night for meals—Killed on highway when so returning—Did he come by his death in an accident arising out of and in the course of his employment under his employer.

The deceased was a night-watcher employed by the appellant. The normal hours of duty were between 6 a.m. and 9 a.m. No meals were served to him while on duty and each night he was in the habit of returning home for a short period to have his dinner. While on his way home to dinner one night he was murdered on the highway outside the premises over which it was his duty to watch.

Widow of the deceased applied for an order for compensation against the appellant under the Workmen's Compensation Ordinance.

Held: *That in the circumstances the death of the deceased was not caused in an accident "arising out of and in the course of his employment" under the appellant within the meaning of section* 3 *of the Ordinance, as he was not on the highway in respect of any duty which he owed to his master.*

KRISHNAKUTTY AND OTHERS *vs.* MARIA NONA ... ... XL. 78

Appeal—Failure to conform to requirements of section 340 (2) of the Criminal Procedure Code—Effect on Appeal.

An appeal under section 48 of the Workmen's Compensation Ordinance is governed by Chapter XXX of the Criminal Procedure Code and the failure to state the point of law to be argued and to attach a certificate as required by section 340 (2) of the Code are grounds on which such an appeal must be rejected.

THOMAS *vs.* CEYLON WHARFAGE CO., LTD. ... ... XLI. 71

Inquiry into application—Applicant's absence—Order nisi **dismissing application—Subsequent order after lapse of fourteen days setting aside order** nisi **on cause shown with notice to respondent—Respondent's failure to appeal—Is the order a nullity in view of Rule 30 of Workmen's Compensation Regulations 1935 and section 84 of the Civil Procedure Code.**

On 10th November, 1947, a Commissioner for Workmen's Compensation made an order *nisi* dismissing an application for compensation on the ground of the applicant's failure to appear on that day, being the date fixed hearing.

On 23rd December, 1947, after inquiry with notice to the respondent the Commissioner made order setting aside the order *nisi* and fixed the application for inquiry. There was no appeal from this order.

At this inquiry on 23rd December, 1947, the respondent contended that in view of Rule 30 of the Workmen's Compensation Regulations 1935, section 84 of the Civil Procedure Code became applicable to the order *nisi*, which became automatically absolute after fourteen days and therefore the order setting aside the order was a nullity.

The Commissioner accepted this contention and dismissed the application for compensation. The applicant appealed.

Held: (1) *That in view of the wide discretion given to the Commissioner under Rule* 30 *as to whether he should proceed otherwise than in accordance with the relevant provisions of the Civil Procedure Code the Commissioner had jurisdiction to set aside the order* nisi *made on the* 23*rd of December,* 1947, *and, therefore, the order was not a nullity but a voidable one.*

(2) *That the respondent, not having exercised his right of appeal, is bound by the order.*

WEERASOORIYA *vs.* THE CONTROLLER OF ESTABLISHMENTS ... XLII. 51

Workmen's Compensation—Failure to make claim before expiry of statutory

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period—What constitutes sufficient cause for delay.

Where an employer paid the injured workman money for his expenses from time to time and promised to obtain for him further sums of money from the insurance company and as a result the workman failed to make his claim for compensation within the statutory period of six months.

Held: *That these circumstances constituted sufficient cause within the meaning of section* 16 (2) *of the Ordinance to enable the Commissioner to entertain the claim after the expiry of the statutory period.*

THEMANIS *vs.* LAWARIS ... XLVI. 77

Employee of Omnibus Company—Traffic Inspector employed to check number of passengers carried in each omnibus and ticket books, etc.—Is such person "workman" within the meaning of section 2 of Ordinance read with Clause 1 of Schedule II.

Institution of claim six months after accident—Is ignorant of law "sufficient cause" within the meaning of section 16 (2) of the Ordinance.

Held: (1) *That a person employed by an omnibus company as Traffic Inspector whose main duties were (a) to check the number of passengers carried by each omnibus operating in a particular area and the ticket books: (b) to supervise the field staff which included checkers, timekeepers, stand supervisers, drivers and conductors; (c) to make a report to the proper official in the event of a breakdown of an omnibus is a 'workman' within the meaning of section* 2 *of the Workman's Compensation Ordinance.*

(2) *That the plea that the failure to make the claim for compensation within the six months specified in the Ordinance was due to ignorance of legal requirements is not a 'sufficient cause' within the meaning of section* 16 (2) *of the Ordinance.*

SOUTH WESTERN OMNIBUS CO., LTD. *vs.* JAMES SILVA ... ... L. 99

WRIT

Writ for delivery of possession of property to person other than purchaser at sale in execution—Not invalid.

DIAS *vs.* DE SILVA ... XLIII. 24

WRONGFUL DISMISSAL

Dismissal of Teacher—Quantum of damages.

THURAISAMY *vs.* THAIALPAGAR XXV. 41

WRONGFUL SEIZURE

See under **SEIZURE**

YOUTHFUL OFFENDERS

Youthful Offenders Ordinance—Section 32—Person in possession of property devolving on an orphan—Is he a person "legally liable to maintain" such orphan.

Held: *That a person in possession of property to which an orphan has a claim is not a person "legally liable to maintain" such orphan for the purposes of section* 32 *of the Youthful Offenders Ordinance.*

CASSIPILIAI *vs.* RAJARETNAM ... VIII. 144

Youthful offender with previous good record—Questions to be considered in imposing sentence.

FERNANDO *vs.* ALWIS ... XXIV. 135

Principles determining sentence to be passed on youthful offender.

REX *vs.* JAYASENA *alias* JAYASINGHE ... ... XLIII. 71

Youthful offender—Convicted of offence triable only by Supreme Court—Power to make order for Borstal detention instead of order for imprisonment.

REX *vs.* A. G. MARTIN ... XLIV. 92

Sentence on Youthful Offender—Importance of placing before Court evidence helpful for selection of appropriate punishment.

REX *vs.* M. SENERIS SINGHO XLVI. 55

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ADMISSION

By party in pleadings—Does it amount to an Estoppel.

REV. MORAGOLLE SUMANGALA *vs.* REV. KIRIBAMUNE PIYADASSI ... ... LII. 4

AGREEMENT

For sale of premises—Action for specific performance—Decree for specific performance or damages in lieu of specific performance—Validity of decree.

ADONIS DE SILVA *vs.* HENRY DE SILVA *et al* ... ...LII. 85

APPEAL

Right of appeal to Privy Council under Parliamentary Elections Amendment Act No. 19 of 1948.

SENANAYAKE *vs.* NAVARATNE AND ANOTHER ... ... LI. 36

Can Appellate Court re-examine issues in the light of fresh legislation passed after order appealed from.

NAWADUN KORALE CO-OPERATIVE STORES UNION LTD. *vs.* PREMARATNE LI. 39

APPEAL COURT

When will Appeal Court interfere with judgments of lower court on a question of fact.

MUTTHAL AND 5 OTHERS *vs.* MURUGAPPA CHETTIAR ... ... LI. 97

ARBITRATION

Contract—Clause that disputes arising from contract to be settled by arbitration printed on margin of contract—Validity—Default by one party—Submission to arbitration—No formal agreement to submit to arbitration necessary—Reciprocal Enforcements of Judgments Ordinance Cap. 79 section 3.

The appellant company contracted with the respondent to purchase from him a certain quantity of rubber within a certain period. On the margin of the relevant contract was printed a clause to the effect that any dispute arising from the contract should be settled by arbitration.

The respondent defaulted in the performance of his part of the contract and the appellant submitted the matter to arbitration after due notice to the respondent. The respondent was not represented at the arbitration and an award was made in favour of the appellant. When the award was sought to be enforced the respondent objected on the ground that the submission to arbitration should have been by a formal agreement signed by both parties and hence he was not bound by the award.

Held: *That the award was valid. The fact that the clause referring to arbitration in the contract is printed in the margin of the document was no justification for treating it as if it had not existed. According to the law of England which regulated the transaction in this case the requirements are* (1) *that there must be an agreement in the sense that the parties must be* "ad-idem" *and* (2) *that the agreement must be in writing.*

MARCHANT HEYWORTH AND SWIFT LTD. *vs.* MOHAMED USOOF ... LIII. 17

ARREST

Without warrant—Legality

COREA AND TWO OTHERS *vs.* THE QUEEN ... ... LII. 17

AUTREFOIS ACQUIT

Accused charged in two cases for offences relating substantially to the same transaction—Acquittal in one case—Effect of, in subsequent charge—Magistrate's power to try summarily offences involving non-summary proceedings.

(1) Where an accused is charged in two separate cases for offences relating substantially to the same transaction, and he is acquitted in one, the prosecution must accept the correctness of the verdict and cannot challenge it at the second trial. But the verdict of acquittal is not conclusive of the accused's innocence on the second charge, but the accused is entitled to rely on his acquittal in so far as it is relevant in his defence and it should be considered by the trial Judge as reducing the weight of the case against him. A

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conviction in violation of this rule cannot be sustained.

(2) A Magistrate who, upon the facts alleged, has no power to deal with a criminal case summarily cannot indirectly vest himself with jurisdiction in the matter by permitting the prosecution to treat those facts as constituting only a reduced offence which lies within his jurisdiction.

DAVID APPUHAMY AND OTHERS *vs.* INSPECTOR OF POLICE, WELIGAMA LI. 15

BILLS OF EXCHANGE

Crossed cheque paid over the counter contrary to the crossing—Action for declaration that the bank is not entitled to debit the amount from the drawer's account—Cause of action, elements of—Section 79 (2) and 8 (3) of the Bills of Exchange Ordinance (Cap. 68).

Plaintiff had borrowed Rs. 2,000/- from a Dr. T. (the payee) and given as security a cheque for this amount on the defendant bank in favour of the payee or order, to be presented for payment later. The cheque was crossed generally. Six months later, at the payee's request, the plaintiff altered the date as the cheque was "stale", and authenticated the alteration with his signature. The payee thereupon endorsed the cheque in blank, and gave it to someone to be posted for collection to the Bank of Ceylon. The cheque was not endorsed specially to the Bank of Ceylon, or made "not negotiable." The plaintiff later discovered tnat the cheque had been paid by the defendant bank across the counter to a subsequent indorser, signing himself "W. D. Fernando." When presented for payment the cheque bore words cancelling the crossing, the cancellation purporting to be authenticated by the drawer's signature. The trial Judge found that this signature was a forgery. The plaintiff sued the defendant bank for a declaration that it was not entitled to debit plaintiff's account with the amount paid.

Held: *Assuming that the bank realized (or should have realized) that when the cheque was presented for payment it was still crossed generally and should not have been paid across the counter:—*

(1) *Section 79 (2) of the Ordinance was irrelevant to plaintiff's claim, as he was not the "true owner" of the cheque within the meaning of the section.*

(2) *The plaintiff had no cause of action against the defendant bank under the English Common Law, which was applicable, because he had suffered no loss (which was an essential element of the cause of action) by payment of the crossed cheque over the counter. For the plaintiff's debt to the payee was now extinguished. Even assuming that the cheque was accepted by the payee as conditional payment of the debt, the payee's endorsement in blank converted the cheque into a "bill payable to bearer" (section 8 (3) of the Ordinance). Accordingly, payment to "W. D. Fernando", the holder at that point of time, operated as a discharge of the bill. The fact that the cheque was paid over the counter and not through a bank did not divert the proceeds into wrong hands.*

MERCANTILE BANK OF INDIA LTD. *vs.* V. S. RATNAM ... ... LIII. 7

BRIBERY ACT

Bribery Act, No. 11 of 1954—Indictment without preliminary inquiry before Magistrate—Sections 5 and 8—Indictment signed by Crown Counsel—Preliminary objection that absence of Attorney-General's signature contravened section 78 (1) of the Act.

Held: *That an indictment under the Bribery Act No. 11 of 1954, signed by a Crown Counsel and presented to the District Court in a case where there has been no preliminary inquiry by a Magistrate, contravenes the provisions of section 78 (1) that no prosecution shall be instituted in any court except by the Attorney-General.*

ATTORNEY GENERAL *vs.* WILLIAM *et al* ... ... LIII. 21

BUDDHIST ECCLESIASTICAL LAW

Right to an incumbency cannot be acquired by mere prescription order.

REV. MORAGOLLE SUMANGALA *vs.* REV. KIRIBAMUNE PIYADASSI ... LII. 4

Sissyanu sissya paramparawa—**Nomination of junior pupil to succession in preference to senior pupil—Deed of settlement between pupils—Can pupil renounce his rights under nomination—Common law and ecclesiastical law.**

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A viharadhipathi of two vihares nominated by deed, J, the junior of his two pupils, to succeed him as *Adikari* to both vihares in preference to S, the senior pupil. After his death a settlement was reached between the pupils whereby J was to be in charge of one vihare, and S of the other vihare. In derogation of the settlement J. by deed, appointed one of his co-pupils to be in charge of the vihare allotted to him and went to reside in the temple assigned to S where he died in 1949. The appellant, the senior pupil of J, prayed that he be declared viharadhipati of the other vihare, as against the respondent, the senior pupil of S.

Held: (1) *That there is nothing in the Vinaya or the decisions of the Supreme Court which forbids a* bhikku *from renouncing his right to the management of a vihare.*

(2) *That under the settlement J had renounced his rights to the management of the other vihare.*

(3) *That upon J's renunciation, S, as the original Viharadhipathi's senior pupil, became* viharadhipathi *of the other vihare (J having no pupils at the time); and that the respondent, as pupil of S, is entitled to be Viharadhipathi.*

NANDARAMA THERO *vs.* RATHANAPALA THERO ... ... LII. 81

Viharadhipati—Renunciation—Need not be expressly made—Inference from facts and circumstances must be clear—Onus on party asserting—Cannot be abandoned by residence in another temple.

A bhikkhu's intention to renounce his right to be the *viharadhipathi* of a temple will not be inferred unless it clearly appears from the facts and circumstances of the case. If the facts and circumstances leave the matter in doubt the inference to be drawn is that there is no renunciation. There being no presumption in favour of renunciation of a right the onus is on the party who asserts the renunciation to prove the facts and circumstances from which an intention to renunciate could be clearly inferred. The office of Viharadhipati is not one that can be abandoned by mere residence in another temple.

JINARATANA THERO *vs.* DHAMMARATANA THERO ... ... LIII. 2

BUDDHIST TEMPORALITIES ORDINANCE

Section 4 (2) meaning of term Viharadhipathi—Does a bhikkhu who is not in the line of pupillary succession come within the term Viharadhipathi.

Held: (1) *That the term "Viharadhipathi" in section* 4 (2) *of the Buddhist Temporalities Ordinance* (*Cap.* 222) *means the monk who is the principal bhikkhu in the line of pupillary succession from the first incumbent of a temple.*

(2) *That the cases* Sumana Therunnanse *vs.* Somaratena Therunnanse (1936) 5. C.L.W. 37 *and* Chandrawimala Therunnanse *vs.* Siyadoris (1947) 47 N.L.R. 304 *must be regarded as having been pronounced* per incuriam.

Per SANSONI, J.—"At no time in the history of Buddhist temples in this Island has a priest who has no right to the incumbency of a temple been invested with the title to or the power to manage, the temporalities of the temple, I am unable to accept the suggestion that the Ordinance of 1931, Cap. 222 had the far-reaching effect of conferring an important legal status on one who may not even claim to be, and who is not in law, the chief priest of a temple. Instead of the words "the chief" in the earlier definitions of "incumbent" the definition of "Viharadhipathi" contains the words "the principal" and the only other change is that a Bhikkhu could be a Viharadhipathi whether he was resident in the temple or not—a change which was probably made because a priest can be an incumbent of more than one temple. In effect, therefore, a Viharadhipathi after 1931 is the presiding priest who was known as an incumbent before 1931. With the difference that he need not be resident in the temple of which he claims to be the Viharadhipathi."

THOMA PERERA *vs.* PREMANANDA THERO ... ... LII. 14

CARRIAGE OF GOODS

Carriage of goods—Defendant company carrying on business as carrier—Goods with identifying marks consigned to plaintiff in ship—Company entrusted with duty of discharging cargo from ship by Port Controller—

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No evidence of receipt of goods by company from ship—Plaintiff's claim against company for failure to deliver goods—Liability of—Principles governing carrier's liability.

ALIBHOY *vs.* CEYLON WHARFAGE CO. LTD. ... ... LI. 65

CARRIER

Principles governing carrier's liability

ALIBHOY *vs.* CEYLON WHARFAGE CO. LTD. ... ... LI. 65

CEYLON (PARLIAMENTARY ELECTIONS) ORDER-IN-COUNCIL

Privy Council — Jurisdiction — Election petition—Election declared void for corrupt practices—Decision of Supreme Court final and conclusive under section 82B (3) of Parliamentary Elections (Amendment) Act No. 19 of 1948—No right of appeal to Privy Council—Ceylon (Parliamentary Elections) Order-in-Council 1946, sections 81, 82, 83—Construction of.

Both the Trial Court and the Supreme Court declared void the election of the appellant to the House of Representatives on the ground of a corrupt practice, *viz.*, that he had knowingly made the declaration as to election expenses required by section 70 of the Order-in-Council falsely. He appealed to the Privy Council.

The respondent objected to the appeal on the ground that the appellant had no right of appeal as the Parliamentary Elections (Amendment) Act provided for an appeal to the Supreme Court against the determination of an election Judge and that its decision was final and conclusive.

The trial Judge had allowed the respondent to amend the original petition by including a charge which alleged a false declaration as to election expenses. Both the trial Judge and the Supreme Court had rejected the plea made on behalf of the appellant that the trial Judge had no jurisdiction to hear the petition as the application for leave to amend the petition was not made within the period prescribed by section 50 of the Order-in-Council, 1946.

The appellant's counsel submitted that the Board had jurisdiction to hear the appeal for the reason that the jurisdiction of the election Judge having been challenged, the Board must have jurisdiction to determine whether his order was a nullity.

Held: (1) *That the election Judge as established by the Order-in-Council* 1946 *was a tribunal with a jurisdiction not only to determine finally the question whether the corrupt practices alleged in the petition had been committed, but also to determine finally whether upon the construction of the Order-in-Council it was competent in the circumstances for the petitioner to maintain his amended petition.*

(2) *That the peculiar nature of the jurisdiction and the importance in the public interest of securing at an early date a final determination of the matter, and the representation in Parliament of the constituency affected, make it clear, that it was not the intention of the Order-in-Council to create a tribunal with the ordinary incident of an appeal to the Crown.*

SENANAYAKE *vs.* NAVARATNE AND ANOTHER ... ... LI. 36

CHEQUE

Landlord and tenant—Payment of rent by cheque—Delay in presenting cheque for payment—Cheque dishonoured on the ground that it had become "stale"—Is tenant in arrears of rent.

NADAR AND ANOTHER *vs.* ESMAILJEE AND TWO OTHERS ... ... LI. 72

CIVIL PROCEDURE

Defective pleadings—Judges powers under section 77 of Civil Procedure Code.

MARIYA UMMA *vs.* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. ... ... LII. 99

CIVIL PROCEDURE CODE

Sections 17, 18 and 473—Action by several trustees—One trustee refusing to join as plaintiff—Should he be joined as party defendant.

Where one of several trustees, refused to join others as plaintiff, he should be joined as a party defendant, in view of the provisions of section 473 of the Civil Procedure Code.

SINNATHAMBY *et al vs.* KANDIAH *et al* LI. 80

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Section 337 (1) (b)—Meaning of "Subsequent order"

PIYARATNE THERO *vs.* RAHIM LI. 88

Sections 323, 325, 328 and 329—Resistance to Fiscal—Writ for possession of immovable property—Party ejected not bound by decree—His right to be restored to possession.

In the purported execution of a writ for delivery of possession the Fiscal ejected S. a sub-tenant of the defendant who was not bound by the decree. S. applied to Court to be restored to possession and after inquiry the Court ordered that S. be restored to possession. When the Fiscal went to give possession to S. he found the premises occupied by C., to whom the plaintiff had let it a few days after S. had been ejected. C. obstructed the Fiscal and S. petitioned the Court.

Held: *That the order directing S. to be restored to possession by itself did not have the effect of an order that C. should be removed from the premises and therefore C. was not liable to be ejected.*

CALDERA *vs.* ABDUL SAMEEM AND OTHERS ... ... LI. 109

Section 823 (3)—Forgetfulness on part of defendant to appear in Court on summons returnable date—Validity of excuse.

PAUL *vs.* SELVARAJAH ... LII. 13

Section 704—Action under summary procedure for liquid claims—Leave to appear and defend—What the Court has to be satisfied with.

Held: *That before an application for leave to appear and defend under section* 704 *of the Civil Prodedure Code is granted, the Court has not only to be satisfied that there is a defence* prima facie *sustainable, but also that it is put forward in good faith.*

EBRAHIM VALIMOHAMED AND TWO OTHERS *vs.* D. JIWATRAM ... ... LII. 29

Sections 232, 350 and 352—Concurrence—Money deposited in Court by sale in execution of decree on primary mortgage—Balance, after satisfying primary mortgagee seized by judgment creditors including secondary and tertiary mortgagees of the land sold—Applications by some seizing creditors to transfer sums of money to the creditors of their actions to satisfy their claims—Order by Court after inquiry that only seizing creditors who had applied for transfer of money entitled to concurrence—Validity of such order.

Held: *That where no order in favour of any particular seizing creditor had been made, all judgment-creditors who had effected seizures are entitled to share in the money deposited to the credit of a case after execution of a decree and they all had the same right to claim concurrence under sections* 350 *and* 352 *of the Civil Procedure, Code.*

Per SANSONI, J.—"On the contrary, the basis of the decision in *Shaw & Sons vs. Sulaiman* (*supra*) is that a judgment-creditor who applies for execution is not shut out from claiming concurrence so long as the money lying in the custody Court has not been appropriated to a particular decree holder or holders by an order of that Court."

THAMBI PILLAI *vs.* CANAGARATNE LII. 43

Section 9 Jurisdiction—Contract of marriage between Muslims—Payment of money as kaikuli **by plaintiff's father to defendant at Galle—Marriage subsequently contracted at Matara—Action by plaintiff instituted at Matara for recovery of** kaikuli**—Which Court has Jurisdiction?—Kaikuli—Nature of.—**

Where a sum of money was paid as *kaikuli* by the plaintiff's father to the defendant at Galle and the marriage between the plaintiff and the defendant was thereafter celebrated at Matara.

Held: *That the Matara Court had jurisdiction to entertain an action by the plaintiff to recover the* kaikuli *from the defendant as the obligation to pay the* kaikuli *to the plaintiff was undertaken by the defendant at Matara when he married her.*

Per GRATIAEN, J.—If the obligation be equated to an obligation in the nature of a trust, the English Law applies and the trustee debtor must seek out the beneficiary in order to discharge the trust. Alternatively (if *kaikuli* is regarded as an implied contractual obligation to pay upon marriage to the wife whenever she demands it or if she dies, to her heirs) there was a breach of a contractual obligation undertaken at Matara.

MOHAMED CASSIM SOWDONNA *vs.* HADJIAR ABDUL MUEES ... ... LII. 47

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Sections 143 and 214—New issues raised—Adjourned hearing—Order to pay incurred costs—Factors for consideration in awarding costs—Judicial discretion how to be exercised.

Held: (1) *That when the hearing of a case is adjourned on the application of a party and costs are awarded, the trial Judge is not entitled to make an order that is vague or arbitrary. He must take into consideration such factors as the amount involved, the extra expenditure incurred by the postponement, the stage of the case, etc.*

(2) *That it is undesirable to order incurred costs unless the Judge is in a position to form a fairly accurate estimate of such costs.*

(3) *That a Judge should not enhance the amount of costs merely for the reason that a party is in affluent circumstances.*

Per DE SILVA, J.—Although I would not go so far as to say that a Judge in no circumstances should order a party to pay "incurred costs" I would however venture to observe that such an order is an undesirable one and should be made only in cases where the Judge is in a position to form a fairly accurate estimate of the "incurred costs." Where he makes such an order the record also should show that he had material before him to arrive at the estimate of "incurred costs." Otherwise it would not be possible for this Court to ascertain whether or not the Judge had exercised his discretion judicially. In this case it is not possible to gather from the Judge's record even a very rough idea of the amount of costs incurred by the plaintiff and which the defendant was ordered to pay. If the Judge had no means of knowing what the plaintiff had spent, it cannot be said that he used his discretion judicially in ordering the defendant to pay the "incurred cost." The learned District Judge should have stated in his order his estimate of the "incurred costs" and the grounds on which he based that estimate before he made the order.

V. RAJARATNAM *vs.* V. RAJASEKERAM LII. 52

Section 771—Civil Appeal allowed—Respondent not represented by Counsel—Application by respondent to set aside judgment and decree of Supreme Court— Restitutio-in-integrum **or revision — Rehearing ordered—Jurisdiction of Supreme Court.**

Where at the hearing of an appeal before the Supreme Court, the respondent was not represented and the appeal was allowed, and the respondent thereafter applied to the Supreme Court by way of *restitutio-in-integrum* or revision to have the judgment and decree set aside and satisfactorily explained his failure to be represented at the hearing of the appeal, the Supreme Court ordered a rehearing of the appeal under the provisions of Section 771 of the Civil Procedure Code.

KALAWANE DHAMMADASSI THERO *vs.* MAWELLA DHAMMAVISUDDHI THERO AND ANOTHER ... ... LII. 71

Sections 331 to 333A—Agreement for sale of premises—Action for specific performance—Decree for specific performance or damages in lieu of specific performance—Validity of decree.

ADONIS DE SILVA *vs.* HENRY DE SILVA *et al* ... ... LII. 85

Section 797—Meaning of "Explanation."

DON ABILIAN *vs.* DON DAVITH SINGHO AND ANOTHER ... ... LII. 86

Chapter 65—Applies to cases of contempt under section 53 of the Partition Act No. 16 of 1951.

DON ABILIAN *vs.* DON DAVITH SINGHO AND ANOTHER ... ... LII. 86

Section 9 (b) Jurisdiction—Land "in respect of which" the action is brought—Courts Ordinance, section 75—"Interest in or the right to the possession of" land—Otty mortgage—Nature of.

The plaintiff-appellants brought this action in the Court of Requests, Vavuniya, for the redemption of an otty mortgage and the release of the mortgaged lands from the mortgage. The lands in respect of which the action was brought lay within the limits of the jurisdiction of the Court; but the Commissioner had held that the action was not brought "in respect" of the lands within the meaning of Section 9 (*b*) of the Civil Procedure Code and that no "interest or right to the possession" of the lands in question was in dispute within the meaning of Section 75 of the Courts Ordinance.

Held: (1) *That the question, whether this particular usufructuary mortgage should be*

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redeemed and the lands released from the encumbrance, is a dispute affecting an interest in the lands in question within Section 9 (b) of the Civil Procedure Code.

(2) *That moreover, as the defendant has a right to possess the land as long as the mortgage is in existence the dispute may be said to be one relating to the possession of the mortgaged lands. The action was therefore instituted in the proper Court.*

Per ROSE, C.J.—"It seems to me that it would be wrong to hold that a mortgage—usufructuary or otherwise—cannot be said to be an interest in land."

NALLATHAMBY AND ANOTHER *vs.* SOMASUNDARAKURUKKAL ... LII. 91

Sections 77 and 146—Trial judges' duty under—To clarify issues.

MARIYA UMMA *vs.* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO. LTD. ... ... LII. 99

Section 823 (6).

MOLODDUWA VILLAGE COMMITTEE *vs.* G. H. BABIYAS APPU ... LII. 112

Section 463—Amended by section 5 of Act No. 48 of 1954—Action in tort against Minister—Application by Attorney-General for substitution—Scope of section—Public officer.

In an action founded in tort filed by plaintiff against a Minister of State, the application by the Attorney-General to be substituted as party defendant signifies "the Crown's consent to remedy wrongs" committed by a public officer, and involved the acceptance of responsibility by the Crown for the decree which might ultimately be awarded in favour of the plaintiff upon the cause of action alleged against the public officer individually, and ought to be allowed.

Per GRATIAEN, J.—"The amendment of section 463 after the present action commenced does not offend the *prima facie* rule against retrospective legislation; it has in no way enlarged the ambit of the Crown's right of intervention in certain classes of private litigation."

ATTORNEY-GENERAL *vs.* RUSSELL ... LIII. 41

COLLATION

Effect of Section 35 of Matrimonial Rights and Inheritance Ordinance.

MURUGIAH *vs.* JAINUDEEN ... LI. 90

CONTEMPT OF COURT

Contempt of Court—Publication of inaccurate report in newspaper—Mistake of reporter—Liability of the proprietors of the newspaper.

K. was indicted for the murder of his wife whose body was discovered in a trunk. Crown relied on the evidence of two witnesses, Miss Briggs and Mrs. Darmody to establish as a part of its case, that K. made many untrue statements in regard to the disappearance of his wife.

Before the examining justices Miss Briggs had stated that after the death of his wife K. had asked her to marry him. At the trial, when Miss Briggs started her evidence, the Judge having read her evidence before the justices, ruled, after a discussion in the absence of the jury, that that part of her evidence should not be given. The rest of her evidence was to the effect that K. had told her that he was unmarried.

Mrs. Darmody's evidence was to the effect that K. had told her that he was married, but that his wife was dead.

On the same evening the following report appeared in the "Evening Standard":

"Trunk Trial Story of Marriage Offer—Husband is Accused."

"Mrs. Getrude Darmody of Spitalfields, Norwich, said at the Assizes here that a man accused of murdering his wife asked her to marry him. He told me he was not married. After I had seen him in the same public house again and he had asked me to marry him I asked him to show me his army pay book."

The words "he told me he was not married" and "I asked him to show me his army pay book" were accurate. The words, " after I had seen him in the same public house again and he had asked me to marry him" were inaccurate.

This report was based on information telephoned to the "Evening Standard" office by reporter F. who was present at the

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trial and who had also been attending earlier before the justices.

According to the system adopted, the reporter, after taking some notes, left the Court during the discussion regarding the admissibility of Miss Briggs' evidence to telephone his account of what had already taken place and returned to Court after the completion of Miss Briggs' evidence to resume reporting and to go out and telephone again.

The report was brought to the notice of the trial judge next morning but the trial proceeded and the prisoner was acquitted.

On a motion by the Attorney-General for a writ of attachment for contempt of court to issue against the proprietors of the newspaper, its editor and the reporter; the Court on the material placed before it was satisfied (*a*) that there was no intentional interference with the course of justice, (*b*) that the reporter had made an honest mistake, (*c*) that the editor had no reason to suppose that the report telephoned to him was otherwise than accurate.

Held: (1) *That the publication of the inaccurate report amounted to a contempt of court, as it tended to interfere with the course of justice. It is immaterial whether or not such report reacted favourably or unfavourably upon the accused.*

(2) *That the proprietors are vicariously liable for the reporter's mistake and a substantial penalty should be imposed on them, as the mistake was a grave one and might have resulted in incalculable harm.*

(3) *That in the circumstances, no penalties should be imposed on the editor or the reporter.*

REGINA *vs.* EVENING STANDARD CO., LTD. ... ... LI. 33

Contempt of Court—Conviction under section 53 of Partition Act No. 16 of 1951—Right of appeal under section, 798 Civil Procedure Code—Is it limited by section 335 of Criminal Procedure Code?—Proper procedure for contempt of Court under chapter 65 of Civil Procedure Code—Section 797—Meaning of "explanation."

The accused was convicted on a charge of contempt of court under section 53 of the Partition Act. The learned judge who tried the case did not ask the accused whether or not he admitted the truth of the charge in terms of section 796 of the Civil Procedure Code and the evidence of the accused was mainly in the form of answers to questions put by the learned judge.

A preliminary objection to the appeal was taken that, having regard to the sentence, leave of court was necessary under section 335 of the Criminal Procedure Code.

Held: (1) *That section 335 of the Criminal Procedure Code did not apply to an appeal under section 798 of the Civil Procedure Code.*

(2) *That the conviction must be set aside as section 797 of the Civil Procedure Code had been infringed by the failure of the learned judge to hear the explanation of the accused, which under the section must be voluntary.*

(3) *That the procedure to be adopted in cases of contempt under section 53 of the Partition Act is the procedure laid down in Chapter 65 of the Civil Procedure Code.*

DON ABILIAN *vs.* DON DAVITH SINGHO AND ANOTHER ... ... LII. 86

CONTRACT

Contract—Donation subject to condition conferring benefit on plaintiff, third party—Subsequent sale of property by donor and donee to defendant absolutely—Both deeds registered—Acceptance by plaintiff of benefit—Enforceability of—Principles governing contracts for the benefit of third party.

A donated property to B subject to the condition that B, "his heirs, executors, administrators and assigns" should sell the property to C (the plaintiff) "or his heirs," if C paid a certain sum of money within five years. A and B sold the property by deed to the defendant absolutely. Both deeds were duly registered. The plaintiff tendered the money within the five years and claimed the property from the defendant.

Held: (1) *That as the deed of donation was registered, the defendant purchased the property subject to the condition in the deed.*

(2) *That the plaintiff was entitled to recover the property from the defendant, an "assign" of the parties to the deed of*

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donation, as he had satisfied the condition by accepting the benefit within the stipulated period.

(3) *That in order to defeat the plaintiff's claim, the defendant should have pleaded and proved that the contract conferring the benefit was rescinded by the contracting parties before acceptance by him, which he has failed to do.*

(4) *That the parties to a contract conferring a benefit on a third party have the right to rescind the contract by agreement between them without the consent of, or reference to, the third party before he has accepted the benefit.*

KODIKARA *vs.* FERNANDO ... LI. 1

Contract by Co-operative Society—Contrary to its bylaws—Enforceability.

PARAKRAMA SAMUDRA C.A.P.S. SOCIETY LTD. *vs.* WIMALASEKERA ... LI. 10

Contract—Carriage of Goods—Defendant Company carrying on business as carrier—Goods with identifying marks consigned to plaintiff in ship—Company entrusted with duty of discharging cargo from ship by the Port Controller—No evidence of receipt of goods by company from ship—Plaintiff's action against company for failure to deliver goods—Liability of—Principles governing Carrier's Liability—English and Roman-Dutch Law—Vis major.

436 bags of beans marked "IOTC" had been consigned from Mombasa to the plaintiff in Colombo on the ship *ss.* "June Crest." As there was severe congestion of shipping and cargo in the Colombo Harbour, the defendant company was directed by the Port Controller to discharge the entire cargo consisting of 50,000 bags, and to stack them at the warehouse without reference to markings. There was no evidence from the ship's agents either at Mombasa or at Colombo that the bags bearing I.O.T.C. marks were received on board or delivered out. The boat notes covering the discharged cargo did not identify the bags by reference to markings but only referred to the markings as "various." The company eventually tendered delivery of 436 bags out of the quantity remaining unclaimed by other consignees, but the plaintiff refused to accept them. There were 60 bags marked I.O.T.C. in the discharged cargo which the plaintiff refused to accept on delivery by the company on the ground that the contents had deteriorated.

The plaintiff sued the defendant in damages for the failure to deliver the 436 bags.

The trial Judge while holding that the company could not be held liable for the entire quantity of 436 bags awarded damages to the plaintiff for non-delivery of 145 bags, which he decided, on the evidence of administrative practice at the Customs, must have been received by the defendant. He also held that the plaintiffs were not bound to accept the 60 bags because the contents had nearly perished.

Held: (1) *That the defendant was not liable as the plaintiff had failed to prove that the defendant had received* 436 *bags bearing the identifying marks "I O T C."*

(2) *That the plaintiff's refusal to accept delivery of the* 60 *bags discharged the defendant from liability, and the plaintiff could not claim damages for the deterioration of the contents as he had not led evidence to show the condition of the grain in the bags when they were received by the defendant.*

(3) *That the trial Judge had misdirected himself on the evidence in finding that* 145 *bags were received by the defendant company.*

(4) *That a carrier upon proof of receipt of goods is liable for their loss or non-delivery to the consignees unless he can prove that it was occasioned by* vis major *or* damnum fatale. *The onus is on the carrier to show that he has taken all due care and not been negligent.*

(5) *That the defence of* vis major *is not restricted to "an act of God" or to the consequences of piracy, shipwreck, thunder, lightning or hostile action by the Queen's enemies. It is sufficient for the carrier to rebut the initial presumption of negligence by proving that the loss or deterioration of the goods resulted from some cause which was "utterly beyond his power to prevent."*

HUSSAIN ALIBHOY *vs.* THE CEYLON WHARFAGE CO., LTD. ... LI. 65

Contract—Plaintiff employed as stenographer by Company—Dismissed by defendant, Manager of Company, according to contract

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—Salary paid in lieu of notice—Defendant entitled to employ and dismiss employees on behalf of Company—Plaintiff's action against defendant personally for causing breach of contract—Breach of contract induced by third party—When cause of action arises—English Law and Roman-Dutch Law.

The plaintiff, who was employed as a stenographer by a Company was dismissed by the defendant, the manager of the Company. Under the terms of the contract of employment, the plaintiff's services could be terminated by either party after a month's notice. The plaintiff was paid a month's salary on dismissal in lieu of notice. The defendant as manager of the Company had the power to employ or dismiss the Company's employees, including the plaintiff.

The plaintiff sued the defendant in his personal capacity for damages, the cause of action alleged being that he had by wrongful and unlawful means maliciously and with intent to injure her caused the Company to terminate the contract of employment with her without just cause.

Held: (1) *That for the plaintiff to succeed in her claim she must establish* (*a*) *that the Company had committed a breach of its contractual obligation to employ her,* (*b*) *that the breach of contract had "without justification" been "induced," "procured" or "caused" by the defendant.*

(2) *That the plaintiff's action must be dismissed as the defendant's act terminating plaintiff's services was the act of the Company and was exercised within the terms of the contract of employment and did not constitute an "unjustifiable interference" by reason of the fact that the defendant had authority to act in this matter and was not a "stranger" to the contract between the plaintiff and the Company.*

(3) *That it is sufficient justification" if the defendant can show that he has fulfilled his contractual obligations with the plaintiff and the question of motive or other reasons for terminating the contract are irrelevant in determining the "justification" for terminating the contract.*

Per GRATIAEN, J.—The essence of this particular category of actionable wrong is that damage has resulted from unjustifiable interference by an intermeddler who has induced or procured a breach by one of the contracting parties. Under the Roman-Dutch law, "every contract imposes a duty upon *persons extraneous thereto* not to interfere with its due performance, and a breach of this duty gives rise to an action for damages"—*Isaacman vs. Miller* (1922) T.P.D. 56 at 65. Similarly, in England, McCardie, J. pointed out that "in every one of the sets of circumstances before the Courts, the person who procured the breach of contract was in fact a *stranger—that is, a third person who stood outside the area of the bargain* between the two contracting parties"—*Said vs. Butt* (1920) 3 K.B. 497 at 506.

BARRETT *vs.* ALTENDORF ... LI. 76

Sale of goods—Delivery under contract provided for either by delivery of goods or tender of documents enabling defendants (buyers) to obtain possession of goods—Tender of documents before and after arrival of goods—Defendant's refusal to accept on the ground of late arrival of ship—Was there a delivery in terms of the contract—Action for damages.

Under the terms of a written contract in the form of an indent, the defendants in Colombo ordered textile goods from the plaintiffs in Holland. The contract provided amongst other terms that payment was to be made in cash on or before the arrival of the goods; that the delivery of the goods or of the bill of lading or such delivery order or documents that would enable the defendants from obtaining possession of the goods constituted a valid delivery (Clause 1); that the defendants were to remove the goods or any part of them from the ship or wharf or store within two days of notice by the plaintiffs and pay customs duties, dues and other charges; that the goods were to be insured by the plaintiffs on behalf of the defendants; that the plaintiffs were not obliged to tender or deliver to the defendants any insurance policy, bill of lading or any other document, except those under Clause 1. The contract also contained an entry thus: Shipment: October/in one lot, January, 1948.

On the 29th January, 1948, the plaintiffs shipped the goods at Rotterdam on the *s.s.* Laurenskerk for Colombo, but as a result of an explosion at Genoa, the goods were transhipped to another ship *s.s.* "Triport," which landed the goods at the Colombo warehouse on 2nd April, 1948. There was no evidence as to whether Triport issued

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bills of lading to the Laurenskerk or to anyone in respect of the goods transhipped.

Before arrival of the Triport on 2nd April but after the casualty to the Laurenskerk, the plaintiff's agents at Colombo demanded on the 26th February payments against documents from the defendants, who refused on the ground that the goods should have been delivered before the end of January, 1948, as provided for in the contract. The plaintiffs through their agents on 3rd April, 1948, immediately after arrival of the ship, tendered the documents informing them of the arrival, and again on the 17th April. The defendants refused to accept on both occasions alleging as reason the late arrival of the ship, and after further negotiation, the goods were sold by auction. The plaintiffs filed action claiming damages for breach of contract.

The Supreme Court reversing the judgment of the District Court dismissed plaintiffs' action on the ground that the contract gave the plaintiffs an option to demand payment on fulfilment of either of two conditions: tender of the goods or of documents specified in Clause 1 of the contract. The plaintiffs had not delivered the goods as they had not offered them to the defendants after clearing them from the warehouse, and they had not tendered documents that would have entitled the defendants to enforce the delivery of the goods from the ship, and in this case there was no document which the plaintiffs could offer issued by the Triport or binding upon that vessel.

Held: (1) *That there was a valid tender of the goods by the plaintiffs on 3rd April, 1948, and the 17th April, as under the contract the defendants were not obliged to offer the goods after they had "cleared" all customs and landing charges, and that it was the defendants who were bound to take delivery of arrived goods and pay these charges, and therefore the defendants were liable in damages for breach of contract.*

(2) *That the contract contemplated that the goods ordered were to be shipped at the end of January, 1948, which the plaintiffs had done, and not that the goods should be shipped so as to arrive in Colombo before the end of January, 1948.*

Obiter: The bill of lading, if it had been taken up by the defendants when tendered by the plaintiffs' agents and presented to the ship when goods arrived, would most probably have enabled the buyers to obtain *de facto* possession from the Master of the vessel, as the Master must have been abundantly aware of the material facts relating to the shipment.

HOLLAND COLOMBO TRADING SOCIETY, LTD., *vs.* ALAWDEEN AND OTHERS LI. 82

Contract—Breach of—Village Committee calling for tenders for construction of abutment of bridge—Condition of notice that successful tenderer should enter into contract with Government Agent and furnish security—Plaintiff signing contract in printed form supplied at Kachcheri before Superintendent of Works (employed by Assistant Local Government Commissioner who replaced Government Agent) and furnishing security—Commencement of work—Subsequent request to plaintiff to stop work till receipt of copy of agreement signed by Commissioner—Action for damages against Crown—Liability of Crown.

The Chairman of a Village Committee called for tenders for the construction of two abutments for a bridge. The notice stated that the successful tenderer should enter into an agreement with the Government Agent and furnish cash security. The Village Committee recommended to the Assistant Commissioner appointed in place of the Government Agent that the plaintiff's tender should be accepted and the plaintiff was in due course notified of it.

The plaintiff thereupon deposited at the Kachcheri the required security and signed in triplicate a printed agreement form before the Superintendent of Village Works. By this agreement the plaintiff bound himself (1) to execute the work, (2) to hypothecate in favour of the Assistant Commissioner the security money, and (3) to complete the work within six months or in default pay liquidated damages.

After the agreement was signed the Superintendent of Works showed the plaintiff where the work had to be done and he accordingly commenced work on the 16th May, 1947.

On 10th July, 1947, the plaintiff received from the Assistant Commissioner a letter dated 30th June, 1947, directing him not to commence work until he received a signed copy of the agreement form.

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The Plaintiff sued the Crown for the recovery of (*a*) the cost of work already performed under the contract, (*b*) the deposit of security, and (*c*) the profit which the plaintiff would have been entitled to if the work was allowed to be completed.

The learned District Judge dismissed the plaintiff's action on the grounds (*a*) that there was no concluded contract as the Assistant Commissioner had not yet signed the agreement, and (*b*) even if the contract was concluded it was entered into by the Assistant Commissioner as agent of the Village Committee and not of the Crown.

In appeal—**Held:** (*a*) *that when the plaintiff signed the agreement, the contract was concluded and left the Crown no* locus poenitentiae *to withdraw as the plaintiff has already complied with the condition of providing security. The clause that the plaintiff should complete the work within six months from the date of the agreement strongly supported the argument.*

(*b*) *In the circumstances it was clear that the Assistant Commissioner had acted on behalf of the Crown.*

APPUHAMY *vs.* THE ATTORNEY-GENERAL ... ... LII. 11

Contract—Breach of, sale of land—Agreement under deed between plaintiff and defendant for transfer of land to plaintiff if certain sum of money was tendered before an agreed date—Money undertaken to be paid on plaintiff's behalf by Industrial Credit Corporation provided land is transferred to plaintiff and mortgaged to the Corporation—Transfer and mortgage to be effected contemporaneously—Guarantee of Corporation adequate—Is it sufficient tender? —Roman Dutch Law.

Under a deed the defendant agreed to convey land to the plaintiff if a certain sum of money was tendered before a given date. The deed did not provide expressly the time for payment of the consideration, apart from the stipulated period. The industrial Credit Corporation, from whom the plaintiff raised a loan, undertook to pay the money at any time within the agreed period provided that the land was transferred to the plaintiff by the defendant and mortgaged in favour of the Corporation, and that both deeds were registered. It was arranged that both the deeds of transfer and of mortgage were to be notarially attested and forwarded for registration at the same time. The plaintiff alternatively offered to deposit the money (pending registration) in Court or with the defendant's lawyer, who were to attest and register the documents. The adequacy of the security or the guarantee of the Corporation was not disputed by the defendant. The defendant refused to transfer the land on the ground that under the deed of agreement, he was entitled to receive the purchase price at or before the time when he actually signed the transfer.

In an action by the plaintiff to have the land conveyed to him by the defendant on the ground that he had made a good and sufficient tender of the consideration in terms of the agreement.

Held: (1) *That under the agreement, the time fixed for the delivery of the deed of transfer by the defendant was also the proper time for the receipt of the purchase price.*

(2) *That the plaintiff's offer amounted to a valid tender and that the defendant was not justified in refusing to sign the deed of transfer in favour of the plaintiff.*

BAIYA *vs.* KARUNASEKERA ... LII. 21

Contract—Agreement between owner of business, P and his employees S and W—Payments made to S in terms of agreement—Business taken over by Company subsequently formed with P as managing director—Oral undertaking by company to make the payments to S—Refusal of company to continue payments after death of P—Action by S to enforce agreement—Novation—Delegation—Estoppel—Roman-Dutch Law—English Law.

S was employed in a business known as 'Hirdaramani' owned by P. W was also an employee of the business. An agreement was entered into between P, S and W by which S was to retire from the business and W was to succeed him as leading jeweller. S after retirement was to receive during his lifetime monthly payments of Rs. 150/- from P and towards these payments W was to contribute Rs. 75/- per month. In the event of W's employment ceasing by death, dismissal or otherwise the monthly payments to S were to cease. In terms of the agreement S received the payments of Rs. 150/- monthly.

Later a private limited company (Hirdaramani Ltd.) was formed with P as Managing

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Director, which took over the business owned by P. W then ceased to be in P's employment and became an employee of the company. Soon after the company was formed P as Managing Director of the company, undertook to make the payments to S under the agreement, and in fact continued to make the monthly payment with the Company's cheques.

Some time afterwards P died. The company thereupon denied liability to continue payments to S under the agreement. S then instituted an action to enforce payment against the company.

The learned District Judge entered judgment in favour of S holding (1) that there had been a novation of the original contract by which the defendant-company undertook the liability of P to make payments in terms of the contract.

(2) that the defendant-company was, by reason of its having made payments to S until the death of P, estopped from denying its liability to continue the payments.

On appeal the Supreme Court reversed the judgment of the learned trial judge holding:

(1) that in the absence of an express declaration a novation cannot be inferred unless it is a necessary inference from all the circumstances of the case and that there had been no novation as the correspondence ruled out the inference that the company had unequivocally undertaken the obligation to pay S.

(2) that the company was not estopped from denying its liability to pay as it could not be said that the plaintiff was misled into the belief that the company would continue the payments throughout his lifetime.

S appealed against the judgment of the Supreme Court to the Privy Council.

Held: (1) *That the obligation to make the payments to S was binding on the Company either because a completely new form of contract which might be regarded as a mixture of novation proper and delegation was made between the Company and S irrespective of any condition with regard to W's employment, or because there was a novation of the original agreement by which the Company was substituted for P at all points of the agreement.*

(2) *That W's obligation to pay half the monthly payment to P was a separate obligation from P's obligation to make the monthly payments to S and that there was no interdependence between the two obligations. W's failure to pay his share would not have excused P from paying the full sum to S.*

Per LORD KIETH OF AVONHOLM.—"The names given to different kinds of novation in Roman-Dutch Law and in other systems of law drawing on the civil law are a convenient means of classifying different kinds of transactions, but introduce no principle which would not equally operate in similar circumstances under the law of contract in England."

DE SILVA *vs.* HIRDARAMANI LIMITED LII. 74

Contract—Insurance—Proposal and personal statement in company's form in English—Assured illiterate in English—Assured's answers translated into English by defendant company's canvasser—Assured's health certified by company's doctor to be good—Death of assured—Repudiation of liability by company on the ground of withholding material information regarding state of health and inaccurate or untrue statements in the proposal—Principles governing construction of insurance policy—Meaning of "consult."

Civil Procedure—Defective pleadings—Judge's powers under section 77 of the Civil Procedure Code.

The plaintiffs husband entered into a contract of insurance of life with the defendant company on the company's proposal form, which was in English, and containing a number of questions, which he had to answer together with questions under "personal statement", also in English. As the assured did not know English the questions were translated into Malayalam and the answers into English by the company's inspector S, and likewise the answers in the personal statement were recorded by the company's doctor, who after examination certified him to be of good health. The assured agreed that the statements should be the "basis of the contract."

In an action by the plaintiff as administratrix to recover the money under the contract after the assured's death, the company repudiated liability on the ground that the deceased had withheld material

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information regarding his health and ailments and that he had given inaccurate and untrue answers to the questions in the proposal and the personal statement, namely, (*a*) whether he had consulted any medical man for any ailment within the past five years; (*b*) whether he had ever suffered from any other illness, accident or injury.

The burden of proving nullity of contract was on the defendant company.

The trial Judge rejected the evidence of one Dr. Shenoy the defendant's witness and that of Dr. Narayan, the plaintiff's witness regarding the state of deceased's health at the time of the contract, and acting on the evidence of Nair, the company's canvasser, and the medical report of the company's doctor found in plaintiff's favour that the deceased was perfectly healthy at the time of effecting the assurance.

The trial Judge relying on the admission of Dr. Narayan that the deceased had a mild attack of "influenza" in 1945 also held that the assured had given an untrue or incorrect answer to the questions in the proposal and the personal statement.

Held: (1) *That there was sufficient evidence to justify the trial Judge's finding that the deceased was in good health at the time of effecting the policy.*

(2) *That the answers given by the assured to the questions in the proposal and the personal statement have not been proved by the defendant to be untrue or incorrect as—*

(*a*) *the defendant had failed to establish that the relevant questions were correctly interpreted and explained by the company's inspector and that the answers thereto were correctly inserted by him;*

(*b*) *the answers given by the assured, on a fair construction of the questions, cannot in the context be said to be untrue, and that the defendant should not be permitted to plead that the question was put in a sense different from or more comprehensive than the assured's answer.*

Observations regarding the duty of a trial Judge under sections 77 and 146 of the Civil Procedure Code to clarify the issues between the parties before evidence is recorded and to prevent parties being taken by surprise.

MARIYA UMMA *vs.* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO. LTD. ... ... LII. 99

Contract—Clause that disputes arising from contract to be settled by arbitration printed on margin of contract—Validity.

MERCHANT HEYWORTH AND SWIFT LTD. *vs.* MOHAMED USOOF ... LIII. 17

Promissory note indorsed by second defendant to plaintiff—Contract between second defendant as indorser and plaintiff as immediate indorsee that maker only liable—Nature of such contract.

DORAISAMY REDDIAR *vs.* SUNDARARAJ REDDIAR AND ANOTHER ... LIII. 55

Contract—Agreement to sell "all such portion or portions as may eventually be allotted to the vendors" in the final decree of a pending partition action—Vendors doubtful whether entitled to any share or extent of share—Final decree allotting larger shares than anticipated by vendors—Repudiation of agreement on the ground of false representation of share by vendee—Validity of contract.

By a written agreement, the defendants-appellants undertook to convey to the plaintiff-respondent for Rs. 1,000 "all such portion or portions as may eventually be allotted to them" in the final decree of a pending partition action. The final decree allotted to them an extent of the land much more than they expected. At the time the agreement was entered into, the defendants were doubtful of the extent of share in the land and even whether they were entitled to any share in the land subject to partition action. The plaintiff-respondent had suggested that the extent of the defendants-appellants' share might be a "quarter of an acre more or less," but the defendants-appellants considered this as speculative. The defendants-appellants repudiated the agreement on the ground that the plaintiff-respondent had induced them to enter into the agreement on a false representation of the shares in the partition action.

Held: (1) *That the representation by the plaintiff-respondent was merely an expression of opinion as to the probable extent of the*

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interest of the defendants-appellants and was understood as such by them, and that the agreement was binding on the parties.

(2) *That under Roman-Dutch Law where a party to a contract makes a representation to the other party that a certain set of facts exists and the latter contracts with the former on that basis, the contract can, if the representation turns out to be untrue, be repudiated at the instance of the latter even if the party who made it believed it to be true provided the representation was material. But a mere expression of opinion, or a statement which merely amounts to the judgment of a party, or which represents something probable or likely to happen will not avoid a contract.*

SENEVIRATNE *et al vs.* PERERA LIII. 86

CONTROL OF PRICES ACT No. 29 of 1950.

Control of Prices Act, No. 29 of 1950—Price Order made under section 4 (1)—Charge of contravening price order—Price order referred to in the charge, but notification in Gazette **of Minister's approval required by section 4 (7) of the Act not referred to in charge—Price order produced at trial, but not notification of Minister's approval—Does such omission entitle an accused person to an acquittal—Judicial notice—Evidence Ordinance Section 57.**

Held: *That for proving an offence under the Control of Prices Act No. 29 of* 1950 *for contravening a price order made under section* 4 (1) *of the Act, it is not obligatory on the prosecution to place before Court the fact (whether as a matter to be proved by evidence or to be taken judicial notice of) that the price order has duly received the Minister's approval, and, therefore, is not necessary to refer to it in the charge or produce the* Gazette *notification of its approval.*

Per WEERASOORIYA, J.—In the present case there was publication in the *Gazette* (as proved by the production of P4) of what purported to be an order under section 4 (1) of the Control of Prices Act No. 29 of 1950, and I see no reason why in the circumstances the Court should not take judicial notice of the order referred to in P4 as one which was duly made and signed under section 4 (1) of the Act. Alternatively, even if the Court were not disposed to take judicial notice of the order referred to in P 4, it seems to me that P 4 itself constitutes *prima facie* proof that such an order was duly made and signed, since under section 78 (3) of the Evidence Ordinance the original order (being, in my view, a public document issued by a department of Her Majesty's Government) may be proved by a copy or extract of it contained in the *Government Gazette.*

FOOD AND PRICE CONTROL INSPECTOR *vs.* PIYASENA ... ... LIII. 25

CO-OPERATIVE SOCIETIES

Co-operative Society—Contract—Agreement to sell paddy between President of Society and plaintiff-respondent—Contract contrary to the bye-laws of Society—Enforceability—"Principle of convenience"—When applicable—Unjustifiable enrichment.

The President of a Co-operative Society agreed to sell a certain quantity of paddy at a stated price to the plaintiff-respondent, provided the committee agreed to sell at that rate. The Committee without referring to any particular contract with any specified buyer resolved to sell the paddy at that price and to deliver it at its store, and to receive payment before delivery. The contract was entered into by the President on these terms only, but was not reduced to writing. It was evident that the contract imposed onerous obligations on the Society some of them to be fulfilled at a future undetermined date. Under the bye-laws of the Society the formation of such a contract was beyond the President's powers, and could be exercised only by the Committee which had no power to delegate this right to any person. The contract also infringed the bye-law, which required that a contract involving future obligations, if entered into by the Committee, should be reduced to writing, and the bye-law which required the approval of the Registrar of Co-operative Societies where credit facilities were granted.

The plaintiff-respondent made various payments and received instalment deliveries from time to time and at the time of the action there was due to the plaintiff-respondent a certain sum of money from the Society for which no deliveries had been made.

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In an action claiming damages from the Society—

Held: (1) *That the contract was unenforceable and invalid as it infringed the bye-laws of the Society.*

(2) *That the "principle of convenience", which entitles a third party to assume against a corporation that all matters of internal administration has been complied with is not applicable to this case. This principle only applies where the third party can point to an article (or bye-law) authorising the delegation of authority by the Directors (or persons vested with actual power) to someone who had purported to enter into the contract on behalf of the Corporation.*

(3) *That the plaintiff-respondent could not recover the money due to him on the basis of "unjustifiable enrichment" as this amount was embezzled by the officers of the Society who had no authority under the bye-laws to accept money on behalf of the Society under a contract by which this Society was not bound.*

PARAKRAMA SAMUDRA COLONY C.A.P.S. SOCIETY LTD. *vs.* WIMALASEKERA LI. 10

Co-operative Societies Ordinance No. 16 of 1936—Section 45—Dispute between Society and past officer—Amendment Act No. 21 of 1949 and (Special Provisions) Act No. 17 of 1952—Time at which dispute arises—Appeal—Can Appellate Court re-examine issues in the light of fresh legislation passed after order appealed from.

In June, 1948, a Co-operative Society referred a dispute that had arisen between itself and a former manager to the Registrar under section 45 of the Co-operative Societies Ordinance No. 16 of 1936. At the time this reference was made there was no provision to refer such a dispute and the Registrar refused to entertain it. Subsequently by the Co-operative Societies (Amendment) Act No. 21 of 1949 which became law on the 24th May, 1949, the section was amended to permit a dispute between the Society and a past officer to be referred to the Registrar and again on the 8th of February, 1950, the Society referred the same dispute to the Registrar who made an award against the respondent. The Society applied to the District Court to enforce the award but the learned District Judge refused to allow the application as the dispute had arisen before the amendment and as such the remedy by way of reference was not available to the Society. The Society appealed from the order of refusal.

In the interval between the District Court order and the argument in appeal, section 45 was again amended by the Co-operative Societies (Special Provisions) Act No. 17 of 1952 to include every dispute of any description contemplated by the 1949 amendment, notwithstanding that the dispute may have arisen prior to 24th May, 1949, and at the appeal it was argued that even if the order of the learned District Judge was right at the time it was made, in view of the later amendment, the Appeal Court could re-examine the issues in the light of the fresh legislation passed in the interval between the judgment of the original court and the hearing of the appeal.

Held: (1) *That the dispute had arisen prior to 24th May, 1949, and as such the amending Act No. 21 of 1949 did not apply to this dispute.*

(2) *That the Appeal Court was bound to decide an appeal according to the law existing at the time the action was begun unless the legislature had in clear and unambiguous terms given the amendment retrospective effect.*

Per GRATIAEN, J.—"A dispute arises between two persons when one of them has for the first time unequivocally repudiated a claim made upon him by the other."

NAVADUM KORALE CO-OPERATIVE STORES UNION LTD. *vs.* PREMARATNE LI. 39

Co-operative Society—Dispute between Society and Manager—Reference to arbitration—Appeal from award to Registrar Dismissal of appeal, later award held to be ultra vires—Second reference to arbitration—Validity—Section 37, Co-operative Societies Ordinance No. 34 of 1921.

A dispute having arisen between a Co-operative Society and its Manager over the value of goods entrusted to the appellant and not accounted for, the matter was referred to arbitration under Rule 29 made under Section 37 of the Co-operative Societies Ordinance No. 34 of 1921. On an award being made directing appellant to pay Rs. 737/40 to the Society the appellant appealed to the Registrar who dismissed the appeal but thereafter declared the award to

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be *ultra vires* on the ground that on the date of the award the appellant had ceased to be an employee of the Society.

On a second reference being made for arbitration an award was made directing the appellant to pay the Society Rs. 808/98. The Society then applied for a writ and the appellant objected on the ground (*a*) that the Assistant Registrar had no authority to refer the matter for arbitration for the second time and (*b*) that the first award was valid.

Held: (1) *That the first award was valid since on the date of the reference to arbitration the appellant had not ceased to be the Manager.*

(2) *That no authority except a court of law could declare an award to be* ultra vires *or invalid.*

UKKU BANDA *vs.* THE RAHATUNGODA CO-OPERATIVE STORES SOCIETY, LTD. ... ... LII. 72

Offence of criminal breach of trust—Under § 50B of the Co-operative Societies Ordinance is the same as the offence defined under § 388 of the Penal Code.

DISSANAYAKE *vs.* REGINA ... LIII. 27

CO-OWNERS

Legal effect of partition among Co-owners.

JAYATILLEKE AND ANOTHER *vs.* SIRIWARDENA AND OTHERS ... LI. 5

Rights to land co-owned—Co-owner building on common land—Opposition by another co-owner—Order for demolition in partition action—Can such order be made.

Where a co-owner put up buildings on the common land contrary to and in spite of the protests of another co-owner.

Held: *That an order for demolition of such building can properly be made in a partition action.*

Per NAGALINGAM, J.—"It is obvious that such a question as whether the co-owner who has put up the buildings without the consent of his co-owners should be permitted to retain it or not in appropriate circumstances cannot be as conveniently determined in a proceeding which has for its object the grant either of a prohibitory injunction or a mandatory order as in a partition action."

"I think it is settled law that where a co-owner puts up or becomes solely entitled to a building on the common land, he cannot compel any of his co-owners to take over such buildings and pay compensation to him for it."

AGNES PERERA *vs.* EDWARD PERERA *et al* ... ... LII. 95

Co-owners—Possessory action by one co-owner against another co-owner—Is it necessary to join all co-owners—Evidence necessary to prove possession.

Where a possessory decree was granted to a co-owner who was stated to have been in possession some time earlier of a defined portion of the common land, without evidence of physical possession by the plaintiff during recent years against a co-owner who interfered with its possession and without joining the other co-owners.

Held (1) *That the plaintiff is entitled to the decree in his favour.*

(2) *That the general rule that disputes between co-owners should be settled in action to which all the co-owners are parties is subject to the following exceptions:*

(*a*) *Where a person in good faith possesses the whole land under the impression that it is not subject to co-ownership.*

(*b*) *Where one co-owner has grown and possessed a plantation whether on the whole or part of a common land in the exercise of his due right as a co-owner and then seeks recognition of his* jus retentionis *of the plantation until such time as co-ownership is terminated by partition.*

(*c*) *Where a co-owner erects a house on the common land and seeks to be protected in his possession of it.*

(*d*) *Where a co-owner whose crops are improperly taken by another co-owner asks for a declaration of title to share of the land as incidental to his claim for damages for the unlawful removal of his crops.*

EMIS ALWIS *vs.* PIERIS APPUHAMY LIII. 104

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CORROBORATION

Charge of rape—Is corroboration of evidence of prosecutrix necessary.

REGINA *vs.* DHARMASENA AND ANOTHER ... ... LIII. 100

COSTS

Bill of—Proctor resident within four miles from Courts summoned as witness—Payment made to compensate for loss of professional income while attending Court—Is the amount of such payment recoverable as part of costs incurred by successful litigant.

Payment made to a Proctor, who was summoned as a witness and who resided within 4 miles of the precincts of the Court, to compensate him for the loss of his professional income while attending the Court in obedience to the summons, is not an expense which the unsuccessful party to a litigation can be compelled to meet.

EVELYN BEATRICE DE SILVA AND ANOTHER *vs.* MERVYN FERNANDO LII. 47

COURT OF CRIMINAL APPEAL DECISIONS

Circumstantial evidence—Conviction of murder—Absence of evidence to indicate mode of violence—Intention requisite for murder.

Where an accused was found guilty of murder on purely circumstantial evidence and there was no evidence to indicate the mode of violence employed from which it could be inferred that accused had the intention requisite to constitute the offence of murder.

Held: *That it was unsafe to allow the verdict of murder to stand.*

REGINA *vs.* DHARMADASA BANDARA LI. 42

Charge of murder—Defence of sudden and grave provocation—Accused giving evidence in support—Cross-examination suggesting facts mitigating offence not mentioned by accused in statement to Police—Application in presence of jury to call Police Officer in rebuttal—Argument in absence of jury—Application disallowed—Effect of questions on jury—Evidence—Ordinance, Section 25.

Penal Code, Section 294, first proviso to Exception I—Party on whom burden lies to prove matters contained in such proviso—Extent of such burden.

The appellant, who was charged with committing murder by inflicting on the deceased several stab wounds with a pointed knife gave evidence to the effect that the deceased insulted and humiliated him to such an extent that he completely lost his self-control and did not know what he did thereafter.

While cross-examining him the prosecuting counsel questioned him as follows:—

Q. Did you tell a single Police Officer that the deceased had insulted you in this way?

A. Yes, to Mr. Nathan. I told him that this girl had insulted me very badly at the well and also that she spat at me at the well.

Q. I am giving you a chance of thinking it over because Mr. Nathan can be called as a witness.

A. I told him.

At the end of the re-examination, prosecuting counsel, in the presence of the jury, moved to call Mr. Nathan to give evidence in rebuttal and in reply to a question by the learned trial Judge as to what part of the accused's evidence he proposed to rebut, stated that it was with regard to the statement that he told the Inspector that the deceased girl insulted him and spat at him when near the well.

At this stage the jury was asked to retire and after further argument the application to call this witness was disallowed. After trial the jury convicted the accused of murder and sentence of death was passed on him. On an appeal from the conviction and sentence it was contended on his behalf (*a*) that the cross-examination of the appellant on, what were in effect, the contents of a confessional statement to the Police, was contrary to section 25 of the Evidence Ordinance; (*b*) that the failure on the part of the learned trial Judge to direct the jury as to the party on whom lay the burden of proving the matters contained in the first proviso to Exception I to section 294 of the Penal Code and the extent of that burden amounted to a non-direction which vitiated the conviction.

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Held: (1) *That the above questions put to the accused in cross-examination coupled with what was said by the prosecuting counsel when he moved in the presence of the jury to lead evidence in rebuttal, amounted to a contravention of section* 25 *of the Evidence Ordinance.*

(2) *That as the accused had adduced evidence to avail himself of Exception* 1 *to section* 294 *of the Penal Code, the burden of proving positive averments which would justify the application of the first proviso to Exception 1 was on the Crown, and the extent of that burden was the same as and no higher than that rested on the accused who claimed the benefit of the Exception to which section* 105 *of the Evidence Ordinance applies.*

(3) *That the failure to give a direction on such burden of proof amounted to a misdirection.*

The Court set aside the conviction and sentence and upon a consideration of the entirety of the admissible evidence ordered a re-trial.

REG *vs.* E. W. BATCHO ... LII. 35

Court of Criminal Appeal—Criminal breach of trust—Accused cashier of Co-operative Society charged with the offence for misappropriating moneys—Order by Deputy Registrar of Co-operative Societies after audit directing accused to pay the amount—Section 50B Co-operative Societies Ordinance (Ch. 107) amended by Act No.21 of 1949—Accused's failure to pay—Is the offence of criminal breach of trust under the Co-operative Societies Ordinance different from that under the Penal Code?—Burden of proof—Deputy Registrar's right to delegate his powers under section 50B.

Held: (1) *That the offence of criminal breach of trust under section* 50*B of the Co-operative Societies Ordinance is the same as the offence defined under section* 388 *of the Penal Code.*

(2) *That section* 50*B of the Ordinance merely facilitates, in charges of criminal breach of trust against any officer of a Co-operative Society, proof of dishonest conversion, if he has failed to pay over or produce or duly account for monies admitted to be due by him.*

(3) *That the Court should acquit an accused in such a charge if the ingredients of the offence under section* 388 *of the Penal Code, are not established by the prosecution, and there is nothing to show that the burden of proof has been shifted to an accused person under section* 50*B.*

(4) *That the Registrar or the Deputy Registrar has power under section* 50 *B to authorize any person to receive the money due by the co-operative officer at a suitable time and place.*

DISSANAYAKE *vs.* REGINA ... LIII. 27

Criminal Procedure Code, sections 233, 160, 161, 286 (1) and 302 (1), meaning of the expression "All statements" in section 233—Separate trials for accused jointly indicted: section 184 Cr. P. Code—Inspection of scene of crime and experiments there at: section 238, Cr.P. Code—Admissibility of confession: section 134, Cr. P. Code and section 80, Evid. Ord.—Admissibility of deposition before Magistrate: section 9, Evid. Ord. Court of Criminal Appeal.

The expression "all statements" in section 233 of the Criminal Procedure Code means all statements of an accused, other than his evidence recorded under section 161.

Where accused persons are jointly indicted, whether separate trials should be ordered or not is governed by section 184, Criminal Procedure Code, and is at the discretion of the trial Judge.

Generally speaking, the conducting of experiments at an inspection of the scene of the offence should be avoided unless it is necessary to do so in the interests of justice Where a view of the scene has been followed by the evidence of the witness who gave the demonstration, there can be no valid objection to the procedure adopted, even though one of the accused did not in person accompany the Judge and jury.

A deposition before a Magistrate cannot be admitted in evidence under section 9, Evidence Ordinance, apart from its truth or falsity.

REGINA *vs.* PERERA AND ANOTHER LIII. 33

Penal Code (Cap.15), sections 303 and 305—Causing death of woman with child by doing an act with intent to cause miscarriage—Section 81—General exception—Evidence Ordinance (Cap.11) section 15—Evidence of similar occurrences—Misdirection—Benefit of reasonable doubt.

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The accused, a registered medical practitioner, was convicted of an offence under section 305, Penal Code, viz., causing the death of a woman with child by doing an act with intent to cause miscarriage. It was argued in appeal:—

(1) That the words "cause the miscarriage" in section 305 should be read in the light of the definition of the offence in section 303.

Held: *Section* 305 *is not controlled by section* 303, *and it is not necessary under the former for the prosecution to prove that the miscarriage was not caused in good faith for the purpose of saving the life of the woman.*

(2) That, because of the general exception in section 81 Penal Code, the accused had committed no offence.

Held: *Section* 81 *did not apply, because there was no evidence to show that the accused consented to suffer or take the risk of the harm which was actually caused to her.*

(3) That inadmissible evidence of similar occurrences in which the accused had performed abortions had been led.

Held: *That the evidence was admissible under section* 15 *Evidence Ordinance as it was relevant to the issue whether the accused had done the act with the* intention *of causing miscarriage.*

(4) That there was no direction by the Commissioner that the appellant should be given the benefit of any reasonable doubt caused by the evidence.

Held: *That there was in fact such a direction. That it is only necessary to clearly direct the jury as to the burden and standard of proof; the use of a particular formula is unnecessary.*

REGINA *vs.* WAIDYASEKERA LIII. 71

Murder—Misdirection to jury about the defences of accused—Evidence of confession —Court of Criminal Appeal Ordinance 23 of 1938—Sections 4, 5 (1), 8 (1) and 16—Form XXXIII, rule 24 (a)—Notices of appeal and grounds of appeal.

To a charge of murder, the 1st and 3rd accused pleaded an *alibi*, the 2nd accused the right of private defence incidentally confirming the plea of the 1st and 3rd accused. In summing up, the Commissioner, while stating that if the 2nd accused was believed the 1st and 3rd accused had to be acquitted, did not state that even if the evidence of the 2nd accused created a reasonable doubt as to the presence of the 1st and 3rd accused, they were yet entitled to acquittal.

Held: *This was a misdirection entitling* 1*st and* 3*rd accused to acquittal.*

Further, at the hearing of the appeal grounds of appeal other than those set out in Form XXXIII of the rules made under the Ordinance were urged.

Held by a majority: *When grounds of appeal are urged for the first time at the hearing section* 5 (1) *does not compel a Court to set aside a verdict on those grounds, even though they may be valid. An "appeal" referred to in section* 5 (1) *is one that conforms to the Ordinance in regard to notices. The grounds of an appeal or application are an integral part of a proper notice under section* 8 (1) *and must be set out.*

Per PULLE, J.—"Unfortunately it is still being assumed, especially in capital cases, that as a matter of course fresh grounds of appeal would be entertained after the expiration of the time limit laid down in section 8 (1). This Court will in future show no indulgence and strictly limit argument only to matters of law raised within the prescribed limit of 14 days."

REGINA *vs.* PINTHERIS AND OTHERS LIII. 90

Charge of rape—Is corroboration of evidence of the prosecutrix necessary?

Where an accused was charged with the offence of rape and the prosecution was not corroborated by independent evidence.

Held: *That our Penal Code does not require that the evidence of the prosecutrix in a charge of rape should be corroborated. Except where corroboration is expressly required by statute our rule of evidence is that no particular number of witnesses shall in any case be required for the proof of any fact.*

Per BASNAYAKE, C.J.—"For the guidance of counsel we should like to add that where in a summing up the Judge makes an erroneous statement as to the evidence he should be invited to correct it immediately."

REGINA *vs.* DHARMASENA AND ANOTHER ... ... LIII. 100

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COURT OF CRIMINAL APPEAL ORDINANCE

Section 5 (1)—Construction of

REGINA *vs.* PINTHERIS AND OTHERS LIII. 90

COURT OF REQUESTS

Absence of defendant on summons returnable day—Ex-parte trial fixed—Application to file answer—Explanation that absence due to forgetfulness—Validity of excuse—Civil Procedure Code section 823 (3).

Held: *That forgetfulness on the part of a defendant to appear in Court on a date fixed for his appearance does not amount to an excuse within the meaning of section* 823 (3) *of the Civil Procedure Code.*

PAUL *vs.* SELVARAJAH ... LII. 13

Right of footpath—Plaintiff absent on trial date—Action dismissed—Motion to file fresh action allowed on terms—Defendant's right to appeal—Section 78 of Courts Ordinance and section 823 (6) of Civil Procedure Code.

Where plaintiff filed action in the Court of Requests for a declaration that defendant was not entitled to a right of footpath over plaintiff's land and at the trial the plaintiff being absent the action was dismissed, and the plaintiff thereafter moved for permission to institute fresh action, and the Court allowed it on terms and the defendant appealed from that order:

Held: *That the order appealed from is not an order having the effect of a 'Final Judgment" and therefore no appeal lay.*

MOLODDUWA VILLAGE COMMITTEE *vs.* G. H. BABIYAR APPU ... LII. 112

COURTS ORDINANCE

Section 17—Proctor—Issue of false Certificate.

The respondent, a Proctor of the Supreme Court issued five certificates on five separate occasions to five persons under regulations made under the Immigrants and Emigrants Act No. 20 of 1948. These certificates were later admitted to be false to the knowledge of the respondent.

Held: *That the respondent had brought himself with the purview of section* 17 *of the Courts Ordinance and should be suspended from the office of a Proctor for three years.*

IN *re* A PROCTOR ... ...LI. 75

Section 79—Scope of proviso.

AMARASEKERA *vs.* ABEYGUNAWARDENA ... ... LII. 1

CRIMINAL LAW

Criminal Law—Statutory offence—mens Rea—Accused charged with offence of selling bread in excess of control price in breach of Price Order under Control of Prices Act No. 29 of 1950—Sale above prescribed price absolutely prohibited by the Order—Evidence of honest belief by accused that sale did not violate the Order—Mistake of fact—Is it a defence to the charge?—Section 72, Penal Code—Applicability of—Can a subsequent Collective Bench overrule a wrong decision of a previous Collective Bench?—Section 51, Courts Ordinance.

Held: *That where a person is charged with the offence of selling bread in excess of the price prescribed by a Price Order, which prohibited absolutely such sale, he is entitled to an acquittal, if he can prove on a balance of probability that by reason of a mistake of fact, and not by reason of a mistake of law, he had in good faith believed himself to be doing something which was not prohibited by law.*

(2) *That the defence available under section* 72 *of the Penal Code is applicable not only to offences punishable under the Penal Code but also to offences punishable under all other criminal statutes enacted in Ceylon, even if the definition of the offence does not contain a particular state of mind or knowledge as one of its elements.*

PERERA *vs.* MUNAWEERA ... LII. 39

CRIMINAL PROCEDURE

Magistrate's power to try summarily offences involving non-summary proceedings.

DAVID APPUHAMY AND OTHERS *vs.* INSPECTOR OF POLICE WELIGAMA LI. 15

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Several charges—Accused charged with criminal misappropriation and three counts of making false entries—Acquittal on criminal misappropriation — Irregularity of the conviction on others.

REGINA *vs.* SIEDLE ANDREW REGINALD JACOBS ... ... LI. 64

Trial Judges' power to quash indictment before evidence led—Erroneous decision that there was a prima facie **case for accused to meet—Does it vitiate a conviction—Proper course to adopt when accused persons desire to call co-accused for defence—Criminal Procedure Code, section 234 (1).**

Held: (1) *That a presiding Judge has no power to quash an indictment merely because he anticipates that the evidence would not support the charge.*

(3) *That an erroneous decision that there was a* prima facie *case for the defence to meet could never constitute an illegality which vitiates a trial.*

(3) *That if an accused person intends to call for his defence a person jointly indicted with him, the proper procedure to adopt is to invite the Judge to order separate trials.*

NAMASIVAYAM *vs.* THE QUEEN LI. 111

Charge under section 457 of Penal Code —Magistrate assuming jurisdiction under section 152 (3) of Criminal Procedure Code—Appeal from conviction—Crown not supporting conviction—Application to remit case for non-summary proceedings—When it should not be granted.

Where on a charge under section 457 of the Penal Code, the Magistrate assumed jurisdiction under section 152 (3) of the Criminal Procedure Code, and after summary trial convicted the accused and on appeal the Crown did not support the conviction on the merits, but urged that a charge of so grave an offence should not have been tried summarily.

Held: *That as both parties had acquiesced in the procedure adopted by the Magistrate in the exercise of his discretion, the gravity of the offence is by itself not a sufficient ground for making an order in the exercise of the powers of revision vested in the Supreme Court, to remit the case for non-summary investigation.*

H. G. THEDIAS INSPECTOR OF POLICE *vs.* S. SIRISENA PERERA ... LII. 93

CRIMINAL PROCEDURE CODE

Sections 297, 407—Proviso to section 297—Appellant charged with offence of retaining stolen property—Evidence led at trial insufficient to support conviction—Evidence recorded in appellant's absence under section 407 read over at trial for cross-examination—Can such evidence be used to support charge.

Held: *That where evidence is recorded under section* 407 *of the Criminal Procedure Code, such evidence cannot be used under the proviso to section* 297 *of the same Code to support a charge when the evidence led at the trial is found insufficient to establish it. The proviso applies to evidence that has already been recorded at an earlier stage of the same inquiry or trial.*

Per GUNASEKARA, J.—"The main part of the section lays down the rule that evidence must be taken in the presence of the accused or his pleader except in those cases in which the law has expressly provided for evidence to be taken in their absence. The proviso relates to one class of these exceptions, namely, where an inquiry or trial, as the case may be, has been proceeded with in the absence of an accused whose attendance has not been dispensed with and who is therefore absent in breach of an obligation to be present. What is enacted in the proviso is a procedure for giving the accused an opportunity of dealing with evidence that has been made a part of the case against him in his absence. I do not agree with the view contended for by the learned Crown Counsel that it is a procedure which enables the prosecution to put in at an inquiry or trial evidence that was taken in the accused's absence before the commencement of that inquiry or trial."

JAMALDEEN *vs.* DE SILVA S. I. POLICE LI. 94

Section 234 (1)—An erroneous decision that there was a prima facie **case for the defence to meet does not constitute an illegality which vitiates the trial.**

NAMASIVAYAM *vs.* THE QUEEN LI. 111

Section 32—Arrest without warrant—Failure of police officer arresting to inform person arrested the reason for arrest—Legality of arrest.

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Held: *That a police officer acts illegally in Ceylon (as in England) if he arrests a man without a warrant on a mere "unexpressed suspicion" that a particular cognizable offence has been committed, unless of course "the circumstances are such that the man must know the general nature of the offence for which he is detained," or unless the man "himself produces the situation which makes it practically impossible to inform him."*

Per GRATIAEN, J.—"Police officers must also realise that before they arrest without a warrant, *'they must be persuaded of the guilt of the accused.* They cannot bolster up their assurance or the strength of the case by seeking further evidence and detaining the man meanwhile, or taking him to some spot where they can or may find further evidence'—*per* Lord Porter in *John Lewis & Co., Ltd. vs. Tims* (1952) A. CW 676 at 691."

COREA AND TWO OTHERS *vs.* THE QUEEN ... ... LII. 17

Accused charged under first plaint even though an amended plaint had been filed—Effect of.

THE ATTORNEY GENERAL *vs.* ALWISAPPU ... ... LII. 31

Section 148—Proceedings instituted by Range Forest Officer under Land Development Ordinance—Is he empowered to do so.

THE ATTORNEY GENERAL *vs.* ALWISAPPU ... ... LII. 31

Sections 156, 159, 160, 161, 162 (1), 163, 389, 391, 392 (2)—Non-summary proceedings against accused persons—Magistrate discharging them under section 162 (1)—Directions by the Attorney-General under section 389 to Magistrate to read out to accused certain amended charges under section 159 and to commit them for trial—Amended charges different from those originally under inquiry—Failure to direct that charges should be read out under section 156 and that fresh proceedings should be taken from that stage—Compliance with directions of Attorney-General and committal of accused for trial in Supreme Court.

Preliminary objection to indictment that Attorney-General's directions ultra **vires—Scope of sections 163, 389, 390 (2) and 391 of the Code—Should indictment be quashed.**

Where a Magistrate committed three prisoners (whom with two others he had discharged earlier under section 162 (1) of the Code after due inquiry into charges relating to the same incident) for trial in the Supreme Court in obedience to the Attorney-General's instructions under section 389 of the Code for offences which were different from those investigated earlier and which instructions were to the effect that the Magistrate (A) should read out to the prisoners under section 159 of the Code certain amended charges alleging—

(*a*) That they together with one T. "and another person unknown to the prosecution" had in truth been members of an alleged unlawful assembly.

(*b*) That the murder of one S. had been committed by the 1st prisoner and this unknown person.

(B) should commit the persons for trial on these amended charges.

And where a preliminary objection was raised at the trial to the effect that the prisoners were not properly committed for trial and that the indictment should be quashed.

Held: (1) *That the directions issued to the Magistrate by the Attorney-General were* ultra vires *as he had no power under section* 389 *of the Code to direct a committal of the prisoners except on the basis of the charges which had been read out to them under section* 156 *of the Code.*

(2) *That the power of a Magistrate to commit under section* 163 *of the Code is determined by the scope of the particular charges which formed the subject-matter of the Magisterial inquiry; the only exception recognised by the Code is in respect of offences of which a man may lawfully be convicted upon a trial of the charges actually inquired into.*

(3) *That the Attorney-General can only direct a Magistrate to enter an order of committal on charges in respect of which the Magistrate himself was previously vested with power to commit.*

(4) *That if the Attorney-General takes the view that the accused person ought to be committed for an offence other than that for which he had been specifically charged (or other than an offence for which he might lawfully have been convicted if*

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properly committed), he is authorised to instruct the Magistrate under section 390 (2) *to reopen the proceedings by formulating an amended charge and thereafter to take all steps prescribed by Chapter* 16.

(5) *That where such directions have been given under section* 390 (2), *it is for the Magistrate alone to decide in the first instance whether or not a commital on the amended charge should be justified.*

(6) *That the residual powers of the Attorney-General under section* 391 *only come into operation at a later stage, that is, if he considers that the Magistrate has wrongly exercised his discretion in favour of the accused.*

THE QUEEN *vs.* THIAGARAJAH AND OTHERS ... ... LII. 56

Section 335—Does not apply to an appeal under section 798 of the Civil Procedure Code.

DON ABILIAN *vs.* DON DAVITH SINGHO AND ANOTHER ... ... LII. 86

Section 152 (3)—Magistrate assuming jurisdiction—Serious nature of the offence—Facts not simple—Undesirability of a summary trial.

Where one of the charges against an accused was forgery of a cheque for Rs. 10,000/- and the trial took at least four whole days, the Magistrate having assumed jurisdiction under section 152 (3) of the Criminal Procedure Code on the ground that the facts were simple.

Held: *That in view of the serious nature of the offence the Magistrate should not have assumed jurisdiction to try summarily.*

HETTIARATCHI *vs.* PERERA ... LIII. 32

Section 233—"All statements" means all statements of an accused other than his evidence recorded under § 161.

REGINA *vs.* PERERA AND ANOTHER LIII. 33

Section 184—Where accused persons are jointly indicted, whether separate trials should be ordered or not is governed by § 184, and is at the discretion of the trial judge.

REGINA *vs.* PERERA AND ANOTHER LIII. 33

Section 238—Inspection of scene of crime and experiments thereat.

REGINA *vs.* PERERA AND ANOTHER LIII. 33

Section 325 (2)—Applicability of section to grave offences.

ATTORNEY-GENERAL *vs.* DE SILVA LIII. 49

Section 66 (1)—Order to produce a document or thing—When can a Court make such order.

Held: *That before an order under section* 66 *of the Criminal Procedure Code is made, the evidence on which the Magistrate forms the opinion that it is necessary or desirable that a particular document or thing should be produced before the Court, should be on the record.*

JAYAKODY *vs.* DON KARTHELIS LIII. 58

Section 253 B (3)—Order for Crown costs and compensation—Failure to record and consider complainants's objections—Legality.

Held: *That where a Magistrate acts under section* 253 *B of the Criminal Procedure Code, he must give the complainant an opportunity of showing cause against the making of the order and record his reasons. The failure to do so is an illegality.*

FERNANDO *vs.* SIMON ... LIII. 59

Section 440 (1)—When it should be used.

Held: (1) *That the summary power conferred by section* 440 (1) *of the Criminal Procedure Code 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.*

(2) *That it was never intended that in the course of a criminal trial, a Judge should, in the exercise of the power under this section, set on foot a subsidiary criminal investigation not against the person charged, but against the witnesses in the case.*

(3) *That if such an investigation is necessary, it can and should be set on foot under section* 440 (4) *of the Code.*

SUBRAMANIAM *vs.* THE QUEEN LIII. 61

Sections 325 and 326—Accused convicted under the Brothels Ordinance, section 2—Keeping or managing a brothel—Binding over

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order—Condition that accused take up permanent residence outside the usual place of residence—Legality.

Held: *That a Magistrate has no power in making an order under sections* 325 *or* 326 *of the Criminal Procedure Code to impose a condition expelling a citizen from any part of the country for however short a time.*

BABY NONA *vs.* WARNASURIYA (I.P.) ... ... LIII. 64

Sections 190, 195—Absence of prosecution witness—Discharge of accused—Is it an acquittal?—Effect of withdrawing a case.

When a prosecution witness is absent on trial date and the accused is discharged, such discharge constitutes an acquittal under section 190 of the Criminal Procedure Code and a plea of *autrefois acquit* may be raised where proceedings are again instituted on the same charge.

Permitting a complainant to withdraw a case under section 195 of the Criminal Procedure Code must also be regarded as an acquittal.

K. EDWIN SINGHO *vs.* P. S. NANAYAKKARA OF NORWOOD POLICE ... LIII. 95

Sections 169 and 178 charge—Duplicity—Want of particulars—Motor Traffic Act No. 14 of 1951—Sections 153 (2) and 219 (1)—Illegality.

Where a person is charged on two counts each containing more than one alternative charge and the charges failed to set out particulars of each offence.

Held: (1) *That the charges so framed in the alternative involving many different offences were bad on account of duplicity.*

(2) *That a charge should furnish particulars of the offence alleged to have been committed.*

EDWIN SINGHO *vs.* SUB-INSPECTOR OF POLICE, KADAWATA ... LIII. 109

Sections 178, 179, 180 Joinder of charges—Four charges—Same offence against several persons—Two transactions.

Where an accused was charged on four counts of causing hurt to three persons on one day and one person on another day.

Held: *That section* 178 *of the Criminal Procedure Code enables sections* 179 *and* 180 *to be applied in combination and therefore two transactions involving several offences of the same kind can be tried together.*

STIVEN *vs.* PERERA SUB-INSPECTOR OF POLICE ... ... LIII. 112

CROWN

Contract between plaintiff and Village Committee—Contract signed before officer employed by Assistant Local Government Commissioner—Breach of contract—Is Crown liable.

APPUHAMY *vs.* THE ATTORNEY-GENERAL ... ... LII. 11

CUSTOMS ORDINANCE

Section 40—Carrier's failure to observe requirements of section—Has no bearing on the question of his civil liability for non-delivery of goods.

ALIBHOY *vs.* CEYLON WHARFAGE CO. LTD. ... ... LI. 65

Sections 146 and 147—Seizure of motor launch—Need security for restoration of vessel be given if owner does not want it to be handed over to him pending action—Security for costs of action—Sufficiency and nature of such security.

Held: (1) *That where an action is brought to reclaim property seized under the Customs Ordinance, it is not necessary to give security for the restoration of the seized property under section* 146 *where the claimant does not require the property seized to be restored to him pending the decision of the action.*

(2) *That under the same section security for costs of the action should be tendered, but this need not necessarily be in cash. Once the plaint has been accepted by Court the burden is on the Crown to prove the inadequacy of the security tendered by leading evidence.*

RAYAPPU SINGARAYER *vs.* ATTORNEY GENERAL ... ... LI. 105

DAMAGES

Sentimental damages are not recoverable in actions based on negligence.

CHISSELL *vs.* CHAPMAN ... LI. 49

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DEBTOR AND CREDITOR

Purpose for which payment made not specified—How is creditor to appropriate the money.

FERNANDO *vs.* FERNANDO ... LI. 13

DECREE

Power of Supreme Court in appeal to grant possessory decree where the original action was for declaration of title and ejectment and the plaintiff failed to establish his title but led sufficient evidence to prove that he was entitled to a possessory decree.

EKANAYAKE *vs.* GUNAWARDENA *et al* LI. 70

Execution decree—Judgment in November, 1939 directing defendant to pay plaintiff a specified amount—Order by Court on 7th February, 1944, for payment on monthly instalments—Application by plaintiff to issue writ on 17th July, 1953, for default—Plea of prescription—Section 337 (1) (b) Civil Procedure Code—Meaning of "subsequent order."

On 27th November, 1939, judgment was entered for plaintiff directing defendant to pay a specified amount. On 7th February, 1944, the Court varied the decree by allowing defendant to pay the decreed amount by monthly instalments subject to issue of writ on default. The plaintiff applied for execution of writ on 17th July, 1953. The defendant pleaded prescription on the ground that ten years had elapsed from the date of the decree in November, 1939.

Held: *That the plea of prescription must be upheld as the order on 7th February, 1944, was not a subsequent order directing the payment of money at a specified date within the meaning of section* 337 (1) (*b*) *of the Civil Procedure Code. At most it was a concession granted to the defendant as to the manner of settling the decreed amount.*

PIYARATNE THERO *vs.* RAHIM ... LI. 88

DEED

Donation subject to condition conferring benefit on plaintiff third party—Subsequent sale of property by donor and donee to defendant absolutely—Both deeds registered —Which deed prevails.

KODIKARA *vs.* FERNANDO ... LI. 1

Deed—Sale of minor's property by mother (curatrix) with Court approval—On attaining majority, action to have deed declared null and void ab initio**—Failure of consideration —Fraud and collusion.**

Where a plaintiff sought to have a deed of sale executed by his mother with the approval of Court during his minority, declared null and void *ab initio* on the grounds:—

(1) that the stipulated consideration had not in fact been paid and;

(2) that the conveyance was executed fraudulently and collusively by his mother acting in concert with one of her judgment creditors. There was no allegation of fraud against the defendant.

Held: (1) *that the issue of fraud did not properly arise out of the pleadings.*

(2) *that if the true position was that the defendant had not paid the stipulated consideration, the proper remedy was to sue him for its recovery and not to have the deed declared null and void.*

SABARATNAM *vs.* KANDIAH ... LII. 80

Deed—Interpretation of.

The plaintiff-appellant to the 1st defendant conveyed "boutique room No. 5 with the undivided soil covered thereby out of the five boutique rooms bearing Nos. 1, 2, 3, 4 and 5 built abutting the high road," on a land within given boundaries. There was another boutique bearing No. 6 behind boutique No. 5 which appellant claimed in this action. The defendants contended that it was a part of boutique No. 5. This contention was upheld by District Judge on the ground that the reference to all the boutique rooms with the boundaries of the whole land and the transfer of an undivided share of the soil "indicated that the bare land and buildings behind were considered as part and parcel of all the rooms."

Held: (1) *That the interpretation given by the learned District Judge was wrong, as according to the plain meaning of the words*

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used the transfer was of the boutique room No. 5 with the soil covered thereby.

(2) *That in construing the terms of a deed the question is not what the parties may have intended, but what is the meaning of the words they have used.*

FERNANDO *vs.* JOSSIE AND ANOTHER ... ... LIII. 111

DELICT

See under **NEGLIGENCE**

DOCTOR

Medical officer of Company—certifying person as unfit—Person refused employment by Company—Doctor's liability in damages.

CHISSELL *vs.* CHAPMAN ... LI. 49

DONATION

Donation subject to condition conferring benefit on plaintiff third party—Subsequent sale of property by donor and donee to defendant absolutely—Both deeds registered —Acceptance by plaintiff of benefit—Enforceability of.

KODIKARA *vs.* FERNANDO ... LI. 1

Gift of property by father to son on the occasion of marriage—Declaration by Court property liable to collation—Property not transferred to administrator, but possessed and mortgaged by donee—Property sold under mortgage decree and conveyed by Deputy Fiscal to respondent, the purchaser —Action by respondent against appellant, administrator of donor's estate, for declaration of title and possession of property.

Collation—Effect of section 35 Matrimonial and Inheritance Ordinance (Chap. 47)— Registration of Court's declaration by appellant after Deputy Fiscal's conveyance— Is it an instrument affecting land?—Registration of Documents Ordinance section 78.

By a deed of gift P. donated a property to his son S. In testamentary proceedings, in which S. opposed grant of letters of administration to P.'s widow, the Court decided in February, 1941, that the property gifted by P. was on the occasion of the marriage of S. and should be brought into collation, if S. desired to inherit as an heir. The Court did not draw up a formal order and S. did not execute a formal transfer to the administrator, P.'s widow. S.continued to possess the property and mortgaged it in 1942, 1944 and in 1948. The mortgage bond of 1948 was put in suit and the property was sold under a Court order and transferred by the Deputy Fiscal to the respondent, the purchaser in February, 1950. In May, 1950, the appellant who had become administrator of P.'s estate in succession to the widow, procured the registration of the decree of February, 1941. In August, 1950, the respondent instituted an action against the appellant alleging that he had forcibly entered into possession of the property three months previously and asked for declaration of title to the property and for possession.

The District Court dismissed the action on the ground that no title passed from S. to the respondent on the conveyance of the Deputy Fiscal and the appellant was in lawful possession. The Supreme Court set aside the judgment of the District Court holding that the respondent was entitled to the property and ordered the ejection of the appellant.

It was argued on appeal before the Board that the effect of section 35 of the Matrimonial Rights and Inheritance Ordinance in respect of rights arising from collation was to impose on the donee who wished to inherit the estate of the deceased parent a positive obligation to bring into the estate the property, the subject of the gift, so as to form part thereof, that there was no option to surrender the value of the property instead of the property itself; and that the order of February, 1941, was in effect a declaration of title in favour of the administrator of P.'s estate.

Held: (1) *That the section did not deprive a donee of property subject to collation the option of renouncing all claim to share in his father's estate or of bringing the property into collation. If he chose the latter alternative, he had the further option of bringing in either the property itself or the value thereof.*

(2) *That it was not possible to construe the order of the Court in February, 1941, in the form it was made, as depriving S. either of his right to retain his gift and renounce his share in the inheritance or, if he desired to participate, of his option to bring in the value of the gift instead of the property.*

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(3) *That S. retained the legal estate in the property and had the right to sell or mortgage the property and that the respondent obtained title to the property on the conveyance by the Deputy Fiscal.*

(4) *That the order of the Court in February,* 1941 *cannot be regarded as an instrument affecting land within section* 8 *of the Registration of Documents Ordinance and that the registration of the Court's order in* 1950 *was ineffective to defeat the title of the respondent.*

MURUGIAH *vs.* JAINUDEEN ... LI. 90

Donation—Gift of property subject to life-interest of donor and to fidei Commissum **in favour of donee's children—Acceptance of gift by donee's aunt—Not authorised by donee to accept gift—Property dealt with by donee as absolute owner during donor's life-time and after death—No evidence of acceptance by donee either before or after donor's death—Validity of donation—Onus of Proof of acceptance.**

By a deed of gift a Muslim lady donated property to her grandson M.U. reserving to herself a life-interest and subject to a *fidei-commissum* in favour of the donee's children. There was evidence to show that the donee had leased the property during the life-time of the donor and had mortgaged it after her death and that in 1907 after donor's death, the donee asserting absolute title had sold the property to a person from whom it ultimately passed to the appellant's father.

Although the donee was of age, the deed of gift was accepted by his aunt. There was no proof that the donee had authorized his aunt to accept this gift or that he was aware of the donor's intention to make it. There was also no evidence that the donee had accepted the gift either during the life-time of the donor or after her death.

The plaintiff claimed the property as a *fidei commissary* under the deed of gift.

Held: (1) *That the gift was inoperative as there is no evidence of acceptance of the gift by the donee either during the life-time of the donor or after her death.*

(2) *That the burden was on the plaintiff to prove a valid acceptance of the gift and not on the defendant to disprove it.*

Per GRATIAEN, J.—"When A conveys his property to B. reserving a life-interest to himself, the title to the property passes immediately to B and the enjoyment of only one of the rights incidental to full ownership is postponed. I doubt if it can fairly be said that in such a situation there has been a postponement of the "fulfilment" of the donation. The law would therefore seem to require "a present acceptance of the dominium which the deed confers subject to the life-interest."

CAFFOOR AND OTHERS *vs.* HAMZA AND OTHERS ... ... LIII. 78

EJECTMENT

Action for ejectment of and damages against tenant and persons occupying premises under his authority—Allegation in plaint that tenant allowed other persons to remain on premises—Liability of such persons for damages.

Plaintiff brought this action for ejectment and damages for wrongful occupation against 1st Defendant, his tenant, and 2nd to the 5th Defendants, who were alleged to be in wrongful occupation with 1st Defendant's permission.

Held: *That the order of the trial judge for ejectment against the Defendants should be upheld: but that the order for damages against the* 2*nd to the* 5*th Defendants should be set aside, inasmuch as it was alleged that only the* 1*st Defendant was the wrongdoer, and damages could only be recovered from* 1*st Defendant for his personal default.*

BASTIAMPILLAI *vs.* KASIPILLAI ... LII. 111

ESTOPPEL

Admission by party in pleadings—Does it amount to an Estoppel.

REV. MORAGOLLE SUMANGALA *vs.* REV. KIRIBAMUNE PIYADASSI ... LII. 4

Estoppel—Sale under Partition Ordinance—Mortgage of undivided share bidding at sale—Subsequent action to enforce mortgage by sale of land—Does it amount to an estoppel.

SALISHAMY *vs.* SALISHAMY *et al* LIII. 65

EVIDENCE

Claim against dead man's estate—Corroboration by independent evidence—Court must approach such a case "with great jealousy."

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Question of fact—When appeal Court will interfere.

Where a claim is made against the estate of a deceased person the evidence of the claimant need not always be corroborated by independent evidence, but the Court must approach such a case with great jealousy. If the evidence given by the living person is convincing to the tribunal then it could be acted upon.

It is the duty of the Appeal Court to interfere with the judgment of a lower Court on a question of fact where the Judge (*a*) failed to remind himself of the special vigilance which ought to be exercised whenever a Court of law adjudicates upon belated claims against a dead man's estate.

(*b*) paid insufficient attention to certain inherent improbabilities in the evidence of the claimant.

(*c*) treated certain items of evidence as corroboration which were in truth corroborative only of matters which were not in controversy.

MUTHTHAL ACHY AND FIVE OTHERS *vs.* MURUGAPPA CHETTIAR ... LI. 97

EVIDENCE ORDINANCE

Section 9—Deposition before Magistrate —Cannot be admitted in evidence under § 9 apart from its truth or falsity.

REGINA *vs.* PERERA AND ANOTHER LIII. .33

Section 57—Judicial notice of Price Control Order.

FOOD AND PRICE CONTROL INSPECTOR *vs.* PIYASENA ... ... LIII. 25

Section 115—Mortgagee bidding at sale under Partition Ordinance—Subsequent action to enforce mortgage by sale of land—Does it amount to an estoppel?

Where under a Partition decree a land is sold and a mortgagee of an undivided share of the same land bids at the sale, he is by that act alone not estopped from bringing an action to enforce his mortgage by the sale of the land. The mere act of bidding does not in any way operate as an inducement to the purchaser to buy the land or represent to him that it was free from any encumbrance. A mortgage is not a right or interest in the land that would be violated by the sale and hence section 115 of the Evidence Ordinance is not applicable in this instance.

SALISHAMY *vs.* SALISHAMY *et al* LIII. 65

Section 15—Admissibility of evidence of similar occurrences.

REGINA *vs.* WAIDYASEKERA LIII. 71

EXCESS PROFITS DUTY ORDINANCE

Income Tax—Excess profit—Appellant and another partner in business—Notice of assessment served on Appellant's partner—Adequacy of notice—Income Tax Ordinance sections 80 (1) 68 (1)—Excess Profits Duty Ordinance.

Under the Excess Profits Duty Ordinance it is sufficient if assessment of excess profits for a particular year is made within the period prescribed by the Ordinance. Notice of such assessment can be served on the assessee either before or after the prescribed date.

A notice of assessment served on one of two partners with the words "For the information of A.L. Abdul Hamid Marikar (the other partner)" is a sufficient notice under the Ordinance to both partners and even if the notice was lacking in form, it was in substance and effect a notice that the assessee was required to pay the assessed amount and the defect was cured by section 68 (1) of the Income Tax Ordinance.

HAMID MARIKAR *vs.* COMMISSIONER OF INCOME TAX ... ... LII. 28

EXCISE ORDINANCE

Section 44—Possession of unlawfully manufactured liquor—Analyst's report that liquor seized not liquor manufactured under license issued by Commissioner—Is the report sufficient to prove charge.

In a prosecution under Section 44 of the Excise Ordinance for possessing without lawful authority unlawfully manufactured liquor, the report of the Government analyst was led in evidence to prove the charge. The Analyst's report expressly stated that the liquor seized was not a liquor manufactured under a license issued by the Excise Commissioner.

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Held: *That though the Analyst was not called as a witness, his report was sufficient evidence to bring the liquor seized within the category of an unlawfully manufactured liquor.*

Per SANSONI, J.—"If the defence intended to raise an objection to the contents of the report on the ground that certain findings made by the Government Analyst should be disregarded for any particular reason, the Government Analyst should have been summoned and cross-examined on his means of knowledge, or the sources of his information."

GUNAWARDENA *vs.* FERNANDO LIII. 12

EXECUTION

Sale in execution—Fiscal's receipt for purchase price—No Conveyance—In whom is the title.

BABY SINGHO *et al vs.* PERERA *et al* LII. 92

EXECUTORS AND ADMINISTRATORS

Administration—Sale by heir of his undivided share in intestate property to defendant—Decree obtained by plaintiff against the estate of the deceased—Right of plaintiff to seize and sell property sold to the defendant.

A creditor has the right to follow the intestate property of deceased, which has been alienated by his heirs, even when there are other assets of the estate to satisfy the creditor.

A purchaser of the intestate property cannot plead in defence that he bought the property from the heir for valuable consideration without notice. But it would be a good defence to such an action if the purchaser can prove that this purchase money had been expended for purposes of administration.

MANKU *vs.* ANTHONY ... LII. 62

FISCAL

Fiscal granting receipt for purchase price at Sale in Execution—No Conveyance—In whom is the title.

BABY SINGHO *et al vs.* PERERA *et al* LII. 92

FORESTS

Forests Ordinance (Cap. 311), section 20—Rule 2 of the Rules dated 2nd June, 1934, framed thereunder—Conviction for breach of such rule—Section 23 of Ordinance.

The accused was convicted of clearing land at the disposal of the Crown without a permit in breach of Rule 2 of the Rules dated 2nd June, 1934, framed under section 20 of the Forests Ordinance. It was argued in appeal that the conviction could not be sustained in view of section 23 of the Ordinance. Section 23 provides that no person shall be deemed to have committed an offence of the kind in question if—

(*a*) The complainant fails to prove that the trees in the said forest are of more than twenty years' growth, and

(*b*) The accused satisfies the Court that he claims the said forest by inheritance or deed based on inheritance and has cultivated it for a prescribed period.

Held: *That conceding that the complainant failed to discharge the onus placed on him by* (*a*) *the accused had not satisfied the Court in regard to condition* (*b*), *for the deed on which the accused relied was executed, not in* his *favour, but in favour of his brother. It could not possibly be said that the accused claimed the chena upon a deed, or that he or his predecessors in title had cultivated it.*

PERERA *vs.* DIVISIONAL REVENUE OFFICER ... ... LIII. 15

HABEAS CORPUS

Habeas Corpus, **writ of—Application by father for custody of children—Parents married in America, resident in Ceylon——Father's claim for custody disputed by mother—Law applicable, whether English Law or Roman-Dutch Law—Marriage of parents not dissolved—Father's preferent right and limitations thereto—Courts Ordinance (Cap. 6) section 45.**

Held: (1) *That a dispute as to the custody of children of parents who are non-nationals resident in Ceylon should be determined according to the law of Ceylon, viz. the Roman-Dutch Law.*

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(2) *That where there has been no legal dissolution of the common home, the father's right to custody remains unaffected by the fact of the separation of the spouses and can only be interfered with in special circumstances.*

(3) *That special circumstances which justify the denial of the right of a father in such a situation to the custody of the children must relate to the prospective danger to the life, health or morals of the children or other circumstances positively establishing detriment to their interests.*

Per H. N. G. FERNANDO, J.—"Parent" where father and mother are both alive, means of course, the father who is the natural guardian of his children, *Van Rooyan vs. Werner*, 9 S.C. 425."

IVALDY *vs.* IVALDY AND OTHERS LIII. 81

HUSBAND AND WIFE

Husband and wife—Marriage not dissolved —Father's right to custody of children remains unaffected by the fact of the separation of the spouses—What are the special circumstances which justify a denial of this right.

IVALDY *vs.* IVALDY AND OTHERS LIII. 81

INCOME TAX ORDINANCE

Sections 68 (1) and 80 (1)—Appellant and another partner in business—Notice of assessment served on appellants' partner—Adequacy of notice.

HAMID MARIKAR *vs.* COMMISSIONER OF INCOME TAX ... ... LII. 28

Income Tax—Sections 76 (5) and 80 (1) and (2)—Commissioner issuing certificate to Magistrate—Magistrate's discretionary power to adjourn—Sufficiency of the particulars in Commissioner's certificate.

The Commissioner of Income Tax filed a certificate in the Magistrate's Court under section 76 (5) of the Income Tax Ordinance certifying that the petitioner had defaulted in paying Rs. 536,499.99 being income tax due from him. On 10-3-54 the petitioner appeared before the Magistrate on summons and order was made on that day directing the case to be called on 25-3-54. On 25-3-54 the Magistrate made the following order: "As respondent had appealed he is not entitled to adjournment under section 80 (2). So the respondent should pay this amount. Payment on 31-3-54."

At the hearing of the application to revise the Magistrate's order it was contended that:—

(*a*) the Magistrate was wrong in supposing that he had no discretion to adjourn the matter.

(*b*) that the certificate did not comply with the provisions of section 80 (1) because it contained no particulars of the tax in default.

Held: (1) *That a Court has an inherent power to direct that any matter which comes before it should stand over for a period, if the Court thinks that that is the proper way to deal with that matter.*

(2) *That section* 80 (2) *of the Income Tax Ordinance which deals with the question of adjournment limits the discretion which ordinarily is vested in a Magistrate, but that is a power conferred only in a case where no appeal lies.*

(3) *That where the certificate sets out the actual tax and the penalty without further particulars as to the amount due for each year the certificate did contain sufficient particulars, as required by section* 80 (1) *of the Ordinance.*

WILLIAM *vs.* THE COMMISSIONER OF INCOME TAX ... ... LII. 83

Income Tax Ordinance—Refusal to admit appeal and make order under section 69 (2)—Refusal to consider objections before issuing certificate under section 80 (3)—Mandamus directing respondent to admit appeal and consider objections—Interpretation of section 69 (1) and 69 (2).

The petitioner complained that the Commissioner (*a*) wrongly refused to admit his notice of objections under section 69 (2); (*b*) refused to consider his objections before issuing a certificate under section 80 (3).

He sought a writ of *mandamus* to compel these actions.

The petitioner did not furnish returns of income in respect of three specific years, and he was accordingly assessed under section 64 (3), and notice of assessment dated 17th August, 1953 posted to him. Although under section 63 (3) such a notice is deemed to be received on the day

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succeeding the day on which it would have been received in the ordinary course of post (i.e. 19th August, 1953, in this case) yet it was only received on the 29th October, 1953. Section 69 (1) fixes a period of 21 days after receipt of the assessment, for appeal by way of notice of objections, by a person aggrieved thereby. This period began on 30th October, 1953. After receipt of notice the petitioner lodged a protest at the assessment, but did not furnish returns of income till 19th November, 1953. When the petitioner did not take further steps within twenty-one days from 30th October, 1953, the Commissioner issued a certificate to a Magistrate under section 80 (1), but proceedings in that Court were adjourned under section 80 (2) to enable the petitioner to submit objections to the Commissioner. Nothing was done during this period, and the Magistrate ordered the petitioner to pay on 13th November, 1954. The present application was filed on 17th December, 1954.

Held: (1) *That there had been no valid appeal by way of a notice of objections under section* 69 (1)*; for there were no precise grounds of objection contained in the petitioner's communication to the Commissioner. Nor could the Commissioner, by waiver of the requirements of section* 69 (1)*, confer validity on an intrinsically invalid notice.*

(2) *Assuming without conceding that the notice of objections was valid, it became invalidated later by the fact of the returns of income not being filed within the twenty-one days as required by the section.*

Per DE SILVA, J.—"A notice of objection to be valid must satisfy the following requirements:—

(1) It must be in writing and addressed to the Commissioner.

(2) It must be filed within the prescribed time.

(3) It must set out the grounds of objection precisely.

(4) If the assessment appealed against was made in the absence of a return of income the return of income must be tendered within the period allowed for filing the notice of objections.

BAHARAM *vs.* ASST. COMMISSIONER OF INCOME TAX ... ... LIII. 4

Income Tax Ordinance section 80 (1)—Non-payment of Tax—Sentence of imprisonment—Assessee adjudged insolvent—Commissioner's discretion to choose method of recovery.

The Commissioner of Income Tax can, at his discretion, choose the most suitable method for the recovery of tax from a defaulter. He can, if he so decides, proceed to issue a certificate to a Magistrate under section 80 (1), even when the assessee is an insolvent, before proceeding against his property.

KUMATHERIS APPUHAMY *vs.* COMMISSIONER OF INCOME TAX ... LIII. 46

INDIAN AND PAKISTANI RESIDENTS (CITIZENSHIP) ACT.

Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949, section 15—Order under section 14 (7) (b)—Power of Supreme Court to remit for further investigation.

Where an application was made to the Supreme Court to remit a case to the Commissioner for further investigation.

Held: *That the powers of the Supreme Court in appeal are found in section* 15 *and the Supreme Court is not entitled to exercise any powers outside those conferred by that section. The power to remit for further investigation is not inherent in that section and cannot be exercised unless it is expressly granted.*

Per BASNAYAKE, A.C.J.—"Where a statute creates a new jurisdiction and confers new powers for carrying out the objects of the statute and gives a right of appeal from the decisions of the tribunal so created the powers of the Appellate Court when hearing an appeal under the statute are limited to those expressly granted."

PITCHAMUTTU *vs.* THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS .. .. .. LIII. 57

Indian and Pakistani Residents (Citizenship) Act—Order made by Supreme Court under—Is it a civil suit or action.

TENNEKONE *vs.* DURAISWAMY LIII. 63

IN PARI DELICTO POTIOR EST CONDITIO DEFENDENTIS

AMARASEKERA *vs.* ABEYGUNAWARDENA ... ... LII. 1

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INTERPRETATION ORDINANCE

Singular includes the plural.

COREA *vs.* MUTHUCUMARU AND MAHADEVA ... ...LI. 81

Statute—Offence committed under a repealed statute—No provision in the repealing statute preserving contraventions under the repealed statute—Can prosecution of offence under the repealed statute be instituted after repeal?—Motor Car Ordinance No. 45 of 1938, Motor Traffic Act No. 15 of 1951, section 243—Interpretation Ordinance (Cap. 2) section 6.

The accused was charged in July, 1953, with the contravention of section 29 (1) of the Motor Car Ordinance No. 45 of 1938, in April, 1950. The Magistrate acquitted the accused on the ground that the Motor Car Ordinance had been repealed by the Motor Traffic Act No. 14 of 1951, and as there was no provision in the latter Act for past contraventions of section 29 (1) of the Motor Car Ordinance in respect of which legal proceedings have not been taken, no charge in respect of the offence could be made.

Held: *That the accused could be prosecuted and punished in respect of the offence committed under the repealed statute as that offence is kept alive by section* 6 (3) (*b*) *of the Interpretation Act.*

RAMALINGAM *vs.* JAFFNA CENTRAL BUS. CO. LTD. ... ... LI. 107

JUDICIAL NOTICE

Judicial Notice—Of Price Control Order

FOOD AND PRICE CONTROL INSPECTOR *vs.* PIYASENA ... ... LIII. 25

JURISDICTION

Of Supreme Court in appeal to grant possessory decree where the original action was for declaration of title and ejectment and the plaintiff failed to establish his title but led sufficient evidence to prove that he was entitled to a possessory decree.

EKANAYAKE *vs.* GUNAWARDENA *et al* LI. 70

Jurisdiction of Collective Bench to overrule a previous decision of a Collective Bench.

Per GRATIAEN, J.—"Even if the decision of a Collective Bench properly constituted under section 51 of the Courts Ordinance is wrong, it cannot subsequently be overruled by even a subsequent Collective Bench, far less by a Bench to which an appeal has been referred under section 48A (of the Courts Ordinance)."

PERERA *vs.* MUNAWEERA (FOOD AND PRICE CONTROL INSPECTOR ... LII. 39

JUS SUPERFICIARUM

Nature of—Basis of compensation.

SAMARASEKERA *vs.* MUNASINGHE AND FOUR OTHERS ... ... LI. 102

KANDYAN LAW

Widow living with another man without contracting valid marriage—Does she forfeit her rights to her deceased husband's property—"Severance from former husband's family"—Test to be applied.

Where a Kandyan widow leaves her deceased husband's home and lives as man and wife with another man she forfeits her rights over the acquired as well as *paraveni* property of her former husband although her marriage with the second husband is not valid for want of registration.

FREDA WICKREMASINGHE *vs.* D. H. KIRIMUTTU AND OTHERS ... LI. 47

Diga married wife dying intestate leaving child by former marriage—Right of husband to life-interest in property acquired during coverture—Kandyan Law Declaration and Amendment Ordinance, No. 39 of 1938—Section 18—Effect of.

Held: *That the surviving husband of a DIGA marriage has a life interest in the acquired property of his deceased wife, even though there are children of the marriage or children of a former marriage, and that this rule has not been altered by section* 18 *of the Kandyan Law Declaration and Amendment Ordinance, No.* 39 *of* 1938.

WIMALAWATHIE *vs.* PUNCHI BANDA LII. 49

Kandyan Law—Adoption—Evidence required to prove.

M claimed the entirety of a land sought to be partitioned on the ground that he was the adopted son of U who was admittedly the original owner of the land.

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M's evidence as to the adoption was entirely disbelieved by the learned trial Judge and the only other evidence on this point was that of a priest who said that some fifty years ago U had requested him to teach letters to M, his adopted son in order that he may succeed to his inheritance. There was no clear and definite finding by the learned trial Judge on the priest's evidence and M's claim was dismissed.

Held: *That the learned trial Judge should have given his mind to the accuracy of the recollection of the priest regarding the conversation and that this evidence if accepted was sufficient to prove the adoption.*

MUDIYANSE *vs.* DINGIRI MENIKE *et al* ... ... LIII. 1

KANDYAN LAW DECLARATION AND AMENDMENT ORDINANCE 39 OF 1938

Effect of section 18.

WIMALAWATHIE *vs.* PUNCHI BANDA LII. 49

LAND ACQUISITION

Land Acquisition—Libel of reference making claimants to a divided portion of the property to be acquired parties—Plea of "misjoinder of parties and causes of action" —Land Acquisition Ordinance, section 32 (Chapter 203).

A libel of reference filed under the Land Acquisition Ordinance cannot be dismissed on the ground of "misjoinder of parties and causes of action," where some of the claimants allege that they own a divided portion of the land sought to be acquired.

The proceedings taken in Court on a libel of reference being filed are subject to the Civil Procedure Code only "so far as they can be made applicable."

GUNAWARDENA, A. G. A. MATARA *vs.* SIDDIK AND SIX OTHERS ... LI. 74

LAND DEVELOPMENT ORDINANCE

Land allotted to defendant by Crown— —Transfer of such land by defendant to plaintiff with consent and approval of Government Agent as required by Ordinance— Lease of land same day to defendant— Consent of Government Agent attached to transfer deed, but not referred to in Notary's attestation—Validity of transfer—Right to eject defendant.

Where an allottee of land under the Land Development Ordinance transferred such land to another with the consent and approval of the Government Agent as required by the Ordinance, which was attached to the deed of transfer but not specifically referred to in the attestation thereof as required by section 162 of the Ordinance.

Held: (1) *That the mere attaching of the consent of the Government Agent to the deed of transfer does not necessarily demonstrate that the consent was obtained prior to the execution of the deed and is not sufficient compliance with the requirements of section* 162 (1) *of the Ordinance.*

(2) *That the term "attestation" in section* 162 (1) *includes both the subscription of the signature and the attestation clause in a deed.*

(3) *That failure to comply with the requirements of section* 162 (1) *renders a transfer null and void.*

DE SILVA *vs.* DE SILVA ... LI. 29

Permit under Land Development Ordinance —Can a permit-holder bring an action to eject a trespasser?

A permit-holder under the Land Development Ordinance is entitled to bring an action for ejectment against an alleged trespasser praying that he be placed in possession.

PALISENA *vs.* PERERA ... LI. 63

Accused charged for offence under— Proceedings instituted by a Range Forest Officer under section 148 (1) (6) Criminal Procedure Code—Objection that Range Forest Officer not empowered to institute proceedings under Land Development Ordinance—Can charge be maintained?—Accused charged under first plaint even though an amended plaint had been filed?—Effect of—Criminal Procedure Code.

The institution of proceedings under section 148 (1) (*b*) of the Criminal Procedure Code for an alleged contravention of a provision of the Land Development Ordinance, is not a proceeding under that Ordinance but is a proceeding under the Criminal Procedure Code. A Forest Range Officer can therefore institute proceedings under section 148 of the Criminal Procedure Code, although he is not an officer who is empowered under the Land Development Ordinance to institute proceedings.

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Where the prosecution tenders an amended plaint setting out a charge different from the first plaint, and there is evidence to show that the prosecution intended that the accused should not be tried under the first plaint, the accused is entitled to be discharged if he is tried under the first plaint.

ATTORNEY-GENERAL *vs.* T. H. ALWISAPPU ... ... LII. 31

LANDLORD AND TENANT

See also under **RENT RESTRICTION**

Landlord and tenant—Notarial lease—Expiry of—Is the tenant entitled to the protection of the Rent Restriction Act No. 29 of 1948—Liability to pay monthly rental—Tender not necessary where creditor in anticipation refuses to accept debt.

Where a notarial lease has come to an end and the tenant wishes to continue in possession of the premises, he becomes a statutory tenant and liable to be ejected for non-payment of the monthly rental under section 13 (1) (*a*) of the Rent Restriction Act. In cases where the monthly rental is not specified in the notarial lease it is capable of a reasonable judicial solution if the parties fail to agree among themselves.

Where the tenant had expressed his willingness to pay the proper rental but the landlord had refused to accept any payment, but insisted on being restored to possession after the expiration of the notarial lease, it was not necessary for the tenant to formally tender the rent.

MOHAMED SIDEEK *vs.* SAINAMBU NATCHIYA ... ... LI. 2

Landlord and tenant—Payment by cheque—Delay in presenting for payment—Arrears—Landlord's right to appropriate later payments for specified periods for revived debt—Rent Restriction Act No. 29 of 1938, section 13 (a).

Where rent was paid by cheque but due to delay in presenting it for payment the bank dishonoured it on the ground that it had become "stale" the tenant cannot be denied his statutory protection and ejected on grounds of arrears of rent. A landlord cannot appropriate any payment specifically accepted to cover a later period towards satisfaction of the debt in respect of the earlier period which was revived by the cheque becoming stale.

Section 13 (1) of the Rent Restriction Act precludes a court from granting an order for ejectment against a tenant when it is satisfied that it is not the intention of the landlord to occupy the premises in their present condition, but to demolish the building and embark on a new building programme in accordance with plans previously approved by the local authority.

NADAR AND ANOTHER *vs.* ESMAILJEE AND TWO OTHERS ... ... LI. 72

Landlord and Tenant—Premium—Payment of, illegally to landlord—Right of tenant to recover—Applicability of maxim "in pari delicto potior est condito defendentis"**—Rent Restriction Ord. No. 60 of 1942.**

Prescription—Transfer of case from Court of Requests to District Court under section 79 of Courts Ordinance—Proviso to section 79—Scope of—Prescription Ordinance, section 10—Meaning of "commenced."

The appellant landlord sued the respondent tenant for ejectment and damages in the Court of Requests on 15th May, 1950. The respondent filed answer on 10th July, 1950, claiming in reconvention (*a*) Rs. 551/88 as rent paid in excess of the authorized rent, (*b*) Rs. 1,800/- paid on 3rd September, 1947, by way of premium as a condition of the grant of tenancy. Owing to the claim in reconvention the case was transferred to the District Court on 6th October, 1950, under an order in terms of section 79 Courts Ordinance. The Rent Restriction Ordinance 1942 prohibited a landlord from demanding or receiving a premium "as a condition of the grant, renewal or continuance" of a tenancy of controlled premises. The trial Judge entered judgment for the tenant for the sum of Rs. 1,800/- in addition to Rs. 551/88 which the landlord admitted was due to the tenant.

The landlord appealed against the order on the following grounds:—

(*a*) that the claim was prescribed since the action for the recovery of the premium did not "commence" within the meaning of section 10 of the Prescription Ordinance, until the transfer of proceedings to the District Court on 6th October, 1950.

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(*b*) that the principle *in pari delicto potior est conditio defendentis* precluded the tenant from asking the Court's aid to recover an illegal payment.

Held: (1) *That the claim for the recovery of the premium was prescribed as the action for its recovery effectually "commenced" only in the District Court, which alone had jurisdiction.*

(2) *That the word "commenced" in section 10 of the Prescription Ordinance means initiated in a Court possessing jurisdiction to grant relief in the form of a decree upon the cause of action.*

(3) *That the words in the proviso to section 79 of the Courts Ordinance "shall thereafter be continued and prosecuted in such Court as if it had been originally commenced therein" do not amount to a statutory provision exempting the operation of the Prescription Ordinance. A direction under the proviso is only procedural, no fresh pleadings need be filed as preliminary to the trial in the new Court, and the proceedings continue in that sense from the stage at which they had been interrupted in the Court where the case was instituted.*

Obiter where a landlord has received a premium in contravention of the law, the Court should aid the tenant to recover the premium, if in the circumstances of the case, it is in the interest of public policy and of justice.

AMARASEKERA *vs.* ABEYGUNAWARDENE ... ... LII. 1

Landlord and tenant—Premises sold under writ issued against landlord—Bought by plaintiff—Tenant (defendant) failed to attorn to plaintiff and pay rent—Plaintiff's right to sue defendant—Tenancy.

Where under a writ issued against the landlord, the premises, of which the defendant was a tenant, were sold by the Fiscal and purchased by the plaintiff who obtained Fiscal's conveyance and was placed in possession and not withstanding plaintiff's requests the defendant failed to pay rent due and where it was argued that plaintiff was not entitled to sue the defendant on the basis of a tenancy as admittedly the defendant had not attorned to the plaintiff.

Held: *That the purchaser of the leased premises was entitled to sue on the contract of lease entered into between the landlord and the tenant.*

W. A. S. DE COSTA *vs.* H. CHARLES PERERA ... ... LII. 54

LEASE

Lease of Hotel and Tea Kiosk business—Assignment of Lease—Is assignee tenant or licencee—Nature of rights involved.

CHARLES APPUHAMY *vs.* ABEYSEKERA ... ... LII. 50

LEX AQUILIA

Cases under—When does cause of action arise.

WIJERATNE *vs.* GABRIEL ... LII. 25

MAINTENANCE

Illegitimate children —Absence of corroboration—False statement of the defendant—Does it remove any doubt?—Maintenance Ordinance, section 6.

Where the evidence of a mother claiming maintenance for her children is not adequately corroborated by the only other witness and the defendant's own evidence consisted of false statements.

Held: *That the false statements made by the defendant remove any doubts that may have existed on the question of corroborative evidence.*

WARAWITA *vs.* JANE NONA ... LII. 41

Maintenance—Duty of children to support parents in indigent circumstances—Roman Dutch Law—How far applicable in Ceylon.

That part of the Roman Dutch Law which requires children to support and maintain their parents in indigent circumstances is applicable in Ceylon. The question whether a parent is in such a state of comparative indigency or destitution is a question of fact depending on the circumstances of each case.

AMBALAVANAR *vs.* NAVARATNAM LII. 65

MANDAMUS

Request to convene special meeting—Discussion of motion—Chairman ruling motion out of order—Validity—Section 39 (2) Town Councils Ordinance No. 3 of 1946 and By-laws 8 (a), (b), (c), (d).

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The petitioners are members of the Town Council, Kankesanturai, and the respondent is Chairman. The petitioners requested respondent in writing to convene a special meeting of the Town Council to discuss a motion which the respondent ruled out of order. The petitioners applied for a writ of *mandamus* on the respondent commanding him to convene a special meeting for that purpose.

The respondent contended firstly that a special meeting was not fundamentally different from an ordinary meeting and accordingly the request to convene a special meeting would be governed by the Council's by-laws, the provisions of which empowered the Chairman to exercise his discretion. Secondly, the petitioner should have sought the alternative remedy provided by the by-laws 1 (*b*) and 8 (*h*) before applying for a writ of *mandamus*.

Held: *That the wording in section* 39 (2) *of the Town Councils Ordinance No.* 3 *of* 1946 *was unambiguous and therefore its provisions vested no discretion in the Chairman to refuse to convene a special meeting as requested by the members of the Council.*

SEENIVASAGAM *et al vs.* CHAIRMAN TOWN COUNCIL KANKESANTURAI ... LII. 8

Mandamus—**On Municipal Commissioner —To compel him to hold a meeting.**

MOHAMED *vs.* GOPALLAWA AND ANOTHER ... ... LIII. 68

MASTER AND SERVANT

Vicarious liability of master for negligence of servant—Motor car accident.

SUBRAMANIAM *vs.* SUDALAIMANY NADAR ... ... LII. 97

MATRIMONIAL RIGHTS AND INHERITANCE ORDINANCE

Section 35—Does it deprive a donee of property subject to collation of the option of renouncing all claim to share in his fathers estate or of bringing the property with collation.

MURUGIAH *vs.* JAINUDEEN ... LI. 90

Matrimonial Rights and Inheritance Ordinance—Effect of—Mukkuwa Law—Thaiwaly Muthisam—Customary tenure.

MARIMUTTU AND TWO OTHERS *vs.* SINNATHAMBY AND OTHERS LIII. 97

MERCHANDISE MARKS

Trade Marks Ordinance No. 15 of 1925—Section 17—"Calculated to deceive"—Test to be applied.

The words "calculated to deceive" in section 17 of the Trade Marks Ordinance (Chap. 121) means no more than likely to deceive. No standard test of what is likely to deceive the purchaser can be laid down. In the present case the test would be whether the average person seeing the appellants' trade mark in the absence and in view only of his general recollection of the registered trade mark would mistake the appellants' trade mark for the registered trade mark.

MOHIDEEN AND ANOTHER *vs.* THE REGISTRAR OF TRADE MARKS LIII. 48

MORTGAGE

Mortgage—Partition of land into separate blocks by deeds among co-owners—Deeds reciting land being unencumbered and warranting title—Divided blocks possessed by the parties and their heirs—Mortgage of undivided share in whole land by one co-owner before partition—Not disclosed to others—Mortgage bond put in suit—Rights acquired thereunder—Legal effect of partition amongst co-owners—Inequitable conduct of mortgagor co-owner—Unjust enrichment——Applicability of.

By amicable settlement three co-owners entered into deeds of exchange, whereby each of them was to hold a separate allotment exclusively in lieu of his shares in the entirety of the land. The deeds contained covenants expressly declaring the land free from encumbrances and undertaking to warrant and defend title to the property. The parties took possession of their respective allotments. One of the co-owners had mortgaged his undivided share in the property many years before the partition, but did not disclose this fact to the other co-owners at the time of the partition. The mortgage bond was put in suit by the first defendant, who after obtaining a Fiscal's conveyance under the decree took possession of the divided lot allotted to the mortgagor, which since the death of the mortgagor, had also been enjoyed by the mortgagor's heirs, including the plaintiffs.

The plaintiffs instituted an action nearly nine years after the Fiscal's conveyance asking for a declaration of title to a proportionate share in the lot possessed

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by the first defendant on the ground that the defendant was entitled to only an undivided one-third share of the entirety of the land under the Fiscal's conveyance.

Held: (1) *That the Fiscal's conveyance passed to the first defendant, only an undivided one-third share of allotments and that the amicable partition did not have the effect of converting the first defendant's hypothecary rights over one-third share of the entirety of the land into hypothecary rights restricted to the divided lot.*

(2) *That the plaintiffs should not be granted the relief asked for as this would result in unjustifiable enrichment of them at the expense of the other co-owners who entered into the partition agreements.*

JAYATILLEKE AND ANOTHER *vs.* SIRIWARDENA AND OTHERS ... LI. 5

Otty mortgage—Nature of.

NALLATHAMBY AND ANOTHER *vs.* SOMASUNDARA KURUKKAL ... LII. 91

MOTOR TRAFFIC ACT

Section 150 (3)—Overtaking without having clear view of road ahead.

SUBRAMANIAM *vs.* SUDALAIMANY NADAR ... ... LII. 97

Motor Traffic Act—Sections 46 and 226—Plying for hire without a proper revenue licence—No notice under section 66 of the Evidence Ordinance—Can secondary evidence of the contents of the revenue licence be produced.

In a prosecution under section 226 of the Motor Traffic Act for using a car for a purpose not authorisecd by the revenue licence, it is necessary to place the licence before the Court. If no notice to produce the licence has been given to the accused, secondary evidence of its contents cannot be led.

ARASARATNAM, SUB-INSPECTOR OF POLICE *vs.* HERATH HAMY ... ... LIII. 16

Motor Traffic Act sections 153 (2) and 219 (1).

EDWIN SINGHO *vs.* SUB-INSPECTOR OF POLICE KADAWATA ... LIII. 109

MUKKUWA LAW

Mukkuwa Law—Thaiwaly Muthisam—Customary tenure—Effect of Matrimonial Rights and Inheritance Ordinance.

MARIMUTTU AND TWO OTHERS *vs.* SINNATHAMBY AND OTHERS ... LIII. 97

MUNICIPAL COUNCIL

Writ of Mandamus—Municipal Commissioner—Compel him to hold meeting—Municipal Councils Ordinance No. 29 of 1947 as amended by Municipal Councils (Amendment Act) No. 7 of 1954 sections 15 (2) and 19 (2) (a) and (b).

On a requisition made by the petitioner and other Councillors, a meeting was held and a resolution passed by the requisite majority for the removal of the Mayor of the Municipal Council. Thereafter the Municipal Commissioner in terms of section 19 (2) (*b*) of the Municipal Councils Ordinance summoned a second meeting to consider whether or not the resolution passed at the first meeting, (the full text of which he reproduced in his second notice) should be confirmed. At the second meeting when the petitioner who was also the mover of the resolution at the first meeting rose to move the confirmation of the resolution that had been passed at the first meeting, the Mayor rose to a point of order on the ground that no notice of the second resolution of the confirmation of the first resolution had been given and that the petitioner therefore was precluded from moving it. The Commissioner upheld the point of order and declared the meeting closed. The petitioner moved for a writ of *mandamus* to compel the Commissioner to continue the meeting.

Held: (1) *That it was clear from the notice convening the second meeting that the members were required to attend a meeting at which the matter for consideration was whether or not the resolution referred to in the notice should be confirmed.*

(2) *The notice of the meeting specifies the business to be transacted thereat and satisfies in every way the requirements of section* 20 (2).

MOHAMED *vs.* GOPALLAWA AND ANOTHER ... ... LIII. 68

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MUSLIM LAW

Kaikuli—Nature of—Which is the proper Court for filing action for recovery of Kaikuli.

SOWDOONA *vs.* MUEES ... LII. 47

Muslim Law—Donation by grandmother—Revocability—Muslim Intestate Succession and Wakfs Ordinance—Section 3.

Where a Muslim lady gifted immovable property to her grandchildren in terms of a notarial transfer.

Held: *That the deed was revocable.*

SINNA MARIKAIR *vs.* THANGARATNAM ... ... LIII. 44

NEGLIGENCE

Plaintiff, applicant for post with Cable and Wireless, Ltd.—Defendant Company's Medical Officer of many years experience—Defendant's certificate of fitness essential for employment by Company—Plaintiff certified unfit by defendant, even though certified fit by two other doctors—Plaintiff refused employment by Company—Plaintiff's action for damages from defendant on ground of gross negligence and incompetence—Liability of—Roman-Dutch Law.

The plaintiff was an applicant for the post of telegraphist with the Cable and Wireless, Ltd. It was a necessary condition of employment that the plaintiff should be certified as physically fit by the defendant, who was the Company's Medical Officer for over 30 years. The defendant after examining the plaintiff thoroughly certified him to be unfit. The plaintiff was then examined by two other experienced doctors, who certified him as physically fit and disagreed with the defendant's report. The defendant at the request of the Company's director again examined the plaintiff in the light of the doctors' reports and reported again to the Company that the plaintiff was unfit. In consequence of this report the Company refused to employ the plaintiff.

The plaintiff sued the defendant for damages on the ground that the defendant's report was due to gross negligence and/or incompetence. He did not allege in his plaint that the defendant has acted maliciously or dishonestly in expressing his opinion.

The trial Judge held that the defendant's report was substantially incorrect and that he had been guilty of gross negligence. He ordered the defendant to pay Rs. 5,000/- as damages, which included a sum unspecified by way of sentimental damages.

The evidence established that the defendant had honestly expressed his view on the condition of the plaintiff after a careful examination, and although his methods were open to criticism and differed to some extent from those adopted by the two doctors, they could not be said to be erroneous. His opinion, even if incorrect, was at the most an error of judgment.

Held: (1) *That there was no evidence to justify the conclusion that the defendant in refusing to certify the plaintiff as fit to be employed by the Company had acted negligently and that the plaintiff's action should be dismissed.*

(2) *That, when a doctor is employed by an employer to examine a person for the purpose of expressing a confidential medical opinion, the doctor's duty towards the employer is to exercise reasonable care and skill, but its obligation towards the examinee (apart from the obvious duty not to cause him physical injury during examination) is to express an opinion which is honest. In such a situation, there is no contractual, fiduciary or analogous relationship between the doctor and the examinee which makes the doctor liable to the examinee for pecuniary loss arising from the communication of a negligent, nondefamatory but honest opinion to the proposed employer.*

(3) *That sentimental damages are, not recoverable in actions based on negligence.*

CHISSEL *vs.* CHAPMAN ... LI. 49

Delict—Patrimonial loss—Cause of Action—Does it arise when the wrong is committed or when the damage ensues—Prescription—Ordinance No. 22 of 1871, section 9.

The plaintiff was the headmaster and the defendant an assistant teacher of the school. The plaintiff alleged that the defendant on 15th June, 1944, falsified certain attendance registers of the school with the intention of putting the plaintiff into trouble and as the result of an inquiry held by the plaintiff's employer, the plaintiff was deprived of his employment on 1st December, 1947. On 28th May, 1948, the plaintiff sued the defendant for damages.

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At the trial the defendant raised a preliminary issue of law that the plaintiff's action was prescribed as the cause of action, if any, arose when the alleged falsification of the registers took place. This issue was held in the defendant's favour and the plaintiff appealed.

Held: *That in cases under the* Lex Aquilia *and others actions in which patrimonial loss is a condition of liability, the cause of action arises only when the damage has actually occurred, which need not necessarily be when the wrongful act or omission has been done. In this case it occurred only when the plaintiff was deprived of his employment in December,* 1947, *and hence his cause of action was not prescribed.*

WIJERATNE *vs.* GABRIEL ... LII. 25

Negligence—Actio Legis Aquiliae—**Motor-car accident—Rash and negligent driving—Motor Traffic Act of 1952, section 150 (3)—Vicarious liability of master for the negligence of servant—Servant's scope of employment.**

The appellant and two others were driving in the defendant's motor car from Negombo to Colombo. While travelling on a wet road at 30 or 45 M.P.H., the driver of the car increased this speed and attempted to overtake a lorry without a clear signal from its driver, but on seeing a car travelling in the opposite direction applied his brakes to avoid a collision. As a result the car overturned, and the plaintiff suffered bodily injuries. The car had been borrowed by the plaintiff from the defendant's attorney and was driven at the time by the defendant's driver at the request of the attorney. There was no evidence that when the plaintiff borrowed the car the driver was placed under his control.

Held: (1) (*Reversing the finding of the trial Judge*) *that the driver had been negligent in—*

(*a*) *attempting to overtake without a clear and unobstructed view of the road—an offence under section* 150 (3) *of the Motor Traffic Act of* 1952; *and*

(*b*) *driving at a speed which was dangerous considering the wet road.*

(2) *That the driver was the servant of the defendant, in that—*

(*a*) *the fact of defendant's ownership of the car was* prima facie *evidence that it was driven by his servant, and*

(*b*) *the driver was the servant of the agent of the defendant.*.....

(3) *That the driver was acting within the scope of his employment. Although the plaintiff had borrowed the defendant's car, in order to escape liability for the acts of his servant, the defendant must discharge the heavy burden of proving that the servant was under the complete control of the plaintiff. The evidence however established that the driver was under the control of the defendant's agent.*

SUBRAMANIAM *vs.* SUDALAIMANY NADAR ... ... LII. 97

NOVATION

In Roman Dutch Law and English Law.

DE SILVA *vs.* HIRDARAMANI LTD. LII. 74

PARENT AND CHILD

Dispute as to custody of children of parents who are non-nationals resident in Ceylon—Should be determined according to the law of Ceylon *viz* Roman-Dutch Law.

IVALDY *vs.* IVALDY AND OTHERS LIII. 81

PARLIAMENTARY ELECTIONS AMENDMENT ACT NO. 19 of 1948.

Rights of appeal to the Privy Council under

SENANAYAKE *vs.* NAVARATNE AND ANOTHER ... ... LI. 36

PARTITION

Partition of land with separate blocks by deeds among co-owners—Deeds reciting land being unencumbered and warranting title—Divided blocks possessed by parties and their heirs—Mortgage of undivided share in whole land by one co-owner before partition—Not disclosed to others—Mortgage bond put in suit—Rights acquired thereunder—Legal effect of partition among co-owners.

JAYATILLEKE AND ANOTHER *vs.* SIRIWARDENA AND OTHERS ... LI. 5

Partition action—Plaintiffs' title based on final decree—Defendants' claim not bound by final decree—Defendant made a party to the partition action—Summons served on him—Intervention by defendant in interlocutory proceedings—Is such decree valid.

HENDRICK *vs.* PODINONA ... LI. 27

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Divided lot of land allotted in partition decree —Decree entered after death of allottee—Heirs substituted after decree—How far valid.

SOMAPALA *vs.* SIRIMANNE ... LI. 31

A certificate of sale under the Partition Ordinance has the effect of terminating the relationship of landlord and tenant and the restrictions contained in § 13 the Rent Restriction Act do not apply to such purchaser.

HEENATIGALA *vs.* BIRD ... LI. 46

Interlocutory decree—In respect of two contiguous allotments—Exclusive possession of one lot by stranger under a planting agreement between a co-owner and stranger—Co-owner purporting to be owner of entirety–Adverse possession–Prescription.

Held: *That where a stranger enters into possession of a divided allotment of property claiming to be sole owner, although his vendor in fact had legal title only to a share, his possession is adverse to the true owners and the date of his entry claiming to be sole owner was a good starting point for prescription.*

FERNANDO AND OTHERS *vs.* PODI NONA AND OTHERS ... ... LII. 33

Partition—Plaintiff's failure to establish title—Dismissal of plaintiff's action—Allotment of plantations and buildings to some parties thereafter—Jurisdiction of Court to make such allotment.

The plaintiffs instituted an action for the partition of a land. They failed to establish their title and the action was accordingly dismissed. The trial judge however proceeded to allot certain plantations and buildings among some of the defendants after investigation their rights.

Held: *That, having dismissed the action on the ground that the plaintiffs had no title, the learned trial judge had no jurisdiction, in the absence of an agreement by the defendants to ask for a partition, to proceed to allot the plantations and the houses among the parties to it.*

WEERAKOON *vs.* LENORIS WAAS LII. 70

Partition Act No. 16 of 1951—Procedure to be adopted in cases of contempt under section 53 is the procedure laid down in Chapter 65 of the Civil Procedure Code.

DON ABILIAN *vs.* DON DAVITH SINGHO AND ANOTHER ... ... LII. 86

Does sale under Partition Ordinance wipe out tenants' rights under § 13 of Rent Restriction Act.

BRITTO *vs.* HEENATIGALA ... LIII. 52

Partition—Sale under Ordinance—Mortgagee of undivided share bidding at sale—Subsequent action to enforce mortgage by sale of land—Does it amount to an estoppel.

SALISHAMY *vs.* SALISHAMY *et al* ... LIII. 65

PENAL CODE

§ 183

Warrant for recovery of arrears of rates—Warrant defective—Validity of conviction under § 183.

DHARMATILEKE *vs.* PERERA ... LI. 79

§ 314

Warrant for recovery of arrears of rates—Warrant defective—Validity of conviction.

DHARMATILLEKE *vs.* PERERA ... LI. 79

Section 294 First proviso to Exception 1—Party on whom burden lies to prove matters contained in such proviso—Extent of such burden.

REG. *vs.* BATCHO ... ... LII. 35

Section 72—Defence under—Is applicable to offences punishable under all other criminal statutes enacted in Ceylon.

PERERA *vs.* MUNAWEERA ... LII. 39

Sections 398 and 400—Charge that deed was executed fraudulently and dishonestly—What is necessary to be proved—Can charge be altered in appeal.

Where the charge against the appellant was that he did deceive one Noiya, the complainant, by fraudulently and dishonestly executing a deed bearing No. 5423 dated 23-7-1951 in her favour, thereby purporting to sell to her a land, after having sold the very same land to his minor son by an earlier deed, and that he thereby intentionally induced the complainant to pay the purchase price of

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Rs. 1,000/- and thereby committed an offence punishable under section 400 of the Penal Code, and the evidence showed that the transactions were really with Noiya's husband Bastia Veda.

Held: (1) *That there was no proof that Noiya was deceived.*

(2) *That there was also no proof that she parted with any property.*

KAROLIYA *vs.* NOIYA ... ... LIII. 13

Section 303 and 305—Meaning of the words "cause the miscarriage" in § 305.

REGINA *vs.* WAIDYASEKERA ... LIII. 71

PLAINT

Amendment of plaint after claim prescribed —Should such amendment be allowed.

ODIRIS SILVA AND SONS LTD. *vs.* JAYAWARDENE ... ... LI. 4

PLEADINGS

Amendment, of plaint—Defendant described as "C. A. Odiris Silva & Sons." Application for amendment describing as "C. A. Odiris Silva & Sons Ltd.," after claim prescribed—Should such amendment be allowed.

A plaint was filed within the period of limitation naming as defendant "C.A. Odiris Silva & Sons." After the expiry of the period of limitation the caption of the plaint was amended to read the defendant as "C.A. Odiris Silva & Sons Limited."

The defendant contended that the action against the company must be taken to have been instituted only upon the amendment and that the claim was prescribed.

Held: *That the effect of the amendment was merely the correction of an error in the description of the defendant and not a substitution of a new defendant, and therefore the action must be taken to have been instituted on the date of the original plaint.*

ODIRIS SILVA & SONS, LTD. *vs.* PAULIS JAYAWARDENE ... ... LI. 4

Admission by party in pleadings—Does it amount to an Estoppel.

REV. MORAGOLLE SUMANGALA *vs.* REV. KIRIBAMUNE PIYADASSI ... LII. 4

POISONS, OPIUM AND DANGEROUS DRUGS ORDINANCE

Possessing pods, seeds, flowers, leaves and other parts of the Hemp plant known as cannabis sativa L, without a license from the Minister, in breach of section 26 together with 2 (2) Offence punishable under Section 76 (5) (a).

The accused was charged with possessing, without a license from the Minister, pods, seeds, flowers, leaves and other parts of the Hemp plant known as *Cannabis sativa L*, in breach of section 26 read with section 2 (2) of the Ordinance, and thereby committing an offence punishable under section 76 (5) (*a*). The constable who detected the offence stated that he saw the accused at a table on which was a parcel containing "the leaves of ganja in the pure state", and that the accused was making up eight small packets with the contents of the larger parcel. An Excise Inspector identified the contents of two of the eight packets as "parts of the Hemp plant commonly and locally known as ganja, botanically as *Cannabis sativa L*".

Held: *That all the essential ingredients of the offence had been set out in the charge and established by the evidence.*

ISMAIL *vs.* KALMUNAI POLICE LIII. 10

POSSESSORY ACTION

Plaintiff, monthly tenant—Protected by Rent Restriction Act—Forcibly dispossessed by defendants—Can plaintiff maintain a possessory action?

A monthly tenant, who is protected by the Rent Restriction Act, is entitled to institute a possessory action for the recovery of the premises from which he has been forcibly ousted.

SAMEEM *vs.* DEP ... ... LI. 44

Possessory Action—By one Co-owner against another Co-owner—Is it necessary to join all Co-owners—Evidence necessary to prove possession.

EMIS ALWIS *vs.* PIERIS APPUHAMY LIII. 104

PRESCRIPTION ORDINANCE

Prescription Ordinance section 10—Applicability of to action from a breach of a fiduciary duty.

FUARD *vs.* WEERASURIYA ... LI. 21

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Transfer of case from Court of Requests to District Court under section 79 of Courts Ordinance—Proviso to section 79—Scope of—Prescription Ordinance section 10—Meaning of "commenced."

AMARASEKERA *vs.* ABEYGUNAWARDENA ... ... LII. 1

Right to an incumbency cannot be acquired by mere prescription user.

REV. MORAGOLLE SUMANGALA *vs.* REV. KIRIBAMUNE PIYADASSI ... LII. 4

Lex Aquilia—**Cases under—When does cause of action arise.**

WIJERATNE *vs.* GABRIEL ... LII. 25

Where a stranger enters into possession of a divided allotment of property claiming to be sole owner, although his vendor in fact had legal title only to a share, his possession is adverse to the true owners and the date of his entry claiming to be sole owner is a good starting point for prescription.

FERNANDO AND OTHERS *vs.* PODI NONA AND OTHERS ... ... LII. 33

PREVENTION OF CRIMES ORDINANCE

Sentence of imprisonment under § 6—Failure to impose sentence for offence—Aggregate term of imprisonment previously imposed below one year—Validity.

A sentence of imprisonment under section 6 of the Prevention of Crimes Ordinance can only be imposed when an offender has been previously, twice or oftener, convicted of any crime and has been sentenced to undergo rigorous imprisonment exceeding one year in the aggregate.

SOLOMONSZ S.I. POLICE *vs.* JINADASA LIII. 60

Prevention of Crimes Ordinance § 6—Sentence of Imprisonment for 1½ years—Additional term of one year purporting to act under the Ordinance—Illegality.

HAMID *vs.* NONIS ... ... LIII. 60

PREVENTION OF FRAUDS ORDINANCE

Transfer of land by indebted transferors by notarial deed—Non notarial agreement to transfer on payment of consideration with interest—Can transferor prove such agreement—Breach of such agreement to sell—Does it amount to fraud within the meaning of the Ordinance.

SAVERIMUTTU *vs.* THANGAVELAUTHAM AND OTHERS ... ...I.I. 17

PRIVY COUNCIL APPEALS ORDINANCE No. 31 of 1909

Order made by Supreme Court under the Indian and Pakistani Residents (Citizenship) Act No. 3 of 1949—Is it a civil suit or action.

The order made by the Deputy Commissioner refusing the respondent's application for registration as a citizen of Ceylon fundamentally affects the civil status of the person concerned and therefore the parties to the appeal are parties to a civil suit or action in the Supreme Court within the meaning of the Appeals (Privy Councils) Ordinance.

TENNEKONE *vs.* DURAISWAMY LIII. 63

PROCTOR

Proctor and Client—Fiduciary relationship of—Proctor's duty towards client—Extent of liability in damages for breach of—Prescription Ordinance, section 10—Applicability of, to action arising from breach of duty.

The respondent, acting through the appellant, his proctor, lent Rs. 20,000/- to one S on a mortgage of two lands called Panwila and Fincham. The respondent knew that the latter was subject to a primary mortgage to M for Rs. 35,000/-. He also was aware at the time of the execution of the bond that there was a mortgage decree in favour of N.M., a cousin of the appellant, in respet of Panwila and a secondary mortgage in favour of the appellant's wife and S. H. in respect of Fincham. The appellant has expressly warned the respondent that S., the borrower, was "a difficult customer and would not keep his word", but did not inform him that S. had evaded summons and had played a "trick", when a decree against him was sought to be executed. The respondents, however, was satisfied after inspection with the security of the land and did not lend the money to S. on his personal reputation.

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But the appellant did not disclose to the respondent (*a*) the fact that the secondary mortgage bond in respect of Fincham carried no interest, (*b*) certain facts relating to the valuation of Fincham when it was mortgaged to M. If these facts, which were known to the appellant, had been disclosed to the respondent, the respondent, might have made a closer investigation of the proposed loan and the soundness of the security offered by S. M. put in suit the bond and realized only Rs. 16,000/- on sale. The respondent obtained Rs. 2,250/- on the sale of Panwila.

The respondent instituted an action claiming damges for loss on the mortgage bond on the ground that the appellant while acting as legal adviser had furthered interests adverse to him and had committed a breach of his professional duty and of the contract of employment as legal adviser.

Held: (1) *That although the appellant had honestly done all that he thought he was bound to do in dealing with the respondent, he had failed to discharge his duty to the respondent in not making a full disclosure to the respondent of information in his possession relevant to the loan, and was liable in damages.*

(2) *That section* 10 *of the Prescription Ordinance applied to a cause of action arising from a breach of a fiduciary duty and that the cause of action "accrued" at the time when the respondent suffered the loss—namely, the date of the sale of Panwila.*

FUARD *vs.* A. R. WEERASURIYA LI. 21

Proctor issuing false certificate brings himself within the purview of section 17 of the Courts Ordinance.

IN *re* A PROCTOR ... ... LI. 75

PROMISSORY NOTES

Promissory note indorsed by second defendant to plaintiff—Contract between second defendant as indorser and plaintiff as immediate indorsee that maker only liable—Nature of such contract—Rights of plaintiff against the drawer and second defendant.

In pursuance of an agreement between them, to the effect that only the maker of the note will be liable the second defendant 'delivered' to the plaintiff certain promissory notes held by and made out to the second defendant by 3rd parties. The promissory note on which this action was brought was signed and delivered by the second defendant to the plaintiff, without any express words on the face of the instrument negativing or limiting the second defendant's liability thereunder as an indorser. Thereafter the plaintiff sued both the first defendant as maker and the second defendant as indorser for the balance sum due on the note, ignoring the terms under which the note had been transferred, namely, that the plaintiff's rights on the note should only be against the first defendant, as maker, and that his rights against the second defendant should be regulated by the terms of the agreement.

Held: (1) *That the terms of the contract between the indorser* (2*nd defendant*) *and his immediate indorsee* (*plaintiff*) *did not consist solely in the writing popularly called an indorsement, but included the intention with which the delivery was made and accepted, as evidence by the attendant words and circumstances.*

(2) *That where the immediate indorsee has later indorsed the instrument to a holder for value without notice of such a contract between indorser and indorsee, then the absence of express words on the face of the document negativing or limiting the original indorser's liability precludes the latter from relying* (*as against the subsequent holder*) *on the terms of the original agreement with his immediate indorsee.*

The second defendant was therefore not liable, though the first defendant was liable as maker.

DORAISAMY REDDIAR *vs.* SUNDARARAJ REDDIAR AND ANOTHER ... LIII. 55

PUBLIC SERVANTS (LIABILITIES) ORDINANCE

Public Servants (Liabilities) Ordinance (Cap. 88), section 2 (2) Amending Act No. 10 of 1951—Extension of immunity to public servants in receipt of salary up to Rs. 520—Defendant unprotected by principal Ordinance giving promissory notes to plaintiff prior to amending Act—Defendant in receipt of salary below Rs. 520/—Defendant sued on promissory notes after amending Act came into operation—Is he entitled to protection under Amending Act?

In 1952 plaintiff sued the defendant, a public servant in receipt of a salary above

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Rs. 300 and below Rs. 520 and obtained decree against him in respect of promissory notes given by him prior to June, 1950. Defendant objected to the execution of the decree on the ground that he was entitled to protection under the Public Servants (Liabilities) Ordinance (Cap. 88) as amended by Act No. 10 of 1951 which amendment came into operation on the 15th March, 1951, and extended the immunity of public servants whose salary fell between Rs. 300 and Rs. 520. The learned District Judge upheld the objection and the plaintiff appealed.

Held: *That the defendant was not entitled to protection under the amending Act as section 6 (2) (b) of the Interpretation Ordinance preserved the rights of the plaintiff against the defendant in respect of the notes sued upon inasmuch as the amending Act did not expressly or even by necessary implication provide a contrary effect.*

HAI BAI *vs.* P. PERERA ... LII. 27

RATES

Warrant for recovery of rates—Form of warrant.

DHARMATILLEKE, TOWN COUNCIL TELDENIYA *vs.* PERERA ... LI. 79

RECIPROCAL ENFORCEMENT OF JUDGMENTS ORDINANCE

§ 3.

MARCHANT HEYWORTH AND SWIFT LTD. *vs.* MOHAMED USOOF ... LIII. 17

REGISTRATION OF DOCUMENTS ORDINANCE

Gift of property by father to son on the occasion of marriage—Declaration by Court that property liable to collation—Property not transferred to administrator but possessed and mortgaged by donee—Property sold under mortgage decree and conveyed by Deputy Fiscal to respondent the purchaser—Registration of Courts declaration by appellant after Deputy Fiscal's conveyance—Is it an instrument affecting land.

MURUGIAH *vs.* JAINUDEEN ... LI. 90

REI VINDICATIO

Action for declaration of title to land—Plaintiff's title based on final decree in partition action—Defendant's claim not bound by final decree—Defendant made a party to the partition action—Summons served on him—Intervention by defendant in interlocutory proceedings—Is such decree valid?

The defendant was added a party in a partition action under which a final decree was made giving the respondent title to the land in dispute. Summons was not served on the defendant but he took part in the proceedings between interlocutory decree and final decree. He did not object to the share allotted but objected to the scheme of partition under the interlocutory decree. The respondent instituted an action claiming title to the land under the final decree.

Held: *That the defendant was bound by the interlocutory decree as failure to object to the allotted share was a tacit admission of the plaintiff's claim, and consequently he was also bound by the final decree.*

Per SWAN, J—"Non-service or improper service of summons is undoubtedly an irregularity but I do not think that every such irregularity is necessarily fatal to the decree subsequently entered."

HENDRICK *vs.* PODINONA ... LI. 27

Action for declaration of title—A divided lot of land allotted in partition decree—Decree entered after death of allottee—Heirs substituted after decree—How far valid.

In a partition decree a divided lot of land was allotted to a defendant who was dead at the time. Thereafter the decree was amended by substituting the heirs.

Held: *That both original decree and the amended decree were null and void as both orders were made on the footing that the defendant was alive.*

SOMAPALA *vs.* SIRIMANNE ... LI. 31

Rei vindicatio **action—Failure of plaintiff to prove title—Evidence led sufficient to grant possessory decree to plaintiff—Can Supreme Court grant such decree** mero motu **in appeal.**

Where in an action for declaration of title and ejectment the plaintiff failed to establish his title, but had led sufficient

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evidence to prove that he was entitled to a possessory decree the Court may grant such decree though no application was made for the purpose.

This remedy could be granted by the Supreme Court on appeal.

EKANAYAKE *vs.* GUNAWARDENA *et al* LI. 70

Sale in execution—Fiscal's receipt for purchase price—No conveyance—In whom is the title—Civil Procedure Code section 289.

A Fiscal's receipt for the payment of the purchase price at a sale in execution does not convey title to the purchaser. In the absence of a duly executed conveyance in the purchaser's favour the title to the land continues to remain in the judgment-debtor.

BABY SINGHO *et al vs.* PERERA *et al* ... LII. 92

Rei vindicatio—**Mukkuwa Law—Thaiwaly Muthisam—Customary tenure—Effect of Matrimonial Rights and Inheritance Ordinance No. 15 of 1876—Prescription.**

By Crown grant of 1898 the lands which form the subject-matter of this action were, along with some other lands, granted to the male representatives of 16 families or "kuddies" of the Kamala caste, who were governed by the Mukkuwa Law, the chief feature of which was that the legal ownership remained in the females of the families, the males being allowed to cultivate or manage them and for the purposes of such cultivation to enter on behalf of the owners into legal transactions with third parties.

Plaintiffs are the female heirs of one of the 16 families whose predecessors in title had the lands in question in lieu of their undivided 1/16 share. Veerakutty was one of the males representing this family and was managing them on behalf of the female heirs. He had granted a lease and a usufructuary mortgage of these lands to the first defendant. 2—13 defendants are the heirs of Veerakutty.

Plaintiffs claimed title to the three lands on the basis (1) of succession under the customary Mukkuwa Law.

(2) Of prescriptive possession. The first defendant did not claim title. The 2—13 defendants claimed title through Veerakutty.

The learned District Judge held against the plaintiffs on both points and dismissed their action. On appeal—

Held: (1) *That the oral evidence led with regard to the customary law was unreliable and inadequate and that such customary law seems to have been impliedly repealed by the Matrimonial Rights and Inheritance Ordinance of* 1876.

(2) *That the documents P2 and P3 clearly showed that Veerakutty entered into those bonds as representative of the female heirs and therefore the question of prescription should have been answered in favour of the plaintiffs, as Veerakutty's possession was in reality a possession on behalf of his sisters who are the predecessors in title of the plaintiffs.*

MARIMUTTU AND TWO OTHERS *vs.* SINNATHAMBY AND OTHERS ... LIII. 97

RENT RESTRICTION

See also under **LANDLORD AND TENANT.**

Rent Restriction Act 1948—Tenant in arrears of rent—Money lending transaction between parties—How payment made without specifying purpose is to be appropriated.

Held: (1) *That where the purpose for which a payment is made is unspecified, it must be carried to that account which it is most beneficiol to the debtor to reduce.*

(2) *That as between a debt arising from a money lending transaction and one arising out of a contract of tenancy subject to the Rent Restriction Act the latter is the more burdensome.*

FERNANDO *vs.* FERNANDO ... LI. 13

Plaintiff a monthly tenant protected by Rent Restriction Act—Forcibly dispossessed by defendant—Can plaintiff maintain possessory action.

SAMEEM *vs.* DEP ... ... LI. 44

Landlord and tenant—Premises occupied by the tenant purchased by the plaintiff at partition sale—Action for declaration of title and ejectment of tenant by plaintiff—Is the tenant entitled to protection of Rent Restriction Act?

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Held: *That a certificate of sale under the Partition Ordinance has the effect of terminating the relationship of landlord and tenant and the restrictions contained in section 13 of the Rent Restriction Act No. 29 of 1948 did not apply to such purchaser.*

HEENATIGALA *vs.* BIRD ... ... LI. 46

Rent Restriction Act, No. 29 of 1948—Section 13 (1) (c)—Two landlords—Action for ejectment of tenant—Premises reasonably required for occupation of landlord—Necessity to prove that the premises are reasonably required for both.

Where two landlords entitled to receive rent for the time being as co-owners sought to eject their tenant under section 13 proviso (1) (*c*) of the Rent Restriction Act No. 29 of 1948.

Held: *That the landlords have to prove that the premises are reasonably required for occupation as residence for both.*

COREA *vs.* MUTHUCUMARU AND MAHADEVA ... ... LI. 81

Rent Restriction Act, (1948)—Lease of hotel and tea kiosk business—Assignment of lease—Is assignee tenant or licensee—Nature of the rights involved.

Where plaintiff by an indenture of lease P1 "let, demised and leased" to A a hotel and tea kiosk business together with all the equipment for a term of 3 years from 1-1-1950 at a monthly rental of Rs. 350, and A by deed P2 assigned his rights under the lease P1 to the defendant with the consent of the plaintiff, and on the expiration of the lease the plaintiff claimed delivery of the hotel and tea kiosk, and the defendant resisted the said claim on the basis of P1 and P2 as a letting and hiring to him of immovable property, and sought the protection of the Rent Act.

Held: (1) *That P1 was not a lease in the true sense of the term and was only the placing of the "lessee" in charge of a business.*

(2) *That defendant's position was no more than that of a licensee, and is not entitled to the benefit of the provisions of the Rent Restriction Act.*

K. C. APPUHAMY *vs.* T. B. ABEYSEKERA ... ... LII. 50

Rent Restriction Act No. 27 of 1948, section 13 (1) (d)—Action for ejectment of tenant on the ground of nuisance to "adjoining occupiers"—Pollution of drains outside the rented premises by tenant's workmen—Complaints to authorities by neighbour living opposite—Is tenant liable—Should the nuisance complained of be created in the premises itself—Meaning of the word "adjoining" in sub-section (d)—Failure of plaintiff to state that she considered such conduct amounted to nuisance—Effect.

The plaintiff sued his tenant, a limited liability company, for ejectment from the premises rented out to it relying on section 13 (1) (*d*) on the ground that the tenant had been guilty of conduct which is a nuisance to the plaintiff and other adjoining occupiers. The nuisance was that one of the rooms of the rented premises was occupied by the tenant's workmen who urinated and polluted the drains just outside the room. A neighbour who lives opposite the premises gave evidence that he repeatedly complained to the Police and the Municipal authorities about their behaviour.

The learned Commissioner held in favour of the plaintiff and in appeal it was contended on his behalf that—

(*a*) the tenant could not be held responsible for the acts of other persons who use the premises;

(*b*) that the conduct complained of must be conduct on the rented premises, not outside it;

(*c*) that the neighbour who gave evidence was not an "adjoining occupier" within the meaning of the section;

(*d*) that the plaintiff has not given evidence that she considered the conduct of the workmen a nuisance.

Held: (1) *That the defendant has indirectly committed the nuisance as it is its responsibility to see that no nuisance is created by anybody who comes on the premises with its permission.*

(2) *That sub-section 13 (1) (d) does not require that the nuisance should exist on the rented premises itself.*

(3) *That the word "adjoining" in this sub-section does not mean mere contiguity. It also means "neighbouring" and all that the context seems to require is that the premises of the adjoining occupiers*

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should be near enough to be effected by the tenant's conduct.

(4) *That although there is no positive evidence of nuisance by the plaintiff herself, upon proof of conduct capable of having this effect, the Court is entitled to infer that it had that effect.*

PATE *vs.* PERERA AND SONS ... LII. 63

Rent Restriction Act 1948—Regulation 2 in Sehedule—Premises leased in 1941 used as hostel for students and place of residence of its warden and teachers employed in Academy run by tenant in another place—At time of action Academy also run in the premises—Are they residential or business premises—Meaning of the expression "for the time being" in regulation 2.

Held: (1) *That in the context of regulation 2 in the Schedule to the Rent Restriction Act of* 1948, *the expression "for the time being" in the definition of residential premises refers to the time of the assessment of the annual value, (viz. November,* 1941) *and not to the time of filing the action for ejectment or the time when the Court is required to make the ejectment order. The same premises cannot be brought within or excepted from the operation of the act from time to time by a mere change in the purpose for which they are occupied.*

(2) *That when proprietors of an Academy took on rent certain premises which were used as a hostel for students and as a place of residence for its warden and the teachers employed at the Academy, and no part of the tenants' business being carried on there, the premises must be regarded as residential premises within the meaning of the Rent Restriction Act.*

FERNANDO *vs.* WIJEWARDENE AND TWO OTHERS ... ... LII. 88

Rent Restriction Act—Section 13—Statutory tenant—Partition Ordinance—Sale—Purchase by co-owner—Right of purchaser to eject tenant—Does the sale wipe out tenart's rights under section 13?

Held: *That a decree for sale entered under section* 4 *of the Partition Ordinance has the effect of bringing to an end the contractual relationship subsisting between the "tenant" and the co-owners (taken collectively) as "landlord" but the statutory protection conferred on the tenant by section* 13 *of the Rent Restriction Act was not extinguished either by the decree for sale or by the certificate of sale.*

BRITTO *vs.* WILSON HEENATIGALA LIII. 52

RES JUDICATA

Action for incumbency—Earlier action by plaintiff's tutor and predecessor against defendant's tutor and predecessor—Dismissal of action holding defendant's tutor's rights valid—Appeal to Supreme Court—Decree affirmed but without deciding that defendant's tutor's rights were valid—Plea by defendant that decision in earlier action precluded plaintiff from reagitating his rights upheld by District Court—Validity of such order—Rights to an incumbency cannot be acquired by prescription—Is plaintiff bound by decision against his tutor—Admission by party in pleadings—Does it amount to an estoppel.

Plaintiff sued the defendant claiming rights to an incumbency of a temple. It was common ground that one S was the lawful incumbent of a Buddhist temple. According to the plaintiff, S had no pupils and he was succeeded in the line of "*sisyan-usisya paramparawa*" by I, plaintiff's tutor, whom he succeeded. According to the defendant S, who had no pupils, appointed R (presumably a stranger to the line of succession) to succeed him and the incumbency passed from R to G and then to defendant's tutor R J, whom the defendant succeeded.

In 1914 I instituted action No. 5232 D.C. Kurunegala claiming a declaration that he was the true incumbent of this temple as against the defendant's tutor R. J. who was actually functioning at the time as incumbent. The learned District Judge dismissed the action holding that the plaintiff's claim could not be sustained and that R. J. was the lawful incumbent. This decision was appealed from and the Supreme Court affirmed the decree but for entirely different reasons. The Supreme Court did not proceed to reject I's claim on the ground of validity of R. J.'s rights, but on I's failure to establish his case. At the trial of this case the defendant raised the plea that this action 5232 operated as *res judicata* against the plaintiff and the District Judge upheld it.

The plaintiff appealed.

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Held: (1) *That the plea of* res judicata *must be considered solely on the basis of the decision of the appellate tribunal as it superseded the decision of the trial Court.*

(2) *That although I. was precluded by the rule of* res judicata *from reasserting his rights against R. J. on any ground whatsoever, plaintiff is not embarrassed by that decree in his claim for the incumbency inasmuch as (a) the Appeal Court did not decide the validity of R. J.'s rights.*

(b) it is well settled law that an incumbent cannot acquire a title to the office by mere prescriptive user.

(3) *That an 'admission' in the pleadings of a party does not create a conclusive estoppel. It merely suggests an inference which a Court of trial may properly take into account and the weight to be attached to it in any particular case depends on many considerations.*

Per GRATIAEN, J.—"For the purposes of a dispute concerning rights to the incumbency of a Buddhist temple, no privity can be assumed between a pupil and his tutor who is not proved to be the true incumbent."

REV. MORAGOLLE SUMANGALA *vs.* REV. KIRIBAMUNE PIYADASSI ... LII. 4

ROMAN DUTCH LAW

Stipulation for the benefit of a third party.

KODIKARA *vs.* FERNANDO ... LI. 1

Doctrine of Unjust Enrichment.

JAYATILLEKE AND ANOTHER *vs.* SIRIWARDENA AND OTHERS ... LI. 5

PARAKRAMA SAMUDRA COLONY C.A.P.S. SOCIETY LTD. *vs.* WIMALASEKERA LI. 10

Action against doctor for damages on ground of gross negligence and incompetence.

CHISSEL *vs.* CHAPMAN ... LI. 49

Interference with contractual relations recognized by law.

BARRETT *vs.* ALTENDORFF ... ... LI. 76

Roman Dutch Law of tender.

BAIYA *vs.* KARUNASEKERA ... LII. 21

Duty of children to support parents in indigent circumstances.

AMBALAVANAR *vs.* NAVARATNAM LII. 65

Roman-Dutch Law applies to determination of dispute as to custody of children of parents who are non-nationals resident in Ceylon.

IVALDY *vs.* IVALDY AND OTHERS LIII. 81

SALE

Sale in Execution—Fiscal's receipt for purchase price—No conveyance—In whom is the title.

BABY SINGHO *et al vs.* PERERA *et al* LII. 92

SALE OF GOODS

Written contract—Delivery under contract provided for either by delivery of goods or tender of documents enabling defendants (buyers) to obtain possession of goods—Tender of documents before and after arrival of goods—Defendants refusal to accept on the ground of late arrival of Ship—Was there a delivery in terms of the contract—Action for damages.

HOLLAND COLOMBO TRADING SOCIETY LTD. COLOMBO *vs.* ALAWDEEN AND OTHERS ... ... LI. 82

SENTENCE

Punishment—Matters that should be taken into consideration in inflicting—Charges of forging important documents against public servant—Accused pleading guilty—Court instead of inflicting punishment, dealt with under section 325 (2) of the Criminal Procedure Code—Applicability of section to grave offences.

The accused, a clerk in the Food Control Department, was indicted with another on three counts of forgery of important documents to enable non-citizens of Ceylon to obtain resident permits. He pleaded guilty to two out of the three counts and the learned District Judge, instead of inflicting punishment ordered him to enter into a bond in a sum of Rs. 300 with one surety to be of good behaviour for two years, purporting to act under section 325 (2) of the Criminal Procedure Code.

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The Attorney-General applied for revision of the said order.

Held: *That the offence is far too grave to be dealt with under section* 325 (2) *of the Criminal Procedure Code.*

Per BASNAYAKE, A.C.J.—(a) "In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweights the previous good character, antecedents and age of the offender, public interest must prevail."

(*b*) "Offences committed in the course of their duties by post office officials *Henry Charles Victor Turner* (1947) 32 Cr. App. Rep. 45 by those who defraud the Post Office Savings Bank *Thomas Elliott* 32 Cr. App. R. 36 (1947), by police officers *Ernest Moore* (1910) 4 Cr. App. Rep. 135, bank clerks *R. C. Mason & J. J. A. Soper* (1908) 1 Cr. App. Rep. 73 at 77, solicitors *R. C. Mason & J. J. A. Soper* (Supra), and other persons, whether professional men or not, in positions of trust are invariably on grounds of public policy, dealt with severely. Age, previous good character and antecedents are of little avail in such cases."

ATTORNEY-GENERAL *vs.* DE SILVA LIII. 49

Sentence—Magistrate's Court—Sentence of Imprisonment for 1 1/2 years—Additional term of 1 year purporting to act under Prevention of Crimes Ordinance, section 6 —Illegality.

Where a sentence of 18 months' rigorous imprisonment was imposed on an accused by a Magistrates' Court and a further one year was added purporting to act under section 6 of the Prevention of Crimes Ordinance.

Held: *That the additional one year's imprisonment was illegal.*

HAMID *vs.* NONIS ... ... LIII. 60

SERVITUDE

Servitude—Son building on father's land with consent—jus superficiarum—**Nature of —Basis of compensation—Present value.**

Where a son builds upon his father's land with his consent, the son could, after ten years' possession acquire the servitude of *jus superficiarum*, which is a right acquired and lost like immovable property and transmitted to his heirs on his death.

A person who has the right of *jus superficiarum* is entitled to receive as compensation "the present value" of the building.

SAMARASEKERA *vs.* MUNASINGHE AND FOUR OTHERS ... ... LI. 102

Amicable partition—No reservation of right of way—Circumstances under which it could be implied.

Where two co-owners amicably partitioned the common land by a deed according to a plan and the right of way of one owner over the land of the other was not expressly reserved.

Held: (1) *That the right of way should be expressly reserved and cannot be lightly implied.*

(2) *In the absence of such an express reservation the claimant to a right of way could only succeed by proving that the dominant tenement would virtually be rendered ineffectal.*

RODRIGO *vs.* NARAYANASAMY ... LII. 68

SPECIFIC PERFORMANCE

Agreement for sale of premises—Action for specific performance—Decree for specific performance or damages in lieu of specific

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performance—Validity of decree—Civil Procedure Code, section 331 et seq.

Where in an action for specific performance of an agreement for the sale of premises the Court decreed the defendant-appellant to convey the premises 'within three years from the date hereof,' or to pay damages whereas the agreement sued upon stated that the conveyance should be within three years from the date of agreement.

Held: (1) *That the words 'within three years from the date hereof' should not have been inserted in the decree. As the period fixed for the execution of the conveyance had lapsed in* 1951 *and the Court should not have given a further three years.*

(2) *The decree for damages in lieu of specific performance should be set aside. If the Defendant-Appellants failed to execute the conveyance, plaintiffs-respondent will be entitled to take steps under section* 331 *to* 333 *A of the Civil Procedure Code.*

The appellant was directed to execute a conveyance within such time as may be fixed by the District Judge after the record reached his court.

ADONIS DE SILVA *vs.* HENRY DE SILVA *et al* ... ... LII. 85

STATUTE

Interpretation of—Singular includes the plural.

COREA *vs.* MUTTUCUMARU AND MAHADEVA ... ... LI. 81

Statute—Offence committed under repealed statute—Or provision in repealing statute preserving contraventions under repealed statute be instituted after repeal.

RAMALINGAM *vs.* JAFFNA CENTRAL BUS CO. LTD. ... ... LI. 107

Statute—Creating new jurisdiction and conferring new powers for carrying out the objects of the statute and giving a right of appeal from decisions of the tribunal so created—The powers of the Appellate Court when hearing an appeal under the statute are limited to those expressly granted.

PITCHAMUTTU *vs.* THE COMMISSIONER FOR REGISTRATION OF INDIAN AND PAKISTANI RESIDENTS ... ... LIII. 57

SUMMONS

"Non-service or improper service of summons is undoubtedly an irregularity, but I do not think that every such irregularity is necessarily fatal to the decree subsequently entered."

HENDRICK *vs.* PODINONA ... LI. 27

SUPREME COURT

Jurisdiction of Collective bench to overrule previous decision of a Collective Bench.

PERERA *vs.* MUNAWEERA ... LII. 39

TENDER

Agreement under deed between plaintiff and defendant for transfer of land to plaintiff if certain sum of money was tendered before agreed date—Money undertaken to be paid on plaintiff's behalf by Industrial Credit Corporation provided land is transferred to plaintiffs and mortgaged to Corporation —Transfer and mortgage to be effected contemporaneously—Guarantee of Corporation adequate—Is it sufficient tender.

BAIYA *vs.* KARUNASEKERA ... LII. 21

THESAWALAMAI

Pre-emption—Who is entitled to—Owner of share subject to life interest of predecessor in title—Is he a "partner" within meaning of Part 7 of section 1 of Ordinance No. 5 of 1869 (Chap. 55).

The word "partner" in Part 7 of section 1 of the *Thesawalamai* Ordinance (Chap. 55) is confined to co-owners who exercise (or are at least entitled to exercise) *plenum dominium* over the common property. Hence a person who is the owner of a share, subject to the life interest of another is not entitled to the right of pre-emption.

Selvaratnam vs. Sabapathy 2 Times 139 (distinguished).

SHIVAGURUNATHAN AND OTHERS *vs.* VISALADCHI AND OTHERS ... LII. 45

Thesawalamai—Pre-emption—Ordinance No. 59 of 1947—Notice under section 5—Consideration on impugned deed—Plaintiffs' ability and willingness to pay.

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Plaintiff, in an action for pre-emption, cannot succeed, even if due notice under section 5 has not been given, unless he can satisfy the Court that he would and could have exercised his rights of pre-emption under section 6 (1) within 3 weeks of the date on which the vendor ought to have given due notice under section 5, and unless the action for pre-emption is instituted within one year of the date on which the conveyance to the stranger was registered

RAJARATNAM AND ANOTHER *vs.* WIJEYARATNAM AND OTHERS ... LIII. 45

TOWN COUNCILS

Penal Code, sections 183 and 314—Town Council—Warrant for recovery of arrears of rates—Omission to specify defaulter, properties to be distrained and amount of arrears—Validity of warrant—Obstruction to distraining officer—Can conviction be sustained.

Where a warrant issued by the Chairman of a Town Council for recovery of arrears of rates, omitted to specify the name of the defaulter or the description or the situation of the properties or the amount of rates in arrears, the warrant must be regarded as a nullity and a defaulter who obstructs and assaults a distraining officer executing such a warrant cannot be convicted under sections 183 or 314 of the Penal Code.

DHARMATILLEKE, TOWN COUNCIL TELDENIYA *vs.* PERERA ... LI. 79

Town Councils Ordinance No. 3 of 1946 section 39 (2)—Request to convene special meeting—Chairman ruling motion out of order—Validity.

SEENIVASAGAM *et al vs.* CHAIRMAN TOWN COUNCIL KANKESANTURAI LII. 8

TRUSTS

Trust—Trusts Ordinance, section 5—Prevention of Frauds Ordinance, section 2—Transfer of land by indebted transferors by notarial deed—Non-notarial agreement to retransfer on payment of consideration with interest—Can transferor prove such agreement—Breach of such agreement to sell—Does it amount to fraud within the meaning of the Prevention of Frauds Ordinance.

In 1937 appellant and his wife transferred to A the land in question and two other lands which were the subject-matter of a mortgage decree in favour of A. The consideration was stated in the deed of transfer to be Rs. 2,000/- being the balance due to A on the mortgage decree.

On the same day A leased the property to the appellant and his wife for six years.

In 1946 A conveyed the property to the respondent who instituted action against the appellant and others for declaration of title and ejectment.

The appellant sought to resist the claim by asserting that the true position of the respondent was that of a trustee for the following reasons:—

(*a*) That the transfer to A was subject to a condition that A was to hold the land in trust for the transferors and reconvey to them on their paying Rs. 2,000/- with interest. (Secondary oral evidence of an informal writing alleged to have been given by A on the same day as the execution of the transfer was led in support of this).

(*b*) That the appellant and his wife were indebted to A at the time of the transfer.

(*c*) That the consideration paid was inadequate.

(*d*) That the respondent had knowledge that A held the property in trust and consequently he was in no better position than A.

The learned District Judge accepted the evidence led on behalf of the appellant and gave judgment for him. The Supreme Court, on appeal, set it aside. On an appeal to the Privy Council.

Held: (1) *That the evidence led in the case was not sufficient to establish a trust. The agreement relied on amounted to nothing more than an agreement for the purchase and sale of immovable property.*

(2) *That it is not open to the appellant to prove by oral evidence that A, the transferee agreed to reconvey the property on payment of the money advanced.*

(3) *That a breach of an agreement (not supported by a notarially attested document) is dishonest but the dishonest conduct resulting from the breach does not*

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amount to fraud within the meaning of the proposition that the Statute of Frauds may not be used as an instrument of fraud.

S. SAVERIMUTTU *vs.* THANGAVELAUTHAM AND OTHERS ... ... LI. 17

Action by several trustees—One trustee refusing to join as plaintiff—Should he be joined as party defendant.

SINNATHAMBY *vs.* KANDIAH ... LI. 80

Trust—Money deposited by plaintiffs in the name of the defendant—Intention to give the money as dowry—Advancement or trust—Sections 83 and 84 Trust Ordinance.

The plaintiffs deposited from time to time various sums of money aggregating to Rs. 5,000/- in the Post Office Savings Bank in the name of their sister, the defendant, with the object of giving that money as dowry to her upon marriage. The Bank pass book always remained in the custody of the eldest brother. There was no express stipulation at any time that the right to draw the money would be conditional on her contracting a marriage approved by them. The defendant eloped with a young man without the approval of her family or brother.

The District Judge dismissed the plaintiff's action, in which they claimed that money on the ground that it never became her property although it was provisionally earmarked for her benefit.

Held: (1) *That the defendant became disentitled to the money as the conditions attaching to the completion of the gift, failed when she married a person not approved by the plaintiffs.*

(2) *That the plaintiffs did not intend an absolute and unqualified gift to come into operation as soon as each sum of money was deposited in defendant's name.*

PERERA AND OTHERS *vs.* SCHOLASTICA PERERA ... ... LII. 66

UNJUST ENRICHMENT

Doctrine of—In Roman Dutch Law.

JAYATILLEKE AND ANOTHER *vs.* SIRIWARDENA AND OTHERS ... LI. 5

PARAKRAMA SAMUDRA COLONY C.A.P.S. SOCIETY LTD. *vs.* WIMALASEKERA LI. 10

URBAN COUNCIL

Claim of pension by retiring officer from Council—Order by Local Government Service Commission directing Council to pay pension in full—Failure of Council to comply with Commission's direction—Application by Commission for writ of Mandamus **on Council—Costs of the application paid out of Council's funds —Costs surcharged against members of Council by the Auditor-General—Validity of —Scope of section 194 (1) Urban Councils Ordinance 61 of 1939—Meaning of "Misconduct"—English Law compared.**

On the retirement of an officer of the Urban Council of Panadura, the members of the Council recommended to the Local Government Service Commission, in whom the power to grant pension was statutorily vested, that the officer should be paid a reduced pension on account of his unsatisfactory work. The Commission rejected this, and directed payment of the pension in full. The Council, however, tendered a cheque to the Commission at the reduced rate for payment, which the Commission returned and then applied to the Supreme Court for a writ of *mandamus* on the Council. Before the action was heard, the Council paid the pension in full, but the Supreme Court condemned the Council to pay the costs of the application, which was ultimately met from the Council's funds.

The Auditor-General charged this amount to the Chairman and members of the Council on the ground that the loss to the Council was incurred by the negligence or misconduct of those persons within the meaning of section 194 (1) of the Urban Councils Ordinance No. 61 of 1939.

Held: *That the Chairman and members were not liable as their conduct in this case was not illegal or improper or negligent or tainted by bad faith so as to amount to misconduct, and consequently section* 194 (1) *of the Ordinance did not apply.*

Per GRATIAEN, J.—"It is therefore clear that in Ceylon any member of an Urban Council may be compelled not only to refund the amount of any payment (made or authorised by him) which is "contrary to law", but also to make good "any loss suffered by the Council owing to his negligence or misconduct as such member." If the payment authorised is contrary to law,

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the liability to be surcharged is absolute; but if any deficiency or loss is not tainted by illegality, negligence or misconduct is a condition precedent to liability."

MENDIS AND ANOTHER *vs.* COMMISSIONER OF LOCAL GOVERNMENT ... LIII. 29

VIS MAJOR

Carriage of goods—Failure to deliver goods—Defence of vis major**—What should defence prove.**

ALIBHOY *vs.* CEYLON WHARFAGE CO. LTD. ... ... LI. 65

WAGES BOARDS

Wages Boards Ordinance—Exercise of power under section 51 (b)—Hindrance of prescribed officer in the exercise of his powers.

The appellant was convicted of having hindered a prescribed officer under the Wages Boards Ordinance in the exercise of his powers under section 51 (*b*). The officer had carried on a shouted conversation with a labourer in charge of a noisy machine, and the appellant had objected.

Held: *That such questioning of the labourer in order to ask routine questions was unreasonable, and that the appellant in objecting did not bring himself within the scope of the Ordinance, and therefore, the conviction should be quashed.*

BALIN FERNANDO *vs.* ASST. COMMISSIONER OF LABOUR KANDY ... ... LIII. 11

WORDS AND PHRASES

"Attestation"

DE SILVA *vs.* DE SILVA ... LI. 29

"Commenced"

AMARASEKERA *vs.* ABEYGUNAWARDENA ... ... LII. 1

"Consult"

MARIYA UMMA *vs.* THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO. LTD. ... ... LII. 99

"Explanation"

DON ABILIAN *vs.* DON DAVITH SINGHO AND ANOTHER ... ... LII. 86

"For the time being"

FERNANDO *vs.* WIJEWARDENA AND TWO OTHERS ... ... LII. 88

"Incumbent"

THOMA PERERA *vs.* PEMANANDA THERO ... ... LII. 14

"May"

MARTIN FERNANDO *vs.* ELIZABETH FERNANDO ... ... LIII. 107

"Parent"

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"Security"

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WORKMEN'S COMPENSATION ORDINANCE 19 OF 1934

Section 16 (1) and 16 (2)—Time within which claim for compensation may be made—"Sufficient cause" for failure to institute claim within statutory period.

The applicant-respondent, the widow of a deceased workman, instituted a claim for compensation in respect of the death of her husband in an accident, nearly three years after the date of the death. *Prima facie*, therefore, the widow's failure to make the claim within the period of six months fixed by section 16 (1) of the Ordinance would operate as a bar to the maintenance of the proceedings. The Commissioner, however, was satisfied that the delay of six months was due to 'sufficient cause' within the meaning of section 16 (2), and that the proceedings were

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maintainable. But in appeal it was argued that the further delay of two years was unreasonable and barred the proceedings, even though the delay of six months was sufficiently excused.

Held: *If the delay of six months was excused for 'sufficient cause' under section* 16 (2), *no subsequent lapse of time without reasonable cause could operate as a bar to proceedings.*

Held further: That the word 'may' in section 16 (2) gave the Commissioner a discretion whether or not to admit a claim even where sufficient cause had been shown for the delay of six months in instituting the claim. However, even then, further delay in instituting a claim after expiry of the six months would not automatically bar the proceedings; but the reasons for the further delay would be relevant to the Commissioner's decision whether or not he ought to exercise in favour of the claimant his discretion to admit the claim.

Per GRATIAEN, J.—"I respectfully take the view that in Ceylon the Commissioner's Jurisdiction under section 16 (2) of the Ordinance to admit and decide a claim for compensation after the expiry of the six month period is regulated by the question whether the failure to institute the claim *within that period* has been sufficiently excused; the section nowhere states that any subsequent delay ousts the Commissioner's jurisdiction under the Ordinance."

MARTIN FERNANDO *vs.* ELIZABETH FERNANDO ... ... LIII. 107

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