The Ceylon Law Weekly

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

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WITH A DIGEST

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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.

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(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 declared void under section 77 (*c*) of the said Order-in-Council.

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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 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 plaintiff 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 sub-section 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

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Contract

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.

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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.

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Co-operative Societies Ordinance (*Cap.* 107)—*Arbitration—Irregularity of proceedings—Procedure to be followed in application to enforce award—Powers of District Court—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 rested in the Courts which are empowered to enforce them.

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Court of Criminal Appeal

Court of Criminal Appeal—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.

(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.

Court of Criminal Appeal—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.

Criminal Procedure

Criminal Procedure—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.

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Criminal Procedure Code

Section 233—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.

See Criminal Procedure 111

Customs Ordinance

Customs Ordinance (Chap. 185)—*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 : 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".

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Divorce

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."

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Donation

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 P4 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-interest 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, grandfather 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.

Per SIR LIONEL LEACH.—"The Judge who sees and hears the witness is in a better position to assess the value of his evidence, as the Board has had reason to point out on numerous occasions, but this does not, of course, fetter the discretion of an Appellate Court in arriving at a contrary

conclusion, if it considers that there are good reasons for so doing."

ARUMUGAM NAGALINGAM *vs.* ARUMUGAM THANABALASINGHAM AND OTHERS 1

Donation by Muslim subject to *fidei commissum* Acceptance by mother on behalf of infant donees—Validity of acceptance—Is Muslim Law or Roman Dutch Law applicable.
See Muslim Law 74

Elections (Parliamentary)

See under Ceylon (Parliamentary Elections) Order-in-Council.

Evidence

Order by Minister conferring power on Assistant Registrar of Co-operative Societies—Gazette publication—Judicial notice—Evidence Ordinance, Section 57 (1) Co-operative Societies Ordinance, Section 17.

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 conferring intended functions on the Deputy or Assistant Registrar must be duly proved and a Court cannot take judicial notice of it.

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Sale of land—No consideration—No delivery of deed or possession—Is plea available to vendor.
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Excess Profits Duty Ordinance

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.

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Executors and Administrators

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See Excess Profits Duty Ordinance 91

Fidei Commissum

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.
See Donation 1

Habeas Corpus

Habeas Corpus, *writ of—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 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 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 Act 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 1st 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 17

Immigrants and Emigrants Act No. 20 of 1948

Deportation Order under Section 31—Can Court interfere with such order.
See Habeas Corpus 17

Immigrants and Emigrants Act No. 20 of 1949—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.

SREENIVASAM *vs.* S. SITTAMPALAM 87

In pari delicto potior est conditio defendentis

See Contract 83

Judge

Discretion of Appellate Judge to arrive at conclusion contrary to that arrived at by trial Judge.
See Donation 1

Order made *per incuriam*—Power of Judge to vacate.
See Civil Procedure 16

Judicial Notice

Of order under Co-operative Societies Ordinance conferring additional powers on Deputy and Assistance Registrar.
See Evidence 97

Jus Accrescendi

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.
See Donation 1

Landlord and Tenant

Landlord and tenant—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 sub-tenant 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-

* 45 C.L.W. 49

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 (*b*) 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 only 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.

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 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.

Mandamus

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.

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.

Minor

Donation to minor—Deed accepted by maternal uncle—Validity of acceptance.

What is the law applicable in Ceylon to the question who is the natural guardian of the property of a Muslim minor.

Muslim Law

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 grandmother) 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.

Per SIR LIONEL LEACH.—"They (their Lordships) would, however, observe that the authorities as to the extent to which and the form in which general Muslim Law has been received into Ceylon seem very conflicting and they would venture to

hope that the question of resolving by legislation the doubts which this conflict of authorities must create may receive early attention."

Muslim Marriage and Divorce Registration Ordinance

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.

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 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".

Partition

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.

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

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.

Partnership

Penal Code

Prevention of Frauds Ordinance

Privy Council

Privy Council—Conviction for murder—Appeal to Court of Criminal Appeal—Re-trial 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 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.

Donation by Muslim subject to *fidei commissum*.
See Muslim Law 74

Railway Ordinance

Railways Ordinance (*Cap.* 153)—*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 ".

Registration of Documents Ordinance

Lis Pendens registered in wrong folio—Effect of final decree entered in partition case.
See Partition 45

Rent Restriction Act No. 29 of 1948

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 mainly for residential purposes " then the premises are " residential premises ".

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 ".

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.

Per GUNASEKERA, J.—" As I read the definition it sets out three categories of persons who can be

members of the family of any person, and it is only the third that consists of dependant relatives. The categories are :

(1) ' The wife of that person,'

(2) ' Any son or daughter of his over eighteen years of age,'

(3) ' Any parent, brother or sister dependant on him.' "

Roman-Dutch Law

Persons competent under—to accept deed of donation on behalf of minor.

Sale

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.

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 something 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.

Sentence

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.

Stamps

Stamps Ordinance, Sections 26 (a), 27 and 51—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 dated 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.

(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.

Statute

Interpretation when statute contains conflicting provisions.

Trusts

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.

Will

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 ... 4

Words and Phrases

PRIVY COUNCIL APPEAL No. 24 OF 1951

Present : LORD PORTER, LORD TUCKER, LORD COHEN, THE CHIEF JUSTICE OF CANADA (THE RIGHT HON. T. RINFRET), SIR LIONEL LEACH.

ARUMUGAM NAGALINGAM OF POLIKANDY vs. ARUMUGAM THANABALASINGHAM AND OTHERS

FROM

THE SUPREME COURT OF CEYLON

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 6TH OCTOBER, 1952

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 P4 to K, who was a minor and was accepted by the maternal uncle on his behalf. Subsequently the doners revoked P4 by P5 and executed in favour of K another deed of donation P6 subject to the reservation of life-interest 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 regard ed as natural guardians of a minor are the father, mother, grandfather 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.

Per SIR LIONEL LEACH.—"The Judge who sees and hears the witness is in a better position to assess the value of of his evidence, as the Board has had reason to point out on numerous occasions, but this does not, of course, fetter the discretion of an Appellate Court in arriving at a contrary conclusion, if it considers that there are good reasons for so doing."

Cases referred to : *Silva vs. Silva*, 11 N. L. R. 161.
Wellappu vs. Mudalihami, 6 N. L. R. 233.
Avichchi Chetty vs. Fonseka, 3 A. C.R . 4.
Cornelis vs. Dharmawardene, 2 A. C. R. Supp. XIII.
Tillekeratne vs. Abeyesekere, 2 N. L. R. 313.

Stephen Chapman, for the plaintiff-appellant.

James Comyn, for the 2nd, 3rd and 4th respondents.

Delivered by SIR LIONEL LEACH

The appellant appeals by special leave from a judgment of the Supreme Court of Ceylon, dated the 13th October, 1948, which allowed an appeal by the second, third and fourth respondents from a decree of the District Court of Jaffna, dated the 7th March, 1947, and dismissed a cross appeal which he had preferred.

The action out of which the appeals to the Supreme Court arose was instituted by the appellant for a declaration that certain land situate at Polikandy is the common property of himself and the first respondent and for an order for partition. The first respondent is a brother of the appellant. At the commencement of the proceedings he was the only defendant and he accepted the averments contained in the plaint. The second, third and fourth respondents are the sons of a deceased brother named Kanthavanam (or Kandavanam). They applied to be made parties and were joined as the second, third and fourth defendants respectively. It will be convenient to refer to them as the contesting respondents. They denied the validity of the claim advanced by the appellant and contended that the title to the land was in them. It had, they said, belonged to their father and had devolved on them on his death.

The District Judge held that the appellant and the first respondent were each entitled to a four-ninth share in the property and the contesting respondents jointly to the remaining one-ninth, although they had not made any such claim in the alternative. He left the parties to bear their own costs. The Supreme Court held that the contesting respondents were entitled to the land to the complete exclusion of the appellant and the first respondent, and consequently allowed their appeal with costs. The appellant asks for the restoration of the findings of the District Judge, except as regards the one-ninth share allotted to the contesting respondents. He maintains that he is entitled in full of the reliefs claimed in his plaint and to his costs throughout.

In the course of the proceedings in the District Court certain other intervenients were allowed to appear in support of a claim that a small portion of the property belonged to them, but the District Judge decided that they had no interest in the land, and they pressed the matter no further. The subject matter of the appeal is, therefore, the full parcel of land described in the schedule to the plaint.

The property was acquired in 1882 by Koolyar Arumugam, the father of the appellant and the first respondent. By his wife Walliammai, Koolyar Arumugam had four sons, the other two sons being Poopalasingham, who died without issue on the 3rd August, 1917, and Kanthavanam, the father of the contesting respondents, who died on the 15th July, 1931. Koolyar Arumugam died in 1920 and his wife in 1929.

The main question in the appeal involves the consideration of three deeds to which Koolyar Arumugam and Walliammai were parties. The first of these deeds is dated the 1st April, 1896, under which they purported to convey to Kanthavanam by way of gift the land in suit and other parcels, subject to the reservation of certain of the produce to themselves during their lifetime. In the District Court this deed was marked as Exhibit P4. At the time of the execution of Exhibit P4 Kanthavanam was a minor. According to his death certificate he would be 11 years of age, but according to his marriage certificate he would be 18 years old. The Supreme Court accepted his age to be about 18 years, and there has been no criticism of this finding. In Ceylon the age of majority is 21 years.

Under Roman Dutch law, the law of Ceylon, a gift to be valid requires a valid acceptance. Being a minor Kandavanam did not sign Exhibit P4. It was signed by his maternal uncle Kanthar Sinnathamby, who, according to a statement in the deed, did so in acceptance of the donation for and on behalf of his nephew. The appellant contends that this did not constitute a valid acceptance and consequently no title to the property passed to Kanthavanam. In the alternative he says that it was revoked by the two later deeds. On the other hand the second, third and fourth respondents maintain that Exhibit P4 constituted a valid deed of gift, which has not been affected by any subsequent action on the part of the donors.

The second deed is dated the 6th July, 1908, and has been marked as Exhibit P5. By this deed Koolyar Arumugam and Walliammai purported to revoke Exhibit P4 and their reasons for doing are given in the following recitals :—

> "Whereas we have executed a donation deed in favour of our son Arumugam Kanthavanam of Polikandy, bearing No. 5825 dated the 1st day of April, 1896, and attested by Eramalingar Arumugam, Notary, for the undermentioned nine properties, and whereas the said Kanthavanam was then a minor and whereas his uncle Kanthar Sinnathamby of Polikandy had only accepted the said deed for and on his behalf and whereas we are possessing and using the said properties according to the said deed and whereas the said Kanthavanam had without our consent married one, among others, who is not of our caste, and whereas the wife of the said Kanthavanam and her people are our bitter enemies and ungrateful to us and whereas we think that the said Kanthavanam would during our lifetime ruin the said properties and whereas the said properties should be donated to the said Kanthavanam himself subject to *fidei commissum* and whereas the said Kanthavanam has full mind and perfect desire to accept such kind of donation."

Exhibit P5 was not signed by Kanthavanam.

Having executed Exhibit P5, Koolyar Arumugam and Walliammai proceeded on the same day to execute in favour of Kanthavanam a new deed of gift of the properties covered by Exhibit P4, subject to reservations of life interests to themselves and a *fidei commissum* for the benefit of the appellant, the first respondent and Poopalasingham. The original of this deed, which was registered, is said to have been lost, but a certified copy was put in evidence and marked Exhibit P6. It is alleged by the appellant that the original Exhibit P6 was signed by Kanthavanam. Immediately preceding the witness clause is this statement :—"I the said Kanthavanam the donee hereof do peacefully accept this donation subject to the aforesaid findings". It is also said that the deed was executed in duplicate. The alleged duplicate copy, purporting to bear the signature of Kanthavanam, was also put in

evidence, being marked Exhibit P6A. Although the execution of Exhibits P5 and P6 by Koolyar Arumugam and Walliammai is not now in question, the contesting respondents deny that Kanthavanam signed Exhibit P6 and say that the alleged signature on Exhibit P6A is a forgery.

The learned District Judge did not deem the appellant's evidence worthy of credit, unless corroborated, but he considered that the case could be decided independently of his testimony. He held that Exhibit P4 was invalid, because the acceptance was merely the act of a maternal uncle, who had no lawful authority to act for the minor and therefore the way was open to the donors to execute Exhibits P5 and P6. He did not, however, consider the question whether there could be lawful acceptance in any other way, for instance by conduct. In holding Exhibit P4 to be invalid the District Judge relied on the judgment of the Supreme Court in *Silva vs. Silva* 11 N. L. R. 161, where it was held that a gift by a father to his minor son and accepted by an uncle on the minor's behalf was invalid for want of lawful acceptance, the uncle not being a natural guardian. In delivering the judgment of the Court, Grenier, A.J. (Hutchinson, C.J. concurring) said that according to Roman Dutch law only the father, the mother, the grandfather and the grandmother stood in the relationship of natural guardians.

A witness to the signature of Exhibit P6 was one Sinnathamby Vallipuram, who stated in evidence that Kanthavanam signed it in his presence and he identified Kanthavanam's signature on the duplicate copy Exhibit P6A. The District Judge saw no reason to disbelieve this witness. He was also impressed by the fact that Kanthavanam, although he must have known of the position, took no steps to challenge the revocation of Exhibit P4.

The District Judge's decision that the appellant and the first respondent were each entitled to a four-ninth share in the land and the contesting respondents jointly to the remaining one-ninth was based on his opinion that on the death of Poopalasingham his interest in the property devolved on his heirs. To this question their Lordships will return later. Notwithstanding that the contesting respondents had made no claim to such a share, the District Judge considered that it was his duty to examine the title of all the parties and decide the case according to the result of the examination.

The appeals to the Supreme Court were heard by Canakeratne and Dias, JJ. The judgment was delivered by Canakeratne, J., Dias, J., concurring. The learned Judges considered that the reputation of K. Kanthavanam, the notary who had acted in the execution of Exhibit P6, was an unsavoury one and they adversely criticised the evidence of Sinnathamby Vallipuram, which the District Judge had accepted, but they did not go to the length of reversing his findings on this question. They left it open the ground that it was unnecessary to decide whether the donee had executed Exhibit P6. They considered that for purposes of acceptance minors could be divided into two classes, infants and those who had attained puberty. One of the second class could be deemed to be capable of thinking for himself and by taking the benefit of the contract could himself accept it. In expressing this opinion the Supreme Court differed from the judgment of Layard, C.J. (sitting with Moncreiff, J.) in *Wellappu vs. Mudalihami*, 6 N. L. R. 233, where the learned Chief Justice said that by the law of Ceylon persons were all either majors or minors, over or under 21 years of age, and it knew nothing of the elaborate distinctions of Roman law, which recognised three stages of non-age, "infancy", "puberty" and "minority".

The Supreme Court came to the conclusion that Exhibit P4 constituted a valid deed of gift because Kanthavanam had accepted it by going into possession. The Court presumed that this took place shortly after the gift was made or at least before the 30th November, 1899, the date of the institution of an action relating to one of the other parcels of land covered by Exhibit P4. In this action the plaintiffs were Koolyar Arumugam and Kanthavanam. The latter, being still a minor, appeared by his father as his next friend. Having found that the gift had been perfected in this way the Supreme Court held that Kanthavanam's title was unaffected by Exhibit P5, because this merely represented the unilateral act of the donors. It was on this footing that the appeal of the contesting respondents was allowed and the cross-appeal of the appellant was dismissed.

Their Lordships see no reason for doubting the correctness of the decision of the District Judge that the maternal uncle's acceptance of the gift on behalf of the minor was not a valid acceptance according to the law of Ceylon. The finding is supported by authority. In addition to the case of *Silva vs. Silva*, on which the District Judge relied, there are two other decisions of the Supreme Court to the same effect, namely *Avichchi Chetty vs. Fonseka*, 3 A. C. R. 4, and *Cornelis vs. Dharmawardene*, 2 A. C. R. Supp. XIII. *A maternal uncle is not a natural gurdian; in the strict sense he is not even a member of the same family.* Without appointment by lawful authority Kanthar Sinnathamby could not act

for Kanthavanam and it is not suggested that any such appointment existed. Therefore acceptance could only spring from Kanthavanam himself, if there was in fact acceptance.

Their Lordships do not consider that it is necessary to discuss the reasons given by the Supreme Court for holding that there was acceptance of the gift by Kanthavanam, because even if its reasons are sound (and here their Lordships express no opinion) they consider that he must be regarded as being a party to the revocation of Exhibit P4. Exhibit P5 in itself obviously could not achieve revocation ; Kanthavanam was not a signatory to it. Here the donors acted alone. But Exhibit P5 must be read with Exhibit P6 and if the latter document was signed by Kanthavanam there can be no doubt that he consented to Exhibit P4 being replaced by Exhibit P6.

Their Lordships are constrained to hold that Kanthavanam signed Exhibit P6. The District Judge accepted the evidence of the witness who deposed to Kanthavanam's signature and in spite of its criticism the Supreme Court did not say that he was wrong. The Judge who sees and hears the witness is in a better position to assess the value of his evidence, as the Board has had reason to point out on numerous occasions, but this does not, of course, fetter the discretion of an Appellate Court in arriving at a contrary conclusion if it considers that there are good reasons for so doing. In the present case their Lordships can find no sufficient reason for rejecting the finding of the District Judge that Exhibit P6 was accepted by Kanthavanam and that consequently it was valid in law. It follows that in their Lordship's opinion the Supreme Court erred in holding that the position was governed by Exhibit P4 alone.

There remains the question whether by reason of Exhibit P6 the contesting respondents are entitled jointly to a one-ninth share in the land, as found by the District Judge. This finding was based on the assumption that Exhibit P6 is to be read as creating a separate *fidei commissum* in favour of each of Kanthavanam's three brothers and not a single *fidei commissum* in their joint favour. The Supreme Court did not express any decided opinion, beyond indicating that it was a question of interpretation of the particular instrument whether on the death of a fidei commissary there was a *jus accrescendi* in favour of the other fidei commissaries or whether the heirs of the deceased fidei commissary acquired his interest.

The direction in Exhibit P6 was that on the death of Kanthavanam the property should, subject to the life interests reserved to the donors, devolve on the other sons "in equal shares". There is room for argument here, but having regard to the judgment of the Board in *Tillekeratne vs. Abeyesekere*, 2 N. L. R. 313, their Lordships hold that the gift in Exhibit P6 is not one of a disposition of one share of the whole to each of the three brothers, but a gift of the whole to the three brothers jointly with benefit of survivorship. It follows that in their Lordships' judgment Poopalasingham's interest, assuming that he had a vested interest when he died, did not devolve upon his heirs, but on his surviving brothers.

The result is that their Lordships will humbly advise Her Majesty to allow the appeal and grant the reliefs claimed by the appellant in his plaint. The appellant is entitled to his costs throughout.

Appeal allowed

Present : Rose, C.J. & Gunasekara, J.

MAUD BEATRICE DAVID vs. GRACE ROBERTS

S. C. 96/D. C. (INTY) Colombo No. 14398/T

Argued on : 27th, 28th and 29th August, 1952.
Decided on : 28th October, 1952.

Last Will—Signature at foot or end thereof—5 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 5 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."

Cases referred to : *De Zilwa vs. Auwardt* 1 S. C. C. 28.
Usoof vs. Bawa, Leader Law Reports 49.

C. Thiagalingam, Q.C., with *S. J. Kadirgamar* and *G. L. L. de Silva*, for the appellant.

H. V. Perera, Q.C., with *P. Navaratnarajah* and *C. Chellappah*, for the petitioner-respondent

ROSE, C.J.

The petitioner-respondent has propounded what is claimed to be the Last Will executed by one D. S. David, now deceased, and she asks for Letters of Administration with the Will annexed. The appellant-objector as Intervenient has filed his statement of objections alleging various matters affecting the validity of the Will. One of the issues—No. 11—was agreed by the parties to be heard as a preliminary issue and it is only with regard to that issue that this appeal is concerned.

Issue No. 11 reads " *Ex facie* does the document comply with the provisions of section 4 of the Prevention of Frauds Ordinance (Chapter 57) ? " For the purpose of the present argument the appellant concedes that the matter should be considered on the basis of the facts most favourable to the respondent, that is to say, that it should be assumed (for the purpose of this appeal only) that the writing was on two sheets of paper ; that it was entirely written by hand ; that at the bottom of the second page of the first sheet appears the signature of the Testator, D. S. David ; that alongside that signature appears the word and figure " No. 1 " and the signature of what is presumably an attesting witness ; that there is no room at the bottom of this page, either above or below these two signatures for any other signature ; that on the second sheet appear four other signatures No. 2 to 5 which presumably are signatures of the other attesting witnesses ; and that the two sheets, at the relevant time, were pinned together.

The relevant words of section 4 of the Prevention of Frauds Ordinance are as follows : " It (the Will) shall be signed at the foot or end thereof by the Testator.....such signature shall be made or acknowledged by the Testator in the presence of five or more witnesses present at the same time, and such witnesses shall subscribe the Will in the presence of the Testator, but no form of attestation shall be necessary ".

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. Section 9 of the (English) Wills Act of 1837, which, as regards the signature of witnesses, is re-enacted in the Wills Amendments Act of 1852 is in substantial conformity with our own section 4 of Chapter 57. In " In the Goods of Horsford " L.R. 1874, Vol. III P.D. 211, the deceased signed his name and the witnesses attested his signature on a piece of paper upon which no dispositive part of the Will was written. This paper was attached with a string to the paper on which the Will was written, just opposite to the termination of the writing. The witnesses deposed—and their evidence was apparently accepted—that the papers, to the best of their knowledge, were in the same state when they signed them as they were at the trial, that is to say, that they were attached by string.

It was held that the execution was valid. Sir James Hannen at page 214 said, " The evidence of the attesting witnesses is not very clear as to what occurred at the time of execution but I have come to the conclusion that the sheet was attached to the codicil at that time and that the Testator acknowledged his signature to the witnesses before the attestation ".

The principle upon which the learned Judge no doubt arrived at this decision appears to be stated by himself in a later case in " In the Goods of Hatton " (1881)—6 P.D. 204 where he said, " The Will may be composed of numerous papers, which together make one instrument ". In that particular case the learned President (as he then was) held that the Will was not entitled to probate on the ground that on the facts the two documents in question were

" separate and independent " documents, the position being that the intended Will was written in duplicate, one copy being signed by the deceased only and the other by the attesting witnesses.

In a comparatively recent English case " In the estate of Mann " 1942 (2) A.E.R. 193, the above observations of Sir James Hannen were referred to with approval and the principle was carried even to the extent of holding that an endorsement by the Testatrix on an envelope (containing the dispositive part of the Will) of the words " The Last Will and Testament of Jane Catherine Mann " was sufficient to entitle the envelope to be regarded as an attached paper and that therefore the documents should be admitted to probate. It is to be noted that in this case the learned Judge came to the conclusion on the facts that the circumstances precluded any possibility of fraud.

It seems to me that this is the correct test to be applied to a case of this kind ; that is to say, that the trial Court should consider the question, in the light of the evidence adduced in the particular case, whether the papers in question in fact constitute a single instrument or whether they are " separate and independent " documents.

I would add that the appellant relied upon a case reported in 1 Supreme Court Circular *De Zilva vs. Auwardt* 1 S. C. C. 28. It is to be noted, however, that the report is short and deficient in reasons ; nor in the absence of a clear statement of the facts is it necessary to assume that the learned Judge acted upon a different principle from that stated in the cases to which I have referred. Moreover, in a later case reported in *Usoof vs. Bawa* 2 Leader Law Reports 49 a more liberal view, from the point of the view of the propounder of the Will, is adopted.

For these reasons I am of opinion that the learned District Judge was correct in holding that *ex facie* the papers which the petitioner-respondent is endeavouring to propound as a Will are capable of being held to form a single instrument. Whether or not the learned District Judge ultimately comes to that conclusion must, of course, depend upon the evidence and the inferences to be drawn from the surrounding circumstances.

That being so, the appeal is dismissed. The appellant must pay the costs of this appeal and such costs of the lower Court as are attributable to the determination of issue No. 11.

GUNASEKARA, J.
I agree.

Appeal dismissed.

Present : H. A. DE SILVA, J.

GABELE vs. THE COMMISSIONER OF STAMPS

S. C. No. 333—*M.C. Colombo* 26290 (*In Revision*)

Argued on : 23rd and 24th October, 1952.
Decided on : 27th November, 1952.

Stamp Ordinance, sections 26 (*a*), 27 *and* 51—*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 dated 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.

(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.

Cases referred to : *Dewar vs. Commissioner of Inland Revenue* 2 K. B. D. (1935), p. 351 at page 359.
Pretty vs. Solly 26 B. A. V. (1859), p. 606 at page 610.
De Winton vs. The May, etc. of Brecon 28 L. J. Ch. p. 598 at page 604.

Joseph St. George, for the petitioner.
N. T. D. Kanakaratne, C.C., for the Commissioner of Stamps.

H. A. DE SILVA, J.

This is an application by the Commissioner of Stamps to recover a sum of Rs. 2,206·90 being the amount of deficiency of stamp duty Rs. 2,131·90 due under Part I Schedule A and penalty Rs. 75 under section 41 (1) (*b*) of the Stamp Ordinance Cap. 189, from the respondent who is the petitioner in respect of an agreement dated 1st September, 1945, between the Calcutta Metal Syndicate and the Ceylon Navigation and Salvage Co., Ltd.

The learned Magistrate after trial ordered the respondent who is the petitioner to pay the said sum. The respondent has applied to this Court in revision to have the said order set aside. To this application the Commissioner of Stamps has been named Respondent. I shall hereafter refer to the Commissioner of Stamps as the respondent, and the respondent to the application before the Magistrate as the petitioner.

In this application the construction and application of certain sections of the Stamp Ordinance Cap. 189 comes up for consideration. It will be necessary to state the facts briefly before I proceed to consider the points of law that were argued before me. By agreement dated the 1st September, 1945, between the Calcutta Metal Syndicate and the Ceylon Navigation and Salvage Co., Ltd., the former agreed to convey to the latter their business for a certain consideration. The petitioner, Frederick Gaebele, signed the agreement on behalf of the Calcutta Metal Syndicate. The stamp duty and the penalty referred to above were sought to be recovered from the petitioner. Although in the original Court a contention among others was put forward that it was not the petitioner who was liable in any event, but the firm known as the Calcutta Metal Syndicate, that contention was abandoned in this Court by learned Counsel for the petitioner. The stamp duty on this agreement had not been paid either by the Calcutta Metal Syndicate or the Ceylon Navigation and Salvage Co., Ltd. Therefore steps were taken by the Commissioner of Stamps to recover the stamp duty and the penalty from the petitioner.

The quantum of duty and penalty is not in dispute. The only dispute is as to who is liable to pay the stamp duty and penalty, the petitioner as contended for by the Commissioner of Stamps, or the Ceylon Navigation and Salvage Co., Ltd., as contended for by the petitioner. Section 27 of the Stamp Ordinance Cap. 189, is headed duties by whom payable. Section 27 runs thus " In the absence of an agreement to the contrary the expense of providing the proper stamps shall be borne (*a*) in the case of any of the following instruments, namely :—sixteen instruments of various kinds are enumerated and thereafter the following phrase appears, " by the person drawing, making, or executing such instruments ". Thereafter section 27 runs thus "(*b*) in the case of a policy of insurance, by the person effecting the insurance ; (*c*) in the case of a conveyance, by the grantee ". It is not necessary to reproduce in this case the rest of section 27. It is abundantly clear that in the absence of an agreement to the contrary in the case of a conveyance the obligation to pay the stamp duty rests on the grantee. Section 27 as it stood, makes only an actual conveyance liable to stamp duty and not an agreement to convey. The Stamp Ordinance was later amended for the purpose of making an agreement or contract for the conveyance or transfer liable to stamp duty by Ordinance No. 47 of 1941. By section 10 of the said Ordinance two new sections were introduced to the principal Ordinance to have effect as sections 26 (*a*) and 26 (*b*) respectively. Section 26(*a*) provides thus—" any agreement or contract for the conveyance or transfer of any business or share in any business.....shall be charged with the same *ad valorem* duty to be paid by the grantee or transferee as it were an actual conveyance or transfer of the business, as the case may be, agreed or contracted to be conveyed or transferred ". The above amendment thus has the effect of making an agreement or contract to convey any business or share in any business liable to stamp duty as though it were an actual conveyance as provided for in section 27 of the principal Ordinance.

The grantee is clearly the Ceylon Navigation and Salvage Co., Ltd. It has been argued by learned Counsel for the petitioner that the party liable was not the petitioner or the firm whom he represents, but the Ceylon Navigation and Salvage Co., Ltd. Learned Crown Counsel who appeared for the Commissioner of Stamps has argued that under section 51 of the Stamp Ordinance (Cap. 189) every person executing an instrument chargeable with stamp duty is liable

to pay to the Commissioner of Stamps the stamp duty and penalty. He also argues that under section 51 (3) a person who pays the stamp duty and penalty is entitled to recover from some other person the said stamp duty and penalty if by agreement or otherwise such other person was bound to pay the stamp duty. Section 27 of the Stamp Ordinance has made specific provision for the parties to arrive at an agreement as to who is liable to pay the duty. In the absence of such an agreement the law clearly provides as to the person who is bound to pay the stamp duty. In the various instruments enumerated in section 27, A1—16, the person drawing, making, or executing such instrument is made liable to pay the stamp duty. In the case of a conveyance the grantee is made liable. What is contained in the principal Ordinance is repeated in section 26 (*a*) which was introduced by Ordinance No. 47 of 1941. It must be borne in mind that section 51 of the Stamp Ordinance (Cap. 189) was an introduction to the principal Ordinance by amending Ordinance No. 18 of 1930. The principal Ordinance is No. 22 of 1909 which has certain amendments introduced from time to time. The amending Ordinance No. 47 of 1941 was enacted after the amending Ordinance No. 18 of 1930.

There is no evidence in this case that the two parties to this instrument came to an agreement as to who was liable. That being so it is necessary to find out upon a construction of the various provisions of the Stamp Ordinance as to who is liable. I have had the advantage of the various arguments urged on behalf of the respective parties. Learned Counsel for the petitioner has urged that in construing a Fiscal Statute if two constructions of the said Statute are equally possible and reasonable, the construction more favourable to the subject must be enforced. He has cited the following authorities for consideration :—*Dewar vs. Commissioner of Inland Revenue* 2 K. B. D. (1935) p. 351 at page 359 Lord Hanworth observed thus :—

> " Now I desire to make two observations in reference to Income Tax and Sur-Tax generally. As has often been pointed out, if the subject is within a charging section, he must pay ; if he is not within the charging section he has not to pay ".

It is argued that section 27 and section 26 (*a*) of the Stamp Ordinance are the charging sections, and that section 51 is merely the recovering section. Learned Crown Counsel lays great store upon section 51 to justify the steps taken by the Commissioner of Stamps by virtue of the powers conferred by that section. Learned Crown Counsel's argument is that by virtue of section 51 it is open to the Commissioner to proceed against one or the other of the parties to this agreement to recover the stanp duty and penalty, if any, notwithstanding the clear provisions of section 26 (*a*) and 27. There is undoubtedly a conflict between sections 26 (*a*) and 27 on the one side and section 51 on the other. That being so, it is necessary to find out when there are conflicting provisions in the same statute which provision shall prevail. Craies on Statute Law 5th Ed., page 205 has been cited to me. The learned author has reproduced at page 205 a dictum of Romilly, M.R., in *Pretty vs. Solly* 26 B. A. V. (1859) p. 606 at page 610. The learned Judge has stated the principle thus :—

> " The general rules which are applicable to particular and general enactments in statutes are very clear, the only difficulty is in their application. The rule is; that whenever there is a particular enactment and a general enactment in the same statute, and the latter taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply ".

The rule of law referred to by Romilly, M.R., in *Pretty vs. Solly*, has been stated by the Master of the Rolls in *De Winton vs. The May, &c., of Brecon* 28 L.J. Ch. p. 598 at page 604. The Master of the Rolls has stated thus :—

> " When an Act of Parliament contains two sets of provisions, one being specific, with precise directions to do particular things, and the other being general, prohibiting certain acts, which in their general sense will include the particular acts in the statute, the general clause does not control the specific enactment "

It is argued that section 51 (1) of the Stamp Ordinance are general sections and that sections 26 and 27 are specific sections which are not controlled by the general sections.

The following cases cited at the argument afford guidance and assistance in the construction of these sections of the Stamp Ordinance. 1936 A. I. R. Calcutta Series, page 814, at page 815. The judgment runs thus :—

> " In applying the rules deducible from the provision contained in section 5, Stamp Act, to which reference has been made above the canons of construction applicable to' Fiscals Statutes must be kept in view and in case of doubt, the construction of a Fiscal's Statute should be construed strictly in favour of and beneficial to the subject. There cannot be any equitable construction of a Fiscal's Statute ; and the Crown seeking to recover a tax must bring it within the letter of the law ; otherwise the subject is free." Vide

the following :—1938 A. I. R. Madras Series, page 498 at page 499. Venkatsubba Rao J., has observed thus :—

"The Court-fees Act is a taxing statute and it is settled law that the intention to impose a charge upon the subject must be shown by clear and unequivocal language."

In *re* Estate of Margaret Wernham 4 N. L. R. page 236, Bonser, C.J., stated that in interpreting an Ordinance imposing burdens on the subject, it must be construed favourably to the subject. This principle has been emphasized in the various authorities that have been cited before me. Vide *Bhana Makan vs. Emperor* 1936 A. I. R. Bombay Series page 256 where the rule of law has been stated thus :—

"Where there is a specific provision in a statute as well as a general one, and the case is covered by the specific provision, it is the specific provision, which must govern the case and not the general."

Learned Crown Counsel referred me to *Speyer Bros. vs. Commissioner of Inland Revenue,* (1908) Appeal Cases, page 92. I do not think this authority has any application to the point under discussion. What was decided in that case was that where a document comes within each of two categories chargeable with duty under the Stamp Act of 1891, the Crown is entitled to only one of the duties but it may choose the higher.

The principles governing the construction of a statute such as this have been laid down in no uncertain terms and I have come to the conclusion after consideration of the sections 26 (*a*), 27 and 51 of the Stamp Ordinance that the contention of the learned Counsel for the petitioner must be upheld.

The order of the learned Magistrate is set aside and the application of the Commissioner of Stamps is disallowed.

Set aside.

Present : SWAN, J. & L. M. D. DE SILVA, J.

HEPPONSTALL vs. PEARL COREA

S. C. 429 *D. C. Colombo No.* 22738/*M*

Argued on : 24th and 30th October, 1952 and 7th November, 1952.

Decided on : 9th December, 1952.

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 mainly for residential purposes" then the premises are "residential premises".

Cases referred to : *Tompkins vs. Rogers* (1921) 2 K. B. 94.
Standard Vacuum Oil Company vs. Jayasuriya, 52 N. L. R. 22.

C. Thiagalingam, Q.C., with *V. Arulambalam,* for the plaintiff-appellant.

H. V. Perera, Q C , with *A. M. Charavanamuttu,* for the defendant-respondent.

L. M. D. DE SILVA, J.

In this case it is conceded that the decree of the learned District Judge must stand if we are of the opinion that the premises in respect of which this action has been brought are found by us to be "business premises" within the meaning of the Rent Restriction Act No. 29 of 1948. We are of that opinion and therefore no other questions need be considered.

The learned District Judge has found on the facts that the respondent took the premises on rent for the purpose of running a boarding and that she has in fact used the premises for that purpose from the time she took it. He has accepted her evidence to the effect that in the

course of negotiations she told the appellant "that she wanted the house to run a boarding for university students and that from the start he was aware that she was going to run a boarding house". These facts are not contested on this appeal. It is also a fact that she lived on these premises.

At the outset we would like to say that the English cases are not helpful because the English statutes which they apply to various sets of facts have no resemblance to the local ordinance. To attempt to gain guidance from them for the purposes of this case would be dangerous. The learned District Judge holds on the authority of *Tompkins vs. Rogers* (1921) 2 K. B. 94 that the premises in question are business premises. But the statutes there considered and the considerations that there arose are vastly different from the ones that are relevant in this case, and that case was no authority for the proposition that the premises under consideration were business premises within the meaning of the Rent Restriction Act No. 29 of 1948. With all respect to the learned District Judge we feel that he has erred in relying on the English case mentioned but the conclusion he has arrived at is right for other reasons.

Residential premises are defined in section 27 thus :—

> "Any premises for the time being occupied wholly or mainly for the purpose of residence".
> Business premises are defined thus :—
> "Any premises other than residential premises as hereinafter defined".

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 to which they are put by the tenant must be examined. If the character of the occupation so judged is "wholly or mainly for residential purposes" then the premises are "residential premises".

The premises in question were used by the respondent to run a hostel and also to serve as a residence for herself. There can be no doubt that the main use to which they were put was the running of a hostel. It is clear therefore that the premises were not occupied "wholly or mainly for residential purposes" and therefore they are not "residential premises" within the meaning of the Ordinance. Consequently they are "business premises".

In the case of *Standard Vacuum Oil Company vs. Jayasuriya*, 52 N. L. R. 22, the Court had under consideration premises taken on rent by a firm in the course of its business for what, from the point of view of the business, could truly have been called business purposes or even wholly business purposes. They were used as a residence for one of the managers of the firm and the provision of a residence for the manager was a business purpose. But the character of the occupation of the premises was found to be mainly residential, because although a few incidents connected with the business took place on the premises, the chief use to which the house was put to was residence. Consequently the premises were held to be residential premises although they may have been described, apart from the narrow question as to what was the character of the occupation (as judged by the use to which it was put) as having been rented by the firm for wholly business purposes.

A notable difference between the facts of this case and the reported case is that in this case business was conducted on the premises, and was the main purpose of its occupation by the respondent. In the reported case only a very small amount of business was conducted on the premises and the main purpose of occupation was residence.

It should be added that it is a fortuitous circumstance in this case that the business purpose of the respondent involved residence by boarders. The Ordinance has, by reference to the rent paid, given protection to persons who occupied buildings for residential or business purposes. The higher limit of Rs. 6,000 placed on the rental of business premises which receive protection (as against the limit of Rs. 2,000 for residential premises) indicates that the Ordinance intended to protect a more valuable class of building where the sole or main purpose of occupation was business. We feel it difficult to take the view that this more extensive measure of protection is not available merely because the business carried on happens to be that of keeping a boarding house. We do not think that residence by the boarders is relevant to the determination of the character fo occupation by the respondent.

For the reasons we have given we would dismiss the appeal with costs.

SWAN, J.

I agree.

Appeal dismissed with costs.

Present : NAGALINGAM, S.P.J. AND PULLE, J.

JAINUDEEN vs. MOHIDEEN THAMBY

S. C. 79—*D. C. Badulla*, 9,595

Argued on : 23rd June, 1992
Decided on : 5th August, 1952

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 ".

H. W. Thambiah, with *E. R. S. R. Coomaraswamy*, for the plaintiff-appellant.

H. W. Jayewardene, for the defendant-respondent.

Cur. adv. vult.

August 5, 1952. NAGALINGAM, S.P.J.—

This is an appeal by an unsuccessful landlord who claimed as against his tenant ejectment from the premises and arrears of rent. The facts as ascertained by the learned District Judge may be accepted as correct, for Counsel for the appellant has not sought to challenge those findings.

The defendant had not paid rent from June 1949 to the plaintiff but the rent from June 1949 to the end of February 1950 had been deposited by the defendant either in special case D. C. Badulla, 120, to which I shall make more detailed reference presently, or with the defendant's Proctor, Mr. Abeyesekera. On 4th April, 1950, the defendant sent by money order a sum of Rs. 35 as rent for the month of March, 1950, and another money order for a similar sum on 4th May, 1950, as rent for April, 1950, and in between these two dates, namely on the 22nd April, 1950, the defendant sent a money order for Rs. 315 on account of rent for the period from 1st June, 1949, to 28th February, 1950. The tenancy was determined by the plaintiff by notice given on 27th February, 1950, terminating the tenancy by the end of March, 1950, and the action was filed on 19th April, 1950. It would be apparent from a consideration of the dates and the amounts remitted that when on the 4th April, 1950, the defendant purported to send the money order for Rs. 35 in respect of rent for the month of March, 1950, that was on the assumption that he had duly paid and accounted for the rent for the period ending February, 1950. But of course the defendant's own conduct clearly indicates that the rent for the period ending 28th February, 1950, far from having been paid to the plaintiff was yet at that date in the hands of other persons and certainly not in the hands of the plaintiff, for it was only on 22nd April, 1950, that he sent the money order in respect of the rent for the period of June, 1949, to February, 1950, to the plaintiff. The plaintiff was therefore justified in disregarding the payment of the sum of Rs. 35 on 4th April, 1950, as a payment of rent for the month of March, 1950, and in treating the defendant as being in arrears with his rent and filing action against him, as already stated, on the 19th April, 1950.

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 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. In this case, therefore, the plaintiff was fully entitled to the benefit of the action instituted by him on 19th April, 1950, and any subsequent payment

made by the defendant could not have tended to detract from the rights that had accrued and vested in him.

The simple question, therefore, is whether the defendant was in arrears of rent for more than a month at the date the plaintiff instituted the action, and in regard to this there cannot be the slightest doubt, for the defendant admittedly was in arrears of rent at least for the period from July, 1949, to February, 1950, at the date of institution of action if defendant be given credit for the payment of Rs. 35 made on 4th April, 1950. Learned Counsel for the respondent was unable to surmount this obstacle but the learned District Judge has, no doubt, sympathising with the defendant and referring to the circumstance that the defendant was not in such impecunious circumstances as not to have been able to pay the rent, stretched a point in his favour and held that the payment or deposit of money either in the special case 120 D. C. Badulla or with the defendant's Proctor, who was then not in fact the defendant's Proctor but Proctor for a party who was litigating with the plaintiff, was a sufficient payment to the plaintiff, and therefore a payment which would have operated to prevent the defendant from being in arrears of rent. It is, however, a trite saying that hard cases make bad law and I do think that however much one may be willing to extend one's sympathy to a party, nevertheless, unless the law is properly and correctly administered without reference to extraneous circumstances such as sympathetic considerations the tendency would be to bring about chaos and disaster.

It is now necessary to advert to the circumstances by stress of which the defendant made payment to parties other than the plaintiff of the rent due for the period from June, 1949, to February, 1950. It would appear that the plaintiff was trustee of the property in question appointed under a will of his father, whereby the income of the property was to be expended in the maintenance of a school. It would also appear that in the special case 120 D. C. Badulla the plaintiff's brother challenged the plaintiff's rights to administer the trust and it would be seen that for some reason or other which is not clear from the record the defendant had chosen to throw in his lot with the plaintiff's brother in that piece of litigation and sought to proffer assistance to the plaintiff's brother by withholding the payment of rent to the plaintiff though the plaintiff demanded the payment of the rents as they fell due; it must be noted in this connection that Mr. Abeysekera who is the defendant's Proctor was at the relevant date of the proceedings of special case 120 D. C. Badulla the Proctor for the plaintiff's brother. In other words the defendant took upon himself to deny the plaintiff's right to recover rents from him although admittedly he was the plaintiff's tenant, and if he did defy the plaintiff he has only himself to thank for the consequences of his conduct, and sympathy should not be permitted to outweigh the plain legal considerations that are applicable to the case.

I would therefore hold that the defendant was in arrears of rent and that the plaintiff is entitled to an order for ejectment.

The defendant claimed by way of reconvention a sum of Rs. 135 as constituting the aggregate of over-payments made by him at the rate of Rs. 5 a month in excess of the authorised rent, but at the trial it was conceded that the excess was only Rs. 2 a month. On this basis the defendant will be entitled to claim a sum of only Rs. 54 for the period ending April, 1950.

I would therefore set aside the judgment of the learned District Judge and enter judgment for the plaintiff for the sum of Rs. 385 less Rs. 54 and for damages at the rate of Rs. 33 a month from 1st May, 1950, until restoration of possession of the premises to the plaintiff and for ejectment of the defendant from the premises and order the plaintiff to be placed in possession thereof. The plaintiff will also be entitled to this costs of the action and of the appeal.

PULLE, J.

I agree.

Judgment set aside.

Present : BASNAYAKE, J. & PULLE, J.

DE MEL vs. DE MEL *et al*

S. C. 277—D. C. Colombo, 1,250/D

Argued on : 7th, 8th, 13th and 15th March, 1951
Decided on : 28th June, 1951

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 deserton 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."

Cases referred to : *Glenister vs. Glenister* (1945) P. 30.
Silva vs. Missinona (1924) 26 N. L. R. 113.
Dallas vs. Dallas 31 Law Times Reports 271.
Thelland vs. Thelland (1906-1909) 3 Appeal Court Cases 528.

U. A. Jayasundera, K.C., with *J. N. Fernandopulle, C. G. Weeramantry* and *Felix Bhareti*, for the plaintiff-appellant.

H. V. Perera, K.C., with *N. K. Choksy, K.C.*, and *H. W. Jayewardene*, for the first defendant-respondent.

N. E. Weerasooria, K.C., with *W. D. Gunasekere*, for the second defendant-respondent.

Cur. adv. vult.

June 28, 1951. PULLE, J.—

This is an appeal in an action for dissolution of marriage instituted by the husband on the ground that his wife, the first defendant, had committed adultery with the second defendant from whom he claimed Rs. 10,000 as damages. The defence was a denial and the wife counter-claimed a divorce on the ground that the plaintiff had maliciously deserted her. The learned District Judge dismissed the plaintiff's action against both defendants and entered a decree in favour of the wife dissolving the marriage.

The case for the plaintiff centres round an incident which occurred on the night of March 7, 1945. The plaintiff and his wife retired for the night. The second defendant who was a guest and a friend of the family slept in an adjoining room. The plaintiff got out of his bed at about 1 a.m. and discovered that his wife was not on her bed and that the door leading to the room where the second defendant was sleeping was partly open. He switched on first the light in his room and on switching on the light of the neighbouring room he saw the wife rising up from the second defendant's bed. If what the plaintiff says he saw that night were true, there can be no doubt that a strong *prima facie* case of adultery was made out.

The wife denies that she lay on the bed of the second defendant. Admittedly she was in the room of the second defendant but her version is that she was suffering from a pain in the chest for which she consulted medical advice only two days previously and that on the night in question the pain became worse and she entered the second defendant's room to help herself to a little brandy from a bottle kept in an almirah in that room. Having taken the bottle she turned back to proceed to her own room and thence to the dining room when the plaintiff asked angrily "Why, why" and before she could explain he approached her in an attitude of violence, whereupon she dropped the bottle on a couch and ran towards the drawing room where he gave her a beating. The husband admits the beating and justifies it, naturally from his point of view, on the ground of provocation.

But for the unusual hour at which the wife was discovered in the room, it could not be a matter for comment if the wife entered the adjoining room, even when the second defendant was there alone, on some legitimate business.

The second defendant was a friend who had a few weeks previously been lodging with them. It was also customary for the wife to prepare the second defendant's bed and take a cup of "Ovaltine" to the room before he retired.

Whether the version given by the wife was probably true depended principally on the independent evidence called to support her. The Police Sergeant and Proctor E. B. Sumanatilake who came before dawn the same night testify to having seen the bottle of brandy on the couch. It is undisputed that she gave her version regarding the bottle of brandy to the Police Sergeant who recorded her statement. Learned Counsel for the husband has invited us to reverse the finding in favour of the wife because her evidence that she switched on the light on entering the second defendant's room was disbelieved. The learned trial Judge accepted the wife's evidence as to the purpose for which she entered the room because it was corroborated by reliable evidence. He did apply his mind to the effect of disbelieving her on this part of the case. He states, "In spite of the first defendant's want of candour on this point, I accept as true her explanation for her presence in the visitors' room that night". The reason given by the trial Judge appears to be adequate and I see no ground for reversing the finding in her favour on the issue of adultery.

It was next submitted that even if the issue of adultery was answered against the husband the learned District Judge was wrong in allowing the wife's claim for a dissolution of the marriage on the ground of malicious desertion. At the outset I may state that the trial seems to have proceeded on the tacit understanding that if the Court accepted the wife's version of her presence in the visitors' room, her counterclaim would succeed. I cannot, otherwise, understand from the note of Counsel's arguments why no reference whatever is made by them to the issue of desertion and the learned trial Judge himself deals with it in three lines.

"As regards the first defendant's claim in reconvention I would hold that the plaintiff's conduct amounts in law to constructive malicious desertion".

The only point taken in the petition of appeal bearing on the issue of desertion is that in any event the alimony awarded was excessive. Be that as it may, it was not contended at the argument in appeal that the appellant was precluded from attacking the decree in his wife's favour.

In examining the evidence of desertion and the authorities cited in connexion therewith, it is essential to remember that the plaintiff's version that he saw his wife in the act of rising from the second defendant's bed has been rejected. After the assault he asked her to clear out of the house and she left on the morning of March 8. From that date down to November 29, 1945, when the plaint was filed, the husband persisted in maintaining that his wife had committed adultery and refused to be reconciled to her on the basis of her version of what had happened. He wanted nothing less than a written confession of adultery with which he intended to pursue an action for damages against the second defendant. If the wife did not commit adultery a confession, written or otherwise, was out of the question. His attitude towards the wife is summed up by his own evidence :

"I was quite convinced in my own mind that my wife would not have gone into second defendant's room except for the purpose of committing adultery. There was no stage after this incident when I contemplated taking back my wife. I was adamant about not taking her back". At the time he filed the action he was not merely convinced that his wife had committed adultery on March 7 but also on November 15, 1944, and February 26, 1945. The latter charges were not, however, pressed.

On the charge of desertion learned Counsel for the husband relied strongly on the following proposition laid down by Lord Merriman in the case of *Glenister vs. Glenister* (1945) p. 30.

> "If the wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, the husband becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause."

In my opinion *Glenister's case* can clearly be distinguished from the facts as found by the trial Judge in the present case. The admitted facts of *Glenister's case*, namely, the presence of strangers in the house during the absence of the husband and the birth of a child probably conceived at a time when the husband could not have had access to the wife pointed to adultery. When one has regard to all the facts, not the facts which constituted the husband's version of the incident, could the plaintiff have honestly believed that his wife had committed adultery? The only point that could be made against her is that she entered a dark room to take a bottle of brandy from the almirah at one end. Prior to March 7 she was admittedly a chaste and faithful wife. There were no recriminations and no suspicions. The husband was aware that she was ill two days previously and ought to

have known that the doctor had prescribed brandy as a palliative. Was it reasonable on his part to put the worst construction possible on her presence in the room, fly into a temper and assault her and then order her out of the house after turning a deaf ear to the explanation which she offered? I am unable, on the facts as found by the District Judge, to hold that the husband had any reasonable grounds for believing that adultery had been committed.

In the case of *Silva vs. Missinona* (1924) 26 N. L. R. 113 Bertram, C.J. ventured to define "malicious desertion" as a "deliberate and unconscientious, definite and final repudiation of the obligations of the marriage state". The repudiation must be *sine animo revertendi*. 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. No wife innocent of such a charge could be expected to offer a renewal of her consortium with the husband so long as he maintained the charge. According to the evidence a reconciliation was only possible if the wife confessed to adultery in writing. In the case of *Dallas vs. Dallas* 31 Law Times Reports 271 the wife petitioned for divorce on the ground of adultery coupled with desertion. The husband refused to live with his wife unless she wrote a letter exonerating a lady of whom she believed she had reason to be jealous. The wife's refusal to write the letter which led to the separation was held to be desertion on the part of the husband. A spouse who lays down a condition for reconciliation which no self-respecting person could accept must take the full consequences of such a condition being rejected.

There remains to consider the case of *Thelland vs. Thelland* (1906-1909) 3 Appeal Court Cases 528 cited on behalf of the plaintiff. The wife sued for a judicial separation on the ground of cruelty. The husband counterclaimed a divorce for adultery. There was not sufficient evidence of physical cruelty, but she was granted a decree and the custody of the children, because slight evidence of physical cruelty was coupled with an unfounded charge of adultery. In appeal the decree was set aside for the reason that, although the husband failed in convincing the trial Judge that adultery was actually committed, the facts before him were sufficient justification for his belief that adultery had been committed and that the bringing of the counter-charge could not therefore, amount to cruelty. By analogy it is argued that a separation brought about by a charge of adultery, which ultimately failed cannot amount in law to malicious desertion. When the facts of *Thelland vs. Thelland* are examined the differences are striking. In aupport of the counterclaim the husband produced several letters written by his wife praying for forgiveness which according to the Court of Appeal were inconsistent with her innocence. For reasons which I have given earlier the finding of the learned Judge as to what the plaintiff must have seen on entering the visitors' room, and not what he states he saw, could not have reasonably created in his mind the belief that his wife had committed adultery.

I would dismiss the appeal with costs.

BASNAYAKE J.

I agree.

Appeal dismissed.

Present: PULLE, J.

M. E. DE SILVA, vs. CROOS

S. C. 1,218—*J.M.C. Colombo*, 39,123

Argued on: 18th March, 1952
Decided on: 24th April, 1952

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."

N. M. de Silva, for the accused-appellant.
A. Mahendrarajah, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

April 24 1952. PULLE, J.—

The appellant who is the Managing Director of a Company incorporated under the Companies Ordinance, No. 51 of 1938, was charged with and convicted of failing to hold a general meeting of the Company in the calendar year of 1949. The charge alleged a breach of sub-section 1 of section 110 of the Ordinance and the commission of the offence under sub-section 2.

Section 110 (1) provides that a general meeting of every Company shall be held once at least in every calendar year. If default is made in holding a meeting sub-section 2 provides, *inter alia*, that every director or manager of the company who is knowingly a party to the default shall be guilty of an offence.

In my opinion the charge which states nothing more than that the appellant failed, in his capacity of managing director, to hold a meeting discloses no offence. The material ingredient in sub-section 2 is that the offender is " knowingly a party to the default ", but this is not set out in the charge with the result that the appellant has been convicted of an offence not known to the law.

The conviction and sentence are, therefore, quashed.

Conviction quashed.

Present : PULLE, J. & L. M. D. DE SILVA, J.

A. V. ANTHONIMUTTU vs. S. SOOSAIPILLAI

S. C. No. 116—*D. C. Jaffna, No.* 8071

Argued on : 5th November, 1952.
Decided on : 9th December, 1952.

Civil Procedure—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.

E. B. Wikremanayake, Q.C., with *A. Chellappah*, for the plaintiff-appellant.
N. Kumarasingham, with *A. Vythialingam*, for the defendant-respondent.

L. M. D. DE SILVA, J.

This was an action on a promissory note under Chapter 53 of the Civil Procedure Code. The defendant filed affidavit asking for permission to file answer and defend. An order was made of consent that the defendant should furnish security in cash in a sum of Rs. 1,000 or in immovable property of the value of Rs. 2,000 before filing answer. Security was to be tendered on the 6th December, 1951. On the 6th December a security bond was tendered and the Judge made order that the case be called on the 11th of December. A journal entry of 11th December, 1951, reads :—" Case called for scrutiny of security bond ". On that date the proctor for the plaintiff objected to the security tendered on various grounds. The defendant and his proctor were absent and the learned District Judge made order entering judgment as prayed for with costs. On the 13th December the proctor for the defendant moved that the order entering judgment be vacated and supported his application with an affidavit to the effect that he was unable to be present on the 11th of December as he fell ill on his way to Court. The learned District Judge has vacated the order entering judgment not on the ground that the defendant's proctor had fallen ill on his way to Court but on the ground that the order entering judgment was made by him *per incuriam*. He says that normally on the 11th of December the matter would have been fixed for inquiry but that by inadvertence he made order entering judgment. We understand from this that the practice in his Court is to fix the matter for inquiry if on the day fixed for scrutiny of security any objections are raised. No doubt the defendant and his proctor were absent but the Court would nevertheless following its usual practice have fixed the case for inquiry but for the inadvertence alluded to. We think that this case is one in which the order entering judgment has been made *per incuriam*. It is conceded by the appellant that the Court can vacate an order made *per incuriam* and we see no reason to interfere with the order made by the learned District Judge.

The appeal is dismissed with costs.

PULLE, J.
I agree

Appeal dismissed with costs.

Present : CHOKSY, A.J.

SUDALI ANDY ASARY, *et al.*, & VANDEN DRESEEN
(INSPECTOR OF POLICE)

Habeas Corpus Applications Nos. 1566—1570 (*Hatton*)

Argued on : 3rd, 4th, 5th & 6th December, 1951
Decided on : 22nd February, 1952

Habeas Corpus, writ of—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 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 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 Act 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 1st 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 *Mudannayake 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 ".

Authorities referred to : *Rex vs. Governor of Brixton Prison, ex parte Pitt Rivers* (1942) All England Law Reports Vol. I, 207.
Shearer vs. Shields (1914) A. C. 808.
An Application for a Writ of Habeas Corpus re Thomas Perera (1926) 29 N. L. R. 52.
The Bracegirdle Case (1937) 39 N. L. R. 193.
Liversidge's Case (1941) 3 All England Law Reports, 338.
Rex vs. The Officer Commanding the Depot Battalion, R.A.S.C., Colchester, Ex-parte Elliott (1949) 1 A. E. R. 373.
(1950) Wade and Phillips on Constitutional Law, 276.
Rex vs. Governor of Brixton Prison, Ex-parte Sarno (1916) 115 Law Times Reports, 608.
Rex vs. Superintendent, Cheswick Police Station (1918) 118 Law Times Reports, 165.
Vimlabai Deshpande vs. Emperor (1945) A. I. R. Nagpur 8 ; and A. I. R. (1946) P. C. 123.
Metacalfe vs. Cox (1895) Appeal Cases, 328.
In re Banwarilal 48 Calcutta Weekly Notes, 766.
Green's Case (1941) 3 All England Reports, 388.
Maledath Bharathan Malyali vs. Commissioner of Police (1950) A. I. R. Bombay, 202 (F. C.).
Mudanayake vs. Sivagnanasunderam (1951) 53 N. L. R. 25.

C. Suntheralingam, with *Christie Fernando*, for the petitioner.

R. R. Crossette-Thambiah, Q.C., Solicitor-General, with *H. A. Wijemanne, Crown Counsel*, for the respondent.

February 22, 1952 CHOKSY, A J —

Five petitions for writs of *habeas corpus* were filed by Sudali Andy Asary against the Inspector of Police, Hatton, for the production in Court of the bodies of five persons, three of whom are said to be cousins of the petitioner and two his nephews. All matters were listed for argument together and by consent of parties the arguments urged in the first application No. 1566 for the production of the body of Nadarajah *alias* Pitchakarai Asari were to be treated as arguments in all the cases. In view of the consolidation of the proceedings I am making one order which is to be treated as an order in each of the five cases.

The petitioner avers that the five persons in respect of whom he has made these five applications were all goldsmiths resident at No. 1, Main Street, Dickoya, until 6th September, 1951. All five individuals were arrested on 6th September, 1951, and produced before the Magistrate of the Magistrate's Court at Hatton on 7th September, 1951, and thereafter remanded

again until 25th September on which date each of them was allowed to stand on bail to appear on 9th October, 1951. The Serial Reports which were submitted to the Magistrate on 7th September when each of the detenues was produced before him, stated that the respective persons had been arrested by the Police " on a charge of illicit landing ". On the 9th October, however, the Inspector of Police stated to Court that the Police found that they did not have sufficient evidence for a prosecution under the Immigrants and Emigrants Act, No. 20 of 1948, and that therefore the Controller of Immigration and Emigration had declined to sanction a prosecution, and the police officer accordingly moved that the accused in the several cases be discharged. He also informed the Court that he had with him five Deportation Orders signed by the Minister of Defence and External Affairs ordering him to detain the respective detenues in Police custody until such time as each was placed on board a ship or aircraft about to leave Ceylon. He concluded his statement by saying that once the accused were discharged he would have to act under the deportation orders issued by the Minister of Defence and External Affairs. Counsel appearing for the accused, as they were called in the proceedings before the Magistrate, thereupon made several submissions with a view to the accused not being taken into custody under the Deportation Orders upon their discharge from Court until after they had returned home from Court. He also urged that the provisions of the Criminal Procedure Code had been abused by the Police and that they had " practised a fraud on the Court " by using the processes of the Court to have the suspects remanded until the Police were able to secure Deportation Orders under Section 31 of the Immigrants and Emigrants Act. In the end the Magistrate directed the Police not to arrest the detenues in the premises of the Court. This order was duly observed and the suspects were arrested under the Deportation Orders immediately after they had gone beyond the Court premises. The petitioner thereupon filed the present applications in this Court on the 9th October, 1951. The detenues were released on bail to attend this Court pending the final decision of the various applications.

The grounds on which the present applications have been made are that the arrests were illegal, that the process of the Magistrate's Court had been utilised improperly and the detenues unlawfully arrested and kept in custody pending the issue of the Deportation Orders, that the Police had acted maliciously under cover of the Criminal Procedure Code in not producing the detenues before the Magistrate with any genuine intent to charge them for any offence, that the Inspector of Police, who is the respondent in these proceedings, had acted *mala fide*, that the re-arrest and detention of the detenues in pursuance of the Deportation Orders was illegal and that the Deportation Orders themselves were *ultra vires* of the powers under section 31 of the Immigrants Act and were a " fraud upon the statute ". The petitioner further contends that the Immigrants and Emigrants Act and connected Acts such as the Citizenship Act, No. 18 of 1948, the 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 1946, in 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 and carry on their occupation.

The respondent has filed an affidavit from himself and one from the police officer who arrested the respective detenues, to the latter of which are annexed copies of the statements said to have been voluntarily made by the respective detenues either to the Police or to a Justice of the Peace. The position taken up by the respondent, as resulting from these affidavits, is that the respective persons concerned did not have valid passports bearing endorsements in the form required, that on information received from an informant these five persons were suspected of having illicitly entered Ceylon, that they made statements admitting that they had all entered Ceylon illicitly within a period ranging from four to six months prior to the date of their arrest, and that they had all reached Ceylon by a sailing vessel and landed at Mannar which was not an approved port of entry to Ceylon.

Counter-affidavits, from each of the detenues, have been filed by the petitioner wherein they state that they immigrated to Ceylon in or about the years 1941, 1942 or 1943 respectively, and that each of them became a member of the " community of inhabitants and citizens of Ceylon known as the Indian Tamil Community in the Report of the Commission on Constitutional Reform signed by Lord Soulbury, Sir F. J. F. Reeves and F. J. Burrows ". Each takes up the position that since his migration to Ceylon he has been and still is a subject and a citizen of Ceylon continuing to owe allegiance to His Late Majesty King George the Sixth, who was the then reigning Sovereign, that none of them had ceased to be citizens of Ceylon on the grant of Independence to Ceylon or on the enactment of the Citizenship Act, No. 18 of 1948, by the Parliament of Ceylon, that they had not acted

or conducted themselves in any manner "not conducive to the public interest", that the alleged statements made by them were made, in each instance, as a result of assaults by the Police and while under fear of grave bodily harm, and therefore under duress. They all specially deny that they admitted having come to Ceylon illicitly. They all state in common that none of them had left Ceylon since June, 1949, and that the rice ration books in support of their residence in Ceylon had been removed by the police officer who arrested them. They in their turn proceed to set out in detail the events which I have set out as having taken place from the 6th September onwards and end their affidavits by incorporating into them the various legal positions taken up by the petitioner in his original petition and affidavit. They however submit that their arrest and detention in custody not only from the 6th October downwards but from the 6th September downwards were equally illegal. They further allege that when the Police found themselves unable to secure "Removal Orders" under Section 28 (1) of the Immigrants Act, they proceeded to secure Deportation Orders under section 31 of the Act and that the Police did so maliciously, wrongfully, unlawfully and for the collateral purpose of nullifying the order of discharge made by the Magistrate on the 9th October, 1951.

The hearing of these petitions commenced on the 3rd December last, as that was the date convenient to all parties concerned. The notices issued on the respondent in the earlier stage of these proceedings were treated as *Orders Nisi*. The Solicitor-General sought to justify the arrest made on the 9th October, 1951, under the Deportation Orders made on 26th September, 1951, which were first referred to in the Magistrate's Court proceedings on the 9th October on which date the detenues were discharged by the Magistrate.

The learned Solicitor-General's position was that if Nadarajah was detained on a commitment which was *prima facie* regular and valid on the face of it, that is an answer to the *rule nisi*, which must then be discharged unless the other side shows that it was not a *bona fide* exercise of power but was a misuse of it for some ulterior or collateral purpose. He submitted that the deportation order was regular and valid on the face of it with the consequence that the detention is at least *prima facie* presumed to be valid (*vide* sec. 41 of the Immigrants Act). He conceded that for the deportation order to be even *prima facie* valid, it was necessary that Nadarajah should be a person to whom Part VI of the Immigrants Act should apply and that he should not be a citizen of Ceylon or an exempted person (sec. 30). It was unnecessary he argued, that Nadarajah should be convicted under the Immigrants and Emigrants Act of having illegally entered Ceylon, but that if the Minister had information that Nadarajah was not a citizen of Ceylon and had illegally immigrated into Ceylon, he could make the deportation order under sec. 31 (1) (*d*) provided the Minister "deems it to be conducive to the public interest" to make a deportation order against that person. The order itself has been produced in these proceedings. It describes itself as a "Deportation Order", under the main heading reading "The Immigrants & Emigrants Act, No. 20 of 1948", and read as follows :—

> "Whereas I, Don Stephen Senanayake, Minister of Defence and External Affairs deem it to be conducive to the public interest to make a deportation order against Nadarajah *alias* Pitchakarai Asari, son of Vala Asari.
>
> Now, therefore, by virtue of the powers vested in me by section 31 of the Immigrants and Emigrants Act, No. 20 of 1948, I do by this Order—
>
> (i) require the said Nadarajah *alias* Pitchakarai Asari, son of Vala Asari to leave, and to remain thereafter out of Ceylon ; and
>
> (ii) direct that the said Nadarajah *alias* Pitchakarai Asari son of Vala Asari be detained in police custody until such time as he is placed on board a ship or aircraft about to leave Ceylon.
>
> (Sgd.) D. S. Senanayake,
> Minister of Defence and External Affairs.
>
> Colombo 26th September 1951."

On the face of it therefore the deportation order purports to be made under the relevant provisions of the Act (although it does not specifically state that Nadarajah is a person to whom Part VI of the Act applies). The learned Solicitor-General therefore argued that the *rule nisi* must be discharged as the deportation order was on the face of it a lawful exercise of his powers by the appropriate Minister and that the papers upon which an application for a writ of habeas corpus had been made did not disclose any *mala fides* or abuse of power such as would entitle the Court to go behind the deportation order.

In view of the contrary submissions by Mr. Suntheralingam it becomes necessary to examine the provisions of the Immigrants and Emigrants Act and also of the Citizenship Act No. 18 of 1948.

After dealing with preliminaries and administrative arrangements the Immigrants and Emigrants Act (which I shall refer to as the Immigrants Act) controls the entry of persons into Ceylon. Under part III a person who is not a citizen of Ceylon, or is not exempted from the provisions of the act, cannot enter Ceylon at any place other than an approved port of entry and unless he is in possession of a valid passport with the necessary endorsement, and also, if required by regulations under the Act, a Visa or a permanent Residence Permit or a Temporary Residence Permit issued to him under the regulations (vide sections 9 and 10).

Part IV of the Act provides for the supervision of persons other than citizens of Ceylon or exempted persons. Part V makes provision for the removal from Ceylon of persons other than citizens or exempted persons. Under section 28 the Minister may make a " Removal Order " directing any such person who is convicted, *inter alia*, of having entered or remained in Ceylon in contravention of Part III of the Act or of any regulations made thereunder, to be removed from Ceylon. A Removal Order may be made by the Minister even though the convicted person may be serving a sentence of imprisonment for his offence.

Part VI deals with the deportation from Ceylon of persons other than citizens of Ceylon or exempted persons. Section 30 enacts that Part VI applies to every person unless he is a citizen of Ceylon or unless he has been exempted from the provisions of Part VI. Section 31 then proceeds to provide the different classes of cases in which the Minister may make a Deportation Order requiring the person named in it to leave Ceylon and to remain thereafter out of Ceylon.

He could make such an order firstly :—

(*a*) Where that person is shown by evidence which the Minister may deem sufficient to be a person who is incapable of supporting himself and his dependants, or is of unsound mind or a prostitute or one living on the prostitution of others, or a person whom it is undesirable to allow to remain in Ceylon for medical reasons ;

(*b*) Where a person has been sentenced to imprisonment and " by reason of the circumstances connected therewith is deemed by the Minister to be an undesirable person to be allowed to remain in Ceylon " ;

(*c*) Where that person has been sentenced outside Ceylon for an extradition crime.....;and

(*d*) Where the Minister deems it to be conducive to the public interest to make a deportation order against that person.

Section 31 provides that such a person has to leave Ceylon and remain out of Ceylon so long as the order is in force. By sub-section 4, such a person may be detained in such manner as may be directed by the Minister and may be placed on a ship about to leave Ceylon. By a later provision the master of the ship is required to receive that person and his dependants, if any, on board his ship and afford them all a passage accommodation and maintenance up to any port outside Ceylon at which that ship is " about to call ".

Parts V and VI, and certain provisions of the Citizenship Act to which I shall refer later, were the storm-centres of the controversy in Court and gave the greatest scope for the dramatic indignation which Mr. Suntheralingam, with all the vigour of his personality, was able to command.

Various other provisions of the Immigration Act were referred to such as section 41, under which any person who is detained in the exercise of any powers conferred by or under the Act shall while so detained be deemed to be in lawful custody ; section 46, which makes all offences under the Act cognizable and triable summarily by a Magistrate ; section 47, under which the burden of proving any allegation by any person that, *inter alia*, he is not a citizen of Ceylon, or that he is a citizen of Ceylon, shall lie upon that person ; and lastly, section 50, because the expression " Citizen of Ceylon " is defined as meaning a citizen of Ceylon under any law for the time being in force.

The Solicitor-General's position was that the expression " Citizen of Ceylon " in the Immigration Act (which came into operation on November 1, 1949) must be given the same meaning as is contained in the Citizenship Act, No. 18 of 1948, which came into operation on 15th November, 1948. He relied on Craies on Statute Law to support his contention that words used in a later statute must be presumed to have the same meaning as that attached to them in an earlier statute. He also stated that the definition of the expression " Citizen of Ceylon " in section 50 necessarily pointed to the meaning attached to that expression by the Citizenship Act which was enacted earlier and which deals with matters relating to citizenship.

The Citizenship Act commences by stating that from the appointed date, namely 15th November, 1948, " there shall be a status to be known as ' the status of a Citizen of Ceylon ' ". Section 2 (2) proceeds to enact the two ways in which a person " shall be or become entitled to the status of a Citizen of Ceylon ", namely by right of descent as provided in the Act, or alter-

natively, by virtue of registration, also as provided by this Act or by any other Act authorising the grant of such status by registration in any special case. Every person who is possessed of that status is referred to in the Act as a "Citizen of Ceylon" (section 2 (2)). A citizen of Ceylon may for any purpose in Ceylon describe his nationality by the use of the expression "Citizen of Ceylon". Part II confers the status of a citizen of Ceylon by descent on a person born in Ceylon before the appointed date, provided certain other conditions are fulfilled. A person born outside Ceylon before the appointed date can also have the status of a citizen of Ceylon by descent if certain conditions are fulfilled (section 4). Section 5 confers the status of a citizen of Ceylon under certain conditions, on a person born in Ceylon on or after the appointed date.

In Part III provisions are made for the acquisition of the status of citizens of Ceylon, by registration by persons possessing the necessary qualifications. Section 12 makes provision for the registration, as citizens, of persons, (in certain special cases) not qualified under the earlier provisions for registration.

Part IV provides for the loss of the status of a citizen of Ceylon by renunciation, or by a citizen, whether by descent or by registration, becoming a citizen of any other country either voluntarily or by the operation of law. There are other ways also of losing that status which it is not necessary to consider here.

Mr. Suntheralingam argued that the expression Citizen of Ceylon" in section 50 of the Immigration Act means not only a citizen under the Citizenship Act but any person who can claim to be a citizen "under any law for the time being in force". His contention is that there was a status larger than that created by the Citizenship Act, attached to all British subjects resident in Ceylon prior to the enactment of the Citizenship Act, which status he said was not taken away by the Act, that that larger status still subsists, and those claiming that larger status had all the rights and privileges, duties and obligations, which attach to the status of a Citizen of Ceylon, as created and defined by the Citizenship Act. In other words, his position is that those persons who come within the expression "Citizen of Ceylon", as defined in the Citizenship Act, form only a section of the inhabitants of Ceylon from among those who were British subjects, previously resident in Ceylon, that those not within that definition are not outside the pale of citizenship, but that they are still possessed of all such rights of citizenship as they previously had and enjoyed except such as have been taken away or specially conferred by statute. He said that the expression "Citizen of Ceylon" as defined in the Act is only a part of the connotation conveyed by the expression "British subject in Ceylon". Indeed, his contention was that the status of a "British subject in Ceylon" is equivalent to that of a "Citizen of Ceylon", the word "Citizen" being in modern terminology the equivalent of the word "subject". He relied on the definition of the term "Citizen" in Volume 3 of the Encyclopædia of the Laws of England (2nd edition, page 85) which states that "Citizen" is a term employed under the republican form of Government as the equivalent of the term "subject" in monarchies of feudal origin. He also relied on the fact that the expression "British subject" was still to be found in our laws. For example, he referred to Article 13 of the Ceylon (Constitution) Order in Council of 1946 which disqualified any person from election or appointment as a Senator "if he is not a British subject or is by virtue of his own act under any acknowledgment of allegiance, obedience or adherence to a foreign power or state"—"British subject" being defined by Article 3 as "any person who is a British subject according to the law for the time being of the United Kingdom, and any person who has been naturalised under any enactments of any of His Majesty's Dominions, and any person who is a citizen or subject of any of the Indian States.....". He contrasted this with the provisions of the Ceylon (Parliamentary Elections) Order in Council of 1946 where the expression "British subject" occurred earlier but was removed and replaced by the expression "Citizen of Ceylon". He utilised these provisions in support of his argument that both the status of a Citizen of Ceylon and of a British subject resident in Ceylon co-existed today and that any "British subject" who is resident in Ceylon—he said later he meant by "resident" one who is domiciled in Ceylon—has nowhere been deprived of his rights as such and that, therefore, all the rights connoted by the expression "British subject" continued intact except such rights as have been expressly taken away by statute. Neither the Ceylon Independence Act (George VI, Ch. 7) nor the Ceylon Independence Order in Council of 1947 nor the Citizenship Act of 1948 had made any difference to that position, he said. The status and rights of a natural born British subject or of a naturalized British subject, in Ceylon, continued unaffected, he submitted.

It cannot be gainsaid that the status of a British subject continues to attach down to the present day to all those born in any of Her

Majesty's territories and under allegiance to Her Majesty, but does it therefore follow that every British subject has all the rights and privileges created or afforded by the civil laws of any dominion in which he may have acquired a domicile or in which he may be resident for the time being?

Strictly speaking the term "British subject" is used to describe the nationality to which the person belongs, in the sense in which that term is used in international law. The nationality of a person in the broad sense describes the particular State which has jurisdiction over a person attached to that State by ties of allegiance to it; that nationality adheres to the person whether he is a resident within or outside the territory of that State, so long as he does not alter his subjection to that State and transfer his allegiance to another. The nationals of a State are all those persons which that State is under duty to protect abroad. At English common law the basis of nationality was permanent allegiance to the Sovereign. All those born within any part of the territories of the British Crown and under allegiance to the Sovereign were called British subjects by birth. No distinction was made between persons born or naturalized in the United Kingdom, or descended from persons born in the United Kingdom, on the one hand, and those acquiring British nationality in similar ways in other British possessions, on the other hand.

The British Nationality Act of 1948 was adverted to in the course of the argument but was not gone into as it did not appear to have a very direct bearing on the case. On an examination of its provisions it would appear as if they are of some assistance in considering the argument put forward by Mr. Suntheralingam that those British subjects resident in Ceylon, who are not "Citizens" of Ceylon within the Citizenship Act, have still a status which has not been taken away and which status enables them to claim and exercise all the rights and privileges attached to "Citizens" of Ceylon within the Citizenship Act, except of course such rights or privileges as may expressly be given by legislation only to those who are "Citizens" under the Citizenship Act. His argument was that wherever "citizens" as defined by the Citizenship Act are intended to be referred to, then words would be used to explicitly say so, and that if the Immigrants Act had intended to refer to such "citizens" only it would not have defined the expression "Citizen of Ceylon" by saying that it "means a Citizen of Ceylon under any law for the time being in force". The last words, he said, clearly indicated that the legislature had in mind not only "Citizens" under the Citizenship Act but also "Citizens of Ceylon" in the broader sense, which status, he maintained, continued to exist, and under which his client was in the same legal situation as a "Ceylon Citizen" under the Citizenship Act and consequently not at all liable to deportation.

The British Nationality Act creates citizenship of the United Kingdom as a sub-class within the status of a British subject and it would appear as if possession of that citizenship automatically confers the status of a British subject on such a person. With the progress of the larger overseas colonies towards complete self-government the maintenance of the universal common status of a British subject became less and less practicable. Canada introduced the concept of a Canadian nationality and the Union of South Africa that of a Union nationality. There began to grow up distinct nationalities attached to each of the countries now forming members of the British Commonwealth, as they gained progressively greater and wider internal and external independence. From and after 1st January 1949 (that being the date on which the British Nationality Act came into force), the term "British subject" seems to me to describe a person who enjoys the new status of a citizen of the "United Kingdom and colonies", or alternatively, the status of a citizen of any of the specified British Commonwealth countries, according to the laws thereof. Indeed, section 1 (2) of that Act equates the expression "British subject" with the expression "Commonwealth Citizen" in express terms and states that both expressions shall have the same meaning. The status of "British subject" is also retained by certain residents of the Republic of Ireland under certain circumstances but others are purely and solely citizens of that Republic. Until citizenship laws are enacted and put into operation in every one of the specified Commonwealth countries there will exist a class of British subjects possessing no citizenship corresponding to the different communities within the British Commonwealth and such a person is designated "a British subject without citizenship" and continues to remain such until he becomes a citizen either of "the United Kingdom and Colonies" or a citizen of any of the Commonwealth countries referred to in section 1 (3) of the Act. The result appears to be that the term "British subject" is equated to, and involves the possession of, the status of "a citizen of the United Kingdom and Colonies" or of any of Commonwealth countries specified in the Act, except in the case of the transitional class of those who are British subjects without citizenship

because of the absence of laws in any particular territories of Her Majesty enabling them to qualify for citizenship in those respective territories.

It will therefore be seen that as from 1949 the term " British subject " takes on a new meaning. A person has thereafter the status of a British subject not merely by virtue of allegiance to Her Majesty but also because of the additional qualification that he is either a citizen of " the United Kingdom and Colomies " or a citizen of any one of the Commonwealth countries mentioned in the Act—unless he falls within the temporary category of a " British subject without citizenship ". In other words, citizenship of either " the United Kingdom and Colonies " or of any of the above 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 a country until they blossom into actual citizens of that country when laws of citizenship are passed in that country. The destinction that existed before 1949 between a person who was not a natural-born British subject and other British subjects was removed by section 31 of the Act which assimilates the rights of a natural-born British subject to those of persons who have become British subjects by other ways than birth within the territory and allegiance of Her Majesty. Under the present state of affairs the status of a British subject cannot be claimed apart from the citizenship of either the " United Kingdom and Colonies " or of any of the specified Commonwealth countries, except of course in the case of the special class of " British subject without citizenship ".

In view of this, it does not seem to be possible to maintain that from 1949 Nadarajah continued to enjoy the status of a British subject with whatever rights or privileges such a status may have connoted before that date (and as to which I express no opinion), because from 1949 a " British subject " is only one who in addition to owing allegiance to the Sovereign is a citizen either of " the United Kungdom and Colonies " or of any of the specified self-governing units of the British Commonwealth of Nations, unless he falls within the transitory class. Nadarajah would not, in the submission of Mr. Suntheralingam, fall into the transitory class. It is therefore unnecessary to consider that position further. His counsel however maintained that Nadarajah was a " Citizen of Ceylon " in the broader sense for which he contended, by virtue of the mere fact of his having been born in British India in 1923 within the allegiance of His Majesty the late King George VI and his continued residence in Ceylon from 1943, in the same allegiance. That position, as it seems to me, is not maintainable. Nadarajah has not been proved to be a " Citizen of Ceylon " within the Citizenship Act, and not having been so proved, he was not, in my opinion, a " Citizen of Ceylon " to exempt himself from the provisions of the Immigrants Act to which those who are not " Citizens of Ceylon " are subject. Mr. Suntheralingam stated generally, in aid of his argument that Nadarajah was a " Ceylon Citizen ", that his client was not a citizen of India either, as on 6th September, 1951, the date of his arrest, in view of the provisions of the Constitution of India, since the people of India formed themselves into " a Sovereign Democratic Republic " as from 26th November, 1949. A cursory view shews that Article 5 of this constitution declares who were citizens of India as at the commencement of the Constitution. Article 8 affords rights of citizenship to certain persons ordinarily resident outside India, as at the date of the Constitution. Article 11 expressly reserves to the Parliament of India the power to make provisions with respect to the acquisition and termination of citizenship and other matters relating to citizenship.

The question whether or not he was a citizen of India on the date of his arrest in September was not really discussed or gone into at the extended hearing of the arguments. However that may be, it does not follow that because he may not have been a citizen of India at the date of his arrest, in September last, he was necessarily a citizen of Ceylon on that date. If he was therefore not a citizen of either India or Ceylon, at the material date, then as he was not entitled in my view to call himself a British subject at all after 1st January, 1949, it may well be that he was an " alien " within section 26 of the Citizenship Act of 1948. If that be the resulting position then he was certainly liable to be dealt with under the provisions of the Immigrants Act.

As an alternative argument Mr. Suntheralingam submitted that it had not been established that the detenues were not citizens of Ceylon. Firstly he pointed to the omission of any statement in the Deportation Order that Nadarajah was not a citizen of Ceylon. The omission was stated to be a significant one which had prejudiced his client in that if the Deportation Order had expressly said that his client was not a citizen of Ceylon his client would have been confronted with that position upon the Deportation Order being shown to him and that it would then have occurred to his client, it is said, to

immediately assert his Ceylon citizenship and request the police officer, who sought to detain him under the Deportation Order, to take him to a Court of law so that his client could request the Court to release him on the ground that he was a citizen of Ceylon, and therefore could not be deported from Ceylon. It is of course theoretically possible that had those words occurred in the Deportation Order they would have evoked the succeeding train of thought in Nadarajah's mind, but from the practical point of view it does not appear to me that any prejudice has in fact been caused to Mr. Suntheralingam's client by the omission to which he attached so much importance.

The learned Solicitor-General contended that the Deportation Order is not required to have all the particularity which one expects to find in an indictment, or even a charge, against a person accused of an offence. If, on the face of it, there was sufficient material to show that there had been the competent exercise of a lawful authority by the person in whom that power and authority had been reposed by the Legislature, that would be a sufficient answer to the rule *nisi* under *habeas corpus* proceedings. The omission to state some particulars in the Form which may be utilised for the purpose of exercising that power, he argued, was immaterial. The real question that the Court had to consider was whether the power sought to be exercised had been given, and whether that power had been *prima facie* duly exercised by the competent authority. He relied on the case of *Rex vs. Governor of Brixton Prison, ex parte Pitt Rivers* (1942) All England Law Reports, Vol. 1, 207. In that case the applicant was detained in prison under an Order made by the Secretary of State for Home Affairs under Defence Regulations which empowered the Secretary of State to make a detention order against a person where by reason of the existence of the circumstances specified in the relevant regulation the Secretary of State believed it to be "necessary to exercise control over that person". The Order made against the applicant did not contain a recital by the Secretary of State of the fact that he believed it to be "necessary to exercise control over" the applicant and the applicant accordingly claimed that by reason of this omission the order of detention was bad on the face of it. The Court rejected this contention. In that case too the applicant was a British subject by birth who had been detained without any charge having been preferred against him and without trial, from 27 June, 1940. It was not till 12th October, 1940, that he was informed in writing on the grounds on which Sir John Anderson made order against him. It seems to me that the reasons for upholding that order of detention despite the omission of words which are said to be vital to its validity could be applied in the present case.

I would say that the position that the detenues were not citizens of Ceylon was implicit in the Deportation Orders even though not explicitly stated to be so. The Deportation Orders purport on the face of them to be made under the Immigrants and Emigrants Act, and by virtue of the powers vested in the Minister by section 31 of the Act. Those recitals would have given the detenues sufficient notice of the provisions of the law under which the Deportation Orders were made. The absence of the statement that the detenues were not Ceylon citizens does not necessarily warrant the inference that the Minister acted without having reasonable grounds for coming to the conclusion that the cases before him were ones where the power could be invoked. Whether or not the detenues were citizens of Ceylon could not depend on a recital of that fact in the Deportation Orders. The want of Ceylon citizenship was a condition precedent to any order of deportation, and the absence of a statement to that effect cannot be made the basis of an inference that the Minister acted completely without jurisdiction. "A right exercise of the powers must, of course, be made, but the exact form of the order for detention is immaterial.....provided that enough clearly appears from the order of the Secretary of State to show what powers the latter was using". That statement from the judgment of Viscount Caldecote, the Lord Chief Justice, applies to the present case. Humphreys J. pointed out that the Courts never allow a mere irregularity on the face of a commitment to prevail over the substance of the matter. I therefore hold that the omission in the present cases of the statement that the detenues were not Ceylon citizens has not been in any way prejudicial to the detenues and that had the words appeared in the Deportation Orders it would not in any way have materially added to their information or assisted the detenues in obtaining their release.

There was a second aspect to his argument that it had not been established that the detenues were not citizens of Ceylon, and that was a denial of any opportunity to the detenues to prove that they were citizens of Ceylon before the Deportation Orders were made.

Every person, unless he is a citizen of Ceylon or is an exempted person, is liable to be dealt with under Part VI of the Immigrants Act. Once the Deportation Order is made and the person against whom it is to operate is detained in Police custody he is deemed under the Act to

be in legal custody—section 41. The burden therefore of proving that the Deportation Order itself was illegal is on the person affected by that Deportation Order. Furthermore, section 47 expressly indicates that with reference to any proceeding under the Act or with reference to anything done under the Act, if it is alleged by any person that he is or he is not a citizen of Ceylon the burden of proving that fact shall lie upon that person. Therefore the mention, or the omission, in the Deportation Order, of the fact that the person concerned is not a citizen of Ceylon leaves the position unaltered ; the burden of proving that he is a Ceylon citizen still remains on him. Mr. Suntheralingam admitted that the Deportation Order is an act or proceeding under the Immigrants Act. He stated therefore that his client should have had the opportunity of proving that he was a citizen of Ceylon at the date of the Deportation Order and that the failure to afford his client such an opportunity vitiates the Deportation Order and all consequential steps taken upon that order. Quite apart from the fact that the mere omission of the alleged words of great import from the Deportation Order could not by itself have deprived detenues of that opportunity, it is to be observed that no procedure is laid down to be followed by the Minister when acting under section 31 (1) (*d*), nor is there any indication that the person to be deported by action under that provision is to have an opportunity of showing cause anterior to the order being made. Even in the cases where the Minister has to have evidence before him prior to making a Deportation Order —such as the four cases dealt with by section 31 (1) (*a*)—there is no provision requiring or entitling the person against whom the section is being invoked to be noticed to be present, or to show cause against any order being made. It is of some significance in this connection that while the Minister has the right to delegate any power, duty or function vested in or imposed or conferred upon the Minister by the Act, he is expressly precluded by section 6 from delegating to anyone the power of making a Deportation Order conferred by section 31. In entrusting such a power to the Minister and to the Minister alone, the Legislature appears to have assumed, as anyone would be entitled to assume in the first instance, that such a high executive officer of the Dominion would act with a sense of responsibility before exercising such a power in the course of his executive functions. For it is purely as the executive that he acts when discharging his functions under this section and in no sense as a Court of law. Any danger to the subject from any arbitrary or capricious exercise of such power is conserved by the right which the subject has of questioning or challenging the action of the Minister by *habeas corpus* proceedings. If the subject can place before this Court facts which *prima facie* show that the Minister acted in bad faith (with all that that expression connotes in the context of *habeas corpus* proceedings) then the Court is entitled to go behind the writ or warrant of commitment, and examine all the facts which led up to it. In the absence of such a *prima facie* case, one cannot assume that the Minister has acted irresponsibly but would rather be entitled to go on the presumption of the regularity of all official acts. The matter does not however end there. There is no material to show that even up to the date of the hearing of these applications any representations had been made to or material placed before the appropriate Minister to demonstrate that the detenues were citizen of Ceylon. Even the opportunity afforded by these Applications was not made use of to prove that the detenues were Ceylon citizens. Reliance was placed on the mere statements in the counter-affidavits of the detenues that they became citizens of Ceylon since their migration to Ceylon and that they did not cease to be citizens of Ceylon on the grant of Independence to Ceylon, or on the enactment of the Citizenship Act. In the petition and affidavit filed on the 9th October by the petitioner, who claimed to be a cousin of the detenues, the petitioner has been content with the bare assertion that the arrest and prosecution and the Deportation Order were illegal and that the detenues could not be dealt with under section 31 (1) of the Immigration and Emigration Act. Counsel for the petitioner rested his case on the contention that the detenues were citizens of Ceylon in the larger sense in which he said every British subject who had been resident in Ceylon prior to the Ceylon Independence Act and subsequent legislation, was a citizen of Ceylon ; and on that basis he asserted that every British subject had rights and immunities equal to those enjoyed by persons who are citizens of Ceylon within the narrower sence of the Citizenship Act. He did not seek to take up the alternative position that if that contention failed the detenues should be permitted to place evidence before the Court that they were citizens of Ceylon within the Citizenship Act. He did not at any stage move to call evidence on any point.

It was then said that the want of a due sense of responsibility and of personal regard for the personal freedom of the individual was manifest from the fact that only the confessions were before the Minister and that he must have acted

entirely upon the confessions which the detenues are alleged to have made while in Police custody, one directly to a Police officer and the others to a Justice of the Peace, but whilst they were within the sphere of influence of the Police. These confessions have been challenged as having been obtained by duress and physical violence exercised by officers of the Police whilst the detenues were in their custody. The Solicitor-General stated that the papers in Court showed that there was at least one other source of information which presumably would have been available to the Minister, namely, the informant referred to in the affidavit tendered on behalf of the respondent. There is no reason to suppose that the Minister must necessarily have acted exclusively upon the impugned confessions. It is however unnecessary to speculate as to the adequacy or the sufficiency or otherwise of the material which was available to the Minister before he made the Deportation Orders. It is sufficient to say that if the necessary conditions, which entitle a Court to go beyond the writ or warrant under which detention has taken place, had been fulfilled, the Court would be under duty to investigate the facts which led up to the detention. It therefore becomes necessary to examine and ascertain the circumstances in which the Court should undertake that task. Many authorities were referred to on both sides and as the ultimate issue involved is the liberty of the subject it becomes necessary to consider them in some detail.

Before I proceed to do that it is desirable that I should deal with and get out of the way certain submissions made on matters which, it was argued, did bring these cases within the ambit of the conditions under which the Court is bound to go behind the orders of commitment.

Much warmth was manifested as counsel for the petitioner dealt with the allegations of assault made against the Police. I do not think that, even if true, the allegations that the confessions were obtained by illegal assaults and duress bring these cases within the principles upon which the Court can go behind the *prima facie* authority for the arrests and detentions. It is however to be noted that no complaint whatsoever had been made either by Nadarajah or by the petitioner or by anyone else, of the duress and violence alleged against the Police until these proceedings commenced. No representations were made to the Minister by or on behalf of the detenues between the date of the first arrest on 6th September, 1950, and the date of their discharge by the Magistrate on the 9th October, 1951.

It was next argued that the "public interest" in support of which the Deportation Order is made must be stated on the face of the document, or that it must at least appear from the document that the interest to be sub-served is in fact of a public nature. Had the words been "deems the public interest to be sub-served.....", then Mr. Suntheralingam argued it might be stated that what was contemplated was a subjective state of mind of the Minister, which could not be demonstrated on the face of the order, but that as the words are "where the Minister deems it to be conducive to the public interest....." then something objective is contemplated and that therefore the order itself must show what is the public interest in aid of which the Deportation Order is made. His contention was that the public interest to be served by the Deportation Order should be either of a pecuniary nature or of a kind where the legal rights or liabilities of a class or section of the general community at large are affected. I do not think that the "public interest" contemplated by section 31 (1) (*d*) has to be narrowed down or restricted in the manner suggested, for it may well be that the public interest may be affected by considerations other than those portrayed by Mr. Suntheralingam. For example, it would be apparent that it is in the public interest that illegal immigration should be put a stop to because if it is allowed to continue unchecked it is bound in the long run to affect the economic condition of the citizens of Ceylon. It may also be that undesirable elements will thus enter the community at large, and affect the health, morals, or general welfare of the country. The other provisions of section 31 give an indication of the "mischief" at which the deportation provisions are aimed. These, each in their own way, affect the public interest, and give an indication that the expression public interest in the context is not to be narrowed down or confined to the types indicated by counsel for the petitioner. There may well be other factors which may affect the public safety or public welfare which it is not possible to envisage and enumerate and for that reason the Minister was given the very wide powers in the last clause of section 31 to catch up cases which it would not be possible to specifically adumbrate.

Dealing more directly with the Deportation Orders and the steps which had been taken for obtaining them Mr. Suntheralingam contended that the Immigrant Act provided specific remedies for different types of cases. In the present instance the arrests were on the footing that the detenues were illegal immigrants. They were remanded as such, and should therefore have

been proceeded against on that footing, and if the prosecutions were likely to fail on the ground of want of sufficient evidence the detenues should have been discharged. No exception could have been taken if such a course had been followed. But what Mr. Suntheralingam vehemently protested against was that the authorities, having failed to obtain Removal Orders because of the insufficiency of evidence, then invoked the provisions of section 31 to obtain the Deportation Orders which, in effect, were very little different from the Removal Orders which they failed to obtain. He admitted that although the detenues were discharged on the ground of insufficiency of evidence to satisfy a Court of law that the detenues were illegal immigrants, nevertheless, Deportation Orders could be issued against such persons. What he strongly pressed was that in such cases the Minister cannot act on the very material on which proceedings had been initiated for illegal immigration and been abandoned, and make Deportation Orders on the self-same insufficient material. This argument is based on the supposition that there was no other information on which the Minister acted in making the Deportation Orders. He supplemented his contention on this aspect by stating that the Minister cannot deal under section 31 (1) (*d*) with cases which fall within sub-sections (*a*) to (*c*). I fail to see why this necessarily should be so. It may be that the Minister may not choose to act, but there does not appear to be anything to prohibit the deportation, under section 31 (1) (*d*), of persons who fall within any of the classes of persons categorically mentioned in section 31 (1) (*a*) or (*b*) or (*c*). It is however unnecessary to specifically decide this point.

Mr. Suntheralingam went still further and contended that the procedure provided for the prosecution of an offender for illegal immigration was used with the indirect object of getting information for Deportation Orders. He charged the Minister and the other officers, in particular the Police, with bad faith and with having abused the processes of the law to get evidence on which to deport the detenues. It had never been the intention of any one concerned to prosecute the detenues for illegal immigration he said, but only an intention to covertly use that machinery with the ulterior object of deporting the detenues. He characterized the entire proceedings commencing with the information said to have been furnished by the informant, up to the ultimate confession of the police officer to the Court of the insufficiency of the evidence for the successful maintenance of the charges of illegal immigration, as a mere mockery and a sham and a "fraud on the statute" entitling the Court to go behind the Deportation Orders and tear asunder the veil which concealed the ugly episode and penetrate into the true motives which underlay the farce which culminated in the Deportation Orders. He accused them all not only of want of good faith but imputed to them "malice in law" as well as "malice in fact". 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. Indeed it would have availed the petitioner's purpose only a little were he able to establish merely malice in law, for that would not involve the indirectness of motive required to be demonstrated before a Court would go behind the writ or warrant of commitment. He therefore had to rely on "malice in fact" both in the Minister and other officers who had been engaged in the various steps which ultimately resulted in the Deportation Orders being made. The direct imputation of malicious intent was levelled at the police officers and vicariously at the Minister of Defence and External Affairs, the Right Hon. D. S. Senanayake, who in that capacity has signed the Deportation Orders, malice in his subordinates being referred to and imputed ultimately to the Minister.

There can be no question that if those concerned acted in contravention of the law, however innocent may have been their state of mind and free of ulterior intention or motive, the detenues should be discharged. Except for the irregularity on the face of the Deportation Order, which I have already dealt with, it was not contended that there was any other *ex-facie* defect or irregularity in the proceedings culminating in the Deportation Orders which would have entitled the detenues to be forthwith discharged. What then is the "malice in fact", which actuated either the Minister or those subordinate to him? Mr. Suntheralingam was not able to refer to any personal ill-will by which any of the officers were motivated. For all that one could gather from the whole scope of his argument one got the impression of a 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.

Obviously any such alleged general desire cannot be regarded as malice in fact against the particular detenues concerned in these applications. Nor has there been placed before the Court any evidence of any extraneous circumstances, or any relationship between the detenues and anyone concerned in the steps resulting in the Deportation Orders from which one could infer any motives of revenge, or any intention to seek satisfaction for any personal grievances either between the officers and detenues or between the detenues and any third parties sheltering behind these public officers to whom the latter lent themselves and their powers for the satisfaction of any personal revenge or spite of those behind the scenes. The plea of " malice " therefore fails and so it is unnecessary to consider whether if malice had been proved in fact, the Court can go into the question as to whether the Deportation Orders and the consequent arrest and detention of the detenues had been justifiably made.

In the case of *An Application for a Writ of Habeas Corpus re Thomas Perera* (1926) 29 N. L. R. 52 it was held by this Court that its powers to issue writs of habeas corpus were conferred by the Courts Ordinance and that these provisions are founded upon English law in consequence of which it would be helpful to refer to the law of England on questions relating to *habeas corpus* proceedings.

*The Bracegirdle Case** (1937) 39 N. L. R. 193 was also referred to by both sides. There the Attorney-General contended that the Courts had no authority to inquire into the circumstances under which an Order of Detention was issued by His Excellency the Governor under the Order-in-Council of 1896. Chief Justice Sir Sidney Abrahams pointed out the danger (if the argument was sound) to the fundamental principle of law enshrined in Magna Carta (that no person can be deprived of his liberty except by judicial process), and to the predominance of the rule of law which distinguishes the systems of government prevalent throughout the British Empire. After examining the position his view was that the Court was under a duty to inquire as to whether the conditions which must be satisfied before the extraordinary powers given to an executive officer can be exercised, have been fulfilled. He sought support from the judgment of the Privy Council in a case where the Governor of Nigeria issued an order requiring a person of the country to remove himself from one part of Nigeria to another, and where the Privy Council reversed the decision of the Supreme Court of Nigeria which held that the judges of that Court had no power to go into the question whether or not certain conditions that had to be fulfilled before the Governor could issue such an order, had or had not been fulfilled. It does not go to the length of deciding whether, if those conditions had been satisfied, there was or was not sufficient material on which the particular executive officer concerned should have acted. In *Liversidge's Case* (1941) 3 All England Law Reports, 338 Lord Atkin expresses the same view (at page 358) when he says that the duty of the Court is to see whether the conditions of the power are fulfilled but that a judge has no further duty of deciding whether he would have been of the same view, any more than if there is reasonable evidence to go to a jury, the judge is concerned to decide whether he would have himself come to the same verdict on such evidence. He points out that the Minister may have reasonable cause on the information before him to believe that a person should be dealt with under his powers. If so, no remedy in the Courts, either by an action for false imprisonment or by way of habeas corpus, is available even though it should subsequently be proved beyond doubt that the Minister's information was wrong. It seems to me to be important to keep clearly before one's mind the distinction between the fulfilment of the conditions which are a prerequisite to the exercise of the power on the one hand, and on the other, the sufficiency or otherwise of the material upon which the officer concerned has acted. Applying the principle to the present case the questions here would be: did the Minister have the power to deport; under what conditions could the power be exercised; were the detenues persons to whom Part VI of the Immigrants Act applied; has the Minister purported to exercise the power of deportation given by that part of the Act; is the Order of Deportation valid on the face of it? In other words, the question is, has there been a competent exercise of a lawful authority? If there has been such, I do not think that the Court has the 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.

In *Rex vs. The Officer Commanding the Depot Battalion, R.A.S.C., Colchester, Ex-parte Elliott* (1949) 1 A. E. R. 373 Lord Goddard, Chief Justice, said (at page 379) " on an application for habeas corpus the Court does not go into the merits so far as the offence is concerned ", which means, in terms of this case, that the Court on an appli-

* 8 C. L. W. p 31.

cation for habeas corpus does not go into the question whether the Minister should or should not have "deemed it to be conducive to the public interest" to deport those detenues. To do so would be to go into the merits or demerits of the cases for deportation. The proper forum for discussing the question as to whether or not the Minister should or should not have exercised his discretion and used such administration powers in a given set of circumstances is Parliament and not the Courts (1950) Wade and Phillips on Constitutional Law, 276.

Since the decision in *Liversidge's case* there has been hardly any application for *habeas corpus* of any importance where the excursions of the Law Lords into the subjective and objective realms of the mind are not recalled. Sir John Anderson, the Home Secretary, issued an order of detention against Jack Perlzweig *alias* Robert Liversidge under the Defence Regulations which enacted that "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations.....and that by reason thereof it is necessary to exercise control over him he may make an order against the person directing that he be detained." The question which was mainly discussed was whether the words "if the Secretary of State has reasonable cause to believe.....", in the context in which they are found, point simply to the belief of the Secretary of State founded upon his view of there being reasonable cause for the belief which he entertains or whether those words in the context require that there must be an external fact which gives reasonable cause for the belief and one therefore capable of being challenged in a Court of law. Four of the noble Lords were of the view that, in the context, and unencumbered by any leanings in favour of the liberty of the subject or otherwise, the words meant that it was for the Secretary of State to decide whether or not he had reasonable grounds; in other words, that the condition was subjective and not objective. In this they departed from the view of Lord Atkin, who in a classical judgment, protested, though alone, against the subjective meaning contended for. Lord Atkin stated that he knew "of only one authority which might justify the suggested method of construction, namely the subjective test and not the objective one, and that authority was only of Humpty Dumpty in Chapter 6 of 'Alice Through The Looking Glass'". It is best to keep clear of any controversy where there is even the suggestion of so much as a broken ankle and I therefore do not propose entering the lists and venturing to say whether Lord Atkin's view that reasonable cause for an action is just as much a positive fact as a broken ankle, is correct; or whether that observation is sufficiently countered by Lord Romer's rejoinder that while it was perfectly true that the words "if a man has a broken ankle" do not and cannot mean "if a man thinks he has a broken ankle" and that the regulation in question was not dealing with the state of a man's body but with the state of his belief or, in other words, with the state of his thoughts. It is sufficient to say that the words in the Immigrants Act take us more firmly into subjective realms than the words of the famous regulation in *Liversidge's case*, as the words we have to deal with are "where the Minister deems it to be conducive to the public interest", and not "where there is reasonable cause for the Minister to deem it to be conducive to the public interest".

It is interesting to note that it was admitted in *Liversidge's case* that "the Home Secretary could act on hearsay and is not required to obtain any legal evidence.....and clearly is not required to summon a person whom he proposes to detain and to hear his objections to the proposed order". Viscount Maugham's view was that there was no onus thrown on the Secretary of State who made the order to give evidence to show that he had reasonable cause to believe that the appellant was a person of hostile associations, &c. His view was that as the order on its face purported to be made under the regulations and stated that the Secretary of State had reasonable cause to believe the facts in question the well known presumption *omnia praesumuntur rita esse acta* can apply and that the order must *prima facie*—that is, until the contrary is proved—be presumed to have been properly made, and it must be taken that the requisite as to the belief of the Secretary of State was complied with. That action itself was for false imprisonment, but the principle is of wide application and is not peculiar to any particular class of action. In that particular case no affidavit had been filed on behalf of the respondent the Home Secretary setting out any of the circumstances leading to the reasonable cause for his belief.

The next case to be considered is *Rex vs. Governor of Brixton Prison, Ex-parte Sarno* (1916) 115 Law Times Reports, 608. Sarno was alleged to have fled from Russia, for political reasons, in 1900. He was arrested under the Aliens Restrictions (Consolidation) Order of 1914 but was set free upon *habeas corpus* on the ground that the order was irregular and invalid as it had not been signed by the Secretary of State. He was however immediately rearrested upon a regular and valid order of the Secretary of State deporting him to Russia in consequence of which

a further rule was issued under a *habeas corpus* application. The grounds upon which the order was challenged were, *inter alia*, that the regulation framed under the Aliens Restrictions Act of 1914 was *ultra vires* for Sarno was never given any opportunity of leaving the United Kingdom, and that as Sarno had been released under an order of Court it was illegal to rearrest him on the same or similar grounds to those upon which he had been discharged, and that he having left Russia for political reasons ought not in any event to be deported to Russia but, if at all, to some friendly or neutral country other than Russia. In opposition to the rule an affidavit was filed from the Assistant Secretary of the Home Office which stated that it was part of the comity of nations that undesirable aliens should be sent back to their own country and not to other countries. It was stated further that according to information supplied by the Police, Sarno was a man with no regular occupation, that he lived in a house which was the resort of thieves, bullies, and prostitutes, and that he was suspected of theft and living on the immoral earnings of women. The Act and Regulations under it had reference to a state of war and the order was in fact made during the first World War.

It was argued for the applicant that the Deportation Order was bad for either of two reasons, firstly because the Regulation was *ultra vires*, or secondly because it was intended to make an improper use of the powers granted to the Secretary of State. The contention that the Regulation under which Sarno was dealt with was *ultra vires* was dismissed in the briefest terms by Chief Justice Lord Reading. On the second point, namely, that it was intended to make an improper use of the powers granted to the Secretary of State in that, counsel for the applicant submitted, deportations should not be ordered unless the safety of the realm was in question and that nothing of that kind had been shown in the case of Sarno, who was, at most, simply an undesirable alien, and that if he was guilty of any of the offences of which he was suspected Sarno could have been dealt with by the Courts of England in the ordinary way but that he could not be deported for any of those reasons, especially in the absence of any suggestion that his presence in England constituted a danger to the State, the Lord Chief Justice stated that in the event of the Court being of opinion that there was a misuse of the extraordinary powers given to the executive the Court would be able to deal with the matter if the misuse was imminent and some act had been done with the intention of misusing the powers. He was satisfied, however, that upon the materials before him, he could not conclude that there had been any misuse of the power. While the evidence against Sarno was only evidence of suspicion on the part of the Police and therefore evidence upon which clearly no action could have been taken in the Criminal Courts, it appeared to the Lord Chief Justice that that was no justification for asserting that the Secretary of State was not entitled to get rid of Sarno. He also expressed the view that although in time of peace it might be an exaggeration to describe suspicion of a crime as a danger to the safety of the realm, nevertheless, suspicion may justify action during a time of war which would not be justified in a time of peace. The case is of importance, in that all the three judges made it clear that the Court has the power to intervene and prevent any misuse of the power of deportation. All of them also made it clear that they were not going into many questions which had been raised and many matters which had been touched upon in the course of the argument, on which the Court was not called upon to decide, amongst them being the question raised as to the power of the Secretary of State to send back to his own country an alien who had sought refuge in England from some political offence which he had committed, or which he had been suspected to have committed in his own country. All three judges expressly refrained from expressing any views on what a Court would do if an attempt had been made, by the exercise of the powers conferred upon the Secretary of State by the Regulations, to compel a real political refugee to return to his native land. Mr. Justice Low made it quite clear that upon the material before him he was not satisfied that Sarno was a political refugee at all and he therefore did not venture to forecast what his conclusion might have been if the evidence on that point had been full and satisfactory. Nevertheless, the principle was laid down that the Court would interfere if satisfied that the power was being used for any purpose other than the one which the law had in contemplation in giving the power of deportation.

The question regarding the next step, so to speak, in a Deportation Order under the Aliens' Restriction (Consolidation) Regulation 1916, arose in Sacksteder's case, *Rex vs. Superintendent, Cheswick Police Station* (1918) 118 Law Times Reports 165. The Regulation there in question enacted that where an alien was ordered to be deported he may be detained in such manner as the Secretary of State directs until the person to be deported could be " conveniently conveyed to a place on board a ship about to leave the United Kingdom....." and while so detained to be in lawful custody. The Home Secretary had

given general instructions that any person named in a Deportation Order which was intended to be enforced immediately should be arrested and conveyed by ship from the United Kingdom and that he should be detained between the time of his arrest and the sailing of the ship selected for the passage. The Home Secretary made an order for deportation in the case of the applicant who was a French subject of military age. He further directed that the order for deportation should be immediately enforced in the case of the applicant. The appeal was from an order made by Lord Reading C.J., and Darling and Low JJ., discharging a *Rule Nisi* for a writ of *habeas corpus*. The Court of Appeal considered it necessary to scrutinise carefully whether the requirements and procedure of the Regulations had been satisfied and followed because the legislation under which the Secretary of State acted in the particular case did not appear to have as an objective the carrying out of an agreement between England and one of her allies during the war by which Great Britain had agreed to place the subjects of that country who were liable to military duty under the laws of that country, within the jurisdiction of that country by the use of the Regulations in question ; but the object of those Regulations appeared to be simply to get rid from the United Kingdom of aliens whom the Secretary of State thought it was not right to allow to remain. Lord Justice Pickford stated it was not for him to say whether it was better in a case of this kind (to fulfil a reciprocal agreement between France and Britain that each country should return to the other country persons subject to military service) to obtain direct authority to do what was wanted, or to take advantage of indirect means when there is no direct authority for doing it, if the indirect means would enable one to attain the same object. That, he said, was for the Government to consider. The Court was satisfied that this deserter from the military service of France was not dealt with under a general order of deportation and transhipment without separate and individual consideration of the circumstances of each case by the Secretary of State himself. Lord Justice Pickford was not prepared to go behind the order of deportation and transhipment although he stated that while he was not prepared to go as far as Low J. was inclined to go in *Sarno's case*, yet if the Lord Justice was satisfied that the Deportation Order was " practically a sham, if the purpose behind it is so illogical as to show the order is not a genuine or *bona fide* order, the Court could go behind it ", although he was not prepared to say that in every case where there is an order of detention or imprisonment the Court is entitled to go behind that and see what the motives were for making that order. He did not think the fact of the motive being to carry out the agreement between France and Britain was sufficient to show that the order of detention until the applicant could be put upon some ship going to France was enough to entitle the Court to say that the Order was invalid and that the custody was not a good custody. Lord Justice Warrington also expressed himself in very similar terms except that he added that, though on the face of it the order may be a valid one, yet the Court would be entitled to go behind that valid order and say that it was no order at all, if it were a mere sham to cover up something which would be illegal or to enable some subsequent act to be done which would itself be illegal. What happened after the ship left the shores of Britain was not a matter which would concern the authorities in Britain. The Lord Justice did not think it was necessary for the Court to consider what may have been the ultimate motive with which the Secretary of State made the order. Lord Justice Scrutton prefaces his judgment by expressing the hope that His Majesty's Judges will always give the same anxious care as he had given to the particular case, to cases where it was alleged that the liberty of the subject had been interfered with, and none the less because the person is not by birth, or naturalisation, a subject of the King, but a foreigner temporarily living within the King's protection. At the same time he made it clear that there was not much room for sympathy in the particular case as the applicant was a French subject, who desired to avoid helping France in her time of national emergency. In the result, he contented himself with the observation that the Court of Appeal had decided in an earlier case that the Court is not a Court of Appeal from the Secretary of State in making an order for deportation, and that the Regulations gave the latter power to select the ship on which the alien should be deported. So that whilst the Court in the earlier case was of the view that the Secretary of State could not in terms make an order that an alien shall be deported to a specific country yet he had the power to select the ship on which the alien may be placed, " and the result may be that, unless he jumps overboard, or manages to get overboard on to some other ship, he will go to the country to which the ship on which he is placed is sailing. That has been decided by the Court of Appeal and I am bound by it." That was the only comfort the applicant received at the hands of Lord Justice Scrutton. Happily it was not necessary for the applicant to adopt the sugges-

tion of that learned and noble Lord Justice and consign himself to the tender mercies of the deep, because he offered to serve in His Majesty's armed forces, an alternative which relieved the applicant from the dilemma in which Lord Justice Scrutton had left him.

Very great emphasis was laid by Mr. Suntheralingam on Vimlabai Deshpande's case : *Vimlabai Deshpande vs. Emperor* (1945) A. I. R. Nagpur 8 and A. I. R. (1946) P. C. 123. Deshpande was detained in Police custody under the Defence of India Rules. He was arrested by the Police (under the ultimate orders of the Deputy Inspector-General of Police) and placed in Nagpur jail. He was detained in police custody later from 21st August, 1944, and on the 26th August the Provincial Governor made order that he should remain in police custody for the remaining period of 15 days during which he could be so detained, on the ground that the particular police officer who arrested Deshpande reasonably suspected Deshpande of having acted or of acting or of being about to act in a manner prejudicial to the efficient prosecution of the war ". Counsel retained by Deshpande's wife to appear on an application for *habeas corpus* made by the wife, were not allowed to interview Deshpande while in police custody on the ground that he was confined under the Defence Regulations and that in those circumstances he could not be allowed to see anyone. Deshpande was an Advocate of the High Court of Nagpur and was an editor of a Marathi Weekly. One Inamdar was employed as a clerk in the office of the press where Deshpande's weekly paper was printed. Inamdar left the services of the press in 1944 and it was not till August 1944 that the police busied themselves by surrounding the residence of Deshpande searching his house and the office of the press, and then requested Deshpande to attend at the police station where he was interrogated and arrested and put in the lock-up. He was not informed why he was arrested nor was he told what the charge against him was. The High Court was satisfied that the search, arrest and detention were in connection with inquiries which the Bombay police were making in the course of an investigation into offences of dacoity, and the actual enquiries regarding Inamdar which were made from Deshpande suggested an inference that the police suspected Inamdar and that they further suspected that Inamdar was harboured in the office of Deshpande's weekly. The Court pointed out, in unmistakable terms, that the provisions relating to detention contained in the Defence of India Rules related to detention and to nothing else, and that if either the police or the Provincial Governor desired to investigate into any offence, whether under the Penal Code or under the Defence of India Rules, then they were bound to conduct their inquiries in accordance with the provisions of the Criminal Procedure Code and that neither of these authorities could use the powers of detention under the Defence Rules for this purpose and under the guise of exercising those powers conduct a secret investigation into a crime. The Court emphatically expressed itself of the view that if the powers of detention given by the Defence Regulations were utilised not for their legitimate purposes but in order to assist the Police in an investigation which had nothing to do with anything contemplated by the Defence Regulations but which related to crimes committed against the ordinary laws of the country, such a use of the powers under the Defence Regulations was " a fraud upon the Act " and that such action cannot be said to be taken in good faith.

In the present instance there has been no use of the powers of the Minister under the Immigrants Act for any collateral or indirect purpose *Deshpande's case* therefore does not help the petitioner. The case of *Metacalfe vs. Cox* (1895) Appeal Cases, 328 was relied on for the proposition that if a person exercises power conferred on him, in bad faith or for a collateral purpose, it is an abuse of the power and " a fraud upon the statute ", and is not really an exercise of the power at all, and a Court can interfere with such a colourable exercise of the power and where an issue is raised whether any particular order has been made in bad faith or for a collateral purpose and therefore not made in exercise of the power, the Court is bound to inquire into the facts. In the case of *In re Banwarilal* 48 Calcutta Weekly Notes, 766 the Court held that the Order made by the Provincial Governor superseding the Howrah Municipality under the Defence of India Rules was invalid because it was made for a purpose not contemplated by the Defence of India Act or Rules framed thereunder. That was clearly an instance where the Court would interfere because a power, intended to secure a particular object, was used to secure another object not within the contemplation of the law giving that power. The Court specifically stated that if a police officer were to detain an accused or a witness supposed to be acquainted with material facts, under the Defence of India Rules in order that he may have the facility of carrying on an investigation unhampered and unrestricted, that would be an abuse of the power conferred by the Defence Regulations. The second proposition culled from *Metacalfe vs. Cox* that the Court is bound to inquire into the facts when the

issue is raised that any particular order has been made in bad faith or for a collateral purpose means, I presume, as Lord Wright put it in *Green's Case* (1941) 3 All England Reports, 388 " until there emerges a dispute the facts into which the Court feels it should inquire, I think the defendant's statement is enough.....". Lord Justice Goddard expressed the same point of view when he said in *Green's case* that where an order which is valid on the face of it is produced " it is for the prisoner to prove the facts necessary to contravert it, and that where all that the prisoner says in effect is ' I do not know why I am interned, I deny that I have done anything wrong ' that does not require an answer because it in no way shows that the Secretary of State—within the words of Regulation 18B—had not reasonable cause to believe.....". In *Deshpande's case* too, the Court expressed the view that where the good faith of the authorities was expressly challenged by facts being set out which, if unrebutted and unexplained, were sufficient to support the allegation, then the complete absence of any refutation of those facts and the failure to explain them would lead the Court to conclude that the orders were not made in good faith, that is to say, that the object was not to legitimately carry out the purpose of the statute but to use the powers given by the statute for some indirect purpose, and that in such a situation the use of the extraordinary powers is unjustifiable—*Maledath Bharathan Malyali vs. Commissioner of Police* (1950) A. I. R. Bombay, 202. It would therefore be seen that facts must be set forth which make it apparent, *ex facie*, that the powers were being used not for their legitimate purpose but for some purpose for which the powers were not intended. In other words, if 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, or shall I say under cover of the statute, to achieve or facilitate some other object or purpose, beyond or 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 person affected by that arrest and detention must be forthwith released and discharged.

I have already dealt with the various allegations made, and the grounds urged in support of the applications, and it seems to me that they do not disclose any such misapplication or misuse of the powers vested in the Minister of Defence and External Affairs as to justify my holding that the arrests and detentions under the Deportation Orders are " a fraud upon the statute ", or are otherwise illegal or invalid. The petitioner has not, in my view, made out a *prima facie* case that the Deportation Orders, or the arrests and detentions under them, as on and from the 9th October, 1951, were motivated by any collateral or indirect or improper purpose. Whether or not it can be said that the earlier arrests and detentions commencing from the 6th September, 1951, and terminating with the discharge of the detenues by the Court on the 9th October, 1951, on the application of the respondent, were made legitimately and *bona fide* for the purposes of and with the intention of prosecuting the detenues for illegal immigration is a matter on which I express no view whatsoever because we are concerned, on the present applications, only with the arrests and detentions which were effected on and from the 9th October, 1951, onwards after the detenues had been discharged from the proceedings in the Magistrate's Court. One cannot, on these applications for *habeas corpus*, deal with a custody which had terminated before these papers were filed.

On the question of *ultra vires* I would follow the ruling in *Mudanayake vs. Sivagnanasunderam* (1951) **53 N. L. R. 25.**

I therefore discharge the rules *nisi* issued on the respondent and dismiss the several applications with costs. There will however be only one set of costs in respect of the arguments which took place in Court on the 3rd, 4th, 5th and 6th December last, and in respect of any appearances in connection with the applications for bail in these proceedings.

In conclusion, I would like to add that the preparation and delivery of this Order were withheld by me pending the hearing of twenty other *habeas corpus* applications where many of the matters of law argued on the present applications were also raised, in the hope that further light may be thrown on them. Those applications were, however, disposed of by me on the 23rd January last after hearing argument, on grounds which made it unnecessary for the points covered by these applications to be argued in those cases.

Rules discharged.

Present : ROSE, C.J., GRATIAEN, J., PULLE, J., SWAN, J. & L. M. D. DE SILVA, J.

A. M. M. MOHAMED IBRAHIM SAIBO vs. S. D. M. MANSOOR *et al.*

S. C. No. 36—*C. R. Colombo, No.* 15508

Argued on : 20th, 21st, and 27th November, 1952
Decided on : 5th January, 1953

Landlord and tenant—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 sub-tenant 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 (*b*) 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 only of the tenant, but also of the sub-tenant and hence the decree-holder can avail himself of the remedies provided by sections 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.

Cases referred to : *Mohamed Haniffa vs. Dissanayake* (1922) 4 T. C. L. R. 94.
Siripina vs. Ekanayaka (1944) 45 N. L. R. 403.
Kudoos Bhai vs. Visvalingam (1948) 50 N. L. R. 59.
Justin Fernando vs. Abdul Rahiman (1951) 52 N. L. R. 462.
Katz vs. Reading et al. (1944) C. P. D. 197.
Adyanath Ghatak vs. Krishna Prasad Singh and another, A. I. R. (1949) 124 P. C.
Brown vs. Draper (1944) 1 K. B. 309.

H. V. Perera, Q.C., with *M. Somasunderam* and *S. Sharvananda*, for the petitioner-appellant.
H. W. Jayawardene with *D. R. P. Goonetilleke*, for the 1st defendant-respondent.
H. W. Thambiah with *V. Ratnasabapathy* and *R. R. Nalliah*, for the 2nd defendant-respondent.
A. W. W. Goonewardene with *T. Velupillai*, for the 3rd, 4th and 6th defendant-respondents.

JUDGMENT.

This appeal was reserved under the provisions of section 51 of the Courts Ordinance for the decision of a Bench of Five Judges. The question to be determined is whether a sub-tenant is liable to be removed by a Fiscal's officer under a writ of ejectment directed against the tenant alone in execution of a decree entered in proceedings to which the sub-tenant was not made a party although he had commenced his occupation of the premises before the action commenced. For the purpose of judgment which we are about to pronounce, the term " sub-tenant " is confined to monthly sub-tenants under non-notarial contracts. The position of a sub-lessee under a notarial contract for a term exceeding one month does not arise for consideration.

The question under consideration had been answered in the negative by a single Judge of this Court in *Mohamed Haniffa vs. Dissanayake* (1922) 4 T. C. L. R. 94, and later by a Bench of

two Judges in *Siripina vs. Ekanayaka* (1944) 45 N. L. R. 403. In *Kudoos Bhai vs. Visvalingam* (1948) 50 N. L. R. 59, however, a single Judge of this Court, under the impression that the ruling in *Siripina's case* was an *obiter dictum* and therefore not binding on him, considered himself free to take a contrary view, but in *Justin Fernando vs. Abdul Rahiman* (1951) 52 N. L. R. 462 a Bench of two Judges held that *Siripina's case* had been correctly decided. In consequence of this conflict of authority, much uncertainty has prevailed as to what is the correct legal position in regard to a problem of considerable practical importance at the present time, and it is desirable that the conflict should be resolved by an authoritative pronouncement of this Court.

The effect of a concluded contract of sub-tenancy is that the tenant, while remaining liable to the original landlord for the fulfilment of his own contractual obligations, has for the time being transferred to the sub-tenant the right to occupy the rented premises. If, during the subsistence of the main tenancy, the intermediate tenant defaults in the payment of rent, the *actio locati* is available to his landlord to sue him (but not the sub-tenant) for recovery of rent. " An original lessor has no right to the *actio ex locati* against a sub-tenant, for there was no contract between them, and one cannot sue or be sued on the contract of another ".—*Voet* 19-2-21. Similarly, an action lies against the tenant at the end of the hiring for " the restoration of the thing in the same state in which it was given ".—*Voet* 19-2-32. This latter remedy is not destroyed by the mere fact that the premises happen to be in the occupancy of a sub-tenant at the relevant date. In that eventuality the Roman-Dutch law recognises that a landlord has one 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 main tenancy has expired. In the South African case (*Katz vs. Reading et al* (1944) C. P. D. 197) Sutton, J., said, " A sub-tenant cannot remain in occupation after the expiration of the main lease " (meaning thereby the main tenancy) " and the landlord is therefore entitled to an order of ejectment against the sub-tenant ". There is nothing in the development of the Roman-Dutch law in Ceylon which leads to a different conclusion.

The practical question arises at once how, in order to avoid a multiplicity of suits, a sub-tenant can be joined in an action for rent and ejectment against a tenant. Although it is extremely desirable and convenient that a landlord should do so it could be said that there was a misjoinder. This difficulty is completely overcome if a plaintiff after filing an action for rent and ejectment against his tenant, moves the Court under section 18 of the Civil Procedure Code to join the sub-tenant. Such an application should normally be allowed. Section 18 provides for the joinder of persons " whose presence may be necessary in order to enable the Court effectively and completely to adjudicate and settle all the questions involved in the action ". In our view the Code after making provision restricting the joinder of parties and causes of action by a plaintiff as of right enables the Court under section 18 on the consideration of the merits of an individual application to relax the rigours imposed by other sections. It is proper that a Court should have this power because, as in the circumstances under consideration, delay and inconvenience would be caused if power was not vested in some authority to relax the rules laid down to prevent in the generality of cases the indiscriminate joinder of parties and causes of action.

In the present action the plaintiff-appellant obtained a decree for ejectment against his tenant alone in proceedings from which a number of sub-tenants, though originally joined as defendants, had been discharged at an early stage of the trial in deference to the current ruling of a single Judge of this Court in *Kudoos Bhai vs. Visvalingam* (supra). The question is whether the decree exposes all these sub-tenants to liability to peremptory removal under the provisions of section 324 (1) of the Civil Procedure Code which reads as follows :—

> " Upon receiving the writ the Fiscal or his officer shall as soon as reasonably may be repair to the ground, and there deliver over possession of the property described in the writ to the judgment creditor or to some person appointed by him to receive delivery on his behalf, and if need be by removing any person bound by the decree who refuses to vacate the property ;
>
> Provided that as to so much of the property, if any, as is in the occupancy of a tenant or other person entitled to occupy the same as against the judgment debtor, and not bound by the decree to relinquish such occupancy, the Fiscal or his officer shall give delivery by affixing a copy of the writ in some conspicuous place on the property and proclaiming to the occupant by beat of tom-tom, or in such other mode as is customary, at some convenient place, the substance of the decree in regard to the property ; and
>
> Provided also that if the occupant can be found, a notice in writing containing the substance of such decree shall be served on him, and in such case no proclamation need be made ".

In an action for ejectment instituted against a tenant by his landlord, the foundation of the decree is the judicial decision that events had

occurred which gave rise to the termination of the main tenancy under the common law and also, should the question arise, that circumstances have arisen which deprive the tenant of the protection of such Rent Restriction legislation as was applicable to the premises at the relevant date. On the basis of this adjudication, the tenant is required under a mandatory decree to fulfil his contractual obligation to restore the property to his landlord. On his failure to obey that direction, the decree authorises the issue of a writ for his removal by the Fiscal from the premises under section 324 (1) with a view to their restoration to the decree holder. This writ would also catch up persons who, though not specifically included in its terms, are present on the property by virtue of some relationship subordinate to the judgment debtor, *e.g.*, his servants and the members of his household. Persons in that category cannot claim the protection of the proviso to section 324 (1) and are without question liable to forcible removal on a writ of ejectment directed against the judgment debtor.

To what extent does a decree for ejectment, if passed against the tenant alone, affect a sub-tenant who is in occupation of the premises? A number of arguments have been addressed to us and a number of reasons appear in the decided cases as to how this question should be answered. Some point in one direction and some in another. We think that a decisive argument is to be found in the section itself. In the words "tenant or other person entitled to occupy the same as against the judgment debtor and not bound by the decree to relinquish such occupancy" the two phrases (1) "entitled to occupy the same as against the judgment debtor" (2) "not bound by the decree to relinquish such occupancy" were not intended to and do not qualify the word tenant. The section recognises a tenant as belonging to the category of persons "entitled to occupy the same as against the judgment debtor and not bound by the decree to relinquish such occupancy" and proceeds to extend the application of the proviso to "other" persons who are in the same category. It follows that the proviso enjoining constructive delivery applies to all tenants. Where the decree for ejectment is against a tenant a sub-tenant would be covered by the word "tenant" in the section. Upon the view we have formed no sub-tenant who is not a party to the decree is bound by the decree to relinquish occupancy but is a person to whom the proviso applies. He is a person who cannot be ejected upon a writ of ejectment against the tenant but in relation to whom constructive delivery under the proviso should be given to the decree-holder.

The constructive delivery of possession under the proviso to section 324 when made on the orders of a Court of competent jurisdiction effectively terminates the right to possession not only of the tenant but also of the sub-tenant. *Adyanath Ghatak vs. Krishna Prasad Singh and another*, A. I. R. (1949) 124 P. C. After constructive possession has been given the decree-holder can avail himself of the remedies provided by sections 325 and 327 for the purpose of obtaining a subsequent order for the ejectment of the sub-tenant. At an inquiry under section 327 the sub-tenant will have an opportunity of being heard before an order for ejectment is made against him. As the constructive delivery under section 324 has effectively determined his rights to possession he would not be able to resist the application to eject him except on the grounds hereinafter mentioned.

What, it may be asked is the purpose in this scheme, which we think has been laid down in the Code, for an inquiry under section 327. It ensures that a person such as a tenant who is not a party to the decree is heard before he is ejected. He is given an opportunity to justify his resistance. The investigation serves to ascertain the precise position of the person resisting and this is important where he is not a party to the decree. If it is verified at the inquiry that the person resisting is a tenant to whom notice of constructive delivery has been given then, subject to such defences as he may raise (these are dealt with later), an order for ejectment will be made. This procedure recognises the wholesome rule that no person not named in the decree (except those in the subordinate relationship previously referred to) can be ejected unless and until it is established after he is heard that he is liable to be ejected.

We have now dealt with two courses which a landlord can adopt for the purpose of obtaining possession. First, to join the sub-tenant in an action against the tenant and thereby obtain a decree for the ejectment of both. Secondly, if he has sued the tenant without joining the sub-tenant he can obtain a subsequent order for ejectment against him under section 327. A third course is open to him. Where the landlord has sued the tenant without joining the sub-tenant he may sue the latter for ejectment in a separate action.

A few further observations on the position of a sub-tenant under the common law are material to the questions we have discussed. The position of a monthly sub-tenant whose immediate

landlord is a monthly tenant is precaricus. The tenant can determine the sub-tenancy by giving notice to quit. But the tenant can also by agreement with the landlord terminate the tenancy between himself and the landlord in which event the sole foundation for the sub-tenant's right to occupation crumbles at once and he is liable to eviction by the landlord. In an action against him, if the circumstances in which he is sought to be evicted are harsh, a Court would no doubt give him relief by staying writ under the decree for a reasonable period. A sub-tenant cannot complain that the law gives him no further rights of protection because he must be taken to know full well that in entering into a contract of tenancy with a person who is himself a tenant his right to occupation is fragile.

In an inquiry under section 327 the termination of the tenancy which is the foundation of the decree against the tenant can be assumed. It is not necessary to resort to any principle of *res judicata* to arrive at this conclusion. As already stated a landlord and tenant by the simple process of agreeing to the determination of the tenancy can deprive a sub-tenant of his right to occupation. Such a determination may work to the detriment of a sub-tenant but there is no room for any complaint of fraud or collusion because however harsh the determination may be it is nevertheless lawful, and results simply from agreement which cannot be characterised as fraudulent or collusive. The declaration implicit in a decree for eviction that the original tenancy has ceased to exist works no more hardship on the sub-tenant, the security of whose tenure is so essentially dependent on the lawful continuation of the main tenancy. The decree of a Court of competent jurisdiction must therefore be regarded as marking formally the cessation of the original tenancy.

The nature of the protection afforded by the Rent Restriction Act to a sub-tenant must now be considered. This Act contains provisions regulating the rights and liabilities of a landlord and his tenant *inter se* and has no direct application to a sub-tenant *vis-a-vis* the head-landlord. It was held by Lord Greene, M.R., in delivering the judgment of the Court of Appeal in the case of *Brown vs. Draper* (1944) 1 K. B. 309 which dealt with the case of a licensee of a tenant that the licensee "cannot in her own right claim the protection of the Acts". That proposition is equally true of our Rent Restriction Act and what is stated about a licensee is applicable equally to a sub-tenant. But a sub-tenant can shelter behind the protection afforded to the tenant (his immediate landlord) if that protection has not ceased to exist. Now where a decree for eviction has been entered against the tenant that protection would normally have ceased to exist. A sub-tenant can plead its continued existence only on the basis that the decree was entered by a Court which had no jurisdiction to enter it, for instance, in a case where the authority of the Board was necessary under section 13 of the Rent Restriction Act of 1948 but had not been obtained.

Section 13 says "no action or proceedings for ejectment of the tenant of any premises to which this Act applies shall be instituted in or entertained by any Court unless the Board, on the application of the landlord, has in writing authorised the institution of such action or proceedings" except in certain specified cases. Any decree entered in an action in which such authority, being necessary, has not been obtained would be a nullity because a Court acting without such authority would be acting without jurisdiction. It has to be noted that it is not competent for a defendant to contract out of such a requirement or by waiver tacit or express to obviate the necessity for compliance with it. There may be other cases where there is a failure of jurisdiction. Such pleas would be open to a sub-tenant in an inquiry under section 327 or in a separate action brought against him.

Something more has to be said about the statutory protection given by the Act to a tenant and of which a sub-tenant may avail himself. A tenant can never contract out of the protection afforded. It follows from this that he can at any moment recall a promise to surrender possession. The only two ways in which the statutory protection comes to an end are :—

1. By the handing back of the premises to the landlord.

2. By the order of a competent Court that is to say a Court acting with jurisdiction.

This was held to be the position in England in the case mentioned above and the position is the same in Ceylon. The statutory protection afforded to a tenant can always be relied on by a sub-tenant except of course where it has ceased to exist.

There remains the application of those general principles to the facts of the present case. On 18th October, 1950, the plaintiff-appellant, who had previously obtained a decree for the ejectment of his tenant (the 1st defendant) complained to the Court that the 2nd to the 6th defendants respectively had wrongfully resisted and obstructed the execution of the writ by asserting claims which were allegedly "frivolous and vexatious". After a careful investigation of the facts the learned Commissioner of Requests

decided that the 2nd to the 6th defendants were in truth monthly sub-tenants of the 1st defendant, each occupying a portion of the leased premises under a contract which had commenced many years before the action against the 1st defendant was instituted. This finding has not been canvassed before us, and we accordingly held that the sub-tenants concerned were not bound by the decree " to relinquish their occupancy of the premises ". On the facts of the present case the application that they be committed to jail under the provisions of section 327A of the Civil Procedure Code was rightly refused by the learned Commissioner.

With regard to the appellant's further application to be placed in possession of the premises, the proper procedure for the Court to have adopted in the circumstances of the case was in the first instance to direct that " constructive delivery " of the premises be given by the Fiscal to the appellant under the proviso to section 324 (1) of the Code, and thereafter to investigate the appellant's claim to complete and effectual possession in accordance with the procedure laid down in section 327 of the Code. Neither of these steps was in fact taken. The true legal position has now been authoritatively clarified, and we make order that, if the appellant so desires, the correct procedure indicated by us should now be followed. Subject to this, the learned Commissioner's order dated 25th July, 1951, is affirmed and the appeal is dismissed with costs as between the appellant and the 2nd to 6th respondents. The 1st respondent will bear his own costs of appeal.

ROSE, C.J.

GRATIAEN, J.

PULLE, J.

SWAN, J.

L. M. D. DE SILVA, J.

Appeal dismissed with costs.

Present : PULLE, J. & L. M. D. DE SILVA, J.

THE URBAN COUNCIL OF MATALE vs. H. WEERASINGHE

S. C. No. 69—D. C. Matale, No. M. R. 338

Argued on : 28th October and 6th November, 1952
Decided on : 12th December, 1952

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.

Per L. M. D. DE SILVA, J.—The law upon this matter has been stated by Parker, J. (afterwards Lord Parker) in *Van Harzfeldt-Wildenburg vs. Alexander* (1912) 1 Ch. 284, " It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire."

Case referred to : *Van Harzfeldt-Wildenburg vs. Alexander* (1912) 1 Ch. 284.

H. V. Perera, Q.C., with *T. B. Dissanayaka* and *G. L. T. de Silva*, for the defendant-appellant.

N. E. Weerasooria, Q.C., with *H. W. Jayawardene* and *P. Ranasinghe*, for the plaintiff-respondent.

L. M. D. DE SILVA, J.

The plaintiff in this case sues the Urban District Council of Matale for damages for breach of a contract which he says that the Council entered into with him. The chief question which arises is whether there is a binding contract between the parties and if this question is answered in the negative the plaintiff's action fails. As we are of that opinion we do not propose to discuss any other questions.

The facts are accurately stated in the judgment of the learned District Judge and we recapitulate here only such facts as are necessary for the purpose of the conclusions we have arrived at.

By a tender notice dated the 7th June, 1949, tenders for the erection of certain buildings on two sites A and B were called for by the defendant Council. Paragraph 3 of the notice was to the following effect :—

> " Successful tenderers must be prepared to enter into an agreement with the Chairman, Urban Council, Matale, and will be required to deposit a sum equal to 5% of the tendered amount in the name of the Chairman, Urban Council, Matale, at the Council Office for the due completion of the contract at the rates quoted and within a period of 5 months from the date of signing the contract. Should the successful tenderer decline to enter into an Agreement within 10 days of notification of the acceptance of the Tender, his Tender will be cancelled and the deposit forfeited ".

The " Form of Tender " on which tenderers were required to tender, and on which the plaintiff tendered, contained the following clauses :—

> " And.....do hereby undertake to have the whole of the work comprised in Group ' B ' which are described in the drawings and specifications complete within the period of 5 months from the date of the signing of the agreement hereinafter referred to, and.....undertake to employ only Ceylonese labour in the execution of this contract.....
>
> And.....further undertake in the event of this tender being accepted, to execute when called upon by the Chairman, Urban Council, Matale, to do so, an Agreement for the due performance of the works, and before the Agreement is signed to deposit a sum equal to 5% (five per cent) of the accepted tender amount in the Bank of Ceylon in the name of the Chairman, Urban Council, Matale, and to mortgage and hypothecate the same as security or to execute a bond with a Bank approved by the Chairman, Urban Council, Matale, as security in favour of the Urban Council, Matale, for the due and satisfactory completion of the whole of the said works as well as such additional work as may be ordered, and for the maintenance in complete repair of the whole of the works for the space of six months from the date of completion thereof and for the payment of all claims to which the Urban Council of Matale may be entitled to under the provisions of the Agreement ".

A document called the " Condition of Tender " contained the following clause :—

> " If a Tenderer within 10 days of his being noticed to do so by the Chairman, Urban Council, Matale, declines or fails to enter into an Agreement on the basis of his tender and/or fails to deposit the security or execute the bond referred to in paragraph 13 of these conditions, the Tender deposit will be forfeited ".

The plaintiff tendered for both groups and his tenders were accepted.

The buildings referred to in the tender notice as those which had to be erected on site A are referred to in this judgment as site A buildings and those to be erected on site B as site B buildings. A formal " agreement " for erection of buildings on site B as contemplated by the document referred to 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. The formal agreement has not been produced and we are not aware whether the variation referred to was embodied in it. Be that as it may, site A buildings were constructed on site B and the plaintiff does not in this case make any claim upon the contract which arose on the formal agreement. No similar formal agreement for the erection of buildings on site A has been entered into. After the completion of the buildings on site B the plaintiff requested the defendant to permit him to erect buildings on site A. The defendant endeavoured to obtain the necessary sanction from the Local Government Board but did not succeed in obtaining it. As a consequence of this the plaintiff has been prevented from erecting the buildings on site A and has brought this action to recover damages for breach of contract. We are of the opinion that in these circumstances, however unfortunate it may be, there is no binding contract in respect of site A between the plaintiff and the defendant.

The law upon this matter has been stated by Parker, J. (afterwards Lord Parker) in *Van Harzfeldt-Wildenburg vs. Alexander* (1912) 1 Ch. 284, " It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether

the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored. The fact that the reference to the more formal document is in words which according to their natural construction import a condition is generally if not invariably conclusive against the reference being treated as the expression of a mere desire ". Lord Parker was there dealing with a sale of land in England but we see no reason why the principles laid down in the passage quoted should not be applied more widely. It appears to us in the case before us that the documents from which passages have been quoted earlier indicate that a binding contract for the erection of buildings was to arise only on the execution of a formal agreement. For example the failure on the part of the plaintiff to enter into a formal agreement if called upon to do so by the Chairman was to be penalised by the forfeiture of the deposit. We are not called upon to decide whether this forfeiture clause is enforceable but the clause indicates to some extent the intention of the parties. The stipulation is that the deposit is to be forfeited and appears to exclude any intention that damages for breach of contract by the plaintiff (or anyone else) are to be payable at any time before the execution of the formal agreement.

A further point urged by Counsel for the appellant which has considerable force is that the period within which the work had to be completed was according to the tender notice "five months from the date of the signing of the contract" and that this period could not be ascertained until the formal agreement was signed. It was contended that this period for completion was a vital term and that it was necessary that it should be definitely determined before a contract could be said to have arisen. There is force in this argument. But in any case the words indicate that the parties did not intend to be bound by a contract for the erection of buildings before a formal agreement was signed.

It was contended by Counsel for the respondent that no formal agreement was necessary to give rise to a contract for building on site A. With this argument we are unable to agree for the reasons already given. It was further contended that when parties agreed that site A buildings should be erected on site B and site B buildings on site A the formal agreement was superseded by an entirely new contract which covered both sites. But this argument overlooks the fact that the variation in respect of sites and buildings took place before the formal agreement was entered into. This is clear from the evidence of the plaintiff. Moreover, as already stated, as the formal agreement entered into has not been produced we cannot even say that the variation was not embodied in it. The variation has to be regarded as a variation of the terms of the tenders accepted and the necessity for formal agreements was not avoided thereby.

We are of the view that upon the documentary and oral evidence no binding contract for the erection of buildings on site A has arisen and that it could have arisen only upon the formal agreement referred to in these documents being executed.

For these reasons we set aside the decree entered by the District Court and dismiss the plaintiffs action. As the right which the plaintiff claimed to erect buildings on site A was not resisted before this case was instituted on the point of law on which this appeal succeeds or even in the Court below and also having regard generally to the merits we think it proper that each party should bear its own costs both on appeal and in the Court below.

PULLE, J.
I agree.

Set aside.

Privy Council Appeal No. 14 *of* 1952

Present : THE LORD CHIEF JUSTICE OF ENGLAND (LORD GODDARD), LORD OAKSEY, LORD REID, LORD ASQUITH OF BISHOPSTONE, SIR LIONEL LEACH

THE ATTORNEY-GENERAL OF CEYLON vs. KUMARASINGHEGE DON JOHN PERERA

FROM THE COURT OF CRIMINAL APPEAL OF CEYLON

Reasons for Report of the Lords of the Judicial Committee of the Privy Council

Delivered the 19th *November*, 1952

Privy Council—Conviction for murder—Appeal to Court of Criminal Appeal—Re-trial 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—Correctness 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 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.

Per LORD GODDARD.—"It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation, otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation and provocation which may cause the sufferer to lose a degree of control but will not excuse the use of a deadly weapon, and in the opinion of Their Lordships it is quite wrong to say that because the Code does not in so many words say that the retaliation must bear some relation to the provocation it is true to say that the contrary is the case".

Overruled : *K. D. J. Perera vs. The King*, 53 N. L. R. 193 (five Judges).

Approved : Majority decision in *Naide vs. The King*, 53 N. L. R. 207.

Sir Frank Soskice, Q.C., with *Mr. Frank Gahan, Q.C.*, and *H. A. Wijemanne, Crown Counsel*, for the appellant.

Dingle Foot with *A. B. Perera* and *Biden Ashbrooke*, for the respondent.

Delivered by Lord Goddard

This is an appeal by special leave from a decision of the Court of Criminal Appeal of Ceylon delivered on the 29th November, 1951, which by a majority of four to one allowed an appeal by the respondent against his conviction before Mr. Justice Gratiaen and a jury for the murder of a woman named Kumarihamy. The Court of Criminal Appeal set aside the verdict and sentence and ordered a new trial as they are entitled to do if, in the words of the Ordinance establishing the Court, " they are of opinion that there was evidence before the jury upon which the accused might reasonably have been convicted but for the irregularity upon which the appeal was allowed ". At the conclusion of the argument their Lordships announced that they would humbly advise Her Majesty that the appeal should be allowed and that the judgment and order of the Court of Criminal Appeal should be set aside and that the verdict of the jury and the sentence passed thereunder should be restored. They now proceed to give their reasons.

The question raised by this appeal is one of considerable importance in the law of Ceylon for not only does there appear to be a considerable conflict of judicial opinion on the matter among the Judges forming the Court of Criminal Appeal but in the previous case of *R. vs. Naide*, 53 N. L. R. 207, a judgment was given in direct conflict with that now under appeal. The three Judges who first heard this appeal were divided in opinion and the majority doubted the correctness of the decision in *Naide's* case and accordingly a further hearing was directed by the Chief Justice and a Court of five Judges was constituted to hear this appeal. The ground upon which the appeal was argued before the Court of Criminal Appeal was that the learned trial Judge had wrongly directed the jury that a defence of provocation could not succeed and the charge of murder could 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. The Court of Criminal Appeal held that this was a misdirection and it is against that decision that this appeal is brought. Various other grounds were raised in the notices of appeal both to the Court of Criminal Appeal and to the Board, but they were not pursued and this particular alleged misdirection was the only matter argued before Their Lordships. A preliminary point, however, was taken by Counsel for the respondent who submitted that the Board had no jurisdiction to entertain an appeal by the Crown in a criminal case. It was submitted that if a decision had once been given in favour of the prisoner no appeal could be brought, reliance being placed upon the doctrine that after an acquittal a prisoner could never be put in peril again. The order of the Court of Criminal Appeal in this case does not amount to an acquittal. It merely sets aside the verdict and sentence and orders a new trial though no doubt the effect of the order is to restore the prisoner to the position of one who has not yet been tried. It is not on this ground that the Board decided they had jurisdiction to entertain the appeal but because a series of cases has decided, in their opinion, that 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 first case to which Their Lordships refer and which has been repeatedly cited with approval is *Reg vs. Bertrand*, L. R. 1 P. C. 520. That was an appeal by the Attorney-General of New South Wales on behalf of Her Majesty against an order of the Supreme Court who made absolute a rule nisi for a new trial obtained by the respondent who had been convicted of murder. It was objected that the Board ought not to entertain the appeal. The matter was argued before a Board consisting of Sir John Coleridge, Sir William Erle, Sir Edward Vaughan Williams, the Lord Chief Baron and Sir Richard Kindersley. In giving the judgment of the Board Sir John Coleridge said " Upon principle, and reference to the decisions of this Committee, it seems undeniable that in all cases, criminal as well as civil, arising in places from which an appeal would lie, and where, either by the terms of a Charter or Statute, the authority has not been parted with, it is the inherent prerogative right, and, on all proper occasions, the duty, of the Queen in Council to exercise an appellate jurisdiction, with a view not only to ensure, so far as may be, the due administration of justice in the individual case, but also to preserve the due course of procedure generally. The interest of the Crown, duly considered, is at least as great in these respects in criminal as in civil cases " and he then proceeded to point out that for reasons which are nowadays well understood these appeals would necessarily be rare. In *R. vs. Murphy*, L. R. 2 P. C. 35. *Bertrand's* case was followed and special leave to appeal was granted to the Crown. In *R. vs. Coote*, L. R. 4 P. C. 599, the Board entertained an appeal against a judgment of the Court of Queen's Bench of Quebec

and though that case was argued only by the Crown, the respondent not being represented, Their Lordships who heard the case evidently had no doubt as to their power for they allowed the appeal and ordered that the judgment which had quashed the conviction should be reversed; they affirmed the conviction and directed the Court to cause the proper sentence to be passed thereon. Coming to more recent times in *Ibrahim vs. Rex*, 1914 A. C. 599, Lord Sumner in giving the judgment of the Board dealt with the grounds upon which the Board entertained appeals in criminal cases. He said "There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future" and for this he cited *Bertrand's* case. In *Nadan vs. Rex*, 1926 A. C. at page 491. Lord Cave said "The right (*i.e.* of appeal) extends (apart from legislation) to judgments in criminal as well as in civil cases" and for this he cited *Bertrand's* case and that case was again cited in *Ambard vs. Attorney-General for Trinidad*, 1936 A. C. 322, on the point as to whether the Board had jurisdiction to entertain the appeal. In not one of these cases does there appear to have been any doubt expressed as to the right of the Board to entertain an appeal by the Crown in a criminal case and Their Lordships accordingly held that they had jurisdiction to entertain the appeal. In view of the conflict of authority and judicial opinion existing in Ceylon on the subject-matter of this appeal to which reference has been made above, this is eminently a case fit to be considered by Her Majesty in Council and would seem to fall directly within the concluding words quoted above in Lord Sumner's judgment in *Ibrahim vs. Rex*.

Turning now to the facts, it is enough to say that the case made at the trial was 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 woman Kumarihamy and three of her sons and it was sought to reduce the crime from murder to manslaughter by reason of certain provocation consisting of stone-throwing by the woman's family, and threats uttered by them, so that, the respondent said, he was suddenly provoked and at the same time felt serious danger to his life and that he did not know what happened as he had lost control over himself. It is unnecessary for the purposes of this appeal to further set out the facts as the only question raised was with regard to the direction which the learned Judge gave and which has already been stated. The Court of Criminal Appeal were at pains to consider whether the law relating to homicide and the reduction of a crime from murder to manslaughter in England was the same as in Ceylon where the lesser crime is known as culpable homicide not amounting to murder. The Court were of opinion that while it was undoubtedly the law in England that the act of retaliation must be reasonably commensurate with the provocation received, this was not the law of Ceylon. The question that falls for decision is one in the opinion of Their Lordships which depends entirely upon the true construction of section 294 of the Penal Code. That Code does not provide for any doctrines of English law to be imported into the criminal law of Ceylon. There is no provision similar to that which is found in the Code of Criminal Procedure whereby the English criminal law can be used to fill any gap which may be found to exist in that Code. But as the Court of Criminal Appeal set out in their judgment what they conceived to be the English law relating to manslaughter Their Lordships feel bound to observe that in one respect the Court were in error. They said in reference to English law "if it is established or clear from the evidence that though provocation of howsoever grievous a kind may have been offered, nevertheless, if it could be shewn that the accused caused the death with an intention to kill, the offence is one of murder and not manslaughter. This is one of the fundamental differences between our Law and that of England." A little further down in the judgment they said "in the case of murder, there must be an intention to kill, in the case of manslaughter, no such intention can exist". With all respect to the Court that is not the law of England. In English law no doubt there is a distinction between what is generally called involuntary and voluntary manslaughter. The former expression is used to describe that class of manslaughter where the death is caused by gross and culpable negligence, the most common example of which is death caused by the dangerous driving of a motor vehicle. In such a case there is of course no intention either to kill or to cause grievous bodily harm and no question of provocation can arise in such a case. The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self control by reason of provocation. An illustration is to be found in a case of a man finding his wife in the act of adultery who kills her or her paramour and the law has always regarded that, although an intentional act, as amounting only to man-

slaughter by reason of the provocation received although no doubt the accused person intended to cause death or grievous bodily harm. Now section 294 of the Ceylon Penal Code provides that culpable homicide is murder firstly if the act by which the death is caused is done with the intention of causing death, secondly if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused and there are two other provisions which it is unnecessary to set out. The Code then goes on to set out an exception in these terms; "Culpable homicide is not murder if the offender while deprived of the power of self-control by grave and sudden provocation, causes the death of the person who gave the provocation, or causes the death of any other person by mistake or accident." It also provides that "Whether the provocation was grave and sudden enough to prevent the offence from amounting to murder is a question of fact." In order to reduce the crime from murder to manslaughter the offender must show first that he was deprived of self-control and secondly that that deprivation was caused by provocation which in the opinion of a jury was both grave and sudden. In directing the jury that they must ask themselves whether the kind of provocation actually given was the kind of provocation which they as reasonable men would regard as sufficiently grave to mitigate the actual killing of the woman, in the opinion of Their Lordships the learned Judge was merely directing the jury as to how they should determine whether the provocation was grave. The words "grave" and "sudden" are both of them 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. It is impossible to determine whether the provocation was grave without at the same time considering the act which resulted from the provocation otherwise some quite minor or trivial provocation might be thought to excuse the use of a deadly weapon. A blow with a fist or with the open hand is undoubtedly provocation and provocation which may cause the sufferer to lose a degree of control but will not excuse the use of a deadly weapon, and in the opinion of Their Lordships it is quite wrong to say that because the Code does not in so many words say that the retaliation must bear some relation to the provocation it is true to say that the contrary is the case.

Their Lordships having considered with care the whole of the summing-up are of opinion that it was quite impeccable and was in accordance with the Law of Ceylon and for these reasons have tendered to Her Majesty their humble advice that the appeal should be allowed.

Present: Rose, C.J., Gratiaen, J. & L. M. D. de Silva, J.

S. C. KANAGASABAI AND ANOTHER vs. M. VELUPILLAI

S. C. No. 534—*D. C. Point Pedro, No.* 3489

Argued on: 17th, 18th and 19th November, 1952
Decided on: 15th December, 1952

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 "hereinafter provided" within the meaning of that section.

Cases referred to: *Marsh vs. Marsh* (1945) A. C. 271.
Anlaby vs. Praetorius, 20 Q. B. D. 764.
Smurthwaite vs. Hannay (1894) A. C. 494.
Fry vs. Moore, 23 Q. B. D. 395.
Sivanadian Chetty vs. Talawasingham, 28 N. L. R. 502.

E. B. Wikremanayake, Q.C., with *T. Arulambalam* and *O. M. de Alwis*, for the plaintiffs-appellants.

H. W. Jayawardene with *M. L. de Silva*, for the defendant-respondent.

L. M. D. DE SILVA, J.

The question arising for decision in this appeal turns on the legal consequences of non-compliance with the provisions of sub-section 12 (1) of the Registration of Documents Ordinance (Cap. 101) which lays down that "a precept or order for the service of summons in a partition action shall not be issued unless and until the action has been duly registered as a *lis pendens*".

The 2nd plaintiff who is the wife of the 1st plaintiff claimed title to the land in dispute by virtue of a final decree for partition entered in her favour in D. C. Point Pedro No. 2284. The defendant, who was not a party to this action, contended, *inter alia*, that the decree for partition was not "good and conclusive" against him within the meaning of section 9 of the Partition Ordinance (Cap. 56) because the action has not been "duly registered" as a *lis pendens* as required by the sub-section quoted. *Lis pendens* had in fact, as the learned District Judge has held, been registered in the wrong folio.

The learned District Judge upheld the defendant's contention on a preliminary issue of law, and dismissed the plaintiff's action with costs. The present appeal is from this decision.

The object of section 12 of the Registration of Documents Ordinance is without doubt to protect purchasers of interests of land from being affected adversely by section 17 of the Partition Ordinance which enacts that alienation by co-owners of their interests while a partition action is pending are void. A prospective purchaser can always examine the register and make sure that no partition action is pending in respect of the interests he is proposing to purchase. It also in some degree gives notice generally to the world that such an action is pending.

Once a certificate of registration is produced the Court has to act on it and is not in a position to decide whether the registration has been made in the correct folio without an investigation which would take it outside its normal functions. The duty is clearly on the plaintiff who institutes the action to ensure that the *lis pendens* is registered in the proper folio.

The two points which arise for consideration are :—

(1) whether failure to comply with this section renders the decree entered in a partition action void by reason of lack of jurisdiction in the Court which entered it ; and

(2) whether, independent of the point just mentioned, such a failure deprives the decree of the conclusive effect which it would have otherwise have under section 9 by reason of the fact that it is a decree not entered "as hereinbefore provided" as required by the section.

Upon the first question it has been argued that section 12 (1) of the Registration of Documents Ordinance is merely directory and that failure to observe its provisions does not lead to any fatal results. It was further contended that even if the section be regarded as being imperative, nevertheless, the partition decree was valid, the argument being that the breach of any procedural provision of the law whether directory or imperative would not render the decree a nullity. To this last argument we are unable to assent. In the case of *Marsh vs. Marsh* (1945) A. C. 271 the Privy Council dealt with a case in which the Supreme Court of Jamaica by an error in computation made an order, which under a Rule of Court it could have made only after a certain period before that period had elapsed. In the course of his judgment Lord Goddard said, "But it does not necessarily follow that because there has not been a literal compliance with the rules the decree is a nullity. A considerable number of cases were cited to their Lordships on the question as to what irregularities will render a judgment or order void or only voidable. *Anlaby vs. Praetorius*, 20 Q. B. D. 764 and *Smurthwaite vs. Hannay* (1894) A. C. 494 are leading examples of the former, while *Fry vs. Moore*, 23 Q. B. D. 395 may be said to illustrate the latter. The practical difference between the two is that if the order is void the party whom it purports to affect can ignore it, and he who has obtained it will proceed thereon at his peril, while if it is voidable only the party affected must get it set aside. No Court has ever attempted to lay down a decisive test for distinguishing between the two classes of irregularities, nor will their Lordships attempt to do so here, beyond saying that one test that may be applied is to inquire whether the irregularity has caused a failure of natural justice. There is, for instance, an obvious distinction between obtaining judgment on a writ which has never been served and one in which, as in *Fry vs. Moore* (supra) there has been a defect in the service but the writ had come to the knowledge of the defendant".

Under the procedure prescribed by section 12 (1) the Court had after acceptance of the plaint on the material placed before it *prima facie* to satisfy itself that the action was duly registered as a *lis pendens* before ordering summons to issue. It is clear that the Court had jurisdiction to accept the plaint and to assume jurisdiction for that purpose so that the real question which arises is whether jurisdiction for

the further progress of the case was arrested until the *lis pendens* was duly registered. If so the failure to comply with the provisions of section 12 was such a fatal irregularity as would by itself have rendered the decree void.

The one clear instance of a failure of jurisdiction laid down by the Privy Council is where the breach of a procedural provision results in the violation of natural justice. In the case before us there is no such violation. Beyond this as observed by Lord Goddard " no Court has ever attempted to lay down a decisive test " which would help us. We find in consequence that a Court can answer the question whether there has been a failure of jurisdiction in the case before us only with much less certainty than the second question referred to above. As the view we have formed on the second question concludes this case it is not necessary to pursue the question of jurisdiction any further.

Does the failure to register a *lis pendens* in a partition action as required by sub-section 12 (1) of the Registration of Documents Ordinance deprive the 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 a decree not entered " as hereinbefore provided " as required by that section? The conclusive effect of section 9 is so drastic that in a long series of cases it has been insisted that before a decree can have such an effect the provisions of the Partition Ordinance prescribing the various steps that have to precede the decree must be strictly complied with. Garvin, J., in the case of *Siwanadian Chetty vs. Talawasingham*, 28 N. L. R. 502 said, " There is a strong body of authority for the proposition that the conclusive character assigned by section 9 to decrees only attaches to decrees entered in a proceeding which strictly complies with the essential and imperative provisions of the Ordinance ". One of the imperative provisions of the Ordinance relates to the issue of summons and is to be found in section 3. There can be no proper compliance with this provision unless sub-section 12 (1) of the Registration of Documents Ordinance has been complied with. Consequently in this case the decree relied on by the plaintiffs does not possess the character of a decree which is " good and conclusive against all persons whomsoever " within the meaning of section 9 of the Ordinance.

For the reasons we have given the judgment of the learned District Judge must be upheld and the appeal is dismissed with costs.

ROSE, C.J.
I agree.

GRATIAEN, J.
I agree.

Appeal dismissed with costs.

Present : GRATIAEN, J., PULLE, J. & L. M. D. DE SILVA, J.

MOHAMED ABDULLA vs. SEYD ISMAIL BUHARI

S. C. No. 152—*C. R. Colombo, No.* 24493

Argued on : 10th and 11th November, 1952
Decided on : 11th December, 1952

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 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.

Per L. M. DE SILVA, J.—" If there are several landlords who with others are parties in a partnership business it is sufficient if all the landlords require the premises and that it is immaterial that they require the premises not only for themselves but for themselves and the other partners."

" The clause (section 13 (1) (*c*)) seeks to relax the disabilities elsewhere placed upon the landlords by the Ordinance, and there is no reason to interpret it in the manner suggested "—(*i.e.* narrowly against the landlord).

Overruled : *Hassanally vs. Jayaratne*, 50 N. L. R. 140.

C. Thiagalingam, Q.C., with *M. Rafeek* and *C. Shanmuganayagam*, for the 1st defendant-appellant.

H. V. Perera, Q.C., with *C. Renganathan*, for the plaintiff-respondent.

L. M. D. de Silva, J.

In this case the correctness of the decision of this Court in *Hassanally vs. Jayaratne*, 50 N. L. R. 140 is disputed. It has been referred by my Lord the Chief Justice to a Bench of three Judges at the instance of Swan, J. before whom it came up for hearing.

In this case a partner in a certain business is seeking without the authorisation of the Board to recover from his tenant possession of certain premises on the ground that he needs them for the purpose of the partnership business. A condition for such a recovery is laid down in clause (c) in the proviso to sub-section 13 (1) of the Rent Restriction Act No. 29 of 1948 thus :—

> " The premises are, in the opinion of the Court, reasonably required for occupation as a residence for the landlord or any member of the family of the landlord, or for the purposes of the trade, business, profession, vocation or employment of the landlord ".

The question which arises in this case is whether this condition has been satisfied.

It was argued that this clause should be interpreted narrowly against a landlord as the general object of the Ordinance is to restrict the rights of a landlord. We cannot agree. The clause seeks to relax the disabilities elsewhere placed upon landlords by the Ordinance and there is no reason to interpret it in the manner suggested.

Then it was said that the interest of the landlord in the business must be full and unqualified proprietorship and that he must be the sole proprietor. It was contended that the rights and interests of a partner in a partnership business fall short of such proprietorship. We do not feel able to agree. It was necessary for Counsel for appellant in order to maintain this point, to go so far as to contend that where there is more than one landlord and all the landlords were partners in a business they cannot seek the aid of the clause to regain possession of the premises let. We think that in the context in which they appear the words " business of.....the landlord " cover the interest of a landlord in a partnership business.

On the question whether the landlord must require the premises for himself alone we are of the opinion that so long as it is established that the landlord requires the premises for himself the condition is satisfied, and that it is immaterial whether he requires the premises for himself alone or for himself and others. It may be that the interest of the plaintiff in a business when compared with the interest of others for whom along with himself he wants the premises is relatively small. This is a consideration which would weigh in deciding whether the request of the landlord is " reasonable " or not, but it does not in our view affect the conclusion that the premises are " required " by the landlord within the meaning of the clause. In this case he requires the premises for himself and his partners and we do not think that this fact avoids the claim. The question of reasonableness has not been raised on this appeal and we need not consider it.

It follows from what we have said that if there are several landlords who with others are partners in a partnership business it is sufficient if all the landlords require the premises and that it is immaterial that they require the premises not only for themselves but for themselves and the other partners. A contrary view was taken in the case of *Hassanally vs. Jayaratne*, 50 N. L. R. 140 which was based upon the decision in the case of *Baker vs. Lewis* (1916) 2 A. E. R. 592. With all respect we think the latter case can and should be distinguished. That case supports the proposition that where there are more landlords than one it must be shown that each of them has an interest in the business but it leaves unaffected the view that it is immaterial that the persons other than the landlords have also such an interest.

For the reasons we have given the appeal is dismissed with costs.

Gratiaen, J.
I agree.

Pulle, J.
I agree.

Appeal dismissed with costs.

Present : Pulle, J.

DODANPALAGE CECIL WEERASOORIYA *et al* vs. POLICE SERGEANT M. SABDEEN OF DIYATALAWA POLICE

S. C. No. 1034-1035—*Badulla-Haldumulla—Case No.* 11979

Argued on : 12th December, 1952
Decided on : 20th January, 1953

Sentence—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.

Cases referred to : *Van Pels* (1943) 29 Cr. A. R. 10
Campbell (1911) 6 Cr. A. R. 131.
Burton (1941) 28 Cr. A. R. 89.

J. A. L Cooray with *J. R. M. Perera*, for the 1st accused-appellant.
2nd accused-appellant in person.
A. Mahendrarajah, Crown Counsel, for the Attorney-General.

PULLE, J.

The appellants were convicted of the offences of breaking into a garage on the night of the 2nd December, 1951, and stealing a Lucas battery from a car. There was ample evidence to support the convictions. I have re-read the evidence in the light of the criticism that the learned Magistrate should not have acted on the evidence of the witness W. Nandasena and the driver of the motor car in which the stolen battery was transported from Haputale to Bandarawela. In my opinion there is no substance in that criticism and the convictions must be affirmed.

The appellants were sentenced to two years' rigorous imprisonment on each count, the sentences to run concurrently. The second accused appellant was further fined Rs. 100 on each count, in default one year's rigorous imprisonment to run concurrently. In passing sentence the Magistrate stated :

> " A deterrent sentence is called for in this case and Police have pressed for such punishment in view of facts within their knowledge apart from their bad records."

The first accused had one previous conviction in 1941 for housebreaking and theft and the second accused five previous convictions all entered in 1952, four for dishonest retention of stolen articles and one for housebreaking and theft.

In my opinion it was wrong for the Police to have pressed for deterrent punishment on the grounds which they were not prepared to disclose and to establish by evidence. The following observations made by the Court of Criminal Appeal in the case Van Pels (1943) 29 Cr. A. R. 10

> " Police officers are nearly always called, after conviction, to assist the Court when it is considering the sentence to be passed on a convicted person. We think that in this case we should enlarge a little on what Lord Alverstone, C.J., said in Campbell (1911) 6 Cr. A. R. 131 and what Humphreys, J., said in Burton (1941) 28 Cr. A. R. 89. When a police officer is called to give evidence about a prisoner who has been convicted, he should in general limit himself to such matters as the previous convictions, if any, and the antecedents of the prisoner, including anything which has been ascertained about his home and upbringing in cases where the age of the prisoner makes this information material. It is the duty of the police officer, we think, to inform the Court also of any matters, whether or not the subject of charges which are to be taken into consideration, which he believes are not disputed by the prisoner and ought to be known by the Court. Police officers should inform the Court of anything in the prisoner's favour which is known to the police, such as periods of employment and good conduct. We have no reason to believe that this is contrary to the present practice of the police who constantly inform the Court of matters which are in the prisoner's favour. We also think that it is the duty of Counsel for the prosecution to see that a police witness, when speaking on all these matters, is kept in hand, and is not allowed, much less invited, to make allegations which are incapable of proof and which he has reason to think will be denied by the prisoner."

In awarding the maximum sentence of imprisonment on each count the learned Magistrate appears to have been influenced by the statement of the Police that the appellants had a worst record than that revealed by the previous convictions. I would, therefore, vary the sentence as follows : The first accused will undergo eighteen months' rigorous imprisonment on each count, the sentences to run concurrently and the second accused to two years' rigorous on each count without any fine, the sentences to run concurrently. The period during which the appellants have been on remand after conviction reckoned from 22nd August, 1952, will be deemed to be part of the sentence.

Subject to the variation indicated above the appeals are dismissed.

Appeals dismissed.

Present : GUNASEKARA, J. & SWAN, J.

A. PETER SINGHO vs. L. A. SIYADORIS AND ANOTHER

D. C. (F) 544/1950—D. C. Kegalle No. 6107

Argued on : 15th September, 1952
Decided on : 5th December, 1952

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.

Cases referred to : *Wessels' Law of Contract in South Africa*, Vol II p. 1197.
Rajah vs. Nadarajah (1943) 44 N. L. R. 470 at 475.
Goonetilleke vs. Fernando (1921) 22 N. L. R. 385 at 391.

E. B. Wikramanayake, Q.C., with *Dodwell Gunawardene* and *L. Muttutamby*, for the defendants-appellants.

N. E. Weerasooria, Q.C., with *C. T. Olegasegarem*, for the plaintiff-respondent.

GUNASEKARA, J.

The plaintiff instituted this action on the 28th April, 1949, for a declaration of title to a one-twelfth share of two plots of land, alleging that the two defendants disputed his title to that share. The principal issue at the trial was whether the *exceptio rei venditae et traditae* was available to the first defendant. The District Judge held that it was not, and he gave judgment declaring the plaintiff entitled to the share in question. The defendants appeal.

The second defendant, who is the father of the first, was at one time the owner of a one-sixth share of the two plots. He sold it in 1937 to the first defendant and another man named Endoris. The one-twelfth share that Endoris so acquired he sold in 1938 to Amarissa, a brother of the second defendant, and he bought it back from him in 1940. On the 16th October, 1943, he sold it to his wife by the deed P4, and on the 6th February, 1947, he bought it back from her by the deed P5. On the 20th October, 1948, he sold it to the plaintiff by the deed P6, reciting as his title the deed P5. In the meantime, however, on the 27th October, 1943,—eleven days after the sale to his wife—Endoris had executed a deed purporting to sell a one-twelfth share of these two plots of land to his brother the first defendant. At that time he had no title to any share of the property, and no title is recited in the deed. It is contended for the defendants that the title subsequently acquired by Endoris upon the deed P5 enured to the benefit of the first defendant, and that he is entitled to plead the *exceptio rei venditae et traditae*.

The District Judge holds on the evidence that there was no consideration for the alleged conveyance to the first defendant, though the deed purports to be a deed of sale, and that the first defendant did not get possession of the property alleged to have been sold to him. He also holds that the alleged sale " has not been accompanied, followed or evidenced by acts which may be deemed equivalent to the Roman *traditio*." The first defendant was not even able to produce the original of the deed by which he claims to have bought the share in question. He produced a copy (D1), and he explained under cross-examination that the original was in the possession of Amarissa and that Amarissa was not on good terms with him. There is no evidence that the deed was ever delivered to him.

There appears to be no sufficient ground for disturbing the learned Judge's findings of fact, and the effect of these findings is that there was in reality no sale from Endoris to the first defendant and that the transaction between them was nothing more than a pretence of a sale. " It is not enough that the parties call the transaction a sale ; the circumstances must show that the parties in reality entered into a true contract of sale." (*Wessels' Law of Contract in South Africa*, Vol. II p. 1197 cited in *Rajah vs. Nadarajah* (1943) 44 N. L. R. 470 at 475). Even where there has been a genuine contract the exception is available only if there has been an act " which may be deemed equivalent to the Roman *traditio* : " *Goonetilleke vs. Fernando* (1921) 22 N. L. R. 385 at 391. It is self-evident that this exception, 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. In my opinion the appeal should be dismissed with costs.

SWAN, J.
I agree.

Appeal dismissed with costs.

Present : PULLE, J. & L. M. D. DE SILVA, J.

CEYLON TEXTILES LIMITED *et al* vs. SENATOR CHITTAMPALAM GARDINER *et al*

S. C. No. 504—*D. C. Colombo, No.* 365/S.

Argued on : 1st, 2nd, 9th, 10th & 14th October, 1952.
Decided on : 9th December, 1952.

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 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 plaintiff 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 embarassment 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 sub-section 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.

Cases referred to : *In re Langham Skating Rink Company.*
The Anglo-Continental Produce Co., Ltd. (1939) 1 A. E. R. 99.
In re Yenidje Tobacco Company Limited (1916) 2 Ch. 426.
Cooper and Sons Limited (1937) 1 Ch. 392.
Loch and Another vs. John Blackwood, Limited.
Cuthbert Cooper & Sons Ltd. (1937) 2 A. E. R. 466 at p. 469.
Baird vs. Lees.

H. V. Perera, Q.C., with *A. Nadarasa*, for the appellants.

D. S. Jayawickreme, with *E. R. S. R. Coomaraswamy*, for the 1st to 7th respondents.

L. M. D. de Silva, J.

This is an appeal from an order made by the learned Additional District Judge of Colombo dated the 7th March, 1951, by which he allowed an application for the winding up by Court of the Ceylon Textiles Limited, a public company incorporated in 1942 under the Companies Ordinance, No. 51 of 1938. The application was made under section 162 (6) of this Ordinance on the grounds—

(1) that there was a complete deadlock in the management and conduct of the company's affairs, and,

(2) that a full investigation of the company's affairs was necessary.

The second ground was not pressed seriously either in the Court below or before us. Section 162 (6) is to the effect that " a company may be wound by the Court if the Court is of the opinion that it is just and equitable that the company should be wound up ". After having heard the arguments addressed to us we feel it would be useful before proceeding to consider the facts to ascertain the scope of the functions of the Court under this section, that is to say, in what circumstances a Court ought to order winding up under the section.

The rights of shareholders are very limited and, generally, the remedy of shareholders dissatisfied with the management of a company, such as the one under consideration, is to replace an existing board of directors by one more acceptable, either by a special resolution, if a three-fourths majority is obtainable for the purpose, or at an annual general meeting or series of annual general meetings. Apart from this right there are certain statutory rights given to shareholders in very exceptional circumstances, one of which is the right given by the section under which the present application is being made. But it has to be remembered that the effective working of a company demands that internal disagreements between shareholders among themselves, between shareholders and directors and among directors between themselves are matters essentially for solution and settlement in a domestic forum. Indeed in general all the internal questions which arise in the course of the working of a company are matters for discussion and solution in such a forum. They are matters in which the Courts rarely interfere. If such questions could be brought up without restriction or limitation in review before the Courts many evils would result. Litigation could clog the effective working of a company. Moreover the Courts would be called upon to decide whether the judgment of directors or groups of directors was sound, a function which they would properly be reluctant to exercise, particularly as they may be called upon to review decisions taken upon purely commercial matters. James, L.J., in the case of *In re Langham Skating Rink Company* (which incidentally was an application for winding up) made the remark, " It really is very important to these companies that 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 a company ". In our view that remark made in 1877 still holds good though the statute law relating to companies has been considerably altered.

The language of section 162 (6) is on the face of it extremely wide. But upon a review of the decisions it appears to us that so far the Courts have acted under this sub-section only in three classes of cases.

First, 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, that is, for example, to do what they are legally entitled to do in a perverse and oppressive manner. For instance, a director with such power may use it to pack the board and vote an unconscionable sum as remuneration for himself. That would be a perverse using of voting power. In such

instances the Court would not normally be able to give relief in ordinary proceedings as the acts, though perverse, have been done under cover of legality. They are instances where a winding up under section 162 (6) is called for.

Secondly, where the sub-stratum of the company has for one reason or another disappeared. We need not dwell here on this class of case as it is not contended that such a thing has happened in the case before us.

Thirdly, where there is a deadlock. In the decided cases the deadlock has been complete. In fact no deadlock can truly be called a deadlock unless it is complete but the word "complete" serves to direct attention to the true nature of the deadlock that must be shown to exist before a liquidation can be ordered. It must be complete not only at any given moment but it must appear reasonably that no remedy can be hoped for by recourse to the Courts or otherwise.

In the case of *The Anglo-Continental Produce Co., Ltd.*, (1939) 1 A. E. R. 99, Benett, J., held in an application under section 186 (6) of the Companies Act, 1929 (which is identical with the section of our Companies Ordinance under which the application is made) that the petitioners to succeed must establish that the facts bring them "within anyone of the decided cases as to what is just and equitable". We feel the same reluctance as Benett, J., to extend the scope of the grounds under which an application can be made under the section in question although we are not altogether sure that one may not have to do so in an extreme case. Be that as it may it is clear that no grounds emerge from the facts of this case for an extension. Indeed the only ground upon which the application was based which has been pressed is the ground of deadlock. Argument has also been addressed to us with regard to the perverse use of voting power although it was not a ground in the application. These grounds will be dealt with later. It is convenient at this stage to consider the facts.

The facts are fully and accurately set out in the judgment of the learned District Judge. We do not agree with all the inferences of fact he draws from them. It appears to us, however, that even if a view as favourable as possible to the respondents were taken of the facts, no case of deadlock or of the perverse use of voting power is made out and that, therefore, the order for the winding up of the company has been wrongly made by the learned District Judge with regard to whom we would like to say with all respect that he could not have had the advantage of the full argument that has taken place before us.

Ceylon Textiles Limited for the winding up of which the petitioners pray is a public company. The original shares were of the par value of Rs. 100,000 divided into 10,000 shares of Rs. 10 each but it is now Rs. 300,000 divided into 30,000 shares. All the shares have been issued and fully paid up. Of these the appellants hold more than half, namely, 15,158 shares. The principal object of the company was and is the carrying on of a business as dealers in textiles and piece goods of every description. Senator Gardiner is a life director and chairman of the company. On 31st August, 1944, one John Chellappah was appointed managing director. In June, 1945, the managing director was replaced by John Chellappah & Company Limited who were appointed agents and secretaries for ten years with effect from 1st April, 1945, on an annual fee of Rs. 18,000 and a commission of 10% on the net profits. John Chellappah & Company Limited is a private company in which John Chellappah, the former managing director holds a controlling interest. It could be regarded as the learned Judge observes as a domestic concern of John Chellappah. John Chellappah remained a director of Ceylon Textiles Limited after he ceased to be its managing director. Differences arose between John Chellappah and the other directors which reached a climax in the year 1949. They appear to have commenced with an objection by Chellappah to the investment of Rs. 200,000 out of a total capital of Rs. 300,000 in the purchase of shares in two firms, namely Cargills Limited and Millers Limited. Later Chellappah appears to have pressed for a sale of these shares when a profit could have been made by a sale, apparently apprehensive that the value of the shares would fall later (as they in fact did) and further because he thought that the money used for the purposes of the business would bring in a higher return. The other directors, in particular Senator Gardiner, did not agree to Chellappah's proposal and the displeasure which arose must have been aggravated by the fact that Senator Gardiner was Chairman of the Board of Directors of Cargills and Millers. The learned District Judge has found "no doubt Senator Gardiner and the other directors honestly believed that the retention of these shares was beneficial to the company". There is no sufficient reason to disagree with this finding but, however that be, the foundation for the subsequent unpleasant events which took place appears to have been laid. Matters came to a head in 1949 and on the 7th September of that year the Board of Directors passed a resolution making five specific com-

plaints against the agents and secretaries, namely :

"(*a*) They did not take steps to have the company's cheques countersigned by J. R. Thampapillai as ordered by the directors ;

(*b*) They did not open a current account in the Bank of Ceylon and operate on it as ordered by the directors ;

(*c*) They did not furnish replies to Mr. Kamil's questions regarding the remittance of Rs. 100,000 to Bombay ;

(*d*) They acted in an arbitrary manner in suppressing certain resolutions forwarded by one of the directors, Mr. Kamil, for inclusion in the agenda for the meeting of August regarding independent audit ; and

(*e*) They do not summon monthly meetings of the directors every third Wednesday of the month as decided by the directors ".

The resolution proceeded further to state that the agents and secretaries were not acting in the best interests of the company and as their continuance was detrimental to the progress of the company called upon them to hand over the account books, etc., to J. R. Thampapillai, another director, on or before 10th September. The one dissentient to this resolution was Chellappah. On the same day Thampapillai was appointed managing director and one Gnanakoon was appointed secretary with effect from 7th September, 1949.

On this decision of the board John Chellappah & Company should have surrendered the books and other documents of the company and ceased to function as agents and secretaries. If they had a grievance that they had been wrongfully dismissed that was a matter, which, if not satisfactorily adjusted, might have formed the subject matter for an action for wrongful dismissal. The refusal of John Chellappah & Company (which was virtually John Chellappah himself) to surrender office cannot be justified but it does not, even when combined with other facts which will shortly be stated, afford good ground for an order for winding up.

It is scarcely necessary to consider the charges made against John Chellappah & Company in any detail but as a great deal of evidence has been led, and as the learned District Judge has made certain observations regarding them, we will deal with them shortly.

The first charge was that John Cehllappah & Company "did not take steps to get the company's cheques countersigned by J. R. Thampapillai as ordered by the Board of Directors ". The cheques of the company were signed by the agents and secretaries and one of the directors and it was decided in June, 1949, that the director should be a director other than John Chellappah, namely, J. R. Thampapillai. This decision was understandable—indeed desirable. In a number of instances John Chellappah & Company failed to carry out this instruction. John Chellappah says that in all but one instance the failure occurred on cheques for which Thampapillai had made a requisition. This is not an acceptable excuse. It is not suggested however that John Chellappah has been guilty of any act of dishonesty either in this or in any other matter. It nevertheless deserved the condemnation passed by the learned District Judge.

The next charge was an alleged failure to open an account in the Bank of Ceylon as ordered by the directors. This decision of the directors was taken because the Bank of Ceylon appeared to afford better credit facilities than the company enjoyed at the moment. John Chellappah says that the cash balance did not permit the opening of such an account as there was already an unpaid overdraft from the Eastern Bank and we agree with the learned District Judge that this charge cannot be supported.

The third charge relates to a failure on the part of John Chellappah & Company to furnish replies to a questionnaire with regard to a remittance in 1947 of a sum of Rs. 100,000 to Bombay. This relates to a transaction where in the course of purchasing textiles in Bombay the Indian Exchange Control Regulations appear to have been infringed. It would appear that this money was remitted to purchase textiles and that in the course of the transaction a sum of Rs. 26,500 was expended in buying export licences in breach of Indian Regulations, a sum of Rs. 1,000 in brokerage fees and the balance utilised in paying for textiles. The price was again paid in Colombo by way of complying with the Indian Exchange Control Regulations with money loaned by the agents and secretaries to the company as these Regulations appear to have required such payment. The money expended in India for the purchase was by some private arrangement returned to Ceylon and Ceylon Textiles did not in fact pay twice over the same goods. This circumlocutory process must have led the other directors to believe that not only the Indian Exchange Regulations but the Ceylon Exchange Regulations had been violated. John Chellappah's position in Court in his evidence and in the argument before us was that the practice of purchasing export licences contrary to Indian Regulations was largely resorted to by the trade and was known to the other directors. It is suggested by Counsel that he refused to give any details because it would have led to a prosecution of a person or persons who aided him in

India and that the person who prepared the questionnaire, a fellow director by the name of Kamil, was also a dealer in textiles and a hostile competitor. This delibrate violation of the Exchange Contrcl Regulations of India is something which cannot be excused. But to say the least it is doubtful whether the other directors really took a serious view of this transaction because in their resolution of 7th September, 1949, dismissing John Chellappah & Company from the position of secretaries they appointed Gnanakoon as the secretary. Gnanakoon is a son-in-law of Chellappah and had been employed by the latter in Bombay to put through the transaction, and must have been the person most directly connected with the breach of the Exchange Control Regulations.

The next charge relates to the failure on the part of the agents and secretaries to summon monthly meetings of the Board of Directors. At a meeting held on the 14th January, 1949, the board decided "that monthly statements of sales and expenditure made up as correctly as possible should be tabled at monthly meetings". It was argued in spite of this decision monthly meetings of the board had not been summoned regularly. It is doubtful whether the decision worded in the form quoted above could be read as a directive to the agents and secretaries to summon monthly meetings. If emphasis is laid on the preparation of monthly sales and expenditure the decision may be interpreted to mean that these statements should in the normal course of business be tabled at monthly meetings. It was undoubtedly taken for granted that the board would meet monthly and that is quite a different matter from saying that the decision amounted to a directive failure to comply with which was an act of disobedience. What might properly be regarded as a directive on this point is a resolution of the board passed on the 21st June, 1949, "that monthly meetings be held monthly and as far as possible on the third Wednesday at 9-30 a.m., after consulting the convenience of the Chairman". It was not suggested at the argument in appeal that if this resolution was the only clear directive there was no substantial compliance with it. Nevertheless the learned District Judge held that this charge was made out on Senator Gardiner's evidence that prior to 21st June it had been pointed out to the agents and secretaries by the Board that monthly meetings should be convened.

The most that can be said to arise upon these charges was that the agents and secretaries were behaving badly, and not functioning as they should have done.

Upon the dismissal of the Company, John Chellappah addressed a requisition signed by himself and five other shareholders to the Board of Directors requesting that an extraordinary general meeting be held to pass certain resolutions the object of which was to reinstate John Chellappah & Company as Managing Agents and Secretaries and to remove all the directors other than the life director from the Board. The requisition was made on the 10th October, 1949, and asked for a meeting on the 22nd of that month. The directors correctly took the view that the nature of the resolutions required a *special* resolution and fixed the meeting for the 30th November. John Chellappah requested the Board to postpone this meeting and this request was complied with. On the 16th November John Chellappah and his fellow requisitionists again requested the Board to summon a meeting on or before the 30th November and contended that no special resolution was necessary. The Board persisted in its opinion and fixed an extraordinary general meeting for the 22nd December. John Chellappah then by a notice dated the 25th November convened an extraordinary general meeting to be held on the 3rd December presumably on the ground that as the Board of Directors had failed to comply with a lawful requisition he had a right to do so under section 112 (3) of the Ordinance. Thereupon three of the directors Thampapillai, Kamil and Ernst of the Ceylon Textiles Limited instituted action No. 22165 in the District Court of Colombo in which, among other things, they asked for an interim injunction restraining John Chellappah from holding or taking part in the meeting convened by him for the 3rd December. On the following day the Court issued the injunction. It was addressed to John Chellappah but it was not served upon him. The Chairman Senator Gardiner arrived at the time and place fixed. The fiscal's process server was also there. John Chellappah was not there but his proxy holder was present. The enjoining order was read by Senator Gardiner to such shareholders as were present but 15 or 20 minutes later after Senator Gardiner had left the shareholders proceeded to hold a meeting at which they purported to reappoint John Chellappah & Company as Agents and Secretaries, to pass a vote of no-confidence in the Board of Directors, to dislodge the existing directors except the life director and to substitute for them John Chellappah and his son A. Chellappah.

The absence of John Chellappah on the 3rd December appears to have been an evasion of the enjoining order issued by the Court. This evasion is again conduct which is blameworthy.

It is not conceded by learned Counsel for the appellants that the resolution passed at this meeting of the 3rd December was of no effect for two among possibly other reasons. First, because a special resolution was necessary to displace the Board of Directors and no such resolution was passed; secondly, because even if it is assumed that the directors were in default in not summoning a meeting, the conveners of the meeting of the 3rd December did not before they summoned a meeting themselves let the time required by law under section 112 (3) to elapse. It is also to be remembered that an injunction had been issued restraining the holding of the meeting. Chellappah, his son A. Chellappah and the Ceylon Textiles Limited however, instituted action No. 22326 of the District Court of Colombo against the three directors Ernst, Kamil and Thampapillai the 1st, 2nd and 3rd defendants respectively in the action and Senator Gardiner praying for a declaration that the 1st, 2nd and 3rd defendants had ceased to be directors of the company, that John Chellappah and his son were duly elected directors, and for an order requiring the 1st, 2nd and 3rd defendants to hand over the management of the company. They also asked for an injunction restraining them for acting as directors and an enjoining order was in fact issued on the 25th January, 1950. Thereafter Messrs. Ernst, Kamil and Thampapillai refrained from functioning as directors. It is clear that the attempt to dislodge the old directors was ineffective in law and that an injunction should not have issued but, however that be, the fact that Chellappah went to Court immediately after the meeting of 3rd December indicates that he desired to obtain covering sanction from Court for the decisions taken at the meeting of 3rd December, 1949.

Subsequent to this there are two matters which deserve mention. On 1st February, 1950, Chellappah (who was a director in any case) entered the business premises of the company for the purpose of examining its books. He says that the examination revealed a number of irregularities and towards evening he decided that the premises should not be left in charge of the Secretary, Gnanakoon. He then attempted to close the premises when Gnanakoon with the help of one or two rowdies thrust him out. On the 2nd February, 1950, Chellappah forcibly re-entered the premises and this re-entry was the subject of a prosecution for house-breaking. The learned District Judge mentions these events as part of the narrative but makes no comment on them. Chellappah says that his action with regard to re-entry was prompted by the belief that irregularities were being committed and this belief receives some support from the evidence of Mr. N. de Costa a member of a firm of chartered accountants who examined the books of the company at the request of the provisional liquidator. We are unable upon this material to say that what Chellappah did on both occasions was prompted by a desire to take the business into his exclusive control and not by a desire to protect it.

The evidence led in the Court below discloses a great deal of recrimination between Senator Gardiner and Chellappah. The undue importance attached to this has somewhat blurred the essential point in this case, namely, whether there was a deadlock such as was necessary in law to sustain an order for winding up. The learned District Judge has expressed certain views on the accusations made by Senator Gardiner and Chellappah against each other but we do not think it necessary to go into them in detail. As an instance we would refer to the accusation made by Senator Gardiner that John Chellappah & Company induced him to sign a contract of service for 10 years and that he signed it without realising that it was for 10 years. This is somewhat curious. Senator Gardiner's position appears to be that the contract was unduly favourable to Chellappah & Company and in his evidence he expresses discontent with Chellappah on that ground. Senator Gardiner also accuses Chellappah of having resisted the payment of dividends with the object of depressing the price of shares in order to buy them up himself. The learned District Judge has held " this charge of deliberately depressing the share of this company levelled against Chellappah has no basis whatsoever " and we have no reason to think that the learned District Judge is wrong.

The course of events since the 7th of September, 1949, appears without doubt to have been turbulent and the unfortunate turns which they took must have impaired the efficient working of the company. But in spite of this it is clear from the evidence that the company is prosperous and doing well. It might have done even better but for the unfortunate events which we have recapitulated. But however turbulent these events might have been and however violent the disputes that have taken place they are not incapable of being resolved. The machinery of the Courts can be invoked in the cases already filed or in others to restore to effective authority the directors entitled to function and to give relief against recalcitrant agents and secretaries.

The appellants cited to us certain cases on the question of deadlock. They all relate to private companies which it is possible, for the reason that they were private, to deal with on the same

footing as partnerships in so far as the question of winding them up arose. Learned Counsel on both sides were unable to cite to us a case in which a public company had been wound up under the corresponding section of the English Act. Such cases, if they can arise at all, are bound to be rare because the constitution of a public company generally makes it possible for disputes to be resolved in a domestic forum or at the worst in a Court of law. In the decided cases, as it appears to us, it was the impossibility of arriving at such a solution that led the Courts to pronounce a winding up order. The embarrassment caused by conflicts between directors and the possible delays inevitable in litigation in achieving their resolution do not in our opinion necessarily lead to the conclusion that a company should be wound up under section 162 (6) of the Companies Ordinance No. 51 of 1938. A case which we do not have to consider in which such an order may be justified is one where such conflits and embarrassment are shown to exist, and it is further established that owing to lack of means of solution they will continue indefinitely so as to make business impossible or at any rate to the serious detriment of the company. It is not the case here that the matters of disagreement between Senator Gardiner and Chellappah and their respective supporters will, for lack of means of solution, be of such a permanent character as either to bring the business of the company to be a standstill or to cause irreparable damage to the shareholders.

In *re Yenidje Tobacco Company Limited* (1916) 2 Ch. 426, a private company with only two shareholders was under consideration. An application for winding up the company was consequently treated on the same principles as an action for dissolution of partnership by one partner against another. A deadlock was alleged. Warrington, L.J., said, " I am prepared to say that in a case like the present, where there are only two persons interested, where there are no shareholders other than those two, where there are no means of overruling by the action of a general meeting of shareholders the trouble which is occasioned by the quarrels of the two directors and shareholders, the company ought to be wound up if there exists such a ground as would be sufficient for the dissolution of a private partnership at the suit of one of the partners against the other ". Before disposing of the case Warrington, L.J., dealt with an article of the company which provided for reference to arbitration in the event of disputes arising. He found that this article did " not provide the means of getting rid of the difficulties which are encountered in the present case ". There is some indication here that a Court should not hold that a deadlock has arisen if some means other than a winding up exists for the resolution of difficulties that may have arisen.

It appears from the argument in the case of *Cooper and Sons Limited* (1937) 1 Ch. 392 that the Court was asked " to exercise its general equitable jurisdiction " under section 168 of the Companies Act, 1929. Commenting upon certain grievances which were urged as grounds for an order for winding up Simonds, J., (as he was then) though he does not say in so many words appears to indicate that if " appropriate relief in appropriate proceedings " was available in respect of them such grievances would not influence him to make an order for winding up.

The respondents in the Court below and before us relied strongly upon the judgment of the Privy Council in *Loch and Another vs. John Blackwood, Limited.* That case makes no pronouncement upon the question of deadlock and relates to the perverse and oppressive use of voting power by those holding a majority of votes. When this was pointed out the respondents sought to suggest that in the case before us also there had been attempts perversely to use voting power and that successful attempts would occur in the future. In the case of *Cuthbert Cooper & Sons Ltd.*, (1937) 2 A. E. R. 466 at p. 469 the petitioners were confined to the grounds stated in the petition and perverse use of voting power is not one of such grounds in this case. But as the learned Judge has made some observations upon the use that John Chellappah may make of voting power we will examine the arguments adduced.

Learned Counsel for the respondents argued before us that the circumstances surrounding the ineffective meeting of 3rd December, 1949, indicate an attempt to use voting power perversely and oppressively. We do not think so. However misguided they were, their actions cannot fairly be described as a perverse or oppressive use of voting power.

The fact that a majority through the medium of legal forms persistently use overwhelming voting power perversely and in oppression of a helpless minority will influence a Court in favour of making an order for winding up. An exhaustive statement of the cases in which the Courts will wind up a company on such grounds would be difficult to make and no such statement has been attempted—but the general nature of the grounds is evident from the decided cases. Thus in the case referred to, a public company was formed to carry on the engineering business of one John Blackwood, deceased, which to all intents and purposes was the domestic concern

of the sister of the deceased, one Mrs. Maclaren, a nephew named Rodger and a niece named Mrs. Loch. What was called the MacLaren group had a majority of six votes which were persistently used to the detriment of the minority. They omitted to hold general meetings or submit accounts or recommend a dividend in spite of the fact that the business was prosperous. Their whole aim was to keep the minority in ignorance of the state of the business with the object ultimately of buying them out at an undervalue. This was a perverse use of voting power.

We have attempted to obtain a report of the case of *Baird vs. Lees* referred to by the Privy Council with approval in the case just referred to. Lord Clyde there said, " I have no intention of attempting a definition of the circumstances which amounts to a ' just and equitable ' cause. But I think I must say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhleming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company ". Although we have not been able to obtain verification from the report it is fairly clear that the violation of the conditions referred to by Lord Clyde was committed by a member and official who wielded overwhelming voting power and used such voting perversely to keep himself in office while violating the conditions referred to. In that case " appropriate relief in appropriate proceedings " does not appear to have been available to other shareholders. No such grounds exist in this case. In the first place John Chellappah has only 34% of the shares (and votes). At the meeting of the 3rd December he appears to have commanded a majority. On this petition he and the others opposing winding up command a majority of votes. But these majorities were commanded presumably by John Chellappah persuading others to support him on the particular questions which arose. Persuasion of this character is legitimate. It was addressed to the merits of particular questions. John Chellappah might have been right or wrong on the views for which he has found support but he has not formed a block which uses a majority of votes perversely in the same sense as that word is used of directors who by commanding a majority of votes keep themselves in office and vote themselves unconscionable amounts as remuneration.

John Chellappah has in fact not been successful up to now in achieving the objects in respect of which he commanded majorities. The resolutions of the meeting of 3rd December were for the reasons already stated ineffective. For this reason the respondents were constrained to plead before us that although in the past voting power has not oppressed a minority it will do so in the future. It was contended before us that it is probable that at the next annual general meeting John Chellappah will command the same degree of support among shareholders as he has done on this petition and will be able to place on the Board directors of his choice. This might happen ; but if it does it could not be called a perverse use of voting power. Then it was argued that there will be a deadlock because John Chellappah was likely to quarrel with the other directors even though they be of his choice because in the past it is alleged he has done so. The allegation is that Ernst and Kamil were of Chellappah's choice and that Chellappah has quarrelled with them. We find it entirely impossible to make a judicial forecast as the one we are asked to make and we feel quite unable to sustain an order for winding up on the ground of deadlock on the kind of probabilities that we are asked to assume for the future. We are of the opinion that no deadlock such as would justify a winding up order has been established.

For the reasons given we would allow the appeal. set aside the decree entered by the learned District Judge. and dismiss the petitioners' application. The petitioners will pay costs in both Courts.

PULLE, J.

I agree.

Set aside.

Present : H. A. DE SILVA, J.

THE PRINCIPAL COLLECTOR OF CUSTOMS vs. T. M. A. WIJESEKERA OF WIJESEKERA & Co., LTD.

S. C. No. 235—*M. C. Colombo No.* 19430/*A*

Argued on : 29th, 30th, 31st October, 1952, and 6th November, 1952.
Decided on : 19th January, 1953.

Customs Ordinance (*Chap.* 185)—*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 establish 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 : 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 ".

Cases referred to : *Director of Public Prosecutions vs. Kent and Sussex Contractors, Ltd. and another* (1944) 1 A. E. R., p. 119.
R. vs. I. C. R. Haulage, Ltd. (1944) 1 A. E. R., p. 691.
Moore vs. L. Bresler Ltd. (1944) 2 A. E. R., p. 515.
Robert Abraham Cohen 34 Criminal Appeal Reports, p. 239 at page 245.
Sayce vs. Coupe 44 Weekly Notes, p. 473.
In Chellappa vs. Commissioner of Income Tax, 52 N. L. R., p. 416.

T. S. Fernando, Acting Solicitor-General, with *A. Mahendrarajah, C.C.*, for the Attorney-General.
S. Nadesan, with *E. B. Vannithamby*, for the accused-respondent.

H. A. DE SILVA, J.

This is an appeal taken with the sanction of the Attorney-General against an order of acquittal of the accused entered in this case by the Magistrate of Colombo. The complainant in this case is the Principal Collector of Customs and the accused is T. M. A. Wijesekera of Wijesekera & Co., Ltd. The accused-respondent was charged on three counts in the charge—to wit—that the accused on or about the 23rd day of November, 1948, at Colombo within the jurisdiction of this Court :

(1) was knowingly concerned in the fraudulent evasion of the Customs duties payable on the exportation of 1,630,458 tons of naked unrefined coconut oil,

(2) did export 1,630,458 tons of naked unrefined coconut oil, being goods liable to duty the duties for which had not been paid or secured,

(3) did deal with 1,630,458 tons of naked unrefined coconut oil being goods liable to duties of Customs with intent to defraud the revenue of such duties, and that the accused abovenamed became liable to forfeit treble the value of the said goods, to wit, a sum of Rs. 6,600,000 and that he has thereby by virtue of section 139A of the Customs Ordinance (Cap. 185) as amended by Ordinance No. 3 of 1939 been guilty of offences punishable under the said section 139A of the Customs Ordinance as so amended.

After trial the learned Magistrate found the accused not guilty and acquitted him. It is

from that order that this appeal is taken. The learned Magistrate has in his judgment set out the facts clearly. It is hardly necessary for me to detail the facts upon which he has come to his finding except to refer to such of the evidence as having a particular bearing on the points that the parties are at issue.

I may say at the outset that on most questions of fact there does not seem to be much variance between the prosecution and the defence. As a matter of fact the accused called no oral evidence but relied on certain documents produced by him.

In the year 1942, the Ceylon Government entered into a contract with the United Kingdom Ministry of Food to supply to it the entire exportable surplus of copra and coconut oil. The Commissioner of Commodity Purchase who was also an Assistant Controller of Exports (coconut products) was the sole exporter of copra and coconut oil.

In August, 1948, the contract with the United Kingdom Ministry of Food was revised. The revision of the contract resulted in only a fraction of the Ceylon produced copra and coconut oil being exported to the United Kingdom by the Commissioner of Commodity Purchase and private parties were permitted on a licence to export copra and coconut oil to any destination subject to the condition that the best price was obtained for the commodity exported. In accordance with that policy adopted by the Government Messrs. Wijesekera & Co., Ltd., of which the accused was the Managing Director at the material dates took steps to export two consignments of coconut oil to the United States of America. The first consignment was 280 tons which was shipped on the steamer s.s. Mount Mansfield. In respect of this shipment Wijesekera & Co., Ltd., paid the export duty before the oil was put on board, but no entry was made or passed under the provisions of section 59 of the Customs Ordinance.

The present charge has arisen on a consignment of 1,630,458 tons of naked unrefined coconut oil shipped on the vessel s.s. Iris Bank. The value of the coconut oil purchased from the Commissioner of Commodity Purchase and shipped on the vessel s.s. Mount Mansfield was duly paid for and Custom duty due thereon either paid or secured as required by the Customs Ordinance. The 1,630,458 tons of coconut oil put on board the Iris Bank by Messrs. Wijesekera & Co., Ltd., were purchased by them from the Commissioner of Commodity Purchase and duly paid for and the necessary licence was obtained therefor. The local agents of the Iris Bank, Messrs. Aitken Spence & Co., Ltd., were paid by Wijesekera & Co., a sum of Rs. 112,533.54 being the freight for the said shipment of coconut oil. Wijesekera & Co., Ltd., purchased the oil from the Commissioner of Commodity Purchase, which oil was stored in the Government Bulk Oil Installation (the oil tanks at Summer Hill). This quantity of oil was upon an allocation made by the Commissioner of Commodity Purchase supplied by Messrs. J. H. Vavasseur & Co., Ltd., and the British Ceylon Corporation. Those two companies were probably in charge of the Oil Installation. No bill of entry was passed in respect of this shipment in terms of section 59 of the Customs Ordinance. Mr. Turpie the Lloyds' surveyor issued his certificate giving the total quantity of oil pumped into the hold of the Iris Bank, the quantity being 1,630,458. The actual quantity pumped could not have been ascertained until the certificate of the Lloyds' surveyor was received. A sample of the oil pumped into the hold of this vessel was taken and duly analysed by the Government Analyst. All payments due to the various parties concerned except the Customs duty was duly paid by Messrs. Wijesekera & Co., Ltd. The learned Magistrate by a careful and full analysis of the evidence has found that all matters relating to the shipment was attended to by the accused as Managing Director of the Company. The learned Magistrate has found that the accused as Director of the Company was aware that it had to pay the export duty on the coconut oil to the Customs notwithstanding the letter P42. This letter P42 looms large in this case. Now this was a letter sent by Commissioner of Commodity Purchase to the Principal Collector of Customs and it runs as follows " I have the honour to inform you that the undernoted shipments of coconut oil will be effected on the above vessel on my behalf. Please issue shipping order direct permit shipment. Inspect shipment.

Messrs. J. H. Vavasseur & Co., Ltd.	807,	tons
Messrs. British Ceylon Corporation Ltd.	807,	,,
	1,614,	tons

This was in a cyclostyled form which was in use when the Commissioner Commodity Purchase was the sole exporter of coconut oil. The words which were inapplicable in this instance, such as, " on my behalf ", " issue shipping orders direct ", and " inspect shipment " would seem to have been not deleted before Biddell signed that letter P42 on behalf of the Commissioner of Commodity Purchase. This letter is dated the 23rd November, 1948. Under the same date

letter P41 was sent by the Assistant Controller of Export (coconut products) to the Principal Collector of Customs in which it was stated that the shipper was Wijesekera & Co., Ltd. It does not seem quite clear how the Customs Officials could have made any mistake about the identity of the shipper in the face of this letter P41. The Commissioner of Commodity Purchase would appear to have been allowed the concession of delivery to the Principal Collector of Customs the usual bill of entry on a date subsequent to the export of goods.

Section 59 of the Customs Ordinance after making provision for the delivery of a bill of entry etc., and for payment of duties and dues in respect of goods mentioned in such entry goes on to say " if such goods are removed from the warehouse or other place appointed for shipment before such entry is passed and all duties paid, and in the absence of any explanation to the satisfaction of the Collector the same shall be forfeited, and such forfeiture shall include all other goods which shall be entered or packed with them as well as the packages in which they are contained ".

The resulting position is clearly this. Wijesekera & Co., Ltd., of which the accused is the Managing Director who on behalf of the Company attended to all the arrangements regarding the export of this quantity of oil has failed to enter the bill of entry and pay the necessary duty and dues to the collector of Customs. There is no gainsaying the fact that the accused was well aware and was concerned in the export of this consignment of oil. The knowledge and intention of its servants have to be imputed to the body corporate. Vide *Director of Public Prosecutions vs. Kent and Sussex Contractors, Ltd., and another* (1944) 1 A. E. R. p. 119. Viscount Caldecote, L.C.J., has thus observed in the above case " bearing that in mind, I think that a great deal of the argument of Counsel for respondents as to whether you can impute to a Co., the knowledge or intent which the agent of the Company has, falls to the ground, because although the directors or general manager of a company are its agents, a company is incapable of acting or speaking or even thinking except in so far as its secretary or general manager or directors and so on have either spoken, acted or thought ".

In *R. vs. I. C. R. Haulage, Ltd.* (1944) 1 A. E. R. p. 691. The Court of Criminal Appeal held, " whether the criminal act of an agent including his state of mind, intention, knowledge or belief is the act of the Company employing him depends on the nature of the charge, the relative position of the officer or agent to the Company and other relevant facts and circumstances. In the present case the fraud of Robarts was fraud of the company ". See also *Moore vs. L. Bresler Ltd.* (1944) 2 A. E. R. p. 515. It has been held that error in regard to the date of the commission of an offence is never material unless time is of the essence of the offence. Vide judgment of Soertsz, J., S. C. 826—M. C. Avissawella.

The section of the Customs Ordinance which needs careful consideration is section 128 in order to determine the charges that are laid against the accused. Section 128 runs thus, " every person who shall be concerned in exporting or taking out of the Island or attempting to export or take out of the Island any prohibited goods or any goods the exportation of which is restricted contrary to such prohibition or restriction, whether the same be laden for shipment or not and every person who shall export or attempt to export any goods liable to duty the duties for which have not been paid or secured, or in any manner deal with any goods liable to duties of Customs with intent to defraud the revenue of such duties or any part thereof, or who shall be knowingly concerned in any fraudulent evasion or attempt at evasion of such duties or any part thereof, shall in each and every of the foregoing cases forfeit either treble the value of the goods, or be liable to a penalty of one thousand rupees at the election of the Collector of Customs ".

It is obvious that in order to bring a person within the ambit of section 128, fraud is a necessary element to be proved. There must be proof that the person concerned was guilty of fraud. In fact learned Acting Solicitor-General very properly conceded that at least on counts one and three of the charge the element of fraud on the part of the accused had to be proved by the prosecution, such as deception etc. His argument is that under section 59 of the Customs Ordinance a non-payment of all duties and dues involves a forfeiture of the goods. A reading of section 59 shows that the forfeiture is in respect of the goods for which the bill of entry was not delivered and for which the duties and dues were not paid and also other goods which shall be entered or packed with them as well as the packages in which they are contained, in the absence of any explanation to the satisfaction of the Collector. In this instance the Collector purported to act under section 128 of the Customs Ordinance when he forfeited treble the value of the goods which amount he reduced to two million rupees in the exercise of his discretion as authorised by the Ordinance. The grand total of the export duty and dues in respect of the shipment came to Rs. 529,888,25, vide evidence of Mr. Thambiah, Controller of Customs.

The learned Magistrate has, in his judgment, analysed section 128 and has come to the conclusion that in order to bring home the guilt to the accused it was incumbent upon the prosecution to prove an element of fraud on the part of the accused in respect of all three counts of the charge. The contention of the learned Acting Solicitor-General is that on count 2 no question of fraud arises. The mere non-payment of export duty and dues results in the accused being liable criminally.

The argument of the learned Counsel for the accused-respondent is that section 128 falls within part 12 of the Customs Ordinance and that said part has the following heading, " Smuggling ", " Seizures " " and prosecutions generally ". He argues that section 128 of the Customs Ordinance is intended to prevent smuggling etc., of goods. He supports the finding of the learned Magistrate that the prosecution must prove fraud and fraudulent intent to sustain the charge under every one of the three counts. In my opinion that contention must succeed. The first count in the charge runs as follows:—" was knowingly concerned in the fraudulent evasion of the Customs duties .....". The wording of the 1st count follows that in the last part of section 128. The wording of the 3rd count follows more or less words in the middle part of the said section—" in any manner deal with any goods liable to duties of Customs with intent to defraud the revenue.....". The wording of count 2 follows that used in the earlier part of section 128 which runs thus—" every person who exports or attempts to export any goods liable to duty the duties for which have not been paid secured.....". Section 128 read as a whole clearly indicates that the following words " with intent to defraud the revenue of such duties or any part thereof " qualifies 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 ". Now has the prosecution successfully brought home to the accused the charge of fraud? That leads one to the question, what is fraud? I have been referred to the case of *Robert Abraham Cohen* 34 Criminal Appeal Reports p. 239 at page 245. Lord Chief Justice who delivered the judgment of the Court in this case made the following observation—" another ingredient of the offence is the intent to defraud, and of this the jury should be reminded. But as in all cases where an intent to defraud is a necessary ingredient, the intent must usually be inferred from the surrounding circumstances. If a jury is satisfied that the defendant knew, which, of course, would include a case in which he had wilfully shut his eyes to the obvious, that the goods were uncustomed, and he had them in his possession for use or sale, it would follow, in the absence of any other circumstance, that he intended to defraud the revenue. That there may be cases where the circumstances would negative the intent is possible, but ordinarily speaking it is indeed difficult to see how it could be found that he did not intend to defraud the Revenue, certainly in such a case as the present, where the appellant not only had the goods in his possession for the purpose of selling but told lies to the officers when he challenged on the matter.

The principle enunciated in this case was followed by the Queen's Bench Division Divisional Court in *Sayce vs. Coupe* 44 Weekly Notes p. 473. In Cohen's case the Lord Chief Justice had used the words " had wilfully shut his eyes to the obvious ". This leads one to a consideration of the meaning of the word " wilfully " as understood in a Penal statute. *In Chellappa, Appellant, and Commissioner of Income Tax, Respondent* 52 N. L. R. p. 416 Basnayake, J., has considered the meaning of the words " wilfully with intent to evade tax in a criminal prosecution ". Basnayake, J., thus observed " in order to understand the scope of the section it is necessary to ascertain the meaning of the words " wilfully " " evade "! The dictionary gives the following meaning of the word " wilfully " with free exercise of the will; voluntarily; in law, designedly; as opposed to inadvertantly; in a Penal statute, purposely, with evil intent. The meaning of the word " evade " is given by Basnayake, J., in the same case, he observes thus, " the word " evade " has several meanings according to the dictionary. It means: " to avoid by artifice; elude or get away by craft or force; save oneself from, as an impending evil; to escape; get away ". It is also used in the sense of " defeat the intention of the law while complying with its letter ".

The facts in this case do not show that the accused or the Company for whom he was acting resorted to any misrepresentation or under-hand contrivance or any other unlawful act deliberately or purposely with the evil intent of depriving the revenue of duties and dues.

The accused has in a lawful manner by taking lawful steps secured the loading of the oil on the vessel Iris Bank. The Collector of Customs undoubtedly was aware of the fact that this oil was put on board the vessel. Apart from the documentary and oral evidence led in this case which undoubtedly shows that the Customs authorities were aware of the loading of this oil

on this vessel by the accused or his Company, in compliance with the requirements of section 64, the Master of the Ship would have undoubtedly apprised the Customs authorities that the quantity of oil was on board this vessel when it left the Port of Colombo bound for its destination. One is not considering the civil aspect of the claim made by the Collector of Customs which will be duly considered in the District Court of Colombo. The result of a criminal prosecution does not in any manner affect the rights of parties in the civil suit. The negligence or otherwise on the part of officials of the Customs is beside the point in this case. All that we are concerned in this case is whether the accused's action in omitting to pay the Customs duty and other Port dues in the circumstances deposed to amounts to an act done with intent to defraud the revenue or duties or any part thereof or any fraudulent evasion or attempt at evasion of such duties or any part thereof.

The consideration of the evidence taken as a whole and the circumstances in this case do not in my opinion, prove the element of fraud or fraudulent evasion as contemplated in section 128 in respect of the duty and dues of this shipment of oil.

I am, therefore, of opinion that the learned Magistrate has arrived at a correct verdict and the appeal is dismissed.

Appeal dismissed.

Present : Pulle, J. & L. M. D. de Silva, J.

VIDANALAYEGEDERA APPU NAIDE *et al* vs. VIDANELAYEGEDERA DINGIRI NAIDE *et al*

S. C. No. 42—*D. C. Matale No. P*206 (271)

Argued and Decided on : 19th May, 1952.

Trust—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.

L. G. Weeramantry, for the defendants-appellants.
B. S. C. Ratwatte, for the plaintiff-respondents.

Pulle, J.

The principal question which arises for determination on this appeal is whether the learned District Judge was right in holding that the corpus to be partitioned should be restricted to lot A shown in plan P1 or whether, as contended for by the appellants, it should be both lot A and the contiguous lot B.

By a series of deeds commencing from 1902 one Kapuru Naide and his sister Menikhamy became owners in equal shares of a land called Miriskuttawe Hena which admittedly is the land comprising lots A and B referred to above. Menikhamy was married to Dingiri Naide, the 1st plaintiff, and after her death in 1909, the 1st plaintiff married Punchihamy, who is the 2nd plaintiff. By a deed of 1917 Kapuru Naide transferred his half-share to the 1st and 2nd plaintiffs and in 1945 they gifted, subject to their life interest, a half share of the land which can now be identified as lot A to their daughter the 3rd plaintiff. The 1st defendant is the son of the 1st plaintiff by Menikhamy and the 2nd defendant is a grand daughter of the 1st plaintiff and Menikhamy. The case for these defendants is that, according to Kandyan Law, upon the death of Menikhamy her half share devolved equally on the 1st defendant and his brother Kirihamy, the deceased father of the 2nd defendant, and that they are entitled to this half share not only out of lot A but out of lot B as well. The claim of the defendants to have lot B included in the corpus sought to be partitioned and to be declared entitled to their shares therein would be incontrovertible but for a transaction which took place on the 27th April, 1933. On this date, for a consideration of Rs. 8 paid by

the 1st and 2nd plaintiffs, the Crown executed a grant in their favour of an allotment of land which is identifiable with lot B.

In regard to this Crown Grant the contention which has prevailed is that lot B became the absolute property of the Crown as a result of proceedings taken under the Waste Lands Ordinance and that the transferees under the grant succeeded to an indefeasible title. In other words, the title on which the defendants based their claim could not avail them as against the Crown grant. In our opinion there is no evidence to warrant the finding that after an inquiry duly held under the Waste Lands Ordinance lot B had been declared the property of the Crown. (The nominal consideration of Rs. 8 rather indicates that lot B was sold preferentially to the 1st and 2nd plaintiffs because they claimed to be in possession under what is commonly known as village title). As there is no proof that the Crown was in a position to convey an indefeasible title to lot B the claim of the defendants as against the 1st and 2nd plaintiffs to a $\frac{1}{4}$th share each in lot B has been made out beyond any doubt.

There is yet another reason why the defendants are entitled to succeed. It would appear that the 1st plaintiff claimed lot B at what is called a " settlement " inquiry. While disclosing that he and his wife the 2nd plaintiff, held shares, he wilfully suppressed the fact that the defendants too were entitled to shares as successors in title of his first wife, Menikhamy, and thereby obtained the advantage of a Crown grant in favour of only himself and the 2nd plaintiff. The 1st plaintiff explained his conduct by stating that it was his intention to give to the defendants, in due course, their shares to lot B. His evidence leaves no room for doubting that, if the claims of the defendants had been disclosed by him, the Crown grant would have been made out in the joint names of the defendants and the two plaintiffs. In the circumstances, by operation of section 92 of the Trusts Ordinance, the two plaintiffs must hold their title to half share in trust for the defendants.

In the result the appeal succeeds to the extent that lot B must be included in the corpus and that the defendants must be declared entitled each to a $\frac{1}{4}$th share of that lot. The appellants do not press their claims to the house which has been allotted exclusively to the 1st plaintiff. The interlocutory decree will be modified to give effect to our decision. The 1st and 2nd plaintiffs will pay to the defendants the costs of appeal. The costs of contest in the Court below will, as already provided, be divided.

L. M. D. DE SILVA, J.

I agree.

Appeal allowed.

Present : PULLE, J. & L. M. D. DE SILVA, J.

B. K. BAPTIST *et al* vs. L. EKANAYAKE

S. C. No. 130—*D. C. Galle, No. M.B.* 439

Argued on : 21st October, 1952.

Decided on : 10th December, 1952.

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 something 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.

Case referred to : *Cader et al vs. Mohamed et al* 40 N. L. R. 136.

J. M. Jayamanne, for the purchasers-appellants.

Malcolm Perera, for the defendant-respondent.

L. M. D. DE SILVA, J.

In this case the defendant mortgaged to the plaintiff certain undivided shares and other interests in a land. Decree was eventually entered under which in default of payment the premises mortgaged by the defendant were ordered to be sold. These premises were correctly described in the schedule to the decree which referred, *inter alia*, to the interest of the defendant in a land called Gederawatta thus :—

> All that undivided ¼ plus 1/40 parts of the soil and soil share trees 1/6 share of the planter's share of the plantations standing on the middle portion 1/8 part of the planter's share of the three plantations standing on the Western side of the said portion together with the entirety of tiled white washed house 13 cubits standing thereon of the land called Gederawatta ".

A commission for the sale of this interest, which in its description showed some signs of indefiniteness, duly issued and a sale was held. On the day of the sale one Suriaratchi who described himself as the plaintiff in Partition case No. 3922 distributed pamphlets among prospective purchasers to the effect that the interest of the defendant in Gederawatta (also known as Gamage Divelwatte) was something other than that described in the decree and the sale advertisement. The learned District Judge has found that the pamphlet deterred many persons from bidding and depressed very substantially the amount which was realised at the sale. We do not doubt the correctness of this finding. For this sole reason the learned District Judge relying on the case of *Cader et al vs. Mohamed et al*, 40 N. L. R. 136 set aside the sale on application made by the judgment debtor. With all respect we do not think the learned District Judge had sufficient reason for the order he made.

In the case referred to it was held by this Court " that when sales are held by an auctioneer acting on orders of the Court, and selling a land on conditions of sale approved by the Court, and subject to the confirmation of the sale by Court, the question that really arises is whether in setting aside the sale, or in refusing to confirm it, the Judge is exercising properly, and in a judicial manner, a discretion which he has expressly reserved to himself. When a Judge is considering how he is to exercise that discretion, I do not think he is limited to the grounds upon which sales held by the Fiscal are set aside. In this instance in the view taken by the Judge of what actually happened on the occasion of the sale, it is impossible for us to say that he has exercised his discretion in a wrong or improper manner and, therefore, we ought not to interfere with his order ".

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.

On a sale under a mortgage decree the right title and interest of the mortgagor is sold and this may, on an examination of title, prove to be less than the interest mortgaged.

As stated by the auctioneer who held the sale, persons disputing the title of the mortgagor in the interest mortgaged not infrequently inform prospective purchasers that the title is disputed. If in fact the claim asserted by a disputant is genuine and sound and the mortgagor's title is imperfect the disputants, to say the least, often save themselves the trouble and expense of litigation with a purchaser in this way. If the claim asserted is not genuine and made at the instance of a prospective purchaser purely with the object of depressing the price the judgment debtor may be able to find relief in appropriate civil or criminal proceedings but that is not a matter for our decision in this case. Be that as it may the mere fact that the title of a mortgagor is disputed at a sale is not by itself a reason for setting aside a sale. It may combined with other facts afford ground for such a consequence. In this case the learned Judge has not found, and there is no evidence upon which we can say, that the purchaser was responsible for the distribution of the pamphlets. Further there is no material whatever in this case upon which it can be suggested that the claim asserted by Suriaratchi was not genuine. Even in the affidavit supporting the petition the judgment debtor has not stated that he was entitled to the interest mortgaged nor has he given evidence to that effect. It is of course impossible to state exhaustively the circumstances in which a Court should set aside a sale but the sole reason given by the learned District Judge is in our opinion clearly insufficient.

We would therefore set aside the order of the learned District Judge of the 13th March, 1951, and send the case back for further proceedings on the basis that the sale held on the 7th August, 1950, was valid.

PULLE, J.

I agree.

Set aside.

Present : SWAN, J.

PREMADASA vs. JANSEN

S. C. 828—*M. C. Gampola,* 3,704

Argued on : 6th October, 1952.
Decided on : 17th October, 1952.

Railways Ordinance (*Cap* 153)—*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 ".

Case referred to : *Namtial vs. Perera.*

H. W. Jayawardene, for the accused appellant.
A. Mahendrarajah, Crown Counsel, for the complainant respondent.

October 7, 1952. SWAN, J.

I do not think that this conviction can be allowed to stand. The appellant was charged under section 12 of the Railway Ordinance (Cap. 153) with having on the 9th June, 1952, at the Gampola Railway Station, wilfully interfered with the comfort of the other passengers on the Railway by assaulting one W. D. Dharmadasa. None of the other passengers were called as witnesses for the prosecution to say that they were in anyway disturbed by the incident. The learned Magistrate, however, seemed to take the view that other passengers included Dharmadasa. If that had been the case for the prosecution the charge should have been differently worded. Mr. Jayawardene for the appellant takes the further objection that there should have been strict proof that Dharmadasa was a " passenger ". The term " passenger " is defined in section 43 as " any person in or upon the Railway being in possession of ticket duly issued according to the conditions provided therefor."

In the case of *Namtial vs. Perera* it was held that before a person can be punished for interfering with the comfort of a passenger it must be proved that the person so interfered with was a passenger, *i.e.*, a person with a ticket or a free pass. The conviction was under section 14 of the Railway Ordinance, 26 of 1885. It will be observed that the term passenger is not defined in that Ordinance. In the present case Dharmadasa did say that he was a passenger travelling in the same compartment as the accused. He was not cross-examined on the point, and in the circumstances, I think the learned Magistrate was right in holding that he was a " passenger " as defined in section 43. But on the matter of interference with the comfort of the other passengers I do not think Dharmadasa's alleged discomfort should have been taken into consideration. Where two passengers involved in an incident which may cause interference with the comfort of the other passengers both may be charged under section 12, but to charge one with having interfered with the comfort of the other is, in my view, a situation not contemplated by the Ordinance.

I set aside the conviction and acquit and discharge the accused.

Appeal allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : SWAN, J. (President), H. A. DE SILVA, J. & L. M. D. DE SILVA, J.

REX vs. 1. M. J. FERNANDO *et al*

Appeals 67—70 *of* 1952 *with Applications* 99—102 *of* 1952.
S. C. No. 17/*M. C. Colombo, No.* 11415.

Argued on : 3rd & 4th December, 1952.
Decided on : 15th December, 1952.

Court of Criminal Appeal—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.
(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.

Cases referred to : *The King vs. Catherine Thorpe*, 18 C. R. A. R. 189.
Mancini vs. Director of Public Prosecutions, 1942 A. C. 1 at p. 12.
Mahbut Shah vs. King-Emperor (1945) A. I. R. 118.
King vs. Assapen, 50 N. L. R. 324.

Colvin R. de Silva, with *L. G. Weeramantry* and *J. R. M. Perera*, for the accused-appellants.
Ananda Pereira, C.C., for the Attorney-General.

L. M. D. DE SILVA, J.

In this case the 1st to the 5th accused have been convicted on the 3rd count of an indictment presented against them which was to the following effect :—

" That at the time and place aforesaid (17th December, 1950).....you did commit murder by causing the death of the said Gorakanage Nicholas Peiris Gunawardene ; and that you have thereby committed an offence punishable under section 296 of the Penal Code ".

The verdict brought in by the jury on this count was one of culpable homicide not amounting to murder " on the ground that there was a sudden fight ". They have been acquitted on count 1 in which they were charged with being members of an unlawful assembly the common object of which was to commit murder and on count 2 in which they are charged with murder committed by one or more of the members of the unlawful assembly. There were no other counts.

There are several disturbing features in this case. There was for instance blood found on the shirt of the deceased which according to expert

medical evidence could not have been the blood of the deceased or any of the assailants. It was, if the expert evidence was accepted, completely unaccounted for by the prosecution evidence. It was also difficult to reconcile the prosecution evidence with several wounds found on the first accused. There were further difficulties.

All these features were very fairly and completely put by the trial Judge to the jury but there is one portion of the summing-up, on which with all respect to him, we feel ourselves reluctantly compelled to acquit the accused—all the more so because it is the portion most material to the verdict which has been brought in.

The evidence of several witnesses was subject to various infirmities all carefully mentioned by the learned trial Judge in the course of his summing-up. These difficulties and infirmities must have been responsible for his having said to the jury " I do not think you can convict any of the accused unless you can say that the evidence of Narayan and the evidence of Sirina Pieris is true " and he went on to warn them that it was not sufficient that " they may be speaking the truth " but the jury had to be satisfied that they were speaking the truth. This was an admirable direction which we think was necessary. The evidence of these two witnesses was free from any obvious infirmity and a verdict of murder could have been returned on their evidence. In fact no verdict other than that of deliberate and premeditated murder was possible if their evidence had been accepted.

Narayan's evidence very shortly was that he saw the five accused accompanied by others armed with cutting instruments, sticks and clubs pass along the road. He says he followed them and saw them standing in front of the deceased headman's house and abusing him in filthy language. That he then saw the headman come out of the house whereupon the " first five accused jumped into his land caught him and assaulted him " striking him with clubs and cutting him with knives. He says he saw the third accused " holding the headman's (deceased) neck and stabbing him with a kris knife ".

Sirina Pieris says that she saw ten or twelve persons gathered in front of her house which is in the immediate vicinity of the deceased's house, that she heard a challenge to the deceased to open his doors, that the deceased came out whereupon the five accused rushed up to him and assaulted him. As far as one can gather the deceased was unarmed. She says she saw one of the accused inflict an injury.

In the evidence of the two witnesses just mentioned and in the rest of the evidence led for the prosecution there was no suggestion of a sudden fight. The evidence led for the defence gave an entirely different version of the events denying that the accused came together to the spot and suggesting that the deceased and one Peter Pieris (his brother) were the aggressors. The possibility of a sudden fight was not raised by the defence in evidence or otherwise.

The learned trial Judge charged the jury thus in one portion of his summing-up :—

" Could it be that the 1st and 3rd accused went along the road and that they met Peter Pieris and that there was an altercation resulting in a fight, and that the other accused also came along and engaged themselves in a fight in which the headman also became involved.

Now gentlemen that is not the case for the prosecution, nor is it the case for the defence. There was a fight, but there are items of evidence in this case which if you accept may justify your returning a verdict on the footing, I mean the 1st to the 5th accused got involved along with the deceased and Peter Pieris. Of course it means gentlemen rejecting large chunks of the evidence of the prosecution and also rejecting large chunks of the evidence of the witnesses for the defence....."

" Supposing the view that you take is that what happened was that there was a sudden fight between Peter Pieris and the 1st and 3rd accused in the first instance into which the other accused became drawn and to which the deceased headman also got involved then, even if you are satisfied beyond reasonable doubt that in that fight these accused had a common intention of causing the death of the deceased with the intention of killing him, or with the intention of causing an injury sufficient in the ordinary course of nature to result in death and therefore *prima facie* the offence of murder, if you are satisfied notwithstanding the offence was committed with that intention, still if you think that it is more likely than not that that killing was caused in the course of a sudden fight between the accused and the headman and Peter Pieris, which arose on a sudden quarrel, without premeditation and without the accused having taken an undue or cruel advantage, then gentlemen the offence of the accused is one of culpable homicide not amounting to murder if all the five accused were animated by a common intention that such an injury should be caused to the headman and that the infliction of that injury was accompanied by a murderous intention as explained by me ". It appears to us that it was extremely difficult on the evidence to come to the conclusion that there was a sudden fight merely by rejecting " large chunks of the evidence " of the witnesses for the prosecution and

the defence. It would have been necessary in addition to supplement what evidence was left after the rejection mentioned by facts derived from conjecture. If there was reason to think that there was a sudden fight which the prosecution witnesses had suppressed, then, fairly considered, the prosecution case would have been open to reasonable doubt and the accused would have been entitled to an acquittal. But a verdict can never be based upon facts suspected but not proved.

A jury should be told to accept or reject evidence that they are entitled to and should draw reasonable inferences from the evidence which they accept, but they should never be directed in a way which opens for them the door to conjecture. This is necessary not only in order that that the case for the defence may not be prejudiced but also in the interests of the prosecution. It has to be remembered that a trial Judge by suggesting an unsustainable element of evidence in favour of an accused may by rendering a verdict founded on that element unreasonable make the verdict itself unsustainable. The prosecution case can be prejudiced in other ways also. The following passages from decisions in English cases have a bearing on what we have just said. Dealing with an appeal on a conviction for murder the Lord Chief Justice said in the case of *The King vs. Catherine Thorpe* 18 Cr. A. R. 189 " If there is no evidence on which a verdict of manslaughter can properly be found, it is the duty of the Judge not to leave the question of manslaughter to the jury, but if there is evidence, then it is the duty of the Judge to leave the question to the jury, notwithstanding that it has not been raised by the defence, and is inconsistent with the defence which is raised ". In the case of *Mancini vs. Director of Public Prosecutions* (1942) A. C. page 1 at page 12, Viscount Simon said, " Taking, for example, a case in which no evidence has been given which would raise the issue of provocation, it is not the duty of the Judge to invite the jury to speculate as to provocative incidents, of which there is no evidence and which cannot be reasonably inferred from the evidence ".

It is clear that we are not in a position to ascertain the reconstructed facts in the minds of the jury which led to the verdict of a sudden fight and this is an important factor which gives emphasis to what follows.

It is admitted by Crown Counsel that there was only one fatal injury and that upon the evidence and verdict we must proceed upon the basis that it is not ascertained which accused inflicted it. In fact Crown Counsel quite properly conceded that unless the element of common intention to kill the deceased can be sustained the conviction cannot stand.

We are of the opinion that the directions given on the question of common intention is inadequate particularly when, as in this case, the common intention to kill which must be established, was formed if formed at all, in the course of a sudden fight. It is very rarely if at all that a common intention to kill in the course of a sudden fight (which must be assumed to be a " sudden fight " on a " sudden quarrel " and without " premeditation ") can be established. It must in this case have been formed, if it was formed at all, " in the twinkling of an eye " to borrow the words used very appropriately by Crown Counsel. Some act must be proved or some circumstance established from which common intention could be reasonably inferred. No direction on this point was given to the jury. In this case there is no such circumstance or act established or even spoken to by the witnesses. As we do not know what facts the jury reconstructed we cannot review them to ascertain whether an inference of common intention was possible on those facts. It is however reasonably clear that without premises derived from conjecture they could not have found that such an act had been done or such circumstance had occurred.

It is true that the learned trial Judge did say :— " Of course, if there was a sudden fight between these accused and the headman and in the course of that one of the accused all of his own went up to the headman and stabbed him, then the other accused are clearly not guilty of that offence " but we do not think this was a sufficient direction. It was an illustration of what was not common intention. There was no doubt further direction on the question of common intention but the positive elements, if there were any, from which common intention could have been inferred were not put to the jury. The jury were told that they must find that there had been a " common intention animating the minds " of all accused but they were not told how in the circumstances of a sudden fight such a common intention could be held to have arisen in this case. They were not told that mere presence of the accused was not sufficient and the difference between " similar intention " and " common intention " was not explained. The Privy Council in the case of *Mahbut Shah vs. King Emperor* (1945) A. I. R. 118 said, " 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 ". It is to be noted that it must be not merely a possible inference but a *necessary*

inference that is to say an inference from which there is no escape. There was no direction to this effect.

Numerous decisions (most of them mentioned in *King vs. Assapen*, 50 N. L. R. 324) of this Court have stressed the importance of a sufficient direction on the question of common intention. These decisions point to the necessity of quashing a conviction based on common intention unless it appears from the summing-up that the possibility of an erroneous view on the part of the jury on this question has been excluded by adequate direction. It should be said that it also appears from them that no direction can be adequate where the law is stated in general terms and not applied closely to the particular facts of each case.

On this last point we may be permitted, going further than is necessary in this case, and taking an extreme case which is not this case, to say that in a summing-up a general statement of the law followed by a statement of the facts is undesirable. A summing-up should avoid not only the pattern just mentioned but any pattern which approximates to it. From a practical point of view it should be realised that a jury is not likely to absorb a long disquisition on the law and the significance to be attached to such a 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. The closer he keeps to this narrow path the more likely is it that the jury will arrive at a correct conclusion and more clearly will it appear to this Court that justice has been done.

We feel unable to accept the only theory which was put forward by the Crown in support of the conviction. In view presumably of the direction that the accused were entitled to an acquittal unless the evidence of Narayan and Sirina was accepted it was urged that a sudden fight was consistent with their evidence. The theory was that the headman had advanced thirty five feet before he was struck down and that this showed that he had accepted the challenge of the accused and engaged in a fight. The fight had to be upon a "sudden quarrel" and "unpremeditated". It was difficult to see how these elements could have been established if Sirina and Narayan were speaking the truth when they said that the accused went armed to the spot and made a challenge. The Crown sought to get over this by suggesting that the jury might have found that it was Peter Pieris (living in the vicinity) that the accused had come to challenge and did in fact challenge and that the deceased on coming out of his house was drawn into a sudden unpremeditated fight. The evidence of the two witnesses indicates that it was the deceased who was challenged. In any case we think the occurrence of a sudden fight is entirely inconsistent with their evidence and it has to be remembered that a point made by the learned trial Judge with which we have already agreed is that it would be unsafe to convict the accused if the evidence of these two witnesses was open to doubt.

The theory put forward by the Crown serves to illustrate the danger of holding that a common intention was established. On the facts suggested by the Crown the accused arrived at the spot armed to attack Peter Pieris. Their attention was diverted to the deceased against whom it appears the accused cherished no animosity of a degree comparable with that which they cherished against Peter Pieris. "In the twinkling of an eye" there was a fight between the accused and the deceased. Someone inflicted an injury which was fatal. In this state of facts the circumstance that the accused were armed establishes neither "common object" nor "common intention" in an offence against the deceased. What other facts establish common intention on the part of the accused to kill him? There are none which we think can safely be relied on.

For these reasons we quash the convictions and acquit the accused.

Convictions quashed.

Present : GUNASEKARA, J.

GUNASEKERA vs. MATHEW

S. C. No. 84/1952—*C. R. Colombo* 34058

Argued on : 15th January, 1953.
Decided on : 27th January, 1953.

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.

Per GUNASEKERA, J.—" As I read the definition it sets out three categories of persons who can be members of the family of any person, and it is only the third that consists of dependant relatives. The categories are :
(1) ' The wife of that person,'
(2) ' Any son or daughter of his over eighteen years of age,'
(3) ' Any parent, brother or sister dependant on him.' "

Cases referred to : *Colombage vs. Gomes*, S. C. 74 C. R. Colombo 15187. 27th September, 1949.
Brito Mutunayagam vs. Hewavitarne (1950) 51 N. L. R. 237 at 239.

V. Wijetunga, for the plaintiff-appellant.

K. Rajaratnam, for the defendant-respondent.

GUNASEKARA, J.

This is an appeal against an order by the Additional Commissioner of Requests of Colombo dismissing an action for the ejectment of the respondent from a house that the appellant had let to him and for the recovery of damages for overholding. The question in the case is whether it has been proved that the premises are, in terms of section 13 (1) of the Rent Restriction Act, No. 29 of 1948, reasonably required for occupation as a residence for any member of the family of the landlord.

The appellant who is about 71 years of age, is a retired interpreter of the District Court of Colombo, and the person for whom he alleges that the house is required as a residence is a son of his named A. P. Gunasekera, who is about 28 years of age and is a clerk in the Government Audit Department. The son is not a dependant on the father, and it is contended for the respondent that therefore he is not a " member of the family " of the latter within the meaning of that expression as defined in the enactment. The definition is in these terms :—

" Member of the family " of any person means the wife of that person, or any son or daughter of his over eighteen years of age, or any parent, brother or sister dependent on him "

I am unable to accept the contention that the words " dependent on him " qualify " son or daughter ".

As I read the definition it sets out three categories of persons who can be members of the family of any person, and it is only the third that consists of dependant relatives. The categories are—

(1) " The wife of that person,"
(2) " Any son or daughter of his over eighteen years of age,"
(3) " Any parent, brother or sister dependent on him ".

The same definition appeared in the corresponding provision of the repealed Rent Restriction Ordinance, No. 60 of 1942, and I have been referred to two cases in which its meaning was considered by this Court. The first of these is an unreported case, *Colombage vs. Gomes*, S.C. 74 C.R. Colombo 15187 decided on 27th September,

1949, in which Canekaratne, J., held that "dependant on him" did not qualify "son or daughter," and therefore rejected a contention that a son of the plaintiff in that case being a person who was not dependant on the plaintiff was for that reason not a "member of the family" of the latter. In the other case, *Brito Mutunayagam vs. Herwavitarne*, (1950) 51 N. L. R. 237 at 239 which was decided on 16th February, 1950, my brother Gratiaen, who was not aware of the earlier unreported decision, took a contrary view—"though not without hesitation" and, as he also puts it, "with diffidence,"—and held that a married daughter of the plaintiff in that case who was not dependent on the plaintiff was therefore not a member of the plaintiff's family. It seems to me, however, that this opinion was *obiter*, for although the notice to quit had stated that the premises were required for the purpose of providing the plaintiff's daughter with additional residential accommodation it was held that they were in reality required by the plaintiff's son-in-law "for the use of himself and the family unit of which he is the head". In any event, I venture to think that if Gratiaen, J., had been aware of the case of *Colombage vs. Gomes* S.C. 74 C.R. Colombo 15187 he might well have been content to follow it as a precedent. For these reasons I prefer to follow the decision in that case and I hold that A. P. Gunasekera is a "member of the family" of the appellant.

At present this gentleman is living with his parents and a brother of the age of 26 and a sister of 19 in another house belonging to the appellant. He is engaged to be married, and the premises in question are alleged to be required as a residence for him after his marriage. The learned Commissioner holds that they are not reasonably required for his purpose. This finding is based on the grounds that the necessary accommodation can be found in the house occupied by the appellant, that the need is not an immediate and present need, and that the respondent will suffer greater hardship if he is ejected than the appellant's son if he is not.

The learned Commissioner's view as to how the new couple can be accommodated is that the appellant can vacate his bedroom and share with his wife and his daughter the adjoining one which is now occupied by them. He holds that such an arrangement would benefit the appellant; for the reason that a ground plan that has been produced indicates that the only bathroom in the house adjoins this second bedroom and communicates with it, and the appellant stated in his evidence that he wakes up frequently in the night "to go to the bathroom". The Commissioner says in his judgment :—

> "The bathroom and lavatory are adjacent to room No. (2) which is occupied by the wife and daughter. It therefore appears that the plaintiff has to go from room No. (1) through room No. (2) in order to go to the bathroom and this is the easiest way of reaching it. It is my view that it would be more convenient and more safe for the plaintiff in his present condition to occupy room No. (2) with his wife and daughter who could be expected as it is also their duty, to look after the plaintiff in his feeble condition".

I am unable to agree with the submission made by Mr. Wijetunge that when the appellant spoke of "going to the bathroom" he was only employing a euphemism for "answering a call of nature" and that the evidence has been misapprehended by the Commissioner when he takes it to mean that the appellant actually visited the bathroom or the water-closet adjoining it. It is clear, however, that the finding that the appellant "has to go from room No. (1) through room No. (2) in order to go to the bathroom" is based on a misapprehension of the evidence, for the plan shows that both bedrooms open into the living-room and from it there is access through a verandah to the bathroom and water-closet. The appellant himself was not questioned as to whether it was through the adjoining bedroom that he was accustomed to go to the bathroom, and there is no other evidence on the point. The only evidence about his health is the following statement made by him : "The state of my health is not quite satisfactory because I have to wake up several times during the nights to go to the bathroom". While I do not lose sight of the fact that the learned Commissioner has seen the appellant, I find no evidence to justify a view that the appellant needs to have a nurse in attendance on him. The finding that the arrangement in question would benefit the appellant is unsupported by the evidence. I have little doubt that but for this erroneous finding the learned Commissioner could not have failed to regard this to be an impracticable arrangement, being one that would deny to the appellant and his daughter a reasonable minimum of privacy.

The appellant and his son stated in evidence at the trial, on the 14th November, 1951, that the latter had been engaged to be married since April but that it has not been possible to fix a date for the marriage because he had no place to

live in with his wife. The learned Commissioner has accepted the evidence about the engagement, but he holds that the need of a residence is not an immediate and present need. "The plaintiff's son is not married yet," he says. "This action is brought in order to provide a house for his son after he gets married. Therefore the need of the landlord is not immediate and present. The plaintiff's evidence is that the marriage is not solemnized yet as they cannot be provided with an accommodation. I refuse to believe this". I am unable to agree that in order to show that the premises are required for occupation as a residence for the landlord's son and the latter's wife the landlord must prove that the son is already married. If it had been arranged that he was to be married on, say, 15th November, 1951, it could surely not be said that because the marriage had not yet taken place the need of a house was not an "immediate and present" need at the time of the trial. Apparently the ground on which the Commissioner rejects the reason given for the marriage not having taken place is the erroneous finding that the necessary accommodation can be found in the appellant's house. No other ground is stated in the judgment, and there is no evidence of any facts that show the existence of any other reason for the marriage not having taken place. It seems to me therefore that there was no sufficient ground for the rejection of the appellant and his son's evidence on this point, and that the appellant has established that the premises are required for occupation as a residence for a member of his family.

One of the matters that are relevant to the question whether they are reasonably required for this purpose is the extent of any hardship that the respondent is likely to suffer if he is evicted. The house is situated in Ratmalana, where the respondent is employed as a minor supervisor in the Mechanical Engineer's Department of the Ceylon Government Railway. It contains two bedrooms, and the authorised rent is Rs. 17·93 a month. The respondent has been in occupation of it from 1946. He is a married man, 34 years of age, and at the time of the trial he was living there with his wife and two children aged 3 years and 1½ years respectively, and his wife was expecting a third child. This last mentioned fact, which is no longer relevant, is one of the matters that the learned Commissioner has taken into account in his assessment of the hardship that ejectment could cause to the respondent. Another circumstance is that the respondent's hours of work are 7 a.m. to 4 p.m. The Commissioner holds that this makes it necessary that the respondent should live close to his place of work. It appears from the respondent's own evidence, however, that even a house in Negombo would be close enough, for he says that he asked his father to find him a house in that town. On the question whether there is alternative accommodation available to the respondent, the Commissioner says :—

> "This defendant has made efforts to get at some other house in Ratmalana. He had also asked his friends and his father also to look out for any suitable house, so far he has not been able to find another house".

The respondent was the only witness called in support of his case, and there is no evidence that the persons whose help he sought made any effort to find him a house, or thus his own efforts went beyond asking his friends to look for a house for him. There can be no doubt that if such evidence had been available it would have been placed before the Court. It is manifest that the respondent made no serious effort to find other accommodation. In my opinion the learned Commissioner's finding on the question of relative hardship is clearly erroneous, and he ought upon the evidence before him to have answered in the appellant's favour the issue whether the premises were reasonably required for occupation as a residence for a member of the appellant's family.

In the lower Court the respondent successfully claimed in reconvention a total sum of Rs. 267·80 which he had paid the appellant in excess of the rent payable up to the 30th June, 1951, and there is no appeal against such of the decree as relates to this claim. It was admitted at the trial that the rent due up to the 31st October, 1951, had been paid. I set aside so much of the order of the Court below as dismisses the appellant's action and directs him to pay the respondent's costs, and I substitute an order for the ejectment of the respondent as prayed for in the plaint, and for the payment of damages by him to the appellant at the rate of Rs. 17·93 a month from the 1st November, 1951, until he is ejected from the premises. I also direct that no person other than the appellant's son A. P. Gunasekera shall enter into occupation of the premises upon vacation thereof by the respondent or upon his ejectment therefrom. Each party will bear his own costs in respect of the proceedings in the Court of Requests and the respondent will pay the appellant his costs of appeal.

Set aside.

IN THE PRIVY COUNCIL

Present : VISCOUNT SIMON, LORD MORTON OF HENRYTON, LORD COHEN, SIR LIONEL LEACH

NOORUL MUHEETHA vs. SITTIE RAFEEKA LEYAUDEEN AND OTHERS

Privy Council Appeal No. 38 of 1951

S. C. 374—D. C. Colombo 2997

Judgment of the Lords of the Judicial Committee of the Privy Council, Delivered on the 12th January, 1953

Muslim Law—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 grandmother) 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.

Per SIR LIONEL LEACH.—" They (their Lordships) would, however, observe that the authorities as to the extent to which and the form in which general Muslim Law has been received into Ceylon seem very conflicting and they would venture to hope that the question of resolving by legislation the doubts which this conflict of authorities must create may receive early attention."

Phineas Quass, Q.C., Dingle Foot and *S. Canagarayar*, for the defendant-appellant.
Stephen Chapman, for the respondents.

SIR LIONEL LEACH.

The parties in this case are Mahomedans residing in Ceylon. The appeal raises a question of considerable difficulty, namely whether Roman-Dutch Law or Muslim Law governs, in the matter of acceptance, a gift of immoveable property made by a Mahomedan in favour of minors, there being embodied in the deed conveying the property a *fidei commissum* for the benefit of the donees' children. A *fidei commissum* is well known in Roman-Dutch Law, which is the basis of the law of Ceylon, but it is completely alien to Muslim jurisprudence.

The deed with which the appeal is concerned was executed by Saffra Umma, the paternal grandmother of the respondents, on 28th June, 1927. The donor was the widow of one Meera Lebbe Marikar Idroos Lebbe Marikar. There were two sons of the marriage, Idroos Lebbe Marikar Mahomed Sathuk, the defendant in the action which has given rise to the appeal, and Idroos Lebbe Marikar Mahomed Zain, the father of the respondents, who died before the execution of the deed. By it the donor conveyed certain immovable property in Colombo to the respondents in equal shares, subject to the reservation of a life interest to herself, with a *fidei commissum* for the benefit of the children of the donees on the death of their parents. All the donees were then minors. Their mother, Fatheela Umma, purported to accept the gift on their behalf in these words :—

> " And these presents further witness that I Sheka Marikar Fatheela Umma who is the mother of the said Donees do hereby thankfully accept the foregoing gift for and on behalf of the said Donees who are all minors."

The deed also contained this statement :—

"And the said Idroos Lebbe Marikar Mohamed Sathuk who is the paternal uncle of the said donees doth hereby renounce all and every right interest or claim whatsoever which he may or shall have in respect of the said premises hereby gifted adverse to them and in the event of any question arising as to the validity of these presents by reason of the said Donees not being put into possession of the said premises according to the law the said Idroos Lebbe Marikar Mohamed Sathuk hereby agrees not to take any objection whatsoever to his advantage or take any other steps whatsoever detrimental to the interests of the said Donees in respect of the premises hereby conveyed."

It is common ground that this clause does not operate to estop the defendant from asserting title to the property. The deed was signed by the donor, the defendant and the minors' mother and was certified by a notary public. It is accepted that it embodies a *fidei commissum* as known to Roman Dutch Law.

On the 4th February, 1928, Saffra Umma executed a document by which she purported to revoke the deed of gift executed by her in favour of the respondents and to grant the property to the defendant for his life and after his death to his son Mohamed Sathuk Mohamed Huzain. On the 6th December, 1929, Suffra Umma died and upon her death the defendant went into possession of the property.

On the 27th September, 1942, the respondents, who then were all of full age, instituted in the District Court of Colombo the action for a declaration that they are entitled to the property and for a decree for possession. By a judgment dated the 31st May, 1945, the District Judge granted the reliefs sought by the respondents. The defendant appealed to the Supreme Court, but during its pendency he died, and his widow, the appellant before their Lordships, was substituted in his place.

At the trial the defendant conceded that in as much as the deed of the 28th June, 1927, created a *fidei commissum* it was governed by Roman Dutch Law, but he contended that there had been no valid acceptance, because the parties to the deed were Mahomedans, and under Muslim Law a mother was not recognised as a natural guardian of her children in matters concerning property. He also maintained that there had been a valid revocation of the deed of gift. The District Judge decided against the defendant on both the points. He held that once it was admitted that the deed created a *fidei commissum* the transaction as a whole must conform to the requirements of Roman Dutch Law, and under that law a widowed mother could validly accept a gift on behalf of her minor children. He rejected the second contention on the ground that the deed did not reserve to the donor a right of revocation.

In the Supreme Court the only argument advanced in support of the appeal was that the deed of gift was bad for want of an acceptance valid under Muslim Law. The Court (Dias, S.P.J. and Pulle, J.), in agreement with the District Judge, held that the question of validity had to be determined solely within the frame of the Roman Dutch Law and under that law the respondents' mother had authority to accept the gift on their behalf. The learned Judges considered that even if this conclusion were wrong the defendant was not entitled to succeed as it had 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. They were of the opinion that before the principle of Muslim Law on which the appellant relied could be applied there must be a *cursus curiae* in favour of its application in Ceylon. The result was that the appeal was dismissed on the ground that the defendant was not entitled to have recourse to Muslim Law to defeat the plaintiffs' claim that Fatheela Umma was empowered by the general law of the land to accept the gift.

In the course of his judgment (with which Dias, S.P.J. agreed) Pulle, J., referred to the judgment of the Board in *Weerasekera vs. Peiris* (1933 A. C. 190). In that case a Mahomedan resident in Ceylon executed a deed purporting to give to his son immovable property in Colombo. The gift was subject to conditions which were inconsistent with a gift recognised by Muslim Law, but it created a *fidei commisum* as known to Roman Dutch Law. It was held that the gift was not invalid on the ground that possession had not been given to the donee as required by Muslim Law. In delivering the judgment of the Board Sir Lancelot Sanderson said :—

"It was not disputed that the last mentioned provisions constituted a *fidei commissum* according to Roman Dutch Law, but, as already stated, it was contended, on behalf of the respondent, that inasmuch as the terms of the first part of the deed purported to constitute a gift inter vivos between Muslims, Mohamedan Law must be applied thereto, and as possession of the premises was not taken by the son during the father's life, the gift was invalid and the *fidei commissum*, which was based on it, also failed.

Their Lordships are not able to adopt this contention of the respondent and upon the true construction of the deed, having regard to all

its terms, they are of opinion that the father did not intend to make to the son such a gift inter vivos as is recognised in Mahomedan Law as necessitating the donee taking possession of the subject-matter during the lifetime of the donor, but that the father intended to create and that he did create a valid *fidei commissum* such as is recognised by the Roman Dutch Law"

Their Lordships respectfully agree with these observations but to not find them of assistance in the decision of the present case. In *Weerasekera vs. Peiris* (supra) the Board were considering the effect of the deed and held that it was to be construed and take effect in accordance with Roman Dutch Law. They were not concerned with the very different question whether a person purporting to accept a gift of immovable property on behalf of infant donees had in fact authority so to do. Their Lordships are prepared to accept that the donor, under the deed of the 28th June, 1927, intended that Roman Dutch Law should apply in determining who could accept the benefaction on behalf of her grandchildren, but their Lordships are unable to agree that the intention of the donor is a relevant factor in determining the authority of the mother. If an agent purports to accept a gift on behalf of a principal, his authority depends not on anything contained in the deed of gift but on the validity of the instrument or act alleged to confer the authority. So the question of a mother's authority to accept a gift on behalf of her infant children must depend not on the intention of some other party to the deed of gift but on the proper law applicable under the law of Ceylon in determining the capacity of infants and the authority of guardians to enter into binding agreements on their behalf. There is no suggestion in the present case that the transaction was not for the benefit of the infants, but if the argument advanced on behalf of the respondents, that the intention of the donor was relevant, were to prevail, it is obvious that an infant might be deprived of the protection which the law as to guardianship was intended to give him or her, and might be saddled with a burdensome property involving him or her in heavy liabilities.

The respondents relied on the decision of the Supreme Court of Ceylon in *Abdul Rahiman vs. Ussan Umma* (19 N. L. R. 175). In that case the question at issue was whether an ante-nuptial contract regulating succession to property entered into between Mahomedans in Ceylon was valid. The Court upheld its validity notwithstanding that it was " a document foreign to the principles of Mahomedan Law ". In the course of his judgment Ennis, J. when referring to a document creating a *fidei commissum* said : " it would seem that the Mahomedans in Ceylon have adopted and followed the general law of Ceylon in executing these documents ". This case however carries the matter no further than the decision of this Board already cited : the mind of the Court was not directed to the question of the authority of a person purporting to execute the contract on behalf of one of the parties thereto. What then is the law applicable in determining the authority of the mother to accept the gift on behalf of her infant children ? If Roman Dutch Law were applicable, it is plain that as she was not the donor, she would have the requisite authority ; (see *e.g. Fernando vs. Weerakoon* 6 N. L. R. 212 ; *Silva vs. Silva* XI N. L. R. 161). But their Lordships are of opinion that Roman Dutch Law is not applicable. The authorities establish that Mahomedans in Ceylon are governed by their own personal law as, to quote the proclamation of 23rd September, 1799, it " subsisted under the ancient Government of the United Provinces " except of course so far as the same may have been altered by statutory enactment.

There remains for consideration what is the law applicable in Ceylon to the question who is the natural guardian of the property of a Mahomedan infant ? There is no doubt that under Muslim Law, as administered in India and laid down in the text books written by Indian authorities on the subject, a mother is not a person who has inherent authority as a guardian of the property of her infant children, but it is by no means clear that this provision of Muslim Law has found acceptance in Ceylon. The learned trial Judge expressed no opinion on the point and had their Lordships to reach a conclusion on the matter without assistance from a Court in Ceylon they might have felt considerable hesitation in holding that the general rule of Muslim Law was not applicable. The point was however argued in the Supreme Court who reached the conclusion 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. Their Lordships are not prepared to dissent from this conclusion. They would, however, observe that the authorities as to the extent to which and the form in which general Muslim Law has been received into Ceylon seem very conflicting and they would venture to hope that the question of resolving by legislation the doubts which this conflict of authorities must create may receive early attention.

For the reasons above stated their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Present : GUNASEKARA, J.

SEYED MOHAMED vs. MOHAMED ALI LEBBE

S. C. 565 *of* 1952/*Board of Kathis Appeal Case* 488

Argued on : 10th October, 1952.
Decided on : 5th February, 1953.

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.

Authority referred to : *Ameer Ali : Mahommedan Law* (fifth edition) Vol. II p. 419.

M. Rafeek for the appellant.

S. A. Marikar, with *D. Abeywickreme*, for the respondent.

GUNASEKARA, J.

This is an appeal under section 21 (3) of the Muslim Marriage and Divorce Registration Ordinance (Cap. 99), taken with the leave of this Court, against an order made by the Board of Kathis affirming an order of maintenance made by the Kathi Court of Harispattu. The order directs the appellant to pay a sum of Rs. 30 a month in respect of his wife and Rs. 20 in respect of his child, and purports to be effective from the date of the application.

The appellant and his wife were married about October, 1949, and the child, a daughter, was born about August in the following year. From the time of their marriage they had been living in the house of her parents, in the village of Akurana, and in September, 1950, they went to the house of his parents, in the neighbouring village of Bulukohotenne, taking the child with them. About 24 days later (on the 19th October, 1950, according to her father) she left him and returned to Akurana with the child. From that day she has lived in separation from him and he has not maintained her or the child. The present action for maintenance was instituted by her father on her behalf on the 21st October, 1950.

The appellant and his wife are both agreed that they had lived happily together until they went to his parents' house in September, 1950. There he discovered that she had left behind some of her jewellery, consisting of several rings that he had given her, and a pair of gold bangles that had been given by her father. He went back to fetch them, but her father said that he did not know where they were. It is common ground that the appellant was displeased about the loss of this jewellery, which according to his wife she had left in an almirah in her parents' house. The parties are disagreed, however, as to the circumstances in which they ceased to live together. According to the appellant, his wife's parents visited them frequently and pressed them to come back, but he insisted on the missing jewellery being returned first, and eventually she went back with her father. Her case is that she left because she was being ill-treated by the appellant.

Counsel for both parties are agreed that the appellant's wife would not be entitled to maintenance if she failed to prove that she had a valid reason for leaving the conjugal domicile.

"When the woman abandons the conjugal domicile without any valid reason she is not

entitled to maintenance. Simple refractoriness, as has been popularly supposed, does not lead to a forfeiture of her right. But if she were to leave the house against his will without any valid reason, she would lose her right, but would recover it on her return to the conjugal domicile. What is a valid and sufficient reason for the wife to leave the husband's home is a matter for the discretion of the Judge. As a general principle.....a wife who leaves her husband's house on account of his or his relations' continued ill-treatment of her.....continues entitled to her maintenance ".

Ameer Ali : Mahommedan Law (fifth edition) Vol. II p. 419.

It was therefore necessary for the Kathi Court to decide whether the appellant's wife had a valid and sufficient reason to leave the appellant. It appears from the order made by the Kathi, however, that the Court failed to appreciate the relevancy of this question to the issue regarding her right to maintenance. He holds that while the loss of the jewellery led to " several disputes between the parties " and " there is no lack of evidence to show that the applicant's daughter was abused and ill-treated by the respondent ", yet " all these things have not much bearing on this case, which is only a claim for maintenance from the respondent for his wife and child ". He proceeds to hold that the appellant has failed to maintain his wife and child, and to consider what he should be ordered to pay for their maintenance. There is no finding on the question as to whether the appellant's wife had a valid reason to leave him, or a discussion of the evidence regarding the alleged ill-treatment. The order of maintenance in respect of the wife therefore cannot stand.

The evidence of ill-treatment consists solely of that of the appellant's wife, who stated that " the whole period of 24 days was a continuity of punishments and abuse ". The specific acts which she imputed to the appellant, however, were merely that on the third day after they went to Bulukohotenne, he complained that she was wasteful because she could not make a pound of dry fish go as far as his mother could ; that he blamed her for their child being a girl ; and that on one occasion he assaulted her. According to her, after the appellant returned from Akurana without the bangles and rings he insisted on her handing to him all her valuables, and on the following night he and his mother and sister assaulted her in an unsuccessful attempt to remove her thali from her neck. She says that she cried and a number of people collected there, and that but for them she and her child might have been killed. None of these persons however, who could have given valuable evidence if her story was true, were called as witnesses. She also says that on the next morning, which was three days after she had gone to Bulukohotenne, her father came there to see her, but the appellant prevented her from speaking to him and he went away to complain to the headman. Her father contradicts her however, for according to him it was in the appellant's absence that he visited his daughter, and she did have a conversation with him. He found her weeping, he says, and when he asked her the reason she said that all the jewellery worn by her had been taken away by the appellant with the help of his mother and sister. He questioned the neighbours and they " corroborated " her and he then complained to the headman. Had the Kathi Court given its mind to the question whether the appellant's wife had any valid reason to leave the conjugal domicile I do not think that upon the evidence they could have reasonably held that she had such reason. In my opinion there is no sufficient ground for a fresh inquiry.

The only point for consideration as regards the order respecting the child is whether the Kathi had the power to direct that it should be effective from the date of the application. A provision to the effect that a Quathi should have such power is contained in section 36 of the Muslim Marriage and Divorce Act, No. 13 of 1951, which has not yet been brought into operation. There is no similar provision in the present Ordinance, and in the absence of such a provision it seems to me that the power to make an order of maintenance must be taken to contemplate only maintenance after the time of the order and not also reimbursement of any expenditure incurred previously.

I set aside the order of maintenance in respect of the appellant's wife, and I affirm the order for payment of maintenance at the rate of Rs. 20 a month in respect of his child, subject to the variation that it shall be effective only from the date of the order, namely, the 14th July, 1951. I make no order as to costs.

Set aside.

Present: DE KRETSER, J. AND JAYATILEKE, J.

MEEVI MOHAMED AFLEEN vs. NONA JULAIYA

S. C. No. 367/*M*—*D. C.* (*Final*) *Colombo No.* 9768

Argued and decided on : 27th July, 1942

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 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 "Stridanam" 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 Stridanam.

Cases refreed to : *Meera Saibo vs. Meera Saibo* 2 C.W.R. 263.
Pakeer Bawa vs. Hassan Lebbe 4 A.C.R. 61.
Zainambu Nachia vs. Usuf Mohamado 38 N.L.R. 37.

L. A. Rajapakse with *R. N. Illangakoon*, for the defendant-appellant.
No appearance for the plaintiff-respondent.

DE KRETSER, J.

Without expressing any opinion on the meaning of the words used, namely, "stridanam and Kaikuli", we think the learned Judge arrived at the correct interpretation of what the parties intended.*

We accordingly dismiss the appeal without costs.

JAYATILEKE, J.

I agree.

Appeal dismissed.

(2-9-41)

* JUDGMENT :

Parties to this case are Malays and they belong to the Muslim religion. On the 14th February, 1938, the marriage between them was registered (see marriage certificate D1). On that date, plaintiff's father handed over to the defendant a sum of Rs. 350. This transaction is entered as item No. 8 in D1. It reads as follows : "Amount of Stridanam Rs. 350". Plaintiff says that this is money that was handed over by her father to the defendant in trust for her. Defendant on the other hand, says that this amount was "stridanam or dowry in consideration of his marrying the plaintiff. The word "stridanam" is a Tamil word derived from the Sanscrit and it is a combination of two words, the meaning of which is "gift to a woman". Therefore, in the absence of any evidence showing that this gift was for any other purpose than is implied by the meaning of the word or of any local custom or usage to the contrary, I would hold that it is a gift to the woman, the custody of which was entrusted to her husband for her benefit.

Defendant, on whom the burden lay of proving such circumstances of usage or custom, has placed evidence before me which, in addition to the evidence placed by the plaintiff has led me to the opinion that the transaction in question was a gift for the benefit of the woman. Dowry is defined in the Concise Oxford Dictionary as the "portion woman brings to her husband". But the opinion has been expressed by De Sampayo, J. in *Meera Saibo against Meera Saibo* 2 C.W.R. 263 that "this kind of marriage gifts or dowry to the hubsand on marriage is common to most communities in Ceylon", and in *Pakeer Bawa against Hassan Lebbe* 4 A.C.R. 61, Hutchinson, C.J. observed that "dowry is not always among Muslims any more than among Christians, given either to the wife alone or to the husband alone or to them jointly". It may be that dowry may be given to a husband, but when it is so given, certainly it cannot bear the Tamil name "stridanam" which is a gift to the woman only.

Plaintiff says that the word "Kaikuly" is not known among the Malays. They always use the word "Stridanam" and Raheem the High Priest of Akbar Mosque, says "in all Muslim marriages when money is given by the bride's parents, it is entered in the "stridanam" cage and not in the Kaikuli" cage. The term Kaikuli is not known among the Malays but they know something called "Stridanam". He continues that to the best of his recollections, in all marriages registered by him, he entered up the Kaikuli column in one case only. In all the other cases he entered these monies in the "stridanam" column. The view that I am inclined to take from this evidence is that Malays, who do not know anything about "Kaikuli" make a gift for the benefit of their daughters for which they use an appropriate word borrowed from the Tamil.

Mr. Salman, Barrister-at-law, has given an explanation of the two words "stridanam" and "kaikuly" which accords with my own personal view regarding these words. I think Stridanam covers a wide ambit than "Kaikuli"

of which it forms a part. " Kaikuly " is the money contribution, whereas " Stridanam " refers to the aggregate of the dowry gifts consisting of immovables, movables and money. This money payment has the special name " Kaikuly " and it is handed over to the bridegroom to be held in trust for the bride. Mr. Salman has given an explanation why this money is handed over to the bridegroom. I agree with him. If, of course, the parties convey immovable property to the bridegroom for and on behalf of " Kaikuly " then they will be confronted with the difficulties arising from the law pronounced in the Full Court case *Zainambu Nachia against Usuf Mohamado* (1936) 38 N.L.R. 57. The opinion expressed by Mr. Salman is supported to some extent by that of Moulavi Hassan. He states as follows :—

" Q : When a marriage is celebrated the father of the bride gives movable and immovable properties to his daughter ?

A : Some people give.

Q : What is the term used for that whole thing ?

A : It is called ' Stridanam Nankudai '. Nankudai means good gift."

Then he asked :—

" Q : What is given to the wife is Stridanam ? "

And his answer is " There are different divisions in the gift as well as in the property ". He goes on to say " In cash there are two kinds. If it is specially agreed that the bridegroom must return on demand, it is called Kaikuli. If there is no special understanding, it is called Rokkam ".

The transaction in question is not entered in the " Kaikuli " column. There is no column for " Rokkam ". It is entered in the " Stridanam " column. I hold that it is entered in the " Stridanam " column. I hold that it is a dowry gift to the daughter to be held in trust for her by the husband.

I accordingly answer issue :

(1) The gift in question is what the face meaning of it implies, namely, it is a gift to the daughter.
(2) No.
(3) Plaintiff is entitled to recover it because it is given as Stridanam.

Enter judgment for plaintiff with costs.

(Sgd.) James Joseph,
District Judge.

Present : Pulle, J.

JAYASINGHE vs. DAYARATNE (A. G. A., Kegalle)

S. C. 128—*In the matter of an applicant for a Writ in the nature of a Writ of Mandamus under section 42 of the Courts Ordinance.*

Argued and Decided on : 10th May, 1951.

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.

H. W. Jayawardene, with *P. Ranasinghe*, for the petitioner.

D. Jansze, Crown Counsel, with *E. R. de Fonseka, Crown Counsel*, for the respondent.

August 7, 1952. Pulle, J.

The motion on which I am asked to make an order prays that the petitioner be called upon to deposit a sum of money to the credit of the proceedings which would be sufficient security for the costs of the respondent.

One of the grounds urged in support of the motion is that the petitioner is not in a position to meet a claim for costs in the event of an order being made against him. I would not regard the poverty of a petitioner as the sole ground for asking him to furnish security for costs.

Whether I should order security or not is purely discretionary. Without in anyway prejudging the issues that fall to be determined at the hearing of the application it seems to me that, apart from the allegation that the petitioner is not possessed of property, this is a fit case in which I should order security. The local option poll was held on a voters' list to which no objection was taken. Under the relevant rules when a local option poll is held on what is termed a final list it is stated to be final and conclusive for all the purposes of the rules.

The only point taken against the validity of the poll is that the respondent had failed to take the advice of the Advisory Committee in terms of rule 13. In regard to this the respondent states that no advice of the committee was

needed as the exact boundaries of the area could be determined in terms of rule 11 read with rule 16A. Further it is submitted that rule 13 did not cast any duty on the respondent in every case to consult the Committee.

The delay of two months in applying for the Writ is also urged against the petitioner.

In the exercise of my discretionary powers I order the petitioner to deposit in Court a sum of Rs. 315 as security for the costs of the respondent before the 24th August, 1952. If he fails to make the deposit the application will stand dismissed with costs.

Petitioner ordered to deposit security for costs of the respondent.

Dismissed with costs.

Present : ROSE, C.J. & SWAN, J.

SUPPIAH vs. SIVARAJAH (IN 2995)
SUPPIAH vs. PERIATHAMBY (IN 2996)

S. C. Nos. D. C. (Inty.) 108 *and* 109/1952—*D. C. Nuwara Eliya* 2995 *and* 2996

Argued on : 10th December, 1952.
Decided on : 27th January, 1953.

Civil Procedure Code, section 218—*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.

Cases referred to : *Silva vs. Kavanihamy* 50 N. L. R. 52.
Pless Pol vs. de Soyza 10 N. L. R. 252.
Powell vs. Perera 9 C. L. Rec. 50.

E. B. Wikremanayake, Q. C., with *D. J. Tampoe*, for the appellant.
P. Somatilakam, with *S. Sharvananda*, for both respondents.

SWAN, J.

It was agreed that these two appeals should be consolidated. The 1st respondent is the execution-creditor in case No. 2995 in which he had obtained judgment against the appellant and certain others for the recovery of Rs. 8,000 interest and costs. The 2nd respondent is the execution-creditor in case No. 2996 in which he had obtained judgment against the appellant and certain others for the recovery of Rs. 1,845 interest and costs. On their respective writs the respondents seized the right, title and interest of the appellant in case No. 3181 D.C. Nuwara Eliya, in which the appellant sought to obtain a declaration against the persons he sued that he was entitled to a one-fourth share of the Tivoli Theatre with its plant and machinery, and asked for an accounting of his share of the profits. In one case the seizure was made as though the property seized was movable, in the other on the basis that it was immovable. I am of the opinion that it was movable property ; but the mode of seizure is immaterial. The fact that it was seized as immovable property, which mode of seizure is the more elaborate, does not invalidate the seizure. It certainly does not effect the question at issue which is whether the property was liable to seizure. Mr. Wikremanayake also contended that the seizure was bad because it was a re-issue of the writs, and no notice was served on the appellant as required by section 349 of the Civil Procedure Code. That point seems to have been abandoned in the lower Court. In any event I would follow the ruling in *Silva vs. Kavanihamy* 50 N. L. R. 52 and hold that failure to serve notice was only an irregularity that would not invalidate the seizure. The only substantial objection that the appellant could have taken would have been that on the previous levy the respondents had failed to exercise due diligence to procure complete satisfaction of their decrees. Such failure was not even suggested in the Court below or before us.

I shall now deal with the main point taken by Mr. Wikremanayake—Was the appellant's right, title and interest in D.C. 3181 seizable ? Section 218 of the Civil Procedure Code states that the judgment-creditor " has the power to seize and sell, or realize in money all saleable property movable or immovable belonging to the judgment-

debtor, or over which he has a disposing power which he may exercise for his own benefit, whether the same be held by or in the name of the judgment-debtor, or by another person in trust for him or on his behalf."

The section then proceeds to state what property is not liable to seizure or sale. The property seized in these cases does not come under any item of excepted property. But Mr. Wikremanayake contends that it is not liable to seizure and sale. The simple question is whether it is property over which the judgment-debtor has a disposing power. I would unhesitatingly answer that question in the affirmative.

Voet 18-4-9 (see Berwick pages 79 and 96) says that a right of action may be sold not only with the consent of the debtor but against his will and in spite of his resistance.....whether the right of action be absolute, or due at a future date, or suspended by a condition. In *Pless Pol vs. de Soyza* 10 N. L. R. 252 it was held that the right of a person in a pending action is assignable. I do not think anybody could challenge the proposition that what is assignable is also saleable. In *Powell vs. Perera* 9 C. L. Rec. 50 it was held that a party's rights in a pending action could be seized and sold against him. In that case it was sought to distinguish *Pless Pol vs. de Soyza* 10 N. L. R. 252 but *Garvin J* brushed aside that contention remarking :— "That a debt is saleable within the meaning of section 218 of the C.P.C. is beyond all question and I am unable to see that it ceases to be saleable immediately an action is instituted for its recovery."

I would dismiss the appeals with costs.

C. J.,

I agree. *Appeal dismissed with costs.*

Present : PULLE, J.

RAJAH vs. RATNADURAI

In re S. N. Rajah (Elections Officer, Jaffna)

Application for Writ of Mandamus on D. S. Ratnadurai, Returning Officer, Jaffna.

Argued and Decided on : 10th October, 1952

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.

Walter Jayawardena, Crown Counsel, in support of the motion.

C. S. Barr Kumarakulasinghe with *T. W. Rajaratnam*, for the petitioner-respondent.

October 10, 1952. PULLE, J.

The motion on which I am asked to make an order is at the instance of the 2nd respondent to an application for a writ of mandamus. The petitioner was the unsuccessful candidate at an election held on the 1st December, 1951, for Ward No. 13 of the Jaffna Municipal Council. The 3rd respondent was the successful candidate who won by a majority of seven votes. The ballot papers were counted twice by the 1st respondent who discharged the dual functions of Presiding Officer and Counting Officer. It is alleged against him that he failed to discharge the duty cast on him personally to count the ballot papers. The relief sought by the petitioner is a mandate on the 1st respondent ordering a recount of the ballot papers.

No relief is sought against the 2nd respondent but it is stated that he has been made a party to give him notice of the proceedings. The petitioner alleges that after the counting the 1st respondent handed the counted ballot papers, the rejected ballot papers, the counterfoils and the marked register to the 2nd respondent, who is described as the Elections Officer, in terms of section 68 of the Local Authorities Elections Ordinance, No. 53 of 1946. The 2nd respondent moves that he be discharged from the proceedings.

There is no statutory requirement that an Elections Officer should be made a party to any proceedings in which relief is sought against the Returning Officer or the Counting Officer. It is not argued for the petitioner that in order to enable the Court effectually and completely to adjudicate upon the questions involved it is necessary that the 2nd respondent should be a party. If for any reason the petitioner thought it desirable to give notice to the 2nd respondent that he has applied for a writ of mandamus against the 1st respondent, he could have done so without making him a party to the case.

I would, therefore, allow the motion and discharge the 2nd respondent from the proceedings. He will be entitled to his costs.

Motion allowed.

Present : GRATIAEN, J. & GUNASEKERA, J.

JAFFERJEE and OTHERS, vs. SUBBIAH PILLAI and OTHERS

S. C. No. 319 *M of* 1950.—*D. C. Colombo No.* 17563 *M.*

Argued on : 24th February, 6th, 10th and 11th March, 1953.
Decided on : 25th March, 1953.

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.

Per GRATIAEN, J.—" An unconditional executory contract is not enforceable unless the act to be performed would have been legal not only at the date of the contract but also at the date fixed for performance."

Authorities referred to : *Hull Blythe & Co. vs. Valliappa Chetty* 39 N. L. R. 97.
Mischeff vs. Springett (1942) 2 K. B. 331.
Wessels on Contract Vol 1 para 682,683—*Justinian* 3-19-2.
David Taylor & Sons Ltd. vs. Barnett Trading Company " Times of England 5-3-53.
Atkinson vs. Ritchie 10 East 330 (103 L. R. 877).
Pollock—Contracts (10th Edn.) p. 314.
Mayor of Norwich vs. Norfolk Railway Company 4 E. & B. 397 (119 E. R. 143).
Bailey vs. de Crespigny (1869) L. R. 4 &. B. 180.
Mahmoud vs. Ispahani (1921) 2 K. B. 731.
Jajbhay vs. Cassim (1939) S. A. A. D. 537.

N. E. Weerasooria, Q.C., with *V. A. Kandiah, W. D. Gunasekera* and *Ivan Perera* for the defendants-appellants.

H. V. Perera, Q.C., with *H. W. Thambiah, C. Renganathan* and *V. Arulambalam*, for the plaintiffs-respondents.

GRATIAEN, J.

The plaintiffs who are a firm of dealers in Colombo sued the defendants in this action for the recovery of an aggregate sum of Rs. 38,500 alleged to be due to them for failure to deliver certain goods in terms of two separate contracts.

As to the first cause of action, they pleaded that the defendants had on 31st October, 1946, agreed to sell to them 500 bags (each containing 2 cwt.) of grain known as " vallai chelam " or " juwari " at Rs. 31 per cwt. to be delivered in Colombo on or before 30th November, 1946 ; that they had paid to the defendants a sum of Rs. 1,000 in part-payment of the purchase price ; but that the defendants had failed to deliver any part of the goods within the stipulated period.

As to the second cause of action, they pleaded that the defendants had on 2nd November, 1946, agreed to sell to them 500 bags (each containing 200 lb.) of " kambu arisi " or " bajiri " at Rs. 35 per bag to be delivered to them in Colombo on or before 30th November, 1946 ; that they had paid to the defendants a sum of Rs. 5,000 in part-payment of the purchase price ; but that on this occasion too the defendants had failed to deliver any part of the goods within the stipulated period. The defendants admitted that they had contracted to sell 500 bags of " juwari " and 500 bags of " bajiri " to the plaintiffs, that the contract price of the consignment of " juwari " was Rs. 31 per cwt. and that they had received Rs. 1,000 and Rs. 5,000 respectively as advances against these transactions. They fixed

the date of each contract, however, at 1st November, 1946, and the contract price for the consignment of " bajiri " at Rs. 43 per cwt.; they also alleged that the date fixed for delivery in each case was not " on or before 30th November, 1946 ", but " against November/December shipment ". They counterclaimed a sum of Rs. 15,096.69 as damages on the ground that the plaintiffs had refused to accept the goods which were duly tendered to them on their arrival in Colombo in January and February 1947, respectively.

The parties had not taken the elementary precaution of having the terms of either contract reduced to writing, and each side in turn alleged that the other had deliberately presented a false version of the facts with the aid of documents fabricated for the purpose. The manner in which the litigation developed at the trial left no room for a decision that there possibly might have been a genuine misunderstanding as to the terms of either transaction in respect of date, price or the time for performance. At the close of the evidence, senior Counsel for the parties each addressed the Court for three days, during which period, I have no doubt, all the oral and documentary evidence was subjected to the most detailed scrutiny. Twelve days later the learned District Judge pronounced judgment accepting the plaintiffs version, and holding that the defendants were the defaulting parties in respect of each contract. With regard to the first cause of action, he awarded the plaintiffs a sum of Rs. 2,000 as damages and also ordered the defendants to repay the sum of Rs. 1,000 advanced to them. With regard to the second, he awarded Rs. 27,500 as damages and ordered the return of the advance of Rs. 5,000. The present appeal is from this judgment. Mr. Weerasuriya does not complain that, if his clients were liable on either cause of action, the quantum of damages was excessive.

We ourselves have had the advantage of a critical analysis of the evidence led at the trial. Mr. Weerasuriya submitted *inter alia* that the learned Judge was in error in that, more particularly in respect of the " bajiri " contract, he had (*a*) declined to give consideration to the relevancy of certain admissible evidence which the defendants had led in support of their case, (*b*) ruled out other items of evidence which were relevant and which, if admitted, might well have turned the scales against the plaintiffs, and (*c*) failed to take into account certain other matters which vitally affected the credibility of the 4th plaintiff. Mr. Weerasuriya also argued, as a matter of law, that the transaction in respect of the consignment of " bajiri " was in any event an illegal contract which was *ab initio* void and unenforceable.

It will be convenient if I first dispose of the " bajiri " contract. I have arrived at the conclusion that, whichever version of the transaction be taken as true, the contract between the parties was unenforceable. The following additional issue were framed in the course of the trial:

22A. Is the alleged contract price referred to in issue 6 in excess of the " control price " of " bajiri " at the relevant date?

22B. If so, is the alleged contract in issue 5 contrary to public policy and/or illegal and therefore void?

23. If issue 22 is answered in the affirmative, can the plaintiffs have and maintain their claim for damages even if issues 5 and 6 are answered in the plaintiffs' favour?

It is common ground that the learned Judge correctly answered issue 22A in the affirmative. In my opinion he should, on the basis on that finding, have answered issue 22B in the affirmative and issue 23 in the negative. For the same reasons, the defendants' claim in reconvention in respect of the " bajiri " contract should also have been dismissed *ex mero motu* by the learned Judge.

The facts relating to these three issues are beyond controversy. At the time when the contract was entered into, there was in operation a statutory order, made by the Controller of Prices under section 3 of the Control of Prices Ordinance No. 39 of 1939, as amended by Defence (Control of Prices, Supplementary Provisions No. 2) Regulations, fixing Rs. 32.50 per bag of 200 lb. as the maximum wholesale price beyond which " bajiri " could not be sold within the Municipal limits of the town of Colombo. On either the plaintiffs' or the defendants' version, therefore, the contract price, which was admittedly a wholesale price, exceeded this statutory maximum. The 4th plaintiff, who had negotiated the transaction on behalf of the partnership and was well aware of this circumstance, explained that his firm's intention was to buy " wholesale " in order to sell the goods at the ruling retail rate of 36 cts. a measure in order to make a small profit and also, in view of the prevailing scarcity of " bajiri " in the local market, to attract custom generally to their business.

The Price Control Order in question (P66) came into operation on July 7th, 1943, and remained continuously in force until 13th November, 1946, when the control was lifted altogether. It is true that, *after that date*, and during what remained of the period fixed for delivery by the sellers, there was no longer any legal objection

to a sale of "bajiri" at the original contract price. The question is whether this supervening circumstance had the effect of removing the taint of illegality which vitiated the contract at its very inception.

The learned District Judge took the view that, as the Control of Prices Ordinance directly penalised only a seller, but not a purchaser, in a transaction where the contract price exceeds the controlled prices, "the plaintiffs could insist on specific performance of the contract and the defendants are liable for breach of contract". Mr. H. V. Perera did not associate himself with this line of reasoning, and, with respect, it is unsound. Even though the Ordinance does not in terms prohibit contracts for sale at prices exceeding the controlled price, it authorises the Controller to make statutory orders from time to time fixing the maximum permissible price for any particular commodity "if it appears to (him) that there is, or is likely to arise, in any part of Ceylon, any shortage of (that) article or any unreasonable increase in (its) price". Section 5 prescribes the punishment for a contravention of such an order. The object of the legislature is clearly to protect the public from the sinister activities of dealers in essential commodities which are in short supply, and, by imposing a penalty on the seller, it prohibits by implication all contracts which are designed to contravene the statute. A dealer who enters into a contract to sell controlled commodities at a prohibited price undertakes, in effect, to commit a criminal offence, and the purchaser cannot seek the assistance of the law for the enforcement of a bargain of that kind. The decision in *Hull Blythe & Co. vs. Valliappa Chetty* (1937) 39 N. L. R. 97 is distinguishable because it was based on the interpretation of an Ordinance which was designed, in the opinion of the Court, to achieve a different object.

Mr. H. V. Perera based his argument on the *ratio decidendi* of *Mischeff vs. Springett* (1942) 2 K. B. 331. In that case, A had agreed to sell to B, for delivery at a future date, a quantity of sardines at an agreed price. Before the time for performance had arrived, however, legislation had been introduced prohibiting the sale of sardines at a price exceeding that prescribed by a statutory order. In the result, the original contract price exceeded the controlled price. The Court held that A, by implementing his earlier contract, was guilty of an offence. Although the agreement was perfectly legitimate at the time when it was entered into, the performance of the seller's obligation after the statutory order came into force contravened the statute. This decision is based on the well-recognised doctrine that "if the subject matter of a contract is *in commercio* at the time when the agreement is concluded, but ceases to be *in commercio* before the contract is carried out, then the contract has no binding force". *Wessels on Contract* Vol. 1 para 682, citing *Justinian* 3.19.2.

We are here concerned with the converse case, and Mr. Perera argued that, by parity of reasoning, the contract being for the sale of unascertained goods, there was no concluded sale until the goods were appropriated to the contract, *i.e.*, in this instance, until the time came for delivery to the buyer. He conceded that the defendants could not have lawfully fulfilled their contractual obligation before November 13th, but pointed out that there still remained 17 days within which delivery could have been effected without contravening the law.

I must confess that I was much attracted by the argument that, in the case of a forward contract, the proper time for testing the legality of the transaction is the date fixed for performance, *i.e.*, when the agreement "matures into a sale". Since we reserved judgment however, I find that the Court of Appeal in England pronounced judgment in a case which in all essentials corresponds precisely to that which now arises for our decision—*David Taylor & Sons Ltd. vs. Barnett Trading Company* (The "Times" of England Newspaper of 5-3-53).

In *Taylor's case* (supra) the defendants had agreed on 27th February, 1952, to sell to the plaintiffs 10,000 cases of Irish stewed steak at a price of 2*s.* 5*d.* a pound, delivery April, May, June, July 1952. At the date of the contract the sale of goods of this description was subject to control under statutory regulations and the contract price in fact exceeded the controlled price. Two months later, however, the regulations were altered, and a higher maximum price was sanctioned, so that the original contract price was no longer prohibited. The defendants refused to deliver the goods in terms of the contract, and the plaintiffs claimed damages. Goddard, L.C.J., had ruled at the trial that the contract was not illegal, but Singleton, L.J., held in appeal (Denning, L.J. and Hodson, L.J. agreeing) that "*the contract at the date when it was made was illegal, and the fact that the price charged had become legal by the date of delivery did not affect the matter*". The full report of the judgment is unfortunately not yet available to us.

The test of legality laid down by Singleton, L.J., is certainly in accordance with the principles of Roman-Dutch law which, in this respect, governs all contracts including those for the sale of goods. *Wessels* (Vol. 1. para 683) declares that if a con-

tract was illegal when entered into, it remains illegal, and even though a new law should make such contracts legal, no action could be brought on it. He cites as authority for this proposition the rule laid down in the *Digest* (50.17.29) "*quod initio vitiosum est non potest tractu temporis convalescere*" which means that "what is bad from its inception cannot be cured by passage of time". Certain earlier English decisions indicate that the law in England is identical. "No contract", said Lord Ellenborough in *Atkinson vs. Ritchie* 10 East 330 (=103 E. R. 877), "can properly be carried into effect which was originally contrary to the provisions of law, *or* which, being made consistently with the rules of law, has become illegal in virtue of some subsequent law". In other words an unconditional executory contract is not enforceable unless the act to be performed would have been legal not only at the date of the contract but also at the date fixed for performance.

It was contended on behalf of the plaintiffs that the present case can in any event be distinguished because, at the time when the contract was made, it was well-known in the trade that price control in respect of "bajiri" would shortly be lifted. I do not think that, in principle, this circumstance concludes the argument. It is true that the Director of Food Supplies, who gave evidence at the trial, stated that he had informed a number of traders about the end of October, 1946, of his decision to recommend to the Controller of Prices the revocation of the ruling price fixed by the earlier Gazette notification P66. His intention in releasing this information was, apparently, to persuade dealers to bring back into the market large quantities of "bajiri" which, in his belief, had been taken underground owing to dissatisfaction over the terms of the price order. But the Director admitted that the ultimate decision rested not with him but with the Controller of Prices, and there was no guarantee that his recommendation would be adopted.

In any event, the present contract is unambiguously a contract whereby the sellers undertook to do something which contravened the law obtaining at the time when they made their bargain. *Pollock on Contracts* (10th Edn.) p. 314 points out that the conflicting judgments in *Mayor of Norwich vs. Norfolk Railway Company* 4 E. & B. 397 (119 E. R. 143) "gives this practical warning, that whenever it is desired to contract for the doing of something which is not certainly lawful at the time, or the lawfulness of which depends on some event not within the control of the parties, *the terms of the contract should make it clear that the thing is not to be done unless it becomes or is ascertained to be lawful*".

The plaintiffs do not allege that the present contract was intended to be conditional upon the anticipated adoption by the Controller of Prices of the rumoured recommendation of the Director of Food Supplies. On the contrary the 4th plaintiff does not even claim to have shared the 1st defendant's knowledge that such a recommendation had in fact been made. Indeed, as I have already pointed out, he admitted in re-examination, after the issue of illegality had expressly been raised, that he contracted for the purposes of his retail business, to buy the goods at a wholesale price which exceeded the statutory rate. "People in general must always be considered as contracting with reference to the laws as existing *at the time of the contract*, and the words showing a contrary intention ought to be perfectly clear to rebut that presumption".—*Bailey vs. de Crespigny* (1869) L. R. 4 Q. B. 180. There is nothing in the pleadings or in the evidence of the 4th plaintiff which rebuts this presumption.

It is interesting to note that in *Taylor's case* (supra) the plaintiffs had also argued, but without success, that the contract was not illegal because the parties knew that the ruling price order would shortly be varied. The true principle, I think, is laid down in *Mahmoud vs. Ispahani* (1921) 2 K. B. 731. Where a contract is *ab initio* illegal, there is no room for applying the rule that where a contract can be performed either in a lawful or in an unlawful manner, a party cannot avoid his obligations by seeking to adopt the latter alternative.

Mr. Perera suggested at one stage of his argument that, even if the original contract was illegal, the defendants had, according to the evidence of the 4th plaintiff, repeated their undertaking at the end of November, 1946,—*i.e.*, after the control had lifted—to deliver the "bajiri" two weeks later. He submitted that the acceptance of this offer constituted a fresh contract, not tainted with illegality, which could be enforced against the defendants. When it was pointed out, however, that no such substituted contract was either pleaded or suggested in the form of an issue, Mr. Perera very properly abandoned this line of argument. Indeed, I think that the 4th plaintiff's evidence, even if true, does not go beyond suggesting that the defendants had merely asked for and obtained an extension of time within which to implement the original undertaking which they had already broken.

For the reasons which I have given I am satisfied that, whichever version of the "bajiri" contract be true, neither the defendants nor the plaintiffs can invoke the assistance of the Court

to enforce a bargain which was *ab initio* tainted with illegality. It is therefore unnecessary to consider whether the learned Judge's findings of fact in respect of the "bajiri" contract should be disturbed. The plaintiffs' claim and the defendants' claim in reconvention on their respective second causes of action must therefore both be dismissed.

This is not a case in which the plaintiffs can properly claim even a decree for the refund of the sum of Rs. 5,000 paid by them in part-payment of the contract price under the illegal contract. The general rule *in pari delicto potior est conditio defendentis* must be applied, and justice does not require that, in the circumstances of this case, the Court should assist a party to recover what he has voluntarily paid in terms of an illegal contract which he has subsequently sought so strenuously to enforce. Both parties to the transaction were dealers in the controlled commodity, and were equally aware of the price control order P66 at the time of their bargain. The money was paid for what the law regards as a dishonourable purpose". The Roman-Dutch law recognises that the general rule may be relaxed only in exceptional cases, "where it is necessary to prevent injustice or to promote public policy"—*Jajbhay vs. Cassim* (1939) S. A. A. D. 537. To grant relief to either party in this case would, I fancy, achieve just the opposite result.

There remains for consideration the judgment in favour of the plaintiffs in respect of the "juwari" contract which was not affected by illegality. I find it quite impossible to say that the learned Judge's finding of fact on that issue should be disturbed. The only substantial controversy with regard to this particular transaction relates to the time fixed for delivery, and, to a lesser degree, the date of the contract. The learned trial Judge had the advantage, which we lack, of having seen and heard the witnesses, and most of Mr. Weerasooria's criticisms of the judgment touched upon issues which directly affected only the terms of the "bajiri" contract. The judgment under appeal in respect of the plaintiffs' first cause of action must therefore be affirmed.

In the result, I would substitute for the decree passed by the learned Judge a decree ordering the defendants to pay to the plaintiffs a sum of Rs. 3,000 together with (*a*) legal interest thereon from the date of the institution of the action until payment in full, and (*b*) costs in the Court below, to be taxed on the basis that the action was instituted for the recovery of Rs. 3,000 only. The defendants have substantially succeeded in this Court, and are therefore entitled to their costs of appeal.

GUNASEKERA, J.

I agree.

Decree varied.

Present : H. A. DE SILVA, J.

V. S. SREENIVASAM vs. S. SITTAMPALAM (Authorised Officer, Department of Immigration and Emigration)

S. C. 557—*M. C. Colombo,* 24,649/*B*

Argued on : 7th November, 1952
Decided on : 23rd January, 1953.

Immigrants and Emigrants Act No. 20 *of* 1949—*Temporary Residence Permit—Residence after expiry of permit—Does Part III of the Act apply to a person resident in Ceylon before* 1*st 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.

N. K. Choksy, Q.C., with *C. Shanmuganayagam* and *K. Rajaratnam*, for the accused-appellant.
Boyd Jayasuriya, Crown Counsel, for the Attorney-General.

H. A. de Silva, J.

The accused appellant in this case appeals against a conviction entered against him in the Magistrate's Court, Colombo.

The point that arises for consideration in this case is the construction of certain sections of Immigrants and Emigrants Act, No. 20 of 1948.

The charge against the accused runs thus :—

" That he being a person to whom Part III of the Immigrants and Emigrants Act, No. 20 of 1948, applies, being the holder of a Temporary Residence Permit No. CX 4631 issued by the Controller of Immigration and Emigration, Colombo, on the 27th day of October, 1950, the said Temporary Residence Permit being valid up to the 27th day of October, 1951, did in contravention of the provisions of section 15 (*b*) of the said Act remain in Ceylon after the expiry of the period of which he was authorised to remain in Ceylon by the said Temporary Residence Permit and did thereby commit an offence punishable under section 45 (1) (*a*) of the said Act ".

After trial the learned Magistrate found him guilty and imposed upon him a fine of Rs. 130.

The following were the admissions made :—

(1) The accused is a British subject and an Indian national.

(2) He was in Ceylon prior to the 1st November, 1949.

(3) The Act came into operation on the 1st November, 1949.

The accused took up the position at the trial that he has been in Ceylon since June, 1943, but the learned Magistrate after considering the evidence led for the prosecution and for the defence found as a fact that the accused was not in Ceylon prior to 1946 or 1947. The accused's Counsel who argued the appeal before me did not canvass that finding of fact. After the perusal of the evidence led in this case I see no reason to dissent from that finding. The accused admittedly obtained a Temporary Residence Permit No. CX 4631 for a period of one year commencing from the 27th October, 1950. The date of expiry of this Temporary Residence Permit is 27th October, 1951. This Temporary Residence Permit has been endorsed by the Controller of Immigration and Emigration on Pass No. 51083 dated 20th September, 1950,— P2 issued by the High Commissioner for India in Ceylon. This Pass expires on the 19th September, 1954. I may mention that this Pass has been issued by the High Commissioner for India at Colombo. The following endorsements appear on this Pass : " Arrived from Ceylon 28th October, 1950. Signed illegibly for Protector, Emigration, Dhanushkodi ". Amongst other endorsements there are the following : " Endorsement Permitted to land, 22nd November, 1950. Signed illegibly. Authorised Officer, Colombo Port, Ceylon ". " Endorsement Permitted to land, 15th August, 1951. Signed illegibly. Authorised Officer, Colombo Port, Ceylon ".

This Pass issued on behalf of the Government of India by the High Commissioner for India in Colombo is made valid only for direct travel between India and Ceylon. The Pass also says that the possession of this Pass does not exempt the holder from compliance with the Immigration regulations of Ceylon. It is admitted that the accused left Ceylon on the 28th October, 1950, and returned on the 22nd November, 1950, to Ceylon. He again left Ceylon on the 6th July, 1951, and came back to Ceylon on the 15th August, 1951. The accused thereafter continued to remain in Ceylon ; thus, according to the prosecution, the accused has contravened the conditions of the Temporary Residence Permit issued to him which expired on the 27th of October, 1951.

The point that has been raised by the learned Counsel for the accused is that the Immigrants and Emigrants Act has no application to those non-nationals who were in Ceylon prior to the date on which the Act came into operation, namely, 1st November, 1949. The fact that the accused-appellant elected to obtain a Temporary Residence Permit does not debar him from raising the point that is taken now. It was not obligatory on his part to have applied and obtained a Temporary Residence Permit. He has not forefeited his rights under the Act to remain in Ceylon by reason of his having obtained the Temporary Residence Permit. It is also argued that when this Act came into force there were a large number of persons who were not citizens of Ceylon, and that their right to remain in Ceylon was by no means affected by the Act. I may also at this stage refer to an observation made by learned Counsel for the accused. He stated that in the charge framed against the accused the word " enter " is not mentioned but he (Counsel) did not want to take advantage of the omission of the word "enter" in the charge with a view to getting an acquittal.

Learned Counsel for the accused conceded that his client had to obtain a valid Passport from the High Commissioner for India in Ceylon for him to travel between India and Ceylon. He contends that Part III of the Act has no application to the accused who was admittedly in Ceylon prior to the 1st November, 1949, the date on which the Act came into operation. Part III of the Act relates to the control of entry into

Ceylon of persons other than citizens of Ceylon. Section 8 which falls within Part III runs thus :— " This part shall apply to every person seeking entry into or entering Ceylon unless—(*a*) he is a citizen of Ceylon ; or (*b*) by virtue of any Order under Part I for the time being in force, he is exempted from the provisions of this Part ".

The argument of learned Counsel for the accused is that Part III of the Act has no application to a person who is seeking re-entry into Ceylon or re-entering Ceylon. His argument is that the accused was not coming to Ceylon for the first time after this Act came into operation, but he having gone back to India was coming back to Ceylon. It is true that armed with the Pass issued to him by the High Commissioner for India in Ceylon which was valid for a period of five years for travel between India and Ceylon, the accused went back to his home country armed with a Temporary Residence Permit to which I have already referred. One of the conditions upon which the High Commissioner for India issued this Pass to him was that he (accused) had to comply with the Immigration regulations of Ceylon. The learned Crown Counsel who appeared on behalf of the learned Attorney-General has argued that the accused was a person to whom Part III of the Act applied and that he, by reason of his remaining in Ceylon after the 27th October, 1951, has violated the provisions of section 15 of the Act. Section 15 runs thus :—" No person to whom this Part applies and who enters Ceylon shall (*a*) if he is not the holder of a visa, permanent Passport or Temporary Residence Permit, remain in Ceylon after the expiry of the period for which he is authorised to remain in Ceylon by the endorsement granted to him at the time of his entry ; or (*b*) if he is the holder of any such visa or permit, remain in Ceylon after the expiry of the period for which he is authorised to remain in Ceylon by that visa or permit, as the case may be ". Section 50 (1) of Act No. 20 of 1948 states that a citizen " means a citizen of Ceylon under any law for the time being in force."

The Citizenship Act, No. 18 of 1948, makes provision for citizenship of Ceylon and for matters connected therewith. This Act came into operation on the 1st November, 1949, by proclamation in Government Gazette No. 10,039 of the 28th of October, 1949. This was admitted by learned Counsel for the accused. Section 2 (1) lays down that with effect from the appointed date, there shall be a status to be known as " the status of a citizen of Ceylon " section 2 (2) reads thus :—" a person shall be or become entitled to the status of a citizen of Ceylon in one of the following ways only :—(*a*) by right of descent as provided by this Act ; (*b*) by virtue of registration as provided by this Act or by any other Act authorizing the grant of such status by registration in any special case of a specified description."

It will be seen that when the Immigrants and Emigrants Act came into force on the 1st November, 1949, there were three catagories of persons inhabiting Ceylon, namely, (1) citizens of Ceylon by descent or registration, (2) British subjects who were not citizens of Ceylon, and (3) persons who were neither British subjects nor citizens of Ceylon. Learned Crown Counsel states that the argument of learned Counsel for the accused is that this Act (Immigrants and Emigrants Act) does not apply to any of these three categories of people who were resident of Ceylon on the 1st November, 1949. He also argues that the only persons who have an absolute right to remain in Ceylon are the citizens of Ceylon. He refers to Part 6 of the Act which deals with deportation from Ceylon of other persons other than citizens of Ceylon. Section 30 which falls within Part 6 states thus :—" This Part shall apply to every person unless—

(*a*) he is a citizen of Ceylon ; or

(*b*) by virtue of any Order under Part 1 for the time being in force, he is exempted from the provisions of this Part." *Vide* section 31.

He further argues that when this Act was passed those persons who were not citizens of Ceylon were permitted to remain in Ceylon. There is no provision in the Act to deport all persons who were not Ceylon nationals on the appointed date, namely, 1st November, 1949.

The question for determination is whether or not Part III of the Act applied to those persons leaving Ceylon after the 1st November, 1949.

The accused was admittedly a person, who is non-national of Ceylon, and who was in Ceylon on 1st November, 1949. He obtained a Passport from the representative of his Government in Ceylon—a Passport to travel between India and Ceylon. His was a valid Passport. Section 50 defines a valid Passport in relation to any person who is not a citizen of Ceylon as one issued to him by or on behalf of any Government recognised by the Government of Ceylon. The accused armed with this valid Passport obtained a Temporary Residence Permit from the Controller of Immigration and Emigration. The Immigrants and Emigrants Act No. 20 of 1948 thus provides " an Act to make provision for controlling the entry into Ceylon of persons other than citizens of Ceylon, for regulating the departure from Ceylon of citizens and persons other than citizens of Ceylon, from removing from Ceylon undesirable persons who are not citizens

of Ceylon, and for other matters incidental to or connected with the matters aforesaid ". Section 2 exempts various classes of persons from the operation of Parts 3, 4, 5, 6 and 7 of this Act to such extent or subject to such conditions or restrictions as may be specified by Order of the Minister. Section (2) (1) also provides that an order under this subjection may be either a special order in respect of any person or group of persons, or a general order applicable to any class or description of persons, being in either case persons referred to in this sub-section. *Vide* section 2 (2) of the Act.

Section 10 of the Act provides that any person to whom Part III applies shall not enter Ceylon unless he has in his possession (*a*) a valid Passport which bears an endorsement in the prescribed form granted to him by an authorised officer under this Part; and if so required by regulations made under this Act a visa granted to him under such regulations or a permanent Passport or Temporary Residence Permit issued to him under such regulations.

Section 11 of the Act requires that no endorsement under Part III shall be granted by an authorised officer to any person unless that person has in his possession (*a*) a Passport which is a valid Passport; and (*b*) if so required by regulations made under this Act, a visa, a permanent residence permit or temporary residence permit granted or issued to him under such regulations. Regulations were made under the various provisions of this Act by the Minister of Defence and External Affairs—*Vide* Government Gazette No. 10,039 of October 28th, 1949. Section 14 makes provision (*a*) for the granting of a visa for a period, not exceeding six months, as may be specified in the visa; (*b*) issue of a Temporary Residence Permit for such definite period, exceeding six months, as may be specified in the permit. (*c*) issue of a permanent residence permit for an indefinite period. Section 14 also makes provision for the extension of the period of a visa or permit above referred to.

It is in pursuance of section 14 (1) (*b*) that the accused was granted a Temporary Residence Permit for a period of one year after the authorities were satisfied that he (accused) had a valid Passport. Now section 14 (3) runs thus :—

> " No permanent residence permit shall be refused—
> (*a*) in the case of the spouse or a dependent child of a citizen of Ceylon; or
>
> (ii) in the case of any other dependent of a citizen of Ceylon, if the Minister is satisfied that the maintenance of such other dependent is assured, or a bond entered into by such citizen in accordance with regulations made under this Act. Section 14 (3) runs thus :—
>
> " No temporary permit shall be refused in the case of a person who, being a British subject, was ordinarily resident in Ceylon for a period of at least five years immediately preceding the appointed date ".

At this stage it will be relevant to advert to the attempt made by the accused to prove that he has been in Ceylon since June, 1943. That attempt in all probability was to prove that he had been in Ceylon for a period of five years before this Act came into operation on the 1st of November, 1949. So that if he came within section 14 (3) (*b*) he would have been entitled as a matter of right, to obtain a Temporary Residence Permit. Even though he had been in Ceylon from June, 1943, yet in my opinion he comes clearly within Part III, section 8 of the Act. Section 14 (3) (*b*) lends support to the argument adduced by learned Crown Counsel that even a person who had been at least five years resident in Ceylon before the Act came into force had to obtain a Temporary Residence Permit. Section 14 (3) (*b*) is an effective answer to the contention made by learned Counsel for the accused-appellant that this Act has no application to British subjects and who are non-nationals who were in Ceylon on the 1st November, 1949. If the legislature had in contemplation the non-applicability of this Act to British subjects who are non-nationals and who were residents in Ceylon, on the 1st of November, 1949, there would have been no difficulty for the legislature to have said so in clear and unambiguous terms. As I said before, the object of the legislature in enacting this piece of legislation is clearly and unequivocally laid down in the preamble to the Act.

Now section 2 of the Act makes provision for the Minister to make an order exempting persons or any class or description of persons from the operation of this Act. The Minister has under section 2 of the Act made order published in Government Gazette No. 10,039 of October 28, 1949.—*Vide* Government Gazette notification—exempting certain persons, or group of persons or class of persons. Paragraph 9 of that order runs thus :—

> " Indian estate labourers proceeding to India and returning from India to Ceylon shall, until further notice, be exempt from the requirement of possessing a valid passport and a visa or a Residence Permit, if they possess an Immigration certificate issued to them under the Estate Labour (Indian) Ordinance, No. 41 of 1943 ". The accused admittedly does not come within this category. It is therefore abundantly clear that the accused is not one of the persons exempted from the operation of this Act.

I do not think that anything turns on the words " enter " or " re-enter ". The accused

comes within the provisions of this Act. He undoubtedly was in Ceylon when the Act came into operation. He is a British subject and a non-national of Ceylon. He had to obtain a valid Passport from the representative of his Government in Ceylon to travel between India and Ceylon. He obtained that Passport. It was granted to him subject to his observance of the regulations made under this Act. Prior to the enactment of the Act No. 20 of 1948 there was no requirement in the law of this country that a person, whether he is national or non-national of Ceylon to have a valid Passport for travel between Ceylon and India. In the case of a national of Ceylon he had to obtain a valid Passport from the officers appointed by the Ceylon Government for that purpose, and in the case of a non-national from his Government or the accredited representative of his country in Ceylon.

The accused, therefore, when he wanted to return to his country obtained a valid Passport from the High Commissioner for India in Ceylon. He had further to obtain a Temporary Residence Permit from the officer of the Government of Ceylon, to enable him to remain in Ceylon for one year. Once he went back to India there was no obligation on his part to come to Ceylon again. He may have remained in his country if he so desired. If he chose to come to Ceylon again armed with his Passport, which was valid for five years, and the Temporary Residence Permit, he was undoubtedly entering Ceylon within the meaning of Part III of the Act.

In the case of a national of this country, if he travels abroad with a Ceylon Passport, he will have to return to Ceylon within the period mentioned in the Passport or within the period of extension, if he had been granted one. A person normally goes back to the country from which he came. The accused did precisely that. Thereafter he came to Ceylon again with the Passport granted to him.

I am unable to agree to the restricted meaning that is sought to be given to the words " entry into or entering Ceylon " in Part III of the Act as applicable only to persons who had not been in Ceylon prior to the 1st November, 1949, on which date the Act came into force. That in short is the contention of Counsel for the accused.

That contention, if upheld, would be repugnant to the object, the scheme and the wording of this Act.

I therefore hold that the verdict of the learned Magistrate is correct. The sentence imposed is not excessive.

The appeal is dismissed.

Appeal dismissed.

Present : Gratiaen, J. & Gunasekera, J.

COMMISSIONER OF INCOME TAX vs. A. H. M. ALLAUDIN

S. C. No. 367 *M of* 1951

Case Stated for the opinion of the Hon'ble the Supreme Court under the provisions of Section 74 *of the Income Tax Ordinance* (*Cap.* 188) *upon the application of the Commissioner of Income Tax.*

Argued on : 18th February, 1953.

Decided on : 27th February, 1953.

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.

Cases referred to : *Pooley vs. Driver* (1877) 5 Ch.D. 458.
Pate vs. Pate (1915) 18 N. L. R. 289.
Balasubramaniam vs. Valiappa Chettiar (1938) 39 N. L. R. 553.
Silva vs. Nelson (1898) 1 Browne 75.
Hordern vs. Hordern (1910) A. C. 468.
Wright vs. Morgan (1926) A. C. 789.
Costa vs. Silva (1917) 19 N. L. R. 481.
Fernando vs. Mathew (1917) 4 C. W. R. 22.

T. S. Fernando, Acting Solicitor-General, with *M. Thiruchelvam, Crown Counsel,* and *G. Sethukavaler,* for the appellant.

S. Nadesan, with *N. Nadarasa,* for the respondent.

GRATIAEN, J.

This is a case stated by the Board of Review for the opinion of the Supreme Court on the application of the Commissioner of Income Tax. The dispute is as to whether, in computing the profits of the business of the Colombo Cargo Boat Company for the year 1944, under the provisions of the Excess Profits Duty Ordinance No. 38 of 1941, certain payments made to T. V. Edwards, who had admittedly managed the business during the relevant accounting period, were permissible deductions.

The assessee claimed that these payments, which took the form of a monthly allowance as well as a share of the profits of the business, had been made to Edwards as an employee who had no proprietary interest in the business. It is common ground that in that event the deduction claimed would be permissible. The Assessor contended, however, and the Commissioner decided in appeal, that Edwards was in truth a partner of the Company. The assessee concedes that if that be so, the deduction could not properly be claimed.

The Board of Review set aside the Commissioner's decision and held that during the relevant accounting period " the Company was not carried on as a partnership business. Accordingly the appellant is entitled to have the payments of profits given to T. V. Edwards deducted from the assessment for Excess Profits Duty ".

The learned Solicitor-General has argued before us that the Board misdirected itself in law in arriving at this conclusion, and that, upon the facts set out in the case stated, there was no ground to support the decision that Edwards was not a partner of the business.

It is convenient at this stage to refer to the history of the Company since the date of its commencement on 6th May, 1919. It had been carried on in partnership from that date until 17th May, 1934, by Ahamadasan (to whom I shall hereafter refer as " the deceased "), Meera Saibo and T. V. Edwards. Meera Saibo then died, and his surviving partners carried on the business as *de facto* partners until 29th June, 1936, when a formal agreement of partnership R1 came into operation, whereby they mutually agreed to, and did in fact continue, to carry on

the business in partnership on the terms set out in the agreement.

The assessee was "prepared to concede" that the deceased and Edwards were partners in the business during the period when the agreement R1 was in operation. I do not see how their relationship could be interpreted otherwise. The deceased had contributed the entire capital of the business, whereas Edwards contributed his skill and experience which were regarded as invaluable to the success of the undertaking. It is correct that under the agreement the deceased indemnified Edwards against liability for any losses which might be incurred by the Company. Nevertheless, Edwards, who alone was to manage the affairs of the business, was in fact and in law "a partner acting on behalf of the firm (introducing the notion of the firm as a separate entity from the existence of its individual members) of which he and the deceased were members, partly for himself and partly as agent for the deceased"—per Jessel, M.R., in *Pooley vs. Driver* (1877) 5 Ch.D. 458. There are many clauses in the agreement which negative entirely the alternative theory that he was merely a servant carrying on the business on behalf of his employer. The stipulation that, upon a dissolution, the deceased would receive back all the capital and goodwill of the partnership does not affect the true relationship of the parties during the subsistence of the business.

Four months after the agreement R1 came into operation the deceased executed a last will dated 5th November, 1936, which was admitted to probate when he died on 2nd September, 1937. The following provision was made in respect of his share of the business of the Colombo Cargo Boat Despatch Company :—

1. I devise and bequeath all my share of the business carried on at Colombo under the name, style and form of the "Colombo Cargo Boat Despatch Company" and all sailing vessels, boats and all other movable articles necessary for carrying on the said business unto my son Mahoodeen Alawoodeen and to any other male child or children who may be born to me hereafter share and share alike.
2. Mr. Thomas Vedanayagam Edwards shall be the manager as heretofore of the said entire business during his lifetime.
3. On the death of Thomas Vedanayagam Edwards the said Company shall be conducted by my son Mahoodeen Alawoodeen and my son-in-law, Kalingu Mohideen, and my son is authorised to give 1/8 share to my son-in-law so long as they are harmonious.

Edwards and another gentleman were appointed executors of the will until the deceased's son Allaudin attained the age of twenty seven, after which the executors were directed to hand over the administration of the estate to him.

The deceased died leaving an only son Allaudin to whom his entire interest in the business passed under the will. The earlier partnership with Edwards was automatically dissolved upon the deceased's death, but the Board of Review has held as a fact that "notwithstanding the dissolution, the business of the Company was carried on *as usual* and *on the same lines as before* by T. V. Edwards, the manager of the business, who continued to draw his allowance and his share of the profits". Allaudin did not apparently attain the age of twenty seven until nine years later when, on 11th December, 1946, he and Edwards entered into a formal agreement R2 in which they recited that they had been previously "carrying on business in Colombo under the name, style and form of the Colombo Cargo Despatch Company" and mutually agreed "*to continue the said partnership business*". The terms of R2 were substantially the same as those set out in the agreement R1 under which the deceased and Edwards had previously carried on business in partnership.

It is necessary to determine Edwards' precise relationship to the business (which he carried on "as usual and on the same terms as before") during the period 2nd September, 1937, to 11th December, 1946. The assessee argued that after the deceased died Edwards ceased to be a managing partner and commenced to manage the business as an employee of Allaudin who had become the sole proprietor of the Colombo Cargo Boat Despatch Company by virtue of his father's will; that this alleged change of status had taken place in strict accordance with the instructions contained in the will; and that in any event Edwards, as an executor, derived no "power" under the will to continue to occupy his former role as a partner of the business. The Assessor's contention on the other hand was that the testator's direction was that Edwards should continue to manage the business as a partner "as heretofore", and that he did in fact continue to do so in that capacity.

Admittedly no written agreement was in operation during the relevant period from which one can ascertain whether Edwards carried on the business as an employee or as a partner until 11th December, 1946, but the facts, as set out in the case stated, may be summarised as follows :

On September, 1937, Edwards, as surviving partner of the Company, sent a notification to the Registrar of Business Names declaring that

his former partner (the deceased) had died on 2nd September, 1937. On 23rd May, 1939, the name of Edwards and his co-executor were included in the Register as " added partners " who were carrying on the business in partnership with Edwards in his personal capacity, and a contemporaneous document was registered stating, in conformity with the provisions of section 3 of the Business Names Ordinance (Cap. 120), that " the added partners " were functioning in a representative capacity *for the benefit of Allaudin*. In 1940, and from time to time thereafter both Allaudin and Edwards submitted their respective Income Tax returns disclosing, in the columns specially reserved for " income received from a business carried on in partnership ", the amounts each of them had received out of the profits of the Colombo Cargo Boat Despatch Company. The distribution of profits between the partners was on each occasion calculated in the proportions stipulated in the earlier agreement R1 (and subsequently in R2). Eventually, as I have said, Allaudin entered into a formal agreement with Edwards in 1946 to *continue* to carry on the business on the basis of a partnership, and their association as partners was duly registered under the Business Names Ordinance. There is no evidence to indicate that Edwards was at any stage regarded by himself or by his co-executor or by Allaudin as a mere employee who had no proprietary interest in the business which he was managing. Upon these facts, I conceive that it was not possible for any tribunal to come to any other conclusion than that a *de facto* partnership was subsisting during the relevant accounting period between Edwards on the one hand and himself and his co-executor on the other, the executors functioning in a representative capacity for the benefit of Allaudin who was the survivor-in-interest of the deceased's share in the business; and that the profits had in fact been distributed between Edwards and Allaudin on that basis.

I now proceed to examine the grounds upon which the Board considered themselves precluded from holding that Edwards was a partner in the business during the relevant accounting period. They first decided, as a matter of law, that it was not open to the Assessor to prove the existence of the partnership because the initial capital of the business exceeded Rs. 1,000 and there was no written agreement of partnership in operation until 1946. In the second place they decided, also as a matter of law, that in any event " T. V. Edwards as the executor of the will marked A could not enter into a partnership with himself, that being a breach of trust ". In my opinion the Board misdirected itself on both these questions, and wrongly applied the law in pronouncing that "*for these two reasons* the assessee had established his contention that from the death of the deceased in 1937, until December 1946, the Company was not carried on as a partnership business ". The Board has not found as a fact that Edwards was Allaudin's employee.

Section 18 (*c*) of the Prevention of Frauds Ordinance (Cap. 57) declares that " No.....agreement, unless it be in writing.....shall be of force or avail in law.....for the purpose of.....*establishing a partnership* where the capital exceeds one thousand rupees : provided that this shall not be construed to prevent third parties from suing partners, or persons acting as such, and offering in evidence circumstances to prove a partnership existing between such persons ". The true meaning of section 18 (*c*) has been authoritatively explained by the Judicial Committee of the Privy Council in *Pate vs. Pate* (1915) 18 N. L. R. 289. Apart from cases to which the proviso applies, the existence of a partnership (whose capital exceeds Rs. 1,000) cannot, in the absence of a written agreement, be established " *as the basis of a suit* ", or, to put it in another way, as the foundation of a claim in proceedings before the appropriate tribunal vested with jurisdiction in the matter. Can it be said that in the present case the Assessor, in offering circumstantial proof of the *de facto* partnership, was " seeking to establish the partnership " as the basis of a claim to recover excess profits duty from the assessee? The answer is to be found, I think, in the provisions of the Income Tax Ordinance and the Excess Profits Duty Ordinance. If an assessee is dissatisfied with an assessment of his income or of the profits of a business in which he has an interest, the only proceedings which can be equated to a " suit " would be his appeal to the Commissioner for the purpose of having the assessment amended, revised, or set aside. Before each successive tribunal, the onus of proof of the character of payments claimed as admissible deductions in the computation of profits is upon him.

It was the assessee, who, in a sense, " sued " the Assessor before the Commissioner, and later before the Board of Review, claiming a reduction of the assessment on the ground that the payments to Edwards were permissible deductions. The basis of his claim on each occasion was that Edwards was a mere employee in the business, and the Assessor relied on the evidence of a partnership for the purpose only of rebutting that allegation. In *Balasubramaniam vs. Valiappa Chettiar* (1938) 39 N. L. R. 553 Poyser, J.

and Keuneman J., in separate judgments, decided that, even in an action between two *de facto* partners, one of them might lead evidence, " by way of defence ", to prove the existence of the partnership in order to negative the other partner's claim to an accounting based on the allegation that their true relationship was only that of principal and agent. *Vide* Bonser, C.J.'s judgment to the same effect in *Silva vs. Nelson* (1898) 1 Browne 75. *A fortiori*, the Assessor was not precluded from proving the partnership for the purpose of resisting the assessee's claim to have the assessment reduced upon a false hypothesis. The evidentiary prohibition contained in section 18 (*c*) does not apply to such a situation, and there is really no need to resort to the proviso in order to arrive at this conclusion.

I shall now examine the second ground which forms the basis of the Board's decision. It is not correct to state, as an absolute proposition of law, that a transaction which a man enters into *qua* executor with himself in his personal capacity is automatically void. Such a situation without doubt gives rise to a conflict between his interest and his duty. If, however, that conflict was " brought about by a situation created by the testator " the transaction is perfectly valid unless, of course, he can be attacked on the ground of fraud and bad faith. *Hordern vs. Hordern* (1910) A. C. 468, if on the other hand, the transaction was not authorized by the will or sanctioned by the Court, the beneficiaries affected by it would be entitled to have the transaction set aside; equally, they would have a right, if they so choose, to adopt the transaction. *Wright vs. Morgan* (1926) A. C. 789. In other words the transaction is not void at its inception but avoidable. As Lord Buckmaster pointed out in *Costa vs. Silva* (1917) 19 N. L. R. 481 " a party entitled either to affirm or disaffirm it is sure to regulate his action by the consideration of which course will in the end prove to be most profitable. It is primarily this right which is given to a person in that position and it is this risk that is run by any (executor) who enters into a transaction subject to such defect ". I do not agree that Wood Renton, C. J. intended to lay down a different rule of equity in *Fernando vs. Mathew* (1917) 4 C. W. R. 22.

These general principles must now be applied to the facts of the present case. Even if we were to assume that the establishment of the partnership between Edwards and the executors (including himself) was not an authorised transaction, the facts set out in the case stated establish beyond doubt that it was affirmed and adopted by Allaudin for whose benefit the executors had acted in the transaction. Allaudin cannot now be heard to disaffirm the partnership respectively. Besides, I think that, upon a proper interpretation of the will A1, there is a clear indication that the testator, by directing the business to be managed by Edwards " as heretofore ", did intend that Edwards should continue to function as the managing partner of the business. Very different language would have been necessary to give expression to a testamentary direction that Edwards' connection with the business should be converted into that of a mere employee.

For the reasons which I have set out, I take the view that the decision of the Board is insupportable. The particular questions submitted for our opinion, as questions of law are :—

1. Was the business of the Colombo Cargo Boat Company carried on as a partnership during the fourth accounting period ?

2. Are the profits paid to T. V. Edwards during the period to be deducted from the assessment of Excess Profits Duty ?

Upon the facts set out in the case stated and summarised in my judgment I would answer the first of these questions in the affirmative. In that view of the matter, the second question must admittedly be answered in the negative. In accordance with this decision, I would restore the order of the Commissioner of Income Tax confirming the Assessor's basis of assessment and fixing the duty payable for the fourth accounting period at Rs. 235,814. The assessee must pay the Commissioner's costs of this appeal, and also a sum of Rs. 50 representing the fee delivered to the Clerk to the Board of Review under section 74 (1) of the Ordinance.

GUNASEKERA, J.

I agree.

Order of Board of Review set aside.

Present : GRATIAEN, J. & GUNASEKERA, J.

DON NIKIULAS vs. HEWAPUWAKDANDAWEGE ANDIRISHAMY

S. C. No. 145 *of* 1952 (*Inty.*).—*D. C. Tangalla No. P*182.

Argued on : 18th March, 1953.
Decided on : 25th March, 1953.

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.

Cases referred to : *Jayawardena on Partition* p. 91.
Sinchi Appu vs. Wijegoonesekera (1902) 6 N. L. R. 1 at page 11.
Sanchi Appu vs. Marthelis (1914) 17 N. L. R. 296 at page 297.

N. E. Weerasooria, Q.C., with *W. D. Gunasekera*, for the plaintiff-appellant.

Vernon Wijetunge, for the 7th defendant-respondent.

GRATIAEN, J.

In this case the learned District Judge entered an interlocutory decree for the partition of the land depicted in Plan No. 350 filed of record, allotting shares to the parties as indicated in paragraph 7 of the plaint. There was no dispute as to the soil shares, but there was a contest as to the claim of the 7th defendant in respect of an improvement represented by Building No. 3 standing on Lot B. The learned District Judge held as a fact that this building had been constructed by the 7th defendant before the action commenced, and in his interlocutory decree he gave a " special direction " that the Commissioner should in his scheme of partition give the 7th defendant his rights in the soil so as to include this building. The present appeal is directed against this " special direction ".

A Court, when entering an interlocutory decree, undoubtedly possesses jurisdiction under section 5 of the Partition Ordinance to give a special direction to the effect that a co-owner who has made certain improvements should be allotted, in lieu of his undivided share, a specified portion which includes those improvements. *Jayawardena on Partition* p. 91. But a Court should, I think, 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. In *Sinchi Appu vs. Wijegoonesekera* (1902) 6 N. L. R. 1 at page 11, Wendt, J. directed that, in the circumstances of that particular case, " in the partition the Commissioner making it will, *if possible*, so divide the land that the buildings may fall in the defendants' moiety, but if that be not possible, some other division will be adopted which will give the defendants the entire value of the buildings ". Similarly, in *Sanchi Appu vs. Marthelis* (1914) 17 N. L. R. 296 at page 297 Pereira, J. ordered an interlocutory decree " declaring that the second defendant is entitled to compensation in respect of the house from his co-owners.....', and directing that, " *if practicable*, the second defendant, on the partition, be given a portion with the house on it ".

The circumstance that a particular co-owner had, in the exercise of his rights as co-owner, built a house on the common land is certainly, even in the absence of special directions by the Court, a weighty consideration to be taken into account by the Commissioner who prepares a scheme of partition for confirmation by the Court. But it is not necessarily the only consideration. In the present case, for instance, the plaintiff draws attention to his claim to be the owner of the land on the east immediately adjoining the portion on which the building stands, whereas the 7th defendant owns the adjoining land on the west which is far removed from the site of the building. The learned Judge has given no expression in his judgment to his opinion on these or any other factors, but he seems instead to have been influenced almost entirely by his suspicion that the plaintiff, who is wealthier than the 7th defendant, desired a sale instead of a partition of the land so as to "swallow up all the rights in it". This theory is disproved by the plaintiff's evidence where he expressly asked for partition and not for sale.

I am not convinced that the unconditional special direction given to the Commissioner was not premature. It would have sufficed, I think, to have given only a general direction that due consideration should be given by the Commissioner to the circumstance that the 7th defendant was the co-owner who had constructed the building No. 3, and I would prefer not to fetter the Commissioner's discretion to any further extent for the present. It seems to me that, after the scheme of partition which the Commissioner ultimately recommends has been duly submitted, the Court would be in a better position to adjudicate upon any objections which a party might raise against it.

I would amend the decree by substituting for the special direction given by the learned District Judge a direction that the Commissioner should pay due regard to the circumstance that the 7th defendant is the co-owner who constructed the building No. 3 standing on Lot B. Subject to this variation, I would affirm the judgment of the learned District Judge dated 25th May, 1951. In all the circumstances, I would make no order as to costs of this appeal.

Gunasekera, J.

I agree.

Decree amended.

Present : Pulle, J.

W. A. ROMANIS SINGHO vs. ABEYSINGHE (P. S. 271)

S. C. 988—*M. C. Ratnapura*, 19715

Argued on : 16th March, 1951
Decided on : 2nd April, 1951

Evidence—Order by Minister conferring power on Asst. Registrar of Co-Operative Societies—Gazette publication—Judicial notice—Evidence Ordinance, section 57 (1) *Co-Operative Societies Ordinance, section* 17.

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 Asst. 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 Asst. Registrar all or any of the powers of the Registrar.

Held : That such an order by the Minister published in the Government Gazette conferring intended functions on the Deputy or Asst. Registrar must be duly proved and a Court cannot take judicial notice of it.

M. D. H. Jayawardena for the accused-appellant.
A. C. Alles, Crown Counsel, for the Attorney-General.

April 2, 1951. Pulle, J.

The case against the accused-appellant is that on the 10th February, 1950, he disobeyed wilfully a written order to produce the books, cash, securities and papers belonging to Polgahawa Co-operative Stores Society of which he was the Treasurer. The order was given by a writing dated 31st January, 1950, by Mr. G. H. K. Gunawardena, an Inspector of Co-operative Societies. The learned Magistrate has in a carefully considered judgment found that the appel-

lant who was duly served with the written order wilfully disobeyed it. This is a finding that cannot possibly be challenged.

It is submitted on behalf of the appellant that the conviction is bad on the ground that the charge was defective. It has not been possible to examine the contents of the charge for the reason that the charge sheet is missing from the record. As the learned Magistrate has pointed out in a report, it is possible that the charge sheet was mislaid when the record was detatched loose and rebound before transmission to the Registry. It is clear from the record that the accused was charged from the charge sheet and it was, therefore, not open to the appellant to urge that the trial was held without the appellant being charged as required by the Criminal Procedure Code. I permitted the learned Counsel for the appellant to make his submission on the basis that the allegations contained in the report filed under section 148 (1) (*b*) had been incorporated in the charge sheet. The only point of any substance urged was that the prosecution had not set out in the report section 17 of the Co-operative Societies Ordinance (Chapter 107), as amended by the Co-operative Societies (Amendment) Act, No. 21 of 1949.

In my opinion the failure to set out section 17 is not fatal to the charge. The appellant was informed in the written order served on him that Mr. Gunawardena had been authorised to make the demand under section 17 (2A) (*b*) of the Ordinance. A copy of this order was an exhibit in the case and in his evidence also Mr. Gunawardena mentioned section 17 as the one under which he was authorised to act. I, therefore, hold that the submission that the charge was defective fails.

On an examination of the documents on which Mr. Gunawardena relied to establish that he had legal authority to issue an order to the appellant I find that they are defective. The order P1 dated the 31st January, 1950, recites that Mr. Gunawardena was authorised by the Registrar of Co-operative Societies. This recital is incorrect because in document P3 dated the 10th October, 1949, Mr. S. B. Yatawara has in the capacity of Deputy Registrar, Co-operative Societies, had authorised Mr. Gunawardena to audit accounts and to obtain books, papers, etc., from registered Co-operative Societies. If in point of fact it was proved that Mr. Yatawara was empowered to issue an authority to Mr. Gunawardena the incorrect recital would not have vitiated the order P1 issued by Mr. Gunawardena. The question then is whether Mr. Yatawara's authority dated 10th October, 1949, is valid.

Section 17 of the Co-operative Societies Ordinance empowers only the Registrar to cause to be audited by some person authorised by him the accounts of a registered Society. In the face of this section alone the authority issued by Mr. Yatawara cannot be justified. Section 2 of the Ordinance as amended by the proclamation issued by the Governor-General dated February 4, 1948, reads as follows :—

> " 2. (1) There may be appointed a Registrar of Co-operative Societies for the Island or any portion thereof and such number of Deputy or Assistant Registrars as may be necessary.
>
> 2)) The Minister may, by general or special order published in the Gazette, confer on any Deputy or Assistant Registrar all or any of the powers of a Registrar under this Ordinance ".

It does not appear either in the report made to the Magistrate under section 148 (1) (*b*) of the Criminal Procedure Code or in the evidence that the Minister by a general or special order published in the Gazette conferred on Mr. Yatawara all or any of the powers of a Registrar under the Ordinance. My attention, however, has been drawn to such an order published in the Gazette of the 7th January, 1949. The question then arises whether the Minister's order is one of which I must take judicial notice. The answer must be in the negative. In my opinion the order does not fall within the ambit of section 57 (1) of the Evidence Ordinance as a law or a rule having the force of law. Under section 57 (1) I could take judicial notice of Mr. Yatawara's accession to office as Deputy Registrar of Co-operative Societies and of his functions in that capacity but not the extended functions conferred by the order in question.

I am, therefore, compelled most reluctantly to reach the decision that the prosecution has failed to adduce sufficient proof that the order issued by Mr. Gunawardena was one which the appellant disobeyed at his peril.

The conviction and sentence are set aside and the appellant is acquitted.

Appeal allowed.

Present : SWAN, J.

J. C. W. MUNASINGHE & S. C. S. COREA *et al.*

Election Petition No. 11 *of* 1952 (*Chilaw*)

Argued on : 9th October, 1952.
Decided on : 28th October, 1952.

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.

Cases referred to : *Islington* 1901 5 O' M. & H. 132.
Wilson vs. Ingham, 64 L. J. Q. B. 775, 72 L. T. 796.
Dias and others vs. Amarasuriya, (1931) 33 N. L. R. 169.
Saravanamuthu vs. de Silva (1941) 43 N. L. R. 77.
Kuruppu vs. Hettiaratchy (1947) 49 N. L. R. 57.

S. J. V. Chelvanayakam, Q.C., with *A. C. Nadarajah, S. Thangarajah, B. S. C. Ratwatte, W. Mendis* and *C. V. Munasinghe*, for the petitioner.

E. B. Wikremanayake, Q.C., with *A. H. C. de Silva, G. T. Samarawickreme* and *A. K. Premadasa*, for the 1st respondent.

T. S. Fernando, Acting Solicitor-General, with *V. Tennekoon*, for the 2nd respondent.

SWAN, J.

There are two matters that arise for consideration and adjudication, namely :—

(1) The application of the 1st respondent on his motion dated 16-7-52 asking for inspection of certain documents, and

(2) The application of the 2nd respondent on his motion dated 12-7-52 to be discharged from the proceedings.

I shall deal with the second application first. The Acting Solicitor-General appearing for the 2nd respondent (who is the Returning Officer) contends that the 2nd respondent is not a necessary party inasmuch as he has no interest in the result of the election petition and would not be affected adversely or otherwise, by any order that the Court may make thereon.

Mr. Chelvanayakam for the petitioner submits that the 2nd respondent is a necessary party. He points to paragraph 4 (*a*) of the petition which states 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 ; in the result a large number of votes given in favour of the petitioner were not counted as votes for him."

He submits that inasmuch as an allegation of misconduct has been made against the returning officer he should be respondent. He has, in this connection, drawn my attention to section 108 (2) of the Representation of the People Act, 1949 12 and 13 Geo. VI C. 38 which follows section 51 of the Parliamentary Elections Act, 1868 31 and 32 Vict. C 125 (*a*) and subsequent legislation. It would appear that under the law as it obtains

in England the Returning Officer is " deemed to be a respondent " where the petition " complains " of his conduct.

In further support of his contention that the 2nd respondent is a necessary party, Mr. Chelvanayakam cited the case of Islington 1901 5 O'M and H 132 in which it was held that a Returning Officer might be joined where there was conduct by himself or his deputies not amounting to wilful misconduct or wilful misfeasance. In that case complaint was made that the polling stations were kept open too long, that the seals of a ballot box were improperly broken to allow the inspection of a ballot paper, and that the numbers on the back of certain ballot papers were made known to an agent.

He also referred me to the case of *Wilson vs. Ingham* 64 L. J. Q. B. 775 72 L. T. 796 where the name of a candidate who had withdrawn was inadvertently printed on a ballot paper. In that case Day, J. observed that if he had been satisfied that there had been gross negligence he would not have hesitated to mulct the returning officer in costs.

The Acting Solicitor-General submits that the English Law is different from our law ; that under our Order in Council there is no similar provision regarding the Returning Officer, namely, that he is deemed to be a respondent in certain cases. In the absence of any such provision the general law would apply ; and the general law is that only such persons should be made parties as are interested in the matter of the application and would be affected by any order made thereon.

Mr. Wikremanayake for the 1st respondent adopts a neutral attitude and says that from his client's point of view it is immaterial whether the 2nd respondent is a party or not.

There may be instances where the Returning Officer could and should be made a party respondent to an election petition but I am not satisfied that this is one. I would therefore make order discharging the 2nd respondent from the proceedings. In the circumstances of this case I make no order in his favour for costs against the petitioner.

I shall now deal with the other application, namely, the application of the petitioner on his motion dated 16-7-52 to inspect and take copies of :—

(*a*) the tendered votes lists made by the presiding officers,
(*b*) the tendered ballot papers,
(*c*) the counterfoils of tendered ballot papers,
(*d*) the declarations made by the persons who voted on tendered ballot papers,
(*e*) those rejected ballot papers which were not stamped or perforated with the official mark,
(*f*) the counted ballot papers,
(*g*) the counterfoils of the original ballot papers on which the alleged personators voted,
(*h*) the journals of the presiding officers, and
(*i*) the marked registers.

In the course of his reply to Senior Counsel for the 1st respondent and the learned Acting Solicitor-General (who appeared in this matter as *amicus curiae*) Mr. Chelvanayakam said that he was not pressing his application in respect of (*b*), (*c*), (*f*), (*g*), and (*h*). I shall therefore confine my attention to the documents mentioned in (*a*), (*d*), (*e*) and (*i*).

Mr. Wikremanayake says that to allow the petitioner inspection of the marked register, the tendered votes lists and the declarations would violate the rule of secrecy. He points to section 47 (1) of the Order in Council which requires every Presiding Officer of each polling station at the close of the poll to " make up into separate packets, sealed with his own seal and the seals of the candidates or their agents if they desire to affix their seals—

(*a*) the unused and spoilt ballot papers placed together,
(*b*) the marked copies of the register of electors, and the counterfoils of the ballot papers, and
(*c*) the tendered votes lists.

.....and despatch each such packet.....in safe custody to the Returning Officer."

In the case of *Dias and others vs. Amarasuriya* Drieberg, J. (1931) 33 N. L. R. 169 acting under section 45 (10) of the Ceylon (State Council Elections) Order in Council, 1931 (in which similar provision was made to that contained in section 48 (10) of the present Order in Council) allowed inspection of the tendered votes lists, the declarations made by the voters who were given tendered ballot papers and the marked register. It should be noted that neither Counsel for the respondent in that case nor Crown Counsel who appeared for the returning officer raised any objection to inspection of the tendered votes lists. As regards the marked register while Counsel for the respondent objected, Crown Counsel said he was prepared to allow inspection. Dealing with this matter Drieberg, J. stated :—

" There is no reason why the petitioners should not be allowed inspection of the marked register. It will only enable them to ascertain what votes were recorded

and this they are entitled to know. Inspection of the marked register is allowed in England."

In respect of the application for inspection of the declarations made by those who had given tendered votes neither Counsel for the respondent nor Crown Counsel raised any objection, and Drieberg, J. in allowing the application merely stated that there could not be any objection to the petitioners being allowed inspection of those documents.

In the case of *Saravanamuthu vs. de Silva* (1941) 43 N. L. R. 77 de Kretser, J. refused to allow inspection of the marked registers and the tendered votes lists. In that case the application was also made under section 45 (10) of the Ceylon (State Council Elections) Order in Council, 1931. It was made by the respondent during the course of the trial and the learned Judge said that he could not allow the application as it was not made for the purpose of instituting or maintaining an election petition but in order to refute an allegation that certain persons had not voted. In the course of his order de Kretser, J. drew attention to the fact that the English Law is different from our law ; that under Rule 42 of the Ballot Act all documents other than ballot papers and counterfoils were open to public inspection, and that the marked register was therefore a document that the petitioner in an election petition would in England be entitled to inspect.

In the case of *Kuruppu vs. Hettiaratchy* Nagalingam, J. (1947) 49 N. L. R. 57 dealing with an application made under the present Order in Council refused to allow inspection of (*a*) the journals of the Presiding Officers on the ground that they were private documents which were not liable to be disclosed, and (*b*) rejected and tendered ballot papers on the ground that disclosure would violate the rule of secrecy. He allowed inspection of (*c*) the tendered votes lists, (*d*) the declarations made by those persons who voted on tendered ballot papers, and (*e*) the marked register. Dealing with (*c*) and (*e*) my learned brother observed :—

> " The list of tendered ballot papers and the marked register are documents which I think the petitioner is entitled to inspect in view of the allegation that voters who would have cast their votes in favour of the petitioner have been personated at the election."

Dealing with (*d*), namely, the declarations made by the persons who voted on tendered ballot papers, he remarked :—

> " The declarations.....to my mind are not documents which would furnish information to the petitioner any greater than what the list of tendered ballot papers and the marked register would show ; but as Counsel for both the respondents have consented to those documents being made available to the petitioner, and I can see no harm in granting the petitioner's request in regard to them I would allow their inspection too."

On reading section 45 (which deals with tendered votes) I find that the declarations would *prima facie* contain more information than the lists ; for whereas the latter give only the numbers of the voters the former disclose their names as well. Of course it could be said that when the numbers are given the names are ascertainable from the register. But to my mind the declarations would help the petitioner to decide whether the persons who voted on tendered ballot papers were the real electors appearing on the register or imposters.

Mr. Wikremanayake says that if the polling agents of the petitioner were wide awake and conscious of their responsibilities they should have noted the numbers and names of the persons who claimed and obtained tendered ballot papers. Those remarks would apply equally to the marked registers, for each polling agent could have ticked off on his own copy of the register the voters who obtained ballot papers. In the absence of any provision that every polling agent should keep his own marked register and also note the numbers and/or names of persons who obtained tendered ballot papers I do not think inspection could be refused on the particular ground urged by Counsel for the 1st respondent.

As regards the rule of secrecy of the ballot I cannot see how it would be infringed by allowing the petitioner to have inspection of the tendered votes lists, the declarations and the marked registers. These documents would not reveal for whom the electors voted.

Mr. Wikremanayake also contends that inspection of the documents to which Mr. Chelvanayakam has confined his application are not necessary for the purpose mentioned in section 48 (10), namely, of " instituting or maintaining .....an election petition in connection with the petition." He also submits that I should not allow inspection unless I am satisfied beyond reasonable doubt that inspection is necessary. Section 48 (10) reads as follows :—

> " A Judge of the Supreme Court may make an order that any ballot paper or other document relating to an election which has been sealed as required by this Order be inspected, copied or produced at such time and place and subject to such conditions as the Judge may deem expedient, but shall not make such an order unless he is satisfied that such inspection, copy or production is required for the purpose of instituting or maintaining a prosecution or an election petition in connection with the election. Save as aforesaid, no person shall be

allowed to inspect any such ballot paper or document after it has been sealed up in pursuance of sub-section 9."

It would thus appear that inspection cannot be had for the mere asking. In fact as I construe the section I realize that I am forbidden to allow inspection unless I am satisfied that inspection is necessary for the petitioner to maintain his petition.

On the material placed before me and the submission made by Counsel for the petitioner, I am satisfied that inspection is necessary in respect of the tendered votes lists, the declarations made by persons who voted on tendered ballot papers and the marked register so that the petitioner may maintain the charge of personation set out in paragraph (5) of the petition. The petitioner will therefore be allowed to inspect and take copies of these documents.

I shall now deal with the application for inspection of (*e*) "those rejected ballot papers which were not stamped or perforated with the official mark." Undoubtedly the decision of the Returning Officer regarding these rejected votes are final. Section 49 (1) requires him to reject *inter alia* all ballot papers which are not stamped or perforated with the official mark; and sub-section 5 declares that "the decision of the Returning Officer whether or not any ballot paper shall be rejected shall be final and shall not be questioned on an election petition. But the Order in Council does not anywhere state that an election shall not be declared void on the ground alleged. Whether the alleged issue by the Presiding Officers and their Assistants of a large number of ballot papers without the official stamp or perforation would avoid the election is a matter that will have to be considered at the trial.

In my opinion the petitioner should be allowed inspection of these papers. He will, however, not be allowed to take copies, because the taking of copies will not only be unnecessary for his purpose but may infringe the rule of secrecy. In order to ensure secrecy these papers must be inspected face upwards, and all proper precautions should be taken to prevent any person from seeing the numbers printed on their backs.

Inspections of the documents of which I have allowed inspection will be had by the petitioner or his duly authorised agent in this behalf in the immediate presence of the Returning Officer and of Mr. Navaratnam, Deputy Registrar of this Court. The 1st respondent or his duly authorized agent in this behalf will also be entitled to be present. The Deputy Registrar is directed to see that no others are present.

I make no order as to the costs of this inquiry.

Motions allowed.

Present : Gratiaen, J. & Gunasekera, J.

BARNES DE SILVA & GALKISSA WATTARAPPOLA CO-OP. STORES SOCIETY

S. C. 157—*D. C. Colombo,* 930/*X*

Appeal from an Order of the District Court, Colombo.

Argued on : 6th February, 1953
Decided on : 18th February, 1953

Co-operative Societies Ordinance (*Cap.* 107)—*Arbitration—Irregularity of proceedings—Procedure to be followed in application to enforce award—Powers of District Court—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 rested in the Courts which are empowered to enforce them.

Per GRATIAEN, J.—"It is the clear duty of a Court of law whose machinery as a Court of execution is invoked to satisfy itself, before allowing writ to issue, that the purported decision or award is *prima facie* a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance".

Cases referred to : *Illangakoon vs. Bogallegama* (1948) 49 N. L. R. 403.
Ekanayake vs The Prince of Wales Co-operative Society (1949) 50 N. L. R. 297.
Wijetunga vs. Weerasinghe (1949) 51 N. L. R. 229.
Sirisena vs. Kotaweva-Udagama Co-operative Societies Ltd. (1949) 51 N. L. R. 262.

Colvin R. de Silva, with *Ananda G. de Silva*, for the defendant-appellant.

H. W. Jayawardena, with *D. R. P. Goonetilleke*, for the plaintiff-respondent.

cur. adv. vult.

February 18, 1953.—GRATIAEN, J.

This is an appeal from an order of the District Judge of Colombo refusing to recall a writ issued for the enforcement of a purported award under the provisions of the Co-operative Societies Ordinance (107).

I find from certain recorded admissions in the document D1 filed of record, that the appellant had been the Treasurer of the Galkissa and Wattarappola Co-operative Stores Society Ltd. (hereinafter referred to as " the Society ") during the period 20th August, 1944, to September, 1948, and a dispute had arisen between the Society and the appellant in regard to certain claims preferred against him relating to his period of office as Treasurer. That dispute was referred to the Registrar of Co-operative Societies on 13th August, 1949, for his decision, and he referred it in turn to an arbitrator named A. E. Perera for disposal. On 25th October, 1949, Perera purported to make an award directing the appellant to pay to the Society a sum of Rs. 2,210.56, and the Society applied in due course to the District Court of Colombo for enforcement of the award " as a decree ". The application was granted ex-parte, but the appellant later moved that the writ should be recalled on the ground that Perera's award had been made without jurisdiction. After some argument on this issue, Counsel for the Society conceded in the lower Court that the arbitration proceedings were irregular and he accordingly moved to withdraw the Society's application for enforcement of the purported award. The learned District Judge made an order in the following terms :—

" In view of Mr. Misso's submissions, no execution proceedings will be permitted in this Court. Let the writ be recalled forthwith."

In my opinion this part of the order is equivalent to an inter partes decision that Perera's purported decision was *ultra vires* and therefore inoperative. That decision is binding on both the Society and the appellant.

The learned Judge then proceeded to make an order granting to the Society " liberty to have its dispute with (the appellant) referred to arbitration in accordance with the provisions of the Co-operative Societies Ordinance, provided of course such dispute can be referred to arbitration ". With great respect, a District Judge has no power to confer such a privilege on a party to a dispute arising under the Ordinance. The only function reserved to a District Court under the Ordinance is that of executing valid decisions made by the Registrar or valid awards made by an arbitrator in regard to disputes of the kind particularised in section 45. The question whether a Society may have a dispute " re-referred " after a previous award has been found to be *ultra vires* must depend on the provisions of the Ordinance and not on any permission granted by a Court of law whose jurisdiction of disputes has been expressly taken away by the Legislature.

The present appeal relates to the events which occurred after the writ for execution of Perera's purported award had been recalled in the earlier proceedings. On 16th February, 1951, the Society's proctor made an ex-parte application to the District Court of Colombo in accordance

with the procedure laid down in section 224 of the Civil Procedure Code for the execution of judicial decrees, for the enforcement of an award against the appellant purporting to have been made on the 27th October, 1950, by an arbitrator named H. E. Amarasinghe upon a reference purporting to have been made to him by the Assistant Registrar of Co-operative Societies, Western Province, on 26th September, 1950—*i.e.*, 4 months after the previous award made by Perera had been declared invalid. It is common ground that this second award relates to the identical dispute in respect of which Perera had previously purported to exercise jurisdiction.

An order for execution was made ex-parte. Once again the appellant intervened with an application to have the writ recalled on the ground that the second arbitrator had also acted without jurisdiction. This objection raises mixed questions of law and fact, and I find it impossible to decide the issue upon the material which was placed before the learned District Judge who dealt with it in the Court below. It is sufficient to state that the main ground on which the objection was rejected in the lower Court is, for the reasons which I have already indicated, insupportable. The learned 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". As I have said, if the Society already possessed that statutory right, the permission of the Court was superfluous; if it did not, such permission could not cure the defect.

In my opinion the Society's ex-parte application to enforce the award as a decree of Court was *ab initio* irregular. Section 224 lays down the procedure for the execution of decree passed by a Court of Law which is thereafter empowered to execute it. The section is in my opinion inappropriate to proceedings for the enforcement of an extra-judicial decree or award which a Court is empowered, upon proof of its validity, to recognise and enforce as if it were a judicial decree.

Section 46 (2) (*t*) of the Co-operative Societies Ordinance empowers the appropriate authority to make statutory rules for, *inter alia*, "the enforcement of the decisions of the Registrar or the awards of arbitrators". These powers have in fact been exercised by the Minister of Food and Co-operative Undertakings who, on 22nd March, 1950, made a rule in the following terms:—

> "A decision or an award shall on application to any Civil Court having jurisdiction in the area in which the Society carries on business be enforced in the same manner as a decree of such Court." *Vide* the Ceylon Government Gazette No. 10,086 of 24th March, 1950, Part I, Sec. 1 (General), p. 305.

This rule, the validity of which may be assumed for the purposes of the present appeal, does not lay down the procedure for making such applications, but it is the clear duty of a Court of law whose machinery as a Court of execution is invoked to satisfy itself, before allowing writ to issue, that the purported decision or award is *prima facie* a valid decision or award made by a person duly authorised under the Ordinance to determine a dispute which has properly arisen for the decision of an extra-judicial tribunal under the Ordinance. In that event alone would the Court be justified in holding that the decision or award is entitled to recognition and capable, under the appropriate rule, of enforcement as if it were a decree of Court. To achieve that end, a person seeking to enforce an award should be required to apply either in 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. The Court should in the latter event enter an order *nisi* or interlocutory order granting the application, and notice thereof should be served on the opposite party so that he may be given an opportunity of showing cause against the proposed enforcement of the award. Then, and only then, would the Court be justified in permitting execution proceedings under the Civil Procedure Code to be issued.

None of these essential steps was taken by or on behalf of the Society in the present case. No material of any kind was placed before the Court in the first instance for the purpose of satisfying it that the purported award had been made by the arbitrator upon a proper reference under the Ordinance for the adjudication of an outstanding dispute of a description contemplated by section 45. It seems to me that many questions of fact and law would need to be decided before the validity of the purported award could be established. For example:

(*a*) Had there been a proper reference of the same dispute to the original arbitrator A. E. Perera?

(*b*) If so, did A. E. Perera become *functus officio* when he made his award which was invalid; or did he continue thereafter to be vested with jurisdiction over the dispute?

(*c*) In the latter event, was the Registrar entitled, under an appropriate rule passed

under the Ordinance, to withdraw Perera's jurisdiction as an arbitrator and to refer the same dispute thereafter to a different arbitrator?

(*d*) Was the reference to the new arbitrator H. E. Amarasinghe a valid reference under the Ordinance, and if so,

(*e*) was his award valid and therefore entitled to be recognised and enforced as a decree of Court?

There is sufficient material on record upon which all these questions can be decided now, and in my opinion it was the duty of the Court, quite apart from the particular objections raised by the appellants, to recall the writ which was prematurely issued ex-parte on 31st March, 1951, without proof of any of the essential facts relevant to the Court's decision that its jurisdiction as a Court of execution had been properly invoked. In the subsequent proceedings, only some of the relevant matters have come to light, while others, equally relevant, have not yet been divulged.

It must not be thought that the opinions which I have expressed are based on technical considerations. Previous decisions of this Court have served to demonstrate how dangerous it is to assume too lightly, and without strict proof, that purported awards under the Co-operative Societies Ordinance have been regularly made. Vide *Illangakoon vs. Bogallegama*—(1948) 49 N. L. R. 403, *Ekanayake vs. The Prince of Wales Co-operative Society*—(1949) 50 N. L. R. 297, *Wijetunga vs. Weerasinghe*—(1949) 51 N. L. R. 229, and *Sirisena vs. Kotaweva-Udagama Co-operative Societies Ltd.*—(1949) 51 N. L. R. 262. The legislature had no doubt withdrawn from Courts of law their jurisdiction to determine disputes touching the affairs of Co-operative Societies or even to scrutinise the correctness of decisions or awards made by extra-judicial tribunals properly exercising jurisdiction under the Ordinance. But the right and the duty to examine the validity of such decisions and awards is still vested in the Courts which are empowered to enforce them. And, unless that duty be vigilantly performed, there is a great risk that the judicial process may be abused. In the present case, for instance, a man's property has twice been seized without notice to him in execution proceedings irregularly initiated against him—on the first occasion, for the enforcement of a purported award which was subsequently admitted to be invalid, on the second occasion, for the enforcement of a purported award the validity of which has not yet been established.

I would set aside the order under appeal, and direct that the writ issued against the appellant on 31st March, 1951, be recalled on the ground that it had not been obtained upon proper material. The judgment must not, however, be construed as deciding that the Society is necessarily precluded from applying hereafter in due form for the enforcement of the purported award in its favour.

GUNASEKARA, J.

I agree.

Order set aside.

Present : SWAN, J.

S. J. V. CHELVANAYAKAM & S. NATESAN

Election Petition No. 17 *of* 1952 (*Kankesanturai*)

Application for Leave to Amend Election Petition No. 17 *of* 1952 (*Kankesanturai*)

Argued on : 28th March, 1952

Decided on : 21st October, 1952

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 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.

Cases referred to : *Kunasingam vs. Ponnambalam* (1952) 54 N. L. R. 36.

C. S. Barr Kumarakulasinghe with *G. T. Samarawickreme, A. Vythialingam* and *Izzadeen Mohamed*, for the petitioner.

G. E. Chitty, with *C. C. Rasaratnam, N. Nadarasa, E. R. S. R. Coomaraswamy* and *V. K. Palasuntheram*, for the respondent.

cur. adv. vult.

SWAN, J.

The petitioner applies for leave to amend the election petition filed by him against the respondent. The application is made under section 83 (2) of the Ceylon (Parliamentary Elections) Order in Council, 1946. The petitioner seeks to include an additional ground upon which the election is questioned, namely, that " the respondent above-named was guilty of a corrupt practice under article 58 (1) (*f*) of the Ceylon (Parliamentary Elections) Order in Council, in that, being a candidate and his own election agent, he knowingly made declarations as to his election expenses required by section 70 falsely."

Section 83 (2) provides that :—

" An election petition presented in due time may, for the purpose of questioning the return or the election upon an allegation of a corrupt or illegal practice, be amended with the leave of a Judge of the Supreme Court within the time within which an election petition questioning the return or the election upon that ground may be presented."

Mr. Chitty appearing for the respondent does not dispute that the original petition was presented within time. Upon that matter I do not think there can be any doubt. The result of the election was published in the Gazette on 2-6-52. The election petition was filed on 23-6-52.

In the Jaffna Election Petition (19 of 1952), *Kunasingam vs. Ponnambalam*—(1952) 54 N. L. R. 36,—this question was considered by Gunasekera, J. There, too, the result of the election was gazetted on 2-6-52. It was contended by the respondent that the petition was out of time. Gunasekara, J., held that it was within twenty one days. My learned brother went into the matter at great length and came to the conclusion that the date of publication of the election in the Gazette must be excluded in the computation of the twenty one days. With that view I am in complete agreement. Although Mr. Chitty did not dispute that the election petition was filed within time I must myself be satisfied that it has been " presented in due time " because that is a pre-requisite for an application for leave to amend under section 83 (2). As I have already said there can be no doubt at all, not even the shadow of a doubt that it was presented in time.

I shall now consider the application on its merits. The grounds upon which an election petition may be questioned are set out in sub-sections (*a*) to (*e*) of section 77. Counsel for the petitioner submits that the application now made would fall under sub-section (*c*) I shall therefore reproduce the relevant portion of the section.

" 77. The election of a candidate as a member shall be declared to be void on an election petition on any of the following grounds, namely :—
(*a*) .....
(*b*) .....
(*c*) that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by an agent of the candidate."

Mr. Kumarakulasinghe submits that the making of a false return as to election expenses would be a corrupt practice under section 58 (1) (*f*). I shall now reproduce the relevant portion of that section.

" 58. (1) Every person who—
(*a*) .....
(*b*) .....
(*c*) .....
(*d*) .....
(*e*) .....
(*f*) being a candidate or election agent, knowingly makes the declaration as to election expenses required by Section 70 falsely, shall be guilty of a corrupt practice, and shall on conviction by a District Court ....."

Mr. Kumarakulasinghe contends that in as much as the making of a false return respecting election expenses is declared to be a corrupt practice under section 58 (1) (*f*) it could be made a ground for seeking to have an election declared void under section 77 (*c*).

The contention appears to be sound but Mr. Chitty for the respondent strenuously opposes the

application to amend. He submits, in the first instance, that the proposed additional ground is not a corrupt practice committed " in connection with the election " within the meaning of section 77 (*c*). I have no hesitation in holding that the making of a return in respect of election expenses is an act done in connection with the election. In *Kunasingham vs. Ponnambalam*—(1952) 54 N. L. R. 36—my brother Gunasekara came to the same conclusion. It seems to me absurd to say that because the return is made after the election it is not done in connection with the election.

The next point urged was that the corrupt practice referred to in section 77 (*c*) must be followed by a payment of money or something akin thereto. This contention was based on section 83 (1) (*a*) which provides that :—

> " An election petition questioning the return or the election upon the ground of a corrupt practice and specifically alleging a payment of money or other act made or done since the date aforesaid by the member whose election is questioned or by an agent of the member, or with the privity of the member or his election agent in pursuance or in furtherance of such corrupt practice may, so far as respects such corrupt practice, be presented at any time within twenty-eight days after the date of such payment or act."

Mr. Chitty submits that " other act " must be *ejusdem generis* with payment of money. I am unable to put such a restricted interpretation on the expression " other act ".

Mr. Chitty also relies on the words " in pursuance or in furtherance of such corrupt practice " in support of his contention that the making of a false return respecting election expenses cannot be a ground for declaring an election void. He argues that, if the making of the false return is the corrupt practice alleged, there must be some other act alleged as having been done in pursuance or in furtherance thereof ; that the making of the false return cannot both be the corrupt practice alleged and the other act done in pursuance or in furtherance of the corrupt practice. But the making and transmission of a return is what every candidate required to do under section 70. It is the making of a false return that is a corrupt practice. One might therefore reasonably say that it is the actual preparation of the false return which is the corrupt practice and the transmission of that return to the returning officer, the other act done in pursuance or in furtherance of the corrupt practice.

The last point made by Mr. Chitty was based on section 58 (1) (*f*) read in conjunction with section 76 which declares :—

> " 76. The election of a candidate as a member is avoided by his conviction for any corrupt or illegal practice."

The making of a false return, argues Mr. Chitty, renders the offender liable to a prosecution, and if the offender is the candidate he would be automatically unseated upon his being convicted ; but the making of a false return cannot be a ground for having an election declared void upon an election petition. If a candidate or his election agent makes a false return the only consequence is a liability to be prosecuted, but the validity of the election cannot be questioned by a voter on that ground. I am unable to reach that conclusion. If the making of a false return is a corrupt practice which renders a candidate or his election agent liable to a criminal prosecution I cannot see how it can be excluded from the scope of the expression " corrupt practice " in section 77 (*c*).

It is not necessary for me to decide whether an order upon an application to amend an election petition under section 83 must also be made within the twenty-eight days referred to in section 83 (1) (*a*). The application to amend was made within time, and on 28-7-52 when the matter came up before Gratiaen, J., it was agreed that " whatever order may be made upon the application in terms of the petitioner's prayer shall be regarded as though it had been made today." That date, namely 28-7-52, was clearly within the twenty-eight days.

The application to amend the petition is allowed. Costs will be costs in the cause.

Amendment of election petition allowed.

IN THE COURT OF CRIMINAL APPEAL

Present: Nagalingam, S.P.J. (*President*), Gunasekera, J., De Silva, J.

REGINA vs. M. S. ABU-BAKR

Appeal No. 11 *of* 1953—*S. C.* 46/*M. C. Colombo* 24048/*A of* 1953

Argued on : 23rd, 24th and 25th March, 1953
Decided on : 10th April, 1953

Court of Criminal Appeal—Accused charged 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.

Cases referred to : *R. V. Burns and Others* (1886) 16 Cox 355 at 361.
Maniben Liladhar Kara vs. The Emperor A. I. R. 1933 Bombay 65 ; 57 Bombay 253.
Gautam vs. The Emperor A. I. R. 1936 Allahabad 561.
Nepal Chandra Bhattacharya vs. The Emperor A. I. R. 1939 Calcutta 306.

Izzadeen Mohamed with *K. C. Kamalanathan* and *A. S. Vanigasooriyar*, for the appellant.

H. A. Wijemanne, Crown Counsel, with *N. T. D. Kanekeratne, Crown Counsel*, for the Crown.

GUNASEKARA, J.

The appellant, Mohamed Salem Abu Bakr, was convicted of an offence punishable under section 120 of the Penal Code and sentenced to six months' simple imprisonment. The charge alleged that on or about the 5th June, 1951, he did by means of certain words spoken by him during the course of a speech delivered by him in Sinhalese at a public meeting held at the Municipal Playground at Dematagoda, " attempt to promote feelings of ill-will and hostility between different classes of the King's subject ". The appeal was pressed on grounds of misreception of evidence and misdirection.

The prosecution adduced evidence to the effect that the speech in question was electrically recorded, and subsequently reproduced, by means of an instrument called the Webster wire recorder, and that when it was reproduced it was taken down in writing by an officer of the Criminal Investigation Department, named Wijesena, and that the document P4 contained the text of the speech as taken down by him. Wijesena gave evidence and both identified P4 and read it aloud to the jury. One of the grounds of appeal is that P4 was inadmissible.

There was evidence before the jury, about the working of the wire recorder, upon which it was open to them to hold that the instrument could accurately record a speech and reproduce it ; and there was also evidence that it was operated on the occasion in question by a police sergeant so as to record on a particular spool of wire (P1) almost the entirety of a speech made by the appellant and the whole of another speech that immediately preceded it and also the announcements that were made by the chairman of the meeting before these two speeches. According to Wijesena's evidence the speech that he took down purported to be one made by a person who was announced as Abu Bakr. The police sergeant who had operated the instrument at the time of the speeches gave evidence to the effect that it was he who operated it later to reproduce the sounds recorded on P1 so that Wijesena might take down the appellant's speech as reproduced, and that he identified the appellant's voice on that occasion. Another police sergeant, too, gave evidence to the effect that he was present on both occasions and that he too identified the voice that was reproduced as the voice of the appellant.

The speech that is alleged to have been reproduced in Wijesena's hearing by means of the wire recorder is a fact that, in connection with the other facts alleged by the prosecution wit-

nesses regarding the making of a speech by the appellant and the recording and reproduction of it, makes it highly probable that the appellant made a speech in the same terms on the occasion in question. Therefore, if it is not a fact that is otherwise relevant, it is relevant under section 11 of the Evidence Ordinance; which provides that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence of any fact in issue or relevant fact highly probable. It was open to Wijesena to give oral evidence of the words that were reproduced in his hearing by means of the instrument, using the writing that he made at the time of the reproduction to refresh his memory (Evidence Ordinance, section 159). It was also open to him to testify to the facts there noted by him even though he may have had no specific recollection of the facts themselves, if he was sure that they had been correctly recorded in the document. (Section 160). He did nothing different when he read out the contents of P4 to the jury. Therefore, even if the document itself was inadmissible there was before the jury admissible oral evidence of what was heard by Wijesena, from which they could infer what was said by the appellant and was recorded on the spool of wire P1.

It appears that at the trial the speech that is alleged to have been made by the appellant was reproduced in the hearing of the jury by means of the wire recorder and it is contended for the appellant that this procedure was contrary to law. In the view that we have taken about the admissibility of the evidence given by Wijesena it is not necessary to consider this ground of appeal.

It was next contended that the trial Judge misdirected the jury in that he had "failed to direct the jury as to what was meant by (1) ill-will and hostility and (2) between different classes of the King's subjects".

The charge sets out the passage in the speech that is alleged to be seditious, together with a translation of it into English. The appellant was also charged, in other counts of the indictment, with having by means of the same words attempted to excite feelings of disaffection to the Government and to raise discontent or disaffection among the King's subjects. With these charges we are not concerned in this appeal, which relates only to the charge of attempting to promote feelings of ill-will and hostility between different classes of the King's subjects.

The indictment does not state what are the different classes that are contemplated in the charge. It was stated at the Bar, however, that the acting Solicitor-General, who appeared for the Crown at the trial, stated to the jury that the classes were "capitalists" and "workers" respectively. Upon the case that was presented by the prosecution, then, the jury had to decide whether these groups formed "different classes of the King's subjects" within the meaning of section 120 of the Penal Code.

The term "class" in ordinary usage signifies "a number of individuals (persons or things) possessing common attributes, and grouped together under a general or "class" name; a kind, sort, division" (*Shorter Oxford English Dictionary*). Not all classes of persons however, are among those contemplated in the section. They must of course be classes of the Queen's (or King's) subjects. But the context and the object of the enactment, which appears to be to avert civil commotion, limit the sense further, and they must be classes that can be readily distinguished one from another and have a reasonably clear dividing line between them; for it is not possible to conceive of hostility between two classes that can result in a violent conflict between them unless they are sufficiently distinct from each other. For a similar reason their composition must be reasonably stable and not continually shifting, and they must not consist of a few individuals merely but must be numerous. In other words, an attempt to promote feelings of ill-will and hostility between different classes of the Queen's subjects cannot come within the section unless the classes are reasonably well-defined, stable and numerous; and it is a question for the jury in each case whether a given class has these characteristics and is therefore a class that is contemplated by the section. That an intention to excite ill-will and hostility between different classes of the Queen's subjects is not necessarily a seditious intention was pointed out in the case of *R. V. Burns and others*[1], (1886) 16 Cox 355 at 361 which was cited to us by Mr. Wijemanne. Cave, J. said to the jury in that case :—

> Any intention to excite ill-will and hostility between different classes of Her Majesty's subjects may be a seditious intention; whether in a particular case this is a seditious intention or not, you must judge and decide in your own minds, taking into consideration the whole of the circumstances of the case.

Mr. Izzadeen Mohamed has referred us to three cases decided by the High Courts of Bombay, Allahabad and Calcutta, respectively, where it was held that "capitalists" did not form a "class of His Majesty's subjects" within the meaning of section 153A of the Indian Penal Code, the terms of which are almost identical with the material words of section 120 of our Code. The earliest of these is *Maniben Liladhar*

Kara vs. the Emperor[2] A. I. R. (1933) Bombay 65; 57 Bombay 253. There Beaumont, C.J., with whom Nanavati, J. agreed, said :—

> I think that any definite and ascertainable class of His Majesty's subjects will come within the section, although the class may not be divided on racial or religious grounds. But I differ from the learned Chief Presidency Magistrate when he says that capitalists are a sufficiently defined class. " Capitalist " in the literal sense of the word is, I suppose, anyone who possesses any accumulated wealth, and practically every one possesses some accumulated wealth, though some people do not possess very much. On that definition practically everybody will be within the capitalist class. No doubt in the region of economic discussion capitalists are referred to in a more limited sense. In reference to divisions between capital and labour, the capitalist generally means a person with a considerable amount of property invested in industry. But if you take any definition of that sort, it is impossible to say what amount of capital would bring a man within the class. He might be within the class one day, and without it the next. He may be a capitalist in one country and not in another. It seems to me " capitalist " is altogether too vague a phrase to denote a definite and ascertainable class so as to come within section 153-A."

Nanavati, J. said :—

> The object of the section is to prevent breaches of the public tranquillity which might result from exciting feelings of enmity between different classes of His Majesty's subjects; but when the persons included in any group are not readily ascertainable, it is difficult to see how any criticism of such an ill-defined group can lead to a tumult or breach of tranquillity.....As far as I can see, the first and most important ingredient in the connotation of the term is that the words used must point to a well-defined and readily ascertainable group of His Majesty's subjects.....In the second place some element of permanence or stability in the group would have to be present before you can have an attempt to excite enmity against that group..... Thirdly, there is a question of numbers. The group indicated must, I think, be sufficiently numerous and widespread to be designated " a class ".....The reason for this requirement is that unless a group is numerous and widespread the excitement of feelings against it is not likely to be of consequence from the point of view of tranquillity. Now, if the speaker meant to indicate by the word " capitalists " the " idle rich ", it may be doubted if persons who answer to the description in Bombay, or even in India, are sufficiently numerous to form a class of the kind contemplated in this section.

The decision in this case was cited with approval in *Gautam vs. the Emperor*[3], A. I. R. (1936) Allahabad 561 decided by Sulaiman, C.J., Allsop, J. and Bajpai, J. In the latter case the learned Chief Justice of Allahabad said :—

> Again feelings of enmity and hatred should be aroused between two classes of His Majesty's subjects, that is to say, between two sections of the people which can be classified as two groups opposed to each other. A vague, indefinite and nameless body, even though given one name, may not in certain circumstances be considered as a class by itself, particularly if individuals overlap indiscriminately. But it may also be conceded that it is not necessary that the classes should be so distinct and separate as to make it easy to put an individual in one class or the other.

Maniben's case[2] A. I. R. (1933) Bombay 65; 57 Bombay 253 was also cited with approval in *Nepal Chandra Bhattacharya vs. the Emperor*[4], A. I. R. (1939) Calcutta 306 which was decided by Bartley and Henderson, JJ. In this case Bartley, J. said :—

> If the word " capitalists " is susceptible of accurate definition at all, that definition must be with reference to a world system of economics. We are in agreement with Beaumont, C.J., when he said in 57 Bom. 253 that :
>
> > Capitalist is altogether too vague a phrase to denote a definite and ascertainable class so as to come within section 153-A.
>
> Literally, the common factor in such a case is accumulated wealth. Economically, the common factors are, possibly, wealth plus investment. Practically, it is impossible to define the limits of any such classification or to say how any speech would affect any given proportion of its components.

We respectfully adopt as applicable to section 120 of the Ceylon Penal Code the tests laid down in these cases for determining whether a given class comes within section 153A of the Indian Code. It must be appreciated, however, that in each case the decision as to whether " capitalists " were such a class must be understood in the light of its own circumstances. It may well happen that a term that does not ordinarily denote a class such as is contemplated in the section does in a particular context mean such a class. This possibility is adverted to in the judgment of Nanavati, J. in *Maniben's case*[2] A. I. R. (1933) Bombay 65 ; 57 Bombay 253 :—

> You may refer to people as diehards, or extremists, or nationalists ; as free traders or fair traders ; as nationalists or communalists ; as militarists or pacifists, as imperialists or little Englanders ; and it would be difficult to regard the people designated or meant to be designated by these and like expressions as forming classes sufficiently precise for the purpose of the criminal law. What is a well-defined class will of course depend on circumstances. There may arise circumstances in which people designated by any of the expressions I have mentioned may be so well-defined that it might be possible to say that they form a class against whom hatred or enmity could be excited. But the Courts would have to be very careful in ascertaining who were the persons attacked before holding that an attempt had been made to excite enmity against a class of people within the terms of section 153-A, I.P.C.

The second case cited by Mr. Mohamed, *Gautam vs. the Emperor*[3], A. I. R. (1936) Allahabad 561 furnishes an instance of a decision that " capitalist classes " and " working classes " fall within the section. The question in that case was whether there was in either of both of two books that were the subject of the proceedings any

matter the publication of which was punishable under section 153A of the Indian Penal Code, and it was held that one of them contained such matter. After summarising the contents of that book, Sulaiman, C.J., who delivered the judgment of the Court, said :—

> There can, therefore, be no doubt that this translation of an old Manifesto directly aims at promoting class hatred and enmity, and in fact incites working classes to overthrow the capitalist classes even with the use of force and so it undoubtedly contains matter which is objectionable under section 153-A.

In the present case, having regard to all the evidence that was placed before the jury we are unable to say that it was not reasonably open to them, upon a proper direction, to hold that the appellant intended to promote feelings of ill-will and hostility between different classes of the King's subjects. They were not directed, however, that the term " classes " as used in the section must be given a restrictive interpretation and not its ordinary meaning. Indeed, they were given a direction which suggests the contrary, for the learned Judge said in his summing-up :—

> Well gentlemen of the jury, there is no such thing as a capitalist class in Ceylon but some people are referred to by that phrase and in the context you will ask yourselves who is the capitalist class referred to here and who is the class referred to in contra distinction with regard to that term.

The summing-up contains no further discussion of the term " class " and gives no definition of it. In our opinion this omission constitutes a vital misdirection, and it cannot be said that upon a proper direction the jury would, without doubt, have arrived at the same verdict. We therefore quash the conviction of the appellant and set aside the sentence.

Set aside.

Present : GRATIAEN, J.

THE QUEEN vs. MAHADEVA SATHASIVAM

S. C. No. 1 *Western Circuit—M. C. Colombo South No.* 38682

Argued on : 20th and 23rd March, 1953
Decided on : 24th March, 1953

Ruling on the admissibility of certain evidence tendered by the Crown at the trial

Criminal Procedure—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.

Per GRATIAEN, J.—"It must be observed in this connection that the section (section 233) is obligatory, and that it contains words of the utmost generality which are sufficiently wide to cover an accused person's deposition because :

(*a*) each statement contained in the deposition cannot be said to have lost the character of a " statement " merely because of the oath or affirmation which preceded it ;

(*b*) it has been " recorded in the course of the inquiry at the Magistrate's Court " as required by the amended Code.

I can discover no logical or convincing answer to the question why the scope of these words of generality should be given a meaning so restricted as to require the compulsory reception in evidence of a prisoner's unsworn statement at the subsequent trial but to exclude altogether from the jury statements which have the additional sanctity of the oath or affirmation which precedes it".

Cases referred to : *P. C. Kalutara* 7620 (1899) *Koch's Reports* 52.
The King vs. Punchi Mahatmaya (1942) 44 N. L. R. 80.
Rex vs. Naylor (1933) 1 KB. 685.
Rex vs. Littleboy (1934) 2 KB 408.
Rex vs. Leckey (1944) KB 84.
Phipson on Evidence (8th Edn.) 234.

T. S. Fernando, Solicitor-General, with *Douglas Jansze, Crown Counsel, Ananda Pereira, Crown Counsel*, and *Vincent Thamotheram, Crown Counsel*, for the Crown.

Colvin R. de Silva with *T. W. Rajaratnam* and *Ananda de Silva*, instructed by *Merrill Pereira* and *Gunasekera*, for the accused.

ORDER :

In this case the prisoner is on his trial for murder. The learned Solicitor-General has invited me, before he addresses the jury, to give a ruling upon a submission raised by the defence as to certain items of evidence on which the Crown seeks to rely as part of its case. Although it is generally regarded as undesirable to decide such questions in advance, learned Counsel agree, and I am satisfied, that this procedure would be more convenient in the present case.

After the prosecution witnesses had been examined at the non-summary inquiry held under Chapter 16 of the Criminal Procedure Code, the charge was read out to the prisoner and he was informed, under the provisions of section 159, of his right to give evidence if he so desired on his own behalf. The statutory caution prescribed by section 160 was then administered, and the prisoner made a brief statement from the dock protesting his innocence in the following words :

" I am not guilty ".

That statement will in due course be read in evidence at this trial as required by section 233.

After due compliance with the provisions of section 160, the learned Magistrate proceeded to ask the prisoner, in terms of section 161 (1), whether *inter alia* he desired to give evidence on his own behalf. The prisoner elected to do so ; he gave evidence on affirmation ; he was cross-examined at some considerable length by Counsel appearing for his (then) co-accused and to a lesser extent by Crown Counsel ; and he was then re-examined. The whole of his deposition now appears as item 143 in the list of documents annexed to the indictment.

The learned Solicitor-General states that the Crown does not desire to read in evidence the prisoner's deposition in its entirety. The Crown proposes, instead, to prove and to rely on a number of extracts selected from the deposition and containing, so it is stated, admissions which to some extent support the case for the prosecution. Dr. de Silva objects to this proposed procedure, and contends that, whether or not the prisoner elects to give evidence at the trial, it is the duty of the Crown to lead in evidence his entire deposition which was recorded by the committing Magistrate. He relies on section 233 of the Code which is in the following terms :

> " All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution ".

The defence claims as of right that section 233 must be applied to the whole of the deposition, and it has been argued that the words " all statements " cover not only the prisoner's statutory unsworn statement made in terms of sections 160 and 161, but also the sworn testimony which he had given at the inquiry in the exercise of the privilege conferred for the first time on accused persons when the Code was amended by section 8 of Ordinance 13 of 1938. The Solicitor-General submits, on the other hand, that in this context the word " statement " must be construed as having been used in contradistinction to " testimony " given on oath or affirmation.

As far as our combined researches go, there are no reported decisions of this Court or of the Court of Criminal Appeal to guide me in arriving at a decision on this point, but it has been brought to my notice that on 25th May, 1949, in S. C. No. 3/M. C. Colombo 13273, which came up for trial at the Assizes, Windham, J. ruled in precisely similar circumstances that the deposition of the prisoner recorded in the lower Court came within the ambit of section 233. He accordingly

directed that the deposition should be read in evidence at the trial notwithstanding objection by the Crown. Unfortunately, the reasons for Windham J.'s decision are not available to me. I have also consulted one of my brother Judges who recollects that, shortly after the amending Ordinance of 1938 was enacted, Soertsz, J. had given a similar ruling at the Assizes, but here again his order cannot be traced. Having given my best consideration to the problem on the footing that the question is not expressly covered by authority, I have myself come to the same conclusion.

It will be helpful to trace the historical development of Chapter 16 of the present Code since it was first enacted as Ordinance No. 15 of 1898. It originally provided that an accused person should, at the commencement of the non-summary proceedings, be informed of the nature of the charge against him, and that he should be given the opportunity at that stage of making a statutory statement—section 155 (1). It then imposed on the Magistrate, if a *prima facie* case of guilt had been established by the evidence for the prosecution, the duty of questioning the accused so as to enable him to explain any circumstances which had been proved against him—sections 156 (3), 295 and 302. The accused was also permitted to call witnesses in support of his defence, but he was precluded from giving evidence at any stage of the inquiry on oath or affirmation on his own behalf—*P. C. Kalutara* 7620 (1899) *Koch's Reports* 52.

This part of the Code was substantially altered in many respects by Ordinance 13 of 1938. The amendments which are relevant to the present problem are to the following effect :

(1) Section 155 (1) in its original form was repealed, and a new section was enacted requiring the Magistrate, at the commencement of the inquiry, merely to inform the accused person of the nature of the charge against him, but not to record at that stage any statement which might be made in reply thereto.

(2) The procedure of interrogation prescribed by section 156 (3), 295 and 302, were entirely swept away. Instead

(3) The new sections numbered 159, 160 and 161 permitted the accused, after the evidence for the prosecution had been led, to make a statutory statement under section 160 (1) and also, if he so desired, to give evidence on his own behalf (section 161).

Notwithstanding the fundamental alteration in the form of the proceedings, section 233 of the Code was retained in its original form. It still requires, therefore, that "all statements" of the accused recorded in the Magistrate's Court "shall" be put in and read in evidence before the close of the case for the prosecution.

Before the Code was amended in 1938, the word "statement" in the context in which it appeared clearly had no application to statements made on oath or affirmation, because, as I have pointed out, an accused person was at that time precluded from giving evidence in his defence at the inquiry. The plurality of "statements" contemplated in the earlier procedure was at that time confined to the original statutory statement made under section 155 and to other statements subsequently made by the accused person under interrogation by the Magistrate.

What, then, are "all" the accused's "st
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imperative provisions of section 2
original form? Admittedly, the sec
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Punchi Mahatmaya* (1942) 44 N. L. R. 80 tha
section 233 also applies to any later unsworn statement which an accused person may, at a later stage of the inquiry, chose to make in order to supplement or vary his original statutory statement. With respect, I agree that although the Code makes no express provision for the recording of such statutory statements after the stage fixed by section 160 has passed, it is manifestly fair that statements of that kind should not be withheld from the jury at the trial. To this extent, the rules of essential justice may legitimately be permitted to override those of strict interpretation.

The question is whether the application of section 233 must be limited to unsworn statements of the kind which I have previously enumerated. It must be observed in this connection that the section is obligatory, and that it contains words of the utmost generality which are sufficiently wide to cover an accused person's deposition because :

(*a*) each statement contained in the deposition cannot be said to have lost the character

of a " statement " merely because of the oath or affirmation which preceded it ;

(*b*) it has been " recorded in the course of the inquiry at the Magistrate's Court " as required by the amended Code.

I can discover no logical or convincing answer to the question why the scope of these words of generality should be given a meaning so restricted as to require the compulsory reception in evidence of a prisoner's unsworn statement at the subsequent trial but to exclude altogether from the jury statements which have the additional sanctity of the oath or affirmation which precedes it. The privilege of giving sworn evidence at the Magisterial inquiry has advisedly been substituted for the earlier and less agreeable ...rience, whether he liked it or not, of making ...statements in reply to questions put to ...he interrogating Magistrate. If the ...ments were required of law to be ...re the jury, I see no reason in prin... illogical an intention as to exclude ...ust be ascribed to the legislature.

...tages to be derived from the com... ...cent privilege of giving evidence at ... the risks which a man necessarily ... in electing to exercise it, and in ... his voluntary submission to the ordeal ... examination before the actual trial has ...nced, would be reduced to little more than ...mockery if they were merely to give the Crown an opportunity :

(*a*) to discover evidence which would contradict any part of his evidence which it does not accept as true, and

(*b*) to select from the deposition certain passages containing admissions tending, if isolated from their context, to support the case for the prosecution.

I well appreciate that if an accused person does not testify on his own behalf at his trial, the reception of his earlier deposition may not strictly constitute positive proof of any exculpatory facts asserted in the document. But this argument applies with even greater force to the unsworn statements recorded under section 160 (1). In either event, the weight which the jury may attach to any statement, sworn or unsworn, is a matter upon which they must in due course receive proper directions and assistance from the presiding Judge. In one case, for instance, a statement of either kind might well be found to militate against the defence if the Crown can disprove at the trial the truth of what the prisoner has stated to the Magistrate. In another case, the value of the defence which he ultimately puts forward at the trial might, subject to the limitations indicated in *Rex vs. Naylor* (1933) 1 K. B. 685, legitimately be regarded as weakened, by his failure to disclose it on the earlier occasion. *Rex vs. Littleboy* (1934) 2 K. B. 408. But in yet another case, the circumstance that the prisoner had, at the first opportunity provided by our procedure, voluntarily given an explanation of his conduct and persisted in it thereafter may very properly be reckoned in his favour. In other words, section 233 is enacted " in the interests as much of innocent persons as in the interests of justice against guilty persons "—*Rex vs. Leckey* (1944) K. B. 84.

I hold that it is always the duty of the Crown to put in the whole of the prisoner's deposition in terms of section 233—subject, of course, to any directions which the presiding Judge may give for the exclusion of any portions which are irrelevant or inadmissible. *Phipson on Evidence* (8th Edn.) 234. In the present case the prisoner desires that this procedure should be followed, but my ruling would have been the same even if he did not. I must not be understood, of course, to mean that every part of the deposition would form part of the case for the Crown. But it is material which the law requires to be placed before the jury for the purpose of arriving at their verdict in the case.

In England the prosecution, though not compelled to do so, invariably leads evidence of all statements, exculpatory or incriminatory, which the prisoner has made to a police officer after being cautioned in accordance with the Judges' Rules. That procedure cannot be adopted in this country owing to certain restrictions imposed by the provisions of our Evidence Ordinance and of Chapter 12 of the Criminal Procedure Code. Having regard to these restrictions, it is all the more desirable that an accused person should not be discouraged from offering, either by sworn evidence or in the form of an unsworn statement, an explanation of his conduct at the earliest point of time which the law permits under the existing procedure. And when that opportunity has been voluntarily taken, justice requires, and section 233 insists, that the whole of his explanation should be brought to the notice of the jury who are empanelled to try him. The section as I read it, is enacted in the interests of accused persons as well as of the Crown.

Prisoner's deposition in Magistrate's Court to be read in evidence subject to directions of Court.

END OF VOLUME XLVIII